Chapter 2
Criminal Law Protection of Cultural Heritage: An International Perspective

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Introduction: The Criminal Law Dimension in the Protection of Cultural Goods

For more than 50 years – and a good deal longer in certain areas – the international community has exerted considerable efforts to protect the world's cultural heritage in its various facets. These efforts, whether to protect movable or immovable assets, reflects their importance which far transcends their mere economic value, since they represent a significant expression of the history and traditions of nations, reflected in the concrete choices that the law is required to address. Further strong calls for juridical protection have also arisen since the end of the colonial era with the growing demands of States that were victims of despoliation in earlier centuries, demanding restitution of their assets and works of global importance that had been appropriated, often in highly questionable ways.[1]

However, there is a growing recognition among observers that the past development of international instruments regarding the protection of cultural heritage has pursued a protective aim, giving only a primarily marginal, disorganized and fragmentary role to their punitive element. Indeed, in some areas, international law has widely favoured recourse to extra-penal instruments, commercial or civil law in nature (with special emphasis, as is well known, to the remedy of return and restitution). In other areas, while compelling States to impose penal sanctions, the juridical framework outlined by international instruments has often been muddled, convoluted and incomplete. From this starting-point, the aim of this paper is to *analyse critically the criminal law dimension emerging at the international level in the field of safeguarding cultural assets* and to examine the prospects for possible reforms. By way of introduction, however, there is a need to look at the extent of the theme from a

[1] On *cultural internationalism* as compared to *cultural nationalism*, see Merryman (1985, 1986).

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methodological point of view as well as its inherent content. *In methodological terms*, one has to ask whether we should focus so strongly today on the punitive dimension in the protection of cultural assets. As is well known, criminal law scholars in recent decades have tended to concentrate primarily on restricting the punitive response to comply with the fundamental principles of *extrema ratio* and proportionality, pursuing instead conceptual schemes moving progressively from reduced to minimalist sanctions and ultimately to abolish them altogether. In this scenario, international law has tended to act in a contrary direction, pressing criminal law legislators towards the definition and adoption of further and ever broader criminal offences and operating as one of the most influential factors pushing towards the expansion of domestic legislation. It is precisely this one-way direction (real or supposed) of international norms, accompanied moreover by a general inadequacy of institutional procedures with regard to the traditional canons of legality, which has given rise to extremely severe criticisms in a large area of penal science relative to this "criminalisation engine". International law, in its various articulations, has thus come to represent the main object of critical analysis from the "classical" quarter of penology, which moreover is currently reviving – not without some controversy – concerning the strong trends inspired by social defence and the concept of dangerousness. We must then wonder whether we should subscribe in theoretical terms to a standpoint in favour of recourse (or greater recourse) to the punitive instrument even in an apparently marginal area like the protection of artistic, archaeological and cultural assets.

Such a fundamental interrogation cannot be wholly discarded with an assumption that it is essential to proceed in this direction (in other words that there exists an "ontological necessity" connected to the abstract importance of the interests concerned) or by merely asserting that a trend towards criminalization is spreading among international organizations (so as to reveal, in other words, an "institutional necessity"), while contrarily demanding a close scrutiny of possible reasons militating for an intensification of political–criminal instruments. This paper, therefore, must *first of all address the supposed need for a justification* (which must be demonstrated) for a greater move towards criminalisation in *cultural heritage* protection, by examining the empirical and value-based arguments underlying this choice. Yet, it must not be forgotten that favouring a greater use of international instruments in the punitive field does not exempt one from verifying the extent to which such an approach should be adopted.

Practical considerations also necessitate *limiting the aims*, in order to comply with the permitted length of this contribution. The cultural heritage theme in fact embraces a wide range of issues that are difficult to unify, and involves an extremely difficult definition, given the absolute relativity of the concept of art and culture.[2]

[2]Lalive (2009a), page 4: "a movable object may only be characterized as "artistic" or "cultural" as a result of a value judgment, i.e. of a personal and subjective opinion. Contrary to ordinary movables or chattels, it can hardly be described with precision by its weight or measure – and its value does not depend on physical characteristics but rather on aesthetic or historic factors. Hence, the difficulty of regulating sales of works of art and, for instance, the responsibility of the seller and the relevance of an expertise. So the definition of cultural property is clearly an obstacle, first to legislation (national and "international") on the subject, and then to its implementation".

At this point it is opportune to introduce a *summa divisio* which, however approximately, allows the exclusion of a good proportion of objects from the scope of the study and thereby facts which (potentially) may come within the scope of criminal law. Thus, no analysis is made in the present study of the heritage of immovable property – unless purely incidentally – although it is important and is dealt within specific provisions in the international field (especially in humanitarian international law and international criminal law). Immoveable property includes historical and religious buildings, whole urban centres, monuments erected as part of mankind's heritage. More widely, we also exclude natural resources from the scope of this study which could otherwise be covered in a broad definition of cultural heritage, even though these certainly deserve to be protected under criminal law for the high value they embody within their social environment, being both unique and irreplaceable.

International law today appears to focus on the *strengthening of protection for movable assets, notably including artistic and archaeological assets*, which might be packaged within the overall definition of *cultural property*. Furthermore, while the protection of immovable property is now included in the international normative framework, at least with reference to extremely serious phenomena (war crimes and other violent acts arising during armed conflict), the movable property sector – as we see – appears, by comparison, defenceless in terms of criminal law protection. Having thus defined our area of study, further precision still is called for, since the diversity of objects endowed with cultural importance has already led to a diversity of choices in the international instruments devoted to this subject.

With the scope of our examination thus set out, we can proceed to the main issues requiring analysis. Initially, we have to ask what basic contemporary factors have led to a potential extension of the international criminal law sector to cultural heritage protection? Two different issues then require consideration: first an identification of the empirical–criminological components of criminal activity in the artistic and cultural field, and second the identification of the objects to be protected and thereby the importance that the cultural and common heritage of mankind is destined to assume in the face of harmful or dangerous assaults.

Secondly, we proceed to a review of the punitive components of the conventional regulation of artistic and cultural assets. In looking forward to the basic elements expected to emerge from this analysis, which occupies a major part of our study, we emphasize both the heterogeneity and a certain "criminal minimalism" in the international juridical scene.

The aspect to be examined immediately after setting out the areas for the application of important internationally sourced norms concerns an evaluative component of great substance, capable of providing a number of critical leads on the concrete choice for criminalisation crystallized in the texts contained in international pacts but remitted for their practical application to national legislatures.

Finally, we reflect on some issues arising in the debate in order to reform the present legal framework.

The Punitive Option for the Protection of Movable Cultural Assets: Its Fundamentals and Limits in the Light of a Criminological Evaluation

Crimes variously related to artistic, cultural and archaeological assets present a very diffuse phenomenon, nationally as well as internationally and little is known about their nature and extent.[3] Today, we still do not have a systematic approach to the gathering of criminal statistics which would permit an accurate analysis of such crimes, most of which are likely to be unreported or "hidden statistics" (*chiffre noir*).[4]

Some information may be gleaned from the limited official data provided by national authorities, but although these are certainly useful to a degree, they offer only an extremely restricted tranche of criminal typologies and trends.

In Italy, for example, in view of the richness of the national heritage, useful elements appear in the 2009 report of the Comando tutela Patrimonio Culturale (Heritage Protection Command) of the Carabinieri,[5] which highlights, relative to the previous year: a significant diminution of *thefts* in general (95 cases, a reduction of c. 14.5%); a continuing persistence of the phenomenon of *falsification*, as seen in the high number of people pursued before the Judicial Authority (299 cases, an increase of 424%); a major reduction in *illicit excavations* (161 cases, −76%); a slight but significant increase of counter activity in terms of both persons pursued before the Judicial Authority (+2%) and of the variety of typology of the offences prosecuted.

There are a good number of official data banks, from which it is possible to deduce, albeit in extremely summary form, the totality of crime in the field of art and antiquities. For example, the French authority appointed to take charge in this sector (*Central office for combating trafficking in cultural assets*) has a specific data-bank, the *Thesaurus of electronic and image research in artistic matters* ("TRIMA"), which since 1985 has assembled data on stolen objects (names of the victims, details of thefts, photographs), including up to now some 20,000 items. In recent years, however, there has been a decrease: the count of cases handled by the police authorities has moved from some 8,000 cases recorded annually to 2,023 in 2008.[6]

Recently, the inadequate and fragmentary nature of available data on the extent of crime in this area has been underlined in the work of the UN *Commission on Crime Prevention and Criminal Justice*: "Analysis of data over time for the States reporting a continuous time series for police-recorded offences involving theft of cultural property for the period 2003–2008 (10 States) suggests a consistent decreasing trend". Caution must be exercised in such analysis, however, due to the small number of States for which data are available and to differences in the definition of theft of cultural property.[7]

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[3] Polk (1999).

[4] Brodie et al. (2000). See also Calvani (2009).

[5] Comando Tutela patrimonio Culturale dei Carabinieri. *Relazione per l'anno 2009* (December, 2009).

[6] Gauffeny (2009).

[7] Commission on Crime Prevention and Criminal Justice (2010).

Apart from the quantitative data, thus summarized, studies in this field lead one to underline certain prevalent characteristics in this area of crime, which may be summarized as set out below.

(a) A *paradigm of transnational crime*. Unlawful activities in the field of art and antiquities often involve the use of highly specialized techniques and skills, which operate across frontiers so that the structural elements of the crime are rarely confined to the territory of a single country. In view of the exponential increase in the circulation (including unlawful trafficking) of individual cultural objects, the transnational nature of the crimes shows a continuous growth, and this results in a corresponding attention to trafficking phenomena (in drugs, arms and human beings), all of them highly profitable, which can easily extend into the field of cultural assets.[8] A number of factors explain this trend. First, the international traffic, including legitimate trade, is stimulated by the presence of States particularly rich in terms of their artistic and archaeological heritage, that are traditionally victims of looting, and of States which, for basically economic reasons, act as importers of such assets. The transnational dimension of the crime, moreover, is supported by the diversity of juridical frameworks (both in the field of private as well as criminal law) which prevail in different national systems and by the presence of national legislations favouring the import of cultural assets.[9] Further, the development of *e-commerce* currently represents a valid mechanism for putting assets of dubious provenance on the international market. This development can be seen in the case study elsewhere in this book (Brodie) concerning looting from Iraq which highlights the commercialization, through the internet, of numerous finds of questionable provenance.[10] This combination of factors fully justifies the attention that we are now paying to set out the punitive responses offered from international sources, in a perspective of closer cooperation between state authorities and, marginally, of a growing measure of closer harmonization in domestic penal legislation.

(b) A second characteristic of undoubted interest is the *porosity between the legal and the illegal market* in antiquities.[11] Licit and illicit trade in *objets d'art* and in antiques passes through the same channels. This is particularly true for the intermediaries: auction houses, antiques dealers and galleries can find themselves, often unknowingly, handling illegally sourced goods, as a series of instances coming to light in recent years have amply demonstrated. Moreover, this applies also to the final consignees (museums, private collections) who – in the majority of cases through sheer negligence – may come to acquire cultural assets which have been stolen or illegally exported.

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[8] Tijhuis (2009).

[9] Lalive (2009b), page 9: "theft or cultural property nearly always involves the crossing of a frontier. Why? Not only (in fact) because the thieves (often organised but also individuals) hope to better escape the police! but also in order to benefit from the diversity of national laws regulating the acquisition by the so-called 'purchaser in good faith' ".

[10] Brodie (2009).

[11] Massy (2008).

(c) Finally, we must mention the correlation of crime in the artistic and archaeological sector with these *unlawful phenomena on a broader scale*, such as receiving of stolen goods, money-laundering and financial and tax offences, that are systematically highlighted by the police authorities and are relevant also in our present study. As the United Nations has emphasized, this associated area is especially problematic at the present time as it concerns the role played by *organized crime* in this field, Thus *Resolution 2004/34 of 21 July 2004, Protection Against Trafficking in Cultural Property*,[12] of the Economic and Social Council notes that "organized criminal groups are involved in trafficking in stolen cultural property and that the international trade in looted, stolen or smuggled cultural property is estimated at several billion United States dollars per year". As we see later, various political–diplomatic initiatives have been undertaken on the basis of such a (problematic) premise.

Undoubtedly, there are criminal activities which, in the great majority of cases, have organized and many-faceted forms: international trafficking in works of art is rarely the work of a single individual. Nor are we to ignore the fact that notorious organized crime groups, such as the Mafia, are giving close attention to the art and antiquities market for a number of reasons that have recently come to light: the undoubted huge profit margins available; probably also for the high symbolic value of works of art in terms of personal status; finally, for their importance as a common heritage, whose removal and destruction may be perceived as a *vulnus* to the whole national community and an element of the might of the criminal organization. Having said this, it is doubtful if one should go further and maintain that this represents a "typical" activity of the major criminal organizations in the way in which drug trafficking, extortion, or certain forms of forgery are.[13]

In terms of punitive responses, on the basis of the characteristics just examined, a very important contest is emerging in the protection of antiquities. Not infrequently recourse is had in the systems where they are established to crimes of criminal association or conspiracy, provided that the offences against antiquities meet the level of gravity required by the relevant legislative provisions. Influenced by some States particularly active in taking a punitive approach to the protection of cultural heritage items, the international community is now endeavouring to include illicit actions involving such items within the all-embracing category of organized crime. The outcome of such endeavours (or perhaps the main objective) is to then apply the range of especially effective penal instruments and procedures developed over recent years (like "invasive"

[12]ECOSOC (2004).

[13]In the Report of the General Secretary, entitled *Protection against trafficking in cultural property*, presented to the Commission on Crime Prevention and Criminal Justice 15th Session held in Vienna from 24 to 28 April 2006, Italy declared that: "As far as the involvement of organized crime in trafficking in cultural property was concerned, reference was made to the analysis of results of investigations carried out in the country showing that only in a few limited circumstances were Mafia-type organizations involved in that specific field. *Such trafficking was more often organized by individuals or criminal groups that utilized international contacts* consolidated over the years and managed to set up illicit markets abroad" (emphasis added).

investigative techniques, under-cover operations, evidential assistance such as the reversal of the burden of proof, mechanisms for seizure and confiscation, inclusion of offences among those on which money-laundering is based, etc.) to the field of cultural property. However, caution needs to be exercised when broadening the concept of organized crime in this way since it is a nebulous concept at the best of times and often involves the application of quite draconian measures affecting individual liberties.

(d) Finally, it must be stated that an important element in the expansion of crime is this sector derives from the contrast between its economic scope, with the vast profits produced, and the *relatively modest penalties* which can be imposed. This element, moreover, is accentuated by the diversity of penalties applied between jurisdictions which can lead to "forum shopping" among the most cunning criminals, who adopt strategies to avoid prosecution in those jurisdictions known for the severity of their penal responses.

The Cultural Heritage as the Property of Mankind

Identification of the juridical assets to be protected, as an essential basis for the punitive response, presents a series of difficulties, beginning with the extreme variability of the definition of *cultural heritage*.[14] Here, we confine ourselves to underline how, even on an international plane, there is growing awareness of the enormous range of artistic and archaeological assets that need to be protected. This knowledge has been evidenced by the way in which a number of Penal Codes have now added cultural property offences to their contents.[15]

Cultural assets are then considered in legal doctrine as part of mankind's rights, both in their individual dimension, relative to the law applying to each cultural object and to the rights of peoples' historical and cultural identity.[16] They receive the public attention appropriate to their universality. A special importance is attributed to religious objects, a symbol of the collective identity. Recent conflicts have strongly evidenced the importance of such items, which have been subjected to wide and indiscriminate assaults, sometimes tending even to destroy the identity of a people. Examples can be found in the forms of ethnic cleansing perpetrated in the former Yugoslavia, including the burning of the Sarajevo library and the attack on the ancient historical centre of Dubrovnik; in the destruction of the statue of the Bayman Buddha in Afghanistan; and in the looting of the Baghdad museum during the occupation of Iraq.[17]

Various international texts recognize the crucial importance of cultural assets: the norms to protect property and basic freedoms contained in the Universal Declaration of Human Rights and in the International Convention on Economic and Social Rights

[14] Merryman (1990); Blake (2000a).

[15] Merryman (1990); Blake (2000a).

[16] Blake (2000b); Francioni (2004).

[17] Phuong (2004).

indirectly support this recognition. At a generic level, the protection of "*the common heritage of mankind*" represented by assets such as books, monuments, works of art or science, lies within the province of UNESCO (Article 1 of the Statute).[18] This corresponds to the progressive growth of knowledge in the international community, especially in the wake of two World Wars, that the damaging, looting and destruction of cultural assets represents a threat to the whole of mankind. So *human common heritage* must be understood as that whole entity of assets of "outstanding universal value", which, in the territory of some States and subject to their sovereignty, become by their intrinsic value important to the whole international community. Since these are assets subject to the sovereignty of individual States, the application of the protective regime laid down by UNESCO – and in particular the 1970 Convention[19] – needs the request of the proprietary State, accepting thereby a self-limitation of national sovereignty over the assets in recognition of their common value for all of mankind.

Gradually, all the instruments adopted in this sector emphasize the correlation between *cultural property* and national identity, including the latest document being developed within the United Nations, namely, that of the Commission for the Prevention of Crime and Criminal Justice. The Commission referred in Vienna in 2010 to "the significance of cultural property as part of the common heritage of humankind and as unique and important testimony of the culture and identity of peoples and the necessity of protecting it".[20] Of great importance is the declaration on the international destruction of the cultural heritage adopted by the General Conference of UNESCO in 2003, with some punitive dimensions, where it is asked that: "States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit or order to be committed, acts of international destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization" (Art VII – *Individual criminal responsibility*).[21]

Review of the Punitive Components of the Conventional Rules for the Protection of Artistic and Cultural Assets: Identification of the Principal Juridical Frameworks

The juridical framework hitherto available shows a marked *heterogeneity* with a plurality of texts (essentially arising from international pacts) and formulations adopted in different eras and meeting the concerns that have arisen in the international community at various historical moments. Among this mass of different

[18] Canino (1997).

[19] O'Keefe (2004).

[20] *Draft Resolution 2010. "Protection against trafficking in cultural property"*.

[21] UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*, 17 October 2003.

texts, albeit to a variable degree according to the different sectors involved, there is a certain "reluctance" to identify the precise obligations incumbent upon Party States, which sometimes results in a sort of "*penal minimalism*". Brevity and simplicity of exposition compel us to concentrate on two main juridical areas within the international area:

– First, the regime for the protection of the artistic and cultural heritage in conditions of armed conflict (*the juridical framework of exception*), which essentially is contained in the texts of international humanitarian law and international criminal law
– Second, rules governing the circulation of cultural assets in export, import or transfer of them in the broadest sense (*the juridical framework of circulation*) to which the UNESCO and UNIDROIT Conventions, adopted respectively in 1970 and 1995, are dedicated

We will not be looking at *other specific and intermediate juridical regimes*, standing between the paradigms of the exception linked to armed conflict and the everyday circulation of assets, like the regime concerning archaeological assets, which are specifically protected by UNESCO (the UNESCO 2001 Convention on the protection of the submarine cultural heritage)[22] and the Council of Europe.[23]

The "Juridical Framework of Exception": Protection of the Cultural Heritage in Conditions of Armed Conflict. The 1954 Hague Convention in a Penal Perspective

In the first of the normative assets upon which we concentrate lie all those provisions dealing with the protection of the cultural heritage of mankind in case of armed conflict.

In the modern era, the starting point is represented by the *Convention for the protection of cultural property in the case of armed conflict*, signed at The Hague on 14 May 1954, which came into force on 7 August 1956, as a reaction to the acts of barbarism committed during World War II, and which apply when war is declared or international or non-international armed conflict occurs, or a foreign territory is invaded.

The historical antecedents of this discipline lie back in history: first, as the object of a purely *indirect* protection as a result of the propagation of rules for humanizing conflicts, and subsequently, with the bursting on to the scene of military techniques endowed with a massive destructive capability, with the creation of instruments

[22] UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*, 17 October 2003.

[23] European Convention on The Protection of The Archaeological Heritage, London, 6 May 1969 and European Convention on The Protection of The Archaeological Heritage (Revised), Valletta, 16 January 1992.

aimed *directly* at protecting cultural assets. Article 35 of the US *Lieber Code* of 1863, which is considered to be the first legislative provision in this field, provides that: "Classical works of art, libraries, scientific collections, or precision instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded".[24] Later, we have the *Regulations concerning the Laws and Customs of War on Land* linked with the Second Hague Convention of 1907 to intervene in the argument[25]: they lay down the duty of all States to protect immovable assets,[26] while the protection of movable assets was provided, albeit indirectly, through the prohibition of confiscation and injury, with intensified provisions applying in relation to occupied territories.[27]

Nevertheless, we must focus on the 1954 Hague Convention because this was inspired by the experiences of the Military Tribunal of Nuremburg, which signals a fundamental transformation of the juridical framework, resorting to individual liability for offences against the cultural heritage. With regard to the entirety of the cultural heritage, broadly defined by Article 1 of the 1954 Convention as the "movable or immovable property of *great importance*" – and this specification is obviously important because it confines the protection to works of major value – of the cultural heritage of each people, it includes monuments, archaeological sites, works of art and so on, as well as the buildings and historical centres containing them. This is a highly innovative definition, founded on the two criteria of importance to the cultural heritage of any people and the artistic, historical and archaeological interest involved, although this has been criticized in legal doctrine for its vagueness.[28]

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[24] General Orders No. 100: *The Lieber Code (Instructions for the Government of Armies of the United States in the Field Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863)*.

[25] *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 29 July 1899. Article 27: "In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants".

[26] *Convention (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907. Article 27: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand".

[27] Article 56: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings". See Maugeri (2008a).

[28] Maugeri (2008b).

These are added to the general protection laid down in Articles 2 et seq. the special protection of Articles 8 et seq., based on the mechanism of inscription, under the aegis of the Director General of UNESCO, in an international register of cultural assets covered by special protection, although this does not relate to movable goods except insofar as they are located in the relevant protected sites.

With regard to such assets, the States parties to the 1954 Convention engage themselves to ensure their protection, and prohibits their use for purposes that might expose them to danger in the course of armed conflict (e.g. use of a monument as cover for military action) or involves directly hostile acts (e.g. the bombardment of museums). Additionally, there are express prohibitions of thefts, damaging or improper acquisition, while reprisals – considered legitimate under certain conditions of humanitarian international law – are not permitted against such specifically protected assets.

Further, in the sense of Article 28 of this Convention, "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention". While this norm comes within the punitive province, it does not seem very demanding, on the one hand because of its extreme generality linked with the imprecise definition of prohibited acts, and on the other by the admissibility of alternative protective instruments by the typical disciplinary sanctions of military law. Nor, despite what was envisaged in the preparatory work, it was stated that only wilful actions were to be the subject of sanctions.[29]

This initial basic text has led to further instruments generated by the international community for the protection of the cultural heritage in conditions of armed conflict. It is significant, in evaluating such an evolution, that the 1954 Convention has had an unsatisfactory reception on the international plane: it was not until 25 September 2008 that the American Senate agreed to its ratification – some 50 years after its signature – and this came into effect on 13 March 2009, bringing the number of adherent States up to 123.

Subsequent Developments: Protocols Additional to the Geneva and Hague Conventions and International Criminal Courts

This subsequent process of evolution has led to the adoption of numerous instruments, among which particular mention – in a much later period – must be made of the Protocols additional to the Geneva Convention and the Hague Convention.

(a) In the first group of texts (*Geneva law*), of particular interest is the *Protocol I of 1977*, which introduces the prohibition of "indiscriminate attacks" and of attacks and reprisals against the civil population,[30] while specific protection is accorded

[29] O'Keefe (2006a).

[30] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Articles 51(4) e 52(1).

to cultural assets, even if purely in a subsidiary capacity to the 1954 Convention. Particular interdicts are: (a) to commit any acts of hostility directed against historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort and (c) to make such objects the object of reprisals (Art 53. Protection of cultural objects and of places of worship). Further, in the sense of Article 85, are addressed "grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: […] making the clearly-recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives" [Article 85(4)(d)]. For such serious violations, deemed to be war crimes [Article 81(5)], domestic law is required to impose sanctions and States are obliged to apply the principle of universal jurisdiction. Individual liability is extended, with an innovative norm destined to lead to important developments in international criminal law and to the so-called *command responsibility*. It has been rightly observed that the norm, in requiring conduct "causing as a result extensive destruction" introduces an instance of damage, although this is superseded by Protocol II of the 1990 Hague Convention, which instead speaks of protecting from the risk of damage.[31] The Second Protocol to the Geneva Convention equally gives protection to cultural property in the course of armed conflicts which are not international in nature (Article 16).[32]

(b) In the second normative area (*The Hague law*) is contained the *First additional Protocol to the 1954 Hague Convention*, adopted at the same date that the main Convention (which requires adherent States to prevent exportation of protected assets from occupied territories) and the *Second Protocol*, adopted on 26 March 1999, which came into force on 9 March 2004 and has currently been ratified by 56 States of whom the latest is Germany (25 November 1999); this extends the Conventional protection to conditions of conflict within States. As has been underlined, the major contribution of these texts lies in a more efficient regulation of individual criminal liability for violations committed intentionally or in excess of military necessity.[33]

In the sense of Article 15 of II Protocol ("Serious violations of this Protocol"), five different instances are set out: "(a) making cultural property under enhanced protection (and thus only in this specific case) the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military

[31] Maugeri (2008c).

[32] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II)*, 8 June 1977.

[33] Maugeri (2008d).

action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention". As already indicated, each of these instances significantly looks to the threshold of penal protection without requiring, unlike Protocol 1 of the Geneva Convention, the infliction of actual damage.[34] The actions which they describe embrace the extremes of the abstract concept of damage: the legislator presumes, in the particular cases mentioned in letters a, b and d (attack and abuse of property subject to *enhanced protection* or attacks on property protected by the Convention) that such acts expose the protected property to danger, thereby meriting an appropriate punitive response on the part of the States.

In relation to such acts, and differently from the "1954 Convention, there is imposed on each State an obligation to prescribe *criminal offences* under its domestic law […] and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act", with the further obligation, for each of the detailed acts to introduce a universal penal jurisdiction,[35] to introduce provisions for extradition,[36] to recognize the principle *aut dedere aut iudicare* in the case, where there is no current scope for extradition, and to encourage judicial cooperation.

For provisions different from those contemplated by Article 15 the State obligations are much less demanding. One reads, for instance, in Article 21 ("Measures regarding other violations") that: "Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, *administrative or disciplinary measures* as may be necessary to suppress the following acts when committed intentionally: (a) any use of cultural property in violation of the Convention or this Protocol – as well as, a significant aspect for our present purpose – (b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol".

In this context, only deliberate crimes are punishable and a residual role is always given to military necessity.[37] Legal theory debates whether the responsibility extends to every form of participation, e.g. the so-called *command responsibility*: Article 15(2) provides in this regard that: "With respect to the exercise of jurisdiction

[34] O'Keefe (2006b).

[35] Article 16 Jurisdiction: "1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases: a. when such an offence is committed in the territory of that State; b. when the alleged offender is a national of that State; c. in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory"; O'Keefe (2006c).

[36] Article 18 Extradition: "1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them". See also Article 20 – *Grounds for refusal*.

[37] Maugeri (2008e).

and without prejudice to Article 28 of the Convention: (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law", which would lead us to conclude that they embrace the provisions of Article 86(1) of the First Protocol to the Geneva Conventions as well as those of the Statute of the International Criminal Court (Articles 25 and 28), which we now consider briefly.

As a token in this juridical framework, the same international penal jurisdictions, starting with Nuremburg and going on to the ad hoc tribunals of the 1990s and finally the International Criminal Court, have recognized their competence to impose penal sanctions for those acts serious enough to constitute international crimes. There is a very useful examination on this point in cases decided before the *International Criminal Tribunal of the former Yugoslavia (ICTY)*.[38] These deal with "Violations of the laws or customs of war" in the sense of Article 3 *ICTY* Statute (the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science [Article 3(d)]), but a wider indirect protection is to be found in the other instances contemplated by the same Article 3 and in the succeeding Articles 4 and 5, relating respectively to the crime of genocide and to crimes against humanity.[39]

Finally, it has to be mentioned that the protection afforded by the Rome Statute enables punishment for "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" [Article 8(2)(b) IX and 2(e)(iv) – ICC Statute].

The "Juridical Framework of Circulation" and the 1970 UNESCO Convention in a Penal Perspective

The second ground for intervention by the international community on illicit imports, exports and transfers of ownership of cultural property was realized – some 40 years ago – in the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, signed in Paris on 14 November 1970, which came into force on 24 April 1972. At the present time, this is the principal international instrument setting out minimum rules for legislative provisions which the Party States are required to adopt to repress the illegal circulation of cultural property.

The UNESCO Convention is structured in accordance with a double order of considerations. On the one hand, it relies, like other instruments of the Organization, on emphasizing the importance to be accorded to cultural property, as "the basic elements

[38] Abtahi (2001).

[39] Maugeri (2008f).

of civilization and national culture". On the other hand, by focusing strongly on the dangers resulting from illicit acts directed at cultural property, the Preamble underlines how "illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO's mission to promote". This last element represents the main *raison d'être* of the instrument, recalling the provisions of Article 2, paragraph 1 of which more specifically underlines how "the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property". Thus, the specific aim of the Convention is defined as "enhancing the international cooperation for protecting each country's cultural property against all the danger resulting from", in particular "by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations" (paragraph 2).

As regards the field of application, we now witness an instrument which has a very broad spectrum of cultural property: this covers items which the State, for religious or secular reasons, has declared to have great importance on the archaeological, pre-historic, historical, literary, artistic or scientific levels and which belong to specified normative categories (Article 1). Article 4 then sets out the criteria by which individual cultural assets can be declared to form part of the cultural heritage of an individual State.

With regard to this broad extent of cultural property, the Convention identifies a framework of regulations for States to observe with regard to the import, export or transfer of ownership of property. The first group is generic in nature and concerns the creation of "one or more national services" charged with formulating norms in this field, drawing up and updating of lists of objects to be protected and establishing rules meeting the "*ethical principles*" established by the Convention. This last provision, contained in Article 5(c), indirectly recalls the existence of rules of conduct, not covered by sanctions, which result from the text of the Convention, as well as being particularly rich in other instruments of *soft law* adopted in this field.

The core of the Convention, however, in which the more demanding obligations are articulated, concerns the export and import of assets, which – by virtue of a marked divergence between exporting and importing countries coming to light during the preparatory works – are the subject of significantly varying treatment.[40]

The most stringent regulations regard *export* activities. For these, provision is made for the issue of a certificate by the national authorities, permitting transfer abroad of the item. In particular – and this is a significant element in the perspective of criminal law – the Party State is given the obligation to "prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned certificate" [Article 6(b)].

Less exacting are the provisions concerning the *import* of cultural assets, which are formulated at two levels, according to whether they are dealing with items illegally exported or to items stolen abroad. In the first case, national legislations must introduce

[40]Frigo (2001a).

norms suitable "to prevent museums and similar institutions from their territories from acquiring cultural property originating in other Party States which have been illegally exported". In the second case, they must place a ban on the "import of the cultural property stolen", but only when it comes "from a museum or a religious or secular monument or similar institution in another Party State", provided of course that the property is of major value. In this case, provision is made for the duty to "recover and return" the property, provided that "just compensation" is paid to the "purchaser or to a person who has valid title to the property". This supersedes the obligation, envisaged in the original draft, to introduce penal sanctions against officials of public or private institutions who acquire cultural property without having ascertained their provenance; likewise, it was decided not to make the certificate a control instrument to cover also importation because of the excessive complexity of such a mechanism.

As is well known, this last mechanism analysed, contemplated by Article 7, represents the essential nucleus of the whole import of the Convention. In fact, it determines the obligation, which previously was extremely rare and difficult to implement, to create a mechanism to restore illegal acquired property to the victim State. It is important to underline for our purposes that this is an option which does not involve the penal system. The fulcrum of the system controlling the illicit circulation of cultural assets lies, instead, in instruments of an administrative or private law nature which require a certificate accompanying the assets (Article 6) and in their restitution where they have been illegally transferred [Article 7(b)(ii) and Article 13], even when the transfer itself involved acts of penal significance, such as theft. Nevertheless, there are practical difficulties in the mechanism of restitution, whether in relation to those countries that are not party to the Convention or to those Party States when the possessor can claim a proprietary title validly created in good faith in the consignee State, or, a fortiori, when the declaration of ownership is supported by a legislative provision in that State.[41]

Passing more specifically to prohibitions, in terms of entire generality, Article 3 provides that "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Party thereto, shall be illicit". However, that has not translated into a renewed obligation of States to impose penal sanctions against such conduct. There seem to be two reasons for this: evidential difficulties and the lack of an international willingness to move against crimes committed against the cultural heritage of a foreign country.[42]

The few exiguous obligations of criminal law intervention, which, in the broader ambit of the 1970 Convention, bear upon States, are represented by the succeeding Articles 8, 10 and 13. The first of these provides that Party States "impose penalties or administrative sanctions" for the acts identified in Articles 6(b) and 7(b). The route of penalization is thus pursued in terms that are purely possible, in the sense that States are able to favour alternative purely administrative and thus highly generalized sanctions in view of the vagueness of the Conventional provisions. As we have already observed, Article 6(b) covers the case of "exportation of cultural property"

[41] Frigo (2001b).

[42] O'Keefe (1992).

that is not accompanied by the relevant certificate; however, both Article 7(b) and Article 8 call for it without exception, the scope of the obligation to impose penalties is limited interpretively to the first paragraph concerning the importation of stolen property, and cannot be extended to acts attributable to States in the same way as those dealing with recovery and restitution.

The other provision of interest in the perspective of sanctions is contained in Article 10(a), under which every Party State must "oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject". Even in this case, the criminal law route is only one of the possible alternatives for States, who alternatively may choose administrative sanctions, and for acts that are not described with sufficient precision and details under the terms of the Convention, with regard to which the systems of the Party States enjoy ample space for manoeuvre in the description of punishable acts.

Vaguer still are the obligations that spring from Article 13 of the Convention which – at the conclusion of the system – endeavours to establish that Party States, in a way compatible with their domestic law, avoid the transfer of title to cultural property susceptible to promoting illegal export or import and establish a swift procedure for restitution to the true owner, as well as the exercise of judicial proceedings to protect individual juridical positions for the recovery of the property in question.

So in a very initial evaluation of the Convention, we see how, in widening the object of protection, the punitive scope of the instrument is weakened: in explicit terms, the actions for which the adoption of penal sanctions is required are few and extremely generalized and also have the express provision of an alternative recourse to administrative sanctions.

Thus, in the face of such bland obligations, it is interesting to see that some States especially active in the acquisition of cultural assets (like Australia and the USA) have put interpretative reservations on the norms in question, in order to exclude the need to provide new specific legislation in this area. So the first of these States, has placed an express restriction on Article 10, declaring that "Australia is not at present in a position to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold […]", thus imposing a very significant redimensioning of the field of application of domestic legislation containing penal sanctions. The reservations of the USA have gone much further, showing the clearest intention to exempt themselves from the most penetrating of the Conventional obligations,[43] to such a point that Mexico has considered "that these comments and reservations are not compatible with the purpose and aims of the Convention". Primarily, on the American side, it has been asserted that the provisions in question are not "neither self-executing nor retroactive". With regard to the important provision, already frequently mentioned, of Article 7(a) relating to the acquisition by museums of illegally exported items, it is stated that it is "not (to) require the enactment of new legislation". With regard to Article 7(b), moreover, is

[43] Herscher (1985).

intended that it should not exclude instruments for the recovery of stolen items with the payment of some compensation. Finally, the requirement contained in Article 10, that the obligation imposed on antique dealers is introduced "as appropriate for each country" must be deemed to be wholly remitted to State and municipal authorities, whom the adoption of the relevant legislation would affect.

Finally, legal doctrine has highlighted that the provisions of the UNESCO Convention will come up against significant limits in the absence of a general acceptance on the international plane: for example, Switzerland ratified the Convention only in 2003[44] and Great Britain, which traditionally has a flourishing art market, joined it in 2002; moreover, there are very few signatory States that have enacted the requisite legislation under the Convention.[45]

The 1995 Unidroit Convention and Rejection of the Penal Route

Motivated by the difficulties that have marked the UNESCO Convention, when in the stage of negotiation, on the issue of adjusting national domestic legislations, and later at the point of concrete application of its provisions in the courts, the decision was made to entrust to Unidroit, with its specific competence in dealing with the unification of private law, the task of formulating an instrument that more effectively enables illegally exported or stolen items to be returned to their original owners. The outcome of this initiative is to be found in the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted in Rome on 24 June 1995. This sets out precise rules of private international law for the recovery and restitution of the items in question, with derogatories relative to the principles commonly applied in private law on account of the importance attached to them, while at the same time instituting a fair and reasonable measure of compensation for the people who have been holding them in good faith and have made the necessary preliminary enquiries with regard to them.[46]

In the Preamble to the text, there is an examination, carried out with thoroughness and recognition of the limits of the instrument, of the two essential themes that inspire it. In the first case, it reaffirms as usual "the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples and the dissemination of culture for the well-being of humanity and the progress of civilisation". There is, however, further development of the themes leading to the introduction of a mechanism aimed at combating the illicit traffic: on the one hand, it underlines that need to proceed to the "important step of

[44] Widmer (2009).

[45] Frigo (2001c).

[46] See Prott (1997, 2009); Carducci (1997); Lalive (1999); On the preparatory works see Schneider (1992). On the *bona fide* concept see Prott (1992).

establishing common minimal legal rules for the restitution and return"; on the other hand, however, it does not hide the fact that "this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation". In short, the private law route is significantly strengthened, even though it cannot be entirely relied upon – in the words of the draftsmen – to provide a complete solution to the complex problems inherent in illicit activities to the detriment of the cultural heritage.

Precisely because of the extra-penal nature of the solutions adopted in Rome, it is not our present remit to examine the detailed and complex mechanism of this Convention; let us, however, simply glance at the overall scheme, if only to bring to light the insufficiency of the instruments adopted.

Since the field of application of the Convention is extremely wide (Article 1) and not founded on any particular merit, value or importance of the cultural property, in order to enhance its deterrent effect, it should be observed that two discrete juridical regimes are put forward, according to whether the items in question have been stolen or illegally exported: in the latter case, they are the subject of "return", while in the former case they are subjected to a broader mechanism of "restitution" regardless of whether it comes from a Party State (Article 1). Both of these are measures that are not unknown to private international law but here are the subject of a different and more restrictive definition.[47]

The duty of restitution and its relative procedures, laid down in Articles 3 and 4, require the possessor to restore the stolen property even if he has acquired it in good faith. This is a particularly innovative provision, introducing a derogation to general rules applying in many of the States party to the Convention,[48] even if some problematic aspects remain in matters of limitation periods.[49]

More controversial is Chapter II of the Convention dealing with the "return" mechanism for illegally exported assets which permits importance to be accorded to provisions of public law which a State may have adopted in protection of its own cultural heritage. Here too, there is recognition of the right of the possessor of the property to receive fair compensation.

In short, the assessment contained above is confirmed: the whole Unidroit Convention, in line with the premise inspiring it and within the range of the institution which drew it up, concentrates entirely on ameliorating the instruments in the field of private law, without giving the least attention to the criminal or, more broadly, punitive element. This fact does not prevent Party States from adopting them, as is indirectly confirmed by which: "does not in any way legitimize any illegal transaction of whatever has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this Article, nor limit any right of a State or other person to make a claim under remedies available outside the

[47] For an overall picture, see Prott (1997, 2009); Carducci (1997); Lalive (1999); On the travaux préparatoires see Schneider (1992); On the *bona fide* concept see Prott (1992).

[48] Frigo (2001d).

[49] O'Keefe (2006d).

framework of this Convention for the restitution of return of an cultural, object stolen or illegally exported before the entry into force of this convention" (Article 10, paragraph 3). The compass of this obligation is embodied in the right to "fair and reasonable compensation" for the holder in good faith, which represents a balanced compromise as between importing and exporting States.

The Model Treaty of the United Nations: An Interesting Tool with No Binding Force

One of the instruments of interest in a criminal law context is the *Model treaty for the prevention of crimes that impinge on the cultural heritage of peoples in the form of movable property*, adopted in the course of the United Nations 8th Congress on crime and criminal justice in 1990.[50] It must be said, however, that this instrument, unlike other *model treaties* adopted at Havana, has not been accepted by any Resolution of the General Assembly, so that, in its capacity purely as a model-treaty, it has no binding juridical value, and simply represents a schema which could be helpful in relations between States who wish to cooperate in combating crime in the sector of movable cultural property. In the Preamble, States who wish to introduce "measures for impeding illicit transnational trafficking in movable cultural property whether or not it has been stolen", agree to have recourse to the "imposition of appropriate and effective administrative and penal sanctions and the provision of a means of restitution". Although the restitution is common – as has been seen – to the main existing Conventions (UNESCO Convention and the UNIDROIT Convention), we see the idea of sanctions for illicit importation and exportation as the real innovation here. In this respect, States would undertake three different obligations.

First of all, in generic terms, they would undertake "To take the necessary measures to prohibit the import and export of movable cultural property (1) which has been stolen or (2) which has been illegally exported from the other State Party [Article 2(a)]. The provision is accompanied by the requirement to adopt sanctions, including possible minimal penal sanctions to given offences of illicit exportation and – what is more innovative – illicit importation of movable cultural property.

Secondly, after having accepted the duty to "take the necessary measures to prohibit the acquisition of, and dealing within its territory with, movable cultural property which has been imported, Article 3 extends the provision of penal sanctions to acts perpetrated in breach of such norm. Here, the *Model Treaty* requires as a condition for the imposition of penal sanctions that the acts have been perpetrated by "Persons or institutions that knowingly acquire or deal in stolen or illicitly imported movable property". The scope for its application seems to be confined by the requirement that the acquiring person be aware of the illicit provenance of the property; even

[50]Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chapter I, section B.1, annex.

if that would cause evidential problems, one must still approve such a normative choice, which is in line with general principles in terms of subjective responsibility, while rejecting forms of presumption of guilt of a serious offence or the acceptance of negligent offences, as indeed some legal theory would advocate.[51]

Extremely vague, and connected to the prospect of the growing incursion of organized crime into this sector, is the final paragraph of Article 3, which requires the adoption of penal sanctions also for "Persons or institutions that enter into international conspiracies to obtain, export or import movable cultural property by illicit means". This provision would seem to refer to the possibility of applying sanctions to both physical and juridical persons.

Some of the provisions in this Model-treaty might provide a point of departure for the introduction of new international instruments to fight the illicit trafficking. As proof of the interest of the instrument, it should be said that the Economic and Social Council in the *United Nations Resolution 2003/29 on the Prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*, "Encourages Member States to consider, where appropriate and in accordance with national law, when concluding relevant agreements with other States, the Model Treaty".[52]

A Look at the European Instruments: Convention of the Council of Europe and Legal Texts Adopted by the European Union

Only limited attention can be given here to the European juridical context – a true laboratory for the regionalization of criminal law – which has progressively developed in many varying forms, namely, to the two institutions that are important from a juridical point of view: the Council of Europe, currently comprising 47 countries, has for some time followed the route of Conventions, within which some attention has been given to the penalistic dimension; the European Union, which for its part has 27 Members, all of whom are also in the Council of Europe, has expended its efforts solely in the private law and commercial law fields.

The Council of Europe has generated the June 1985 *European Convention on Offences relating to Cultural Property*, signed at Delphi on 23 June 1985, although this has remained a dead letter since it was signed only by six States, none of which went on to ratify it.[53] From the point of view of criminal law, this has to be considered as a "lost opportunity": the Conventional provision in fact gives particular

[51] Mackenzie, S. *The Model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*: "these only work if the legal context is one where wilful blindness constitutes knowledge (i.e. where a dealer 'ought to have known')".

[52] E/2003/INF/2/Add.4, 22 July 2003.

[53] Cunha (1992); Möhrenschlager (1992).

attention to this dimension, focusing on three distinct assets. These are: direct protection of the assets, their restitution and the repression of crime in this sector. It is very significant that the chapter on restitution includes a series of measures regarding judicial cooperation (Article 8): the execution of Letters Rogatory "for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents", "for the purpose of seizure and restitution of cultural property which has been removed to the territory of the requested Party subsequent to an offence relating to cultural property" or simply "relating to the enforcement of judgments delivered by the competent authorities of the requesting Party in respect of an offence relating to cultural property for the purpose of seizure and restitution of cultural property". Similarly, provision is made for restitution in the case of extradition, provided that this has been agreed but cannot be executed "owing to the death or escape of the person claimed or to other reasons of fact". Finally, "The requested Party may not refuse to return the cultural property on the grounds that it has seized, confiscated or otherwise acquired rights to the property in question as the result of a fiscal or customs offence committed in respect of that property".

It is very important that an effort has been made towards harmonizing some rules of criminal law, the third intervention aim under the Delphi Convention. In the terms of Article 12 (*Sanctioning*): "The Parties acknowledge the gravity of any act or omission that affects cultural property; they shall accordingly take the necessary measures for adequate sanctioning", which moves in the direction of an effective system of protection, even if not expressly correlated to the punitive dimension. For our purpose, also important are the succeeding provisions aimed at extending the scope of criteria for the application of criminal law, within the appropriate balance whereby the rights of the accused are safeguarded.

As regards the other regional normative area, the European Union, it must be said at the outset that the principle of free circulation of goods, one of the four fundamental freedoms of an economic nature recognized by the Treaties, permits the introduction of prohibitions or restrictions on imports, exports or goods in transit justified on grounds of […] the protection of national treasures possessing artistic, historic or archaeological value (now Article 36, Treaty on the Functioning of the European Union). Nevertheless, recognizing that "such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States", the Court of Justice of the European Union has allowed an extremely restrictive interpretation of the scope for derogation.[54]

The "conservation and safeguarding of cultural heritage of European significance" recognized by the treaties (now Article 167, Treaty on the Functioning of the European Union) has led in the past to the adoption of two important instruments: Regulation No. 3911/92 of 9 December 1992 on the export of cultural property outside the European space and Directive 93/7/EEC of the Council of 15 March 1993 on the restitution of cultural property that has illicitly left the territory of a Member State; both of these have had subsequent amendments.

[54] Manacorda (2010).

The Regulation had been amended on a number of occasions and is now codified in the *Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods*[55]: it is founded on the mechanism of export authorization for allowing the transfer of goods out of the EU area (the so-called export licence), leaving one Member State, which is valid in all the other States for transfer to a non-EU country. Although the Regulation is an instrument endowed in general with direct application, some of its provisions necessitate legislative acceptance by the national authorities. This is the case – which is important for our purposes – of Article 9 on *Penalties*, under which "The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented". In utilizing a formula which is very common within the EU, it requires that these penalties shall be "effective, proportionate and dissuasive", although this does not preclude recourse to penal sanctions when such criteria have been deemed to have been satisfied exclusively by such typology of instrument.

The Directive,[56] modified in 1997[57] and in 2001,[58] is less important for our purposes. It proposes to complete the mechanism of restitution provided by the Unidroit Convention in the cases of goods that have been illicitly exported from one or more Member States. Under Article 15, there is an express reservation for the use of sanctions including penal ones, by Member States: "This Directive shall be without prejudice to any civil or criminal proceedings that may be brought under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen".

An Overall Assessment of Criminal Law Components in International Texts to Be Adopted within National Legislations

Taking together the quantity of detailed normative elements, upon which we have focused in this analysis, we are able to draw up a comprehensive balance-sheet of the lines adopted on the international plane in the political–criminal field. It is possible to look into the choices of criminalization both at the macro-system level (in order to assess the underlying political–criminal options regarding recourse to

[55]Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Codified version), in OJEU, L39/1, 10.02.2009.

[56]Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member States, in OJEC, L74/74, 27.03.1993; See Frigo (1992).

[57]Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 amending the Annex to Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, in OJEU, L60/59, 1.3.1997.

[58]Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, in OJEU L187/43, 10.07.2001.

penal sanctions (*when should one punish?*) and on the micro-system level, with the aim of identifying the mechanisms for protection, the levels of penalty or the geographical range for applying the criminal laws: choices which are rarely pursued in international texts although more frequently requested by the domestic legislator (*how is one to punish?*).

In the macro-systematic perspective, the choices made in the two sectors on intervention that have been analysed, correspond to very different philosophies between them concerning the use of the penal instrument. In the first area of intervention, humanitarian criminal law and international criminal law both refer to extreme situations of armed conflict and focus on the most important cultural assets forming part of a nation's heritage. In line with this premise, they opt *notably in favour of the punitive instrument*, laying down *a level – albeit minimal – of harmonization*, whose concrete implementation, however, is actually required from States.

As may easily be seen, the other areas of intervention of international law in the protection of cultural property – if we ignore the extreme circumstances of armed conflict and look at a broader spectrum of assets, and not only those of the highest cultural and historical eminence – display a greater caution in mobilizing the punitive weapon in this field. So in the second aspect of intervention dealing with the circulation of cultural property, international law, although on the one hand it embraces a great swathe of protection for cultural property; on the other hand, it relegates *criminal law to a purely residual role*, relying essentially on the private law instruments of return, restitution and compensation, although it refrains from focusing on the promotion of harmonization among the domestic legal systems. Paradigmatically, as we have perceived, penal sanctioning in the UNESCO Convention remains only one of the possible routes that Party State legislators have open to them, as opposed to embracing the administrative route.

Altogether, these basic political–criminal options – thus briefly summarized – should be considered to be justified, insofar as they represent an adequate adaptation of the plurality of interests in play, even if, to the criminal lawyer, they reveal a number of problematical facets.

For situations of armed conflict, providing these affect property of the highest and most exceptional importance to mankind at large, Party States are required to impose penal sanctions, especially for those actions so serious as to amount to war crimes. To launch an attack against a cultural site or a historical monument, so as to assault the identity of a people, as so often has occurred in recent conflicts, is conduct which, without question, deserves the most severe responses from the system. Here, the balance between interests has to lie between the legitimate conduct of hostilities on the one hand and the *fil rouge* of the whole of international law for armed conflicts on the other, which is that of progressive humanization of warfare: apart from the cases covered by the vast and still controversial concept of military necessity, whether one of typicality or as grounds for justification, the formulation of an individual criminal liability fits the context of *cultural heritage*. Yet, we may observe critically that in the texts under observation there appears no precise choice as to the essential elements of the offence: *theft* or *pillage* are mere labels for which there is not even a tentative minimum definition.

For the case of illegal circulation of goods, however, the juridical framework is essentially dominated by elements of an administrative law flavour (cataloguing of assets and system of certification) or of private law (restitution and compensation for the *bona fide* holder). By contrast, the criminal law is allocated a subsidiary and accessory, a fragmentary and residual, function. Here, the punitive choice is more tentative and is not unanimously applied by the international texts, having to give due regard to the existence of opposing interests needing to be protected, especially the principle of free circulation of the artistic and cultural property which represent a physiological dimension – insofar as it is strictly regulated – of the property in question and the rights of the *bona fide* possessor. This is a situation which, alongside the premises, leads to a limited recourse to penal sanctions (the penal minimalism mentioned above), in a perspective which seems understandable from a pragmatic point of view, especially in view of the difficulties in reconciling in the course of negotiations the positions of exporting and importing countries, but which nonetheless holds a crucial importance.

To renounce out of hand the national embodiment of the *ius punendi* is a policy not without inconsistencies and not without a price. With regard to the first proposition, it is notable that States, whether in the UNESCO Convention or the Unidroit Convention, concentrate their attention on property acquired by theft – which is unanimously and globally punished at law – while refraining, however, from any sort of coordination of the provisions protecting the property in question. It is as if the legislator, paradoxically, has recognized the existence of unquestionably criminal acts in national law but "forgotten" to draw from them the necessary consequences. Considerable attention could well be given here to consider whether models–offences should be put forward so as to induce domestic systems to view criminal conducts in a homogenous way, even if only with regard to *standard* minimum punishments and recovery procedures of an entirely penal nature such as attachment and confiscation.

On the other hand, the substantial failure by the Conventions to penalize, incurs a price in terms of the capacity to fight the object phenomenon, since the disparity, which is sometimes very great, between the choice of measures available to control illegal conduct adopted by national systems, a direct consequence of the great gaps in international law, ends by encouraging those illicit phenomena which the same Conventions with their bias towards civil law treatment endeavour to combat. We have occasion, in the last part of this paper, to judge developments that might prove possible in the area of Conventions with regard to illegal circulation to endow themselves finally with a well-considered and balanced response in punitive terms.

It is much harder to evaluate the penal juridical scene in micro-systematic terms (*how to punish?*) especially as these figure minimally in international texts. Strictly speaking, only a comparative study, which would consider those legislatures that have pursued the criminal path, could determine whether, and in what terms, this failing exists, but this is an objective that lies outside the scope of our present study. Let us simply take a brief look of the principle choices adopted in Conventions on this theme.

For war crimes, we have already seen – compliant with the classical structure of the criminally punished prohibition – how examination of the damage caused predominates.

In the most recent texts, however, we can see the use of instances of danger, which would seem to find adequate justification relative to the collective dimension of the juridical asset protected, to the serial or systematic nature of the criminal conduct in this area, and to the appropriateness of safeguarding the *cultural heritage* of this before it is irreversibly destroyed or dispersed.

From the point of view of subjective criteria for responsibility, the prohibited acts have a fundamentally willing nature: for instance, a deliberate attack on a cultural site when the so-called military necessity justification does not exist, but certainly deserves to be severely punished. However, the exceptional importance of the protected property raises the question of whether the ability of punishment should also extend to cases characterized by a lesser degree of deliberateness. Should utilizing an archaeological site of exceptional interest for concealing arms, while impervious to the risk that it may be destroyed, incur criminal sanctions? The problem of opening the door to *dolus eventualis* is, on the other hand, practically posed in relation to Article 30 of the Rome Statute: if opinions in criminal science diverge on this point, the first decided cases before the ICC – albeit in an entirely different situation – incline towards its acceptance. On the other hand, the role of criminal intent seems minimal in this area: even if the conventions lay down the precautionary measures to be followed in the case of an attack or in the concrete outbreak of hostilities, there does not follow the obligation to punish an involuntary infringement. Indeed, it should not be underestimated that a good part of offences occurring during hostilities result from negligence, inexperience or rashness of soldiers in the field, as may be seen recently in connection with *peacekeeping* operations, leading one to reflect on the possible criminalization of such conduct even if only culpable in such ways.

In the second aspect of intervention, in relation to the illicit circulation of property, the response in the form of penal sanctions is moving at the level of minor criminal offences or administrative ones: this is not only the consequence of a trend towards "moderation" in resorting to the penal instrument, but results from favouring a model of penalization organized in an accessory form, through recourse to the declared schema for the protection of the cultural heritage. Consequently, on the structural plane, normative intervention of a criminal sort hinges on a system for the protection of functions, which could militate towards a broad recourse in domestic law to the issue of risk of damage.[59]

Proposals for Reform in the International Penal Context: Towards a New Offence of "Trafficking in Works of Art"

In the international panorama, there has recently been a move in favour of strengthening the range of penal instruments, although this has not yet translated into the adoption of a new Convention text; nevertheless a number of standpoints have been established at the scientific as well as the political–diplomatic level.

[59]De Muro (2002); Manna (2005).

(a) To take a first trend, the protection of the cultural heritage could make use of international-type norms – both existing and possible future ones – to fight organized crime. In this direction, strong support has been expressed for applying the *United Nations Convention against Transnational Organized Crime*, adopted by the General Assembly in *Resolution 55/25* of 15 November 2000 (UNTOC). The real nub of this Convention lies famously in requiring the introduction of criminal offences connected with organized criminal acts having an international dimension (from participation in a criminal association to money laundering) as well as the creation of stronger instruments for an international cooperation.

In this direction, there has been talk of introducing a new Protocol in addition to the three existing ones,[60] which would focus solely on the phenomenon of traffic in artistic and archaeological assets. This route seems to have reached a dead end in negotiating forums, partly due to the difficulty in mobilizing the entire international community into action to achieve intensified penal responses for an issue which only concerns in practice a limited number of States – as victims of the phenomenon.

As an alternative, the idea has been put forward to permit – interpretatively and legislatively – an application of the same UNTOC in such a way as to embrace the phenomena which now concern us. Specifically, Party States would be induced to impose the highest levels of penalty (a minimum of 4 years imprisonment) for illegal acts in the field of cultural property, so as to qualify in the "Serious Crimes" category in Article 2 of the Convention. The immediate consequence would be – *inter alia* – the extension of acts participating in organized crime (*Criminalization of participation in an organized criminal group*) relative to trafficking in works of art and archaeological artefacts. The inclusion of the *cultural heritage* in UNTOC's field of application has been advocated on various occasions in recent years. A first major step in this direction may be seen in *Resolution ECOSC 2004/34 of 21 July 2004*, "*Protection against trafficking in cultural property*", in which it is stressed that "the entry into force of the United Nations Convention against Transnational Organized Crime is expected to create a new impetus in international cooperation to counter and curb *transnational organized crime*, which will in turn lead to innovative and broader approaches to dealing with the various manifestations of such crime, including trafficking in movable cultural property". In the same way, the *11th United Nations Congress on Crime Prevention and Criminal Justice*, held in Bangkok 18–25 April 2005, "took note of the increased involvement of *organized criminal groups* in the theft of and trafficking in cultural property and reaffirmed the fundamental importance

[60]Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, adopted by General Assembly resolution 55/25; Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly resolution 55/25; Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/255 of 31 May 2001.

of implementation of existing instruments and the further development of national measures and international cooperation in criminal matters, calling upon Member States to take effective action to that effect". Likewise, in ECOSOC Resolution No. 2008/23, the Council said it was "*Alarmed* at the growing involvement of organized criminal groups in all aspects of trafficking in cultural property", once more strongly? supporting recourse to UNTOC. Further discussion of the question took place at the United Nations Congress on Crime at Salvador de Bahia in March 2010, with the agreement to "invite the Commission on Crime Prevention and Criminal Justice for an appropriate follow-up including, *inter alia*, exploring *the need for guidelines for crime prevention with respect to trafficking cultural property*, (…) *bearing in mind the existing relevant international instruments, including the United Nations Convention against Transnational Organized Crime* where appropriate".

(b) A second route in the relative development of punitive tools has been put forward recently in the work of the United Nations, and in particular two objectives: the creation of a model–offence of trafficking, and also one of confiscation. The fuller development of this strategy (even if ambiguously characterized by a certain superimposition upon the prospect of a similar utilization of the provisions of UNTOC) is to be found in the work of the group of experts convened at the end of 2009 at the *United Nations Office on Drugs and Crime*, whose proposals were embodied in the Report presented by the Secretary General to the *19th Session Commission on Crime Prevention and Criminal Justice*, Vienna 17–21 May 2010.

First of all the Party States were asked to make "legislation that is appropriate for *criminalizing trafficking in cultural property* and that takes into account the specificities of such property". More specifically: "States should criminalize *activities related to trafficking* in cultural property *by using a wide definition* that can be applied to stolen and illicitly exported cultural property. They *should also criminalize the import, export or transfer of cultural property* in accordance with Article 3 of the 1970 Convention. States should also consider making trafficking in cultural property (including stealing and looting at archaeological sites) a serious crime in accordance with their national legislation and Article 2 of the Organized Crime Convention, especially when organized criminal groups are involved".

Moreover, the group of experts asked for confiscation – already mentioned in the *ECOSOC Resolution 2008/*23: "If consistent with their legal systems, including the fundamental principles of their legal systems, States are invited to consider: (a) Allowing cultural property to be seized when those in possession of the property cannot prove the licit provenance of the objects or that they have a reasonable belief in the licit provenance of the objects". In this regard, "the Organized Crime Convention may constitute a useful basis".

In conclusion, international law is currently moving towards a substantial strengthening of penal instruments that could in future lead to a notable intensification of criminal sanctions for illicit activities in the field of cultural property. However, reservations immediately come to mind over such a broad and nebulous

prospect, characterized by a general compression of individual civil liberties. In particular, the incisive legislation against organized crime, inspired by a widening of the control, would forthwith be extended to a sector upon which empirical evidence at least throws some doubt regarding the involvement of the major criminal cartels. Allowing that trafficking in works of art and antiquities may become the object of such an international instrument, it could open the door, as to a "Trojan horse", to ever new emergencies destined to appear on the international plane, with mechanisms creating perplexity both in constructive deliberation and democratic representation: tomorrow, trafficking in animals and the day after, dangerous waste and so on.

That does not mean that all prospects for reform should be rejected. As we have already seen, there are many inconsistencies in the existing system and an impetus towards the introduction of well-considered reforms, particularly in three directions.

First – as we have often seen – progress must be made towards a *growing harmonization of the definition of crimes*, through a precise identification of the objects to be protected and the constituent elements of the offences. Probably, there should be a convergence of views on the insertion in international texts of a model–offence of trafficking in works of art and archaeological artefacts, to resolve the dichotomy between import and export and to outline carefully the elements of the case and other minimum requirements from the point of view of imposing penal sanctions.

There is, further, to be seen a more general consensus for strengthening the instruments of *seizure and confiscation*. This would call for a consensus to overcome the mere recourse to private law mechanisms for restitution and return, although careful thought needs to be given to protect *bona fide* third parties and their property rights. In very brief terms, it should be pursued only if it is accompanied by an adequate level of safeguards, both from the substantive point of view (one thinks of the recent issue of corollaries of non-retroactivity and retroactivity *in bonam partem* in this sector in many European systems) and procedurally (with the provision of guarantees of fair process). However, one would not favour, as mooted in the work of the United Nations, a reversal in this field of the burden of proof.

Finally, a last probable prospect could see the extension of *criminal responsibility* from physical persons to *juridical persons*; the pressure in this direction results from a number of criminological features in this sector (strong group pressures on individual participants, porosity between licit and illicit markets), as well as some normative peculiarities (a high presence in the sector of deontological codes, supported by a possible attribution of liability to juridical persons).

We are looking here at reform hypotheses that could only perhaps be confirmed by future developments in the international normative framework: juridical science needs to concentrate continuously on normative processes, in order that criminal law finds its proper place in that prospect of a careful balance of relevant interests and moderation of punitive interventions, subject to the guiding principles of *ultima ratio* and proportionality which have inspired this study.

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