

# **ISPAC**

*International Scientific and Professional  
Advisory Council  
of the United Nations  
Crime Prevention and Criminal  
Justice Programme*

## **PROTECTING CULTURAL HERITAGE AS A COMMON GOOD OF HUMANITY: A CHALLENGE FOR CRIMINAL JUSTICE**

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Selected papers and contributions from the international Conference on  
«Protecting Cultural Heritage as a Common Good of Humanity:  
A Challenge for Criminal Justice»  
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## **PREFACE**



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Law scholars and practitioners face today an increasingly great number of difficult tasks whenever they want to foster systematic and in-depth research into cultural heritage protection: to measure the role that heritage and its protection play in national constitutions and international charters of human rights (aware that culture, both tangible and intangible, is closely intertwined with the core essential values that it is the duty of the law to preserve); to analyse the phenomenon of legal and illegal transactions in cultural heritage, defining the precise objects and scope of legal protection, as well as their limitations, in this area; to select the most appropriate, and least prejudicial to fundamental rights, amongst the many possible approaches to protection, picking, within the wide arsenal of sanctions and preventive measures the law can offer, those that appear the most adequate; to coordinate the application of criminal law (which should in any event be considered as a last resort, or *extrema ratio*) with the complex questions arising from private law in relation to cultural property ownership, as well as with those stemming from public ownership and/or control over cultural heritage and its governance by public authorities; to come up with uniform responses on a global scale, without losing sight of the fact that the extreme variety of approaches and sensibilities to this issue – a result, in part, of each individual State’s history – makes it hard to bring consistency to a framework that, in terms of comparative studies, still suffers from a degree of fragmentation, when not from a clear opposition between different philosophies regarding protection and intervention strategies.

It is with these primary goals in mind that, pursuant to its vocation as a United Nations forum for academic and professional counsel in the field of preventing and combating crime, ISPAC, in recent years, has put a special focus on conducts detrimental to cultural heritage and on the most appropriate criminal policy responses to them.

Research into these issues has been an important feature throughout ISPAC's history. ISPAC was actively involved in the international workshop, promoted in collaboration with the United Nations and UNESCO, and held in Italy from 25 to 27 June 1992, which led to the *Charte de Courmayeur sur le patrimoine artistique et culturel*. Over the last five years, as international institutions have shown renewed interest in this topic, ISPAC has promoted, or participated in, several other research meetings and publications. Pursuant a proposal from the United Nations, a first meeting was held in Courmayeur in December 2008, which led to the publication of a book entitled *Organised Crime in Art and Antiquities*. Revised and enriched, these contributions supplied the core for a further volume, *Crime in the Art and Antiquities World. Illegal Activities in Cultural Property and Criminal Policy Responses* (Springer, 2011). After that, ISPAC, in partnership with top-tier Italian university research centres, has kept working on like initiatives and research projects, aware that Italy lies at the heart of the debate, owing both to its extremely rich cultural heritage and, at the same time, to the awareness of the flourishing illicit activities affecting it. Some of these ventures have already resulted in publications (*Beni culturali e sistema penale*, Vita e Pensiero, 2013), while others are soon to be available in print (*Patrimonio culturale e tutela penale: prospettive di riforma*, Giuffrè, 2015).

Notwithstanding all these previous initiatives, involving globally-acknowledged institutions and experts, a further effort to analyse and debate the problems related to offences against cultural heritage appeared to be needed, and, in December 2013, scholars and cultural heritage protection experts gathered for the annual ISPAC Conference, entitled *Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice*, whose proceedings are now collated in this book. ISPAC has decided to press on in its work to investigate and understand these issues for a number of reasons. It is worthwhile to go back over them by way of introduction.

A first, significant element is *the incessant repetition of events* – widely covered in the media – showing that cultural heritage is damaged or seriously endangered by human neglect and, even more often, by criminal activities undertaken for personal gain: Pompeii regularly features on newspapers' front pages around the globe; worldwide public opinion worries about Venice's future, especially as, in recent past, news emerged of criminal offences committed by those same city officials in charge of

running one of the most emblematic cities of art and culture, patrimony of humankind; the plundering of artworks continues through every conflict around the globe, including, in recent times, Syria and Libya; the discovery, and the theft and looting, of artworks and archaeological artifacts goes on and on, and so do reports in the media – for instance – in Germany, France, Italy, and the United States.

The experts and scholars who met in Courmayeur in 2013, however, didn't just set themselves to the task of raising the umpteenth – and so often falling on deaf ears – cry of alarm. Their main and true purpose was, instead, to keep researching, investigating, meditating on – one may even venture to say 'digging' into (just to borrow from a technical terminology strictly pertaining to the object of our study) – the many questions related to harms to cultural heritage, which, in our opinion, is the only effective way to understand what is going on and plan the most appropriate legal responses. This is the aim pursued by all the contributions gathered in the present volume, which mostly (albeit with some exceptions) reproduce the speeches from the meeting.

First of all, we wanted to *strengthen the focus on methodology*: ongoing work by international institutions – which are ISPAC's main reference point – to foster a renewed framework for cultural heritage protection is not always adequately matched by a preliminary adequate analysis of the grounds for the various possible strategies, which in turn puts such efforts at risk of being less effective than they could otherwise be.

The time has come to start offering some food for thought in order to establish *cultural heritage as a theoretical category strictly related with the concept of 'common goods'*. The purpose of this book is to pave the way for such a reflection, without claiming to exhaust the debate or preclude other possible conceptual frames. As *Ugo Mattei* says in his contribution, «it is in the idea of future generations' interest [...] that the critic to the usual distinction between public and private is grounded, which in turn focuses on the idea of common goods». The common good is a category that, as imprecise and needing further development as it may be, may serve as a useful connecting point for two very different perspectives: criminal law, with its need for specific objects deemed worthy of protection, and international law, whose provisions cannot but be grounded in values transcending merely national interests.

It also seemed appropriate to pay further attention to the *different potential options for cultural heritage protection*, considering them under several perspectives: highlighting the shortcomings of focusing solely on the recovery of stolen or illegally exported objects, to the detriment of a more traditional criminal justice approach against the offenders; weighting the potential efficacy of new, specific legal instruments against that of more conventional and well-tried criminal law ‘weapons’; and marking the need for criminal justice systems to engage in a constructive dialogue with other branches of knowledge, starting with archaeology and art history (as it is particularly remarked in *Derek Fincham’s* contribution).

Secondly, we were perfectly aware that, notwithstanding previous research, *harms to cultural heritage still present a number of aspects worthy of further empirical investigation*. Building on work previously undertaken by ISPAC, and, even more, on the growing number of official international initiatives targeted at renewing criminal justice protection of cultural heritage, especially relating to cultural property trafficking, these last five years have seen a huge increase in the number of research projects, workshops, and conferences (particularly in English-speaking countries), and a consequently significant rise in the related academic literature. We felt that this was a good time to go back over a part of this debate and take it a step further: the essay by *Simon Mackenzie* and *Tess Davis* here collected thus highlights the gaps in criminological research regarding so-called transit countries, and offers a significant contribution through a case study of Cambodian trafficking networks. Initiatives by US prosecutors and lawyers, often following the seizure of items stolen abroad and imported in the USA (well illustrated in *Steven D. Feldman’s* contribution); the work by Italian prosecutors on judicial cooperation (about which *Giovanni Melillo* offers an important account of recent cases that received significant media coverage); updated figures and data from specialised enforcement agencies (*Antonio Coppola*, in particular, relates the activity of the Italian Carabinieri Corps) – all of these provide an overview, both legal and empirical, which can hardly be found in other contemporary researches.

Thirdly – and yet primarily – the Conference and the resulting volume were actually prompted by the already mentioned *increase in international initiatives aimed at combating offences against cultural heritage*. Many are the public and private international institutions which have been working in this field for years (for a brief overview, see the

works by *Folarin Shyllon* and *Mark V. Vlastic*), and UNESCO keeps making great efforts to protect cultural heritage through training and awareness-raising activities (as *Alberto Deregibus* relates, particularly with regard to projects involving a number of African countries); but the real novelty is the increasing commitment of UNODC, with the drafting of a set of *guidelines* that will soon be discussed for adoption by the UN General Assembly (on which topic *John Sandage* and *Sara Greenblatt* provide an insiders' view, while *Stefano Manacorda* offers a critical analysis).

Strictly linked to this rising awareness are also the many *transformations in domestic criminal law systems*, in response to growing international pressures for penalization. After a brief reconstruction (thanks to the contribution by *Fabrizio Lemme*) of the historic evolution of Italian laws aimed at protecting cultural heritage, several other works offer to the reader a wider comparative perspective. The contribution by *Huang Feng* incisively links, through a unitary overview, the increasing efforts by the international community, for all their lasting limits (mainly those which affect judicial cooperation), with the ongoing reforms in the People's Republic of China legal system. *Marc-André Renold* and *Marie Pfammatter*'s essay on return, restitution, and confiscation shows the progress achieved in the Swiss legal system. *Hossein Mir Mohammad Sadeghi* reports on the experience of the Islamic Republic of Iran, where an offence of «destruction of cultural property» has been added to the Penal Code, and criminal sanctions are also provided for other offences such as theft and illicit export, without neglecting preventative measures by administrative authorities. Even tiny Vatican City State – declared a UNESCO World Heritage site in its entirety – recently increased its efforts to more effectively protect its own cultural heritage (*Fabio Vagnoni*).

It should also be noted that the variety of available instruments aimed at fighting offences against cultural heritage is in a way strictly related to the peculiar *mix of public, legal interventions and private ventures*: the latter, quite heterogeneous in their features, keep multiplying and flourishing, as may be seen in this book. After reporting on well-known cases of looted cultural (often archaeological) goods, *Jason Felch* reminds us of the *Antiquarium*, a recent initiative to gather data and raise social and collective awareness of the problem. *James Ratcliffe* reports on the *Art Loss Register*, a private organization that provides (though not without some problematic issues) paid services for people operating on the

art and antiquities market to help them identify cultural goods of illicit provenance. And as *Mark Starling* shows us, companies that supply services to the art market (typically insurance, transport and conservation) are also often involved in pursuing the common goal of reducing illegal behaviours.

It is our hope that the essays collected in this volume, just as the debate that preceded and nurtured them in Courmayeur, will help strengthen common efforts towards cultural heritage protection, bringing together all the different disciplines and approaches involved, and keeping always in mind (as we were keen to point out, starting with the very title of the meeting) the real, immeasurable importance of our objective, as well as of the modesty of criminal law potential alone. As for the first point, it is worth remembering that our objects of interest do not belong exclusively to their legitimate owners, or to the State where they are located; they are, more broadly speaking, «*common goods of humanity*» and, given their irreplaceable nature, they must be protected not just in a short-term perspective, but also with an eye to future generations (as the English expression ‘*cultural heritage*’ so perfectly highlights). On the second front, in relation to the reforms that cultural heritage so sorely needs today, it is our hope that the essays collected in this book will help pave the way for a rational and measured criminal law intervention, free from those symbolic claims so common when punishment is hastily and uncritically called for, and so fearsome when the object of protection are values universally cared for: this is the real «*challenge*» for our lawmakers, to which the title of the Conference significantly refers.



## **KEYNOTE ADDRESS**



JOHN SANDAGE  
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Excellencies, Ladies and Gentlemen, good afternoon.

I am pleased to be here today, at this important event. The International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme has a distinguished history of assisting the United Nations in formulating and implementing programmes related to criminal justice, as well as conducting scientific research.

This is a very timely Conference. Trafficking in cultural property and the need to protect our common cultural heritage have increasingly come to the attention of the international community. There is also greater awareness now that trafficking in cultural property is not a victimless crime – it affects communities and humanity as a whole.

There is also growing awareness and evidence of the increasing involvement of organized criminal groups in cultural property trafficking. Such groups are also often involved in other types of crimes, such as illicit arms and drugs trafficking, money-laundering and corruption.

The art market is a soft target for organized criminal groups. The participants in this market are, for the most part, wealthy; there are high financial returns, and many of the transactions are confidential as this particular market affords a high degree of confidentiality and anonymity. Recent technological developments and the use of the Internet have compounded the problem.

In addition, the art market operates internationally, in cross-border transactions, whereby perfectly legal infrastructures can be exploited to conduct illegal transactions. This unfortunate synergy between legal and illegal markets greatly hinders the efforts of both the international community and the national authorities in addressing trafficking in cultural property.

It is, therefore, of crucial importance, that States apply the existing international legal framework, namely the Hague Convention of 1954, the Additional Protocols to the Geneva Conventions, as well as all the UNESCO and UNIDROIT Conventions on protecting cultural property.

I also wish to emphasize the utility of the UN Convention against Transnational Organized Crime in addressing the issue of trafficking in cultural property, as it applies to the commission of national and cross-border offences. As organized criminal groups are frequently involved, the framework for law enforcement action and judicial cooperation, provided by the Convention, can be of particular use to States.

The Convention covers a wide range of relevant offences, which apply in this context, namely: participation in an organized criminal group, laundering of proceeds of crime, corruption and obstruction of justice.

The Convention also provides a useful common framework for criminalization, on the basis of which investigative measures and judicial procedures may take place. Many of the provisions are highly relevant to address trafficking in cultural property, including provisions on the liability of legal persons, cooperation among law enforcement authorities, as well as special investigative techniques, and the establishment of joint investigative bodies.

Most importantly, however, the Convention offers a broad framework for international cooperation in criminal matters and, with its 179 States parties, it offers a nearly universal basis for such cooperation.

Cooperation and coordination among States is crucial in ensuring successful investigations of crimes related to cultural property. Mechanisms for extradition and mutual legal assistance should be used to good effect and cooperation between law enforcement agencies and private entities, such as auction houses, should be improved.

UNODC has endeavoured to assist States in building their capacity to investigate serious crimes and we have a particular mandate and interest in addressing the issue of cultural property, especially from a crime prevention and criminal justice perspective.

The Economic and Social Council and the General Assembly adopted several resolutions on cultural property since 2004, including this year, which guide our activities, and which request UNODC to undertake specific action in this regard.

One such activity is the development of specific guidelines for crime prevention and criminal justice responses to trafficking in cultural property. On the basis of the most recent mandate from ECOSOC, next

month<sup>1</sup>, UNODC will reconvene the intergovernmental expert group on protection against cultural property to review and finalize those guidelines.

We also held consultations on the utility of, and possible amendments to, the Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the form of Movable Property and cooperated with other intergovernmental organizations in the area of protection against cultural property.

My colleague Sara Greenblatt, the Chief of the Organized Crime and Illicit Trafficking Branch, will provide more details on our activities during Session II<sup>2</sup>.

I would like to emphasise how important it is that all of us, all the organizations and national authorities represented in this room, work together in addressing the challenges posed by trafficking in cultural property.

Before I conclude, I would like to thank the International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme for hosting and organizing this Conference and for inviting UNODC. Conferences such as this, which are organized by ISPAC, bring together experts to discuss on a wide range of topics and greatly contribute to addressing a number of crime prevention and criminal justice issues.

We are honoured to have cooperated in the organization of this event and look forward to contributing to what, I'm certain, will be very fruitful discussions.

Thank you.

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<sup>1</sup> The reference is to the Third Meeting of the open-ended intergovernmental expert group on protection against trafficking in cultural property, held in Vienna from 15 to 17 January 2014 (see <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2014.html>) [editors' note].

<sup>2</sup> See *infra*, S. GREENBLATT, *UNODC and the Fight against Illicit Trafficking in Cultural Property* [editors' note].



*Part I*

**ILLEGAL TRAFFIC IN  
CULTURAL PROPERTY:  
THE NEED FOR REFORM**





PATRIMONIO CULTURALE E BENI COMUNI:  
UN NUOVO COMPITO PER LA COMUNITÀ INTERNAZIONALE

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Thank you so much, Mr. Chairman.

Con il Suo permesso, parlerò in italiano.

Siamo in Italia, parliamo in italiano e riflettiamo sui beni culturali, croce e delizia di questo Paese. Sicuramente l'Italia è ricchissima di beni culturali, sicuramente l'Italia ha una grande consapevolezza storica della propria ricchezza di beni culturali e dell'importanza di questi, e questa consapevolezza storica si manifesta, anche qui, sia nel bene che nel male. Le piazze italiane, ahimè, ancora oggi ospitano prede coloniali sottratte all'Etiopia, alla Somalia e ad altri luoghi del mondo, perché gli italiani, nella loro esperienza coloniale, ancorché breve e non particolarmente fortunata, hanno a loro volta depredato l'arte di Paesi lontani.

È stata una pratica molto diffusa delle potenze coloniali, quella di depredare l'arte dei Paesi colonizzati. L'arte sottratta a questi Paesi, oppure l'arte locale, l'arte autoctona (l'Italia in gran parte è una produttrice di arte autoctona), può essere trattata in un modo piuttosto che in un altro. Gli italiani hanno introdotto nella loro Costituzione l'art. 9, che è considerato uno dei più avanzati pezzi della nostra avanzatissima Costituzione del 1948. L'art. 9 tutela non soltanto la libertà culturale e la libertà di ricerca scientifica, ma tutela altresì il patrimonio culturale e artistico (oltre all'ambiente). Sicuramente, quindi, in Italia c'è da sempre una grande consapevolezza del valore dell'arte. D'altra parte, a questa consapevolezza non è mai seguita una politica di valorizzazione e di mantenimento dei beni culturali degna di questo nome. Noi abbiamo studiosi e intellettuali importantissimi (il più celebre è Salvatore Settis, ma ce ne sono altri, per esempio Tomaso Montanari) che da anni e anni denunciano come l'Italia

abbia un grande patrimonio artistico, ma come il nostro Stato non sia in grado di tutelarlo e valorizzarlo, di evitare il disastro che si sta verificando. Io vivo molto negli Stati Uniti e posso dire che spesso le notizie che arrivano dall'Italia riguardano, per esempio, il crollo di qualcosa a Pompei... Questi sono i momenti in cui l'Italia diventa internazionalmente celebre, in cui acquista una fama non bella, ma che dimostra quanto tutto il mondo sappia che il nostro è un Paese ricchissimo d'arte e quanto tutto il mondo si preoccupi dell'arte italiana come di un bene comune dell'umanità (come dice, per l'appunto, il titolo di questa conferenza). Trattandosi di una radice storica molto antica, del centro, del cuore della civiltà, quanto meno della civiltà occidentale, il nostro patrimonio artistico preoccupa un po' tutti, ma lo Stato è fortemente deficitario nella sua tutela. Io non ho ora a disposizione i dati economici, ma purtroppo gli investimenti per la tutela del patrimonio artistico sono bassissimi, le nostre Sovrintendenze culturali sono assolutamente sotto i limiti di decenza dal punto di vista dell'organico e tutta una serie di recenti riforme, tra le quali quella relativa al federalismo demaniale e altre alzate d'ingegno di questo tipo, hanno allentato ulteriormente la tutela giuridica del patrimonio artistico. Insomma, il patrimonio artistico per l'Italia è un'emergenza; avrebbe potuto essere una grande opportunità e invece in questo momento è sicuramente un grandissimo problema.

Della consapevolezza del valore incredibile del patrimonio culturale dell'Italia, che è parte del patrimonio pubblico, io ebbi personalmente contezza quando, a partire dal 2005, partecipai presso l'Accademia Nazionale dei Lincei, una delle istituzioni culturali e scientifiche più importanti del nostro Paese, a una grande ricerca condotta in quell'ambito sulla proprietà pubblica in Italia. Allora noi cercammo di fare un censimento del valore e della conformazione della proprietà pubblica in Italia e ci rendemmo conto che c'erano moltissime opere d'arte di cui la gran parte era chiusa negli scantinati dei musei o dei ministeri, cioè in luoghi che rendevano queste opere del tutto inaccessibili, e che questo patrimonio è di grande valore anche sul piano commerciale. Per esempio, una famiglia nobile di grande blasone che non ha più denaro potrebbe vendere dei quadri di cui è proprietaria, anche se naturalmente questa non è una cosa auspicabile. Io però dico: se non si vogliono vendere i quadri che si possiedono, quanto meno ogni tanto andrebbero esposti e ammirati. Invece, una gran parte del nostro patrimonio mobiliare pubblico,

sotto forma di beni culturali e artistici, rimane chiuso a chiave negli scantinati di ministeri e musei.

A questo punto, arrivo a un'idea di beni comuni che in qualche misura è la ragione per cui sono stato invitato a parlare, nel senso che io non sono un professore di diritto penale e non ho mai pubblicato nulla in materia di beni culturali, però mi sono occupato a fondo di proprietà e soprattutto, più di recente, di beni comuni. Essendo questo convegno dedicato al «patrimonio culturale come bene comune dell'umanità», credo che la ragione per cui mi è stata data la parola per primo sia che io posso mettere sul tavolo, ai fini anche della discussione successiva, la nozione di beni comuni, con le sue implicazioni dal punto di vista del diritto, cioè quello che si impara affrontando il patrimonio culturale artistico come bene comune.

Lo Stato, perlomeno lo Stato italiano (poi potremo discutere se altri Stati fanno di meglio, probabilmente sì), non gestisce bene il proprio patrimonio artistico. Probabilmente stiamo facendo dei tentativi anche generosi. In questo senso, è stata menzionata l'apposita organizzazione che si occupa della materia nel quadro dell'Arma dei Carabinieri. Non c'è dubbio, quindi, che c'è una consapevolezza (l'abbiamo detto più volte) che dà grandi frutti, di cui uno molto importante è l'art. 9 della Costituzione, legato al nome di un grande studioso come Concetto Marchesi (al cuore dell'*intelligenza* del nostro Paese). Sicuramente si fanno dei tentativi per cercare di governare il nostro patrimonio artistico, ma non ci si riesce. D'altra parte, qual è l'alternativa rispetto allo Stato che normalmente viene posta sul tappeto? Il mercato. Nell'immaginario della quotidianità del nostro discorso giuridico e politico, noi contrapponiamo queste due categorie: da un lato lo Stato, il pubblico, dall'altro il mercato, il privato. Nell'analizzare il rapporto tra Stato e mercato, noi siamo abituati a considerare una sorta di gioco a somma zero: se c'è più Stato, c'è meno mercato, se c'è più mercato, c'è meno Stato. Sull'alternativa tra Stato e mercato come possibili modelli di organizzazione e anche di governo dei beni culturali si è discusso più che mai, nel senso che questo tema fa parte delle categorie fondanti il nostro pensiero occidentale. Per esempio, perché non governare il patrimonio artistico privatizzandolo? Perché non utilizzare il privato, quindi il modello di mercato, come modo per valorizzare i beni culturali e artistici? Perché i privati, nell'immaginario collettivo, quanto meno fino a prima della corrente crisi, erano sicuramente considerati dei migliori organizzatori, dei migliori gestori rispetto allo

Stato. Lo Stato è gerarchico, è polveroso, è stantio, è burocratico, ha dei modi di gestione privi degli incentivi efficienti che consentono in qualche modo alla gestione di funzionare bene; una struttura privata, invece, una *corporation*, potrebbe essere molto più efficace: date gli Uffici a un privato e vedrete che gli Uffici verranno tenuti molto meglio. Quindi si dice: valorizziamo sul mercato questo grande patrimonio.

In effetti, il gruppo di lavoro che si doveva occupare dello studio per l'Accademia dei Lincei cui ho accennato era stato messo in piedi anche in virtù del fatto che l'idea del mercato inteso come contrapposto allo Stato era emersa in modo forte come alternativa per una migliore gestione dei beni culturali. Questo, naturalmente, a livello di retorica. Quando vendi i quadri di famiglia, o quando rinunci a un patrimonio culturale importante come il patrimonio artistico perché lo vendi, hai bisogno di una retorica di accompagnamento di questa operazione; retorica di accompagnamento, che presenta il mercato come il mezzo più efficiente, che sicuramente era stata utilizzata in quella fase storica, prospettando di privatizzare i beni culturali, magari non vendendoli, ma dandoli in concessione, ad esempio una concessione di lungo periodo che consenta di far pagare un biglietto sufficientemente alto per vederli. Insomma, costruiamo un mercato dell'arte e consegniamogli una cospicua quantità del nostro patrimonio collettivo perché questo mercato lo metta a reddito e lo faccia fruttare di più: magari lo Stato potrà prendere qualche *royalty*, potrà darlo in affitto. Erano presenti tutti questi modi di pensare al mercato come alternativa di governo dei beni culturali, che i più sospettosi fra noi giuristi cominciavano a guardare con una certa preoccupazione, anche perché probabilmente avevamo alle spalle, in Italia, un decennio di privatizzazioni estremamente sostenute, anzi *il* decennio di privatizzazioni più sostenute che l'intera Europa abbia mai avuto (compresa l'Inghilterra di Margaret Thatcher), quindi, di fronte alla prospettiva del mercato dell'arte come possibile modo di gestione privatistica dei beni culturali, alcuni si erano allarmati.

Stato e mercato sono due possibili alternative e così sono presentate; tuttavia, guardando meglio le cose (e qui nasce in qualche misura la sensibilità per i beni comuni), si vede che tanto lo Stato quanto il mercato non costituiscono la struttura istituzionale migliore per governare il problema; o perlomeno, quando un aggregato problematico viene identificato e riconosciuto come bene comune (come voi avete fatto per quanto riguarda il patrimonio culturale in generale in questo convegno),

ecco che scatta il valore del bene comune come ‘né Stato né mercato’. Il bene comune nasce nel nostro sistema come categoria culturale, come categoria del pensiero (in quello economico si presenta legatissimo al nome di Elinor Ostrom<sup>1</sup>, la grande economista e sociologa americana che ricevette il Premio Nobel nel 2009), più o meno a partire dalla prima parte del 2000, come momento di critica del processo di privatizzazione, per cui i beni comuni diventano in qualche modo quello zoccolo duro di beni appartenenti al popolo intero che, per ragioni profondamente assiologiche, legate al nostro patrimonio, all’identità culturale della nazione e a tutta una serie di aspetti, si ritiene di escludere dalla logica individualistica e volontaristica del mercato stesso. D’altra parte, il Codice dei Beni Culturali è il luogo nel quale l’ideologia della proprietà privata intesa come piena libertà individuale del privato proprietario viene messa tecnicamente in discussione attraverso un limite strutturale all’idea stessa di proprietà.

Nel corso annuale sulla proprietà, quando racconto agli studenti le teorie volontaristiche della proprietà, porto l’esempio di quel signore molto ricco che ha collezionato quadri d’autore per tutta la vita e che lascia scritto nel suo testamento di voler essere cremato insieme ai suoi quadri di Picasso. La libertà testamentaria è naturalmente un aspetto importante della nostra visione della proprietà libera, la libertà proprietaria contiene l’*usus* e l’*abusus* (quindi la distruzione o l’alienazione) e il diritto di successione nella tradizione giuridica occidentale è considerato un’appendice inscindibile rispetto al diritto di proprietà, ergo: se ragioniamo in chiave proprietaria, quel signore che dice, in un testamento valido, «crematemi con i miei quadri» obbliga la struttura del diritto costituito a dar seguito alla sua volontà. Eppure, questo tipo di ragionamento fa orrore a tutti e tutti siamo molto pronti a dire «ma no, non è possibile che, soltanto perché quel signore è proprietario di quei quadri, possa distruggerli e portarseli via per sempre». Perché? Perché si ritiene che il patrimonio culturale (per esempio un quadro d’autore) abbia un valore che va molto oltre la generazione presente, che anzi si estende alle generazioni future, con una trasmissione dal passato al futuro che supera la durata dell’esistenza umana, per cui la logica del diritto come assetto istituzionale che si occupa del ‘qui e adesso’ viene superata da una visione del diritto come capace di farsi carico anche degli interessi delle generazioni future.

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<sup>1</sup> Cfr. E. OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990, trad. it. *Governare i beni collettivi*, Marsilio, 2006.

È nell'idea di interesse delle generazioni future, quindi, che si articola la critica della distinzione fra pubblico e privato incentrata sul concetto di beni comuni. In altre parole, lo Stato non può alienare il patrimonio artistico, il governo in carica non può scegliere liberamente di vendere il patrimonio artistico e culturale perché in qualche misura, nell'alienarlo, nel privatizzarlo e nel dare la possibilità di venderlo, supponiamo, sul mercato, in realtà il governo in carica agisce contro l'interesse della comunità intesa in senso più ampio, che comprende anche quelli che non sono ancora nati. Questo lo vediamo molto chiaramente con un quadro di grande valore; lo vediamo meno chiaramente con le infrastrutture, per esempio gli acquedotti, le strade, le autostrade; ma il principio è lo stesso: la comunità ha ricevuto queste infrastrutture dal passato e deve trasferirle anche alle future generazioni, quindi tutelarle nei confronti di chi voglia governarle non già nella logica pubblica, non già nella logica dell'interesse di tutti, ma nella logica del profitto e dell'interesse individuale. Di qui nasce l'idea di bene comune dal punto di vista giuridico: bene comune come correzione, se vogliamo, di quel grande sbilanciamento istituzionale e costituzionale che la tradizione occidentale ci consegna.

In altre parole, la tradizione occidentale, che è molto pronta a tutelare la proprietà privata nei confronti dello Stato (lo Stato può espropriare, certo, i beni privati, ma soltanto a seguito di un processo giuridico, avendo dichiarato la pubblica necessità dell'espropriazione, riconoscendo un indennizzo, che è un indennizzo che deve essere calcolato a prezzo di mercato, quindi proteggendo attraverso l'ordinamento giuridico il privato in relazione ai suoi beni), non riconosce lo stesso tipo di protezione quando i beni, invece di essere parte del patrimonio di un solo individuo, sono parte del patrimonio di tutti. Pensiamo ai quadri nelle pinacoteche: quando vengono privatizzati o alienati dal governo in carica, questi esercita senza dubbio un potere pubblico, potere legittimo nel quadro del costituzionalismo liberale; ma l'esercizio di questa privatizzazione, che né deve dimostrare la pubblica utilità né deve indennizzare chicchessia, né può essere controllato attraverso i processi di verifica della costituzionalità delle leggi, noi sentiamo che toglie qualcosa alle generazioni future. In qualche misura, il passaggio dal pubblico al privato deciso dallo Stato è un passaggio che potremmo definire *ultra vires*, perché privatizza qualcosa su cui lo Stato in quanto tale non può decidere perché ci sono interessi più importanti e ampi, interessi di lungo

periodo che sono anche gli interessi delle generazioni future. Quindi le privatizzazioni devono a loro volta essere accompagnate, quanto meno, dalle stesse garanzie che accompagnano il passaggio inverso, quello dal privato al pubblico.

A questo punto si evidenzia lo sbilanciamento costituzionale tipico della tradizione occidentale, che la nozione di beni comuni cerca di correggere. Cioè si dice: è necessaria una nozione, una categoria, che sia giuridica, che sia capace di essere difesa sia nei confronti dello Stato che nei confronti del mercato, che sia portatrice in qualche misura di un apparato valoriale proprio; apparato valoriale che, di per sé, non si riflette nell'ambito del costituzionalismo occidentale così come l'abbiamo organizzato nel quadro della modernità. Voi capite che questo è un ripensamento molto importante di una delle grandi categorie, di una delle grandi idee, della modernità occidentale, ossia l'idea che lo Stato sovrano è il rappresentante della comunità del popolo.

La riduzione della comunità allo Stato-apparato è stata la cifra della modernità, ma essa si scontra con il fatto che il 'qui e adesso', cioè l'esperienza di vita di un singolo individuo o di un singolo governo, non è sufficiente a farsi carico di interessi che sono più generali. Da qui il problema: il mercato non è un buon tutore dei beni comuni, quindi dei beni culturali come beni comuni, perché è animato da una logica di profitto del 'qui e adesso', una logica di tipo estrattivo, come qualche volta viene chiamata, che mal si concilia con quella necessità di promozione della cultura, della persona, della personalità e del suo contesto sociale, a cui dovrebbe servire l'arte; arte che si presenta come grande espressione dell'artista, ma anche come momento di fruizione, di promozione, di crescita culturale del fruitore dell'arte stessa. Un popolo, attraverso la propria arte, educa i propri cittadini a essere tali, mentre il mercato si oppone a questa logica, perché il mercato è un'istituzione escludente: il collezionista molto ricco, che può comprarsi un monile proveniente chissà da dove, lo compra per poterselo guardare; cioè gran parte del piacere, in una logica di mercato, sta proprio nell'esclusione degli altri, mentre il governo pubblico dei beni comuni dovrebbe connotarsi per un'impostazione di tipo inclusivo. D'altra parte, lo Stato si comporta con logiche abbastanza simili, nel senso che lo Stato a sua volta, o comunque l'organizzazione giuridica così come l'abbiamo ereditata dai nostri padri, dai giuristi della modernità, è un'istituzione che si basa sull'assolutismo dello Stato stesso: questi personifica il sovrano e il sovrano ha la libertà del

volere, piena ed esclusiva, proprio come la libertà del volere di quel signore che vuol farsi cremare con i suoi quadri. Se l'abuso dei quadri lo compie lo Stato, esso lo commette legittimamente e non esiste un sistema di controllo istituzionale per limitarlo in questa sua azione. Di qui il ruolo crescente del diritto internazionale. In questo senso, l'entrata del 'sovrano' nel quadro di accordi internazionali riconosciuti da altri sovrani ha come esito la limitazione della libertà sovrana anche rispetto ai beni culturali: è la struttura del diritto internazionale che introduce quel tipo di limite all'arbitrio del sovrano che può essere funzionalizzato anche all'interesse delle generazioni future, e quindi all'interesse per i beni culturali e i beni comuni.

Vorrei dirvi tante altre cose, ma il mio tempo è finito e non voglio rubare spazio agli altri relatori.



GLI STRUMENTI DI CONTRASTO DEL TRAFFICO ILLECITO  
DI BENI CULTURALI: LE RECENTI INIZIATIVE  
A LIVELLO INTERNAZIONALE

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Molte grazie, professor Chappell, grazie per l'introduzione.

Io passerò dalle vette così alte che abbiamo raggiunto con la relazione di Ugo Mattei<sup>1</sup>, su tematiche di fondo e di sistema, a profili molto più concreti e di dettaglio. La mia analisi verterà difatti sugli strumenti internazionali di tutela penale del patrimonio culturale, in particolare con riferimento alla circolazione illecita, il nucleo problematico essenziale con il quale siamo chiamati a confrontarci in questi tre giorni di lavori.

A dire il vero, la relazione introduttiva del professor Mattei consente – anche nello specifico dell'approccio penalistico – una riflessione preliminare. Anche il diritto penale, al pari delle ulteriori componenti dell'ordinamento cui ci si è già riferiti, si inserisce nello scenario di giustapposizione Stato/mercato, in cui si contrappongono interessi pubblici e privati, o comunque rinvia implicitamente a esso. Senza adottare una visione radicale che vede tali dimensioni in netto contrasto, può agevolmente intuirsi come l'accentuarsi della dimensione pubblicistica determini un innalzamento delle soglie di tutela penale del patrimonio, mentre la eventuale valorizzazione della dimensione privatistica, senza necessariamente determinare un arretramento della tutela, comporti perlomeno una focalizzazione sulle tematiche della circolazione.

Approntare strumenti sanzionatori a tutela dei beni culturali appare quindi un esito possibile delle diverse prospettive in campo e la sessione

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<sup>1</sup> V. *supra*, U. MATTEI, *Patrimonio culturale e beni comuni: un nuovo compito per la comunità internazionale*.

odierna del nostro convegno adotta sul punto un taglio molto deciso, indicando la necessità di una riforma penale. Si tratta di un'espressione, quella della necessità, che un buon penalista dovrebbe in qualche modo evitare o perlomeno accompagnare con un punto interrogativo. La domanda che sorge è se siamo davvero in presenza di elementi che consigliano, giustificano o addirittura rendono necessario un rafforzamento del quadro penalistico in sede internazionale. Nella prima parte di questo intervento tenterò di offrire qualche elemento di risposta a questa domanda in chiave tendenzialmente positiva, ma ovviamente problematica, per poi passare, in un secondo momento, all'analisi sommaria delle iniziative adottate nel corso degli ultimi anni (ma direi addirittura degli ultimi giorni, perché mi intratterrò sull'attualità giuridica delle Nazioni Unite) per contrastare il fenomeno; iniziative che evidentemente non sono immuni da quelle tensioni e da quelle contrapposizioni di punti di vista cui il professor Mattei accennava poc'anzi.

Anzitutto, occorre domandarsi quali siano le ragioni che sorreggono una riforma del quadro giuridico di contrasto al traffico illecito dei beni culturali. In tale ambito, quali sono le coordinate all'interno delle quali occorre muoversi e quali sono i fattori che potrebbero spingere in direzione di un rafforzamento della tutela?

Nel presentarvi rapidamente alcuni dati, ci si riferirà ai principali risultati emersi degli studi condotti dal 2009 a oggi – in un arco di tempo relativamente ristretto, ma direi estremamente fruttuoso – da un gruppo di ricercatori (alcuni dei quali sono in questa sala<sup>2</sup>), che hanno consentito, tappa dopo tappa, di acquisire una crescente consapevolezza in relazione ai fattori che spingono verso una criminalizzazione del fenomeno del traffico illecito.

In primo luogo: la rilevanza del dato empirico. È certamente scontato osservare che la fenomenologia degli illeciti in questo specifico ambito si è estremamente diversificata e rafforzata nel corso degli ultimi anni. Il pensiero di ciascuno di noi corre ovviamente anche a fatti di cronaca, al ritrovamento di centinaia di opere d'arte trafugate dai nazisti e rinchiusi in un bunker fino a un'epoca recentissima, opere d'arte dal valore

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<sup>2</sup> Per un efficace compendio di tali studi si rinvia, in particolare, a N. BRODIE - J. DIETZLER - S. MACKENZIE, *Trafficking in Cultural Objects: An Empirical Overview*, in S. MANACORDA - A. VISCONTI (a cura di), *Beni culturali e sistema penale*, Vita e Pensiero, 2013, pp. 19 ss.

economico inestimabile<sup>3</sup>. Un fatto che forse è meno noto ai nostri colleghi stranieri è che pochi giorni orsono è stato nominato, dopo anni e anni di abbandono, il nuovo Commissario di Pompei nella persona del precedente Comandante del Nucleo Tutela Patrimonio Artistico dei Carabinieri<sup>4</sup>, quasi che vi sia un legame inscindibile, almeno in questo Paese, tra tutela del patrimonio culturale e intervento penale.

I dati di cronaca sarebbero tanti, ma che cosa è emerso in termini di *pattern* criminologici? In questa sede non sarà possibile approfondire i singoli elementi e ci si limiterà ad una mera esposizione dei principali dati. Potremmo dire che sono emersi almeno tre profili in ordine alla struttura dei fenomeni criminali nello specifico settore che qui ci occupa.

Il primo profilo riguarda un fenomeno di progressiva contiguità tra mercato lecito e mercato illecito. Qui vi è un paradigma del mercato molto forte nella circolazione illecita dei beni culturali: ci siamo resi conto che vi sono attori comuni nel settore della circolazione lecita e della circolazione illecita, una sorta d'interpenetrazione o di osmosi. Gallerie, case d'asta, collezionisti o musei si ritrovano spesso tanto sul versante lecito quanto sul versante illecito. Se da ciò volessimo trarre delle indicazioni penali, si tratterà di chiedersi se occorre responsabilizzare ulteriormente gli attori del mercato lecito, imponendo nuovi e più stringenti di obblighi di vigilanza.

Il secondo *pattern* criminologico evidente è quello della partecipazione del crimine organizzato ad attività come quelle in oggetto. Questo è il dato più controverso, come ci è stato ricordato anche in apertura. Attività di riciclaggio attraverso il mercato dell'arte e realizzazione di condotte da parte di pluralità di soggetti, fattispecie associative e strutture organizzate, questi sono i fenomeni più evidenti. Ma poi vi è qualcosa che è sotto gli occhi di tutti: la dimensione transnazionale della circolazione e dell'organizzazione, una sorta di profilo fenomenologico che trascende le competenze di ogni singolo Stato. Da ciascuna di queste indicazioni così sommarie di natura empirica si potrebbero trarre indicazioni penali, ma oltre a questo primo fattore, che

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<sup>3</sup> Il riferimento è al ritrovamento di centinaia di opere dei più famosi artisti di inizio Novecento in un appartamento privato di Monaco di Baviera, opere confiscate sotto il regime nazista e scomparse nel corso della Seconda Guerra Mondiale, e tornate alla luce solo nel 2011 ad opera delle autorità tedesche (ma la notizia sarebbe divenuta di pubblico dominio solo a fine 2013: *Meisterwerke zwischen Müll - Fahnder entdecken in München Nazi-Schatz in Milliardenhöhe*, in *Focus*, 4 novembre 2013, s.A.).

<sup>4</sup> Il 9 dicembre 2013 è stato investito dell'incarico il Generale dell'Arma dei Carabinieri Giovanni Nistri.

accende l'interesse e che ci spinge a riflettere sulla necessità di una riforma, un secondo fattore opera nello stesso senso – pur essendo forse meno noto, meno evidente – il quale nasce da un'analisi, sia pure sommaria, di tipo comparatistico.

Se si confrontano, in chiave comparata, le risposte approntate dagli Stati contro il fenomeno della circolazione illecita, e in particolare le risposte penali, si assiste a una fortissima divaricazione dei modelli. Qui si potrebbe riprendere il tema del dualismo introdotto da Ugo Mattei tra Stato e mercato, nel senso che – da un lato – vi sono ordinamenti, come quello italiano, in cui prevale in maniera evidente la mano pubblica sui beni culturali, con una ricaduta sullo sviluppo di una normativa amministrativistica particolarmente ricca (autorizzazioni, licenze di esportazione, proprietà pubblica dei beni archeologici), destinata a incidere anche sugli assetti di tutela penalistica (modello contravvenzionale, accessorio e fortemente normativizzato) e vi sono – da un altro lato – modelli dove invece prevale l'idea della libera circolazione, della libera proprietà e della riduzione dei controlli pubblici sulla circolazione lecita o illecita dei beni culturali, aspetti tutti destinati ugualmente a condizionare, questa volta in chiave più permissiva, gli assetti della tutela punitiva. Si tratta, all'evidenza, di mere intuizioni comparatistiche che solo uno studio più attento e analitico permetterebbe di convalidare *in toto*. I primi dati che i gruppi di ricerca all'opera hanno potuto raccogliere tendono tuttavia a confermare la tendenziale polarizzazione delle tutele, sia pure con una serie di sfumature e modellistiche intermedie.

Tale contrapposizione ha avuto un'eco, come si vedrà nell'ultima parte di questo mio intervento, sull'attuale dibattito in corso alle Nazioni Unite, dove a Paesi con un consistente patrimonio culturale e a forte impronta pubblicistica in tema di tutela si vedono contrapporsi blocchi di Stati, invece, molto più aperti alla logica del libero mercato, il che oggi ha un'incidenza significativa sulle opzioni penalistiche.

Il terzo e ultimo punto emerso significativamente dagli studi condotti nel corso degli ultimi anni attiene alla ovvia constatazione che nel settore specifico sono presenti molte convenzioni internazionali: la Convenzione dell'Aja del 1954 e il relativo primo Protocollo, la Convenzione del Consiglio d'Europa del 1985, gli atti dell'Unione Europea. Fondamentalmente, però, gli strumenti internazionali principali in materia ruotano intorno alla Convenzione dell'UNESCO del 1970 e alla Convenzione dell'UNIDROIT del 1995. Ebbene, è paradossale che

entrambe contengano riferimenti a condotte illecite sovente oggetto di fattispecie incriminatrici in diritto interno (furto, sottrazione, circolazione illecita), ma che al contempo lascino impregiudicata la scelta tra una sanzione amministrativa e una sanzione penale, senza imporre standard minimi né nella definizione delle fattispecie né nella soglia sanzionatoria minima da imporsi. Da ciò deriva che, ancor oggi, in presenza di un quadro giuridico internazionale molto articolato e strutturato, la richiesta di sanzionare penalmente condotte legate alla circolazione illecita è pressoché inesistente.

I tre fattori che sono stati elencati (fattori, per così dire, di tipo empirico-fenomenologico; fattori legati alla diversificazione, anche radicale, dei modelli di tutela penale interna; fattori di taglio internazionalistico che evidenziano un certo minimalismo penale del quadro convenzionale) spingono in maniera convergente verso un ripensamento degli strumenti di tutela, inducendo oggi le istituzioni internazionali a interrogarsi sul se e sul come di nuovi strumenti che diano effettiva tutela a un bene comune quale il patrimonio culturale dell'umanità.

Vengo quindi allo specifico della questione. Avendo effettuato uno studio per conto delle Nazioni Unite per l'adozione di uno strumento di contrasto ai fenomeni illeciti di cui qui si discorre, devo dire che il quadro che ne emerge non lascia presagire facilmente un'evoluzione a breve termine. Illustrerò la tipologia d'intervento predisposta di recente dalle Nazioni Unite e alcuni dei suoi contenuti essenziali. Ancora una volta, non potrò che procedere a volo d'uccello e con estrema rapidità, rinviando per il resto alla lettura dei testi.

Innanzitutto, come potevano procedere le Nazioni Unite per rafforzare il quadro penale in materia di traffico illecito dei beni culturali? Le opzioni disponibili erano molteplici e alcune di queste sono state concretamente analizzate o perseguite, sia pur in assenza di un qualsivoglia approfondimento di taglio metodologico. Una prima opzione consisteva nell'adottare un nuovo strumento convenzionale, prospettiva che è stata subito scartata per ragioni di opportunità politico-diplomatica: addivenire a una nuova convenzione equivaleva, ovviamente, a ravvivare i conflitti tra le diverse organizzazioni internazionali, nonché a dispiegare energie che non era possibile mettere in campo.

Vi erano, però, almeno altre tre opzioni disponibili, di cui la prima consisteva nel valorizzare le attuali convenzioni internazionali ad ampio

spettro, estendendone l'applicazione anche ai fenomeni in oggetto. Ebbene, in tale ambito, l'idea poteva essere quella di consentire l'applicazione al traffico di opere d'arte della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale, la cosiddetta UNTOC. Questa è forse l'idea dominante nell'ambito delle istituzioni internazionali, che tuttavia si presta a numerosi rilievi critici, primo fra tutti quello di determinare un generale innalzamento delle risposte sanzionatorie e di consentire il ricorso a strumenti di indagine concepiti per forme di criminalità particolarmente gravi.

Una seconda opzione consisteva nel raffinare ulteriormente il *Model Treaty* che il Congresso delle Nazioni Unite tenutosi nel 1990 all'Avana aveva elaborato<sup>5</sup>, il quale contiene precise disposizioni penali. Anche questa strada, però, non era facile da perseguire, giacché un trattato-modello è uno strumento cui gli Stati possono ispirarsi nelle relazioni bilaterali con altri Stati al fine di rafforzare la tutela penale e non si presta invece a delineare un complesso scenario multilaterale.

Vi era una terza strada, che poi è stata perseguita: l'adozione di uno strumento di *soft law*, un compendio di raccomandazioni destinate agli Stati (non si sa bene se al legislatore o alle autorità di *enforcement* degli Stati; su questa ambiguità si è giocata anche la redazione del testo), delle *guidelines* con contenuti elaborati. Ebbene, queste *guidelines*, redatte sotto la direzione del Segretariato dell'UNODC e pubblicamente accessibili<sup>6</sup>, sono articolate in cinquantaquattro articoli, con la puntuale indicazione dei riferimenti normativi e delle finalità di ogni singola proposta, dando vita a un corposo documento di circa cento pagine. Esse sono divise in diversi capitoli: un primo capitolo ha ad oggetto le misure preventive, ed è destinato a intersecarsi con i lavori di altre istituzioni internazionali; il secondo capitolo è incentrato sulla dimensione penale ed è del tutto innovativo; nel terzo capitolo vengono affrontate le questioni legate alla cooperazione giudiziaria, in gran parte mutuata dalla UNTOC; all'interno di questo capitolo, l'ultima sezione è specificamente dedicata agli

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<sup>5</sup> *Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the form of Movable Property*, elaborato nel corso dell'ottava Conferenza delle Nazioni Unite sulla prevenzione del crimine e il trattamento dei rei tenutasi all'Avana dal 27 agosto al 7 settembre 1990.

<sup>6</sup> I successivi *draft* delle *Guidelines* in questione sono consultabili sul sito dell'UNODC alla pagina <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2014.html>.

strumenti di restituzione (a loro volta strettamente collegati a quelli di confisca trattati nella *guideline* n. 46).

In questa sede è possibile semplicemente enunciare alcuni tratti salienti del documento oggi in discussione dinanzi al gruppo di lavoro intergovernativo costituito presso le Nazioni Unite<sup>7</sup>, dando anche atto delle reazioni, alcune delle quali molto critiche, che un gruppo di Stati ha avanzato contro simili proposte.

Innanzitutto si è detto che le *guidelines* erano uno strumento dalla natura ambigua, vaga, *not-binding*, che andava oltre il mandato e, su queste basi, un gruppo di Stati (essenzialmente *market States*) ha manifestato fin dall'inizio un forte dissenso circa la loro adozione. Altri Stati (per lo più *source States*) hanno invece manifestato in blocco un appoggio incondizionato a una scelta di questo tipo. Si sono ovviamente delineate posizioni intermedie, nel complesso comunque orientate all'adozione subordinata ad alcune modifiche di fondo. La varietà delle posizioni e la profonda contrarietà di alcuni Stati può leggersi nei commenti ufficiali all'iniziale *draft* delle *guidelines* allegati ai lavori preparatori<sup>8</sup>.

Ma veniamo ai contenuti. Per la prima volta, si prospetta all'interno dello strumento l'adozione di una fattispecie di traffico illecito di beni culturali. Questa fattispecie si aggiunge e si combina con altre fattispecie (vedi *guideline* n. 16), innestandosi sull'ipotesi dell'esportazione illecita, sull'ipotesi del furto di beni culturali e su quelle di saccheggio e scavo archeologico illegale. La fattispecie di traffico presuppone che il bene abbia già natura illecita, cioè sia stato già illegittimamente sottratto, sia stato già esportato o importato illecitamente, sia stato già illegalmente scavato; solo in questi casi, questa fattispecie ulteriore e sussidiaria interviene. L'intento dei redattori delle *guidelines* di rendere autonoma la fattispecie di traffico, limitandone tuttavia lo spettro applicativo, non è stato condiviso dalla maggior parte delle delegazioni degli Stati Membri, i cui interventi lasciano intendere che non se ne è colta la reale autonomia né la necessità nell'attuale quadro giuridico-penale.

Un secondo punto che è stato oggetto di un dibattito molto acceso è quello relativo alla necessità di provare la conoscenza della natura illecita del bene. Le *guidelines* si orientavano nel senso di ritenere che ciascun operatore del mercato debba previamente consultare i cataloghi delle opere

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<sup>7</sup> In tema si veda anche, *infra*, S. GREENBLATT, *UNODC and the Fight against Illicit Trafficking in Cultural Property*.

<sup>8</sup> V. nota 6.

rubate o illecitamente esportate, di modo che, laddove il bene compaia in questi cataloghi, si possa addivenire alla prova della consapevolezza della natura illecita dell'atto commesso. Su questo aspetto si è aperto un accesissimo dibattito, obiettandosi da parte di talune delegazioni che tale misura avrebbe istituito una forma di responsabilità oggettiva. Tale reazione è, con ogni probabilità, il frutto di un fraintendimento a opera delle delegazioni, giacché la proposta in oggetto prendeva proprio le mosse dalla tendenza giurisprudenziale – riscontratasi ad esempio in Italia in relazione all'esportazione illecita di cui all'art. 174 del Codice dei beni culturali – ad annoverare tra le condotte punibili anche comportamenti strutturalmente colposi non riconducibili alla area applicativa del delitto o a vere e proprie forme di *dolus in re ipsa* correlate alla posizione dell'agente. Mediante l'individuazione di un onere di informazione a carico dell'agente, venivano affrontati nelle *guidelines* i profili probatori in termini di consapevolezza dell'origine illecita.

Un aspetto ulteriore riguarda la responsabilità delle persone giuridiche e delle imprese in questo ambito. Anche su tale dato ci si è dialetticamente confrontati, laddove appare di immediata evidenza che sanzionare i singoli individui si rivela insufficiente, se è il mercato ad essere strutturalmente organizzato per veicolare anche traffici illeciti. È noto che anche presso le principali case d'asta mondiali si mette in vendita una percentuale di beni dalla provenienza dubbia o chiaramente illecita, il che impone di immaginare strategie preventive e punitive che abbiano a oggetto l'organizzazione d'impresa, secondo modelli oramai ampiamente collaudati in altri settori della criminalità economica.

In ultimo, nello strumento delle *guidelines* si prevedono non solo la restituzione, che già è contemplata dalla Convenzione UNESCO, ma anche misure più articolate e puntuali di confisca e di sequestro, tenuto conto del fatto che la realizzazione di queste forme di criminalità, chiaramente orientate all'ottenimento di un profitto illecito, deve passare, in termini di contrasto e repressione, anche per misure ablatorie dei beni e conservative degli stessi.

Non era mio intento, com'è ovvio, difendere le *guidelines*. Qui si intendeva semplicemente rappresentare l'esistenza di un dibattito, che non coinvolge solo esperti e studiosi della materia, ma intercorre essenzialmente tra gli Stati.

È auspicabile che tale dibattito conduca all'adozione di uno strumento atto effettivamente a prevenire e contrastare il fenomeno del



traffico illecito, anche se sussiste qualche perplessità circa l'effettiva capacità degli Stati di trovare un punto d'accordo. Le esperienze già maturate in relazione alla Convenzione UNESCO e alla Convenzione UNIDROIT nonché le tantissime resistenze che proprio gli stessi Stati che oggi si oppongono al nuovo strumento già allora ebbero a manifestare, lasciano pensare che il cammino sia ancora in salita. Un elemento che non induce certo gli studiosi a desistere, ma che viceversa rappresenta uno sprone ulteriore al nostro dibattito.



*Part II*

**INTERNATIONAL INSTITUTIONS  
AND THE FIGHT AGAINST  
ILLCIT TRAFFICKING  
IN CULTURAL PROPERTY**



RECENT ACTIVITIES OF UNESCO REGARDING THE FIGHT  
AGAINST TRAFFIC IN CULTURAL PROPERTY

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Let me first thank the organizers of this meeting, and in particular professor Manacorda for inviting UNESCO to this very important Conference.

I am a Lieutenant Colonel of the Italian Carabinieri Corps, and since 1987 I have been part of the Department devoted to Cultural Heritage Protection (TPC). While continuing to be in charge of the Carabinieri TPC, I have been seconded since February 2012 to the UNESCO Secretariat, working in particular in the section that deals with the treaties for the protection of cultural heritage. Please allow me to convey the fondest greetings by the chief of that section, Mr. Jan Hladik.

My role is to try and offer my experience from years in the field to UNESCO and particularly to the section in which I work. In this sense, I participate in training workshops throughout the year in different countries with the aim of enhancing the safeguards against illicit trafficking in cultural property. My goal is to directly bring the tools that the Carabinieri have developed to police forces across the world. These trainings offer vital opportunities to compare institutions and policing mechanisms.

The collections in the National Museums of Baghdad or Cairo, Syrian mosaics or spiritual collections, and the irreplaceable manuscripts of Timbuktu, are just some of the many cultural properties in danger today.

Such heritage has an immeasurable value for their communities: not only for local communities, but for all humankind.

UNESCO deploys field missions to assess damage and prepare for emergencies by mobilizing international cooperation. This is done in accord with UNESCO's conventions on the protection of tangible heritage from hazards, including armed conflict and illicit trafficking.

Please allow me to offer a very brief overview of the two principal international standard-setting UNESCO instruments that can be utilized to fight illicit trafficking.

First, there is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Primarily, this Convention requires its States Parties to take action in the following fields:

- Preventive measures. The Convention provides for States Parties to undertake the creation of appropriate inventories, export certificates, monitoring of trade, imposition of penal or administrative sanctions, and educational campaigns, to name a few preventive measures. Among other issues, one of the primary goals of this Convention, to which currently 125 States are Parties, is to encourage capacity-building among police and customs officers.

- Provisions for restitution. According to Article 7 of the Convention, States Parties undertake, at the request of the State Party «of origin», to take appropriate steps to recover and return any cultural property imported after the entry into force of this Convention for both States concerned, provided, however, that the requesting State will pay just compensation to any innocent purchaser or to any person who has valid title to that property. More indirectly, and subject to domestic legislation, Article 13 of the Convention also sets out provisions on restitution and cooperation.

- A framework for international cooperation. The idea of strengthening cooperation amongst States Parties is present throughout the Convention. For instance, in cases where cultural heritage is in jeopardy because of pillage, Article 9 provides a possibility for more specific undertakings, such as a call for import and export controls.

In addition to the 1970 Convention, the second instrument that we have at our disposal is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Convention was adopted together with its First Protocol in order to prevent the export of cultural property from any occupied territory, requiring the return of such property to the territory of the State from which it was removed.

Furthermore, the destruction of cultural property in the course of the conflicts that took place at the end of the 1980s and the beginning of the 1990s highlighted the necessity of a number of improvements to be addressed in the implementation of the Hague Convention. A review of the Convention began in 1991, resulting in the adoption of a Second Protocol additional to the Hague Convention in March 1999.

These two specialised instruments can be concretely useful in our common battle against pillage and illicit trafficking. In fact, they offer not only juridical tools, that are important in and of themselves, but they also allow the UNESCO's Secretariat – according to the circumstances – to assist a single State or a region in sensitizing local populations on the issues at hand, or in improving the capacity of specific target groups involved in the fight against illicit trafficking.

Capacity-building workshops and training courses are perhaps the most effective tactic to help countries protect their cultural heritage. Indeed, these educational ventures give participants the tools they need to defend their own heritage and to begin developing their own best practices to recover stolen or illegally exported works of art.

During this meeting, we are faced with a very exciting occasion to verify the 'state of the art' of the tools – not only juridical ones – that can help in the fight against illicit trafficking. I would like to emphasize how important it is in this field to sensitize, to raise awareness and, in particular, to organize specific capacity-building workshops for people involved in the issue or potentially involved in this special battle. Drawing from my direct experience, I think that efforts to this effect are really strategic to foster better protection for cultural heritage, all over the world. The purpose is, in fact, not only to give more tools to improve the possibility (for police and customs officers) of fighting illicit trafficking in a specific region, but also to create a network of people that can act together and make common cause in different countries.

In addition, it is important to underline that the protection of cultural objects is an issue that we can face only if we understand that illicit trafficking begins in parts of the world that are facing difficult conditions.

Wherever there is a widespread lack of security, pillage and theft can be easier to commit, or these crimes might not be adequately considered. These are the kind of areas that the international community

has to focus on. In these areas, it is necessary to get a stronger and more effective commitment of international organizations like UNESCO.

On a regular basis, UNESCO organizes, with its different Field Offices (and often in close collaboration with the Ministry of Culture or Department of Antiquity of the specific country) regional or national informational and promotional seminars which are aimed at fostering a better understanding of the concepts, measures and mechanisms of UNESCO's cultural heritage Conventions and of other normative instruments.

Training activities are composed of three elements: a legal component, an operational component, and an educational and awareness-raising programme.

The Secretariat provides a number of legal and practical instruments to answer specific questions related to illicit trafficking in cultural property.

The main objectives of the training activities are:

- To develop capacities regarding the prevention and fight against illicit trafficking in cultural property, as well as the restitution of stolen or illegally exported objects;
- To establish preventive measures such as inventories of cultural objects (whether archaeological or not);
- To raise awareness about the need for adopting an effective national legislation and for developing international cooperation in this area;
- To develop networks at local, national and regional levels to ensure general awareness about the dramatic consequences of trafficking in cultural property in relation to population impoverishment.

The Secretariat is deeply committed in promoting these kinds of training, as they bring together representatives from all relevant stakeholders and thus can combine efforts towards their common goals. Typically, participants in these trainings include:

- Experts in the field of culture (for example, museum managers, curators, archaeologists, etc.);
- Customs officials;
- Police officers;



- Government officials (for instance, representatives from Ministries of culture, tourism, interior and foreign affairs, etc.);
- Academics;
- Representatives from the local and international markets.

These participants each bring their own perspectives to the discussion and the deliberations carried out at trainings, and there is a strong interactive component during sessions.

There have been a number of trainings recently undertaken by UNESCO.

In Africa, for instance, three different regional workshops on prevention and fight against illicit traffic in cultural goods were organized in Dakar (Senegal), in Gaborone (Botswana) and in Bamako (Mali).

In Asia, a three-year-long project has been recently carried out, which aims at improving local abilities in combating illicit trafficking in cultural property in Mongolia, through the enhancement of operational capacity-building actions and awareness-raising activities. The activities were prepared by UNESCO's Headquarters together with the Beijing Office, in cooperation with the Mongolian authorities and in coordination with Monaco's Office for International Cooperation and the Permanent Delegation of Monaco to UNESCO.

In Latin America and the Caribbean, the implementation of the 1970 Convention effectively addresses the endemic problem of illicit excavations and trade of archaeological artefacts, especially the illicit export of religious and pre-Columbian cultural objects. The current debate focuses on improving security conditions at archaeological sites, on better management of inventories, and on the monitoring of border controls. The most recent regional workshops were held in Buenos Aires, co-organized with INTERPOL's Regional Office, in Saint-Lucia, for all the Caribbean Countries, in Asuncion (Paraguay) and, most recently, in Lima, for the Andean region.

In Europe, UNESCO has organized in Gaziantep (Turkey) a specific training for the fight against illicit trafficking in cultural property in south-eastern Europe.

Due to the difficult and unstable situations arising in some Arab States, UNESCO has organized several workshops or training courses in that region, either at national or regional level. In particular, there have been trainings in Amman (Jordan), as well as, in relation to the difficult Syrian situation, in Damascus (Syria), with a specific national workshop on

the fight against illicit trafficking in cultural property, and also three workshops for Libya, and a regional training workshop in Casablanca (Morocco).

I would like to underline in particular the importance of a few specific activities. In the following cases, the meetings were not only held to sensitize and build the capacity of police and customs officers; rather, in some of these cases the meetings were an occasion to prepare an action plan for a critical situation. These action plans seek to individuate the main issues at hand and to try and find the best solutions to such problems. The goal is to draw a 'road map' towards ideal procedures and to foster the involvement of the relevant stakeholders.

First, let me discuss UNESCO's actions in Libya.

Three training workshops were organized by UNESCO to address the protection of cultural sites and museums to prevent and fight against the illicit trafficking in Libyan cultural property. These workshops occurred in three different areas of Libya: Tripoli, Sabratha and Shahat in the East.

The training workshops brought together staff from police departments (tourist police, border security and criminal department), customs, as well as universities and civil society organizations from all over Libya, all with a view to implementing an efficient protection system in the country and establishing a specialized Libyan police force dedicated to protect the country's cultural heritage. In addition, public prosecutors, judges and representatives from INTERPOL's National Centre Bureau in Libya also participated in the debates. A number of international and Libyan archaeologists, university researchers and experts from the WCO (World Customs Organisation), as well as from the UNSMIL (United Nations Support Mission in Libya) Police, French Customs and Border Security advisory units, participated in the training as key partners.

It was a very interesting opportunity to focus, for the first time after the new Government's establishment in Libya, on the crucial issue of protecting the irreplaceable and rich cultural heritage in that country. Importantly, these meetings set out to prepare the next fundamental step for effective protection of Libyan cultural heritage: the institution of a specialized police unit. After a specific training held directly in the Headquarters of Italian Carabinieri Department for Cultural Heritage Protection, this potentially specialized Libyan police unit could be better prepared, in the future, to face the sensitive issues in this difficult area.

At the end of each workshop, participants agreed on a set of recommendations, paving the way for setting up a national strategic framework to effectively prevent and fight illicit trafficking in cultural property in Libya. In addition, these recommendations provide an urgent plan of security measures aimed at enforcing the protection of World Heritage Sites in Libya.

These training workshops were co-organized by UNESCO and the Department of Antiquities of Libya, which is part of the Ministry of Culture. Such workshops fall within a broader capacity-building programme funded by the Italian Government.

Next, let me turn to UNESCO's actions in Syria.

Throughout the conflict in Syria, UNESCO has continually called the attention of the international community to the risk of illicit trafficking in Syrian cultural property. Since 2012, UNESCO has mobilized its partners, as well as specialized police forces and Syria's neighbouring countries, to jointly cooperate within the framework of the 1970 Convention, all in hopes of preventing the illicit trafficking in cultural objects from Syria, notably by strengthening border controls.

UNESCO, with the support of the Swiss Federal Office of Culture, and in cooperation with its international partners, organized in February 2013 an emergency regional training workshop in Amman to raise awareness about the protection of movable cultural heritage in Syria.

The meeting gathered representatives of antiquities departments, police and customs from Syria and some neighbouring countries, together with international organizations involved in cultural heritage management and protection (ICCROM, INTERPOL, UNIDROIT, World Customs Organization, ICOMOS, ICOM, ICA, Blue Shield network), law enforcement experts from specialized international police units (France, Italy and Switzerland), and archaeologists representing the main international archaeological missions working in Syria. I would like also to underline that an international auction house, which represented the global market potentially interested in the acquisition of objects stolen or looted in that country, also participated.

During this important meeting, UNESCO obtained a considerable result: the development of a strategy to fight the illicit trafficking in cultural property. In fact, an action plan was developed in the course of two working sessions, aimed at discussing possible actions to address the

present scenario in Syria and to pave the way for recovery, by improving regional and international cooperation.

The actions recommended were a result of the discussions held during the training workshop.

Now, let me shift the focus to UNESCO's efforts in Egypt.

In August 2013, thanks to the close and continual contacts with the relevant local authorities and in particular with the Egyptian Ministry for Antiquities, UNESCO was amongst the first to receive a report that the Mallawi National Museum had been looted and had suffered extensive damage. Thieves broke into the Mallawi Museum, burning and destroying 48 artefacts and stealing 1.041 objects, including coins, jewels and statues dating from the beginning of recorded Egyptian history through the Islamic period. Immediately, we shared this information with INTERPOL, WCO and other UNESCO partners, such as the Carabinieri TPC and other specialized police units. A few days later, the UNESCO Director-General publicly deplored the damage to cultural property in Egypt and, in the following month, she sent a mission of UNESCO experts to Egypt to verify the devastation suffered by the Museum and to collect all possible information and details about the stolen objects. Within a few days, the Egyptian police had successfully recovered 589 out of the 1.089 total objects that had been recorded in the inventory of the Mallawi National Museum.

Lastly, let me turn to what UNESCO has undertaken in Mali.

The crisis in Mali erupted in early 2012. Since April of that year, UNESCO has been at the forefront to alert the international community about the serious threats to Mali's cultural heritage. In particular, UNESCO has mobilized its partners and the countries bordering Mali in order to avoid, to the greatest possible extent, theft and illicit export of Malian cultural property.

One of the main issues in the North of the country was to safeguard the important manuscripts in Timbuktu. These ancient manuscripts are one of the most important riches of African heritage and of all humanity. Some of them were unfortunately destroyed during these difficult moments. Acutely aware of what a terrible blow this was to the heritage of humankind, UNESCO immediately offered its concrete support to relocate some of the manuscripts to a safe place, far from areas in combat, and to later provide for their restoration.

Since the beginning of the crisis, one of the main commitments of UNESCO has been to work for cultural preservation in Mali. In February 2013, an Action Plan for the Rehabilitation of Cultural Heritage and the Safeguarding of Ancient Manuscripts in Mali was adopted at an international experts' meeting organized by UNESCO and France at the UNESCO Headquarters in Paris.

The Action Plan for Mali has three priorities:

- To restore cultural heritage damaged during the conflict with the active participation of local communities;
- To take measures to protect the ancient manuscripts kept in the region; and
- To provide training activities so as to re-establish appropriate conditions for the conservation and management of cultural heritage, including manuscripts and intangible heritage. A considerable sum was provided to finance these measures.

Actions foreseen under the plan concerned both World Heritage sites and cultural heritage properties protected under national legislation. Specific actions were provided for in relation to Timbuktu, the Tomb of Askia in Gao, the Old Town of Djenne and the Cliff of Bandiagara (Land of the Dogons), as well as museums.

In addition, UNESCO has developed cultural heritage maps and a 'heritage passport' to help protect Mali's cultural heritage. In fact, UNESCO, in collaboration with the National Directorate of Cultural Heritage in Mali and the International Centre for Earthen Architecture (CRAterre), has produced two publications on the cultural heritage of Timbuktu, Gao and Kidal. The first is an illustrated map with detailed texts in two formats. The second publication is a brochure entitled *Heritage Passport*. Available in French, these publications provide detailed information on the location and the importance of cultural sites in the northern region of Mali<sup>1</sup>. They were developed to raise awareness among the armed forces, NGOs, the international community and local communities about the importance of safeguarding these heritage sites. They are also currently being distributed to all personnel of military

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<sup>1</sup> See MINISTÈRE DE LA CULTURE - UNESCO, *Passeport pour le Patrimoine. Biens culturels à préserver*, DNPC - CRAterre, 2012, available on-line with further information at <http://whc.unesco.org/en/news/981/>.

multinational forces involved in the Operation Underway in Mali since the beginning of 2013.

Two months ago, another effective tool was prepared by UNESCO, in close coordination with the relevant authorities of Mali, in particular the National Directorate of Cultural Heritage. During the training courses organized by the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) for military, police and civilian staff from Benin, Côte d'Ivoire, Egypt, France, Romania, Rwanda, Togo and the United Kingdom, a specific session was provided for immediately upon their arrival in Mali. This course was held in collaboration with UNESCO to ensure the safeguarding of cultural heritage sites in Mali. In fact, cultural heritage protection is recognized as an integral part of peace-keeping operations and constitutes a landmark in acknowledging the importance of culture for the process of building lasting peace and reconciliation in that country.

Currently, some specific training sessions are focusing on how to identify cultural heritage and on informing MINUSMA personnel about existing legislation in this area and specific measures they need to take as part of their mission. Focus is also on principles to be observed and sanctions that can be applied when these principles are not respected.

Held in the framework of the programme established by MINUSMA's training centre, these sessions help participants become familiar with concepts that are essential to their new mission to protect Mali's cultural heritage, particularly in those parts of the country affected by the recent political and military crisis. The training also raises personnel's awareness of the diversity of community-based cultural practices and expressions and of their great importance for national reconciliation.

A brochure entitled *Protecting Cultural Heritage in Mali*, also produced by UNESCO, will be made available to trained personnel, so as to help them in their field work.

To conclude, I would like to emphasize that the recent activities of UNESCO for the protection of cultural heritage, in particular in difficult areas or in crisis areas, constitute one of the main facets of UNESCO's strategy, and are perhaps crucial for promoting global protection for cultural heritage in the coming years.

In some crisis-torn areas, official governments do not have the possibility of organizing a strong front against illicit excavations or pillage

at archaeological sites. Sometimes, in very difficult situations, the protection of cultural heritage and the related training could be not considered a priority.

Despite the environmental conditions and the difficulties in these areas, according to the direct experience of my Section during the training courses in Libya or in Mali, we have discovered great interest and passion among the participants. In many of them, we found a concrete commitment to learn new strategies to fight illicit trafficking, or the desire to learn how other colleagues in different places in the world face similar problems.

Culture is one of the most solid bases on which to create a new future for a country and to better organize a State. Culture is knowledge of the roots of a country, and therefore it can bear directly on a country's future.

So, the protection of cultural heritage, of the artistic, historical and archaeological objects in a country, can be considered a fundamental and crucial issue to focus on.

These trainings become strategic tools, useful for raising awareness about the importance of cultural heritage in a country and for stressing the necessity of its protection.





## UNODC AND THE FIGHT AGAINST ILLICIT TRAFFICKING IN CULTURAL PROPERTY

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The following contribution details the work which the United Nations Office on Drugs and Crime (UNODC) is conducting in the fight against illicit trafficking in cultural property.

In recent years, several resolutions have been adopted, both by the General Assembly<sup>1</sup> and the Economic and Social Council<sup>2</sup>, with a view to strengthening the crime prevention and criminal justice responses to the protection of cultural property, in order to address the illicit trafficking in cultural property, which has become a considerable source of profit for organized criminal groups. Research and data collection on this subject are relatively recent, but in a 2011 publication<sup>3</sup> UNODC estimated that the proceeds of transnational crime related to art and cultural property amounted to about 0,8% of all illicit financial flows, between 3.4 and 6.3 billion dollars.

In addition to the attention that this topic has generated within the General Assembly and ECOSOC, other UN bodies – such as the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC), and the Commission on Crime Prevention and Criminal Justice – have discussed and agreed on ways in which the international community can better prevent and combat the illicit trafficking in cultural property.

This multilateral process of intergovernmental negotiations has resulted in a comprehensive mandate for the UNODC, which includes concrete cooperation with UNESCO and with other relevant international organizations.

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<sup>1</sup> GA Resolutions 66/180, 68/186 and the Resolution, soon to be adopted, approved by ECOSOC in its resolution 2014/20.

<sup>2</sup> ECOSOC Resolutions 2004/34, 2008/23, 2010/19.

<sup>3</sup> UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*, Research report, 2011.

With respect to these key mandates resulting from these intergovernmental processes, it is necessary to refer to the work of the open-ended intergovernmental expert group meeting on protection against trafficking in cultural property, which is the most specialized intergovernmental body on the subject within the UN infrastructure. The creation of this expert group was mandated by ECOSOC in 2004, to submit relevant recommendations to the Crime Commission. To date, the expert group has met in Vienna twice<sup>4</sup>, with an upcoming third meeting already scheduled for January 2014<sup>5</sup>.

In addition to formulating recommendations on a broad number of subjects, such as: prevention, criminalization, international instruments, cooperation, awareness-raising, capacity-building, and the use of new technologies<sup>6</sup>, the expert group has predominantly focused on two specific areas of work, namely: the development of the international guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property and other related offences, and the possible improvement and potential utility of the Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property.

With regard to the development of the guidelines, UNODC has convened a number of formal and informal meetings, the first of which took place in November 2011, in which experts, acting in their personal capacity, met in Vienna to discuss the first draft of such guidelines. Professor Stefano Manacorda, ISPAC Deputy Chair and Director, who was recruited as a consultant by UNODC, prepared this draft, which was presented and discussed at length by Member States at the second meeting of the open-ended intergovernmental expert group on protection against trafficking in cultural property, held in June 2012.

As mentioned earlier, UNODC will reconvene this expert group in January 2014, with a view to reviewing and finalizing the guidelines. It is

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<sup>4</sup> The first meeting was held in Vienna from 24 to 26 November 2009. The second meeting was held from 27 to 29 June 2012.

<sup>5</sup> Pending the publication of the present volume, the aforementioned meeting was held in Vienna from 15 to 17 January 2014, leading to the finalization of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences. The Guidelines can now be consulted in Annex I of the Report of this meeting, available at <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2014.html>.

<sup>6</sup> These recommendations are included in document UNODC/CCPCJ/EG.1/2009/2.

expected that, once finalized, the guidelines will be submitted to the Commission on Crime Prevention and Criminal Justice at its twenty-third session<sup>7</sup>, and brought to the attention of the Conference of the Parties to the UNTOC Convention.

The current version of the guidelines was drafted based on a review of current practices and initiatives in several countries in addressing the problem of trafficking in cultural property. They provide comprehensive coverage of the most relevant topics, with a particular focus on:

- Prevention strategies (including information and data collection, the role of cultural institutions and private sector, monitoring, as well as education and public awareness);
- Criminal justice policies (including adherence and implementation of relevant international treaties, the criminalization of specific harmful conduct or the establishment of administrative offences, corporate liability, seizure and confiscation and investigative measures); and
- Related law enforcement and judicial cooperation (including jurisdictional basis, extradition, international seizure and confiscation, police and investigative cooperation, and return, restitution and repatriation of cultural property)<sup>9</sup>.

Once finalized, the guidelines could assist law- and policymakers, as well as law enforcement officers, prosecutors, magistrates, public and private institutions in effectively protecting cultural property from being trafficked.

The Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property has also been the object of extensive consultations and exchange of views. Member States have expressed a variety of opinions underlining the need to

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<sup>7</sup> Pending the publication of the present volume, the Commission on Crime Prevention and Criminal Justice, at its twenty-third session, brought to the attention of ECOSOC, for adoption by the General Assembly, Draft Resolution III, which contains, as annex, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences. Furthermore, ECOSOC adopted Resolution 2014/20, in which it recommends to the General Assembly the adoption of the Guidelines.

<sup>9</sup> The final version of the Guidelines also includes a Chapter on the scope of application of these guidelines.

modernize and update this instrument. In light of ECOSOC resolution 2013/31<sup>10</sup>, the review of the Model Treaty remains a work in progress and Member States, as well as international organizations, are expected to continue submitting their comments to the Secretariat.

In addition to these intergovernmental processes taking place within the expert group on protection against trafficking in cultural property, the Conference of the Parties to the UNTOC Convention has mandated the two working groups, on technical assistance and on international cooperation, to examine the subject of illicit trafficking in cultural property and to submit specific recommendations for further consideration by the Conference. In this regard, both working groups held a joint session on trafficking in cultural property, on the margins of the sixth Conference of the Parties (Vienna, 18 October 2012). After extensive discussion, the joint session agreed on a set of recommendations aimed at promoting the practical application of the UNTOC Convention, including, *inter alia*, the designation of national focal points to facilitate international cooperation, the undertaking of awareness-raising activities, and the submission of data from Member States on trafficking in cultural property.

ECOSOC resolution 2013/31 further invites Member States to consider reviewing their legal frameworks, with a view to providing the most extensive international cooperation possible, to fully address the issue of trafficking in cultural property and it also invites Member States to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in Article 2 of the UNTOC Convention, with a view to fully utilizing that Convention, which has been ratified by 179 States Parties, for promoting international cooperation in fighting all forms and aspects of trafficking in cultural property and related offences.

It is important to underline the transnational dimension of illicit trafficking in cultural property, which commonly involves different actors in different countries, importing and exporting cultural movable property. Every State is affected by the negative consequences of this business, irrespective of whether they are countries of source or destination in this illicit trade. In addition to the transnational character of illicit trafficking in cultural property, the situation becomes more complex as such illicit transactions may be conducted online. This presents challenges for

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<sup>10</sup> Pending the publication of the present volume, ECOSOC Resolution 2013/31 was adopted by General Assembly Resolution A/RES/68/186.

evidence gathering with respect to provenance, as well as deciding the exercise of jurisdiction

Given the transnational nature of the illicit trafficking in cultural property, international cooperation in criminal matters, including extradition and mutual legal assistance, is essential to combat this form of crime. UNODC has undertaken long-standing work in this area and some relevant tools are listed below:

- The Directory of Competent National Authorities handling requests for extradition and mutual legal assistance (including information on national requirements for making requests, their acceptance, or rejection, of international conventions as the legal basis for requests, and the indication of whether requests can be made through INTERPOL);
- The Mutual Legal Assistance Request Writer Tool, to assist States with the drafting of MLA requests, facilitating and strengthening international cooperation in criminal matters;
- The SHERLOC (SHaring Electronic Resources and Laws against Organized Crime) Knowledge Management Portal, which is a national legislation and case law database under development. It, among other features, contains relevant case law in thematic areas of our work, including illicit trafficking in cultural property<sup>11</sup>. It is expected that this Portal will be launched during the next Commission on Crime Prevention and Criminal Justice in May 2014<sup>11</sup>.

It is hoped that this momentum can be translated into concrete actions, whereby Member States will be better prepared to confront this specific type of transnational crime, which generates considerable illicit income for organized criminal groups, but deprives humanity of the knowledge, understanding and enjoyment of its cultural heritage.

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<sup>11</sup> It also contains a reference/weblink to the UNESCO Database of National Cultural Heritage Laws.

<sup>11</sup> The Report on the twenty-third session (13 December 2013 and 12-16 May 2014) of the Commission on Crime Prevention and Criminal Justice (E/2014/30 - E/CN.15/2014/20), also containing a draft resolution on «international guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property and other related offences» is now available for consultation on-line at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/038/08/PDF/V1403808.pdf?OpenElement>.



INTERGOVERNMENTAL AND NON-GOVERNMENTAL  
ORGANIZATIONS GRASPING THE NETTLE OF ILLICIT  
TRAFFICKING IN CULTURAL PROPERTY

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1. *Introduction*

The current international market in illicitly acquired art and archaeological treasures is a huge business now running to billions of dollars. During the Second World War cultural property was looted on a massive scale by the Axis powers, especially Nazi Germany and Japan. These outrageous activities provoked a significant development in the setting of standards for the protection of cultural property at the international level when, on 5 January 1943, the Allied powers issued the Declaration of London<sup>1</sup>. Published in London (and simultaneously in Washington and Moscow) by seventeen governments and the French National Committee, it reserved all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which were, or had been, situated in the territories which had come under the occupation or control, direct or indirect, of the Governments with which they were at war, or which belonged, or had belonged to persons (including juridical persons) resident in such territories. This warning applied whether such transfers or dealings had taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purported to have been voluntarily effected<sup>2</sup>.

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<sup>1</sup> *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory Memorandum issued by the Parties to the Declaration)*, London, 5 January 1943.

<sup>2</sup> L.V. PROTT - P.J. O'KEEFE, *Law and the Cultural Heritage*, Vol. III: *Movement*, Butterworth & Co., 1989, pp. 805-806.

Immediately after the war, measures were taken to implement this Declaration in a number of countries. The novelty here was that countries like France and Holland, that had plundered their colonies of their cultural property, were now victims of the same spoliation. Another irony that marked this Declaration out was the fact that the Soviet Union, a signatory to the Declaration of London and a victim of Nazi plunder, near the end of the war itself turned to looting in the reclaimed and occupied territories.

The Declaration of London may be regarded as an early example of an international body fighting illicit dealing in cultural property. The end of the war signalled the commencement of collective action and measures at the international level against illicit dealing in cultural property led by the United Nations' organ on culture, the United Nations Educational, Scientific and Cultural Organization (UNESCO). We begin however with the intervention of UNESCO's parent body itself in the matter of cultural property in 1973.

## 2. *United Nations*

In 1973 twelve States, all of them African, sponsored the first United Nations General Assembly's resolution on the subject of cultural property – *Restitution of Works of Art to Countries Victims of Expropriation*<sup>3</sup>. The resolution in its preamble deplored «the wholesale removal, virtually without payment, of *objects d'art* from one country to another, frequently as a result of colonial or foreign occupation»; it went on to maintain in the first substantive paragraph that «the prompt restitution to a country of its *objects d'art*, monuments, museum pieces and manuscripts and documents by another country, without charge» will constitute «just reparation for damage done». While the Resolution did not strictly deal with illicit trafficking development, it led in UNESCO to the alignment of illicit trafficking with colonial expropriation.

We turn next to UN's specific actions on illegal trafficking in cultural property. The first is the adoption in 2000 of the United Nations Convention against Transnational Organized Crime (Palermo Convention) which came into operation on 29 September 2003. Since the beginning of the Twenty-first Century, the UN, through several resolutions, has urged

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<sup>3</sup> Adopted by the General Assembly during its Twenty-eight Session, on 18 December 1973.



Member States to consider trafficking in cultural property as a serious offence, and to act accordingly by joining and implementing the 2000 Convention and the earlier ones of 1954, 1970 and 1995. Resolution 66/180, on strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, urges Member States to criminalize activities related to trafficking in cultural property by using a broad definition that can be applied to all stolen, looted, unlawfully excavated and illicitly exported or imported cultural property. It also invites Member States to make trafficking cultural property a serious crime. It requests the United Nations Office on Drugs and Crime (UNODC) to address trafficking in cultural property in its programmes.

### 3. *UNESCO*

UNESCO came into existence in 1946. In the field of culture and cultural heritage it started in 1954 with the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention). The 1954 (First) Protocol to the Convention obliges each contracting party to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention. Article 24 of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, establishes the Committee for the Protection of Cultural Property in the Event of Armed Conflict as the monitoring organ. The members of the Committee should be persons qualified in the fields of cultural heritage, defence or international law. The functions of the Committee include development of guidelines for the implementation of the Second Protocol; and monitoring and supervising the implementation of the Protocol and promoting the identification of cultural property under enhanced protection.

In 1970 the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted. This is the first international instrument that directly and explicitly confronts the bane of illicit trafficking in cultural property. But the Convention failed to make provision for a monitoring body to

tackle the implementation of the Convention against illicit traffic in cultural property.

Prior to the adoption of the 1970 Convention, the General Conference of UNESCO had, in 1964, adopted the Recommendation on the Means of Prohibiting and Preventing the illicit Export, Import and Transfer of Ownership of Cultural Property. Another recommendation on the same theme was adopted in 1978, namely, the Recommendation for the Protection of Moveable Cultural Property.

Reaction within UNESCO to the aforementioned UN Resolution 3187 of 1973 led to the establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. The Committee is to deal, among other things, with cases of return or restitution that could not be resolved either under the 1970 Convention or under any other multilateral or bilateral instrument. The Committee held its first session at the UNESCO Headquarters in Paris in 1980 and since then has met eighteen times. At the Second Meeting of States Parties to the Convention, held in Paris on 20 and 21 June 2012, it was decided to establish a Subsidiary Committee to monitor its implementation. The Subsidiary Committee held its inaugural meeting on 2 and 3 July 2013. The Committee will meet again in July 2014, when it is anticipated it will settle its operational guidelines<sup>4</sup>.

Although to date the Committee has only handled eight cases its success or achievements with regard to fighting illicit trafficking in cultural property cannot be assessed only on this premise. Since its inception it has been the vehicle for the introduction of many tools to fight illicit trafficking. The UNESCO Database of National Cultural Heritage Laws is an informative tool for States to improve their national laws, and it is also a boon to researchers. The UNESCO *International Code of Ethics for Dealers in Cultural Property* of 1999, along with similar self-denying ordinances, has influenced the acquisition practices of museums and also provenance enquiries by art dealers and auction houses. The rules of procedure on mediation and conciliation have created a new climate in negotiations amongst States for the return or restitution of cultural property. The tens of thousands of returns that had taken place during these thirty-three years attest to this assertion. Countries and individuals have

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<sup>4</sup> Proceedings of the Second Session of the Subsidiary Committee are now available at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/subsidiary-committee/2nd-sc-session-2014/> [editors' note].

been persuaded to make returns and restitutions through the influence of the Committee, or what the Committee's first Chairperson called «moral pressure».

In 2001 the Convention on the Protection of the Underwater Cultural Heritage was adopted. A highly technical international instrument, it provides in Article 23 for the establishment of a Scientific and Technical Advisory Body composed of experts to assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.

#### 4. *UNIDROIT*

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is a scheme under international law and based on a philosophy of government to government action. Its operation revealed weaknesses in the area of private law under which the art trade is conducted. Accordingly, UNESCO approached UNIDROIT to prepare an instrument that deals with the harmonisation of private law aspects of trafficking in cultural property. UNIDROIT came into existence in 1926 as an auxiliary organ of the League of Nations to harmonise rules of private law whenever possible. It was re-established in 1940. The outcome of UNESCO's approach is the 1995 Convention on Stolen or Illegally Exported Cultural Objects, which has forged a partnership between the two inter-governmental organizations in the fight against illicit trafficking in cultural property. The Director General of UNESCO described the UNIDROIT Convention as a «breakthrough international framework to combat private-sector transactions in stolen art and cultural property» and as «a watershed in our common struggle to defend cultural property»<sup>5</sup>. O'Keefe and Prott have pointed out that the Convention covers some of the most difficult issues in the legal control of illegal trafficking. It deals with precise issues, compared to many articles of the 1970 UNESCO Convention which are, for the most part, drafted as general principles<sup>6</sup>.

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<sup>5</sup> *UNESCO News*, Vol. 2, No. 5, 20 September 1995, p. 74.

<sup>6</sup> P.J O'KEEFE - L. PROTT, *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries*, Institute of Art and Law, 2011, p. 112.

Besides UNIDROIT, UNESCO is also in close partnership with INTERPOL, the World Customs Organization (WCO) and the International Council of Museums (ICOM) in the fight against illicit trafficking in cultural goods. Their roles are discussed hereafter.

At the 16<sup>th</sup> session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in case of Illicit Appropriation, in 2010, two speakers representing the art trade attacked the whole tenets of the 1995 UNIDROIT Convention. The grouse of the representative of the *Syndicat national des antiquaires* (SNA), its Secretary-General, was that the Convention «created legal uncertainty for the owner of the object, did not impose any import controls and provided for conditional compensation»<sup>7</sup>. The representative of *Syndicat national des maisons de ventes volontaires* (SYMEV) was outraged by the Convention because some of its provisions «created an unfavourable legal situation in the market» and «seizures of objects undermined the art market and the image of the country that harboured them»<sup>8</sup>. As O’Keefe and Prott have commented, the reaction of the art trade, in a number of countries, to the final text of the UNIDROIT Convention «was extraordinary and to some extent hysterical»<sup>9</sup>. In the comments of the art trade representatives we see the superiority of the UNIDROIT Convention over the UNESCO Convention, and its improvement on the fight against illegal traffic. Both Conventions indeed complement each other.

##### *5. UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects*

In six short and simple paragraphs the group of experts that prepared the Model Provisions seeks to encourage the protection of archaeological objects and to favour their restitution to the State where illicit excavation took place. It was adopted by the Intergovernmental

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<sup>7</sup> Final report of the Sixteenth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in case of Illicit Appropriation, held in Paris from 21 to 23 September 2010, CLT-2010/CONF.203/COM.16/6REV.

<sup>8</sup> *Ibidem*.

<sup>9</sup> O’KEEFE - PROTT, *Cultural Heritage Conventions and Other Instruments*, p. 112.

Committee on Return or Restitution at its 17<sup>th</sup> session in Paris in 2011. Provision 1 provides that the State shall take all necessary and appropriate measures to protect undiscovered cultural objects. The new law should incorporate Provisions 2 to 6. Provision 2 states that «undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, literature, art or science and are located in the soil or underwater». Provision 3 declares that «undiscovered cultural objects are owned by the State, provided there is no prior existing ownership». In Provision 4 it is declared that «cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects». «The transfer of ownership of a cultural object deemed to be stolen under Provision 4», Provision 5 adds, «is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer». Finally, Provision 6 declares that «for the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects». As stated in the Recommendations to the 16<sup>th</sup> and 17<sup>th</sup> sessions of the Intergovernmental Committee, the Model Provisions are not a binding legal text or a normative instrument. They are a model offered to States which might need it, among other tools to fight illegal traffic in cultural goods.

## 6. ICOM

The International Council of Museums (ICOM), like UNESCO, was established in 1946. It has maintained formal relations with UNESCO since 1946. But unlike UNESCO, ICOM is a non-governmental organization of museums and museum professionals dedicated to promoting and protecting cultural heritage in all its ramifications. One of its key missions is fighting illicit trafficking in cultural objects. An important tool in this endeavour is the 1986 ICOM Code of Ethics for Museums, which requires utmost probity from museums and museum professionals in the acquisition and transfer of collections. A principal reason for codes of ethics is that they are intended to counter the problem of secrecy in the art market. In 1984, two years before the ICOM Code, a *Code of Practice for the Control of International Trading in Works of Art* was signed by representatives of several British auctioneers and dealers

including multinational dealers Christie's and Sotheby's. Members agreed «to the best of their ability, not to import, export or transfer the ownership of such objects» exported illegally from their country of origin, or acquired dishonestly or illegally (Article 1). The British code, with appropriate adjustments, was adopted by the *Confédération Internationale des Négociants en Oeuvres d'Art* (CINOA) in Florence in September 1987, and in Venice in July 1992.

ICOM has also devised two reference tools. The *Red Lists Database* and the *One Hundred Missing Objects* series. To date ICOM has published in the *One Hundred Missing Objects* series four volumes: *Looting in Angkor* (1993, 2<sup>nd</sup> edition 1997); *Looting in Africa* (1994, 2<sup>nd</sup> edition 1997); *Looting in Latin America* (1997); and *Looting in Europe* (2001). The *Red List* has generated much more volumes: *Red List of African Archaeological Objects* (2000), *Red List of Latin American Cultural Objects at Risk* (2003), *Emergency Red List of Iraqi Antiquities at Risk* (2003), *Red List of Afghanistan Antiquities at Risk* (2006), *Red List of Peruvian Antiquities at Risk* (2007), *Red List of Cambodian Antiquities at Risk* (2009), *Red List of Endangered Cultural Objects of Central America and Mexico* (2009), *Emergency Red List of Haitian Cultural Objects at Risk* (2010), *Red List of Colombian Cultural Objects at Risk* (2010), *Emergency Red List of Egyptian Cultural Objects at Risk* (2011), *Red List of Dominican Cultural Objects at Risk* (2011), *Red List of Chinese Cultural Objects at Risk* (2011), and *Red List of Syrian Cultural Objects at Risk* (2013). Both the *Red Lists* and the *One Hundred Missing Objects* series have helped law enforcement agencies to seize trafficked cultural objects and antiquities. ICOM cooperates with INTERPOL and World Customs Organization in its mission against illicit trafficking in cultural property, having signed in 2000 a cooperation agreement and a cooperation memorandum of understanding respectively with the two enforcement agencies. Also since 2002 ICOM has cooperated with ALECSO (the Arab League Educational Cultural and Scientific Organization) on the protection and promotion of the museum heritage of the region.

In its efforts to enhance the fight against illicit traffic, ICOM recently launched a long-term and innovative instrument: the International Observatory on Illicit Traffic in Cultural Goods. The Observatory «is an ambitious international programme dedicated to permanent monitoring and reporting on the rising trend which the smuggling and illicit trading of

cultural assets has become»<sup>10</sup>. This is in addition to the international Object Identification project which ICOM now manages, which makes the identification of stolen cultural objects easier. The Object ID project was originally created and coordinated by the Getty Information Institute, but is now managed and promoted by ICOM, and is the outcome of collaboration among UNESCO, the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe, the European Union, ICOM, INTERPOL and the United States Information Agency (USIA). The General Conference of UNESCO at its 30<sup>th</sup> session, in November 1999, recommended that all Member States use and promote Object-ID following its endorsement by the Intergovernmental Committee at its 10<sup>th</sup> session as the international core documentation standard for recording minimal data on moveable cultural property and for identifying cultural objects with a view to combating illicit traffic in cultural property. Object-ID is also compatible with other existing databases, as well as with the CRIGEN-ART form used by INTERPOL to collect information on stolen cultural property.

Over the years several regional groupings of ICOM have emerged, giving more energy to the missions of ICOM, including that of fighting illegal traffic in cultural goods. They include the International Council of African Museums (AFRICOM); the International Council of Museums - Asia-Pacific Alliance (ICOM-ASPAC); the International Council of Museums Latin - America and Caribbean Alliance (ICOM-LAC); the International Council of Museums - South East Europe Alliance (ICOM-SEE); and International Council of Museums - Europe.

## 7. *WIPO*

The World Intellectual Property Organization (WIPO), a United Nations specialized agency, now collaborates with ICOM in the Art and Cultural Mediation Programme. Through the WIPO Mediation and Arbitration Centre, WIPO and ICOM have developed a special mediation process for art and cultural heritage disputes.

Joint work on the matter by the World Intellectual Property Organization (WIPO) and UNESCO resulted in 1983 in the Model Provisions for National Laws on the Protection of Expressions of Folklore

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<sup>10</sup> See <http://www.ffcr.fr/recherches-et-projets/1868-icom-illicit-traffic>.

against Illicit Exploitation and Other Prejudicial Actions. In 1993, UNESCO launched the system of Living Human Treasures. Meanwhile, the concern for the recognition of the similarity between folklore and copyright was the inspiration for the UNESCO Guidelines for Establishment of National 'Living Human Treasures' System in 1996, which were updated in 2002. In 1998 UNESCO furthered the profile of intangible heritage by establishing the biennial Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. In addition, WIPO has now established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore as an international forum for debate and dialogue concerning the interplay between intellectual property, traditional knowledge, traditional cultural expressions (folklore) and genetic resources.

## 8. UNODC

The United Nations Office on Drugs and Crime (UNODC) uses the UNTOC Convention in its role in fighting and preventing trafficking in cultural property. UNESCO collaborates closely with the United Nations Office on Drugs and Crime (UNODC) in combating crime relating to cultural property. For example, an expert from UNESCO participated in the 5<sup>th</sup> session of States Parties to the Convention against Transnational Organized Crime held from 18 to 22 October 2010, and in the 20<sup>th</sup> session of the UNODC Commission on Crime Prevention and Criminal Justice held from 11 to 15 April 2011<sup>12</sup>. ICOM also works closely with UNODC in its mission to fight illicit traffic in cultural property. The cooperation with UNODC by UNESCO and ICOM is good strategy. Many commentators have underlined the similarity between the art trade and the hard drug trade. Paul Bator has earlier noted that much about the art trade is simply not knowable because it operates in secret<sup>13</sup>. Clemency Coggins agrees, adding that the art market requires concealment at every level. «It

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<sup>12</sup> UNESCO, Intergovernmental Committee. Secretariat Report to the 17<sup>th</sup> Session. Paris, 30 June - 1 July 2011. CLT-2011/CONF.208/COM.17/2REV.

<sup>13</sup> P. BATOR, *An Essay on the International Trade in Art*, in *Stanford Law Review*, 1982 (34), p. 275, at p. 290.



operates more like the clandestine narcotics traffic»<sup>14</sup>. McIntosh observes that the international structure of the illicit art trade and the illicit drug trade are «remarkably similar»<sup>15</sup>. While Gimberé concludes that the trade in cultural property is the most important illegal trade after the drug trade, and moreover, «often carried out by the same people»<sup>16</sup>.

## 9. INTERPOL

The International Criminal Police Organization, or INTERPOL, was established in 1923. It is an inter-governmental organization facilitating international police cooperation. On illicit traffic in cultural objects it works in cooperation with UNESCO, ICOM, and World Customs Organization to fight the trafficking. It now has a Works of Art unit and a database of about 40.000 stolen works of art.

## 10. UNESCO-WCO Model Export Certificate for Cultural Objects

This standard export certificate is meant to serve States, as well as customs officials worldwide, in combating illicit trafficking in cultural property. In developing the Model Export Certificate for Cultural Objects, comments by INTERPOL and UNIDROIT were taken into consideration and a comparison was made with the European Union standard certificate<sup>17</sup>.

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<sup>14</sup> C.C. COGGINS, *A Licit International Traffic in Ancient Art: Let There be Light*, in *International Journal of Cultural Property*, 1995 (4), p. 61, at p. 63.

<sup>15</sup> R.J. MCINTOSH, *Just Say Shame: Excising the Rot of Cultural Genocide*, in P.R. SCHMIDT - R. J. MCINTOSH (eds.), *Plundering Africa's Past*, Indiana University Press, 1966, p. 46.

<sup>16</sup> S. GIMBERÉ, *Illicit Traffic in Cultural Property and National and International Law*, in H.M. LEYTEN (ed.) *Illicit Traffic in Cultural Property: Museums against Pillage*. Royal Tropical Institute, 1995, p. 53, pp. 59-60.

<sup>17</sup> UNESCO, Intergovernmental Committee, Secretariat Report to the 14<sup>th</sup> Session. Paris 5-6 June 2007. CLT – 2007/CONF.211/COM.14/2. 4-5.

## 11. *International Committee of The Blue Shield*

The International Committee of the Blue Shield (ICBS) was created in 1996 to protect the world's cultural heritage threatened by wars and natural disaster. It derives its name from the usage of the blue shield as specified in Article 16 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict as the distinctive emblem of the Convention. It brings together organizations engaged in the global protection of cultural heritage. It consists of representatives from five international organizations, namely: the International Council of Museums (ICOM); the International Council of Archives (ICA); the International Council on Monuments and Sites (ICOMOS); the International Federation of Library Associations and Institutions (IFLA); and the Coordinating Council of Audiovisual Archives Association (CCAAA).

## 12. *The European Union*

Apart from UNESCO and UNIDROIT Conventions, a notable multinational regulatory framework to combat illicit trafficking in cultural property is the European Union (EU) Council Regulation on the export of cultural goods (Council Regulation EC No. 116/2009) first issued in 1992 and codified in 2009; and the Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Council Directive No. 93/7/EEC) of 15 March 1993<sup>17</sup>. The Council Regulation establishes a licensing system for the export of cultural goods outside the EU, while the Council Directive outlines provisions for the restitution of illegally exported cultural goods within the EU. As a common export regulation for trade with third countries, the EU seeks to ensure through the Regulation that no cultural object protected by any Member State will be exported without an export licence issued by the country of lawful location. The Directive, on the other hand, allows Member States to prohibit the removal of cultural objects from their territory and to enforce these prohibitions by bringing action for the return of the illegally removed

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<sup>17</sup> Pending the publication of the present volume the Directive was replaced by the new Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 [editors' note].

objects in the law courts of any Member State where the object may be located. The two instruments are complementary.

There is also the European Convention on the Protection of the Archaeological Heritage, revised in 1992. It was first adopted by the Council of Europe in 1969. It is not as extensive as the UNESCO and UNIDROIT Conventions.

### 13. *Networking*

The illicit antiquities trade, as a recent article in *International Journal of Cultural Property* confirms, is conducted as a transnational criminal network<sup>18</sup>. It therefore also requires networking among law enforcement agencies across the globe to tackle the trade. This UNESCO and ICOM have tried to forge in recent years. At recent sessions of UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property, UNESCO partners (ICOM, INTERPOL and WCO) have participated and given accounts of their efforts to stem illicit traffic. And as we saw earlier, ICOM in 2000 entered into bilateral cooperation agreements with INTERPOL and WCO. Representatives of the art trade have also become regular participants at the sessions of the Intergovernmental Committee. There must be synergy between the activities of both governmental and non-governmental organizations in the struggle against illicit traffic. This is the only way to tackle what is now widely regarded as crimes against our common cultural heritage.

UNESCO has indeed grasped the nettle in the area of cooperation with other governmental and non-governmental agencies involved in the fight against illicit trafficking. It has even co-opted the art trade in its endeavour. The Secretariat of the Committee, in its report to the 16<sup>th</sup> session, discloses that UNESCO continues to deepen the professional relationships and dialogue it has established since 2008 with, among others, the auction houses of Christie's and Sotheby's, particularly from the perspective of improving the applicability of UNESCO's International Code of Ethics for Dealers in Cultural Property.

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<sup>18</sup> P.B. CAMPBELL, *The Illicit Antiquities Trade as a Transnational Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, in *International Journal of Cultural Property*, 2013 (20) pp. 113-153.

Additionally, UNESCO wishes to encourage a better, mutual understanding, first of the working methods of the art market and, secondly, of the international community's concerns regarding the circulation of works of art and issues related to the return of cultural property.

In the report to the 17<sup>th</sup> session of the Intergovernmental Committee, the Secretariat affirms that UNESCO continues to cooperate fruitfully with INTERPOL, UNDRIT, WCO and ICOM in actions aimed at combating illicit trafficking. UNESCO and these organizations «communicate almost daily on matters relating, in particular, to the theft and illicit export of cultural property worldwide and to procedures to be followed to secure its restitution. Such cooperation yields tangible results»<sup>19</sup>.

#### *14. Cooperative Network for the Protection Against Trafficking in Cultural Property*

Thus the cooperative network for the protection against trafficking in cultural property consisting of UNESCO, UNODC, INTERPOL, WCO, UNIDROIT and ICOM has emerged to grasp the nettle of illegal traffic in cultural property. In this connection representatives of this network's members participate at each other's meetings. At those meetings, representatives of UNODC lead discussions on the Organized Crime Convention and promote the Convention's use as an effective international instrument in the fight against illegal traffic in cultural property, as well as providing information on UNODC's activities related to protection against trafficking in cultural property and discussing with representatives of partner organizations modalities for better cooperation and coordination of activities in order to leverage resources and avoid duplication of efforts<sup>20</sup>.

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<sup>19</sup> UNESCO, Intergovernmental Committee, Secretariat Report to the 17<sup>th</sup> Session, p. 4.

<sup>20</sup> C. CASTAÑEDA DE LA MORA, *The Work of the United Nations Office on Drugs and Crime in the Area of Illicit Trafficking in Cultural Property*, in S. MANACORDA - A. VISCONTI (eds.), *Beni culturali e sistema penale*, Vita e Pensiero, 2013, pp. 3-18, at p. 14.

*Part III*

**INTERNATIONAL  
COOPERATION:  
OPPORTUNITIES  
AND CHALLENGES**



LA COOPERAZIONE INTERNAZIONALE IN MATERIA PENALE:  
UN INDISPENSABILE STRUMENTO PER LA PROTEZIONE DEI  
BENI CULTURALI

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La Cina è uno dei Paesi che ha il più ricco patrimonio culturale al mondo, da tempo fortemente depredata e oggetto di traffico illecito internazionale. È possibile difatti distinguere tra due periodi fondamentali nel corso dei quali tale fenomeno illecito ha assunto una dimensione spropositata. Nel primo periodo, intercorrente tra il 1860 e il 1949, la Cina è stata tormentata da guerre continue (tra cui le due guerre dell'oppio e le aggressioni militari delle otto Potenze alleate occidentali, nonché la guerra di aggressione giapponese) durante le quali i beni culturali e i tesori storici cinesi rappresentavano i principali trofei delle forze armate estere. Nel secondo periodo, che ha avuto inizio a partire dagli anni Ottanta, e che non potrei dire sia ancora definitivamente concluso, un periodo in cui il Partito Comunista Cinese ha aperto le porte della Cina al mondo, la circolazione illecita internazionale dei beni culturali ha avuto un nuovo sviluppo. Per realizzare imprese transnazionali, connette insieme i ladri, i contrabbandieri e i commercianti illeciti, e forma un passaggio clandestino dal continente cinese ai Paesi europei, agli Stati Uniti, al Giappone e ad altri Paesi, utilizzando le zone di Hong Kong e di Macao come aree di transito.

Per proteggere i beni culturali, a partire dagli anni Ottanta del secolo scorso, la Cina ha introdotto una serie di normative. Con la modifica del 1982, la Costituzione cinese ha disposto che lo Stato tutela i monumenti storici e famosi, i beni culturali pregiati e gli altri importanti patrimoni storici e culturali. Nello stesso anno (il 19 novembre 1982) è stata adottata la Legge sulla protezione dei beni culturali, la prima legislazione speciale cinese diretta a tutelare i beni culturali, modificata poi

nel 2003. Nel 1997, in seno al Codice penale, è stata introdotta una nuova categoria di delitti, rappresentata dai «delitti contro l'amministrazione dei beni culturali», punibili con la pena della reclusione non inferiore a tre anni e, in casi gravi, con l'ergastolo o addirittura la pena di morte, la quale tuttavia è stata abolita in relazione a questi reati con la legge di revisione del 25 febbraio 2011.

Di fronte a uno sfrenato traffico illecito di beni culturali, la Cina ha rafforzato, mediante atti normativi interni, gli strumenti preventivi e repressivi e, consapevole della propria responsabilità nel recuperare i beni culturali persi all'estero, ha aderito alle convenzioni internazionali per la protezione dei beni culturali, quali la Convenzione UNESCO del 1970 e la Convenzione UNIDROIT del 1995. A quest'ultimo riguardo, le autorità cinesi sono particolarmente propense a implementare la cooperazione internazionale in materia penale, anche in tema di beni culturali, riponendo le proprie speranze in una giustizia mondiale, che vari Paesi vogliono comunemente realizzare e mantenere.

Negli ultimi vent'anni, attraverso la collaborazione internazionale, il mio Paese ha individuato e recuperato dall'estero un grande numero di oggetti antichi. Farò almeno tre esempi importanti. Nel 1995, la polizia inglese ha sequestrato presso due porti inglesi 3.494 beni antichi cinesi di vari periodi storici, esportati illecitamente da un'organizzazione dedita al contrabbando di opere culturali. Tali beni, di cui è stata accertata la provenienza cinese nel corso del processo, sono stati in seguito rimpatriati. Nel 2000, in seguito a una denuncia del Governo cinese, una Corte degli Stati Uniti d'America ha interdetto l'asta di una scultura militare del 960 d.C. organizzata dalla società Christie's e, a seguito di una *civil forfeiture*, ha provveduto a restituirla alla Cina. Nel 2006 sono stati restituiti dalle autorità danesi alla Cina 156 oggetti antichi, provenienti dalle tombe della dinastia Yuan e della dinastia Ming, sequestrati in precedenza in un'abitazione di Copenhagen.

Questi casi, in cui la cooperazione internazionale nella restituzione dei beni culturali trafugati ha avuto un esito positivo, presentano una caratteristica comune: le autorità nazionali si sono generalmente avvalse dei mezzi dell'indagine criminale o dei procedimenti che si usano nei confronti dei proventi di reato, sequestrando rapidamente e efficacemente gli oggetti sospetti, in modo da identificare la loro provenienza e farne una ragionevole disposizione. Ciò dimostra l'importanza sia dello strumento



penale nella lotta contro il traffico illecito dei beni culturali, sia della cooperazione internazionale in materia penale.

Tuttavia, con riferimento ai beni culturali, la cooperazione internazionale in materia penale incontra oggi ancora forti limiti. Taluni Paesi, in cui sono spesso importati tali beni, non prevedono fattispecie incriminatrici dirette a punire i fatti di traffico illecito, così precludendo la cooperazione giudiziaria per difetto del requisito della doppia incriminazione. Tale difficoltà giuridica costituisce spesso una scappatoia per i trafficanti e acquirenti in mala fede, che da imputati o indiziati nei processi penali si trasformano in parti nei processi civili e in ‘terzi innocenti’ nel processo penale, derivando da tale ultima posizione la preclusione al sequestro, recupero, confisca e restituzione dei beni trafficati.

A tal proposito esprimo il mio apprezzamento per il Trattato Modello per la prevenzione dei reati che offendono il patrimonio culturale mobile, adottato all’Havana nel 1990, un documento internazionale stilato dagli organi delle Nazioni Unite, nel quale si definiscono come «reati» le attività di traffico illecito di beni culturali, incluse l’importazione e l’esportazione, la vendita e l’acquisto. Tuttavia, tale documento è un ‘modello’ che non ha nessuna forza vincolante sul piano internazionale, che si limita a regolare i rapporti bilaterali tra i Paesi eventualmente contraenti, e che, da un punto di vista di tecnica legislativa, sembrerebbe meno vicino alle consuetudini e alle pratiche del contrarre convenzioni nei diversi Paesi.

Le *guidelines* per la prevenzione e il contrasto del traffico e di altre attività illecite contro il patrimonio culturale, elaborate con il supporto dell’Ufficio delle Nazioni Unite per il Controllo della Droga e la Prevenzione del Crimine (UNODC), hanno rappresentato più di recente un nuovo stimolo allo sviluppo di una cooperazione internazionale in materia penale diretto alla protezione dei beni culturali. Tali *guidelines* difatti stabiliscono che gli Stati devono adottare previsioni interne dirette a punire l’importazione, l’esportazione, l’acquisto, la vendita, la consegna, il trasporto o il trasferimento di un bene culturale esportato o importato illecitamente, rubato, rapinato o scavato illecitamente. Secondo me, oggi c’è un urgente necessità di tali linee guida, da un lato per concentrare, riassumere e spiegare le regole, normative e strumenti internazionali esistenti che possono essere applicati nella lotta contro il traffico dei beni culturali, dall’altro per concordare, coordinare, fornire i principi, i criteri e

le direttive da riferire o seguire nelle attività legislative interne dei diversi Paesi e nelle attività internazionali volte a elaborare una specifica convenzione potenziale.

Cogliendo qui l'occasione, vorrei fare un sincero appello a tutti i Paesi della comunità internazionale, ivi inclusi quei Paesi che sono maggiori vittime delle attività di traffico illecito dei beni culturali, come la Cina, a superare gli interessi nazionali ristretti nell'ambito della protezione dei beni culturali, e ad adoperarsi per l'adozione di strumenti normativi internazionali diretti a coordinare le misure legislative nazionali. Partendo da una concezione del patrimonio culturale come bene comune dell'umanità si rivela, a mio avviso, indispensabile la realizzazione di un sistema 'forte' di protezione internazionale dei beni culturali, analogo a quello costruito per la lotta al traffico della droga o alla tratta delle persone.

Peraltro, rispetto alla cooperazione internazionale nei confronti delle altre forme di criminalità, la cooperazione internazionale in materia penale nei confronti del traffico illecito dei beni culturali dovrebbe prendere in maggiore considerazione il recupero degli oggetti trafficati, e prestare maggiore attenzione a togliere il velo del cosiddetto 'terzo innocente' o 'compratore innocente'. La buona fede non dovrebbe sussistere, a mio avviso, qualora il bene culturale, al momento della transazione: (1) sia registrato nell'ambito del *database* dei beni scomparsi; (2) non sia accompagnato dall'attestato di esportazione rilasciato da parte del Paese fonte; (3) sia esportato da un Paese in stato di conflitto armato interno o internazionale. In aggiunta, il detentore dei beni deve essere certo della provenienza lecita del bene, assumendo nell'eventuale processo l'onere della prova.

Qualora il traffico illecito di beni culturali si manifesti nei termini di un crimine organizzato transnazionale o sia collegato ad atti di corruzione, devono ritenersi applicabili rispettivamente la Convenzione contro la criminalità organizzata transnazionale e quella contro la corruzione, entrambe elaborate in seno alle Nazioni Unite, in modo da rafforzare la cooperazione in vista dell'extradizione, l'assistenza giudiziaria, il riconoscimento e l'esecuzione reciproca delle decisioni penali, nonché la restituzione dei beni. A tale ultimo proposito, deve essere rispettato il principio del ritorno dei beni introdotto dagli artt. 51 e 57 della Convenzione anti-corruzione e, in aggiunta, mi pare interessante l'idea di elaborare, nell'ambito della Convenzione contro la criminalità organizzata

transnazionale, un protocollo speciale per la repressione della criminalità nell'ambito del traffico illecito dei beni culturali.

Tenendo presente che i reati di furto, rapina, danneggiamento, scavo illecito, importazione ed esportazione illecita di beni culturali possono essere commessi sotto uno sfondo politico speciale, o da un autore politico, o per qualche motivo politico, o nel corso di un conflitto armato internazionale o interno, nell'ambito dell'extradizione o dell'assistenza giudiziaria occorre prudenza nel prevedere quale motivo di rifiuto il 'reato politico' o altro reato a esso connesso, e si deve cercare di realizzare la depoliticizzazione della criminalità legata al traffico dei beni culturali ai fini dell'extradizione e dell'assistenza giudiziaria, mediante la stipulazione dei necessari documenti internazionali, sul modello della depoliticizzazione della criminalità legata al traffico di droga realizzata dalla Convenzione delle Nazioni Unite contro il traffico illecito di stupefacenti e di sostanze psicotrope del 1988. Analogamente, in caso di reati commessi da militari o durante un conflitto armato interno o internazionale, ritengo che debba escludersi, nel contesto della cooperazione internazionale, il ricorso al motivo di rifiuto del 'reato militare'.

I beni culturali non solo fanno parte delle proprietà dei Paesi di provenienza, ma sono anche patrimonio comune dell'umanità. Se il traffico di droga distrugge fisicamente l'umanità, il traffico di beni culturali distrugge culturalmente l'umanità. Nessun Paese e nessun ente culturale possono guadagnare nobile arricchimento e rispetto universale col tollerare o tacere sul fenomeno del traffico dei beni culturali altrui. Tutti i Paesi nel mondo devono unirsi per proteggere i beni culturali come patrimonio comune di tutta l'umanità, impegnandosi nella lotta contro le attività di traffico illecito dei beni culturali, anche attraverso la indispensabile cooperazione internazionale in materia penale.



## TWO WAYS OF POLICING CULTURAL HERITAGE

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### 1. *Introduction*

The title of this paper is, of course, a play upon the title of Professor John Henry Merryman's well-known essay which laid out the ways of conceptualizing cultural property law<sup>1</sup>. Professor Merryman argued that there are two ways to think about cultural objects. One as part of a national patrimony, and second as a piece of our collective cultural heritage. In a similar way there are two ways to envision jurisdiction of cultural heritage crime.

Criminal law can of course apply to policing the individuals responsible for stealing, looting, selling and transporting illicit art and antiquities. Or, law enforcement resources can be used to secure the successful return of stolen art, and the protection of sites. The criminal law can regulate people; and it can also regulate things. In order to produce meaningful change in the disposition of art, it must do both effectively. Focusing on art at the expense of criminal deterrence for individuals is an incomplete strategy.

The gap between what we think should happen to art and antiquities, and what actually occurs is widening. Art and antiquities cross state boundaries. Yet illicit cultural property does not get treated with the same care as its licit counterparts<sup>2</sup>. Stolen art and antiquities travel around the world in shipping containers, slip anonymously through freeports, are stowed away in airplane luggage, car trunks, and all manner of instrumentalities.

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<sup>1</sup> J.H. MERRYMAN, *Two Ways of Thinking about Cultural Property*, in *American Journal of International Law*, 1986 (80), p. 831.

<sup>2</sup> See e.g., J. FELCH - R. FRAMMOLINO, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum*, Houghton Mifflin Harcourt, 2011.

As a result one of the very first questions we must think about when putting forth a model system of criminal regulation is what groups will have jurisdiction over illicit works of art and the individuals who steal, loot and traffic these objects. Whose law should govern a dispute? To put it another way, what police forces and courts have jurisdiction?

In fact this is the first question any legal system must decide – how nation-states should exercise their policing powers and hand down judgments. Max Weber, the sociologist and legal philosopher, attached this idea of jurisdiction to what it means to be a State. It is, he argued, the groups that have a monopoly over the exercise of legitimate force that create nation-states<sup>3</sup>.

Yet as we all become more connected, this idea of a traditional State with the exclusive jurisdiction over its territory has changed. Criminal justice systems now are increasingly overlapping with each other. Nation-state communities like the European Union, sub-states, and even international criminal regimes like the International Criminal Court – all of these systems are now competing with each other for jurisdiction. This challenges the very foundation of what it means to be a State. And when we consider the transnational nature of the illicit trade in art and antiquities, jurisdictional questions are of course an important consideration. The author has argued in the past that courts, when confronted with overlapping legal regimes, should focus on the *lex originis*, or the law of the source of the object should govern<sup>4</sup>. But a more important jurisdictional consideration confronts us – a court's power, its jurisdiction, can either attach to individuals (*in personam*) or things (*in res*).

## 2. Jurisdiction of the Person

Let us consider a common scenario. An individual steals an important work of art, and immediately hides that work. A number of actors immediately spring into action. The owner of the work; the local police; international police organizations; members of the press; the art

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<sup>3</sup> M. WEBER, *Politics as a Vocation*, in H.H. GERTH - C. WRIGHT MILLS (eds. & trans.), *From Max Weber: Essays in Sociology*, Oxford University Press, 1946, p. 77, at p. 78.

<sup>4</sup> D. FINCHAM, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, in *Columbia Journal of Law & the Arts*, 2008 (32), p. 111.

world – all of these groups suddenly are paying attention to a valuable and beautiful object because it has been stolen and removed from the public trust.

How should law enforcement respond? It wants to do two things: recover this very valuable work of art – but at the same time prosecute the thieves and other criminals responsible for the theft. A clever criminal will separate from the stolen art – hide it somewhere so that if he or she is apprehended, the safe return of the art may be used for leverage to reduce or evade a potential prosecution.

Think about this in terms of jurisdiction. The criminal defendant is connected to the crime via personal jurisdiction. The criminal law can be used to prosecute the thief. This prosecution has a number of good potential outcomes. It will punish someone who has taken a beautiful work, it allows prosecutors and law enforcement to show that serious thefts will not be tolerated, and it ideally sends a message to future thieves to refrain from further theft.

### 3. *Jurisdiction over the Res*

Now consider the jurisdiction over a stolen work of art itself, or jurisdiction *in res*. The criminal law has been used to forfeit works of art with more regularity. The increase of these *in res* proceedings has a simple advantage. Forfeiture does not require a criminal prosecution. All that is required in a jurisdiction like the United States is a connection to the crime. Forfeiture is proper if the object was connected to a criminal violation, either in the United States or abroad.

Policing the art itself has emerged in the United States as a popular tool for federal prosecutors. For those unfamiliar with it, it is a confusing legal action. In American legal practice it involves a suit brought by prosecutors for the United States' Government suing illicit art. For example the Egon Schiele case *United States v. Portrait of Wally*<sup>5</sup>; or even the case of Michael Steinhardt's fabricated customs paperwork which resulted in *United States v. An Antique Platter of Gold*<sup>6</sup>.

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<sup>5</sup> *United States v. Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. 2002).

<sup>6</sup> *United States v. An Antique Platter of Gold*, 991 F.Supp. 222, 226 (S.D.N.Y. 1997).

Forfeiture is a legal concept with roots in Anglo-Saxon, Roman, and African tribal law. It rests on the legal fiction that an object involved in a crime should be forfeited. It was firmly embedded into American law in 1827 when the United States Supreme Court ruled that a pirate ship, the Palmyra, could be forfeited to the government even though the ship's owners were not convicted or even charged with piracy<sup>7</sup>. Forfeitures are powerful tools for prosecutors. From the Government's perspective these proceedings offer a number of advantages over prosecution of defendants *in personam*. The burden of proof for a prosecutors is much lower. A mere preponderance of the evidence rather than beyond a reasonable doubt<sup>8</sup>. A prosecutor also only has to prove a crime occurred, and does not actually put the offender on trial; greatly easing problems of discovering and introducing evidence.

From the perspective of claimants challenging a forfeiture, these proceedings cause great difficulty. Individuals are confronted with the vast resources of a Federal Prosecutor, with financial and investigative resources, that are much greater than in typical private disputes between original owners and current possessors. In fact it is no surprise then that in nearly every federal forfeiture of cultural property, the Government is successful; and many forfeitures are not even contested.

Think about the use of police powers which are not challenged in court. In September of 2013 the U.S. Immigration and Customs Enforcement announced<sup>9</sup> that it had returned an ancient Roman vessel, 5<sup>th</sup> century b.C. gold oil appliques, and 17<sup>th</sup> century gold ornaments. These objects had been seized in Newark in 2001 and were being returned to Afghanistan. Yet these objects were returned without any prosecution. They were seized and repatriated. This emphasizes the *res*, the recovery and repatriation of the objects, but not the hard work of investigating and indicting smugglers, and those who intentionally destroy our collective cultural heritage are left free to continue their illegal activity. Though isolated shipments of antiquities or art may be stopped by hard working customs and border agents, these seizures are not comprehensive and they are often sadly seen by antiquities dealers as the simple cost of doing business. More sites can always be looted. And it is not just American

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<sup>7</sup> *In re Palmyra* 25 U.S. (12 Wheat.) 1 (1827).

<sup>8</sup> Civil Asset Forfeiture Reform Act 18 U.S.C. §§981(g), 983, 985 and 28 U.S.C. §§ 2466, 2467, 2680 (2012).

<sup>9</sup> <http://www.ice.gov/news/releases/1309/130909washingtondc.htm>.



prosecutors and customs agents who are concerned with the object itself. It is, after all, a work of art.

The desire to secure the return of the object is what often hampers criminal regulation. And this is reflected in the behaviour of former law enforcement officers: Bob Wittman and Dick Ellis are but two examples of well-respected law enforcers who left the public sector (a sector that is generally designed to secure the prosecution of individuals and deter crime) towards the private sector with an emphasis on recovery. They have shifted gears to private consulting to secure the return of objects. They are in essence private art law enforcement with self-imposed jurisdiction over the object itself, funded by original owners and insurers. They will surely tell any who ask that they work with law enforcement – but the fact remains that the financial incentives for them must be geared towards a successful return of the art itself, of the object.

In the context of antiquities, archaeologists like David Gill, who have access to police photographic archives, publicly criticize auction houses when objects come up for sale that match photographs from known dealers of looted archaeological material. This network of public and private actors focuses on recovering and returning objects. Even cultural officials from nations of origin are concerned with returning works of art, and the *Nostoi* exhibitions in 2007 and 2008 in Italy and Greece showcasing the return of looted art are a tangible physical reminder of this.

We should of course be concerned with the return of a work of art because it is valuable aesthetically and economically. But in overly concerning ourselves with recovery, those of us in the cultural heritage world risk perpetuating the endless cycle of looting, theft, shaming and return.

#### 4. *International Cooperation*

Consider other efforts to combat transnational crime. In 2000, 124 nations, including both the United States and Italy, signed the Convention on Transnational Organized Crime in Palermo, Italy<sup>10</sup>. This has created a powerful new international enforcement regime to combat transnational organized crime. Its aims are ambitious, it created legally binding

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<sup>10</sup> United Nations Convention Against Transnational Organized Crime, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 4, U.N. Doc A/Res/55/25 (2001).

instruments committing ratifying States to take concrete measures. These measures include the creation of domestic criminal offenses, the adoption of new frameworks for mutual legal assistance, extradition, extra-territorial forfeiture, and law enforcement cooperation. In essence this is a globalized policing network that, if successful, would provide a global solution to global organized crime. Yet its importance has been under-examined in the context of cultural heritage law. We in the cultural heritage field focus too much on jurisdiction over the object, at the expense of the criminals responsible.

The international relationships between prosecutors and law enforcement officials are becoming deeper and better developed. Many of these relationships have been erected in pursuit of other criminal networks such as drug trafficking, financial crimes, and terrorism. But of course these tools are not just relegated to those crimes, and the tools that nations have created for their collective international policing will of course be used for other crimes.

### *5. Other Illicit Trades*

There are lessons which can be learned from successful efforts to reduce other illicit trades. The illicit trade in ivory shares many important characteristics with the illicit art trade. The United States Government had a cache of illicit ivory carvings and jewelry totaling six tons. The existence of this seized illicit ivory was not widely known. In November the United States Fish and Wildlife Service publicly pulverized all six tons of it<sup>11</sup>. This ‘ivory crush’ was a first for the agency, and is a part of a broad federal initiative to combat poaching and illegal trafficking. President Obama announced in July that the initiative will train park rangers and local officials in African poaching hubs, essentially training at the source, and work towards stiffer penalties for ivory smugglers under United States law.

One of the engines driving this policing is a model international law, the Convention on International Trade in Endangered Species

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<sup>11</sup> E. HUETTEMAN, *In a Message to Poachers, U.S. Will Destroy Its Ivory*, in *The New York Times*, 5 November 5 2013.

(CITES)<sup>12</sup>. The goal of CITES is the protection of endangered species worldwide. The Convention operates by subjecting international trade in products of certain endangered species to controls. All import, export, and re-export has to be authorized through a licensing system. 5.000 species of animals and 29.000 species of plants are protected.

This massive ivory destruction is a symbolic act, but it's a symbolic act that generated enormous publicity in the effort to stigmatize the trade in African ivory. Could we imagine a national government, any national government, willfully destroying such an amount of art?

Symbolic destruction of this ivory was an important step. Though some argued this ivory should have been sold in a licit market to reduce the demand for illicit ivory, allowing ivory to enter a legal trade only makes enforcement more difficult. Traffickers have more ways to disguise the poached and illegal ivory, and past sales only serve to fuel demand. All factors that share direct parallels with the antiquities trade.

In fact this massive ivory crush resembles the public marijuana burnings that have become very popular among law enforcement. Yet the market in illicit narcotics and ivory has become massive. The only feasible solution to reduce the harm is to shrink the market by reducing demand. By publicizing high-profile busts of drugs or ivory officials get the double advantage of showing customers that purchase is illegal and scaring off sellers. So what lessons can we draw to the illicit trade in cultural property? The market demand for art and antiquities continues to grow, and there seems only a small likelihood that officials will burn or crush decades worth of seized illicit art and antiquities. Instead these officials often simply return the art to the nation of origin, or allow private actors to secure the return of art.

## 6. *Conclusion*

Cultural heritage policy can concern itself with recovering art; or it can concern itself with prosecuting the actors involved in looting and theft. So long as it only focuses on the object though, the efforts to reduce theft and looting will be half-measures. So long as we are just concerned about

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<sup>12</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

recoveries and returning art, the criminals who are stealing our collective cultural heritage are going to continue.

As a consequence, cultural heritage advocates need to shift their focus away from trying to continually develop new laws designed especially for art and antiquities. And when they do, they may discover that the tools they are looking for have already been created. And the means to repatriate and target the financial incentives for dealing in illicit cultural heritage are already here, waiting to be used. Because the most effective means of policing the antiquities trade are increased resources. To achieve success, criminal justice authorities need to become more adept at working with noncriminal law professionals like archaeologists, ethical members of the art trade, and other specialists. The transnational nature of the illicit trade in art and antiquities poses significant challenges for those of us who are concerned about achieving cultural justice and preserving our collective cultural heritage

## CULTURAL HERITAGE CRIME IN THE ISLAMIC PENAL CODE OF IRAN

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Let me start by saying that it is a great pleasure for me to attend this Conference and to share views with so many learned colleagues from different countries. I would like to thank the organizers for holding this Conference and for inviting me to be part of it.

By way of introduction, it must be emphasized that the importance of cultural property far transcends its mere economic value, since it represents a significant expression of the history and traditions of nations. Thus, destruction of cultural property may have significant long term effects upon the cultural identity of a nation. Moreover, destruction of cultural property affects not only the people of a country, but serves to decrease the cultural diversity of the world. As such, it is important to prosecute the crime of destruction of cultural property in order to protect the cultural identity of different nations and the cultural diversity of the world.

What adds to the problem is the fact that trafficking in cultural property is amongst the main illicit revenues of transnational organized criminal groups in the world and brings in 2-6 billion dollars per year, which have to undergo a money-laundering process, and go to fund international organized groups' criminal activities.

Iran's geographical location, occupying a surface area of 1.648.000 sq.km. with a population of 75 million, and its historical background, in the sense of being one of the world's oldest civilizations dating back to almost 7.000 years ago, has resulted in the existence of a large number of cultural monuments in the country. As a result, Iran is vulnerable to looting, trafficking, theft and smuggling of its cultural property committed by

individuals, as well as organized criminal rings dealing with ancient objects. Thus, Iran has, on several occasions, demanded restitution of its assets and works of art of global importance that had been appropriated often in highly questionable ways. For example, during the Qajar dynasty, i.e., in the year 1900, a treaty was signed between the Iranian Government and the French Government, by virtue of which the French acquired a conclusive right for digging and searching Iranian historical sites. According to this treaty, and often in breach of it, many objects were found and transferred to France, one being the Hammurabi Code Table, dating back to over 4.000 years ago and being the oldest written law of mankind, which is now kept at the Louvre Museum in Paris<sup>1</sup>.

To combat the destruction of the country's cultural property and to protect its cultural heritage, the legislator of Iran, which has ratified the 1954 and 1972 UNESCO Conventions at an early stage, has criminalized many acts committed against cultural property.

It is the aim of this paper to briefly introduce the crime of destruction of cultural property, as outlined under this title in Section 9 of the Islamic Penal Code of 1996. The section consists of 15 articles.

The first article in this section concerns damaging cultural and historical buildings and monuments which have been registered on Iran's general inventory of national heritage, and also any moveable object attached to them which in itself is of historical significance. As to what constitutes national heritage, an old law passed in 1930 by Iran's National Legislative Assembly regarded any monuments and buildings built in Iran prior to AD 1794 (which is the end of Zandiyeh dynasty, who ruled Iran between 1750 and 1794) as national heritage. The said law required the Government to include such sites in a general inventory of national monuments. However, another law, passed in 1973, extended the definition of national heritage, and provided that the Ministry of Culture and Art is authorized to register, on the general inventory of national heritage, any immovable property whose preservation is in the public interest from an historical and artistic point of view, whether or not such property predated

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<sup>1</sup> See also the book written in Persian by D. KARIMLOO, *Taraje Mirase Melli* («Plunder of National Heritage»), 3 Vols., The Center for Documents and Diplomatic History, 2005-2010, containing 222 documents showing the export of many historical objects from Iran during the reign of Reza Shah Pahlavi (1925-1941). See also *Iran Daily* (Persian edition), 30 June 2013.

1794. This task has now been given to Iran Cultural Heritage, Handicrafts and Tourism Organization (ICHHTO).

Another crime mentioned in Article 559 of section 9 is the theft of cultural objects from preserves such as museums and exhibitions. The article also criminalizes handling of such stolen goods and prescribes the same punishment for those who knowingly buy or hide the stolen objects. This is due to the fact that in order to make a profit, the thief has to sell the stolen objects to fences who can dispose of stolen goods through their own means and thus make the restitution of such objects more difficult.

Cultural heritage crime also includes the illegal export of protected cultural objects that, even though may have been legally acquired, may not be taken out of the country without a permit. Any attempt to do so is punishable by one to three years imprisonment and a fine twice the value of the goods, according to Article 561 of the Islamic Penal Code. As it does not exist a proper registration process for immoveable objects, in the event of any dispute as to whether or not an object is an antiquity, ICHHTO has the final word in this respect, according to the Note to Article 561.

To carry out any digging or search with the intent to acquire historical and cultural property (which is frequently done by greedy people) is forbidden by virtue of Article 562. The punishment will be aggravated if such excavation or search is done inside historical or religious sites<sup>2</sup>.

The buying or selling of objects acquired in this way is also punishable by six months to three years imprisonment by virtue of Note 2 to Article 562. And if such sale is made to foreign nationals, then the maximum amount of punishment would be imposed on the seller, as in such cases the chance of such objects being exported outside the country would increase<sup>3</sup>.

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<sup>2</sup> For example, the Iranian press reported the arrest of some people who, by digging a 20 m. tunnel at a depth of 4 m. under the ground in the city of Ramhormuz, were trying to obtain antiques from an historical hill. Before that, some treasure hunters who were digging a deep tunnel at an old house in Shahr-e-Ray, near Tehran, escaped after one of them died in the tunnel as a result of suffocation. See: *Jaam-e-Jam Daily* (Persian), 6 April 2012.

<sup>3</sup> The *Roozgar Daily* (Persian) reports on 29 January 2012 that a young man was arrested in the city of Manjil as he was trying to sell to another man in the city of Roodbar 112 pieces of antique objects including coins, bracelets, rings and earrings dating back to 1000 B.C. He had discovered these items when digging a well in his agricultural land. In such

Any trespass to historical monuments delimited by ICHHTO will make the trespasser liable to six months to two years imprisonment, according to Article 563.

Any act likely to damage cultural property has also been criminalized. Examples include construction and similar activities carried out in the surrounding area of a registered site<sup>4</sup>, or carrying out any work on, repairing, developing or altering a registered heritage place without the consent of ICHHTO (Articles 560 and 564).

Any unauthorized transfer of the ownership of registered cultural property and the alteration of its use in a way contradictory to its dignity has also been made an offence by virtue of Articles 565 and 566.

To make sure that those committing offences against cultural property are duly prosecuted, ICHHTO has been vested with the duty to make a claim against such offenders to proper judicial authorities.

It is to be noted that until 2013, when a new Penal Code was enacted in Iran, all offences against cultural property were categorized as so-called 'private offences', in the sense that the prosecution of offenders needed a complaint being lodged by a claimant, in this case ICHHTO. However, in Article 104 of the new Penal Code, these offences have not been categorized as offences requiring a claim being made by anyone, but rather as offences in respect of which the prosecutor can prosecute on his own initiative. This is an additional safeguard for the protection of cultural property.

A person committing an offence against cultural property may also be a legal rather than a natural person, in which case, by virtue of Article 568, the director or manager in charge will be subjected to the prescribed punishments. In addition, the punishment of legal entities, for example companies, has also been made possible by virtue of Article 143 of the new Penal Code (2013). Such punishment will be in addition to any punishment imposed on the natural person and shall include sanctions like a fine or the disclosure of the company, etc., by virtue of Articles 20 and 21 of the new Penal Code.

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cases, the person who discovers antiquities is required, by virtue of Note 1 to Article 562 of the Penal Code, to deliver them to ICHHTO.

<sup>4</sup> As an example, there was a piece of news in the Iranian press on 16 May 2009 concerning the building of a sheep-cote at less than 50 m. distance from an historical site in the city of Kazeroon.



In addition to imposing a punishment on the offender, in all cases, the cultural property and any instruments used to commit such offences against cultural property will be confiscated in favour of ICHHTO, by virtue of the Note to Article 568.

It must be added that, in an attempt to preserve natural heritage and protect green environment, the felling of certain trees, even if done by the owner, has also been made an offence by virtue of Article 686 of the Penal Code.

Also Article 566 *bis* of the Penal Code criminalizes an act which is somehow similar to fraud, i.e. making, possessing for sale, or buying forged copies of cultural and historical objects, whether from Iran or abroad. This is punishable by 91 days to six months imprisonment and a fine equal to half the value of the original item<sup>5</sup>.

It can be said by way of conclusion that the Islamic Penal Code of Iran contains provisions to combat many of the offences committed against cultural property. The Iranian Government has also ratified many international conventions dealing with cultural property, including the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, and The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.

However, as elsewhere, and perhaps even more so in such cases, prevention is to be preferred. And it is here that there are certain gaps. First of all, although ICHHTO is the organization responsible for identifying and registering cultural property, there still seem to be many unregistered historical sites, the number of which may even exceed that of registered ones. The problem is worse in respect of moveable objects of historical value, for which there is no recognized registration process. Lack of proper supervision by ICHHTO, as the authority in charge of protection of cultural property, even on registered monuments is another problem which needs special attention. So although there are special guards to protect historical monuments, many more of them are needed to properly carry out the task of guarding all registered sites.

It is to be added that to list a building as cultural property will reduce the owner's ability to develop it or to change an item of property.

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<sup>5</sup> For details see H.M.M. SADEGHI, *Offences Against Security of the State and Public Tranquility* (Persian), Mizan Publication, 2013, pp. 237-238.

This will undoubtedly reduce the value of the property to its owner and hence the need to allocate proper budget to buy buildings classified as historical monuments from their owners. In fact, the Guardian Council (consisting of six lawyers and six Muslim jurists, who have the duty of making sure that no act passed by the Parliament – *Majlis* – contradicts any principle of the country's Constitution or any requirement of *sharia*, i.e. Islamic law) declared the Law on the Protection of National Monuments to be against *sharia* in so far as it applied to private property. Of course, in such cases, the proposed act can, according to the Iranian Constitution, be referred to the so-called Expediency Council, who can then approve the law notwithstanding the contrary view of the Guardian Council, which is what happened in this case.

It is to be borne in mind that the Iranian Penal Code has taken a favorable position towards an owner committing one of the offences against cultural property, by stipulating, in Article 569, that in all cases where the person accused of destruction of cultural property is unaware of the registration of his/her property as national monument, he/she will be acquitted.

The other issue to which more attention should be paid under Iranian law is the intangible heritage. It is true that this is a more novel concept and thus UNESCO's Convention for the Safeguarding of Intangible Heritage was approved by UNESCO's General Conference on 17 October 2003 and entered into force on 20 April 2006, whereas the Convention Concerning the Protection of the World Cultural and Natural Heritage, dealing with tangible heritage, dates from 1972, i.e., about 35 years earlier. However, the fact remains that Iran, as a country with a very old history and home to many customs, ceremonies, beliefs, attitudes etc., and a State Party to the Intangible Heritage Convention, should have proper laws and procedures to implement the said Convention, especially bearing in mind that UNESCO has registered ceremonies like *nowruz* (the Iranian new year) and *taaziyeh* (tragic religious presentations) on the basis of the said Convention.

Another thing which is needed is a more active participation by Iranian NGOs and civil society. This will result in a better protection of cultural property. Recently, a group of Iranian NGOs, who are involved in advocating cultural heritage, sent an open letter to the French Culture and Communication Minister calling for a ban on the sale, by French auction

houses, of several antiques stolen from Jiroft historical area in southeastern Iran.

The fact always to bear in mind is that the importance of the protection of cultural heritage is also emphasized by the teachings of Islam, upon which the Islamic Republic of Iran has been founded. The *Quran* in various verses recommends followers to travel on the earth and to take lessons from what is left of previous generations<sup>6</sup>. The same has been reflected in the 1985 law approving the statute of ICHHTO, which in Article 1 defines cultural heritage as comprising those things that we have inherited from previous generations which indicate human movement throughout history, and by knowing it, people take lessons and can find their proper cultural direction. This is, of course, in contrast with what Taliban did, for example, with the annihilation of the Bamiyan Budhas, then trying to justify their acts by saying that these were nothing but objects made of mud or stone<sup>7</sup>!

Paying attention to these Quranic verses shows how far and remote such horrible acts are from the true teachings of Islam.

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<sup>6</sup> See, for example, verses 137/III, 11/VI, 16/XXXVI and 82/XL.

<sup>7</sup> D. GILLMAN, *The Idea of Cultural Heritage*, Institute of Art and Law, 2006, p.6.



## IL COMANDO DEI CARABINIERI PER LA TUTELA DEL PATRIMONIO CULTURALE

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Vorrei in primo luogo ringraziare l'ISPAC anche a nome del mio Comandante, il Generale Mossa, per l'invito a questo eccezionale momento di confronto, al cospetto di relatori certamente qualificati sul tema.

Cercherò di concentrare il mio intervento sulle prospettive operative nell'azione di contrasto al crimine transnazionale. Prima di entrare nel dettaglio, però, farò un brevissimo cenno alla storia della struttura che ho l'onore di rappresentare e che è già stata più volte citata.

Come molti di Loro sapranno, il Comando per la Tutela del Patrimonio Culturale (da ora in poi lo chiamerò per sintesi TPC) è il reparto di polizia italiana specificamente dedicato alla lotta contro il traffico illecito dei beni culturali. Il Comando è inserito funzionalmente nell'ambito del Ministero dei Beni e delle Attività culturali e del Turismo e svolge compiti concernenti la sicurezza del patrimonio culturale nazionale, attraverso un'attività di prevenzione e di repressione delle connesse e molteplici attività delittuose del settore.

In Italia il TPC è stato individuato quale polo di gravitazione informativa e di analisi a favore di tutte le forze di polizia con un decreto del Ministro dell'Interno del 28 aprile 2006.

Le principali direttrici operative del nostro Comando consistono nel recupero dei beni culturali trafugati, alcuni dei quali vengono immessi sul mercato con alterazioni anche molto sofisticate. Ad esempio, alcuni dipinti vengono modificati per poi immetterli sul mercato internazionale, e quindi esportarli illecitamente, attraverso una sorta di collage che noi chiamiamo 'art attack'. Con questa tecnica da un dipinto se ne possono ricavare molteplici altri, dividendo le immagini o componendole, il che serve

soprattutto a introdurre sul mercato beni che sono stati trafugati o che vengono esportati illecitamente.

Oltre al recupero dei beni culturali trafugati, tra i nostri compiti rientra la sorveglianza dei siti archeologici, la tutela del paesaggio, il monitoraggio del mercato delle antichità, e in particolare delle attività commerciali sia fisse che itineranti (penso, ad esempio, a una realtà molto comune in alcune città italiane, cioè i mercatini settimanali dell'antiquariato, che per noi costituiscono importanti siti da controllare).

Effettuiamo il monitoraggio dei flussi generati dalle casa d'asta (attività anch'essa molto remunerativa) e anche dell'*e-commerce*. In tal senso, sono stati stabiliti specifici accordi, nel corso degli anni, con amministratori internazionali di portali internet specializzati per la consultazione privilegiata delle banche dati da loro gestite (come Art Index o Artprice) o per l'acquisizione facilitata di informazioni su piattaforme di commercio elettronico come eBay, Amazon e così via.

Il TPC rappresenta inoltre il punto di riferimento nazionale nell'ambito della cooperazione internazionale nel settore dei beni culturali.

Oltre a far parte delle commissioni previste dagli accordi bilaterali stipulati, il Comando organizza e partecipa regolarmente a diversi progetti formativi internazionali (per citarne alcuni, il Twinning Project in Romania e il Twinning Project in Bulgaria), finalizzati soprattutto allo sviluppo di strumenti operativi e all'acquisizione di una struttura normativa adeguata alla protezione del patrimonio culturale. Per la Bulgaria, ad esempio, il Comando è stato coinvolto recentemente nella creazione di una banca dati basata su criteri omogenei a quella che utilizziamo noi (su cui tornerò a breve).

Il Comando, inoltre, è impegnato in attività addestrative presso l'Accademia Europea di Polizia (CEPOL) e il Centro di Eccellenza per le Unità di Polizia di Stabilità (CoESPU). Il Comando effettua regolarmente corsi per funzionari di polizia stranieri, volti a perseguire l'unità delle procedure operative sulla base di consolidate *best practices*. In tutti questi corsi, ovviamente, vengono invitati in qualità di relatori anche i rappresentanti di organizzazioni come UNESCO, UNIDROIT, INTERPOL, proprio per diffondere i principi delle convenzioni internazionali in materia.

Il principale strumento operativo del TPC è rappresentato dalla banca dati dei beni culturali illecitamente sottratti. In essa sono censiti oltre 160.000 eventi e descritti circa cinque milioni di beni culturali. Questo non

significa, ovviamente, che vi siano cinque milioni di beni trafugati. Di questo enorme numero, quasi un quarto è costituito da beni asportati in Italia o all'estero (abbiamo catalogato circa 560.000 immagini digitalizzate). Tutte le informazioni contenute nella banca dati costituiscono, per noi ma non solo, un riferimento investigativo insostituibile. Come accennato, noi siamo un polo di gravitazione informativa, per cui la banca dati è uno strumento a favore di tutte le forze di polizia italiane ed estere nell'ambito della cooperazione internazionale, soprattutto in relazione all'analisi del fenomeno del traffico illecito di beni culturali. In particolare, la banca dati costituisce per il mio Reparto un mezzo di supporto quotidiano alle attività investigative complesse; ciò attraverso lo sviluppo delle informazioni che indirizzano la manovra investigativa nel contrasto ai fenomeni criminali che muovono il mercato illegale dei beni culturali, ad esempio attraverso la mappatura e la georeferenziazione degli eventi (furti, danneggiamenti, ecc.).

Alla base dell'architettura della banca dati vi sono dei moduli di inserimento dati (i famosi Object-ID<sup>1</sup>) attraverso cui si sviluppa la ricerca su eventi, persone, collegamenti esistenti e cointeressenze, nonché la successiva elaborazione dei dati statistici. C'è un'interfaccia *web* con supporto multilingue e sono presenti delle *utility* di riconoscimento attraverso *software* che rendono possibile il confronto tra le immagini acquisite e i dati catalogati nella banca dati, ma, anche se devo dire che questi *software* sono certamente un grande ausilio, il lavoro dell'uomo, almeno per quella che è la nostra esperienza, rimane insostituibile. Si tratta in ogni caso di uno strumento che agevola indubbiamente la cooperazione di polizia, mediante un assetto informativo fruibile sia dagli organi investigativi sia dalle strutture istituzionali, ad esempio le Sovrintendenze sul territorio. In tal senso, l'Italia è capofila del progetto internazionale PSYCHE (*Protection System for Cultural Heritage*), finanziato dalla Comunità Europea, in collaborazione con l'INTERPOL. La finalità di questo progetto è quella di sfruttare la competenza dei Carabinieri: il Comandante del TPC è infatti *project leader* per la modernizzazione della

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<sup>1</sup> L'Object-ID rappresenta uno standard internazionale per la descrizione di beni culturali, sviluppato a partire dal 1993 dal J. Paul Getty Trust, in collaborazione con musei, forze di polizia e operatori del mercato dell'arte e assicurativo. Oltre che dal Comando Carabinieri per la Tutela del Patrimonio Culturale e da numerose altre forze di polizia (inclusa l'INTERPOL), l'Object-ID è attualmente adottato e promosso da organizzazioni internazionali come UNESCO e ICOM.

banca dati dell'INTERPOL<sup>2</sup> di cui parlava prima Mr. Ellis<sup>3</sup>, con la creazione di un'architettura di immagazzinamento dei dati omogenea e soprattutto consultabile in tempo reale da tutti i Paesi partecipanti al progetto, affinché, una volta operativa, PSYCHE possa rappresentare efficacemente una vera e propria banca dati comune.

Dal 1970 a oggi, i Carabinieri del TPC hanno recuperato circa 712.000 beni culturali trafugati e hanno sequestrato oltre 1.100.000 reperti archeologici e oltre 268.000 beni d'arte falsificati o contraffatti. Noi poniamo grandissima attenzione al fenomeno della falsificazione, soprattutto della falsificazione dell'arte contemporanea, perché è indubbio che questo fenomeno influisce in maniera assolutamente incisiva sul mercato dell'arte, creando anche fortissimi danni economici al commercio degli stessi beni. Abbiamo inoltre recuperato 189.220 beni culturali rubati.

Questi dati, apparentemente freddi, li propongo non per esaltare l'efficienza operativa del Comando, ma perché rappresentano una drammatica istantanea dell'ampiezza del fenomeno criminale, che, violentando il patrimonio culturale identitario di noi Italiani, muove sistematicamente il mercato illecito internazionale dei beni culturali. Quella descritta, per altro, è soltanto una minima parte del fenomeno.

A seguito dell'esperienza acquisita, possiamo fondatamente affermare che il traffico illecito dei beni culturali rientra a pieno titolo tra quei reati nuovi ed emergenti per i quali è indispensabile applicare le previsioni della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale (UNTOC), essendo questo ormai connotato da tre caratteristiche essenziali: l'elevatissima remuneratività, l'associazionismo, la transnazionalità.

In particolare, dall'esame delle indagini svolte negli ultimi anni, che spesso hanno portato all'emissione di rogatorie internazionali, è stato possibile individuare le principali rotte del traffico illecito dei beni culturali da e per l'Italia. In sintesi, infatti, possiamo dire che in uscita abbiamo monitorato flussi verso Austria, Australia, Svizzera, Stati Uniti, Regno Unito, Portogallo, Francia, Giappone, Germania, cioè verso quei mercati dove il grande interesse per questo genere di beni, soprattutto archeologici, si associa a una maggiore disponibilità finanziaria; in entrata, flussi

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<sup>2</sup> Lo *Stolen Works of Art Database*, consultabile con accesso diretto da parte degli utenti autorizzati a partire dal 2009: <http://www.interpol.int/Crime-areas/Works-of-art/Database>.

<sup>3</sup> Riferimento all'intervento di RICHARD ELLIS, fondatore della *Art and Antiquities Squad* di Scotland Yard, non incluso nel presente volume [n.d.C.].



principalmente dai Paesi dell'Est Europa (Bulgaria, Romania, Serbia, Russia), del Medio Oriente (Iran, Iraq, Libano, Pakistan), nonché dal Centro e dal Sud America. Sono tantissimi, ad esempio, i beni peruviani o ecuadoregni immessi sul mercato italiano che vengono recuperati.

A dimostrazione dell'esistenza di traffici illeciti di beni culturali a livello transnazionale gestiti da vere e proprie organizzazioni criminali, cito soltanto alcune delle attività investigative più significative. Una è un'indagine chiamata 'Guardi', dal nome del famoso artista veneziano settecentesco Francesco Guardi, iniziata nel 2008 ma che di fatto non si è ancora conclusa, se si pensa che alcuni dei beni illecitamente sottratti al patrimonio nazionale non sono ancora rientrati nella disponibilità dello Stato.

Nel dettaglio, monitorando i cataloghi *on-line* di alcune case d'asta, erano stati individuati due dipinti di Francesco Guardi. La base d'asta si aggirava su svariati milioni di sterline e il catalogo di vendita, ovviamente, come spesso avviene in questi casi, non presentava indicazioni di dettaglio sull'origine e sulla proprietà dei dipinti. Le successive indagini sono state quindi sviluppate attraverso un'attività di ricerca storica e bibliografica sulla catalogazione delle tele e mediante accertamenti sulla documentazione relativa all'esportazione delle stesse, e quindi attraverso controlli presso gli Uffici Esportazioni delle Sovrintendenze.

Grazie a un'azione operativa attenta, si è così scoperto che i due dipinti, abilmente alterati con tecniche sofisticate, erano stati esportati ingannando i funzionari deputati al controllo. Una volta comprovata l'illecita esportazione, Scotland Yard, grazie all'assistenza giudiziaria dell'Home Office britannico, ha sequestrato le due tele, incriminando un importante rivenditore che le aveva messe in commercio. Questa attività, sviluppata attraverso una manovra complessa che ha richiesto numerose intercettazioni telefoniche e ambientali, ha consentito di far emergere l'esistenza di un sistema criminale articolato attraverso la costituzione di diverse società *off-shore* che muovevano beni d'arte sul mercato internazionale.

Contestualmente, sono state realizzate attività rogatorie in Inghilterra, Portogallo, Belgio, Stati Uniti. Proprio a New York è stato possibile recuperare uno straordinario dipinto di Lelio Orsi, *Leda e il cigno*, messo all'asta, all'epoca, per quasi un milione e mezzo di dollari. La restituzione di *Leda e il cigno* è stata realizzata attraverso la fondamentale collaborazione dell'US *Immigration and Customs Enforcement* (ICE) ed è

stata possibile grazie ad accordi bilaterali con gli Stati Uniti. Questa indagine è stata inoltre fondamentale perché ha consentito il monitoraggio di numerose tecniche attraverso le quali si sviluppano le esportazioni illegali: alterazione, attraverso vernici coprenti, delle caratteristiche principali dei dipinti, oppure quelle che noi chiamiamo ‘attività sottobraccio’, cioè il trasporto fisico di beni oltre le frontiere, sottraendoli al controllo doganale; importazioni illegali in quanto fittizie, cioè relative a beni che non si sono mai mossi dall’Italia, ma che figurano come importati dall’estero (il che serve per renderne più agevole la futura esportazione); esportazioni temporanee, ad esempio a scopo di restauro, soprattutto di beni culturali appartenenti a collezioni private e magari poco conosciute.

Un’altra operazione che posso citare è l’operazione ‘Ghelas’, che ha disarticolato un’organizzazione criminale dedita al traffico internazionale di reperti archeologici estratti clandestinamente da siti siciliani e successivamente collocati in Spagna. Questa organizzazione si fondava su una struttura rudimentale e insieme complessa, nel cui ambito ogni attore svolgeva compiti ben precisi, dal tombarolo fino ad arrivare a chi metteva in commercio il bene. Infatti, come una vera e propria famiglia mafiosa, pur senza averne i requisiti tecnici, l’associazione poteva contare, nelle aree interessate, su vari referenti dei singoli gruppi locali, che avevano il compito di gestire e controllare le diverse fasi dell’attività illecita, e su un collettore unico per ricercare i compratori e i contatti esteri.

Per ultima cito l’operazione denominata ‘Boucher’, condotta in modo integrato con un’indagine svolta dall’omologo *Office central de lutte contre le trafic de biens culturels* (OCBC) francese e dalla Polizia finanziaria d’oltralpe. Questa operazione ha posto in luce l’attività di riciclaggio svolta in Francia attraverso vendite in gallerie d’arte e investimenti in beni immobili; attività basata su oggetti archeologici clandestinamente scavati da più gruppi di tombaroli operanti nel Sud Italia e illecitamente esportati.

Le varie investigazioni citate evidenziano come i gruppi implicati nel traffico dei beni culturali, quand’anche non siano di per sé organizzati nel senso tradizionale, utilizzano metodologie operative proprie delle associazioni per delinquere non comuni e di tipo mafioso, assumono sempre più spesso connotazioni transnazionali, e hanno disponibilità di mezzi e tecnologie all’avanguardia. Pertanto, gli strumenti di cui devono essere dotate la magistratura e le forze di polizia, in particolare quelle specializzate come i carabinieri del TPC, vanno adeguati all’evoluzione

della minaccia da contrastare. Al riguardo, l'importanza della Convenzione di Palermo va rimarcata, non fosse altro perché, nel focalizzare l'attenzione sul carattere transnazionale di specifiche attività criminali, ha consentito di individuare figure giuridiche, tipologie di reato e strumenti operativi estremamente attagliati al settore dei beni culturali, quali, ad esempio, le definizioni di «gruppo criminale organizzato» e di «gruppo strutturato» (art. 2, punti a. e c., UNTOC), che consentono di perseguire strutture associative meno formalmente articolate di quelle tradizionali di stampo mafioso, ma che si costituiscono per commettere anche un solo reato; il fenomeno del riciclaggio (artt. 6 e 7), che riguarda l'investimento di profitti provenienti dal traffico illecito di beni culturali; alcune tecniche speciali di investigazione, quali indagini sotto copertura e consegne controllate (art. 20), che appaiono indispensabili in materia, anche per contrastare l'incremento esponenziale dei traffici illeciti via internet.

Al fine di fornire un contributo concreto, non mi soffermo sull'ampio contesto normativo internazionale esistente, sul quale, tra l'altro, anche altri relatori più qualificati si sono ampiamente trattenuti. Evidenzio, invece, le principali direttrici legislative attraverso le quali opera in Italia il Comando TPC, ovvero, sostanzialmente, gli strumenti reali che noi come Carabinieri riusciamo a utilizzare per il recupero internazionale dei beni alienati illecitamente al patrimonio dello Stato italiano. In ambito europeo, infatti, le rogatorie vengono avanzate in base alla Convenzione di Strasburgo del 1990 sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato, la quale, a differenza della Convenzione europea di assistenza giudiziaria in materia penale del 1959, ci consente la restituzione definitiva dei beni oggetto di rogatoria. Le azioni di rivendica, invece, vengono proposte dallo Stato attraverso il Ministero dei Beni e delle Attività culturali e del Turismo, ai sensi della famosa Direttiva 93/7 CEE relativa alla restituzione dei beni culturali usciti illegalmente dal territorio di uno Stato membro<sup>4</sup> (la prima volta che siamo riusciti a utilizzare questa direttiva è stata a ottobre di quest'anno per delle monete da restituire alla Grecia: questo per dare un'idea della sua efficacia).

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<sup>4</sup> Nelle more della pubblicazione, la Direttiva in vigore è stata sostituita dalla Direttiva 2014/60/EU del 15 maggio 2014, relativa alla restituzione dei beni culturali usciti illegalmente dal territorio di uno Stato membro e che reca modifiche al Regolamento 1024/2012, la quale troverà applicazione a partire dal 19 dicembre 2015 [n.d.C.].

Con gli Stati Uniti, invece, le rogatorie prima venivano inoltrate ai sensi del Trattato di mutua assistenza in materia penale sottoscritto da Italia e Stati Uniti nel 1982, rispetto al quale, però, gli Stati Uniti non avevano recepito i casi di sequestro e confisca di cui all'art. 18. Questa lacuna è stata colmata, estendendo inoltre il raggio d'azione del Trattato a ulteriori fattispecie di reato, con il nuovo accordo del 2006 tra il Governo della Repubblica Italiana e il Governo degli Stati Uniti d'America, ratificato con la l. 16 marzo 2009, n. 25, oltre che con la l. 16 marzo 2006, n. 146 (di ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale), ma soprattutto con il Memorandum d'intesa tra Italia e Stati Uniti<sup>5</sup> che prevede, sostanzialmente, una limitazione all'importazione negli USA di beni facenti capo a una lista allegata al Memorandum stesso, entrato in vigore nel 2001 e che ogni anno viene rinnovato. Secondo questo accordo, i beni italiani rientranti nella lista in questione devono sempre avere l'autorizzazione all'uscita, mentre il sequestro e la confisca avvengono in base al *National Stolen Property Act*, quindi al 'codice dei beni culturali' statunitense, che accerta se c'è violazione doganale con particolare riferimento alla provenienza e all'origine del bene. Il 99% dei recuperi e delle restituzioni – riuscite grazie all'attività dei carabinieri – è realizzabile proprio attraverso questo Memorandum.

E con questo dato concludo il mio intervento.

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<sup>5</sup> *Memorandum d'intesa tra il Governo degli Stati Uniti d'America e il Governo della Repubblica Italiana circa l'imposizione di limitazioni all'importazione di categorie di materiale archeologico databile ai periodi italiani pre-classico, classico e della Roma imperiale*, fatto a Washington il 19 gennaio 2001.

## LA PROTEZIONE DEI BENI CULTURALI NELL'AMBITO DEL PATRIMONIO ARTISTICO RELIGIOSO DEL VATICANO

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Vorrei innanzitutto esprimere la grande soddisfazione nel trovarmi di fronte a questa platea a parlare di temi che sicuramente voi conoscete più approfonditamente di me. Con l'occasione porto i saluti e i ringraziamenti del Direttore dei Servizi di Sicurezza e Protezione Civile del Corpo della Gendarmeria, dottor Domenico Giani, che per impegni pregressi non ha potuto essere presente a questa manifestazione. Vorrei quindi rivolgere un particolare ringraziamento all'ISPAC, che ha dato l'opportunità alla Direzione dei Servizi di Sicurezza e Protezione Civile del Corpo della Gendarmeria di far parte di questo consesso.

Prima di addentrarmi nel tema che vorrei trattare, ovvero i beni culturali nel peculiare ambito del patrimonio artistico religioso, vorrei spendere qualche parola sul Corpo della Gendarmeria, sulla Direzione dei Servizi di Sicurezza e sullo Stato della Città del Vaticano.

Lo Stato della Città del Vaticano è uno Stato *sui generis*. La ragione di ciò è riconducibile a diversi aspetti, primo fra tutti la relazione o meglio l'interdipendenza con la Santa Sede. Lo Stato della Città del Vaticano nasce ed esiste per garantire l'indipendenza del Sommo Pontefice nell'esercizio del suo ministero sacerdotale – da qui la sua principale peculiarità – e non si parla di indipendenza tanto in senso territoriale quanto, piuttosto, di indipendenza spirituale. Infatti lo Stato garantisce l'indipendenza alla Santa Sede intesa, a tenore del Can. 361 del *Codex Juris Canonici* (CIC) come «[...] non solo il Romano Pontefice, ma anche [...] la Segreteria di Stato, il Consiglio per gli affari pubblici della Chiesa ed altri organismi della Curia Romana». Da ciò ne consegue, ed è fondamentale notarlo, come il soggetto che entra in contatto con gli attori della vita internazionale non è lo Stato della Città del Vaticano oppure la Chiesa Cattolica intesa come comunità di credenti, ma la Santa Sede, cioè

il Papa e la Curia Romana, soggetto sovrano di diritto internazionale, di carattere religioso e morale. Appare evidente quindi che la Santa Sede gode di personalità giuridica internazionale e tale legittimità internazionale, sin dall'Alto Medioevo, non è mai stata contestata.

In forza di ciò non appare possibile paragonare lo Stato della Città del Vaticano a qualsivoglia altra realtà a livello mondiale, poiché il confronto potrebbe mostrare tutt'al più delle generiche similitudini, ma mai un'uguaglianza palese.

Giungendo quindi a un inquadramento, seppur molto generale, possiamo dire che con il termine Santa Sede, o Sede Apostolica, nel diritto canonico, si intende il supremo organo di governo della Chiesa cattolica (can. 361 C.I.C.), mentre il Vaticano o, più precisamente, lo Stato della Città del Vaticano, è proprio quel piccolo territorio destinato a garantire la sovranità, l'immunità e l'indipendenza nelle funzioni dell'ufficio del Santo Padre. Come realtà statale indipendente e autonoma, lo Stato della Città del Vaticano possiede tutti gli elementi costitutivi propri di uno Stato: il territorio, il popolo, la potestà sovrana. Le varie branche funzionali e di governo dello Stato sono racchiuse all'interno del Governatorato, che rappresenta il complesso di organismi per la gestione dello Stato nel suo complesso. Nello specifico si compone di nove Direzioni che rappresentano i principali organi operativi. Il Corpo della Gendarmeria e il corpo dei Vigili del Fuoco sono incardinati all'interno di una delle nove Direzioni menzionate, ovvero la Direzione dei Servizi di Sicurezza e Protezione Civile.

Il Corpo della Gendarmeria rappresenta a tutti gli effetti il corpo di polizia dello Stato con tutte le prerogative che afferiscono normalmente alle forze di polizia in materia di prevenzione e repressione dei reati e più in generale di pubblica sicurezza e ordine pubblico.

Appare *de plano* quindi che anche i reati relativi alle opere d'arte ricadono nelle competenze del Corpo.

Venendo più al vivo del discorso, vorrei parlare dell'influenza della religione nell'espressione artistica come realtà dalla quale non si può prescindere e accennare brevemente all'importanza di avere sensibilità rispetto alle opere d'arte, perché, se non si ha sensibilità rispetto a questo genere di eccellenze, non si percepisce il significato di quello che viene definito patrimonio culturale.

Nella diapositiva della *Pietà di Michelangelo* qui mostrata, vediamo un'opera che risale alla fine del Quattrocento e che nel 1972 fu

seriamente danneggiata dal folle gesto di un individuo che entrò nella Basilica di San Pietro (all'epoca la statua era esposta senza barriere di alcun tipo) cominciò a colpire la statua con un martello, procurandole numerosi danni. Fortunatamente fu possibile un restauro, per cui oggi possiamo apprezzare l'opera così com'era prima. Ho voluto portare questo esempio, celebre, semplicemente per attestare la vulnerabilità e le minacce cui sono esposte le opere d'arte, oggi come, ancor di più, in passato.

Forse le opere d'arte a carattere religioso sono ancor più esposte a tali rischi in quanto, per la loro peculiarità di essere sovente oggetto di venerazione, sono lasciate alla disponibilità collettiva.

Abbiamo tracce che indicano come sin dai tempi della preistoria immagini dipinte costituissero espressione delle diverse forme di religione.

L'espressione della religione nell'arte, infatti, la troviamo già nei graffiti che ornano le volte delle caverne dell'area mediterranea preistorica, poi, con il passare del tempo, la religione nell'arte diventa l'elemento essenziale di manifestazioni artistiche tra le più elevate.

Senza scendere in dettagli storici vorrei dire che sin da allora sono stati scelti siti di particolare misticismo. In effetti, e vengo alle criticità, alcuni luoghi dove sono custodite opere d'arte di carattere religioso presentano la loro primaria vulnerabilità proprio nell'isolamento degli edifici sacri nei quali generalmente queste opere sono conservate. Qui troviamo scarse o addirittura inesistenti misure di sicurezza a protezione di questi luoghi, che a volte vengono abbandonati o comunque diventano desueti per la perdita del loro senso religioso. A tal proposito vorrei fare riferimento all'intervento del professor Mackenzie<sup>1</sup>, il quale durante la sua esposizione ha mostrato come alcuni siti siano collocati in zone rurali, completamente al di fuori di ogni controllo, quindi in condizioni favorevoli al furto di opere d'arte o alla loro perdita definitiva, oppure a danneggiamenti che ne rovinano la bellezza.

Senza andare troppo lontano, in Italia abbiamo numerosi casi di chiese che si trovano in aree rurali praticamente disabitate o comunque isolate, il che rappresenta una vulnerabilità proprio per il fatto che la percezione della fruibilità di tali luoghi da parte dei malintenzionati è talmente ampia che chiunque può pensare di compiere una qualsivoglia azione illecita senza essere minimamente disturbato. Questa vulnerabilità è tanto più grave se è rapportata all'importanza che i beni artistici hanno per

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<sup>1</sup> V. *infra*, in questo volume, S. MACKENZIE - T. DAVIS, *Cambodian Statue Trafficking Networks: An Empirical Report from Regional Case Study Fieldwork*.

l'umanità. Lo Stato della Città del Vaticano percepisce questa vulnerabilità in maniera particolarmente sensibile, essendo denso di ricchezze artistiche, tanto che è stato dichiarato interamente patrimonio dell'umanità dall'UNESCO. Per questo, in qualità di forza di polizia dello Stato della Città del Vaticano, il Corpo della Gendarmeria è chiamato a proteggere questo importante patrimonio in collaborazione con altri uffici del Vaticano, il che, com'è facilmente intuibile, rappresenta un compito particolarmente delicato, un dovere importante non solo per il valore economico delle opere che, anzi, probabilmente è l'aspetto meno importante, ma soprattutto perché, come disse Benedetto XVI nel corso del Sinodo dei Vescovi del 2011, per molte persone venire a Roma ed entrare nei Musei Vaticani rappresenta il contatto maggiore e forse unico con la Santa Sede e quindi un'occasione privilegiata per conoscere il messaggio cristiano. Questo dimostra come l'arte possa diventare un mezzo che avvicina popoli e culture.

Per quanto riguarda la protezione delle opere d'arte, noi abbiamo posto in essere delle misure di prevenzione e protezione che sono il risultato della sintesi di due elementi fondamentali: l'uomo e la tecnologia. Sono pienamente d'accordo con il collega, Maggiore Coppola<sup>2</sup>, sul fatto che l'uomo rimane – e suppongo rimarrà – l'elemento essenziale per quanto riguarda certe attività, benché la tecnologia sia fondamentale per agevolare il lavoro che si compie. Nel binomio uomo-tecnologia, l'importante è non escludere una serie di accorgimenti adottati per la sicurezza e per l'eventuale recupero delle opere d'arte. Quindi, laddove non fosse possibile assicurare la presenza di personale preposto, sarebbe necessario affrontare la problematica dell'inesperienza o della negligenza delle persone che operano in determinate aree. A tal proposito, mi vengono in mente le parole dello storico greco Tucidide, il quale diceva: lo spessore delle mura di una fortezza non conta tanto quanto la volontà di difendere quella stessa fortezza. Questo richiamo è valido ancora oggi e pertanto è importante una buona preparazione del personale, oltre a una messa in atto di misure di protezione specifiche.

All'interno dei Musei Vaticani, che sono certamente una delle gallerie più importanti al mondo, ma non una delle più grandi, vigilano trecento persone, compreso il personale della Gendarmeria. Questo perché è stato dimostrato come la sola presenza fisica eserciti di fatto una capacità

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<sup>2</sup> V. *supra* A. COPPOLA, *Il Comando dei Carabinieri per la Tutela del Patrimonio Culturale*.



dissuasiva nei confronti di eventuali malintenzionati, anche se a volte l'impiego di personale è vincolato dai limiti economici che tutti, bene o male, dobbiamo affrontare; tuttavia, è sempre auspicabile che non si sopravvaluti l'elemento tecnologico rispetto a quello umano.

Un aspetto essenziale, che è tutt'altro che superato come problema, è quello di preparare cataloghi dettagliati, perché ancora oggi abbiamo luoghi (parlo sempre delle menzionate chiese sparse sul territorio italiano) dove non si sa che cosa sia custodito; in ragione di ciò è evidente che con dei cataloghi, auspicabilmente in formato elettronico, sarebbe più facile risalire almeno a quello che è stato rubato.

Per quanto riguarda la protezione delle opere d'arte, un aspetto imprescindibile è la cooperazione internazionale nell'ambito delle forze di polizia e non. Ovviamente, il Corpo della Gendarmeria è fortemente convinto dell'importanza della cooperazione internazionale. Il primo rapporto di cooperazione è sicuramente quello con le forze di polizia italiane ed è un rapporto, essendo il Vaticano uno Stato-*enclave*, praticamente quotidiano, oltre che eccellente. Tuttavia, nel 2008 la Città del Vaticano ha aderito all'INTERPOL e quindi si è dotata di un proprio Ufficio Centrale Nazionale attraverso il quale può fruire della vasta rete di collegamento e scambio di informazioni che offre l'organizzazione internazionale. All'interno dell'INTERPOL (che oggi conta 190 Paesi membri e di conseguenza è diffusa in quasi tutto il mondo) c'è una branca funzionale, l'Unità per le Opere d'Arte Rubate, che a sua volta è dotata di un *database*.

A questo punto torniamo al discorso dei *database* come elemento fondamentale. Come ha accennato il Maggiore Coppola<sup>3</sup>, si auspica il passaggio a PSYCHE per una condivisione a livello mondiale delle informazioni. Il *database* dell'INTERPOL è un valido supporto, almeno per quanto ci riguarda, in quanto viene alimentato dai 190 Paesi membri e quindi può essere fruibile da tutti. Inoltre, di recente tale *database* è stato reso consultabile anche dal sito pubblico dell'INTERPOL e questa è una novità positiva, in quanto chiunque può accedervi per evitare, per esempio, un acquisto incauto.

Venendo all'attività della Chiesa cattolica, vorrei citare due iniziative tra le più importanti: la prima è la lettera circolare della Pontificia Commissione per i Beni Culturali della Chiesa che risale al 1999 e che titola *Sulla necessità e sull'urgenza dell'inventariazione e*

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<sup>3</sup> *Ibidem*.

*catalogazione dei beni culturali della Chiesa*, che praticamente per la prima volta sollecita tutte le diocesi mondiali a contribuire alla formazione del catalogo delle opere d'arte; la seconda, molto più recente, realizzata tra l'altro dal Comando dei Carabinieri per la Tutela del Patrimonio Culturale, è nata da un'idea del cardinal Ravasi e dell'allora ministro Ornaghi, ed è il *Manuale sulla tutela dei Beni Culturali Ecclesiastici*<sup>4</sup>.

Mi accingo a concludere dicendo che la grandissima varietà di esigenze e impostazioni diverse dei luoghi di culto non consente di pensare a un modello unico di sicurezza adatto per tutte le situazioni. L'ambiente, il territorio, i beni custoditi e le persone che hanno in cura le opere d'arte sono tutti parametri da tenere in considerazione, ma l'importante è saper valutare i rischi e trovare le misure protettive adeguate.

Personalmente sono convinto che nella protezione delle opere d'arte il fattore umano costituisca un valore aggiunto, che non ci sia dispositivo elettronico o nuova tecnologia che abbia la stessa facoltà di percezione di una persona. Questo, ovviamente, senza prescindere dall'elemento fondamentale della cooperazione internazionale fra tutte le istituzioni competenti, di polizia e non, in quanto la volontà di cooperare a livello internazionale è alla base dell'attività di salvaguardia di un patrimonio che senza ombra di dubbio appartiene all'umanità intera e alle generazioni future.

Grazie per l'attenzione.

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<sup>4</sup> MINISTERO DEI BENI E DELLE ATTIVITÀ CULTURALI - PONTIFICIUM CONSILIUM DE CULTURA, *Manuale sulla tutela dei Beni Culturali Ecclesiastici*, Comando Carabinieri Tutela Patrimonio Culturale, 2013 ([http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1361956415878\\_Manuale\\_sulla\\_tutela\\_dei\\_beni\\_culturali\\_ecclesiastici.pdf](http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1361956415878_Manuale_sulla_tutela_dei_beni_culturali_ecclesiastici.pdf)).

INTERNATIONAL JUDICIAL COOPERATION: A TOOL  
FOR FIGHTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY  
(RETURN, RESTITUTION AND CONFISCATION)

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International judicial cooperation in criminal matters can be most effectively used as a tool to fight trafficking in cultural property. We will show this more specifically from a Swiss perspective.

In 2005, Switzerland adopted the Cultural Property Transfer Act (CPTA)<sup>1</sup> and the Cultural Property Ordinance (CPTO)<sup>2</sup> to subject the international transfer of cultural property, such as the import, the export and the excavation of cultural goods, to stricter controls. Among the many existing methods to fight the trafficking in cultural property, the CPTA expressly refers to Mutual Judicial Assistance as a way to confiscate and return illegal cultural property to its owner (art. 23 CPTA).

The Federal Act on International Mutual Assistance in Criminal Matters (the Mutual Assistance Act)<sup>3</sup> has many advantages and the use of

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<sup>1</sup> Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA), 20 June 2003 (RS 444.1).

<sup>2</sup> Ordinance on the International Transfer of Cultural Property (Cultural Property Transfer Ordinance, CPTO), 13 April 2003 (RS 444.11).

<sup>3</sup> Federal Act on International Mutual Assistance in Criminal Matters (Mutual Assistance Act), 20 March 1981 (RS 351.1).

its proceeding can effectively promote the return of cultural property. The specific criminal provisions of the CPTA are also a useful tool and their interaction with the Mutual Assistance Act will be reviewed.

### 1. *The Mutual Assistance Act and the Return of Cultural Property*

The Swiss Mutual Assistance Act includes mutual assistance cooperation proceedings, but also extradition proceedings. Switzerland is also party to two European treaties, the European Convention on Extradition<sup>4</sup> and the European Convention on Mutual Assistance<sup>5</sup>.

Without going into the details on how the Mutual Assistance Act regulates judicial assistance proceedings, we will concentrate on the main advantages of the use of such proceedings.

First, this type of cooperation, at least with respect the Swiss law, is open to all States. This means that there is no need for a State to be part to a bilateral agreement with Switzerland to be able to request the confiscation or the return of cultural property located on the Swiss territory<sup>6</sup>. In this case, the request will be treated on the basis of the Mutual Assistance Act. The requesting State will however often be asked to provide a guarantee of reciprocity<sup>7</sup>.

Second, the proceeding is fast and efficient, which is typical of criminal proceedings<sup>8</sup>.

Third, in judicial assistance proceedings the good faith presumption is overturned. A person in possession of a good requested by the requesting

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<sup>4</sup> European Convention on Extradition, 13 December 1957 (RS 0.353.1).

<sup>5</sup> European Convention on Mutual Assistance, 20 April 1959 (RS 0.351.1).

<sup>6</sup> According to the CPTA, Switzerland can negotiate bilateral agreements with other Member States of the 1970 UNESCO Convention to allow the return of illegally exported cultural property (Art. 7 CPTA). As of today, Switzerland is party of six bilateral agreements and all six of them are in force (Italy, Egypt, Greece, Columbia, China and Cyprus).

<sup>7</sup> G. BOMIO, *L'entraide internationale et les biens culturels*, in M.-A. RENOLD (ed.), *L'entraide judiciaire internationale dans le domaine des biens culturels, Etudes en droit de l'art*, Vol. 20, Schulthess, 2011, p. 25.

<sup>8</sup> R. ZIMMERMANN, *La coopération judiciaire internationale en matière pénale*, Stämpfli, 2009, n. 312.

State has to make his good faith likely<sup>9</sup>. Usually, according to the Swiss Civil Code, the good faith of the person in possession of the good is presumed and it is therefore the person who is claiming the good who has the burden to prove the lack of good faith of the person in possession of it<sup>10</sup>. The good faith presumption is thus overturned. In international judicial cooperation proceedings the system is changed. However, it is sufficient that the good faith possessor make his good faith *likely*, which is not the case in a proceeding before a traditional Court, where it has to be *proven on the merits*<sup>11</sup>. The evidence standard is therefore usually much lower in a judicial assistance proceeding: this will often be to the advantage of the requesting State as it becomes more and more difficult to make one's good faith likely with respect to the acquisition of cultural property<sup>12</sup>.

Another advantage is that, in principle, the proceedings are free for the requesting State which does not have to pay an indemnity to a possible good faith purchaser<sup>13</sup>.

Finally, the request of cooperation is answered by the Swiss authorities on the basis of the law in force at the time of the decision taken with respect to the cooperation<sup>14</sup>. This is particularly valuable in the context of trafficking in cultural property, as one of the classical issues in this field is the non-retroactivity of the law.

The Mutual Assistance Act provides for three ways to hand over cultural property to the requesting State, provided, of course, that all the conditions are fulfilled. The three options are:

- Handing over of objects as evidence, which is a provisional measure;

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<sup>9</sup> ZIMMERMANN, *La coopération judiciaire*, n. 342; L. MOREILLON (ed.), *Entraide internationale en matière pénale, commentaire romand*, Helbing Lichtenhahn Verlag, 2004, ad Art. 74 a EIMP n. 43.

<sup>10</sup> Art. 3 Swiss Civil Code.

<sup>11</sup> ZIMMERMANN, *La coopération judiciaire*, n. 342; Federal Court Case, ATF 123 II 134 cons. 6.

<sup>12</sup> M. BOILLAT, *Trafic illicite de biens culturels et coopération judiciaire internationale en matière pénale, Etudes en droit de l'art*, Vol. 22, Schulthess, 2012, pp. 175 ff. and pp. 245 ff.; Federal Court Case, ATF 123 II 134 cons. 6.

<sup>13</sup> ZIMMERMANN, *La coopération judiciaire*, n. 462 ; BOMIO, *L'entraide internationale*, p. 29.

<sup>14</sup> ZIMMERMANN, *La coopération judiciaire*, n. 580; BOMIO, *L'entraide internationale*, p. 27.

- Handing over of objects for the purpose of forfeiture or return, which is, on the contrary, a final decision;
- Handing over of objects, in the context of an extradition proceeding

#### 1.A. *The Handing over of Cultural Property as Evidence*

According to the handing over of evidence proceeding, the requested State hands over objects to the requesting State as evidence for the requesting State's national proceeding (art. 74 Mutual Assistance Act)<sup>15</sup>. It is a provisional measure: the handing over is subject to the condition that the requesting State give the guarantee to return the objects, free of charge, at the end of his national proceeding. This guarantee to return is required with respect to possible third parties' right on the object.

As an example of such a proceeding, it is worth to mention the Federal Court case of November 2007<sup>16</sup>. In this case, the Swiss authorities returned 4.400 archeological objects to Italy based on the criminal activities of handling stolen goods and participation in organized crime. According to the Italian request of mutual assistance, two art dealers in Basel had acquired illegally excavated objects and were selling them on the market. Criminal proceedings had been initiated in Italy against them.

The Swiss authorities ordered the search of the premises belonging to the art dealers and found these objects. They ordered the handing over of the objects to the Italian authorities as evidence for the needs of the ongoing criminal procedure in Italy.

The art dealers protested against this decision, claiming that, even though the handing over of the objects as evidence was a provisional measure, once in Italy, the objects would never come back to Switzerland. They also argued that this type of handing over was operated to overcome the final handing over, the conditions of which are harder to respect. The art dealers claimed that there was a risk that the requesting State would never return the objects handed over as evidence at the end of the procedure in Italy, as Italy might very well use an argument based on State

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<sup>15</sup> MOREILLON, *Entraide internationale en matière pénale*, ad Art. 74 EIMP n. 2.

<sup>16</sup> Federal Court Case, 12 November 2007, 1A.47/2007.

immunity<sup>17</sup>. The Swiss authorities handed over the objects to Italy<sup>18</sup>, and the art dealers were never considered as holding the objects in good faith.

### 1.B. *The Handing over of a Cultural Property for the Purpose of Forfeiture*

The second way to hand over objects through mutual judicial assistance is provided for by art. 74a of the Mutual Assistance Act. In such a case the handing over is final and it is made specifically for the purpose of forfeiture or return<sup>19</sup>.

According to art. 74a of the Mutual Assistance Act, various types of objects can be handed over, such as the instruments used to commit the offense, the products of or profits from the offense, their replacement value and any unlawful advantage, or gifts and other contributions, which served to instigate the offence or recompense the offender, as well as their replacement value. In the context of trafficking in cultural property, it will often be the product of the offence.

The main condition for this final handing over to the requesting State, is that the requesting State must either benefit from a final decision issued during its own national proceeding or the situation must be clear and unambiguous<sup>20</sup>. This means that the Swiss authorities find the situation so clear that a final decision from the requesting State regarding the objects does not seem necessary for the return. This is the case when there is no doubt about the identification of the object, its provenance and the identity of the owner<sup>21</sup>.

When the Swiss authorities hand over an object to the requesting State through this proceeding, they lose control over the object. It is

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<sup>17</sup> J. CANDRIAN, *L'immunité des Etats face aux droits de l'homme et à la protection des biens culturels: Immunité de juridiction des Etats et droits de l'homme, immunité d'exécution des Etats et de leurs biens culturels*, Schulthess, 2005, n. 150 ff.; BOILLAT, *Trafic illicite de biens culturels*, pp. 197 f.

<sup>18</sup> After this decision, there was still a doubt about the origin of 68 of the seized objects. These cultural goods were eventually restituted to Italy on 14 March 2014. For more information about this case, see <https://www.news.admin.ch/>.

<sup>19</sup> MOREILLON, *Entraide internationale en matière pénale*, ad Art. 74a EIMP n. 7.

<sup>20</sup> ZIMMERMAN, *La coopération judiciaire*, n. 340 ff.; BOILLAT, *Trafic illicite de biens culturels*, n. 703 ff.

<sup>21</sup> Federal Court Case, ATF 123 II 134; BOILLAT, *Trafic illicite de biens culturels*, n. 704.

therefore not a provisional measure such as the handing over of evidence proceeding provided for at art. 74 of the Mutual Assistance Act<sup>22</sup>.

The Federal Court case dating April 1997 is a good example of the final handing over proceeding<sup>23</sup>. In this case, a stolen painting was handed over to France without a final decision by the French authorities as there was no doubt on the identity of the previous owner of the object and the fact that the painting was stolen from a specific castle in France. Moreover, the person in possession of the painting in Switzerland was not able to make his good faith acquisition likely and the painting was therefore returned. The Swiss authorities directly returned the painting to the previous owner in France.

A second very well known example is a Federal Court case dated June 1997<sup>24</sup>. In this case, relating to the Italian trafficker Medici<sup>25</sup>, Italy was requesting the handing over of 3.000 archeological objects that were located in the free ports in Geneva. After a few exchanges between the Swiss and the Italian authorities, Italy transmitted a scientific report identifying the archeological objects as coming from a specific place in Italy. However, according to the Swiss authorities, this report wasn't sufficient to establish without doubt the origin of these objects and the identity of the owner. The Italian authorities then requested the handing over of the objects as evidence for their proceeding. Finally, the Swiss authorities transferred the entire criminal procedure to Italy because the case presented more connection with Italy than Switzerland. This led to the conviction of Medici after a long and very public court case.

The difficulty with excavated objects is that the provenance is rarely clear and unambiguous. There are always issues of evidence regarding the origin and ownership of the objects. Therefore, when excavated objects are at issue, the return of the objects to the requesting State can be lengthier since final decision from the requesting State about these questions of origin and ownership will be necessary<sup>26</sup>.

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<sup>22</sup> MOREILLON, *Entraide internationale en matière pénale*, ad Art. 74a EIMP n. 7.

<sup>23</sup> Federal Court Case, ATF 123 II 134; BOILLAT, *Trafic illicite de biens culturels*, n. 710 ff.

<sup>24</sup> Federal Court Case, ATF 123 II 268; BOILLAT, *Trafic illicite de biens culturels*, n. 720 ff.

<sup>25</sup> For details about the case see *infra* in this volume J. FELCH, *Case Studies Involving Antiquities Trafficking Networks*.

<sup>26</sup> BOILLAT, *Trafic illicite de biens culturels*, n. 789.



### *1.C. The Handing over of Cultural property within an Extraordinary Proceeding*

It is worth to mention briefly the handing over of objects in the context of an extradition proceeding. When a State requests the extradition of a person, the objects that are with the person can be handed over as well if they are the product of the crime or can be used as evidence in the proceedings<sup>27</sup>.

The conditions of extradition are generally harder to meet than the conditions of judicial cooperation. It is therefore more complicated to return the objects possessed by the person whose extradition is requested than through a mutual assistance proceeding.

There is a recent example of an extradition proceeding between Russia and Switzerland, where Russia is requesting the extradition of a person arrested in Geneva on 4 September 2013<sup>28</sup>. This person is suspected of being a trafficker in illegally excavated objects in Russia, such as ancient helmets, coins, etc. A total of 700 cultural objects were found in a car at the border of Finland and Russia on 28 October 2009 and the Russian authorities suspect that person to be the head of an important trafficking organization. The suspected person appealed the extradition decision and the procedure is still ongoing.

### *2. The Interaction between the Mutual Assistance Act and the CPTA*

The CPTA was adopted by Switzerland to enforce the 1970 UNESCO Convention. Article 2 CPTA refers directly to the 1970 UNESCO Convention to define cultural property<sup>29</sup>. Thanks to the CPTA, cultural property has become a proper legal concept in Swiss law.

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<sup>27</sup> Art. 59 Mutual Assistance Act and Art. 22 of the Federal Act on International Mutual Assistance in Criminal Matters Act Ordinance (Mutual Assistance Act Ordinance), 24 February 1982 (RS 351.11).

<sup>28</sup> Federal Criminal Court Case, 1 October 2013, RR.2013.7 and Federal Criminal Court Case, 17 February 2013, RR.2013.374.

<sup>29</sup> P. GABUS - M.-A. RENOLD, *Commentaire LTBC: Loi fédérale sur le transfert international de biens culturels*, Schulthess, 2006, ad art. 2 CPTA n. 2 ff.

According to Article 20 CPTA, the competent criminal prosecution authorities can order the seizure of cultural property when there is suspicion that the cultural property was stolen, lost against the will of the owner or illegally imported in Switzerland. Moreover according to article 23 CPTA, mutual judicial cooperation is expressly considered as a tool for the return of illegal cultural property.

The CPTA has adopted specific criminal behaviors in relation with cultural property (Arts. 24 and 25 CPTA). According to Article 24 CPTA:

«1. to the extent that the offense is not threatened by a higher sanction under another provision, punishment of imprisonment up to one year or a fine up to 100.000 Swiss Francs will be imposed on whoever intentionally:

- a) imports, sells, distributes, procures, acquires, or exports cultural property stolen or otherwise lost against the will of the owner;
- b) appropriates excavation finds in terms of Article 724, Swiss Civil Code;
- c) illicitly imports cultural property or incorrectly declares the same during import or transit;
- d) illicitly exports cultural goods listed in the Federal Registry or incorrectly declares the same during export;

2. If the offender acts negligently, the sanction is a fee of up to 20.000 Swiss Francs.

3. If the offender acts on a professional basis, the sanction is jail for up to two years or a fine up to 200.000 Swiss Francs.»

These criminal provisions are subsidiary to the provisions provided for in the Swiss Criminal Code, as the latter applies to any type of goods, including cultural property. This means that if a criminal behavior can be punished with a higher sanction applying the Criminal Code than with the one provided in the CPTA (e.g. theft or handling State property), the Criminal Code will apply.

However, the adoption of the specific criminal provisions on cultural property expands the use of judicial assistance to fight trafficking in cultural property. The CPTA favors the acceptance of judicial cooperation requests by the Swiss authorities as the double jeopardy condition will be more easily satisfied<sup>30</sup>. In fact, the wide range of criminal behaviors sanctioned by the CPTA, such as stealing, looting, illegally exporting, etc., allows more types of behaviors committed abroad to be recognized as unlawful in Switzerland. The respect of the double jeopardy

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<sup>30</sup> BOILLAT, *Trafic illicite de biens culturels*, n. 244.

rule is essential for the Swiss authorities to be able to execute a request of assistance<sup>31</sup>.

The illegal import and export of cultural property is considered as a criminal behavior only under restrictive conditions. According to Article 2 al.5 CPTO, illicit import refers to an import in violation of an agreement in terms of Article 7 CPTA or a measure in terms of Art. 8 al.1 lit.a CPTA. Therefore, a bilateral agreement between Switzerland and another country needs to have been adopted to consider the import of cultural property in Switzerland as a criminal behavior, but only as long as no other additional criminal behavior, such as a theft or looting, is committed (Art. 24 al.1 lit.c CPTA).

Illegally excavated property is well protected by the Criminal Code and the CPTA but issues of evidence remain an obstacle to the restitution even with the likelihood standard. As seen above, the proof of ownership and of origin often slow the proceedings and can even prevent the Swiss authorities to accept a request for judicial assistance<sup>32</sup>.

Finally, it is important to underline that the adoption of specific criminal provisions generally enhances the protection of cultural property.

Cantons are responsible for prosecuting and assessing criminal activities (Art. 27 CPTA). Criminal prosecution authorities can order the seizure of cultural property when suspicion exists that it was stolen, lost against the will of the owner or illicitly imported in Switzerland<sup>33</sup>. Seized cultural property is assigned to the Confederation (Art. 28 CPTA)<sup>34</sup> or returned to the State of ownership (Art. 27 CPTO).

Current proceedings linked to sarcophagi illicitly exported from Lebanon and Turkey and seized at the Freeport in Geneva are a good example of such seizure proceedings, pending final decision on the restitution.

The specialized body of the Federal Office for Culture (Art. 2 al.4 CPTA) is the administrative authority which, among other things, controls

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<sup>31</sup> According to Article 64 of the Mutual Assistance Act, «measures under Article 63 which require the use of procedural compulsion may be ordered only if the description of the circumstances of the case indicates that the offence being prosecuted abroad contains the objective elements of an offence under Swiss law». This is called the double jeopardy condition.

<sup>32</sup> Federal Court Case, 12 November 2007, 1A.47/2007; Federal Court Case, ATF 123 II 268.

<sup>33</sup> GABUS - RENOLD, *Commentaire LTBC*, ad Art. 20 CPTA n. 4 ff.

<sup>34</sup> GABUS - RENOLD, *Commentaire LTBC*, ad Art. 28 CPTA n. 3 ff.

the execution of the CPTA in Switzerland. Its specific tasks are described at Article 18 CPTA and they include advising federal and cantonal authorities on issues related to the transfer of cultural property, representing Switzerland *vis-à-vis* with foreign authorities, informing persons active in the art trade and auctioning business as well as all interested persons on issues of transfer of cultural property.

To conclude, it is worth mentioning that since the CPTA entered into force, the number of so-called voluntary restitutions has widely increased. The adoption of specific criminal provisions on cultural property and the fact that behaviors committed by negligence are sanctioned probably encouraged private persons, art dealers, auction houses and collectors to voluntarily retribute potential 'hot potatoes'. Moreover, the adoption of the CPTA has raised awareness with the Swiss population on the importance of protecting cultural heritage and fighting against trafficking in cultural property. A few recent examples, include a funeral high-relief returned by a private collector to Italy in October 2012<sup>35</sup>, four pre-Columbian ceramic objects returned to Peru by a Swiss resident in August 2012<sup>36</sup>, a stolen funeral high-relief returned to Egypt by a museum in Basel in June 2011<sup>37</sup>, four pre-Columbian mummies returned to Chile by a Swiss resident in January 2011<sup>38</sup>, a collection of pre-Columbian objects returned to Peru in June 2010 by a Swiss resident<sup>39</sup>, and a stolen marble head returned to Lebanon by an art merchant<sup>40</sup>.

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<sup>35</sup> <https://www.news.admin.ch/message/index.html?lang=fr&msg-id=46252>.

<sup>36</sup> <https://www.news.admin.ch/message/index.html?lang=fr&msg-id=33977>.

<sup>37</sup> <https://www.news.admin.ch/message/?lang=fr&msg-id=39504>.

<sup>38</sup> <https://www.news.admin.ch/message/?lang=fr&msg-id=37303>.

<sup>39</sup> <https://www.news.admin.ch/message/index.html?lang=fr&msg-id=33977>.

<sup>40</sup> <https://www.news.admin.ch/message/index.html?lang=fr&msg-id=33977>.

EFFORTS BY PROSECUTORS AND PRIVATE COUNSELS  
TO RECOVER CULTURAL PROPERTY IN THE UNITED STATES

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1. *Introduction*

Cases addressing art and cultural object recovery often implicate a variety of complex legal issues which practitioners must be prepared to recognize and address. By way of background, I served as a prosecutor at the United States Attorney's Office for the Southern District of New York in Manhattan. I joined Herrick in 2008 to lead the firm's White Collar Criminal Defense Practice, and my expertise often intersects with my colleagues' work in the art and cultural property recovery arenas. There have been numerous occasions where we represented the victim of a cultural or art loss crime, or an individual who had been defrauded in a transaction, and we helped our clients recover property or receive justice for their losses.

Alternatively, we also represent individuals in the art and cultural property worlds who are collaterally involved when there is a crime. These are individuals required to produce documents in response to investigatory subpoenas, or those who do not seek to be contacted but are forced to participate by law enforcement investigators or by victims who demand answers to their questions. In some cases, we represent individuals who are accused of wrongdoing, which provides a much different perspective on the legal issues involved.

## 2. Strategies to Recover Cultural Property in the United States

It has been said that art and cultural property crime is a multibillion-dollar illegal enterprise<sup>1</sup>. One of the largest markets for illicitly obtained art is the United States<sup>2</sup>.

To prosecute this illegal conduct, one of the principal statutory tools employed by US federal authorities is the National Stolen Property Act (NSPA). Although not limited to targeting stolen art and cultural property, the NSPA is routinely used to prosecute the illicit art and cultural property trade. Pursuant to the NSPA, the federal authorities may criminally prosecute anyone who possesses, conceals, sells, receives, or transports stolen goods valued at more than 5.000\$ that have either crossed a State line or a United States boundary line, thereby moving in interstate or foreign commerce<sup>3</sup>. Violations of the NSPA are punishable by imprisonment for up to ten years and monetary fines<sup>4</sup>.

The NSPA actually consists of two statutes codified at Title 18, United States Code, Sections 2314 and 2315. In order to prove a violation of 18 USC § 2314, the Government must prove beyond a reasonable doubt that (i) the goods were stolen, converted, or taken by fraud; (ii) the defendant transported the property or caused the property to be transported in interstate or foreign commerce; (iii) that at the time of the transportation, the defendant knew the property was stolen, converted or taken by fraud; and (iv) that the value of the property was at least 5.000\$<sup>5</sup>. To prove a violation of 18 USC § 2315, the Government must prove many similar elements: (i) that the goods were stolen, converted, or taken by fraud; (ii) that after the property had been stolen, it crossed a boundary of a State or of the United States; (iii) that the defendant received, possessed, concealed, stored, bartered, sold or disposed of the property; (iv) that the defendant knew the property had been stolen, converted or unlawfully taken; and (v)

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<sup>1</sup> FEDERAL BUREAU OF INVESTIGATION, *Art Theft*, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/arttheft](http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft) (last visited 5 February 2014).

<sup>2</sup> T. BISHOP, *Art Investigators: Saving the Country's Cultural Heritage, One Recovered Work at a Time*, in *The Baltimore Sun*, 23 October 2011 ([http://articles.baltimoresun.com/2011-10-23/news/bs-md-history-thieves-20111007\\_1\\_art-theft-art-fraud-investigators](http://articles.baltimoresun.com/2011-10-23/news/bs-md-history-thieves-20111007_1_art-theft-art-fraud-investigators)).

<sup>3</sup> 18 USC §§ 2314-2315.

<sup>4</sup> *Ibidem*.

<sup>5</sup> J.S. SIFFERT ET AL., *Modern Federal Jury Instructions (Criminal Volumes)*, Matthew Bender, 2005 (e-book 2013), § 54.03.

that the value of the property was at least 5.000\$<sup>6</sup>. The knowledge element is of critical importance in a criminal case since the intent of the NSPA is to prosecute those who have engaged in intentional wrongdoing, not those who unknowingly possess stolen property through negligence or inadvertence.

Another useful statute for federal authorities to target illicit art and cultural property trafficking is Title 18, United States Code, Section 545, the Criminal Smuggling Statute, which prohibits any individual from knowingly and willfully smuggling or attempting to smuggle goods into the United States with false or forged documentation regarding such goods<sup>7</sup>. The Smuggling Statute prohibits any individual from fraudulently or knowingly importing any merchandise contrary to law; or receiving, concealing, buying, selling or facilitating the transportation, concealment or sale of such merchandise after its importation; knowing it to have been imported or brought into the United States contrary to law<sup>8</sup>. Pursuant to the Criminal Smuggling Statute, US Customs agents are allowed to seize any item that is smuggled or improperly declared upon its entry into the United States<sup>9</sup>. Violations of this Statute are punishable by fine and imprisonment for up to 20 years<sup>10</sup>.

In addition to these criminal statutes, under US federal civil practice, the Civil Asset Forfeiture Reform Act (CAFRA) generally allows the forfeiture of property connected to criminal actions if that property is (i) contraband, (ii) the instrumentality of a criminal offense, or (iii) property constituting, derived from, or traceable to any proceeds obtained from criminal activity<sup>11</sup>. Thus, on the civil side, CAFRA is one of the main statutes used by federal authorities to forfeit stolen property in the United States. With the exception of a few federal laws that are specifically exempted, CAFRA provides for civil forfeitures initiated pursuant to nearly any federal criminal law, including the NSPA. Accordingly, an individual who transports stolen property across State lines with the knowledge that such property is stolen can be criminally prosecuted under the NSPA, and the stolen property can be forfeited under CAFRA.

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<sup>6</sup> *Ibi*, § 54.06.

<sup>7</sup> 18 USC § 545.

<sup>8</sup> *Ibidem*.

<sup>9</sup> J.A.R. NAFZIGER, *Seizure and Forfeiture of Cultural Property by the United States*, in *Villanova Sports & Entertainment Law Journal*, 1998 (5), pp. 22-23.

<sup>10</sup> *Ibidem*.

<sup>11</sup> 18 USC § 981(a)(1).

In any civil forfeiture action brought under CAFRA, the Government bears the initial burden of showing, by a preponderance of the evidence, that the seized property is subject to forfeiture<sup>12</sup>. For example, to show that particular property is subject to forfeiture under the NSPA, the Government must plead facts to support a reasonable belief that the Government can establish, by a preponderance of the evidence, that (i) the subject property was stolen; (ii) the subject property remained stolen at the time of import into the United States; and (iii) the claimants knew the property was stolen<sup>13</sup>.

The alleged owner, however, may defeat a CAFRA claim by taking advantage of the ‘innocent owner’ defense<sup>14</sup>. The party asserting the innocent owner defense must then carry the burden of proof and must establish the defense by a preponderance of the evidence. As defined in the statute, an «innocent owner» with a property interest «in existence at the time [of] the illegal conduct» is one who either (i) «did not know of the conduct giving rise to [the] forfeiture»; or (ii) «upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property»<sup>15</sup>. Where the property interest is acquired after the conduct giving rise to the forfeiture has taken place, an «innocent owner» is one who, «at the time that [the] person acquired the interest in the property», was «a *bona fide* purchaser or seller for value» and «did not know and was reasonably without cause to believe» that the property being acquired was subject to forfeiture<sup>16</sup>. If the claimant can establish the innocent owner defense, then he or she defeats the Government’s CAFRA forfeiture suit.

Besides CAFRA forfeiture actions, the Government may also initiate non-CAFRA forfeiture actions pursuant to Title 19, United States Code, Section 1595a, a customs statute that authorizes the forfeiture of any merchandise that is «stolen, smuggled, or clandestinely imported or introduced» or attempted to be introduced into the United States «contrary to law»<sup>17</sup>. Unlike CAFRA actions, the Government bears a reduced initial

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<sup>12</sup> 18 USC § 983(c).

<sup>13</sup> See *United States v. A 10th Century Cambodian Sandstone Sculpture, Currently Located At Sotheby’s in New York*, New York, 12 Civ. 2600 (GBD), at 11 (S.D.N.Y. Mar. 28, 2013).

<sup>14</sup> 18 USC § 983(d).

<sup>15</sup> 18 USC § 983(d)(2)(A).

<sup>16</sup> 18 USC § 983(d)(3)(A).

<sup>17</sup> 19 USC § 1595a(c).



burden of proof with respect to a non-CAFRA forfeiture action. Once the Government meets the initial burden of proof by showing that there is probable cause to believe that the property at issue is subject to forfeiture, the burden shifts to the possessor of the property to establish by a preponderance of the evidence that the property was not stolen merchandise introduced into the United States contrary to law. In a non-CAFRA forfeiture action, there is no ‘innocent owner’ defense, which is a significant difference from the perspective of a possessor seeking to challenge the forfeiture claim<sup>18</sup>. The fact that he or she may or may not be an innocent owner plays no part, and the fact that an individual may have acquired stolen property by negligence or inadvertence is no help. The possessor will lose the property unless he or she can establish by a preponderance of the evidence that the property was not stolen.

### *3. Pursuit of Stolen Books for the National Library of Sweden*

With this background in mind, we turn to an example of a recent case involving stolen books. Herrick represented the National Library of Sweden (NLS) in its effort to recover books that were stolen from it by a manuscript librarian in the Library. Over the course of approximately ten years, from the early 1990s until about 2004, the manuscript librarian stole more than 60 rare and valuable books from the Library in small batches<sup>19</sup>.

By way of background, the National Library of Sweden operates in a fashion similar to the United States’ Library of Congress. The NLS’s collection of royal books dates as far back as the 1500s, although the NLS was not officially established until 1661. The collection includes rare books consulted by Sweden’s monarchs in making determinations about world exploration, colonization and commerce. Since 1661, one copy of virtually every material published in Sweden has been deposited with the NLS.

Over the course of a decade, the manuscript librarian stole some of Sweden’s rarest books, and then sold them for cash to the Ketterer Kunst auction house in Hamburg, Germany, using a fake name and no

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<sup>18</sup> See *United States v. Davis*, 648 F.3d 84, 93-95 (2d Cir. 2011).

<sup>19</sup> See P. SHALLWANI, *Rare, Stolen Books Returned to Swedes*, in *The Wall Street Journal*, 24 July 2013 ([http://online.wsj.com/news/articles/SB10001424127887324110404578626313392362492?mod=newsreel\\_2](http://online.wsj.com/news/articles/SB10001424127887324110404578626313392362492?mod=newsreel_2)).

identification documents. Apparently, the auction house made no effort to conduct due diligence regarding the provenance or current ownership of the books. Ketterer Kunst then auctioned off the books to the highest bidders around the world<sup>20</sup>.

Eventually, the NLS caught on to the fact that rare books were missing, an investigation commenced, and the manuscript librarian informed a co-worker of his activities. Subsequently, the manuscript librarian was arrested and questioned by Swedish authorities. After he confessed to the thefts, he was released from police custody and committed suicide in his home. The investigation was subsequently closed<sup>21</sup>.

When Herrick was approached by the NLS in 2010, the NLS had located books that it believed belonged to its collection on sale at various booksellers in New York and other States, and sought our help to recover these books. We reviewed all the available options in developing a strategy. One option was to bring civil lawsuits against the possessors of the books in various courts. Another option, the one we ultimately pursued, was to work with the US Attorney's Office and Federal Bureau of Investigation (FBI) to recover these books.

One of the reasons we chose to pursue the latter option was the expense of litigation. While the books were exceedingly rare, even the most expensive book was valued at a relatively modest price. Thus, it would have been prohibitively expensive for the NLS to bring individual lawsuits against particular booksellers for each missing book. In addition, we knew that having government law enforcement authorities and public prosecutors track down the books would place greater pressure on the possessors to 'do the right thing' and likely achieve the best results for our client.

The involvement of law enforcement provides more leverage since, with the threat of criminal prosecution lurking in the background, people are more likely to consider returning the books when they receive a call or visit from the US Attorney's Office or the FBI than a call from a private attorney. Nonetheless, there are also potential negative consequences that have to be taken into consideration, including a loss of control. While the client's singular goal was to recover the books, the federal authorities'

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<sup>20</sup> *Ibidem*.

<sup>21</sup> See R. MARTIN, *Swedish Librarians Find Stolen Atlas in New York*, in *The Local*, 19 July 2011 (<http://www.thelocal.se/20110719/35034>).

potential prosecution of the current possessor could mean that recovery of books would take longer.

Ultimately, we recovered three books located in the United States. One book, the *Wytfliet Atlas*, one of only nine known copies in existence, was published in 1597 and was returned by the bookseller to an auction house where he had purchased it<sup>22</sup>. The auction house then in turn returned the atlas to the NLS.

In July 2013, two additional books belonging to the NLS were recovered after a different bookseller, who had sold the books to his customers, received a visit from an FBI agent. Since he did not want to be involved in selling stolen property, the bookseller voluntarily purchased the two books back from his clients at his own expense, and returned them to the NLS at no charge<sup>23</sup>. The bookseller cooperated fully with federal authorities and received a special medal from the NLS, honouring and commending him for his contribution to society.

There remain other books in the United States that the NLS is still trying to locate, and we are trying to convince additional people to do the right thing and help us recover them<sup>24</sup>.

#### 4. Recovery of a Dinosaur

As previously discussed, another way that the US Government assists in the fight against the growing illegal art and cultural property market is the use of civil forfeiture actions to recover stolen property and return it to its rightful owner. In a recent forfeiture case that was closely watched, partly because of the unusual object in question, federal prosecutors in New York filed a civil forfeiture lawsuit in June 2012 seeking to return to the country of Mongolia a 70-million-year-old skeleton of a *Tyrannosaurus Bataar* dinosaur that was allegedly discovered in

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<sup>22</sup> P. COHEN, *Swedes Find Stolen Atlas in New York*, in *The New York Times*, 26 June 2012 ([http://www.nytimes.com/2012/06/27/books/swedish-royal-library-recovers-stolen-1597-atlas-in-new-york.html?\\_r=0](http://www.nytimes.com/2012/06/27/books/swedish-royal-library-recovers-stolen-1597-atlas-in-new-york.html?_r=0)).

<sup>23</sup> P. COHEN, *National Library of Sweden to Recover Stolen Books*, in *The New York Times*, 13 July 2013 (<http://artsbeat.blogs.nytimes.com/2013/07/23/national-library-of-sweden-to-recover-stolen-books/>).

<sup>24</sup> A list of the stolen books can be found at <http://www.wytflietatlas.com/>.

1946<sup>25</sup>. In May 2012, the skeleton was slated to sell at auction for 1.05 million dollars, but before the auction was completed, the Government of Mongolia claimed that the bones were stolen<sup>26</sup>.

The skeleton's importer, Eric Prokopi, a self-described 'commercial palaeontologist', intervened in the civil forfeiture action and filed a motion to dismiss, arguing that Mongolia has no law declaring bones to be State property<sup>27</sup>. However, what began as a civil forfeiture case suddenly became a criminal case in October 2012 when Prokopi was arrested and charged with conspiracy to smuggle illegal goods and make false statements, smuggling goods into the United States, and the interstate sale and receipt of stolen goods<sup>28</sup>.

In November 2012, the US District Court for the Southern District of New York denied Prokopi's motion to dismiss the civil forfeiture complaint<sup>29</sup>, and the following month, Prokopi withdrew his civil claim in the forfeiture proceeding, and pled guilty to smuggling the bones, in a bid to reduce a potential 17-year prison sentence. The Court entered a default judgment in favour of the US Government in the civil forfeiture case, and the property was forfeited to the US Government on 14 February 2013<sup>30</sup>, clearing the way for the dinosaur to be returned to Mongolia. In May 2013, the skeleton, along with additional dinosaur fossils the U.S. government had recovered, were formally repatriated to Mongolia.<sup>31</sup>

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<sup>25</sup> Complaint, *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC) (S.D.N.Y. June 18, 2012); see also US ATTORNEY'S OFFICE (press release), *Manhattan U.S. Attorney Announces Action Seeking Forfeiture of Tyrannosaurus Bataar Dinosaur Skeleton Looted from the Gobi Desert in Mongolia*, 18 June 2012 (<http://www.justice.gov/usao/nys/pressreleases/June12/tyrannosaurusbataarcivilfofeiturecompla int.html>).

<sup>26</sup> K. KAZAKINA, *Tyrannosaurus Bataar Sale After Judge Orders Auction Halt*, in Bloomberg, 21 May 2012 (<http://www.bloomberg.com/news/2012-05-21/tyrannosaurus-bataar-auction-ordered-halted-by-texas-judge.html>).

<sup>27</sup> S.D. FELDMAN, *Highlights of Selected Criminal Cases Involving Art & Culture Objects: 2012*, in *Art & Advocacy: The Art Law Newsletter of Herrick, Feinstein LLP*, Spring 2013, Vol. 14 (<http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=13339&print=1>).

<sup>28</sup> *Ibidem*.

<sup>29</sup> *Ibidem*.

<sup>30</sup> Default Judgment, *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC) (S.D.N.Y. Feb. 14, 2013).

<sup>31</sup> US IMMIGRATIONS AND CUSTOMS ENFORCEMENT (news release), *ICE and Manhattan U.S. Attorney's Office return Tyrannosaurus Bataar skeleton to Mongolia*, 5 June 2013,

## 5. *Lessons for Practitioners*

Mr. Prokopi's case illustrates a conundrum periodically faced by defense attorneys in civil forfeiture cases. Because the US Attorney's Office has the ability to bring a criminal case in appropriate circumstances, the US Department of Justice often has far more leverage in a negotiation than does the importer or purported owner of the piece at issue.

The client may wish to contest whether civil forfeiture is appropriate. However, if it can find a non-frivolous basis, the US Attorney's Office can threaten to bring criminal charges against the client if he or she does not consent to forfeiture. Where a piece is forfeited, the client is only out the value of the object. But if a criminal case is instituted, the client is faced with a criminal felony record and possible imprisonment. With such great leverage, the US Attorney's Office often obtains the object it seeks to have forfeited and returned.

When we represent the possessor of the property, we often feel it is unjust for the prosecutors to tie an outcome in the civil forfeiture case to an outcome in a criminal case. As a matter of justice, we argue that each matter should stand on its own. The individual should have the right to challenge a civil forfeiture action without the risk that exercising one's rights to fight the forfeiture action might result in an onerous criminal action. Similarly, if there is an appropriate basis to bring a criminal action, prosecutors should not forego the criminal action because a wrongdoer agrees to give up contested property. Yet, we have seen US federal prosecutors tie these two issues together. They express a willingness to bring a technical criminal case, one that would not warrant prosecution standing alone, unless the claimant gives up his or her claims to the property. Similarly, they agree to cut off the pursuit of a criminal investigation if a client chooses not to pursue a claim to the property at issue. As a practical matter, in order to avoid possible criminal charges, the claimant must drop his or her claims to the contested property regardless of the strength of the defense to the civil forfeiture matter.

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(<https://www.ice.gov/news/releases/ice-and-manhattan-us-attorneys-office-return-tyrannosaurus-bataar-skeleton-mongolia>).



STOLEN ANTIQUITIES, WAR CRIMES AND ASSET RECOVERY:  
PROTECTING CULTURAL HERITAGE AS A COMMON GOOD  
OF HUMANITY AND THE CHALLENGES  
FOR GLOBAL CRIMINAL JUSTICE

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Art is often a forgotten victim of wars. As the toll of human suffering builds, worrying about the fate of paintings, sculptures, and antiquities might seem frivolous, even callous. But there is good reason to care about preserving culture both in conflict and after. The theft and destruction of cultural objects harm humanity by depriving us all of the valuable historical lessons that the archaeological study of antiquities may impart, and harm private and State owners of cultural property, who suffer both financial loss and loss of their nation's cultural heritage. There are plenty of proponents of this view, including among Governments. For instance, the upcoming movie *Monuments Men*, starring George Clooney<sup>1</sup>, tells the true story of the group of individuals tasked by the US Government and its allies during World War II with finding art stolen by the Nazis and returning it to the rightful owners. Today, these efforts continue – and they are not limited to those in uniform – but have spread to civilians, non-governmental organizations, and even a specialized United Nations agency, to help preserve our common humanity and culture.

### 1. *History*

Society has long understood that the destruction and looting of cultural property are unfortunate collateral effects of civil strife. And though archeologists and historians have long lamented the loss of architectural icons and priceless art, only within the last few centuries have

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<sup>1</sup> *The Monuments Men*, by George Clooney, USA-Germany, 2014, 118'.

political and military leaders begun to take measures to protect cultural property.

The looting of cultural goods has been common feature of war since at least Roman times<sup>2</sup>. For many Romans, destroying an enemy's architecture and plundering its wealth was not only lucrative but also a symbol of their victory. Though rulers and officials acquired most of the goods, some fell into private hands. After Rome fell, Europeans carried on Rome's practices for hundreds of years, pillaging the churches, libraries, and palaces of oppositional forces.

It was during the Napoleonic Wars of the early 19<sup>th</sup> Century that the plundering norm came into question. According to reports, France had established organizations to supervise and direct the looting of conquered nations' cultural objects, in particular Italian masterpieces, in the hopes of making Paris the cultural hub of the world. According to scholars, German States, Austria, Russia, and England, among others, responded by demanding that France return its ill-gotten gains. Though France ultimately did not return the cultural objects from Paris to their rightful owners, the negative reaction of the victimized nations fostered a new norm against Roman-style plundering.

Over the next century, wars across the globe incited debates over private and public plundering. In particular, the destruction wrought by World War I incited new global conversations about means to shelter cultural objects from civil unrest. Nations that suffered great cultural losses in the war, such as France and Belgium, condemned the damage to their artwork and historical sites by the German military, and called upon Germany to replace that which had become a casualty of war. Some Allied nations further asserted that Germany's destruction of the university library in Louvain, Belgium, founded in 1426, and damage to Notre-Dame Cathedral in Paris, constituted war crimes.

In light of these frustrations, following World War I, the international community, under the flag of the League of Nations, undertook the first significant steps to bolster norms against the destruction and looting of cultural objects. The League's Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the Roerich Pact), the International Museum Organization (IMO) Draft Convention, and the Draft Rules of Aerial Warfare prohibited States from destroying

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<sup>2</sup> The information in this section comes primarily from W. SANDHOLTZ, *Prohibiting Plunder: How Norms Change*, Oxford University Press, 2007.



cultural sites and looting objects. These agreements required State Parties to protect historical and cultural property during times of war and refrain from plundering. For example, the Draft Rules of Aerial Warfare required commanders to «spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes [and] historic monuments» (Article XXV).

During World War II, General Dwight D. Eisenhower, then Supreme Allied Commander for Europe, took note of the developing norm of preserving cultural heritage and undertook meaningful steps to protect, preserve, and repatriate cultural property. Led by American and British soldiers, the Monuments, Fine Arts, and Archives Section of the Allied military effort included a collection of 345 men and women from 13 countries who recovered thousands of stolen artworks between 1943 and 1951, including works by Johannes Vermeer, Leonardo da Vinci, and Michelangelo. Their efforts helped preserve Europe's cultural identity and provided a foundation upon which the European societies could rebuild.

The second half of the 20th Century saw the establishment of international agencies, partnerships, and mechanisms, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), which all aim at protecting the world's cultural heritage. Countless Member States of the newly founded United Nations became party to the 1954 UNESCO Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and, in time, to its two (1954 and 1999) Protocols. These international agreements are still in force today.

By becoming a party to the Convention and its Protocols, States signaled their commitment to protecting cultural property during armed conflicts and taking individual responsibility for the preservation of such property through means specified in the agreements. The Hague Convention and the First Protocol prohibit Parties from destroying cultural property during armed conflicts and require them to safeguard cultural property within their own territories. It also designates a symbol with which Parties can identify property that is to be immune from destruction.

The Second Protocol to the Convention enhances the means of protection utilized by States to ensure the immunity of cultural goods and architecture during times of unrest and also provides for criminal sanctions for violations of this immunity or other serious violations of the protocol's provisions. Furthermore, it establishes a Committee for the Protection of

Cultural Property in the Event of Armed Conflict, which identifies particular cultural goods that require «enhanced protection».

Two other international agreements, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, also work to protect cultural heritage. The 1970 Convention was drafted in response to a notable increase in thefts of property from museums and cultural sites during times of peace. It obligates its 125 State Parties<sup>3</sup> to undertake preventive measures, assist in the restitution of stolen property, and cooperate with other State Parties to achieve the Convention's goals. According to UNESCO, the 2001 Convention provides protection for submerged cultural property, such as ancient shipwrecks and sunken ruins.

Finally, for property that does not fall within the scope of the aforementioned agreements, UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, in 1978. The Committee serves as a platform for discussions and negotiations of restitution of cultural property. States may call upon the Committee to provide non-binding advisory opinions on restitution issues.

## *2. Combating the Destruction and Illicit Trade of Cultural Property*

As recent events in Syria have made clear, the plundering of goods and the destruction of archeological sites during armed conflicts are still major concerns. First, plundering and illicit trade present significant challenges to preservation of cultural heritage. Moreover, illicit trade networks, which facilitate the exchange of trafficked persons and wildlife, ill-gotten funds, and cultural objects, allow corrupt leaders and officials to retain and grow their power.

Second, according to some scholars, illicit trade may help fund militant and terrorist organizations<sup>4</sup>. It is expected that militant groups and

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<sup>3</sup> Pending the publication of the present volume, State Parties to the 1970 UNESCO Convention have become 127, with the addition of Bahrain and Chile in 2014 (<http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E>) [editors' note].

<sup>4</sup> See, e.g., M. BOGDANOS, *Opinion: Illegal Antiquities Trade Funds Terrorism*, on

corrupt governments have come to see the illicit trade of antiquities as a source of funding. For example, experts report that the Khmer Rouge decimated ancient sites in Cambodia during the Civil War in search of cultural goods to sell on the antiquities market. The funds gained from the sale of the goods allegedly helped finance the violent regime<sup>5</sup>.

Allegedly, terrorists have also turned to trading cultural goods in light of international actions that have frozen their assets and ability to receive funds from outside groups. Though there is little hard evidence to connect illegal sale of cultural goods and terrorism, anecdotal evidence from war-torn countries like Iraq have put forth the terrorism-antiquities connection. At least one US military member has asserted, «[A]s security forces pursue leads for weapons and insurgents, they find antiquities»<sup>6</sup>. In light of these concerns, the domestic Governments and the international community are working more than ever to combat the destruction, looting and trade of cultural property.

### 3. Restitution of Stolen Goods

One means to combat illicit trade is to prevent further exchanges of stolen goods. When looters plunder cultural objects, they are sometimes traded on the black market and, at other times, publicly in auction houses. According to a Cambridge University study, nearly 90% of the objects at auction houses are illicitly obtained<sup>7</sup>. In recent years, domestic Governments and international partners have increasingly collaborated to remove stolen treasures from the market and return them to their rightful owners.

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*CNN.com*, 7 July 2011 (<http://edition.cnn.com/2011/WORLD/meast/07/07/iraq.looting.bogdanos/>); see also *Todespilot Atta Wollte Terroranschläge vom 11. September 2001 durch illegalen Kunsthandel finanzieren*, in *Der Spiegel*, 16 July 16 2005 (<http://www.spiegel.de/spiegel/vorab/a-365376.html>).

<sup>5</sup> T. DAVIS, *Cambodia's Looted Treasures*, in *Los Angeles Times*, 25 April 2012 (<http://articles.latimes.com/2012/apr/25/opinion/la-oe-adv-davis-khmer-loot-sothebys-20120425>).

<sup>6</sup> M. BOGDANOS, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqi Antiquities*, in *Fordham Law Review*, 2007 (31), p. 725, at p. 730.

<sup>7</sup> C.D. STEELE IV, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, in *Suffolk Transnational Law Review*, 2000 (23), p. 667, at p. 668.

The United States recently helped achieve two high-profile restitutions. In the first case, the United States Government ended a legal battle to wrestle a thousand-year-old Cambodian statue valued between two and three million dollars from Sotheby's auction house<sup>8</sup>. Archeologists asserted the statue was stolen during the tumult of the Cambodian civil wars in the 1970s. This past December, Sotheby's, its client selling the statue, and US federal officials brokered an agreement to send the statue back to Cambodia.

Another notable successful restitution took place in mid-January 2014; the United States worked with INTERPOL to return 1.5 million dollars in art stolen from India in 2009<sup>9</sup>. Among the returned items was an 800 year-old, massive sandstone sculpture featuring the deities Vishnu and Lakshmi that had been on INTERPOL's Top 10 stolen works of art.

Admirable national-led efforts like these seek to deter looters from plundering in the first place, while pressuring legitimate businesses from turning a blind eye; they reprehend those falsely alleging to be *bona fide* owners of the objects and shame the businesses engaging in illicit trade. Moreover, the discovery and return of the goods serves as a prime example of the promising results of domestic and international coordination, while highlighting and strengthening the rule of law among nations.

#### 4. *Looting and the 'Arab Spring'*

Another means to combat illicit trade in antiquities is to prevent looting in the first instance – and to draw immediate, global attention to objects that have been stolen. During the so-called 'Arab Spring,' which has caused a wave of instability and political turmoil throughout the Middle East and North Africa, the international community has come together to prevent the looting of priceless cultural property in regions known for their wealth of archaeological sites.

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<sup>8</sup> T. MASHBERG - R. BLUMENTHAL, *Disputed Statue to Be Returned to Cambodia*, in *New York Times*, 12 December 2013 (<http://www.nytimes.com/2013/12/13/arts/design/disputed-statue-to-be-returned-to-cambodia.html>).

<sup>9</sup> T. MASHBERG, *Federal Officials Return Looted Antiquities to India*, in *New York Times*, 14 January 2014 (<http://artsbeat.blogs.nytimes.com/2014/01/14/federal-officials-return-looted-antiquities-to-india/>).

## 5. Iraq

The political instability, lack of security, and poverty experienced in Iraq immediately after the 2003 invasion by the USA was «pretty close to a perfect storm», allowing widespread plundering and destruction of cultural property<sup>10</sup>. Among the most devastating of losses was the theft of approximately 15.000 objects from the Iraq National Museum<sup>11</sup>. The Iraq National Library and Archives were also looted and burned, along with the Mosul Museum, the Museum of Fine Art in Baghdad, and university libraries throughout the country<sup>12</sup>.

In effort to help recover stolen goods, ICOM drew up an *Emergency Red List of Iraqi Antiquities at Risk* in 2003. The *Red List* is an initiative that notifies law-enforcement personnel, customs inspectors, art dealers, auction houses, and museums around the world of the types of pilfered objects that may be on the market and moving through legitimate shipping channels. The *Red List* includes nearly every object imaginable, such as ancient writings, vessels, coins, stamps, sculptures, and accessories. The idea is that giving notice helps prevent stolen objects from becoming ill-gotten spoils of war.

*Red Lists* have been created before for other countries. In the past five years, lists have helped French officials identify and recover cultural goods from Iraq and Togo. In 2007, Switzerland stopped the illegal online sale of a cuneiform tablet, one of the earliest examples of written language, thought to have been smuggled out of Iraq<sup>13</sup>. In 2013, US customs inspectors recovered and returned stolen Afghan items, including a Roman wine pitcher, taken by looters<sup>14</sup>. Like the *Red Lists* created for other countries, the *Red List* for Iraq recommends measures international that

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<sup>10</sup> S. BREITKOPF, *Lost: The Looting of Iraq's Antiquities*, in *History News Network*, 1 January 2007 (<http://historynewsnetwork.org/article/33842>).

<sup>11</sup> See generally, BOGDANOS, *supra*, note 6.

<sup>12</sup> M. GIBSON, *Cultural Tragedy in Iraq: A Report on the Looting of Museums, Archives, and Sites*, in *IFAR Journal*, 2006 (3), available at [https://www.ifar.org/upload/pdf/file8470e61407a5fdifar\\_iraqtragedy.pdf](https://www.ifar.org/upload/pdf/file8470e61407a5fdifar_iraqtragedy.pdf).

<sup>13</sup> See *eBay Iraq Relic Auction Stopped*, in *BBC News*, 18 December 2007 (<http://news.bbc.co.uk/2/hi/europe/7150622.stm>).

<sup>14</sup> See *US Returns Looted Artifacts to Afghanistan*, in *The News International*, 10 September 2013 (<http://www.thenews.com.pk/article-117516-US-returns-looted-artifacts-to-Afghanistan-->).

domestic actors can undertake to identify stolen antiquities and halt the illegal sale and trade of the cultural goods.

Thanks to the *Red List*, ICOM, UNESCO, INTERPOL, and nations such as Germany, Britain, and the USA, thousands of Iraqi cultural goods have been recovered<sup>15</sup>. One of the most highly publicized acts of restitution was the return of a 4.000 to 5.000 year-old necklace that had been auctioned off at Christie's for 100.000\$ in 2007<sup>16</sup>. It is such acts of restitution that ICOM *Red Lists* hope to bring about.

Today, many Iraqi archeological sites are reportedly left unattended, which has left the door open for looters<sup>17</sup>. Until 2008, responsibility for protecting the thousands of archeological sites in Iraq rested in large part with the Federal Protection Police, who were backed by the US Military<sup>18</sup>. Since the departure of US troops, the Federal Protection Police shifted their focus primarily to protecting government buildings. The job of protecting archeological sites was entrusted solely to the Iraqi Antiquities Board, a notoriously underfunded board<sup>19</sup>. The combination of a lack of resources and civil unrest has left Iraq's treasures prey to looters. Still, the international community hopes the cooperative efforts of the world's nations will prevent the illicit trade of stolen Iraqi antiquities.

## 6. Libya

Libya's treasures also fell victim to social upheaval during its civil uprising. Amidst the chaos of its revolution in 2011, looters ransacked a commercial bank in Benghazi, taking a collection of gold and silver coins, beads, agate necklaces, earrings, and bronze statues. To help prevent future losses, in Fall 2013, UNESCO and the Department of Antiquities of Libya gathered Libyan police, government workers, and civil society actors for a

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<sup>15</sup> M. AL-MULHIM, *Museum Official Says Iraq Recovered 3,500 Antiquities Since 2003*, in *Al-Shorfa*, 19 February 2011 ([http://mawtani.al-shorfa.com/en\\_GB/articles/iii/features/iraqtoday/2011/02/20/feature-04](http://mawtani.al-shorfa.com/en_GB/articles/iii/features/iraqtoday/2011/02/20/feature-04)).

<sup>16</sup> M. VAN DER VAART, *Iraqi Antiquities Looted in War Returned*, in *The Washington Times*, 7 July 2011 (<http://www.washingtontimes.com/news/2011/jul/7/antiquities-looted-in-war-returned/?page=all>).

<sup>17</sup> S.L. MYERS, *Iraq's Ancient Ruins Face New Looting*, in *The New York Times*, 25 June 2010 ([http://www.nytimes.com/2010/06/26/world/middleeast/26looting.html?\\_r=0](http://www.nytimes.com/2010/06/26/world/middleeast/26looting.html?_r=0)).

<sup>18</sup> *Ibidem*.

<sup>19</sup> *Ibidem*.

ten-day workshop on how to protect cultural sites and stop illicit trade of antiquities<sup>20</sup>. Such trainings are seen as crucial to implementing measures to prevent culture-loss.

## 7. Egypt

The looting of Egypt's treasures during the 'Arab Spring' has been well documented. Early on in the conflict in 2011<sup>21</sup>, archeologists called on then-Prime Minister Essam Sharaf to police cultural sites in the nation. The Egyptian Government made some efforts to combat the culture-loss: in March 2011, Egyptian police and military assisted an archaeological mission move thirty trucks-worth of antiquities from that storehouse to the Egyptian Museum in Cairo<sup>22</sup>. Yet, when the military deserted the sites to take care of «other tasks»<sup>23</sup>, widespread looting and damages occurred. Tomb-raiders desecrated the resting place of the royal scribe Ken Amun, who lived during the 13<sup>th</sup> Century b.C. At about the same time, storehouses at the 4.500 year-old necropolis Abusir were plundered<sup>24</sup>.

In light of the civil unrest, the international community stepped in to assist Egypt to protect its invaluable cultural property. In 2012, the International Council of Museums (ICOM) launched the *Emergency Red List of Egyptian Cultural Objects at Risk*. Upon publication in 2012, ICOM stressed Red List is far from exhaustive, in light of the diversity and breadth of Egypt's vulnerable cultural objects.

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<sup>20</sup> The UNESCO's Workshop for the Libyan Police on the Prevention and Fight Against Illicit Trafficking of Cultural Property was held in Shahat from 17 to 26 November 2013 (<http://en.unesco.org/events/workshop-libyan-police-prevention-and-fight-against-illicit-trafficking-cultural-property>).

<sup>21</sup> R. LORENZI, *Vandals Looting Unguarded Egyptian Antiquities*, in *NBC News*, 10 March 2011 ([http://www.nbcnews.com/id/42012644/ns/technology\\_and\\_science-science/t/vandals-looting-unguarded-egyptian-antiquities/#.VGR0GfmG-fw](http://www.nbcnews.com/id/42012644/ns/technology_and_science-science/t/vandals-looting-unguarded-egyptian-antiquities/#.VGR0GfmG-fw)).

<sup>22</sup> N. EL-AREF, *Egypt's Antiquities Moved for Fear of Looting*, in *Ahram Online*, 6 March 2011 (<http://english.ahram.org.eg/NewsContent/9/40/7070/Heritage/Ancient-Egypt/Egypt-antiquities-moved-for-fear-of-looting.aspx>).

<sup>23</sup> Minister of Antiquities Zahi Hawass as quoted in LORENZI, *supra*, note 21.

<sup>24</sup> A.R. WILLIAMS, *City of the Dead*, in *National Geographic*, 31 January 2011 ([http://news.nationalgeographic.com/news/2011/01/pictures/110131-egyptian-museum-looted-artifacts-damaged-egypt-protests-mubarak/#/egyptian-museum-artifacts-looted-damaged-square\\_31832\\_600x450.jpg](http://news.nationalgeographic.com/news/2011/01/pictures/110131-egyptian-museum-looted-artifacts-damaged-egypt-protests-mubarak/#/egyptian-museum-artifacts-looted-damaged-square_31832_600x450.jpg)).

The international community has also offered assistance in the wake of more recent clashes in Egypt. In response to the August 2013 looting of the Malawi National Museum, UNESCO offered to mobilize partner organizations, like ICOM, and provide Egypt with technical support to locate stolen antiquities<sup>25</sup>.

Thanks to Egyptian and international efforts, 589 of the 1.089 objects stolen from the Museum were recovered by Egyptian Police about one month later. In January 2014, the Museum of Islamic Art in Cairo was heavily damaged by a truck bomb blast aimed at nearby police headquarters. The blast destroyed 74 precious artifacts, left 90 in disrepair, and caused millions of dollars of damage<sup>26</sup>. Immediately following the blast, UNESCO sent in a team of experts to inspect the damage and agreed to donate 100.000\$ to help restore the museum. The United States also pledged to contribute approximately 140.000\$ to assist in the rebuilding of the museum.

The extent of the culture-loss Egypt will experience in the coming years is unclear. What is, however, certain is that many in the world are watching with bated breath, ready to assist Egypt in preserving its cultural property.

## 8. Syria

Today, one of the most pressing conversations is about how to protect priceless cultural property in war-torn Syria. Syria is rich with ancient and medieval treasures: Greek and Roman cities, Byzantine villages, Bronze and Iron Age sites, centuries-old castles, and ornate Islamic art and structures. Regrettably, the US State Department says that nearly 90% of these invaluable historical sites and objects are within areas of conflict.

As in other 'Arab Spring' nations, looters have taken note of the opportunity presented to them and have ruthlessly pillaged Syrian cultural

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<sup>25</sup> See *UNESCO Director-General Deplores Damage to Cultural Heritage in Egypt*, press release of 19 August 2013 ([http://www.unesco.org/new/en/media-services/single-view/news/unesco\\_director\\_general\\_deplores\\_damage\\_to\\_cultural\\_heritage\\_in\\_egypt/#.VGR3dvmG-fw](http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_deplores_damage_to_cultural_heritage_in_egypt/#.VGR3dvmG-fw)).

<sup>26</sup> S. GAUCH, *Triage for Treasures after a Bomb Blast*, in *The New York Times*, 31 January 2014 (<http://www.nytimes.com/2014/02/01/arts/design/sorting-through-the-rubble-of-museum-of-islamic-art-in-cairo.html>).



sites, seeking to sell treasures on the black market. Just last spring, a cobblestone, columned street built by Roman emperor Marcus Aurelius in the city of Apamea was plundered and damaged. Architectural gems have also fallen prey to armed conflict. In April 2013, the nearly 1.000-year-old minaret of Aleppo's Umayyad mosque collapsed during an intense battle.

UNESCO has said the threats of looting and destruction are «extremely dangerous» and «lethal» to Syria's cultural heritage<sup>27</sup>. This is worrisome because the preservation of Syria's cultural heritage is critical to its reconstruction, reconciliation, and re-building of civil society. Historical sites and objects «are a part of Syrian life – a source of pride and self-definition for their present and future». Losing its cultural history would rob Syria of the economic opportunities linked to tourism and cultural preservation. For example, in 2010, tourism accounted for 12% of the country's GDP and employed 11% of its workers<sup>28</sup>.

The threat of culture loss has moved Syria and the international community to act. The Syrian government transported the contents of 34 of its premiere museums to so-called «safe havens»<sup>29</sup>. At a gathering this Fall in New York, UNESCO, the US Department of State, and ICOM announced the publication of the *Emergency Red List of Syrian Cultural Objects*. As with other *Red Lists*, it is intended to keep things where they belong and return stolen goods to their rightful places. In recent weeks, the international community has taken additional steps to protect Syria's cultural property. For example, the European Union donated 2.5 million € (approximately US 3.4 million \$) to gather information on culture-loss in Syria, combat the illicit trade of stolen antiquities, and raise awareness of the issue<sup>30</sup>. It is the hope that these efforts will shelter and protect Syria's priceless cultural gems.

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<sup>27</sup> E.M. LEDERER, *UN Says Illegal Excavations in Syria are 'Lethal'*, in *NorthJersey.com*, 5 February 2014 (<http://www.northjersey.com/news/world/un-says-illegal-excavations-in-syria-are-lethal-1.674458>).

<sup>28</sup> A.F.P., *Conflict Decimates Syria Tourism: Official Report*, in *Al Arabiya News*, 29 August 2012 (<http://www.alarabiya.net/articles/2012/08/29/235010.html>).

<sup>29</sup> *Ibidem*.

<sup>30</sup> M. NICHOLS, *United Nations Thanks Hollywood Amid Fight to Save Syria's Heritage*, in *Reuters US Edition*, 5 February 2014 (<http://www.reuters.com/article/2014/02/05/us-syria-crisis-un-hollywood-idUSBREA1422720140205>).

## 9. *Other Global Efforts to Fight Illicit Trade*

Another important way the international community protects cultural heritage is by sharing best practices and generating cooperative networks through which domestic Governments can collaborate. In the same month ICOM released the *Emergency Red List of Syrian Cultural Objects* in New York in September 2013, halfway around the world political leaders at the Asia-Pacific Economic Cooperation (APEC) Pathfinder Dialogue in Bangkok met to discuss the global fight against illicit trade and corruption. Dialogue participants shared their best practices and agreed to support the drafting of new international documents and investigations to combat illegal commerce. By sharing best means, the world's Governments can stop the plunder and trade of cultural property before it starts.

## 10. *Conclusion*

Together, the Pathfinder Dialogue, *Red Lists*, and other international and domestic efforts led by UNESCO, national Governments, and others, work to combat the looting, trade, and destruction of the world's treasures. Like the success stories of World War II, in which the 'Monuments Men' of the Allied military effort recovered thousands of artworks stolen by the Nazis, including works by Johannes Vermeer, Leonardo da Vinci, and Michelangelo, so too do today's actors seek to recover and protect the cultural property of Iraq, Egypt, Libya, Syria, and countless other nations. Preserving cultural heritage is critical to preserving the unique identity of the world's nations and its people. As the international community strives to enhance efforts to protect art, antiquities, and architecture, at least one thing is certain: those who plunder, trade, and destroy cultural property know the world is watching.

*Part IV*

**PROTECTING CULTURAL  
PROPERTY: CASE STUDIES  
AND BEST PRACTICES**



CAMBODIAN STATUE TRAFFICKING NETWORKS:  
AN EMPIRICAL REPORT FROM REGIONAL  
CASE STUDY FIELDWORK

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The authors are part of a four year research project looking at the global traffic in looted cultural objects, funded by the European Research Council. The project is called *Trafficking Culture*, and its aim is to build up the empirical research base in this field of enquiry. At the time of the conference, the project employs five research staff, and we have four affiliated PhD students. Our website, which contains a lot of information about the issue beyond the contents of this paper, is at [www.traffickingculture.org](http://www.traffickingculture.org).

One of the components of our research programme at *Trafficking Culture* is a series of regional case study investigations, which use ethnographic and interview methods of research in order to build a picture of the activities of regional trafficking networks. In other words, we go to places and try to find out – ‘on the ground’, so to speak – what is going on

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in terms of looting and trafficking. We have projects like this running, or in development, in various regions of the world, and this paper is about one of those studies, our work in Cambodia and Thailand.

Before we outline some findings here, let us first set out the parameters and the context for this presentation. Our sense of the literature in this field – the ‘illicit antiquities literature’, that is – is that if we were to divide it three ways into studies of source, transit and market, we would see that most of the academic and policy writing has been about source and market, and that transit remains something of an empirical black hole. So, there have been many studies concerned with recording or analyzing the activities of looters on the one hand<sup>1</sup>, and dealers, museums and collectors around the world on the other<sup>2</sup>, but not a great deal on the way the two are linked up through transit networks<sup>3</sup>. Some of the recent investigative journalism in the field is an exception to that<sup>4</sup>, but in terms of academic

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<sup>1</sup> E.g. D.P. STALEY, *St Lawrence Island's Subsistence Diggers: a New Perspective on Human Effects on Archaeological Sites*, in *Journal of Field Archaeology*, 1993, pp. 347-55; J. FARCHAKH BAJJALY, *Who are the Looters at Archaeological Sites in Iraq?*, in L. ROTHFIELD (ed.), *Antiquities Under Siege: Cultural Heritage Protection After the Iraq War*, AltaMira, 2008, pp. 49-56; S. PAREDES MAURY, *Surviving in the Rainforest: The Realities of Looting in the Rural Villages of El Peten*, in *Guatemala Report submitted to the Foundation for the Advancement of Mesoamerican Studies, Inc.*, 1996, available at their website at <http://www.famsi.org/reports/95096/95096ParedesMaury01.pdf> (version current at 7 September 2013); D. MATSUDA, *The Ethics of Archaeology, Subsistence Digging, and Artifact Looting in Latin America: Point, Muted Counterpoint*, in *International Journal of Cultural Property*, 1998, pp. 87-97; D.T. VAN VELZEN, *The World of Tuscan Tomb Robbers: Living with the Local Community and the Ancestors*, in *International Journal of Cultural Property*, 1996, pp. 111-26.

<sup>2</sup> E.g. C. CHIPPINDALE - D.J.W. GILL, *Material Consequences of Contemporary Classical Collecting*, in *American Journal of Archaeology*, 2000, pp. 463-511; S. MACKENZIE, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, 2005; T. DAVIS, *Supply and Demand: Exposing the Illicit Trade in Cambodian Antiquities Through a Study of Sotheby's Auction House*, in *Crime, Law and Social Change*, 2011, pp. 155-74; N. BRODIE - B. BOWMAN PROULX, *Museum Malpractice as Corporate Crime? The Case of the J. Paul Getty Museum*, in *Journal of Crime and Justice*, 2013, pp. 399-421.

<sup>3</sup> See N. BRODIE - J. DIETZLER - S. MACKENZIE, *Trafficking in Cultural Objects: an Empirical Overview*, in S. MANACORDA - A. VISCONTI (eds.), *Beni culturali e sistema penale*, Vita e Pensiero, 2013, pp. 19-30, for a summary literature review.

<sup>4</sup> E.g. J. FELCH - R. FRAMMOLINO, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum*, Houghton Mifflin Harcourt, 2011; P. WATSON - C. TODESCHINI, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities. From Italy's Tomb Raiders to the World's Greatest Museums*, Public Affairs, 2006; R.

studies, there isn't much on the trafficking phase of the illicit market in cultural objects, especially when we compare it to an associated research field like transnational criminal markets in drugs, human traffic, weapons or wildlife. So to put it in economic language we have a growing evidence base on production and consumption, or supply and demand, but not such a great deal on delivery from producer to consumer.

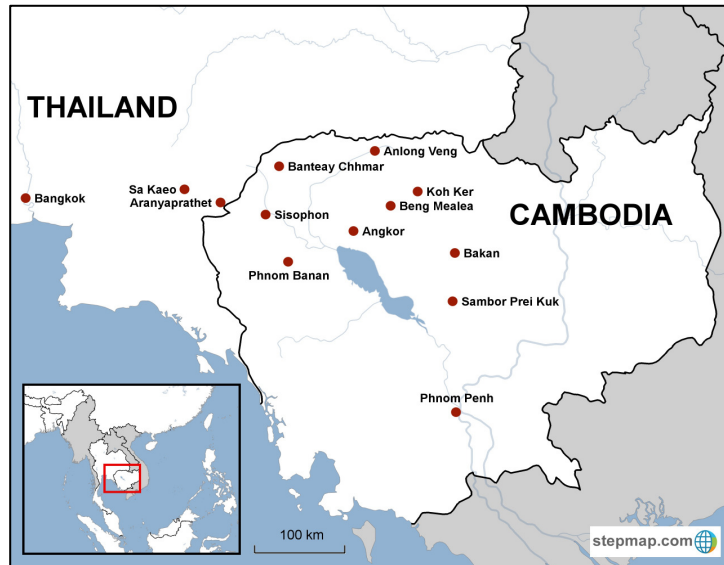
To begin to fill this gap we travelled to Phnom Penh in mid 2013 and from there drove around northern and western Cambodia with a team of guides and translators, visiting seven major archaeological sites which are marked on the map presented here as Figure 1, along with the towns which are the key transit points, as we will see. We started our research at these temple sites, and in nearby villages, seeking out the village elders, or other people who were reputed to know stories about the village, and the historical relationship of the villagers to the temples.

These people were often able to point us to people who had witnessed looting and in some cases to people who had taken part in it. Conversation with those individuals, who had taken statues and other parts from temples, led to information about who had organized the looting and where the objects had gone. This allowed us to move up the chain of supply, and eventually to see the overall shape of the trafficking networks which had been operating in the region. The information we got was mostly historical, referring to the period from the mid 1960s to the mid 2000s, with the majority of activity occurring during the civil war period of 1970-1998.

Remnants of these trafficking networks are still present though, and for example we were told by a receiver at the Thai border that if we wanted any piece currently attached to a temple in Cambodia we should take a picture and he would arrange for it to be looted and delivered to us within a month, using one of the same chains of supply that we will describe here.

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ATWOOD, *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World*, St Martin's Press, 2004.



**Figure 1 – Major archaeological sites and key transit points**

We can also produce a visualization of the network structure which operated in Cambodia. This comprises two channels which we recorded details of.

The first is a funneling type of route structure, which took statues from the various temples, via a number of regional brokers, to two national brokers in the north-western town of Sisophon, who then delivered the looted statues to a receiver at the Thai border, and from there they were moved to Bangkok for international transit. For reasons that will become clear, we are calling this one the ‘organised crime’ channel.

The second channel is what we call the ‘conflict channel’ which goes North, through Anlong Veng to the Thai Border, and was linked to the involvement of key Khmer Rouge figures in the cross-border traffic in timber, gems and antiquities. These two channels are presented in Figures 2 and 3 respectively.



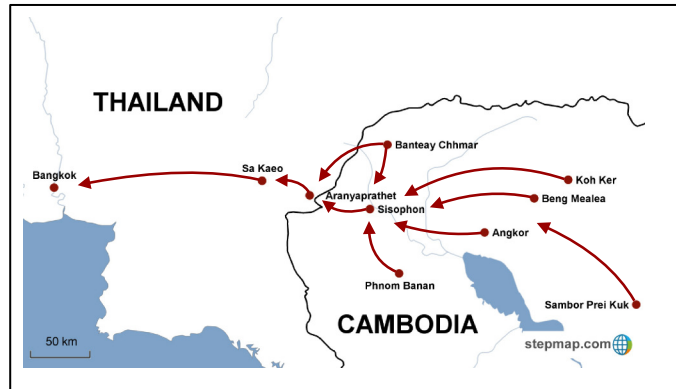


Figure 2 – The organized crime channel

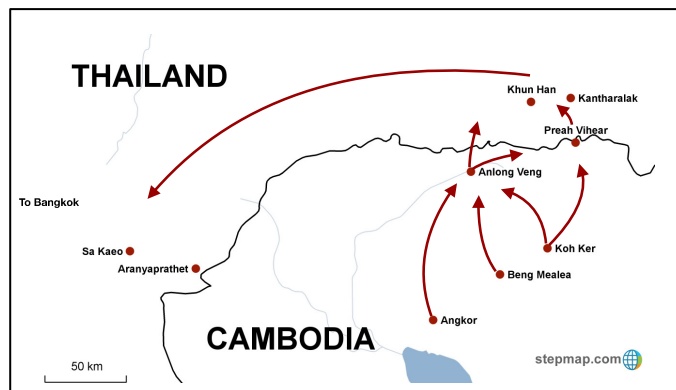


Figure 3 – The conflict channel

### 1. *The Organized Crime Channel*

Let's first look more closely at the organized crime channel, and focus on the stream of objects that passed through it from just one of the archaeological sites we visited, the 10<sup>th</sup> Century ruins of Koh Ker. This example is very topical at the moment, given that a masterpiece from Koh Ker was recently the subject of high profile litigation between the United States Government and Sotheby's, which only ended in December 2013 when the auction house agreed to repatriate the statue to Cambodia. This channel has four major network nodes:

- The regional broker in Koh Ker, who organized the looting of statues from that temple complex and others in his region, and delivered them to Sisophon;
- Two organized criminals in Sisophon, who acted as the north-western hub for Cambodian statue traffic, buying from the regional brokers and delivering to the border with Thailand;
- A receiver on the Thai side of the border who would take delivery of the statues and move them to Bangkok;
- An international-facing dealer in Bangkok, who is the interface between the licit and illicit trades.

In this short paper we can say a few things about each of these phases in the chain, but for a more in-depth analysis we invite readers to refer to the full journal papers we are publishing on each individual route.

### 1.1. *The Regional Broker*

This regional broker ran the temple looting network in a region containing Mount Kulen and Koh Ker, as well as many other archaeological sites. He had a clearly defined concept of his ‘territory’, and controlled the looting in his area with a partner – he said this two-head set-up was the usual pattern for brokers who controlled the various regions in Cambodia. He had been a Khmer Rouge soldier in his teenage years. After the Khmer Rouge were ousted in 1979, he turned to statue trafficking as what he described as a less morally distressing form of enterprise than his previous life of violence. His capacity for violence remained a useful asset though, and he is reputed in the region to be someone we would consider to be within what we might call the conventional type of organized crime – head of a regional gang, controller of a territory, feared for his reputation for violence, and organizing the local illicit statue trade. He had a very large gang of workers, and for example he described to us a particularly heavy statue that took forty men to carry. Although we are talking here of his ‘gang’, many of the looters were just villagers who were hired hands, working for a daily wage or a share of the proceeds. He had an excellent eye for the detail of statues and although he could not read English he could identify objects in catalogues which we showed him as belonging to the correct style and century, and he often noted objects that he had looted – in some cases many varieties of a certain type of object. He estimated

that in a good year his gang would take around 90 statues, so given that he was operating through the 1980s and 1990s and into the 2000s, he may be responsible for taking thousands of statues out of the country.

### 1.2. *Sisophon*

The regional broker would deliver his statues to two organized criminals who worked together in Sisophon as the hub for statues before they crossed the north-western border into Thailand. Sisophon is around 20km from the Thai border, and the border is set between the towns of Poipet on the Cambodian side and Aranyaprathet on the Thai side. The brokers in Sisophon had a reputation for deadly violence and were also running drugs and prostitution rings. One broker was known as the ‘money man’, taking and making payments, and the other was known as the ‘delivery man’, transporting statues from Sisophon to the border. According to the regional broker in Koh Ker and others, they were responsible among many other things for organizing the famous looting incident at Banteay Chhmar in 1998. When the Koh Ker broker’s uncle had once tried to cut them out of the supply chain and delivered a statue direct to Thailand, they had killed him. The normal procedure for doing the deal with Sisophon was that the regional broker would send pictures up the chain with an invitation to buy and then a proposed price would come down the chain from Sisophon, which was negotiable only within fairly narrow margins. As well as this offer-to-sell procedure, occasionally requests would come down the chain to supply a particular type of statue, but these tended to be general types rather than specifically identifiable artefacts, so this is a rather generic view of the idea of ‘theft to order’.

### 1.3. *The Thai Receiver*

We travelled to Aranyaprathet on the Thai side of the border and met the man who had been the main receiving point for the two brokers in Sisophon for the last thirty years. He was also a prodigious and very talented producer of fake statues, employing a team of workers to copy real looted pieces as they came through his office and using a variety of techniques to artificially give the appearance of age, including burying the statues for six months, which is obviously not nearly enough to fool a

discerning buyer but is enough to ensure the statue gives off a musty smell when sprayed with water – and this is a demonstration that the sellers in high end boutiques like River City in Bangkok use regularly to try to persuade non-specialist tourists of authenticity. This Thai receiver had high level contacts in the Thai military and therefore something approaching unfettered access to the border, combined with ready sources of transportation in the form of army trucks for heavy statues heading to Bangkok, a three hour drive up the highway.

#### 1.4. *The Bangkok Dealer*

For Khmer antiquities, real and fake, Bangkok is a key transit point. Our interviews all led to a key figure in the Bangkok trade, who had been a buyer of looted statues for decades, via both the channel we have outlined here and the one we will describe below. The regional broker at Koh Ker described this Bangkok dealer as the main buyer of all the looted statues travelling down this north-western corridor. The Thai receiver in Aranyaprathet cited the Bangkok dealer as a major customer of both fakes and genuine looted pieces. There were reported to be a small number of other similar high-end high-volume Thai dealers, and some of these were suppliers to this main dealer, who was the most notable among them. This dealer plays a key role in the transition of antiquities from the organized criminal traffic we have described towards being inserted into the public international trade as apparently legitimate objects.

This is a role which has been increasingly recognized in the emerging literature attempting to create a typology of the roles involved in antiquities traffic. In our analysis, we are calling this role ‘Janus’, since the occupant of the role has, in the metaphor, one face looking into the illicit past of an artifact and one looking into its public future where that dark past is concealed. This person must therefore have the capacity to ‘face both ways’ up and down the network, as it were, with a criminal face when looking down and a legitimate face when looking up. This is the particular type of international fencing which is the personification of a sanitizing portal for loot, taking it by reaching down the trafficking chain with a dirty hand and passing it onwards up the supply chain with an apparently clean one. Several examples of occupants of this Janus role can be found in the case study literature on the illicit antiquities market.

## *2. Analysis of the Organized Crime Channel*

This is only one trafficking route out of one country, and the method of research is by definition opportunistic, rather than comprehensive in the manner of a large scale survey, but with all the appropriate caveats we can still see how valuable the gathering of first-hand oral history evidence on involvement in organized trafficking can be. There are many implications but we would like to point out just two of them here.

The first is that the discussion of organized crime in relation to the global antiquities trade needs to distinguish between transnational organized trading networks in criminal goods on the one hand, and regional or local organized crime groups in the more traditional sense on the other. Local organized crime groups, like the Cambodian brokers we have seen here, depend on a violent reputation and therefore a degree of visibility to establish and defend their territorial domination. When explaining our anonymity strategy to the Koh Ker broker for example, he said ‘why bother’ – he didn’t care whether he was identifiable in our research output or not because everyone knew who he was anyway, and everyone was afraid of him. It is no surprise that these sorts of organized criminal actors are part of transnational trafficking networks, since their control of illicit activities within their territory makes them good and in some cases essential people to work with in terms of production and distribution of illicit commodities. But there are also these higher-level traders in places like Bangkok who are part of a transnational organized crime network in the sense of the grey zone of illicit enterprise which is much more closely tied to public and legal markets, and who are not violent, and are not members of any organized crime group in the sense we are applying that term to the Cambodian traffickers.

The second conclusion is that there are perhaps surprisingly few steps in this chain between source and market. The organized and violent statue traffic at source and across the border is very directly linked to international dealers who are passing objects to auctions, to museums and to other dealers and collectors, and the proximity of the public market to some very unsavory origins for the statues was one of the most striking findings in this research.

This proximity was further evidenced in the second of the two channels we uncovered, which we call the ‘conflict channel’, and describe next.

### *3. The Conflict Channel*

Armed conflict and the illicit antiquities trade are increasingly linked in the modern world. Today in the unstable zones of the ‘Arab Spring’, archaeological looting and trafficking are reportedly significant problems. Before these examples, there were those from Afghanistan and Iraq, and still before those was Cambodia.

In 1970, Cambodia’s long held neutrality in the Indochina conflict ended violently, as fighting erupted between government forces and communist guerillas (including the ‘Red Cambodians’ or ‘Khmer Rouge’). This civil war continued in varying forms until the 1998 death of Pol Pot and subsequent surrender of his remaining forces. It decimated the country’s population – one in four Cambodians may have perished between 1975 and 1979 in the brief but brutal ‘Killing Fields’ – and its rich cultural heritage. Every archaeologist to whom we have spoken says they believe all known (and many unknown) sites were plundered during the conflict’s long decades.

Some of the sites we visited – shown above in Figure 1 – fell to the communists as early as 1970. All were under Khmer Rouge control from 1975 to 1979 and some through 1998. The latter and their surrounding populations naturally suffered the worst of the war. The majority of Cambodia’s 64,000 landmine and unexploded ordinance (UXO) casualties and amputees are in this part of the country (the central, north and west) and while tourist sites have been thoroughly cleared, teams are still working at remote temples. To illustrate the problem’s scale, when one of us visited Koh Ker in the mid-2000s, 1,382 mines and a shocking 1,447,212 pieces of UXOs were in the process of being removed from 56 fields<sup>5</sup>. Even today signs posted at Beng Mealea warn that such work is ongoing.

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<sup>5</sup> T. SHELTON - K.C. AMRAK, *Koh Ker Gears up for Tourism*, in *The Phnom Penh Post*, 30 November 2007, (available at <http://www.phnompenhpost.com/national/koh-ker-gears-tourism>; accessed March 13, 2014).

A large number of Cambodia's remaining 4-6 million landmines are concentrated outside the frontier town of Anlong Veng, the main non-archaeological target of our fieldwork on the Cambodian side. It lies at the foot of the Dangrek Mountains forming the country's northern border with Thailand. Anlong Veng is infamous not only for those lasting hazards, but also as the Khmer Rouge's last stronghold, and Pol Pot's final resting place. It has since become a haven for former cadres evading the country's genocide trial as well as a key stop for tourists on the trail of the Killing Fields.

#### *4. Channel 2's Network Structure*

Anlong Veng is also a key stop on Channel 2. This route drew from many of the same temples as Channel 1. But while Channel 1 was the ambit of local gangmasters like the Koh Ker broker, and used main highways and commercial hubs like Sisophon, Channel 2 instead snaked across minefields and jungles controlled by the Khmer Rouge, routing statues due northward across the Dangrek Mountains at Anlong Veng and other border crossings like Preah Vihear.

#### *5. The Debated Role of the Khmer Rouge*

But what was the role of armed forces in Channel 2 and the illicit antiquities trade more broadly? The Khmer Rouge were noted and unapologetic traffickers of arms, gems, and timber, however experts have questioned their role in the illicit antiquities trade. This confusion is rooted in their ideology.

Following the lead of Mao Zedong in China, and yet far surpassing him, Pol Pot sought to replace traditional Cambodian culture with a new revolutionary culture. When the Khmer Rouge controlled the country between 1975 and 1979, in the words of Sarah J. Thomas, they «proclaimed a return to 'Year Zero' and set about demolishing links to the past, to the outside world, and to religion»<sup>6</sup>. This meant razing Buddhist

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<sup>6</sup> S.J. THOMAS, *Prosecuting the Crime of Destruction of Cultural Property. Searching for the Truth*, in *Magazine of the Documentation Center of Cambodia*, 2006, pp. 29-33, at p. 29.

pagodas, Catholic cathedrals, and Cham mosques. In light of this destruction, it seems only natural the Khmer Rouge would have also targeted the country's Buddhist and Hindu archaeological heritage, an argument that top private collectors of Cambodian art have repeatedly used to justify their actions in 'saving' the country's heritage from destruction.

However, the Khmer Rouge also glorified the Angkorian Empire, using its success to justify their unwavering pursuit of an agrarian State based on slave labor. For this reason, noted historians have claimed they spared and even safeguarded Cambodia's ancient religious temples and other sites, albeit only for their own perverse needs. Angkor Wat appeared in propaganda posters, party songs, and even on the flag. The award winning journalist and historian Elizabeth Becker thus wrote: «During their murderous regime, the one thing the Khmer Rouge protected was [Angkor Wat]. They killed or worked to death nearly two million Cambodians, but they preserved those magnificent temples as the symbol of Cambodia's greatness»<sup>7</sup>.

So were the Khmer Rouge guardians of or threats to Cambodia's ancient temples? Our initial fieldwork indicates they were both, although in this field of enquiry reliable reports are hard to elicit, and clearly more research is needed to unravel the contradictions which arise from conflicting memories and the possible recasting of historical events in light of contemporary views and experiences. The Khmer Rouge's history is long and complex. Over the decades they went from the jungle to the capital and back again. And their use – or misuse – of Cambodia's past seems to have changed along with their changing fortunes.

## 6. *General Ta Mok: The Butcher of Cambodia*

The general known as Ta Mok perhaps best illustrates the Khmer Rouge's changing and complex relationship with Cambodia's past. We say 'known as' because he remains such a shadowy figure that even today scholars differ on his real name. 'Ta' is a friendly and even affectionate honorific meaning 'grandfather,' in great contrast to his other *nom de*

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<sup>7</sup> E. BECKER, *When Museums Decide to Return Looted Art. [Letter to the Editor]*, in *The New York Times*, 6 May 2013 (available at <http://www.nytimes.com/2013/05/07/opinion/when-museums-decide-to-return-looted-art.html>]; last accessed March 13, 2014).



*guerre*, ‘The Butcher.’ That he would be singled out as such in a whole regime of killers speaks to his major role in the Cambodian genocide.

A former monk, Ta Mok fought for Cambodia’s independence from the French in the 1950s, and as did many of the region’s other freedom fighters, joined the communists in the 1960s. Over the years and then decades he rose through the Khmer Rouge hierarchy. Renowned for his fearlessness in battle, he lost a leg during combat in 1970, but this did not slow him down, and eventually he became the party’s ‘Brother Number 5’. He had even more power than this title would suggest after the Vietnamese invasion and occupation, as he retreated to Anlong Veng and waged war from there for another twenty years. Government forces only captured him near the Thai border in 1999 and he died in a Cambodian prison in 2006 still awaiting trial for Khmer Rouge atrocities.

Ta Mok’s stronghold was his lakeside villa in Anlong Veng, which survives today, and is even recommended by *Lonely Planet* as a tourist attraction. The now empty compound’s most prominent feature remains the childlike murals of Angkor Wat and Preah Vihear temples adorning its walls. However, when Ta Mok lived here, these paintings would have been complemented by pieces of actual temples. At least 61 statues were seized here by government forces following Ta Mok’s arrest in 1999. These added to another collection that was confiscated in 1994, when the Khmer Rouge briefly lost Anlong Veng, and with it more art from Ta Mok’s house.

That such a haul would be found so close to Thailand and its ready art market would initially suggest that Ta Mok was an active participant in the illicit antiquities trade. But those close to him, some of whom remain in the area, insist it was the opposite. His son-in-law told anthropologist Timothy Dylan Wood that Ta Mok wanted his house to «become a museum with ancient artefacts such as statues, busts, etc. captured from Thai smugglers»<sup>8</sup>. Today a caretaker at the villa – who had served in the Cambodian government’s forces in his youth, but then defected to the Khmer Rouge, and eventually sided with Ta Mok against Pol Pot – said the same to us. He told us that Ta Mok was a ‘guardian’ of antiquities. While he certainly had confiscated pieces from looters, he did not loot himself, and would even punish looters with death. The collection of 61 statues was

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<sup>8</sup> T.D. WOOD, *Tracing the Last Breath: Movements in Anlong Veng*, 2009, (doctoral dissertation: available at <http://search.proquest.com/docview/304989019>; last accessed March 13, 2014).

a collection for the local people, not for himself, and it was not going to be taken the few kilometers over the border and sold. Likewise, a caretaker at the Conservation d'Angkor told us that Ta Mok 'collected artifacts' although it is hard to tell in the overall context of that conversation whether this is a reference to the sort of collection mentioned above or a euphemism for looting and trafficking. He showed us many of the 61 statues that had been seized from the house (others are at the Angkor National Museum in Siem Reap) which stylistically appear to have come from all over the country.

It is possible that Ta Mok did begin as a preserver of antiquities, especially when doing so meant toeing the party line, as described earlier by the journalist/historian Becker. At the Khmer Rouge's height of power, he certainly would have had both the motivation and means to enforce this policy, while the regime firmly controlled Cambodia with a steady flow of support from China and elsewhere. But we found this view of Ta Mok did not meet with consensus among Anlong Veng's former Khmer Rouge or even Ta Mok's past business associates.

Research with these groups conducted by our local associates in Cambodia supports the contention that Ta Mok was indeed involved in organized antiquities trafficking, using the route we have identified as Channel 2. The story seems to be that he entered the trade at the behest of Thai dealers. It is well documented that Ta Mok had a close relationship with members of the Thai army and criminal gangs, which enabled his lucrative cross border gem and timber trade. But upon seeing the Thai middlemen get rich, he decided to bypass them, and deal with buyers further up the chain.

Ta Mok's apparent change of heart could easily be explained by his changing situation: he and the Khmer Rouge increasingly needed the money. During the 1975-1979 'Killing Fields' and subsequent 1979-1989 Vietnamese occupation, the Khmer Rouge were able to survive because they still received backing from China and other allies. But as news of their atrocities spread, this support dwindled steadily, and by the early 1990s, they were in dire straits.

Anlong Veng's gems, timber, and also it seems antiquities, were thus sold to the highest bidder as the Khmer Rouge were forced to find other means of arming their cause. This suggestion finds support in some statements made by those with no loyalty to Ta Mok; for example an official at the Conservation d'Angkor – which safeguards the 61 statues

taken from Anlong Veng – has previously referred in the press to Ta Mok as «the chief thief» of Khmer antiquities<sup>9</sup>.

## 7. *Conclusions from Channel 2*

Ta Mok's true role in the illicit antiquities trade, and that of the broader Khmer Rouge, may never be answered, like so many questions from the 'Killing Fields.' More work on this topic is certainly needed, and it is especially important that more oral history research be conducted and soon, as those who witnessed the crucial beginning of Cambodia's plunder will not live forever. Documenting their stories is in many ways a race against the clock.

But regardless of the remaining unknowns, such as they are, the picture of wartime looting in Cambodia is slowly being uncovered and there is much we can say with some certainty. Chief amongst these conclusions is that armed forces in Cambodia – including the Khmer Rouge, but also the Cambodian military and paramilitary groups, perhaps to an even larger degree – did indeed seek to fund their operations through antiquities trafficking. How much they succeeded is hard to say, but regardless of the financial impact, there was a financial motive.

The possibility that armed conflict may be funded by antiquities trafficking is not the only red flag to emerge from our research. The story of Cambodia reminds us that while an organized antiquities trade – such as that now being reported in Egypt, Libya, and Syria – may start with a war, it does not necessarily end with it. Business continued along Channels 1 and 2 well after hostilities ceased, and in fact, peacetime appears to have opened new doors for it.

Related to this, when examining Channel 2 alongside Channel 1, we begin to see that antiquities trafficking in Cambodia was both the enterprise of armed forces and organized crime. At times the lines between the two were blurred, but even when these groups were distinct, and even when they were not working directly together, they still enabled one another. The war allowed organized crime to thrive, and in turn, organized crime helped to fund the war's major players through a trade in illicit

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<sup>9</sup> C. MCCALL, *Cambodia's Heritage Another Casualty of War*, in *Reuters*, 19 November 1997 (available at <http://www.museum-security.org/97/19111997.html>; accessed March 13, 2014).

antiquities, gemstones, and timber. While this again calls for more research, it is a stark warning that the antiquities trafficking networks now being born of the 'Arab Spring' will have lasting impacts on conflict and crime in the region.

## LA COOPERAZIONE GIUDIZIARIA INTERNAZIONALE

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Per cominciare vorrei esprimere la mia gratitudine al Centro Nazionale di Prevenzione e Difesa Sociale e all'ISPAC, perché alle loro iniziative si deve lo straordinario cammino che in questa materia si è fatto negli ultimi anni, sul piano della promozione del diritto internazionale convenzionale, ma direi anche (ed è il punto di vista che maggiormente mi interessa) al fine della creazione di un autentico interesse intorno alla materia della tutela penale dei beni culturali da parte di attori che, in precedenza, erano sostanzialmente tenuti ai margini di tutto ciò che ruotava intorno alla sorte dei patrimoni culturali oggetto di traffici illeciti.

D'altra parte, la difficoltà di assicurare una garanzia di tutela attraverso il processo penale e gli strumenti della cooperazione internazionale è una difficoltà antica. Qualcuno ricorderà che, intorno alla metà del XIX secolo, un aristocratico di origine italiana, Guglielmo Bruto Icilio Timoleone, conte Libri-Carrucci della Sommaia, nominato dall'Imperatore di Francia componente di una commissione ministeriale avente il compito di procedere alla ricognizione degli antichi manoscritti conservati nelle biblioteche del Regno di Francia, approfittò immediatamente di tale incarico per recarsi a visitare ciascuna delle biblioteche nelle quali avrebbe dovuto svolgere, insieme alla commissione, questo lavoro e, profittando dell'ampio mantello che gli copriva le vesti, nascose preziosi volumi sotto di esso, in ogni sua visita, per poi farli scomparire. Una volta scoperto, la giustizia francese si attivò immediatamente e il Conte fu condannato alla pena di dieci anni di reclusione, pena che non fu mai scontata perché, nel frattempo, egli era riparato in Inghilterra, dove, non esistendo un trattato di estradizione, non esisteva neanche la possibilità di riconsegna, perché l'Inghilterra non riconosceva le condanne in contumacia. Del diritto internazionale penale,

però, allora non vi era bisogno, perché i meccanismi di restituzione erano affidati al senso dell'onore; infatti, quando i collezionisti che avevano acquistato i libri sottratti dal Conte scoprirono l'origine dei loro acquisti, si affrettarono a restituirli. Lord Hashburnham, un aristocratico inglese che aveva acquistato la gran parte della refurtiva frutto delle imprese del Conte, si affrettò a riconsegnare tutti gli antichi manoscritti che aveva acquistato all'ambasciatore di Francia a Londra.

In questa vicenda, come avrete notato, giudici e magistrati non compaiono, e se compaiono hanno un ruolo limitato, perché la loro iniziativa è destinata a rimanere sulla carta, nel caso specifico con una condanna nei confronti del conte Libri-Carrucci della Sommaia che non verrà eseguita. Cionondimeno, la lezione è servita, perché la storia, anche se non si ripete, talvolta assume connotati ancora più interessanti, come è accaduto recentemente, quando un signore, nominato consigliere da un Ministro dei Beni e delle Attività culturali della Repubblica Italiana, e subito dopo direttore di una storica biblioteca italiana, ne ha approfittato per sottrarre migliaia di volumi che hanno inondato il mercato antiquario internazionale<sup>1</sup>.

È inutile dire che, salvo rarissime eccezioni, se il conte Libri-Carrucci ha trovato un erede delle proprie imprese storiche assolutamente degno del modello originario, Lord Hashburnham non ha trovato, invece, alcuna prosecuzione di sé, vale a dire: nessuno ha mai spontaneamente restituito i volumi sottratti a quella storica biblioteca statale; storica biblioteca statale che è stata oggetto di un'autentica opera di devastazione che ormai l'ha sfigurata e resa assolutamente diversa da quella che si era conservata per secoli. Fatto sta che nel caso in questione giudici e magistrati sono stati chiamati a svolgere un ruolo nuovo, a svolgere un'attività diversa da quella che normalmente segna l'intervento giudiziario in questo tipo di vicende processuali: in primo luogo, l'applicazione delle regole e dei metodi d'indagine tipicamente utilizzati in materia di criminalità organizzata a quanto accaduto.

In generale, in materia di traffici illegali, occorre assolutamente evitare un equivoco: quello di ritenere che la dimensione organizzata di questi traffici dipenda dall'eventuale presenza di gruppi criminali

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<sup>1</sup> La sentenza di primo grado (confermata in Corte d'Appello nel maggio 2014) relativa al noto caso della 'spogliazione' della Biblioteca dei Girolamini è consultabile sulla rivista *Diritto Penale Contemporaneo*, 23 luglio 2013 (<http://www.penalecontemporaneo.it/>): cfr. Trib. Napoli, Uff. GIP, 15 marzo 2013, est. Pilla, imp. De Caro e altri.

organizzati tradizionali. Non è così. Questa presenza a volte si manifesta in modo inquietante, ma quello che conta è che i traffici di beni culturali hanno di per sé, di regola, le caratteristiche proprie del crimine organizzato. Il mercato antiquario internazionale clandestino utilizza esattamente gli stessi canali finanziari deputati alla movimentazione dei denari finalizzati a operazioni di corruzione internazionale o di riciclaggio. In generale, i traffici di beni culturali esigono necessariamente l'esistenza di organizzazioni stabili, di strumenti, di sistemi di relazione, di metodi che sono tipici del crimine organizzato, quantunque la vera natura degli interessi in gioco sia sovente occultata o resa più gradevole dalla dimensione culturale dei soggetti chiamati a svolgere operazioni di mediazione.

Ora, l'intero mondo dei *black dealer* o dei *broker* che operano nel campo del mercato antiquario internazionale è certo molto più affascinante e popolato di persone simpatiche di quanto non lo sia quello del traffico internazionale di stupefacenti. Ebbene, la consapevolezza di ciò è alla base (lo è stata nel caso al quale ho fatto riferimento) dell'applicazione delle regole tipiche delle indagini in materia di criminalità organizzata: massivo controllo delle comunicazioni, pedinamenti, osservazioni, monitoraggio delle transazioni finanziarie e, soprattutto, ricorso allo scambio di informazioni e alla collaborazione con gli altri Stati.

Qui si aprono note dolenti, perché la collaborazione si è registrata secondo modelli e con esiti diversi: in alcuni casi essa è stata assolutamente efficace, assolutamente encomiabile, come nel caso, per esempio, della collaborazione offerta dalla Repubblica Federale Tedesca, che ha permesso di bloccare un'importante asta e di recuperare centinaia di volumi sottratti alla Biblioteca dei Girolamini, oltre che di estradare successivamente il titolare della casa d'aste che aveva governato le transazioni finalizzate a incamerare i beni in oggetto (il che dà la misura anche della dimensione dei traffici che si verificano, anche se non credo che siano stati molti i casi di arresto e successiva estradizione dei titolari di importanti case d'aste o antiquarie); in altri casi la collaborazione internazionale è stata estremamente carente, perché si è piegata alle regole dell'autoprotezione del mercato antiquario.

Rispetto a quanto sopra detto, dunque, possiamo aggiungere che alcune cose sono necessarie, mentre altre è necessario attendere per averle. Per esempio, il completamento dei lavori nel processo di evoluzione del diritto internazionale convenzionale, al quale Stefano Manacorda ha fatto

riferimento<sup>2</sup>, è essenziale per giungere all'apposizione di un principio fondamentale, vale a dire il principio della necessità di criminalizzazione della detenzione di beni culturali di origine illecita, nel processo di armonizzazione normativa; processo nel quale sarà fondamentale affermare che l'illiceità dell'origine nasce anche dalla mancanza di consenso all'esportazione del bene secondo le regole dello Stato dal quale il bene culturale proviene.

In altri casi non è necessario attendere, ma è possibile fare qualcosa immediatamente, ad esempio far crescere all'interno dei sistemi giudiziari forme di organizzazione del lavoro che agevolino la cooperazione internazionale. Da questo punto di vista, l'Italia è avvantaggiata (se non altro sul piano dell'organizzazione dei servizi di polizia giudiziaria) perché dispone di un corpo di polizia specializzato come quello del Comando per la Tutela del Patrimonio Culturale<sup>3</sup>, la cui collaborazione si rivela ogni volta preziosa. Negli altri Paesi, purtroppo, la mancanza di omologhe strutture pesa negativamente sulle sorti della collaborazione internazionale. In molti Stati, le funzioni di polizia, nel caso di traffico di beni culturali, sono affidate ai servizi doganali o addirittura ai servizi di immigrazione, e questo è un limite negativo di cui occorre assolutamente tenere conto, perché i beni culturali esigono, nel lavoro investigativo, una considerazione diversa da quella che si ha per un carico di materiale elettronico o di albicocche provenienti da questa o quella regione agricola del mondo.

Alla necessità di specializzazione, però, non possono sottrarsi neanche le strutture giudiziarie. Un'indagine come quella partita dopo il saccheggio della Biblioteca dei Girolamini non sarebbe stata possibile, se non fosse stato preventivamente istituito uno specifico gruppo di magistrati chiamati a occuparsene. Cioè, non è possibile considerare questo tipo di indagine un evento occasionale, nell'organizzazione del lavoro giudiziario, ed è invece necessario introdurre forme di specializzazione. La specializzazione del lavoro giudiziario è, del resto, una delle condizioni di efficacia della cooperazione internazionale. Scambiare informazioni con magistrati o funzionari di polizia per i quali un antico manoscritto ha le stesse caratteristiche di un oggetto elettronico è obiettivamente difficile. Si

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<sup>2</sup> V. *supra*, in questo volume, S. MANACORDA, *Gli strumenti di contrasto del traffico illecito di beni culturali: le recenti iniziative a livello internazionale*.

<sup>3</sup> Su cui v. diffusamente *supra* A. COPPOLA, *Il Comando dei Carabinieri per la Tutela del Patrimonio Culturale*.



richiede, quindi, un processo di crescita culturale che deve muoversi all'interno dei singoli sistemi nazionali e che è assolutamente fondamentale. Da questo punto di vista, ormai in Italia i principali uffici giudiziari, i principali uffici del pubblico ministero, a Napoli, a Roma, a Milano, ma anche a Bari, vedono al proprio interno costituirsi gruppi di lavoro specializzati. Alcuni anni fa tutto ciò non esisteva, oggi questa situazione rende progressivamente possibile l'allineamento della professionalità anche dei magistrati a quella di tutti gli altri operatori del settore. Dopo tutto, nella specifica materia i criminali sono criminali ad alta specializzazione e persino le vittime sono specializzate, considerato che parliamo di istituzioni culturali o di collezionisti.

La polizia giudiziaria, fortunatamente, presenta, nei vari sistemi, dei modelli virtuosi di organizzazione specialistica. Il metro della specializzazione deve diventare regola anche nell'organizzazione dei sistemi giudiziari nazionali, come preconditione dell'efficacia della collaborazione internazionale. La dimensione tecnica dei problemi che si pongono in caso di traffico di beni culturali non consente improvvisazioni e non consente approcci non regolati dall'esperienza e dalla capacità di governare situazioni complesse. Anche da questo punto di vista, gli ultimi cinque anni sono serviti a molto, perché non soltanto negli uffici del pubblico ministero sono nati dei *pool* specializzati, ma in generale intorno al lavoro di questi gruppi si è sviluppato un interesse dei media che contribuisce a sostenerne l'azione. Non sempre, peraltro, in questa materia è possibile sottrarsi al fascino degli autori di questo tipo di crimini.

Il *New Yorker* ha dedicato recentemente un lungo articolo alla vicenda dei Girolamini e il dato fondamentale che emerge è l'evidente ammirazione per l'autore di cotante imprese criminali, il quale, alla fine, è gratificato persino da una comparazione con il fascino criminale di Leonardo di Caprio nel film *Prova a prendermi*. Anche questo contribuisce a dare la misura dell'importanza del lavoro che si è fatto in questi anni, nella crescita del quale l'attività del CNPDS e dell'ISPAC è davvero ragione di gratitudine.

Grazie della vostra attenzione.



CENNI SULLE ORIGINI STORICHE E SULLO SVILUPPO  
DELLA LEGISLAZIONE ITALIANA IN MATERIA  
DI BENI CULTURALI

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Se guardiamo attentamente la storia e l'evoluzione del nostro diritto dei beni culturali, dobbiamo, innanzitutto, individuarne la data di nascita. E, al riguardo, dobbiamo subito precisare che un *Ordinamento Giuridico dei Beni Culturali* origina, sul piano strettamente normativo, nel Granducato Mediceo di Toscana, con due 'deliberazioni' datate 24 ottobre e 6 novembre 1602. Ancora una volta la Toscana si afferma come culla della nostra civiltà.

In esse, vengono elencati prima diciotto (24 ottobre), poi diciannove (6 novembre) autori, le cui opere sono considerate talmente qualificanti per l'individuazione delle radici storiche della cultura figurativa, da non poter essere esportate senza il consenso dell'autorità di governo (limite all'esportabilità).

È interessante, al riguardo, notare due cose: la prima, che gli autori non sono tutti di nascita toscana (fra essi vi sono, ad esempio, gli emiliani Correggio e Parmigianino, il veneto Tiziano, il marchigiano Raffaello, l'umbro Perugino); la seconda, che gli stessi autori non sono neppure tutti legati alla cultura toscana, perché sarebbe arduo vedere una nota di 'toscanità', ad esempio, in Tiziano o nel Correggio. Quindi, la tutela assume una dimensione che si potrebbe chiamare 'universalistica': l'arte non ha confini e i suoi alti raggiungimenti vanno tutelati anche al di là delle radici nazionali.

Ma è soprattutto a Roma, nel 1820, con l'Editto di Bartolomeo Pacca, Vescovo di Frascati e Cardinale Camerlengo di Sacra Romana

Chiesa, che la tutela dei beni culturali si articola e si specifica secondo tre linee fondamentali:

- *il principio di catalogazione*: l'Editto Pacca prevede che, in linea di principio, tutto il patrimonio figurativo esistente nello Stato della Chiesa debba essere oggetto di inventariazione, essendo questo il presupposto fondamentale della tutela;
- *il divieto di esportazione*: l'Editto Pacca afferma il principio che i beni culturali debbano essere radicati al territorio di appartenenza e non possano, conseguentemente, essere esportati se non previo permesso del Cardinale Camerlengo;
- *il principio della proprietà pubblica del sottosuolo archeologico*: l'Editto Pacca afferma, contro una tradizione romanistica millenaria, quella relativa al tesoro, ancora oggi affermata nell'art. 932 c.c., che i beni culturali rinvenuti nel sottosuolo siano di proprietà non del privato cui appartenga l'area, bensì dello Stato.

Come è agevole rilevare, nell'Editto Pacca vi sono, *in nuce*, tutti i principi ai quali si ispira la legislazione successiva in materia di beni culturali, da ultimo, il ben noto Codice dei Beni Culturali, emanato con il d.lgs. n. 42/2004.

Nel 1861, il Regno Sardo Piemontese si trasformava nel Regno d'Italia e si dava una legislazione nazionale, interamente modellata sull'esempio centralista francese e portata a compimento, a tempo di record, nel 1865.

Per il principio di continuità degli ordinamenti giuridici (*forma regiminis sublata, non mutatur ipsa civitas*), il subentro di un nuovo Stato non si traduce nella ablazione generalizzata degli strumenti normativi precedentemente vigenti, che continuano a spiegare i loro effetti fino a una effettiva sostituzione.

In Italia, pertanto, nei vari territori poi confluiti nel Regno Unitario, continuavano ad avere effetto le norme di tutela dei beni culturali emanate in precedenza.

Vi erano quindi una normativa sardo-piemontese, una normativa per il Lombardo-Veneto, una normativa per gli Stati asburgico-estensi (Modena e Reggio), una normativa per gli Stati borbonici di Parma Piacenza e Guastalla, una normativa per il Granducato di Toscana, una

normativa per lo Stato Pontificio, una normativa per il Regno delle Due Sicilie.

E la Cassazione di Firenze (coesistevano, allora, ben cinque Corti di Cassazione) affermò la sopravvivenza, nei vari territori dello Stato Unitario (in particolare, nell'ex territorio dello Stato Granducale di Toscana), della legislazione precedente all'unificazione, in attesa di una nuova normativa nazionale (sent. 24 ottobre 1888, in causa Ministero dell'Istruzione c. Condomini di Palazzo Petrucci di Siena).

Che venne, di fatto, attuata – peraltro in forme timide e frammentarie – solo nel 1902, per essere poi completata il 30 giugno 1909, con la ben nota Legge 364 (chiamata, dal nome del proponente, Legge Rosadi), che ricalcava le linee fondamentali dell'Editto Pacca.

Nel 1871 viene estesa alla provincia romana la legislazione del Regno di Sardegna, quindi del Regno d'Italia.

La legislazione del 1865 prevedeva, sull'impronta liberale, l'eliminazione dei fedecommissi, vale a dire l'eliminazione di quei vincoli per i quali i patrimoni dei grandi principi venivano considerati non divisibili e quindi attribuibili per l'eternità al primogenito maschio: il che era contrario al principio di circolazione della ricchezza, proprio dello Stato liberale.

La legislazione del 1865 aveva quindi liberalizzato i grandi patrimoni dei nobili italiani e questo avrebbe comportato anche l'eliminazione delle c.d. 'collezioni fedecommissarie', ossia delle collezioni d'arte che erano state vincolate nei secoli nelle principali famiglie romane (Doria Pamphilj, Colonna, Rospigliosi, collezione che poi si smembra in Rospigliosi e Pallavicini, Borghese, Barberini, Spada, ecc.).

Peraltro, il legislatore nel 1871 interviene, decidendo: anche per Roma vige il principio dell'abolizione dei fedecommissi, ma continuano ad avere efficacia le norme sui fedecommissi d'arte, quindi le collezioni fedecommissarie continuano a esistere. Questo fa sì che si salvino dalla dispersione numerose collezioni romane, anche se poi clandestinamente questi fedecommissi vengono violati perché i principi, quando hanno necessità di fare cassa, vendono clandestinamente delle opere. Questa è una vecchia abitudine romana di cui ricordo un illustre precedente.

I Boccapaduli, nobile e antica famiglia romana, erano proprietari della serie dei *Sette Sacramenti* di Poussin, che costituisce uno dei più alti raggiungimenti della pittura barocca non dico a Roma ma nell'intera

Europa, ma siccome ‘morivano di fame’, a quale espediente ricorsero per sopravvivere? Chiamarono un piccolo pittore fiammingo che si trovava a Roma, André de Muynck, e gli fecero fare le copie dei *Sette Sacramenti* di Poussin, quindi levarono dalle cornici originarie le opere di Poussin e le sostituirono con le copie di de Muynck. Agli occhi dei visitatori le opere erano le stesse, c’erano persino le cornici originali, ma i dipinti avevano preso la via dell’estero perché erano stati acquistati, a prezzo salato, dal Duca di Sutherland, un magnate terriero della Scozia. Quindi le collezioni fedecommissarie, ancorché vincolate, continuavano a essere smembrate.

Come vi ho detto prima, l’Editto Pacca prevede che tutto il sottosuolo archeologico appartenga allo Stato: appartenenza al patrimonio indisponibile.

Lo Stato, in altri termini, è proprietario di beni di cui però non può disporre, il che significa che essi non soltanto non possono essere alienati, ma non possono essere acquistati dai privati nemmeno per usucapione.

Il procuratore Melillo<sup>1</sup> ha portato il caso della Biblioteca dei Girolamini. La Biblioteca dei Girolamini è una biblioteca pubblica i cui libri appartengono al patrimonio indisponibile o addirittura al Demanio dello Stato italiano.

Quindi, quei privati che abbiano acquistato all’asta, anche in buona fede, libri provenienti dalla Biblioteca dei Girolamini, non possono considerarsi proprietari in buona fede dei libri stessi e sono soggetti, senza limiti di tempo, anche a distanza di cent’anni, all’azione di rivalsa da parte dello Stato.

Questo, se è valido secondo l’Editto Pacca, è valido anche nell’attuale ordinamento giuridico, perché la prima legge unitaria, la legge del 30 giugno 1909 n. 363, ricalca le linee direttive dell’Editto Pacca e quindi stabilisce l’appartenenza allo Stato di tutto il patrimonio archeologico che venga rinvenuto nel sottosuolo archeologico italiano.

Pertanto, se un privato è possessore di un bene culturale che è stato estratto dal sottosuolo archeologico italiano, lo Stato lo può reclamare senza limiti di tempo; allo Stato basta dimostrare che quel bene sia stato estratto dal sottosuolo archeologico italiano, mentre al possessore spetta la prova diabolica che l’estrazione sia avvenuta prima del 1909.

Ora, la prima dimostrazione è estremamente semplice, laddove si tratti di reperti archeologici caratteristici del territorio italiano e non diffusi

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<sup>1</sup> V. *supra* in questo volume G. MELILLO, *La cooperazione giudiziaria internazionale*.

altrove. I reperti etruschi, ad esempio, sono limitati all'area del territorio etrusco, che, come voi tutti sapete, ingloba grosso modo l'attuale Toscana, l'Alto Lazio e in particolare la provincia di Viterbo, oltre a una parte della provincia di Roma (Cerveteri) e il territorio, nell'ambito della Campania, di Capua e Cuma.

Quindi i reperti etruschi, in linea di principio, provengono manifestamente dal territorio italiano, così anche i reperti apuli, perché nelle Puglie esistevano varie culture, quelle dei Peucezi, degli Apuli o Iapigi, dei Dauni, dei Messapi, culture locali i cui manufatti difficilmente si trovano al di là dei territori pugliesi.

Il problema è molto più difficile laddove si tratti di reperti provenienti dalla civiltà greco-romana, perché essi corrispondono a un linguaggio comune a tutto l'Impero di Roma, una specie di *koinè* artistica, non semplicemente limitata all'Italia ma espansa in tutti i Paesi del bacino del Mediterraneo.

Come tutti sapete, l'Impero di Roma inglobava i territori del bacino del Mediterraneo e anche alcuni territori del Mar Nero, la Dacia in particolare, fino all'attuale Crimea e alla Turchia (la Turchia settentrionale che si affaccia sul Mar Nero). Praticamente, quindi, i reperti archeologici greco-romani potrebbero provenire dall'Italia ma anche da Paesi dell'area del Mediterraneo che non hanno alcun collegamento con il nostro territorio e quindi lo Stato in questo caso potrebbe trovare delle difficoltà.

In realtà anche tali difficoltà vengono a essere superate (e mi avvio alla fine, anche se il discorso meriterebbe ben altra estensione e approfondimento) perché tutti i Paesi dell'area del Mediterraneo, a eccezione dei Paesi balcanici (Croazia, Bosnia-Erzegovina, Macedonia, Montenegro, anche Albania), hanno delle legislazioni egualmente protezionistiche e si parla addirittura di una *common law* che riguarda tutta l'area del Mediterraneo.

Si dice addirittura, negli studi antropologici del diritto penale, che la cultura del Mediterraneo è diversa dalla cultura dell'Oceano Atlantico e del Mare del Nord.

Anche di questo dovremmo parlare, ma purtroppo il tempo è tiranno.

Io ho semplicemente introdotto il problema per chiarire quali siano i principi che tutelano il patrimonio culturale e lo rendono recuperabile.





## CASE STUDIES INVOLVING ANTIQUITIES TRAFFICKING NETWORKS

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This paper will discuss four case studies involving antiquities trafficking networks, and conclude with a proposal about how to move our work from case studies to a more systematic analysis by creating a collaborative platform for gathering data on the illicit antiquities trade.

### 1. *The Italian Network*

I'm going to start with a trafficking network that many will be familiar with. This is the one described in the famous 'organigram', a handwritten organization chart recovered in the 1990s by Italian investigators from a middle man in the illicit antiquities trade in Italy. It shows the illicit antiquities trade that operated in Italy from the 1960s through the 1990s and is essentially a sketch of an organised crime network made by one of its members.

The supply network of looters and middlemen across Italy filtered illicitly excavated objects to two prominent middlemen. At the bottom of the pyramid you see looters – Elio, Alessandro, Dino. As you move up the chain you see two prominent dealers, Gianfranco Becchina and Giacomo Medici. Becchina was a Sicilian antiquities dealer based in Basel for many years; Medici got his start buying from looters outside of Rome and eventually moved his operation to Geneva's Free Port. Both of them were key suppliers to the man at the top of the pyramid, Robert Hecht. Hecht was an American dealer, a classically trained archaeologist who became the '*capo di tutti i capi*' of the antiquities trade over five decades, dealing

not just in Italian antiquities, but also material from Turkey, Greece and elsewhere.

The discovery of the organigram was an important development for this field. It convinced Italian investigators, and those who follow their work closely, that antiquities trafficking networks could be as organized and sophisticated as other illicit networks. Medici and Becchina were both based across the Italian border, in Switzerland. That gave them some liberty to clean these recently looted objects and prepare them for the market. Hecht, based in Paris and New York, was the key connection to the international market. As you can see at the very top, many of his key clients were museums and collectors in the United States.

The discovery of the organigram led to a raid in Switzerland in 1995 on Medici's warehouse. During that raid Italian investigators recovered thousands of Polaroids. These Polaroids were another breakthrough, in the sense that they provided smoking gun evidence of looting. These objects had come out of the ground recently and were photographed by the looters before they were sent to Switzerland to be cleaned and prepared for the market. The tasks that fell to the Italian investigators was to find out where all these objects had ended up. It was not an easy task – it took two dedicated investigators nearly a decade to trace a hundred or so of these objects.

Many of them ended up at the J. Paul Getty Museum in Malibu, California. Today the Getty Villa is the only museum in the United States dedicated to the art of the ancient Mediterranean. It is exclusively for antiquities, many of which came through this trafficking network.

- The Getty's *Statue of Apollo* is shown in Medici's Polaroids soon after it was illegally excavated in Southern Italy. They show it lying on a packing crate with what looks like oak leaves on the floor.
- *Gryphons Attacking a Fallen Doe* is also shown soon after it was discovered by looters, sitting on what the investigators determined was an Italian newspaper. Another photo shows Giacomo Medici during his visit to the Getty, where he admire his handiwork and took some 'hero shots' in front of the objects he had supplied.
- The Getty's *Euphronios Cup* is show it in photos in the early stages of restoration.

When confronted with these Polaroids, the Getty conducted its own internal investigation. It's striking that the conclusion that the Getty's own lawyers came to was very similar to the org chart created by the Italian traffickers. It was based on a review of the Getty's curatorial files while they were building their collection through the 1970s, 1980s, and 1990s. It shows that objects are coming out of Italy, through Medici, Becchina, Hecht, and Robin Symes in London.

The Getty chart has also introduced a new layer of the illicit trade: private collectors. Barbara and Lawrence Fleischman were prominent New York collectors who bought from these dealers and sold/donated their considerable antiquities collection to the Getty in 1996. Maurice Tempelman is a diamonds trader, also in New York, a very wealthy man best known as the paramour of Jackie Onassis. He built a considerable collection buying objects from Robin Symes. Many of these ended up at the Getty Museum.

If you put together the Italian organigram with the Getty lawyers' charts, you for the first time have a complete picture of what Duncan Chappell and others have referred to as a '*cordata*'<sup>1</sup>, a transnational smuggling network that goes from the fields of Italy to Switzerland, where the objects are laundered, through private collections that give the impression of a clean provenance and onto the shelves of a major American museum.

This was a breakthrough in the general understanding of how organised the antiquities trade is, and all the different steps that objects take as they pass through that trade.

Our reporting gave us access to thousands of internal Getty documents detailing what did the Getty know, and when they knew it. They offer an unprecedented window into the collecting practices of American museums.

A memo that the Getty's own lawyers came to refer to as «the smoking gun memo» describes how the *Gryphon* and the *Apollo* were purchased from Medici, Hecht and Symes. Shortly after the acquisition was formalized, Medici supplied an assistant curator at the Getty with very specific information about the tombs from which the objects had come, and

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<sup>1</sup> D. CHAPPELL - K. POLK, *Unraveling the "Cordata": Just How Organized is the International Traffic in Cultural Objects*, in S. MANACORDA - D. CHAPPELL (eds.), *Crime in the Art and Antiquities World. Illegal Trafficking in Cultural Property*, Springer, 2011, pp. 99-113.

the path that it had taken through the market. This document was an important discovery because for years American museums had presented themselves as innocent victims of a shady market. They presented what was earlier described as ‘the innocent owner’s defense’<sup>2</sup>, arguing that they didn’t know what they were buying had been looted.

This and other documents from the Getty show otherwise. They did know that many of the objects they would buy had been looted, and they took steps to protect themselves legally while continuing to acquire from these corrupt dealers.

## 2. The Getty ‘Aphrodite’

One Getty object not in the Medici Polaroids is the *Statue of a Cult Goddess*, or the Getty *Aphrodite*. It is remarkable not just for its stature – 7 feet tall – but also for its rarity. It comes from the very peak of classical Greece; its style is modelled after Phidias and was probably created by sculptors either trained by Phidias – who created the famous Parthenon sculptures – or were emulating his work. The windblown drapery of the goddess is a direct shout-out to the Parthenon sculptures. The Getty acquired it in 1988 for 18 million dollars, a record high price for a piece of ancient art. To this day there have been just a few pieces that have surpassed that price.

Getty documents that we obtained spoke about a 1987 conversation between Harold Williams, the CEO of the Getty Trust, the umbrella organisation over the museum, and museum director John Walsh. At the time, they were debating a new acquisition policy while considering the acquisition of the *Aphrodite*. The current acquisition policy prevented them from buying objects that might be looted, so they needed a new policy in order to buy the *Aphrodite*, and this was the topic of conversation.

Notes from the meeting show Harold Williams saying, «We’re saying that we’re not looking into the provenance; we know it’s stolen, Symes is a fence».

The question of whether or not to acquire looted antiquities was something that was debated widely in the Getty for years. To the Getty’s credit, other museums simply weren’t having this debate, they were just

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<sup>2</sup> See *supra* in this volume S. FELDMAN, *Efforts by Prosecutors and Private Counsels to Recover Cultural Property in the United States*.

buying the objects. The Getty was wrestling with this in part because Harold Williams was trained as an attorney, and he had concerns about the institution's legal exposure. John Walsh and Marion True, the Getty antiquities director, and others at the Getty, had to explain to him this had been going on for a long time, and was part of museums' business. Williams wanted to make sure that they mitigated their legal risks. The question he left them with was: «Are we willing to buy stolen property for some higher aim?». The higher aim, they believed, was to enlighten the public that visits the Getty and protect and conserve the objects. For decades, the answer to that question at the Getty and at other American museums was yes.

In 2007, my co-author Ralph Frammolino and I split up to investigate how the *Aphrodite* passed through the illicit antiquities trade. Ralph went to Switzerland to track down Renzo Canavesi, a middleman in the trade based in Lugano, Switzerland, just across the Italian border. I went to Sicily to see if I could find out who the actual looters were, and who the source country traffickers had been.

What we found was that the *Aphrodite* was almost certainly looted from a site called Morgantina in central Sicily in the late 1970s. The Campanella brothers are two goat herders who own a piece of property just adjacent to the archaeological site. They deny being involved with this, but local market sources said that they were the ones who initially discovered the *Aphrodite*, which then passed to Orazio Di Simone, an alleged antiquities smuggler who, according to Italian law enforcement, was also involved in other illicit activities. Di Simone allegedly helped move the statue in the back of a carrot truck to Switzerland, where Renzo Canavesi, a former Swiss customs official, held it in his basement for several years before selling it to Robin Symes for 300.000\$. Symes then offered it to a private collector who said it didn't fit in his house, and so ended up going to the Getty museum, who bought it in 1988 for 18 million dollars.

We published a story tracing this path through the trade in the *Los Angeles Times*<sup>3</sup>. In 2010, the Getty agreed to return the statue to Sicily. Getty conservation experts helped install the statue at its new home in Aidone, a small town just adjacent to Morgantina.

One final note on the so-called *Aphrodite*: when objects are returned to their context, their meaning can shift. This sculpture had been

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<sup>3</sup> J. FELCH - R. FRAMMOLINO, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum*, Houghton Mifflin Harcourt, 2011.

known as *Aphrodite* for years, but there is no known record of a cult of Aphrodite in Morgantina. Aphrodite was not the most popular goddess for the Greek settlers who lived in ancient Sicily. Ancient Sicily, particularly the central plains, close to Mount Etna, were devotees of Demeter and Persephone, the fertility goddesses. Ancient Sicily was the bread basket of the ancient world, and produced huge amounts of wheat and other staples.

And so, when you return the *Aphrodite* to its context, you realise that almost certainly she represents Persephone or Demeter. She would have been venerated as a fertility goddess, a bringer of good harvests, not the goddess of love as she's been known.

During her thirty years at the Getty, the statue was never formally studied. There were no academic treatments and there was no close scrutiny of it, in part because of its tainted origins. This is one of the consequences of looting.

### 3. *Other American Museums*

The Getty was by no means alone in its dealings in illicit trade. Here's a tally of the objects that have been returned to Italy and Greece since 2006 based on investigations of the Italian network:

- The Princeton Museum: 178 objects and fragments;
- The Getty: 130 objects and fragments;
- The Metropolitan Museum: 61 objects and fragments;
- The Cleveland Museum: 14 objects;
- The Boston Museum of Fine Art: 13 objects;
- Dallas Museum of Art: 6 objects;
- Minneapolis Museum: 1 object;
- Toledo Museum: 1 object;
- Shelby White (collector): 12 objects;
- American Dealers: nearly 300 objects.

The estimated value of these returns exceed 1 billion dollars. That's a rough estimate, because it's very difficult to value these things, most of which are unique.

#### 4. *The South East Asian Network*

By then, I thought my job as a journalist was done. We had helped expose the role of the Getty Museum and other American museums and collections in the illicit antiquities trade. Museums had returned dozens of priceless objects and promised reforms. But soon after I came across another antiquities trafficking network in my backyard.

In January 2008, 300 federal agents raided four museums in Southern California. They were there to seize hundreds of objects that, according to a five-year undercover investigation, had been smuggled out of Thailand, Cambodia and Burma, into the Port of Los Angeles, and distributed through a network of donors to local museums.

This network began with looters in Ban Chiang, a World Heritage site in Thailand that's been pillaged for decades. Those objects were allegedly passed to Mark Pettibone, an American based in Bangkok. He allegedly provided those objects with forged export documents and shipped them in cargo containers to Robert Olson, an American dealer based on Anaheim, CA. Olson allegedly distributed the objects to private collectors, museum curators and two local dealers, John and Cari Markell. The Markells allegedly provided the objects to collectors or donated them directly to several local museums. Another major client of Olson was Barry MacLean, a prominent industrialist in Chicago who has his own museum at his house.

Today, Robert Olson and Marc Pettibone have been indicted and are facing trial. The other people in the network have not been indicted<sup>4</sup>.

In February 2014, the Bowers Museum, one of Olson's biggest clients, agreed to return more than 500 looted objects acquired from Olson to Thailand. They will also forfeit more than 70 Native American ladles acquired through a related network.

#### 5. *The Cambodian Network*

In 2012, federal agents seized a 10<sup>th</sup> Century Khmer statue of a temple warrior that was being offered for sale at Sotheby's. Its twin is at

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<sup>4</sup> J. FELCH, *Stolen-artifacts Case Has Cost Much, Yielded Little, Critics Say*, in *Los Angeles Times*, 18 May 2013 (<http://articles.latimes.com/2013/may/18/local/la-meanti-quity-indict-20130519>).

the Norton Simon Museum, a few blocks from my house in Pasadena. These objects allegedly passed through another trafficking network involving Khmer antiquities looted in Cambodia and smuggled out of Thailand.

How do we know these objects were looted? Well, thanks to the work of Tess Davis and others we have pictures of their feet *in situ*<sup>5</sup>. The missing feet of those statues remain in the archaeological site of Koh Ker, so there's no question where these objects came from. The question is when they were removed, and what the legal regime was at the time.

Several other objects from this same temple passed through the same network and today are in various American museums. The gentleman who according to law enforcement has been tied to all of these objects is Douglas Latchford, a British citizen who has been based in Bangkok for decades. He is a prominent collector and dealer. To date, he hasn't been accused of a crime, but law enforcement has identified him as the primary supplier of several objects now being sought by Cambodia. Looters, some of whom may have been tied to the Khmer Rouge, raided the temples of northern Cambodia and allegedly smuggled the objects across the border for Latchford, who sold them directly to museums, auction houses and private collectors.

One of them ended up at the Norton Simon Museum. In the 1970s, people were much more upfront about where they got stuff. When asked by the *New York Times* where he got his Asian art collection, Norton Simon said «Hell yes, it was smuggled! I spent between 15 and 16 million dollars in the last two years on Asian art, and most of it was smuggled». Back then you could tell the truth.

In May 2013, the Metropolitan agreed to return to Cambodia two *Kneeling Attendants* acquired from Latchford. In December 2013, Sotheby's ended its lengthy legal battle to keep the contested 2 million dollars temple warrior and agreed to return it to Cambodia. The Norton Simon Museum is currently in talks to return its sculpture of Bhima.

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<sup>5</sup> T. DAVIS, *Supply and Demand: Exposing the Illicit Trade in Cambodian Antiquities Through a Study of Sotheby's Auction House*, in *Crime, Law and Social Change*, 2011, pp. 155-174. See also, *supra* in this volume, S. MACKENZIE - T. DAVIS, *Cambodian Statue Trafficking Networks: An Empirical Report from Regional Case Study Fieldwork*.



## 6. *The Indian Network*

The case that's occupied me most recently is that of Subhash Kapoor, an American antiquities dealer based in Manhattan who since 1974 has been one of the leading dealers of South Asian art. Kapoor has for decades provided the world's leading museums with Asian art and bragged about it, which has made it easier to track where his objects ended up.

One example is this Chola-era bronze sculpture of Shiva Nataraja, which was stolen from a temple in Tamil Nadu, India in 2006 and shipped to Kapoor in New York, where he displayed it in his catalogue cleaned up and bathed in beautiful light. In 2008 he sold it for 5 million dollars to Australia's National Gallery of Art along with 20 other objects, many of which were also stolen from Indian temples. The Australian museum has recently acknowledged it was duped by a false provenance and filed suit against Kapoor in New York. Kapoor is currently on trial in India and faces an arrest warrant in the United States<sup>6</sup>.

Kapoor's network has some similarities to the other ones we've seen: a distributed supply network, with objects coming from India, South East Asia, Afghanistan, and being distributed to museums around the world.

## 7. *A Proposal: Antiquarium*

Looting is a global problem. It's a transnational supply network fuelled by poverty, conflict and the demands of the art market, particularly private collectors and wealthy museums.

As our understanding of the trade has deepened in recent years, we've been seeing increasing evidence of links between the illicit antiquities trade and other forms of organized crime. But there are many questions that still remain unanswered. Most importantly, we really don't even have a good estimate about the size of the trade. This is the reason that to date most researchers have been dealing with case studies and anecdotes, not data. There is no reliable data on the antiquities trade.

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<sup>6</sup> J. FELCH, *Feds Pursue Manhattan Art Dealer Suspected of Smuggling*, in *Los Angeles Times*, 11 June 2013 (<http://www.latimes.com/entertainment/arts/culture/la-et-cm-asian-artifact-smuggling-20130611-story.html#page=1>).

The research of the trade has occasionally been excellent, but often is narrowly focussed and siloed in different academic disciplines. Some criminologists look at it, some art historians look at it, some economists look at it. That's led to an uneven picture. One of the leading researchers of the trade, Neil Brodie, has begun to take a more systematic approach, looking at historical auction sales to try to estimate the flow of materials through the market<sup>7</sup>. It is an imperfect proxy but a useful one. We should do more in this direction.

Looking forward, I see several areas where we could advance our understanding of the trade.

One is the need to move from qualitative approaches to quantitative analysis using data. Because data is scarce, we need to create it, gathering information from the market at a massive scale to broaden our understanding. We also need to engage the public in this work, and encourage the media to be more consistent in its coverage of these issues. And we need to create incentives for museums and collectors to do the right thing, and be more transparent about their collections.

For the past year, I've been working on a new initiative that tries to address these needs. It's an experiment with a new way to harness the power of a global network to gather data about the illicit trade while engaging a broader, interdisciplinary group in the work. I call it Antiquarium.

Antiquarium is a collaborative platform<sup>8</sup> to gather data about the illicit trade, organise the analysis of that data and build our understanding of the global antiquities trade while engaging a broader audience.

The project has three components:

- An antiquities trade database of people, places, and objects linked to the trade;
- A crowdsourcing tool to engage a diverse group of volunteers in the gathering and analysis of data. This approach address a fundamental funding problem, as all of the money in this world is on one side of the equation;

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<sup>7</sup> N. BRODIE - J. DOOLE, *The Asian Art Affair: US Art Museum Collections of Asian Art and Archaeology*, in N. BRODIE - C. HILLS (eds.), *Material Engagements: Studies in Honour of Colin Renfrew*, McDonald Institute, 2004, pp. 83-108.

<sup>8</sup> See <http://chasingaphrodite.com/wikiloot/>.

- A repository for primary source images and documents about trafficking networks.

We have built a rough prototype of the project, and will launch it soon with a select group of researchers and volunteers to test. Down the line we plan to incorporate network analysis tools and data visualization.

With the crowdsourcing component, the project seeks to take advantage of the discovery of several massive dealer archives and other new sources of data. For several reasons, that information has not trickled into the public consciousness. It's voluminous, it's unstructured, and is not readily accessible. It will take a concerted effort to turn it into usable data, and we hope to engage the crowd to do that.

The *Becchina Dossier*, for example, consists of about five gigabytes of images, or tens of thousands of individual .jpps. These digital photographs are a page-by-page capture of the business records of Gianfranco Becchina, one of the most prominent dealers in the Italian Network. Compared to his more famous rival, Medici, Becchina was a much better record keeper. The images include shipping documents, conservation records, receipts... much more detailed information about how he worked in the trade. They include thousands of images of recently looted objects. Where are those objects today? We need the help of the crowd to find out. We need to extract information from these flat records. By doing so, we will begin to build the data sets that will allow us to do the type of analysis being done in fields that are far ahead of us.

How do you make sense of that volume of information? The old approach is to hire a few experts to sit down in a room for two years to crunch it. They would make a good dent in the material, but we don't have the funding to hire those experts. It also is not an efficient approach: it took two Italian experts nearly ten years to find about 100 matches in the Medici archive of Polaroids.

Crowdsourcing has been used successfully by several other disciplines to address this issue, which essentially is a labor problem. Projects like those run by the Citizen Science Alliance asks the public to go through structured, repetitive analysis tasks to help create data and organize information. The key to success is creating tasks well-suited to the crowd's abilities. In other words, not asking people to identify Euphronios as the painter of the vase, but asking them to identify the object as a vase as opposed to a sculpture.

There are important questions about how to preserve reliability with a crowdsourcing approach. This is a relatively new approach to research, but one that's been successfully used by NASA, the Smithsonian and countless others to conduct serious research.

Who is the crowd? Well, it's researchers and academics, university students and journalists, lawyers and law enforcement. And it's the general public, armchair archaeologists who want to combat the illicit trade and don't know how to get involved. In this sense, the project is also a public engagement tool.

In terms of data sourcing, over the past seven years I've collected several massive data sets. There is enough to get the effort started, and I am confident new data sets will continue to emerge. Recently, the Boston Museum of Fine Arts was generous enough to give me five DVDs with data on every classical antiquity they've bought since 1950, including its provenance and, in many cases, the price they paid. The Getty, the Met and other museums are increasingly putting this type of information on-line for us to use. These data sets need to be parked somewhere that's easily accessible to researchers, and where we can process them together in an organized way.

Over the past seven years researching the antiquities trade, I've encountered dozens of passionate people in countries around the world looking to work across borders to disrupt the trade in stolen cultural objects. My hope for Antiquarium is that it can become a hub for those seeking to collaborate on this work.

Our work is guided by the belief that to combat transnational crime, we need to adopt transnational solutions.

*Part V*

**THE ROLE OF PRIVATE  
ACTORS IN PREVENTING  
ILLEGAL TRAFFIC**



## THE ART LOSS REGISTER AND DUE DILIGENCE IN THE TRADE IN CULTURAL PROPERTY

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This paper reflects the experience gained by the Art Loss Register (ALR) in working successfully to prevent and deter the illicit trade in cultural property for over 20 years. It is born out of experience rather than academic research. As such the approach advocated below is undoubtedly more pragmatic than some of the more idealistic ideas advanced by others, as it arises out of our interaction with those engaged in the trade in cultural property, but at the same time it is also more effective. It is our hope that the paper below will, together with others in this volume, provide a stimulus to both academic and practical efforts to reduce the extent of the illicit trade in cultural property. In particular this paper attempts to set out the role for a due diligence database, such as the ALR's, in these efforts; together with the importance of engaging with the market itself.

### *1. The Market*

From our position as a due diligence database we see three phases in the illegal, and legal, trade in cultural property. These are the demand for cultural property; the sources of cultural property; and the market for that cultural property.

As a starting point in considering the question of how to protect cultural heritage, we believe that it must be accepted that there will always be a demand for cultural property. The demand for cultural goods is readily apparent and can be seen from even the most cursory review of auction

catalogues or the stock of specialist dealers. Such a review would also make clear the value ascribed to those items and which drives the market for them.

This demand is in part driven by museums and galleries through their acquisition and exhibition policies; indeed the trend in exhibitions is arguably moving towards glorifying objects and their physical attributes rather than their cultural importance. Exhibitions of cultural property seem to increasingly focus on its aesthetic rather than cultural value, perhaps due to a need for museums to secure high visitor numbers to cover funding shortfalls. As a result, collectors and institutions will continue to find artefacts desirable as decorative objects rather than as sources of information and vital elements of our cultural heritage.

The extent to which cultural property should ever be privately held is a question far beyond the scope of this article, but that it is, will be, and that there is a demand for it is certain.

## *2. The Role of Education*

The benefits of educating those within the market as to the importance of only purchasing those artefacts with a legitimate provenance are often described, and this is undoubtedly an important aspect of the work that should be done to protect cultural heritage; however there may only be minimal gains to be won as a result of further steps towards educating buyers. It is not difficult to name examples of institutions widely considered reputable which in recent years have acted, when it comes to their acquisition policies, in a fashion which then calls their ethics into question. If the institutions which are supposed to be for the benefit and education of the public are not already in a position where they understand the problem and the impact of their actions, then how much more can further efforts at education as to the impact of the illicit trade in cultural property reasonably be expected to achieve? We would argue that there is very little more that can be gained.

Given that the further education of buyers has such a limited potential to improve the position, it appears reasonable to approach the issue on the basis that there is a demand for cultural property, that demand will continue, and as long as there is a demand there will be a market for such artefacts, whether open or illicit.



The demand will always be there unless a profound shift can be achieved in the attitude of those purchasing cultural property, and there is little evidence that such a change is likely to occur. Turning again to the three phases in the market that we identified above, that means that this problem must either be tackled at the source, or in the market itself.

### *3. Source Countries*

There are difficulties in tackling the problem in source countries; some of these can be overcome – for example the invaluable work that UNESCO has been carrying out in relation to training those working on the ground in vulnerable source countries to recognise and protect cultural property, or the guarding of registered sites of cultural importance in Iran – but the most significant difficulty, and hardest to overcome, is the economic drive to loot artefacts.

Subsistence digging, along with similar activities, is driven by the demand for artefacts facilitated by the global market. Unless there are more attractive sources of income for people in source countries that problem will remain, and is likely to continue to grow. The same is true of more targeted looting, it is driven by the fact that the artefacts sought have an economic value which, for the looters, outweighs any cultural value, the risks they face from law enforcement agencies, and the risk that they will find nothing at all.

Much is being achieved in source countries, and undoubtedly more will be done in future, but given that cultural property has such high values associated with it, we do not believe that it is feasible to prevent cultural property entering the market in significant volumes at present. This brings us to the market in our three phases outlined above.

### *4. The Market*

Based upon our experience it is our view that, in a scenario where willing buyers can be found, and people are willing for financial reward to loot artefacts to supply that demand, the problem of protecting cultural heritage can best be targeted through efforts in relation to the market rather than the source or buyer. If the trade in cultural property can be reduced by

cutting off the buyers from the sources, or at least making this trafficking more difficult, then a deterrent effect when it comes to looting should follow. It will simply become a less profitable activity.

Through intervention in the market control can be exerted over the trade in artefacts, both legitimate and looted. Such efforts can also provide information to help tackle buyers who do not see the consequences of their purchase of looted artefacts, and help bring to justice those who bring artefacts onto the market and deal in them.

So if the market, rather than the source or the buyers, is our focus in the way that the private sector can address this problem, there are three broad areas where our experience suggests that pressure can be brought to bear upon that market, and steps taken to try to reduce the trade in looted artefacts.

The first is through the law. That is to say the creation and, more importantly, the application of international and national laws which can be used to prevent, and if necessary punish, the theft of cultural property and dealings in it. Those trafficking and dealing in looted artefacts need to feel that there will be significant legal consequences for them if their involvement is established. International laws also, in so far as is possible, need to remove some of the problems arising from the different approaches of nation states to ownership and title. This is exploited to a significant extent by some of those involved in the trade in cultural property despite increasing efforts towards harmonisation, for example through the 1995 UNIDROIT Convention.

A second way to target the market in looted artefacts is to focus on its ethics and the way in which it practices. Engaging with the trade, encouraging those who take a more principled view and supporting them in turn to put pressure on their peers could prove effective. If dealers and auction houses feel that they are all perceived as the enemy, something perhaps indicated by the rarity of engagement between the trade and those approaching this issue from a more academic standpoint, then it will inevitably make it more difficult to encourage them to work in an ethical fashion. Engaging with the trade might only lead to gradual progress, and accusations from some of an approach complicit with those involved in trafficking, but any improvements in the way in which those in the trade approach their profession could be extremely beneficial in the long run. This will be particularly true if it can be combined with pressure from buyers to secure legitimate artefacts with a known history. That way the

trade might be encouraged to move towards a more ethical market place. Engaging with the trade is something that those in the private sector, such as the ALR, might be better placed to facilitate than others such as public sector bodies, or law enforcement agencies. We can act as an interface between those seeking to deal in cultural property, and those wishing to ensure its proper protection.

The third area in which progress can be made in targeting the market in particular is in proof of provenance, and this is an area in which we believe the ALR has a particular role to play and upon which we will focus below. In particular, the more information that can be provided to create records of a legitimate market, the greater the pressure that can be brought to bear upon the black market. The more that an audit trail for artefacts can be created, and legitimate items have their provenance made clear and valued, the more difficult it will be for stolen and looted goods to enter the market and the lower their value will be.

### *5. The ALR, a Due Diligence Database*

Before outlining what it is that we believe the ALR has to offer in the fight against cultural property crime we ought first to explain briefly what the ALR does and how it operates. The ALR is a private company which maintains a database of uniquely identifiable artefacts including art, antiquities, furniture and so on. That database is the largest private database of such items in the world. Within the art trade we are accepted as the database that must be searched for due diligence purposes.

Items can be entered onto the ALR database when they are lost or stolen, if there are known fakes in the marketplace, or to record that they are in dispute, damaged, or destroyed. The ALR database currently contains roughly 420.000 of these various types of registration. Of particular relevance to the protection of cultural heritage is the fact that positive registrations can also be entered onto the database.

Positive registrations are made before an item goes missing. It is easy to do, simply requiring sufficient information to uniquely identify the item at a later date, and provides both a deterrent effect, and immediate protection if an artefact appears on the open market at a later date. Full details need to be provided at the time of registration, good records kept, and notifications made of any legitimate disposal of course. The obvious benefit of this is that if a known artefact is stolen, and then enters the

market, it will already be on the database and thus is much more likely to be detected than if there is no such record.

Positive registration is particularly helpful since at times of large scale looting it is often the case that the country from which the artefacts are stolen has other things to deal with, looting often going hand in hand with violent conflict, or that the theft is from a storeroom and initially undetected.

#### *6. Searching Against the Database*

Dealers, auction houses and individual buyers are encouraged to search against the ALR's database prior to purchasing or selling an item. If it is registered on the database (or identified by the ALR on an external database to which it has access) then at that point the dealer, the person who registered the item, and relevant law enforcement agencies are informed. If the relevant law enforcement agencies are interested in pursuing the matter, then cooperation and information will be provided to them; if, on the other hand, it is a civil matter, then the ALR will offer its services to the parties to help secure the recovery of the item.

If the item searched is not matched during the search process, then this will be confirmed to the dealer and, provided that they can provide a provenance that does not raise problems, they will be issued with a certificate stating that the item they have searched for is not on the ALR's database and thus not known to be lost or stolen. The provenance provided would also be recorded on the certificate. Records are kept of all searches, and of the information provided with them.

At this point we ought also to mention that those working for law enforcement agencies are able to search our database free of charge to assist them in their ongoing investigations and also to register losses. By way of example we have registered thousands of items for the UK police each year in recent years.

#### *7. Searching for Looted Cultural Property: The Difficulties and the Benefits*

Inevitably with looted artefacts from archaeological sites there are problems that arise in this search process, since the items searched may

never have been known before reaching the black market. Simply put, there is no record of what is still to be found in the ground. This makes the due diligence process for archaeological and ethnographic artefacts particularly difficult. At the ALR we believe that this makes positive registrations particularly important. Because the database is being used by those in the trade as a due diligence tool, positive registrations of this type of artefact ought to have two initial positive impacts. Firstly it should make it much harder for known artefacts, perhaps looted from storerooms or museums, or stolen from standing buildings, to be sold on the open market; and secondly it ought to help to build a picture of the number of such items, where they are originally from, who has been finding them, where they are legitimately held, and the type of provenance that such existing artefacts have.

A further beneficial effect of this increase in positive registrations would be that more positive registrations, and the consequent strengthening of the database, would hopefully help to encourage dealers to search in the hope of receiving a clean bill of health for the item searched. It should also make it harder to avoid this level of due diligence where it is possible through a mechanism as simple as a single search of the ALR database. More searches would in turn have the further benefit of leading to a position where more is known about which dealers are not searching things against the database, or who are searching but offering very little information regarding an item and its history. Such information could permit investigation to be targeted upon those dealers and the cultural property in which they trade.

Information gained from this combination of positive registrations and the data collected through searching can provide evidence that forms part of the audit trail described above, and which should in future allow a greater understanding of the way in which cultural property is traded illicitly on the market. This understanding ought in turn to provide better opportunities to prevent this illicit trade and work towards a cleaner market. Without the due diligence process it is hard to see how equivalent information could be accumulated. Crucial to this is the fact that the ALR database is a managed database, rather than a passive or open database. This means that records are kept of all searchers and the items they are searching, in contrast to other databases, such as that of INTERPOL or the FBI, which can be searched with no records being kept of who has searched and thus might be in possession of an item at that moment. In

contrast, with the ALR database any match can be followed up immediately and the searcher's identity is known.

Such information allows the potential to start approaching the trade in looted cultural property in an informed fashion and to try and use this data to spot where an artefact is likely to be of dubious provenance or high risk for other reasons. Examples might be things such as a sudden influx of a particular type of artefact onto the market which significantly increases the number of that type of artefact beyond those already known; patterns in the locations from which certain types of object enter the trade; or the dealers making particular searches. Simply put, the more that searches are carried out by dealers and the more is known about existing artefacts through positive registrations, the easier it is to trace items through the market and to identify illegitimate, as opposed to legitimate, transactions. The hope would be that this could provide a mechanism to improve the detection of looted artefacts with little or no provenance, and to distinguish such items from antiquities that have legitimately been on the market or in private hands for many years, but which do not have the provenance to support this.

#### *8. A Possible Criticism of this Approach?*

Issuing certificates making clear that an item of cultural property is not known to be looted or stolen is not without its risks. Undoubtedly there will be some who look to treat such certificates as absolute proof that an item has not been looted, when that is neither their purpose nor what is stated upon them. This already happens.

That is why it is important to strengthen those certificates by building up the number of positive registrations on the database. In effect, the more data that can be introduced to the database the better it will become as a tool for reducing the trade in looted cultural property. Another important part of that data gathering process is also the accumulation of searches from dealers and, as mentioned above, the certificates have the benefit of providing an audit trail, indicating who has been involved with an artefact if it later becomes suspect.

Indeed, one of the great difficulties in pursuing those involved in the trade in looted cultural property is linking the people involved at different stages to the item which has passed through their hands. Through

the use of the ALR database, and the issuing of certificates, it is possible to provide evidence of the links between these two categories, the people and the artefacts, at particular points in time. It may be that at the time a search is made an artefact is not known or thought to be looted, or an individual was not known to be dealing in looted artefacts, and in such a scenario a record of that relationship could be invaluable to law enforcement agencies at a later date. If certificates were not issued that information would simply not be available because dealers would not have any need to search as it would offer them no benefit.

Those trading in cultural property may not want to open up their trade to view, but through searches and certificates evidence at a moment in time can be secured and glimpses of their actions revealed. That might not be immediately beneficial at the time the certificate is issued, but later on could be extremely helpful, particularly given the tendency for recoveries and restitution to occur in circumstances where many of the details remain private due to the confidential nature of the settlements that are often the solution to recover cultural property.

### *9. Incentivisation of the Trade*

Side by side with improving the content of the database through the use of positive registrations to better reflect the known artefacts, those involved in the trade must also be encouraged to take sufficient interest in questions of provenance to carry out searches against the database. We therefore suggest that as well as the threat of enforcement action by law enforcement agencies, and the potential for associated reputational and financial costs, which operates as a stick, there is a need to encourage dealers and auction houses to engage with the due diligence process by offering a carrot. In our view the best way to offer a temptation for them to carry out proper due diligence is the prospect that a legitimate trade would most likely permit them to charge higher prices for items where they can prove their legitimacy, both because of the safety it offers to the buyer, and the increased rarity value of artefacts if those that are looted are less likely to make their way through the market. This is something which we believe it may already be possible to detect at the higher end of the market.

If that is indeed the result of an increased focus on provenance in relation to cultural property, then a consequence of reducing the illicit trade

in artefacts is likely to be an increase in the price that can be charged for legitimate artefacts. Something which might well risk making the looting of sites even more attractive once again, as the potential rewards are greater.

The response to this must be that this increase in looting will only happen if the artefacts can then be passed into the market to find a buyer. This is why it is considered so important to focus on the market, and those involved in the trade, through engagement with them and improvements in their due diligence processes.

#### *10. Concluding Thoughts*

The trade in antiquities is a fact of life, that being so the most sensible approach to the problem of the illicit market must be to engage with the trade to move them in the right direction. The easier due diligence can be made for the trade, the harder it will become for them to avoid carrying it out, or to justify this decision.

One of the reasons why the ALR database is used so heavily in due diligence by those in the art market and antiquities trade is that whilst there are many databases out there that can be searched by someone seeking to investigate the provenance of an item, we offer our services to dealers and auction houses to search their items for them, using the information that they provide and centralising the information that is available for their benefit. This takes the burden of searching multiple databases off the searcher. Having one database, such as ours, which incorporates as much information as possible, and allows for as straightforward a process as possible for the dealer or auction house to work with, is a powerful incentive for those involved in the trade in cultural property to move towards a more legitimate market. Due diligence need not be something which makes their lives more difficult, or their business less profitable, which we fear is the perception when there are so many potential databases that a dealer might need to search against and so little certainty to be gained if multiple databases need to be considered.

We at the ALR believe that we are well placed to offer a service such as this. Nation states and international organisations have had the opportunity to create a similar database and due diligence tool, but have not done so. In particular the volume searching for the trade and



international coverage which we offer would be extremely difficult to replicate. Ultimately we suspect this reflects the difficulties that all involved in cultural heritage management and research face in securing funding. A database funded and supported largely by the trade, and which the trade are willing to work with, is in our view the most effective way to ensure that due diligence is firstly possible, and secondly carried out.

#### 11. *A Plea for the Sharing of Information*

Conferences such as that held in Courmayeur in December 2013 on the topic of *Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice* often include a lot of talk of partnerships and building networks and that is something that we at the ALR always welcome. Whenever information can be provided to us strengthens our database as a due diligence tool and puts us in a better position to provide information to others. The stronger that our database can become, the better protected cultural property will be. As a result we are always keen to share information whenever possible, and to incorporate into our database anything that others can offer.

Part of this process is the need for law enforcement agencies and others to work in partnership, to share information and to cooperate with each other and with the private sector. We offer significant information and assistance to law enforcement agencies and, as mentioned above, those in law enforcement agencies can also search our database at no cost to them. But it is important to note that we also work with insurers, the trade, lawyers acting on recoveries, and individuals. Through those links, our ability to facilitate engagement with the trade, our simplification of the due diligence process, and the use and strengthening of our database we believe that reductions in cultural property crime and a greater understanding of the processes it involves can be achieved.

Cultural property is undoubtedly a precious and finite resource and thus anything that can be done to protect it will be of significant benefit to the global community. Crucial to success in this goal will be the sharing of information between those with an interest in preventing cultural property crime, greater efforts at encouraging due diligence, engagement with the trade, and cooperation to ensure the rapid, effective and efficient resolution of claims that do arise.



THE INTERNATIONAL CONVENTION OF EXHIBITION  
AND FINE ART TRANSPORTERS

MARK STARLING

*Chair, International Convention of  
Exhibition and Fine Art Transporters,  
Toronto, Canada*

Dear Esteemed Members of International Scientific and Professional Advisory Council of the United Nations, dedicated Chair people and distinguished panellists, I am honoured to have been invited to attend, and to speak at this very important conference addressing the most important topic of *Protecting Cultural Heritage as a Common Good of Humanity*.

As introduced, my name is Mark Starling, I am first and foremost the President and Managing Director of PACART - Pacific Art Services which is located in both Toronto and Montréal, Canada.

PACART is a fourth generation, family owned and operated business, which exclusively, provides fine art, artifact and museological transportation and storage services to the cultural sector in Canada, and around the world. Our clientele includes major museums, public art galleries, corporate collections, major auction houses, commercial galleries, private collectors and prominent dealers in art and antiquities.

Protecting cultural heritage is and has been an important part of PACART's corporate philosophy. As a private sector service provider, PACART has had the privilege and felt duty bound to work with Canadian law enforcement officials in their investigations of items believed to be involved in the illicit trade of art, artefacts and antiquities. PACART has assisted the Royal Canadian Mounted Police (RCMP) in detaining pre-Columbian artefacts from being illegally exported from Canada. These items were eventually repatriated to Peru. PACART also has fully cooperated with the Canada Customs Inspection Agency regarding items which were thought to be works of art obtained during the Nazi regime in the Second World War. These paintings were trans-shipped into Canada and placed into our secure storage facility.

PACART continues to work together with the Canadian Federal Government's Department of Heritage and Moveable Cultural Property Program by vetting items in shipments destined for export. We analyze the items to be shipped, to establish whether or not they comply with current export requirements for shipments leaving Canada.

When items are identified which fall under the guideline of significant heritage, or cultural property as defined by the Government, PACART notifies the owners that special governmental permission is required to proceed with their export.

PACART will then advise our clients that they must follow the proper procedures. We lend our expertise in assisting the client with completing the proper documentation, and finally we will secure the necessary permits required to proceed with shipping on their behalf.

While this process is taking place, PACART assists our clients and the Government of Canada by providing a secure facility to hold the items pending approval for shipping.

In some instances, shipments from Canada of significant cultural heritage are denied the appropriate permits for export until such time as the Canadian Cultural Export Review Board and Government Ministers render their final decision on whether or not an item may be exported.

I see this system working well for honest participants however it does fall short of the mark in the effort to limit the underground trade and transfer of illegal items.

I feel the process should be integrated with law enforcement agencies who may be better equipped and more knowledgeable in the field of illicit trade and theft of cultural items and artefacts.

### *1. Introducing ICEFAT*

I have been asked to address this knowledgeable and concerned delegation in my role and position as the Chairman of the International Convention of Exhibition and Fine Art Transporters. This organization is recognized around the world as ICEFAT.

PACART has had the privilege of being a member of ICEFAT for 25 years, having attended our first conference in Rio de Janeiro in 1989.

I have had the honour of serving as Chairman, now entering into my 12<sup>th</sup> consecutive term.

ICEFAT is an international organization of independent, private sector companies, each of whom specialize and provide services, dedicated to the safe and secure movement of art, antiquities and cultural property.

Our membership represents over 75 fine art and museological logistics service providers who are located in 35 countries around the globe.

Each member company subscribes to the ICEFAT aim, and objective, of «providing the highest standards» within our highly specialized industry.

From the point of view as Chairman of ICEFAT, I feel it is very important for our members to be relevant players in preventing the trade and traffic of illicit art and artefacts.

## *2. What Does ICEFAT Do in this Area?*

One way ICEFAT attempts to meet this objective is by inviting varied and interesting experts to address our General Assembly during our annual conventions.

Our roster of guest speakers has included fine art insurance professionals, curators, collection management specialists and collection advisors.

Moreover, ICEFAT has been honoured to be able to present to our members notable authors and dedicated professionals in the area of the prevention and detection of criminal activity, within the cultural and heritage preservation field.

One such speaker, of whom you have already had the privilege of hearing from at this Conference, is Mr. Robert Wittman<sup>1</sup>. Mr. Wittman was an honoured guest of ICEFAT during our convention in Florence in 2008. His presentation and discussion was very informative and highly engaging. ICEFAT members were enlightened and appreciative of the information contained in Robert Wittman's presentation.

I must share with you that tremendous interest in the area of illicit trade and repatriation that was generated by Robert Wittman's presentation.

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<sup>1</sup> Reference to the oral report by Mr. ROBERT WITTMAN, art crime investigator and President of Robert Wittman Inc. (USA), not collected in the present volume [editors' note].

ICEFAT was also honoured to present Mr. Ton Cremer, from the Netherlands. Ton was the former Director of Security at the Rijksmuseum in Amsterdam and the founder, the heart and soul, of the Museum Security Network which has been in operation for over 17 years.

ICEFAT has also had the privilege to hear and speak with noted author Mr. Robert Edsel. Mr. Edsel, as you may know, is the founder of the Monuments Men Foundation. Their job description was simple: to protect cultural treasures so far as war allowed. The task of the 'Monuments Men' during World War II was not unlike the task that draws each and everyone of us to be in Courmayeur Mont Blanc this weekend.

Moving forward, where do we need to focus our attention?

What do we need to do to aide in the protection of cultural property and the world's history?

There are many areas were I see our collective attention needs to be focused.

The role of Government is quite clear. All Governments need to lead the way and to set the example.

Strong policies must be made and set on the international stage. They must then be implemented and demonstrated with swift and decisive actions that will signal and set an example for all.

From past times of war and conquest, wrongs need to be set right, to ensure the world recognizes and knows the significance and importance of ownership of our collective world heritage.

Questions that cross my mind frequently are:

- Why do the Parthenon marbles still reside in the collection of a foreign museum when the repatriation of this significant material has been requested? Would it not assist in placing more contextual and cultural relevance when viewed in their homeland setting?
- Why were treasures that were removed from the Inca's in Peru, transported on the ill fated ship *Mercedes/Black Swan* not, at least in part, returned to the Peruvian people?

In times of modern war, and with post-war discoveries, the world's heritage must be protected even if it is counter to the current regime or the one's who are seeking power.

We need to stop events such as those which took place during the Cambodian civil war from 1970 to 1998, where the Khmer Rouge and

other paramilitary groups began decimating that country's ancient sites, in search of treasures to sell on the international art market.

There is a very important role for Governments and peace keeping forces to pursue during times of conflict.

In what other ways can the trade in illegal and illicit art, antiquities and artefacts be controlled?

It can be achieved, in part, by devaluing these items. How?

Illicit cultural objects and artifacts, as a commodity for commercial trade, need to be devalued in the open market place.

What does this mean?

Tainted items will not attract the attention of serious private sector collectors, or institutional buyers, especially in the multi-million dollar playing fields of the collector and museum communities.

The control of illicit traffic in the private sector has to begin with the buyers and sellers of these materials.

As earlier mentioned by Mr. Robert Wittman, provenance is paramount to the value of a piece. Controls need to be in place throughout the supply chain, to ensure that there is no value in the free market for illegal, ill gotten, stolen or forged items.

If items for sale *fail* to meet tight provenance scrutiny to ensure they are legitimate, then their value is diminished or devalued.

The museum community can play an important role here.

Museums must be more vigilant in ascertaining clear provenance, together with establishing that the seller has clear legal title, prior to purchasing or accepting donations of cultural property.

If this can not be clearly established, it will begin to make the item worth 'less' on the world stage.

Governments need to penalize all sellers and purchasers of illicit items by demanding and ensuring the return of these items.

A good example of this is seen in the most recent case involving a major Asian art museum, whom purchased looted items from New York antiquities dealer Subhash Kapoor<sup>2</sup>. Such items need to be returned to their rightful place in the world.

Museums need to be the paramount of legitimacy when collecting items. They must not get caught up in the competitive nature of the

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<sup>2</sup> About this case see *supra* J. FELCH, *Case Studies Involving Antiquities Trafficking Networks*.

commercial world of value over historical importance, which is so prevalent in the private sector.

Taxation laws in some countries may need to be changed and strengthened to ensure Governments are not inadvertently fostering donations of illicit items in return for favorable donations to their national museums with the reward of tax incentives for items that do not have clear, investigated and confirmed provenance.

The system needs to begin to focus on the major vendors and buyers of high value museological art and artefacts. Vendors all, whether they are commercial establishments, galleries, private dealers or auction houses, need to be held to the highest standards, that ensure that what they sell or buy has free and clear title with verifiable, defined provenance.

Profiteers, whether sellers or buyers, need to forfeit both the proceeds of the sales of illicit material and the material itself, where they can not insure that proper due diligence has been used.

Privacy issues need to take a back seat to the common good of humanity when preserving and protecting our collective cultural heritage.

As professionals of the private sector, another area of great concern which can be identified is international shipping.

In the era of 'just in time' shipping, art and artefacts can travel around the world and through several hands entirely undetected and undeclared in a matter of days. This is a fact which can not be stopped.

This is complicated further by the likelihood of the property moving across multiple countries and governmental jurisdictions.

I am sure all reputable, private sector service providers want to be a willing and active participant in the venture of reducing the trade of illicit material and artefacts.

### *3. Moving into the Future...*

Every one of us in this room are partners in the quest of protecting the world's cultural heritage. As we all know, it *is* in the best interest, and for the common good, of humanity.

I would like to thank each and every one, both organizers and participants, at this conference, for your time and for allowing me the opportunity to address this esteemed group of professionals.



I am truly humbled by this experience, and invigorated to share the knowledge I have gained here in Mont Blanc, not only within the ICEFAT and PACART groups, but with colleagues, clients, professional associates and our strategic business partners around the world.

I can only hope that each one of us, in our own way, will be able to effect change by increasing the world's collective conscientious, regarding the absolute necessity in preventing the illegal traffic of art, artefacts which represent our world's cultural heritage.

Thank you very much.

