

# GENERAL ARTICLES

Elisabetta Mottese\*

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emottese@lex.unict.it  
Università degli Studi di Catania  
Law Department  
Via Crociferi, 81  
95124 Catania, Italy

## Preventive Measures in the Council of Europe Convention on Offences relating to Cultural Property: An Overview

**Abstract:** The Council of Europe Convention on Offences relating to Cultural Property (2017) includes relevant provisions on preventive actions to be implemented by States Parties in order to achieve stronger cooperation under the purpose and within the scope of the treaty. This article focuses on the increasing importance of preventive measures for the protection of cultural property against transnational criminality, both at the domestic and international levels. It scrutinizes the most relevant treaty norms related to preventive and other administrative measures (Chapter IV) to be taken by States Parties by coordinating various activities and precautionary mechanisms for the protection of cultural property, in accordance with the *ultima ratio* principle governing the application of criminal law and criminal sanctions. By adopting and applying risk-preparedness tools, States can focus their efforts in the field of cultural property protection in a most effective and efficient way.

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**Keywords:** international cultural heritage law, preventive measures, criminal law, cultural property, soft law, Nicosia Convention

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\* **Elisabetta Mottese** (Ph.D.), research fellow in International Law, Department of Law, University of Catania, Italy. The author wishes to acknowledge that this article is the result of an interdisciplinary research project funded by the University of Catania (2016-2018).

## Introduction

Since the end of the Second World War, and especially during the last 20 years, international awareness of the importance of cultural goods and of their need for “global” protection has been growing, in large part due to frequent attacks against cultural heritage in times of peace or armed conflict, with important consequences for both the States directly affected as well as the whole of humanity.

The looting of museums, art galleries, private and public collections, archaeological sites, and religious buildings, as well as the illicit trafficking of cultural property represent different but interconnected examples of a transnational phenomenon related to widespread criminal activities, often feeding prosperous markets of art masterpieces. Still, the protection of cultural property against these kinds of illicit actions remains very complex due to the transnational dimension of the offences, which involve multiple national jurisdictions. Usually cultural items are looted in one State and travel across several others before reaching their final destination. This problem is even more challenging when cultural property is trafficked through virtual means, making any effort to follow the stolen goods in their travels through the different territories even more difficult. Against this background,<sup>1</sup> the Council of Europe, which is strongly committed to the field of European cultural heritage protection, has promoted a new instrument of international cooperation designed to protect cultural property by drafting the Convention on Offences relating to Cultural Property, adopted in Nicosia on 3 May 2017 (“the Nicosia Convention”).<sup>2</sup> The purpose of this new treaty is essentially to prevent and combat the destruction of, damage to, and trafficking in cultural property by providing for the criminalization of certain acts; to *strengthen crime prevention* and the criminal justice response; and to promote national and international co-operation, given “the importance of concerted international action as key to addressing the recurrent problems posed by the violation of the national and international norms on the protection of cultural heritage”.<sup>3</sup>

In the European regional context, the Nicosia Convention constitutes the most developed international treaty specifically focused on the criminalization

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<sup>1</sup> For more on the rationale behind the treaty, see: Council of Europe’s Committee of Ministers, *The Namur Call*, 24 April 2015, <https://rm.coe.int/16802f8129> [accessed: 6.04.2019]; see also Council of Europe’s Parliamentary Assembly, *Deliberate Destruction and Illegal Trafficking of Cultural Heritage. Report of the Committee on Culture, Science, Education and Media*, 6 June 2018, <http://assembly.coe.int> [accessed: 6.04.2019].

<sup>2</sup> 19 May 2017, CETS 221. The treaty, which has not yet entered into force, has been signed by 11 Council of Europe Member States (Armenia, Cyprus, Greece, Italy, Latvia, Portugal, San Marino, Russian Federation, Slovenia, Ukraine) and 1 non-member (Mexico); it has been ratified only by Cyprus and Mexico.

<sup>3</sup> See the Council of Europe, *Explanatory Report to the Council of Europe Convention on Offences relating to Cultural Property, Nicosia, 19.05.2017*, para. 14, <https://rm.coe.int/1680710437> [accessed: 6.04.2019] (“Explanatory Report”).

of offences against cultural property, both in terms of its repression and in terms of its prevention.<sup>4</sup>

However, as emphasized by many international and criminal legal scholars, the effectiveness of norms and sanctions in the field of cultural heritage protection strictly depends on the adoption of a set of precautionary or preventive measures<sup>5</sup> producing a deterrent effect based on, *inter alia*, an understanding and awareness of (or “education” about) the damage brought about by certain types of conduct.<sup>6</sup> This is the reason why the Convention drafters paid particular attention to States’ obligations relating to prevention issues, confirming a general trend of criminal justice policies to set up overall *prevention strategies* – not merely focused on apprehension and criminal justice, but also on social, economic, and cultural interventions.

The purpose of this article is to show the relevance of preventive measures in cultural heritage law as developed by the Nicosia Convention by examining its relevant provisions in the light of the international and regional policy priorities currently prevailing in the processes of cultural law rule-making. By further anticipating the level and typologies of various contrasting measures in cases of offences to cultural goods, it highlights the need for coordinated or shared systems of preventive actions to guarantee adequate and meaningful ways of enforcing efficient regulatory models of cultural heritage protection. It further emphasizes that the dissemination of the spirit of respect for cultural property through the implementation of public awareness campaigns is a powerful way to reduce art crimes.

In order to provide a full understanding of the problems at stake, this article firstly introduces the issue of the relevance of the preventive measures for the protection of cultural property. It further analyses Articles 20 and 21 of the Nicosia Convention (Chapter IV) dealing with preventive and other administrative measures to be implemented at the national and international levels. Specifically, some of the most relevant issues raised by the above provisions will be considered in two main analytical sections, concerning national and international preventive measures respectively, with a special focus on inventorying and databases; due diligence obligations; and e-commerce, education and information policies, and the adoption of codes of conduct. At the end the article offers some brief concluding remarks.

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<sup>4</sup> It is worth recalling that in the context of the Council of Europe a previous treaty has been adopted on the same issues, the European Convention on Offences relating to Cultural Property, signed in Delphi on 23 June 1985 (ETS 119), which however never entered into force.

<sup>5</sup> A. Visconti, *Le prospettive internazionali di tutela penale: strategie sanzionatorie e politico-criminali*, in: S. Manacorda, A. Visconti (eds.), *Beni culturali e sistema penale*, Vita e Pensiero, Milano 2013.

<sup>6</sup> L. Eusebi, *Ripensare le modalità della risposta ai reati traendo spunto da C. Eur. Dir. Uomo 19 giugno 2009, Sulejmanovic c. Italie*, “Cassazione Penale” 2009, Vol. 19, pp. 4938-4958; A. Visconti, op. cit.

## Protecting Cultural Property Through Preventive Measures

The idea that an effective cultural heritage protection policy should be based on the principle of prevention is deeply rooted in international law and can be evaluated with reference to both hard and soft law instruments. As regards the former, the preventive approach can be seen for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”).<sup>7</sup> This treaty, even though committed to standards of protection in times of war, establishes some general obligations to be implemented in times of peace as well, as clearly shown by the principles on safeguarding and respect for cultural property (Articles 3 and 4).<sup>8</sup> With regards to soft law provisions, many non-binding international instruments which highlight the importance of preventive actions in cultural heritage protection have been drawn up over time. This article offers a brief perusal of the main ones.

Since 1972, UNESCO has called upon Member States to “take all necessary scientific, technical and administrative, legal and financial measures, to ensure the protection of the cultural and natural heritage in their territories”.<sup>9</sup> It has identified some actions as capable of providing a pre-emptive protection effect, including, *inter alia*, drawing up an inventory<sup>10</sup> and collecting<sup>11</sup> the information acquired to organize “educational campaigns to arouse widespread public interest in, and respect for, the cultural and natural heritage”,<sup>12</sup> and enhancing international cooperation by exchange of information between Member States.<sup>13</sup>

Although preventive measures are embedded in the legal developments concerning cultural heritage protection, precautionary tools and strategies have taken on a greater importance in the international legal discourse over the last few years, with the increasing awareness on the part of the international community of issues related to cultural heritage protection. A clear example of this renewed interest are

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<sup>7</sup> 14 May 1954, 249 UNTS 240.

<sup>8</sup> Article 3 (Safeguarding of cultural property): “The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate”. Article 4 (Respect for cultural property): “1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property. [...]”.

<sup>9</sup> UNESCO, Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 16 November 1972, para. 18; available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13087&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13087&URL_DO=DO_TOPIC&URL_SECTION=201.html) [accessed: 5.05.2019].

<sup>10</sup> *Ibidem*, para. 29.

<sup>11</sup> *Ibidem*, para. 30.

<sup>12</sup> *Ibidem*, para. 61.

<sup>13</sup> *Ibidem*, para. 66.

the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (“UN Guidelines”), adopted by the United Nations General Assembly on 18 December 2014.<sup>14</sup> Indeed, one of the four chapters of the UN Guidelines is expressly focused on “crime prevention strategies”.<sup>15</sup> This document, specifically mentioned in the Preamble of the Nicosia Convention, has been considered as the starting point for the drafting process of the treaty, being based “[...] on *crime prevention* and criminal justice aspects of protection against trafficking in cultural property, taking into consideration a review of current practices and initiatives in several countries in addressing the problem of trafficking in cultural property”.<sup>16</sup> In accordance with the UN Guidelines, the preventive measures include, *inter alia*: information and data collection, the establishment of a central national authority, monitoring of the cultural property market, imports and exports, encouraging cultural institutions and museums to disseminate best practices and adopt codes of conduct, as well as supporting education and public awareness campaigns.

All the above mentioned measures are, moreover, endorsed by a list of suggested key actions<sup>17</sup> drawn up in 2016 by Italy, Jordan, INTERPOL, UNESCO, and UNODC in response to three main challenges: “*preventing destruction, spoliation, looting and other illegal activities in the provenance areas (especially those in conflict or crisis situations), countering all aspects of transnational trafficking, and repressing illegal markets in destination areas*”.<sup>18</sup> It is worth mentioning that this document expressly invites States to also adopt strict norms to check the provenance of cultural items and respect of due diligence provisions as promoting a closer systematic cooperation between States and international organizations especially based on sharing information, including intelligence sources such as the Interpol Database.

To strengthen the protection of cultural heritage, above all in conflict situations, the international community has launched additional initiatives as reflected in the United Nations Security Council (UNSC) Resolutions (2347/2017 being the latest one)<sup>19</sup> in which the illicit trafficking of artefacts has been recognized as a way

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<sup>14</sup> The Guidelines were adopted by the United Nations General Assembly: Resolution 69/196, 18 December 2014, A/RES/69/196.

<sup>15</sup> *Ibidem*, Chapter I.

<sup>16</sup> UN Guidelines, Introduction, para. 3 (emphasis added).

<sup>17</sup> United Nations, *Protecting Cultural Heritage: An Imperative for Humanity. Acting Together against Destruction and Trafficking of Cultural Property by Terrorist and Organized Crime Groups*, 22 September 2016, <http://www.unesco.se/wp-content/uploads/2016/09/2016-Protecting-cultural-heritage.-An-imperative.pdf> [accessed: 6.04.2019]. The document is based on the outcomes of a series of meetings (2015-2016) at UN Headquarters in New York chaired by Italy and Jordan dedicated to different aspects of the protection of cultural heritage.

<sup>18</sup> *Ibidem*, p. 9 (emphasis added).

<sup>19</sup> Adopted by the United Nations Security Council at its 7907th meeting, on 24 March 2017, S/RES/2347 (2017).

of financing terrorism and Member States have been called on to take appropriate precautionary measures to prevent trading in cultural property from Iraq and Syria.

This brief and non-exhaustive overview of hard and soft legal sources clearly shows how the discourse on prevention has always been central to measures aimed at protecting cultural property.

## Preventive and other administrative measures at the domestic level

### Inventories and databases

All of the aforementioned strategies are listed in Chapter IV of the Nicosia Convention (“Preventive measures and other administrative measures”), which contains two provisions – Articles 20 and 21 – which, for the first time, have turned soft law commitments into hard law obligations.<sup>20</sup>

Article 20 in particular is subdivided into twelve sub-paragraphs, from a) to l), containing a list of legislative and other necessary measures that States Parties should adopt – at the domestic level – “to reduce the likelihood of offences contain[ed] within this Convention from occurring, since the use of criminal sanctions, in line with the principle of *ultima ratio*, is understood as a means of last resort”.<sup>21</sup>

The measures established by the Council of Europe’s new treaty, like those suggested by the international legal instruments we have briefly mentioned in the previous section, concern different legal and judicial areas. It is possible to distinguish between: a) measures aimed at promoting the ratification of the existing international conventions on the matter or the strengthening of national institutions through the creation of specialized trained units; b) measures designed to criminalize offences against cultural property or regulate the import/export of cultural items; c) provisions enhancing inventorying and documentation actions; as well d) as norms aimed at diffusing international cooperation through educational and awareness-raising programmes.<sup>22</sup>

This article does not address all of these provisions, but explores just some of them: the newest (those regarding e-commerce); and the most challenging but at the same time the most valuable (as we explain in the conclusion) – to create a true global system of cultural property protection.

In this sense, Article 20(a) is of special importance, as it invites States Parties to prepare or improve inventories and databases of goods classified as “cultural” by Article 2 of the Nicosia Convention. The idea that the drafting of inventories, lists,

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<sup>20</sup> In this sense the Nicosia Convention has already followed the standard of recent criminal law conventions of the Council of Europe which provide specific preventive rules, as demonstrated for example by Articles 21 and 22 of the Council of Europe Convention against Trafficking in Human Organs, signed in Santiago de Compostela on 25 March 2015 (CETS 216).

<sup>21</sup> Explanatory Report, para. 111.

<sup>22</sup> See UNSC, Report of the Secretary-General on the implementation of Security Council Resolution 2347 (2017), 17 November 2017, S/2017/969, [www.undocs.org/S/2017/969](http://www.undocs.org/S/2017/969) [accessed: 6.04.2019].

and databases has a critical positive impact on the prevention of cultural heritage offenses is not new. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 UNESCO Convention”) already established, in Article 5, that:

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: [...] b) *establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.*<sup>23</sup>

Article 5 of the Second Protocol to the 1954 Hague Convention provides a list of preparatory measures that States Parties must arrange in times of peace for the protection of cultural property. This list specifically mentions, *inter alia*, “the preparation of inventories”.<sup>24</sup>

Similarly, the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage<sup>25</sup> invites States to submit to the World Heritage Committee an inventory of cultural and natural sites located on their territory which are likely to be listed in the World Heritage List, as established in Article 11(2) on the basis of what the Operational Guidelines for the implementation of the World Heritage Convention<sup>26</sup> define as a “Tentative List” (i.e. the inventory of the properties situated on the territory of a State Party considered suitable for nomination to the World Heritage List).

Explicit reference to the need to prepare inventories can be found in the Council of Europe’s “Cultural Conventions” as well: Article 2<sup>27</sup> of the Convention for the Protection of the Architectural Heritage of Europe, and Articles 2(i)<sup>28</sup>

<sup>23</sup> 14 November 1970, 823 UNTS 231 (emphasis added).

<sup>24</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 21, Article 5: “Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the *preparation of inventories*, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property” (emphasis added).

<sup>25</sup> 16 November 1972, 1037 UNTS 151.

<sup>26</sup> 8 July 2015, UNESCO Doc. WHC.15/01 (2015).

<sup>27</sup> 3 October 1985, ETS 121: “For the purpose of precise identification of the monuments, groups of buildings and sites to be protected, each Party undertakes to maintain *inventories* and in the event of threats to the properties concerned, to prepare appropriate documentation at the earliest opportunity” (emphasis added).

<sup>28</sup> 16 January 1992, ETS 143: “Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for:

and 7(i)<sup>29</sup> of the European Convention on the Protection of the Archaeological Heritage.

Despite the above provisions, the problem of taking efficient measures for the protection of cultural property is very often related to lack of knowledge: this means that there are no catalogues available to classify the (physical and legal) *status* of those goods or their correct geographical location (is the object on its national territory or has it crossed borders as stolen or illegally exported?).

Among the most recent and most innovative projects in the field of preventive safety measures, the following are worth mentioning: 1) the FING-ART-PRINT, developed by the Dutch Rijksdienst voor het Cultureel Erfgoed and funded by the European Commission, is a complex system of data collection through which it is possible to develop a real digital fingerprint of the object, giving it an unequivocal identification in a place and time; 2) the software created by the American Art Fraud Insights LLC, which is able to predict the probability that a future virtual auction will sell counterfeit cultural property;<sup>30</sup> 3) a project realized by the Dutch government – using, like the American one, a “predictive” database – creating the Database of Crime in Cultural Heritage, which has already become the largest source of information on cultural crime in the Netherlands.<sup>31</sup>

It is worth noting that the implementation of such actions has been strongly supported by the UNSC, whose resolutions on counterterrorism have been, as previously mentioned, especially in the last few years ever more committed to tackling offences related to cultural property. Resolutions Nos. 2199/2015 and 2347/2017, to name just two, establish that Member States – in order to prevent and combat the trafficking of cultural property illegally appropriated and exported in the context of armed conflicts, notably by terrorist groups – should introduce or improve “local and national inventory lists, including through digitalized information when possible, and [make] them easily accessible to relevant author-

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i) the maintenance of an *inventory* of its archaeological heritage and the designation of protected monuments and areas” (emphasis added).

<sup>29</sup> Ibidem: “For the purpose of facilitating the study of, and dissemination of knowledge about, archaeological discoveries, each Party undertakes: i) to make or bring up to date surveys, *inventories* and maps of archaeological sites in the areas within its jurisdiction” (emphasis added).

<sup>30</sup> For more details, see: C. Loll, *Art, Anxiety and the Online Marketplace*, in: A. Tompkins (ed.), *Art Crime and Its Prevention*, Lund Humphries, London 2016, pp. 69-80.

<sup>31</sup> See: D. Drent, *Security for Protection of Art. Strategy, Tactics, Technology and Making New Paths*, in: A. Tompkins (ed.), *Art Crime and Its Prevention*, Lund Humphries, London 2016, p. 119. “If a museum knows in what ways it is likely to be attacked, based on information that is as all-encompassing as it can be, it is unlikely to be surprised by a novel or previously unknown threat. And even these novel and unknown threats, otherwise termed ‘critical unknowns’, can be analysed. Through alternative analysis processes such as strategic red teaming analysis, it is possible to creatively and realistically build likely scenarios of future attacks, based on the goals and capabilities of potential adversaries. Quantitative, even automated, data crunching in the large databases of the cultural heritage sectors, and even across the multiple pan-sectoral crime databases, reveals trends and tendencies in crime information that had previously been missed”.



ities and agencies, as appropriate”<sup>32</sup> and “databases devoted to collect information on criminal activities”.<sup>33</sup>

### Due diligence obligations

The international legal discourse on preventive measures cannot ignore the importance of due diligence obligations in building strategies to deter criminal offences related to cultural goods: the due diligence rules in fact appear crucial in guaranteeing the protection of cultural heritage law, emphasizing its core premises on transparency and fairness of the art market.

One of the most interesting aspects of the due diligence provisions in the framework of the Nicosia Convention is their strict connection with the preventive/deterrent effect they can produce. This can be better understood by comparing those norms with other conventional instruments, such as the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which refers to due diligence rather as a parameter to verify good faith requirements in the acquisition of cultural goods.<sup>34</sup>

Indeed, many provisions of the Nicosia Convention clearly refer to *due diligence* obligations: Articles 20(c), 7, 8, and 15 are dedicated, respectively, to alternative measures, acquisition and placing on the market of cultural property, as well as aggravating circumstances.

The first of the aforementioned provisions (Article 20(c)) provides that States Parties should consider introducing “due diligence provisions for art and antiquity dealers, auction houses and others involved in the trade in cultural property” and obliging them to establish and maintain records of all transactions. States Parties are thus requested to establish norms addressed to specific categories of natural and legal persons trading in cultural property.

The due diligence provisions basically adopt a dual approach: on the one hand they reconnect to the broader principle of state *responsibility to prevent* illicit conducts;<sup>35</sup> while on the other they concern the implementation of specific measures by non-state actors to prevent offences against cultural property, encouraging the compliance with such measures by providing that compliance with domestic or international legal standards discharges responsibility.

<sup>32</sup> See United Nations Security Council Resolution No. 2347, para. 17(a).

<sup>33</sup> *Ibidem*, para. 17(e).

<sup>34</sup> 24 June 1995, 34 ILM 1322, Article 4(4): “In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the *character of the parties*, the *price paid*, whether the possessor *consulted* any reasonably accessible *register* of stolen cultural objects, and any other relevant *information* and *documentation* which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances” (emphasis added).

<sup>35</sup> For more on due diligence and state responsibility, see, *ex multis*, R. Pisillo Mazzeschi, *Due diligence e responsabilità internazionale degli Stati*, Giuffrè, Milano 1989.

## GENERAL ARTICLES

Elisabetta Mottese

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Taking into account due diligence and the positive obligations incumbent on States in cultural heritage issues, the responsibility to prevent shifts from States to non-state actors, or at least could, involve *also* non-state actors. An example is useful here.

The transnational nature of trafficking and damaging of cultural property has made it necessary to draft a provision, such as Article 20, which recalls the United Nations Convention against Transnational Organized Crime,<sup>36</sup> and in particular its Article 7, which indirectly refers to the Financial Action Task Force (FATF) Recommendations.<sup>37</sup> The importance of these soft rules is clear:

Compliance with these FATF standards is promoted through various channels. The Security Council has urged UN members to implement the standards; the World Bank and International Monetary Fund (IMF) have used the standards as part of their regular assessments of countries' performance; and bilateral assistance schemes often incorporate the standards. In 2000, the FATF also established its own compliance mechanism of blacklisting jurisdictions deemed to be "noncooperative".<sup>38</sup>

To explain the transformations occurring in international law, reference has been made to the influence of non-legal binding rules. For example Krisch states that:

change takes place largely outside the channels of traditional international law-making – in particular, through unilateral action and informal structures that appear more useful for problem solving and the effective exercise of power than formal institutions and the increasingly firm and demanding processes of multilateral treaty making. The resulting picture is one in which international law is often side-lined and in which hierarchy plays a significant role, both within and outside the formal international legal order. This shift is partly mitigated by forms of representation and consultation, but it remains a significant move away from a consent-based order [...].<sup>39</sup>

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<sup>36</sup> 15 November 2000, 2237 UNTS 319.

<sup>37</sup> FATF is an inter-governmental body established in 1989. The FATF has developed a series of Recommendations that are recognized as the international standard for combating money laundering, the financing of terrorism, and proliferation of weapons of mass destruction. They form the basis for a co-ordinated response to these threats to the integrity of the financial system and help ensure a level playing field. First issued in 1990, the FATF Recommendations have been revised many times; most recently in 2012. K.W. Abbott and D. Snidal, in their very interesting article *Hard and Soft Law in International Governance*, "International Organization" 2000, Vol. 54(3), state that FATF "has issued policy recommendations, administers a system of peer review, and can even impose mild sanctions. Its guidelines are not as tightly constraining as hard legal commitments and are more difficult to 'enforce'. Yet they provide a common basis for domestic implementation (with enough flexibility to accommodate national differences), guide behaviour, and create expectations that violations will bring political costs. Task force guidelines legitimize participation in national decisions by international actors and by concerned domestic bureaucracies and NGOs. They invoke a form of legal discourse and some principles of international law. In its decade of operation, the task force has fostered a significant degree of convergence around the principles contained in its guidelines".

<sup>38</sup> N. Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, "The American Journal of International Law" 2014, Vol. 108(1), p. 22. The author confirms the increasing use and success of informal compliance mechanisms in international law.

<sup>39</sup> *Ibidem*, p. 2.

FATF Recommendation No. 10 (customer due diligence and record-keeping) contains a series of diligence measures to be adopted in order to identify customers and track financial transactions, with the aim of facilitating the identification of any suspicious transactions. Recommendation No. 22 (designated non-financial businesses and professions) identifies the entities which are obliged to respect the duties of care, registration, and custody of any transactions. In this regard, as mentioned above, the Nicosia Convention specifies that antique dealers, auction houses, and all persons involved in cultural property trade must register their transactions and make them available “to the competent authorities in accordance with domestic law”.<sup>40</sup> The purpose is obviously to ensure the collection and availability of a large amount of data in order to facilitate, *inter alia*, the matching of goods in transactions with the most wanted cultural property, and to verify as well that the entities, whether institutional or not, involved in various ways in the exchange of cultural and archaeological goods have behaved in accordance with the required level of due diligence.

To this end, the Nicosia Convention outlines two different liability regimes. Indeed, Articles 7 (acquisition) and 8 (placing on the market) distinguish the two regimes, depending on *who* is involved, i.e. whether or not they are an art professional. Article 7(1) establishes that the criminalization of purchasing cultural property must be envisaged only when the person knows the illicit origin of the object (“where the person knows of such unlawful provenance”). However, Paragraph 2 provides that “the conduct described in paragraph 1 of the present article constitutes a criminal offence also in the case of a *person who should have known of the cultural property’s unlawful provenance* if he or she had exercised *due care and attention* in acquiring the cultural property”.<sup>41</sup>

It seems clear that the Nicosia Convention drafters wished to differentiate – along the lines of UNSC Resolution No. 2347/2017<sup>42</sup> – between the case of an ordinary person and one where the offence was carried out by professionals or collectors who should (and could) have known the cultural property’s unlawful origin if they had exercised the requisite due diligence. This point is explained very precisely by the Explanatory Report:

Where appropriate, certain classes of persons may be required to abide by higher standards of conduct established by domestic statutory norms (if any), and/or ethical guidelines adopted by the trade associations to which they belong (if any). For instance, professional art dealers and auctioneers are often required to establish the identity of the seller; obtain a written declaration of the seller’s legal title and on

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<sup>40</sup> Article 20(c).

<sup>41</sup> (emphasis added).

<sup>42</sup> See Paragraph 17(g): “Engaging museums, relevant business associations and antiquities market participants on standards of provenance documentation, differentiated due diligence and all measures to prevent the trade of stolen or illegally traded cultural property”.

his/her right to dispose of the cultural property; inform customers on existing import and export regulations; and maintain an inventory for each transaction including records as to the description of the property, date of transfer of ownership, sale price or appraised value.<sup>43</sup>

We will see, therefore, that the suggested actions significantly correspond with those preventive measures referred to in Article 20(c).

Placing an obligation of due diligence on art professionals can easily prevent the commission of certain types of offences, through both a successful deterrent effect (so long as those who do not comply with the rules face sanctions) and the creation of best practices in, for instance, collecting and sharing data on cultural items. In addition it should be kept in mind that compliance with best practices can result in benefits for art professionals themselves, e.g. result in them being considered a “reputable dealer” in claims for return/restitution of cultural objects.

## E-commerce – information, education, and training duties

In framing the list of preventive measures to be adopted at the domestic level, Article 20 of the Nicosia Convention stresses the importance of two more dimensions: one relating to e-commerce in cultural goods, and the other concerning obligations vis-à-vis the dissemination of information, education, and public awareness.

As regards the first, the Convention pays great attention to this challenging aspect, which has not yet been addressed nor regulated (at least not using hard law instruments), by referring to the “virtual” trading of cultural property. Individuals (who are sometimes unaware of the illegality of their conduct) and art professionals increasingly use e-commerce as a preferential means for facilitating a commercial transaction. The Explanatory Report to the Convention highlights that: “The black market is moving away from traditional means of trading, such as flea markets, to trading antiquities online through social media and the Deep Web”.<sup>44</sup>

In this regard, Article 20 provides two interesting and innovative provisions that address the need to adopt effective regulations with respect to online transactions related to cultural property. Article 20(e) calls upon States Parties to implement a system of “monitoring and reporting of suspicious dealings or sales on the internet”. Further, under Article 20(j) States should invite “internet service providers, internet platforms and web-based sellers to co-operate in preventing the trafficking of cultural property by participating in the elaboration and implementation of relevant policies”.<sup>45</sup> Web traders are thus requested to self-regulate and implement efficient policies to fight against the offences affecting cultural property – for exam-

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<sup>43</sup> Explanatory Report, para. 58.

<sup>44</sup> Explanatory Report, para. 5.

<sup>45</sup> In the same vein, see the UN Guidelines: “States should encourage, as appropriate, internet providers and web-based auctioneers and vendors to cooperate in preventing trafficking in cultural property, including through the adoption of specific codes of conduct” (Guideline No. 8).

ple “by posting disclaimers advising prospective buyers to check and request a verification of the licit provenance of the cultural property they are interested in”.<sup>46</sup>

The other aspect analysed in this section is related to people’s “education”, a very important issue to which the international legislator has devoted a great deal of attention, based on the principle that: In order to enforce all the rules referred to, it is necessary to *know* those rules.

The Council of Europe’s new Nicosia Convention dedicates two provisions to education as one of the most relevant instruments to spread awareness of respect for cultural heritage. Indeed, clauses (g) and (l) of Article 20 invite States to “promote awareness-raising campaigns addressed to the general public about the protection of cultural property and the dangers posed by the crimes against it” and to “improve the dissemination of information relating to any cultural property that has been the subject of an offence as defined by this Convention to its customs and police authorities in order to prevent the trafficking of this cultural property”.

The decision of the Convention drafters to include norms regarding education obviously derives from the principle that cultural property protection is closely related to its perception in public opinion: the more people consider these goods as a component of national, European, and universal heritage, the more difficult it will be for someone to commit an offence against them and the easier it will be to provide an effective means of protection. At the same time, it is necessary to convey adequate information on the criminal or non-criminal consequences deriving from violation of the Convention’s norms and to solicit an “exchange of information in order to raise an alert concerning a particular cultural property at risk of being subject to trafficking”.<sup>47</sup>

In this regard the words of the Convention sound familiar. It is worth recalling that the 1954 Hague Convention had already considered (although not directly) an “appropriate measure” under Article 3, concerning the dissemination “as widely as possible” of the text of the Convention (and of the annexed regulations and protocols) among the population, in particular amongst the armed forces and the personnel responsible for the protection of cultural property (Article 25). Similarly, the 1970 UNESCO Convention calls on States to adopt “educational measures to stimulate and develop respect for the cultural heritage of all States, and [to spread] knowledge of the provisions of this Convention”<sup>48</sup> and “to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports”.<sup>49</sup>

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<sup>46</sup> Explanatory Report, para. 121.

<sup>47</sup> See: Explanatory Report, para. 123: “As such, it asks national authorities and where appropriate private entities to improve the dissemination at domestic level of information on cultural property that has been the subject of an offence covered by the Convention to customs and police authorities in order to take more effective preventive measures”.

<sup>48</sup> Article 5(f).

<sup>49</sup> Article 10(b).

## GENERAL ARTICLES

Elisabetta Mottese

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Even the above-mentioned UN Guidelines<sup>50</sup> invite States to carry out awareness campaigns in order to promote a “culture” of cultural heritage protection as a powerful “weapon” against looting and trafficking.

In this regard, it is impossible not to agree with international legal scholars who emphasize that:

The most effective long-term option is targeting the social nature of trade. Criminologists note how difficult it is for crime to continue when society is mobilized against it, removing both participants and convergence settings. By challenging collectors’ desire for status symbols, a culture change would prevent the trafficking from the top down. While admittedly difficult, this is the only real option for large-scale prevention of the trade. *Culture changes have found varying success in other areas, including “blood” diamonds, the antifur movement, and the environmental movement.* This movement has already begun with archaeologists arguing the similarities between endangered species and cultural heritage as well as drawing parallels between blood diamonds and illicit antiquities.<sup>51</sup>

The importance of education and training is also clearly reiterated in Articles 18 and 20(h) of the Nicosia Convention; after all, as has been highlighted, “protecting cultural heritage is not just about actions and resources. It is about mind-set”.<sup>52</sup>

The education issue is strictly connected to the implementation of measures ensuring “that persons, units or services in charge of investigations are specialised in the field of combating the trafficking of cultural property or that persons are trained for this purpose”.<sup>53</sup>

Working in this direction is the Memorandum of Understanding signed in 2016 for the creation of the Italian National Task Force within the framework of UNESCO’s Global Coalition under Unite4Heritage.<sup>54</sup> This agreement represents a total innovation in the relationship between UNESCO and its Member States,

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<sup>50</sup> “Guideline 12. States should consider supporting and promoting public awareness campaigns, including through the media, to foster among the general public a culture of concern about trafficking in cultural property, for the purpose of protecting that cultural property against pillage and trafficking”.

<sup>51</sup> P.B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, “International Journal of Cultural Property” 2013, Vol. 20(2), p. 137 (emphasis added).

<sup>52</sup> D. Drent, *op. cit.*, p. 111.

<sup>53</sup> Article 18 of the Nicosia Convention.

<sup>54</sup> The Memorandum was signed on 6 February 2016 in Rome between the Italian Government and UNESCO within the framework of Unite4Heritage launched in Bonn in 2015. The text of the agreement is available on the website of the Italian Ministry of Culture: <http://www.beniculturali.it>. On the topic, see: P. Foradori, *Protecting Cultural Heritage During Armed Conflict: The Italian Contribution to “Cultural Peacekeeping”*, “Modern Italy” 2017, Vol. 22, pp. 1-17; U. Leanza, *La proposta italiana per i caschi blu della cultura*, pp. 139-144 and M. Silvi, *La proposta italiana dei Caschi blu della cultura presso l’UNESCO*, pp. 145-154, both in: I. Caracciolo, U. Montuoro (eds.), *L’evoluzione del peacekeeping. Il ruolo dell’Italia*, Giappichelli, Turin 2017. About *cultural peacekeeping*, see J. Petrovic, *The Cultural Dimension of Peace Operations: Peacekeeping and Cultural Property*, in: A.H. Campbell (ed.), *Global Leadership Initiatives for Conflict Resolution and Peacebuilding*, IG Global, Hershey 2018.

establishing for the first time the creation of highly specialized personnel for the purpose of cultural heritage protection, operating on the request of a UNESCO Member “facing crisis or natural disaster”.

In this vein, Article 20(h) invites States to take appropriate measures to avoid the acquisition of cultural property illicitly removed by “providing information and training to the personnel of such institutions” in museums and similar institutions whose acquisition policy is under state control.

Moreover, it is interesting to observe that Articles 20(h) and (i) differentiate between public museums (and similar institutions whose acquisition policy is under state control) and private ones. Indeed, the treaty provides different obligations for both kinds of entities, without any apparent reason, given that an appropriate and efficient management of these matters would seem to require that these obligations would be better considered as complementary rather than alternative. However, even the Convention’s wording is different when referring to public and private institutions, the former being requested to “ensure” that they do not acquire illicitly removed cultural property, while the latter are to “encourage” such an end, and are merely invited to comply with “existing *ethical rules* on the acquisition of movable cultural property and report to law enforcement authorities any suspected trafficking of cultural property”.<sup>55</sup> That said, ethical codes of conduct are in any case deemed useful for both types of entities.<sup>56</sup> In addition, the relevance and effectiveness of soft law rules – such as guidelines, principles, and codes of conduct – is confirmed by the rising role of non-state actors as rule-makers in multiple aspects of transnational cultural heritage issues.<sup>57</sup> Just to mention two cases as part of this trend, the destruction of archaeological sites or the loss of national treasures has led some States (especially source countries) to adopt standards for “responsible” management of museum activities, and the Code of Ethics for Museums,<sup>58</sup> estab-

<sup>55</sup> Article 20(i) (emphasis added). See also UN Guidelines: “States should consider encouraging cultural institutions and the private sector to adopt codes of conduct and to disseminate best practices on policies on the acquisition of cultural property” (Guideline No. 5).

<sup>56</sup> See M. Frigo, *Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property*, “International Journal of Cultural Property” 2009, Vol. 16(1), pp. 49-66; P. O’Keefe, *Codes of Ethics: Form and Function in Cultural Heritage Management*, “International Journal of Cultural Property” 1998, Vol. 7(1), pp. 32-51.

<sup>57</sup> In this sense, see, *ex multis*, M.R. Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism*, “Global Jurist, Frontiers” 2009, Vol. 9(1); eadem, *Governance. Sugli effetti politici e giuridici di una «soft revolution»*, “Politica del diritto” 2014, Vol. 45(2).

<sup>58</sup> The Code was adopted unanimously by the 15th ICOM General Assembly, in Buenos Aires, on 4 November 1986. It establishes a minimum standard set of rules for museum practice based on the assumption that “museums ensure the conservation, interpretation and enhancement of the natural and cultural heritage of humanity” and “[...] keep their collections for the benefit of society and its development”. The Code has been recently revised, as is well known, in response to the scandals involving the J.P. Getty Museum and its curator, Mrs Marion True, who was involved in suspicious acquisitions of a large number of stolen or illegally exported cultural property in favour of the Californian institution. To avoid the repetition of such alarming and discrediting situations, the Code has firmly stated (Principle No. 2) that “[m]useums have the

## GENERAL ARTICLES

Elisabetta Mottese

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lished by the International Council of Museums (ICOM),<sup>59</sup> is a successful *guideline* on cultural property acquisition policies and procedures. In addition, the Charter for the Protection and Management of the Archaeological Heritage, drafted in 1990 by the International Scientific Committee on Archaeological Heritage Management (ICAHM),<sup>60</sup> is another illustrative case.

What's more, in general terms there has been a high degree of compliance with the rules in the Code of Ethics. This type of soft regulation is gaining ever greater (regulatory) importance, balancing the absence of (legal) constraints with the creation of a system of (non-juridical) obligations and sanctions (so-called *shame sanctions*) against members who do not comply with those rules, such as dismissal from the association and the ensuing loss of reputation. Thus one may say that *soft* is not only the rule but the sanction as well.

### Preventive measures and other administrative measures at the international level

As we have already said, Article 20 of the Nicosia Convention provides that States Parties should consider adopting legislative and other domestic measures with a view toward achieving the purposes of the treaty. In Article 21, for instance, the drafters call upon the States to promote international cooperation through implementation of the preventive actions required.

In particular, States Parties should, with the aim of preventing and combating intentional destruction, damage, and trafficking of cultural property:

- a. promote consultation and exchange of information as regards the identification, seizure and confiscation of cultural property that has been the subject of an offence defined by this Convention and that has been recovered within their territory;
- b. contribute to international data collection on trafficking of movable cultural property by sharing or interconnecting national inventories or databases on cultural property that has been the subject of an offence defined by this Convention, and/or contributing to international inventories or databases, such as the Interpol database on stolen works of art;
- c. facilitate co-operation for the purpose of also protecting and preserving cultural property in times of instability or conflict.<sup>61</sup>

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duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal”.

<sup>59</sup> ICOM is a membership association and a non-governmental organization which establishes professional and ethical standards for museum activities. Created in 1946, it currently has more than 40,000 members.

<sup>60</sup> ICAHM is the international scientific committee on the archaeological heritage management of ICOMOS, and advises it and the World Heritage Committee on matters that pertain to all aspects of the management of archaeological sites and landscapes.

<sup>61</sup> Article 21 of the Nicosia Convention.



The implementation of these measures at the domestic level is obviously a prerequisite for a higher level of cooperation among the Member States of the international community. In this regard, coming back to Article 20 it may be useful to bear in mind that sub-paragraph d) provides that States should establish “a central national authority or empower existing authorities and [put] in place other mechanisms for co-ordinating the activities related to the protection of cultural property”.<sup>62</sup> The Convention also suggests the creation of a central body at international level to spread uniform information. Accordingly, it assigns to the Committee of the Parties the function of, *inter alia*, facilitating “the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat trafficking in cultural property”.<sup>63</sup>

Within the course set by the Convention it is possible to refer to many fruitful international examples (recalled by the drafters) of the preventive measures stated in Article 21 having derived from non-binding norms. Indeed, by paraphrasing Kenneth W. Abbott and Duncan Snidal one may state that “soft law is a steppingstone to hard law”.<sup>64</sup>

ICOM, together with the International Organization for the Protection of Works of Art provided a considerable contribution as well, in the form of the famous Red Lists, prepared by ICOM to “classify the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported”.<sup>65</sup> The Lists are submitted world-wide to: 1) the police using INTERPOL and the World Customs Organization; 2) private and public museums associated with ICOM; and 3) auction houses and art sellers.<sup>66</sup> In this regard, the Nicosia Convention Explanatory Report establishes that “States Parties should enter into a dialogue not only to link these national databases, but also to link them to international ones, such as the INTERPOL database on stolen works of art or the International Council of Museums (ICOM) Red List on endangered cultural properties”.<sup>67</sup>

<sup>62</sup> See Explanatory Report, para. 115: “Article 20 sub-paragraph d) encourages States Parties, with a view to developing or increasing effective co-operation between national authorities, to establish a central national authority, or empower existing authorities, in order to, for instance, exchange information about criminal offences relating to cultural property”.

<sup>63</sup> Article 24(2).

<sup>64</sup> The phrase used by Abbott and Snidal (op. cit., p. 456) is: “Soft law is valuable on its own, not just as a steppingstone to hard law”.

<sup>65</sup> ICOM website: <https://icom.museum/en>.

<sup>66</sup> “The Red List of African Archaeological Objects was instrumental in identifying the undocumented *Djenne* and *Nok* terracotta statues that were to be auctioned in Brussels”, see “Red List Success Stories” on <http://icom.museum/programmes/fighting-illicit-traffic/red-list> [accessed: 5.08.2012].

<sup>67</sup> Explanatory Report, para. 125.

In this field, as we have already underlined, the Nicosia Convention uses the helpful recommendations of the UN Guidelines:

States should consider: [...] e) Contributing to international data collection on trafficking in cultural property and related offences through the United Nations Survey on Crime Trends and Operations of Criminal Justice Systems, conducted by the United Nations Office on Drugs and Crime, and the INTERPOL database on stolen works of art and through other relevant organizations.<sup>68</sup>

It is worth recalling that the importance of preventive international cooperation emphasized by the Nicosia Convention – mainly in the forms of information exchanges and shared database use – has already been highlighted by the UNSC in Resolution No. 2347/2017.<sup>69</sup>

### Concluding Remarks

While the provisions of the Nicosia Convention have only been briefly analysed, they clearly reveal that the implementation of preventive measures at the domestic level and/or in the form of international cooperation is becoming a key aim of cultural heritage law. These norms provide a wide range of preventive actions, representing the important and innovative approach conveyed by the treaty. Even if the Convention does not appear at first sight to have established new ways of combatting offences against cultural property, it has nevertheless harmonized the existing legal landscape in the field by combining previous developments – taken from both hard and soft law – into a legally-binding international law document. In this regard the Explanatory Report to the Convention reminds us that many of the provisions actually reflect measures already existing in other international law instruments, “such as the 1970 and 1972 UNESCO Conventions and 1995 UNIDROIT Convention” and that therefore “States may have already implemented the following measures in this Convention in light of their obligations and commitments under those conventions, where appropriate”.<sup>70</sup>

The systematic campaigns of illegal excavations, looting, and pillaging of cultural heritage, as well as unlawful attacks against cultural sites and buildings, undoubtedly demonstrate the partial failure of international cultural heritage law and its system of protection. That said, the focus of cultural property protection law is shifting towards a wider application of the principle of prevention on one hand, and the strengthening of responsibility regimes for violations of international law (in-

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<sup>68</sup> UN Guidelines, Guideline No. 1.

<sup>69</sup> See paras 17(e) and (f).

<sup>70</sup> Explanatory Report, para. 111.

cluding reparations for cultural loss or cultural harm)<sup>71</sup> on the other.<sup>72</sup> Seen in this perspective, it seems that international cultural law is increasingly focusing on the ever more challenging obligations to prevent and to repair as being opposing and complementary sides of the “protection” process.

The implementation of all the measures suggested by the Nicosia Convention will not be easy nor rapid, as States still have much to do. But as the Report of the Secretary-General on the implementation of UNSC Resolution No. 2347/2017<sup>73</sup> demonstrates, some things are nevertheless being done.

Among the different measures analysed by this contribution, some have problematic aspects which require a greater effort on the part of not only the national and international institutions, but of civil society as well. Communities, people, stakeholders, and art professionals must become leading players in the establishment of an efficient international system of cultural property protection. Educational actions and public awareness campaigns are, therefore, among the most important preventive measures since, as has been said, only a “cultural revolution” – via dissemination of the spirit of preservation and respect for cultural property – can stimulate a virtuous circle, which is impossible to create through mere criminal or non-criminal sanctions. Monetary sanctions, for example, could be considered by the offenders as nothing more than the price of doing business.<sup>74</sup> In this regard dissuasive sanctions (such as bans or disqualifications, revocation of licenses, and revocation of benefits) have proved to be much more effective. The importance of the implementation of due diligence provisions is, as highlighted in the previous sections, therefore easily understandable.

It should be stressed that inter-state cooperation remains a key element in the successful realization of a global protection system. The cooperation between specialized units sharing dedicated databases and collected data on damage and theft at the global level can prevent and fight illicit trafficking and the damaging of cultural property, because “the transnational nature of crimes related to culture and

<sup>71</sup> For more on the topic, see, *ex plurimis*, A.F. Vrdoljak, *Reparations for Cultural Loss*, in: F. Lenzerini (ed.), *Reparations for Indigenous Peoples*, Oxford University Press, Oxford 2007, pp. 197-228; E. Novic, *Reparation for Intended Cultural Harm*, in: E. Novic (ed.), *The Concept of Cultural Genocide*, Oxford University Press, Oxford 2016, pp. 192-236.

<sup>72</sup> A. Jakubowski, *State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts*, “Santander Art and Culture Law Review” 2015, Vol. 2(1), pp. 147-174: “The international law rules on the protection of cultural heritage in armed conflicts would not be effective without an efficient regime governing the consequences of their violation”.

<sup>73</sup> See above note 22.

<sup>74</sup> U. Gneezy, A. Rustichini, *A Fine is a Price*, “The Journal of Legal Studies” 2000, Vol. 29. “We present the results of a field study in a group of day-care centers that contradicts this prediction. Parents used to arrive late to collect their children, forcing a teacher to stay after closing time. We introduced a monetary fine for late-coming parents. As a result, the number of late-coming parents increased significantly. After the fine was removed no reduction occurred. We argue that penalties are usually introduced into an incomplete contract, social or private. They may change the information that agents have, and therefore the effect on behavior may be the opposite of that expected”.

# GENERAL ARTICLES

Elisabetta Mottese

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the involvement of several national jurisdictions leads to gaps and loopholes which are exploited by individuals and organized groups”.<sup>75</sup> Having this in mind, UNESCO and INTERPOL are putting great efforts into facilitating investigations and cooperation. It should be pointed out, however, that the “ways of thinking about cultural property”<sup>76</sup> – as Merryman has taught us – can vary to a great extent between source and market nations, which explains why it is still so difficult to establish a “level playing field on a truly global level”.<sup>77</sup>

We do not know yet if the Convention will eventually come into force. It is hard to imagine that States will readily and easily implement the criminal provisions of the Council of Europe’s new treaty, as when criminal law is involved there is usually a reaction against the “creeping assault” on domestic sovereignty.

Finally, as we have stated, even if many provisions of the Nicosia Convention are based on existing norms of hard or soft law, this does not diminish the importance of the treaty, as it clearly shows the evolution of international cultural law and perhaps of international law itself as it aims towards the protection of public goods and the fulfilment of community interests, rather than merely being content with community coexistence.

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<sup>75</sup> UNSC, *Report of the Secretary-General...*, para. 60.

<sup>76</sup> See J.H. Merryman, *Two Ways of Thinking about Cultural Property*, “American Journal of International Law” 1986, Vol. 80(4).

<sup>77</sup> C. Roussev, *A Comparison of Antiquities-related Trade Laws within the General Framework of Cultural Heritage Law: The EU and National Law*, in: J. Nafziger, T. Scovazzi, *The Cultural Heritage of Mankind*, Martinus Nijhoff Publishers, Leiden – Boston 2008.

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Elisabetta Mottese

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