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Legislative and Policy Responses to the Illicit Trafficking of Cultural Property in the European Union

An historical inquiry into the legal means and methods employed by the EU and its northern Member states to protect cultural property from illicit trafficking

PhD in Cognitive and Cultural Systems – Analysis and Management of Cultural Heritage

XXXIII Cycle

By

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Dedication

Malachy George Oakes
6 May 1948 – 23 December 2020

This work is dedicated in loving and devoted memory to my late father, Malachy.

Dearest Dad, I wish you could be here to see me reach the end of this academic journey. But I know you believed in me all the way. I could never have done it without you, your love and your constant support. Thank you for everything. Mo ghrá thú. Ted. x

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In the third year of this PhD programme, I was fortunate to do a placement at the European Commission where I worked directly on the EU import regulation for cultural goods. This was an invaluable research opportunity to support this dissertation, and for this I am grateful to team in DG TAXUD, and Anna Kostova-Bourgeix in DG GROW in particular, for their guidance, as well as my friends in Brussels: Frida,

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Finally and most importantly. To my sister and brother, Jennifer and Robert. This is for you, with endless love and gratitude. Thank you.

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Publications

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2. 'Provenance Research as a Tool in the Fight against the Illicit Traffic: The Role of ICOM in the Global Museum Community' in Schneider, Marina (ed) *Reflections on cultural goods without Provenance* (Conference article; Summer 2021)

3. 'Exporting Art from Ireland: The Alfred Beit Foundation and the Protection of Cultural Property' in *Irish Journal of Cultural Policy and Arts Management* (Spring 2017)

4. 'Proceedings of the Inaugural UNESCO High Level Forum on Museums'. Hayashi, N (ed). (UNESCO, Paris 2017).

Presentations

1. 'Identifying Heritage at Risk: the Role of the ICOM Red List in the Protection of Cultural Heritage' at C*ross Border Transfer of Cultural Objects: Law, Challenges and Practice* Erasmus University Rotterdam (Summer school lecture; August 2021)

2. 'Borders and Brexit: Moving Cultural Property between Britain, Ireland and the EU' at International Society for Public Law, Pontifical Catholic University of Chile, Santiago, (Conference Presentation; June 2019)

3. 'Accommodating National Cultural Priorities within the International Treaty Framework for protecting Cultural Property' at *ICON-S: Identity, Security, Democracy: Challenges for Public Law* Hong Kong University (Conference Presentation; June 2018)

Abbreviations

CINOA	International Confederation of Art Dealers
EU	European Union
EEAS	European External Action Service
ICOM	International Council of Museums
Interpol	International Criminal Police Organization
OECD	Organization for Economic Cooperation and Development
OIM	International Museums Office *(Office international des musées)*
SEA	Single European Act
TEU	Treaty on European Union (AKA Treaty of Maastricht)
TFEU	Treaty on the Functioning of the European Union (AKA Treaty of Rome)
UK	United Kingdom
UN	United Nations
US	United State of America
UNESCO	United Nations Educational, Scientific and Cultural Organisation
Unidroit	International Institute for the Unification of Private Law

Abstract

This doctoral dissertation is an historical analysis of the legislative and policy responses to the phenomenon that is illicit trafficking and the illegal movement of cultural property to, from and within the European continent in the 20th and 21st centuries. Its intent is to illustrate the evolution of the historic means used the restrain the illicit trafficking of culture property, ascertain if they work(ed), and understand the extent to which they influence the current EU legal order.

Using archival resources, comparisons of national, European and international legislation, policy, codes of conduct, and contemporary media commentary, this dissertation illustrates that illicit trafficking is an old and complex illegal trade that has long posed legal and policy headaches for governments; though the types of objects being trafficked differ from state to state, this dissertation illustrates that the problems faced by governments in addressing this phenomenon are often similar. Export controls are historically the main means by which states protect heritage from trafficking, and this dissertation agrees with this observation. However, the EU decision to complement export controls with import controls appears to suggest the inability of these traditionally accepted methods to fully restrain trafficking.

The most surprising findings of this work are the extent to which museums have influenced national and EU policy; and early stage which the EU engaged in finding solutions to illicit trade, earlier than originally presumed. Finally, the innovative responses by the EU are ground-breaking, and in this sense, this dissertation further demonstrates the potential of the EU as an emerging major partner and forward-thinking actor in the fight against illicit trafficking.

Foreword

There is a long history regarding the spoliation of cultural heritage, with some very high-profile examples. In the first century AD, the Romans displayed loot taken from Jerusalem during the Jewish Wars (with the inscription of this humiliation of the Jews still being found on the Arch of Titus in Rome[1]); since the 1100s, the Venetians have displayed the Horses of Saint Mark on the loggia of the basilica of the same name (also known as the Triumphal Quadriga), which were originally found at the Hippodrome of Constantinople[2]; and in the 1600s Queen Christina of Sweden directed her troops to plunder the libraries of Bavaria and Bohemia and bring their contents back to Stockholm (some of which still remain in the Royal Library of Sweden).[3] These spoliations and transfers of cultural materials are well known and explored in detail, and taking into consideration this history and the work conducted, our inquiry will move to examine similar removals of heritage, but by private actors and individuals, in times of peace just as much as times of war.

Beyond these spoliations however, this dissertation has its origins in two key events: the authors master's dissertation in 2016 which was an analysis of Irish export legislation to prevent the illegal export of cultural heritage from the Irish state; and the attacks at the Bataclan theatre in November 2015. At the root of the author's dissertation in 2016 was the deaccession, illegal export and sale of valuable Irish patrimony, a

[1] See Miles, Margaret Melanie. (2008). *Art as plunder: the ancient origins of debate about cultural property*. New York: Cambridge University Press; also see Fitz-Gibbon, K. (2005). *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law*: Rutgers University Press

[2] See Lindsay, I. (2014). *The History of Loot and Stolen Art: from Antiquity until the Present Day*. Unicorn Press Limited especially 'Chapter 2: The Crusades and the sack of Constantinople'

[3] Sandholtz, Wayne (2007). *Prohibiting plunder: how norms change.* Oxford University Press) p. 1; see also Hagström Molin, Emma. (2019). Dudík: Correspondence with Gustaf Edvard Klemming (1875–76) *Translocations. Anthologie: Eine Sammlung kommentierter Quellentexte zu Kulturgutverlagerungen seit der Antike*.

scandal which exposed inadequacies in governance in the Irish cultural sector and forced reform in the Irish export control system. Despite these changes, the paintings at the subject of the dissertation were sold and lost to private buyers abroad with little likelihood of their return to Ireland. The entire scandal demonstrated that (in Ireland at least) there is a long way to go to in term of protecting and valorising heritage for public benefit. Prior to the Bataclan attacks – claimed by Daesh (or Islamic State) – it was clear that not only were Daesh carrying out extensive human rights violations in Iraq and Syria, but they were deliberately destroying cultural heritage and historical objects they claimed to be idolatrous. After the attacks, it became apparent that these zealots were smuggling and selling to buyers from abroad the same heritage they claimed to be idolatrous and that proceeds for these illegal sales had been used to help organise their activities, including attacks like those in Paris. These events in turn demonstrated that the international order to protect heritage from theft and trafficking is similarly wanting.

Taking these two events into account, the author was interested in understanding how legal orders to protect heritage from trafficking come into being, and how they can in turn (if at all) restrain illicit trade and protect heritage. This work therefore is not just a study which began in Lucca in November 2017 but is representative of a greater obsession in heritage protection that reflects a wider interest in national, EU and international policy, as well as politics, human rights and the enjoyment of culture for all.

Ted Oakes
Paris, March 2023

Introduction

The purpose this dissertation is to look at the theft and illegal removal of cultural property from one nation, state or territory to another during times of peace (and sometimes war), by individuals or organisations, and to understand how the legislative orders of the EU have developed in response to this phenomenon. Though these acts bear similarities with historic misappropriations through European colonialism or the spoliation of cultural heritage during conflict (commonalities which we shall touch upon throughout this dissertation), there are striking differences. Generally, the theft and illegal export of cultural heritage can happen in times of peace as much as war, and this contemporary peacetime illicit trade of cultural property (as it is usually known) – and the responses to help stop it – shall be the principal focus of our inquiry. The dissertation shall follow the narrative of an historical inquiry, using primary sources (including archival resources; comparisons of national, European and international legislation; government policy and codes of conduct; and contemporary media commentary) supported by secondary source materials. The arc of this inquiry shall also mirror the changing realities of this problem on the ground, in that we shall begin our inquiry with an historic analysis of the problem, then consider the first investigations by international actors, as well as the responses from Member States of the EU, before giving way to an in-depth focus of the EU's responses and the growing threats at international level which forced the EU to engage.

This dissertation will begin with a non-exhaustive literature review, where we shall provide a broad analysis of selected studies already completed and also the problems that accompany this subject matter. This subject of illicit trafficking is an exciting area of study, but it is still a developing and growing area of research with many conflicts

of opinion and cleavages, and for this reason it is imperative that we address some of the more complex thematic considerations before we begin our inquiry in earnest. For example, though we will use the term 'cultural property' predominantly throughout this work, we must also acknowledge that there are other terms that other professionals and scholars have used to describe cultural heritage, and the choice of terminology can have wide reaching implications for the levels of protection afforded by the law. Similarly, the concepts of source and market countries – as articulated by Merryman – have played a key role in shaping modern discourse on illicit trafficking policy, and for this reason, we shall unpack them in the literature review. But at the same time, though it is an influential proposition, it has also been viewed as simplistic and overlooks other factors, including the complexity of the illegal market, lack of regulation, and motives that drive buyers to break laws to acquire illicit cultural heritage. Merryman is also chiefly associated with another dichotomy, that of the heritage nationalist and the heritage internationalist, another influential proposition that divides heritage protection into two camps: one that sees heritage as emblematic of a nation or group of people (heritage nationalism) and one where heritage is seen as a universal trait of human creativity and encourages the sharing of this heritage across borders (heritage internationalism). Though highly influential, like the source/market dichotomy, questions have been asked about the place for other actors in this national/international cleavage, in particular the EU, which given its s*ui generis* nature does not entirely fit into either position. The place of the EU is further interesting to consider in the context of cultural policy; heritage is often emblematic of a nation or people, and so many states manage this through active cultural policies. But there is a constant tension between the Member States, who have the prerogatives over cultural policy, and the EU, which must balance its liberalised free-trade agenda with the priorities of the

Member States. This literature review shall continue with an examination of the concept of the border, illicitness and the other terms that are routinely used in this academic debate. The existence of a border between states is arguably the single most important aspect of our entire study, as without a border the phenomenon of illicit trafficking does not exist. Here, we shall also unpack the concept of illicitness and the subtle nuances it imparts to a phenomenon that itself is often driven by emotive or sensational language and reporting. Like many of the debates in this literature review, there is no right or wrong argument, and we shall not try to demonstrate the superiority of one term or theory over another, but it is important that we at least consider the research already conducted before we proceed further with our inquiry. Finally, the literature review will conclude with a brief acknowledgement of the important legal problems that we face in trying to find a solution to illicit trafficking. Though Prott, Kowalski and Siehr note many problems with the conflict of laws and the legal problems that follow an object across a border, both Jayme and Lalive have noted there are positive solutions implemented at international level which have important influence on the EU and our case studies, as we shall see.

Moving to the first chapter, we will begin with an outline of the historical problems of illicit trafficking, from which we can frame the rest of the dissertation. This initial examination will demonstrate that illicit trafficking is an old phenomenon, despite many observers viewing it as a contemporary trend. Indeed, the first attempts to mitigate illicit trafficking were executed by the Italian states in the 1500s in the form of export prohibitions. Though the success of these measures is debatable, these early efforts laid the foundations for similar protective mechanisms that are recognisable today. However, the threats continued to grow worldwide, but also in relation to our three case studies did this become a problem. There was a noted

acceleration of the problem in the 20th century, culminating in the vast destruction of heritage during the Second World War. Throughout all of this, not only was the phenomenon evolving, but so too were the ethical and legal norms that would be used to address it, and by the end of the Second World War and the beginning of decolonisation, there was an emerging consensus that the unregulated acquisition of cultural materials was immoral. At this stage, the first international responses to illicit trafficking would begin, efforts that will be highly influential and recognisable throughout the rest of our inquiry. Museum professionals were among the first to raise concerns, with ICOM issuing self-enforcing recommendations and its Code of Ethics advising collectors to avoid the acquisition of illicitly trafficked objects in the late 1960s and early 1980s and stressing the importance of the museum practices of provenance research and due diligence to help fight the problem; at the same time, UNESCO opened the 1970 Convention for ratification, an instrument which has become a standard-setting legal tool that has had long-lasting implications for national and international efforts to address illicit trafficking. Though neither the 1970 Convention nor the ICOM tools are perfect or have stopped illicit trade in its tracks, they set the course of direction for the ethical and legislative norms for the remainder of the 20th century.

We shall continue the historic narrative into the following second chapter where we shall examine our three case studies in closer detail. The choice of the three countries is admittedly unorthodox, and this rationale is explained. Given that the core of our inquiry is the EU, EU Member States must be included to understand the operation of EU policies on the ground. Furthermore, their inclusion matters given that policies and legislation used to fight illicit trafficking have historically originated largely at national level. Finally, intense focus has already been given the larger EU Member States, including Italy and France; therefore, the choice of lesser studied northern states provides a fresh field for research as well as potential solutions from countries that

struggle to contain this phenomenon just as much as France or Italy. Our case studies will also allow us an opportunity to understand the types of objects that are smuggled. Denmark can be framed in its history as a colonial power in the Nordic region whose 'liberal' systems of protection appear to go against conventional wisdom to tackle illicit trafficking: an arm's length system of protection and a strategy of engagement with the art market, importers and exporters, as well as metal detectorists, to prevent illicit trafficking before it happens. Ireland's protections have evolved in the post-colonial context, where its idealistic ambitions to protect cultural materials important to the nation clash with the realities of bureaucracy. This has given way to a system that is far reaching in terms of protecting sites from theft, controlling borders, and criminalising trafficking; although it is resource intensive in a historically poor state that could not always afford the necessary administration and bureaucracy. Sweden's measures for protection have evolved in the context of the country's obsession with social democracy, creating some of the most egalitarian and progressive descriptions for cultural heritage in a country with a strong and dynamic art market, which also puts strain on these protections. Though each system has similarities, they are still individual and unique. The main unifying factor that we shall see in this chapter is that the theft and illicit trafficking of cultural property to and from all three case studies is a problem, and the systems do not appear to be successful in retaining them. A major commonality in all three is the inability of administrative systems and bureaucracies to effectively retain heritage within their borders, with a recurring theme being an inability of national administrations to identify heritage both within and outside their countries of origin. Concluding remarks demonstrate that these policies do not entirely stop illicit trafficking, and their success is debatable.

The third chapter shall zoom in on the European dynamic of illicit trafficking and the first responses to this phenomenon on the European continent in the post-war era. Though the EU is the core of

our inquiry, the Council of Europe – a continental international organisation unrelated to the EU – also began working to produce legal instruments that could address illicit trafficking. Though these efforts came to naught, they (and another important initiative from Unidroit) would greatly impact EU efforts to address illicit trafficking through the following decades. This first part of chapter three will also introduce the concepts and definitions used for heritage at EU level, that of 'national treasure' in the founding Treaty – the TFEU – and 'cultural good'. This terminology, as we shall see, is intertwined in the constitutional foundations of the EU, providing both opportunities for protection as well as limitations and tensions. In examining the constitutional structure, we shall understand the nature of the EU as a customs and economic union from which it is the starting point of the EU to engage in the regulation of the movement of cultural heritage. With this in mind, the second part of this chapter shall move to explore the first EU attempts to legislate to protect certain forms of heritage by introducing the Return Directive, a legislative instrument that took inspiration from the 1995 Unidroit Convention, which would introduce important norms into the EU legal order while attempting to secure the return of cultural heritage illicitly removed from the Member State of origin. Further examination of the Return Directive will show that despite its innovative nature, it has experienced considerable challenges in its implementation. These challenges exposed deep weaknesses in the EU and its Member States, and the inability of the Return Directive to effectively protect heritage would lead to its revision in 2014. Though many of its deficiencies have since been addressed, it remains to be seen if it will be useful in the long-term for preventing illicit trafficking; though some observers note the problems are not with the Directive, but in its implementation. The Directive though has ensured the incorporation of important norms into the EU legal order for the protection of heritage from trafficking, including provenance and due diligence. Another important development we shall explore here is the introduction of EU export controls for cultural

goods, which was another effort to restrain illicit trafficking. Though this regulation has had more success than the Return Directive, evidence from various customs authorities of the EU would appear to show that the types of challenges faced in controlling borders, those we discussed in the second chapter case studies, are also experienced at EU level. The most striking findings of this chapter are the early extent to which the EU began operating in the field of heritage protection and the creative ways in which it did so, all the while managing to remain within its sphere of jurisdiction.

In the fourth chapter and final chapter, we shall trace the first non-legislative actions of the EU to protect heritage from trafficking, with most impetus coming from the EU Member States and grassroots experts, and coordinated by the EU. Through the Council Work Plans, the concerns of illicit trafficking would gradually grow, culminating in series of policy recommendations to better mitigate the phenomenon. An interesting observation is the increasing relevance in other policy areas of the EU which suggest that actions for the protection of cultural heritage also rely on other factors, including that the usage of illicit trafficking policies has been useful in the foreign relations of the EU and security. This final chapter will continue this focus on the influence of external events on EU decision making to fight illicit trafficking, as well as growing criminal and security threat; including an exploration and understanding of the first *ad hoc* measures to regulate the import of cultural goods into the EU from Iraq and Syria, including their background, successes and failures. These will have important ramifications for the EU's ambitious effort to regulate the import of all cultural goods into the EU. This section shall also focus on the increasing security focus of the EU on illicit trafficking as well as the linkages between heritage protection and the financing of terrorism, not to mention the data available on the trade, which is not always easily to access from national authorities nor intergovernmental organizations. Here, the growing importance of law enforcement authorities will become especially apparent. We shall conclude by

exploring how these revelations have impacted the development of the EU's Import Regulations. In particular, we shall examine in closer detail the incoming EU import rules and the willingness of the EU to work on ensuring that these innovative reforms do not inherit the same difficulties encountered by the national legislation of our cases studies, the Return Directive nor the Export Regulation. This demonstrates the willingness of the EU to engage and find solutions to this problem.

The findings of this dissertation indicate that by adopting import controls, the EU has taken a notable departure from the traditionally accepted methods of protection of cultural heritage from illicit trafficking. This innovation on the part of the EU could also provide solutions for the types of problems experienced with export controls at Member State level, in turn strengthening the existing protections at national level. That said, this history has demonstrated that current success needs to be met with adequate resources which are necessary if the success is to be maintained.

Literature Review

Introduction

The questions that we will attempt to answer in this inquiry will mainly focus on contemporary problems, which are cultural, economic and political, and relate largely to the modern threats facing the EU and its Member States. That said, there are also profound intellectual, philosophical and theoretical debates – some of which have very long histories – that deeply impact the nature of the modern policy discourse. Though these debates do not form the core of our inquiry, they inevitably shape the discussion, and for this reason we need to acknowledge them before we delve deeper into the empirical elements of this inquiry. Given the large scope of literature in this increasingly growing field of research, it is important to emphasise the challenges faced in compiling such a non-exhaustive literature review, and in the short space allowed, it would never be possible to include and address all authors. In addition, every academic inquiry will have restraints in its scope, and for this reason, this literature review should be considered in part an acknowledgement of the previous work already conducted relevant to our inquiry, as well as a recognition of the problems that remain – problems which we shall become apparent throughout this work. Many of these debates and discussions are heavily academic and sometimes on-going, and though we shall not attempt to respond to them entirely here in this dissertation nor add to them, before we begin our inquiry it is important that we understand them and at the very least acknowledge them.

i. Cultural Property and Cultural Heritage

The subject of our inquiry concerns objects or goods that are moved illegally across borders, but describing what exactly is being illicitly trafficked has long been problematic since, as many scholars

(notably Merryman, O'Keefe and Prott) have illustrated, we are faced with a lack of coherent terminology and definitions around cultural heritage.[1] Here we must emphasise that we are not discussing the physical characteristics nor attributes of the objects themselves (we shall explore this in detail later in this dissertation[2]), but rather we are concerned here with the concepts of culture and heritage themselves, concepts which can be incredibly complex. As such, we shall attempt to unpack them now.

With respect to 'cultural heritage', Blake notes that it is understood to mean the inherited manifestations of human creativity.[3] However, Blake continues and has warned that cultural heritage itself is a changing notion with no fixed meaning, and the term is used across different disciplines to mean different things.[4] Given that there is no commonly agreed international definition for cultural heritage,[5] the international system has largely left it to states to define it for themselves, which is further important and at the same time complex, since national definitions are often important in establishing an

[1] Merryman has examined these issues extensively and is regarded as one of the pre-eminent experts, see Merryman, John Henry (1986). "Two Ways of Thinking about Cultural Property." *American Journal of International Law.* Vol. 80 (4). pp. 831-853, and Merryman, John Henry (1994). "The Nation and the Object." *International Journal of Cultural Property* Vol. 3 (1). pp.61-76. Prott and O'Keefe touch on the nuances between "heritage" and property" and their interchangeable usage, and for more, see Prott, L. & O'Keefe, P. (1992). "'Cultural Heritage' or 'Cultural Property'?" *International Journal of Cultural Property* Vol. 1 (2). pp. 307-320. Brodie and Tubb have also explored this in 2003, see Brodie, N., & Tubb, K.W. (2003). *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*. Taylor & Francis.

[2] Mainly in chapter three, we shall explore what types of objects are protected by national legislation in Denmark, Ireland and Sweden.

[3] Blake, J. (2000). "On Defining the Cultural Heritage." *International and Comparative Law Quarterly* Vol. 49 (1). pp. 63-64

[4] Blake, J. (2000). pp. 63-64. Here, Blake notes that the term cultural heritage has been loaned and borrowed across various academic subjects which do not always respect the theoretical origins, and that its usage in law is perhaps the most complex of all.

[5] Blake, J. (2000). pp. 62-63

individual state's cultural priorities.[6] This means definitions can change from country to country, and what is cultural heritage in one country may not necessarily be recognised as cultural heritage in another.[7] Still, definitions are important because they will impact of the level of protection afforded to objects.[8] As such, to overcome the ideological baggage that comes with 'cultural heritage' with respect to articulation of cultural policy in the public sphere, policy makers tend to use the term 'cultural property' when discussing illicit trade.[9] Here, Boylan points to the importance of the 1954 Hague Convention,[10] as it was the first attempt to describe 'cultural property' in international law.[11] But still, both Prott and O'Keefe emphasise that neither cultural heritage nor cultural property can be boiled down to what lawyers describe in legislation; rather, heritage and its associated tangible manifestations are much broader phenomena,[12] and Frigo goes further, noting that

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[6] Fechner, F. (1998). "The fundamental aims of cultural property law." *International Journal of Cultural Property* Vol. 7 (2). pp.376-394

[7] Here, Carducci notes that the power to set definition means that the legal notions of 'cultural property' and 'art' (irrespective of theoretical definitions of art) vary greatly, see Carducci, Guido (2020). "The Role of UNESCO in the Elaboration and Implementation of International Art, Cultural Property, and Heritage Law." *Intersections in International Cultural Heritage Law*, A.M. Carstens and E. Varner (eds). Oxford University Press. p185; Merryman also alludes, see Merryman (1994). "The Nation and the Object."

[8] Blake, J. (2000). pp. 63-64; also, see Nafziger, James A. R., Paterson, Robert K. & Renteln, Alison Dundes (2010). *Cultural law: International, Comparative, and Indigenous.* Cambridge University Press. p. 206, where the authors note that the multiple meanings of cultural heritage can lead to confusion and in turn hinder efforts to protect heritage.

[9] Prott, L. & O'Keefe, P. (1992). p.311; Loulanski notes that UNESCO provides for an exhaustive list of what is considered heritage, but also emphasises that the concept of 'heritage' is still an evolving term and has been changing since the first identification of concepts of heritage in late 19th century, see Loulanski, T. (2006). "Revising the Concept for Cultural Heritage: The Argument for a Functional Approach." *International Journal of Cultural Property* Vol. 13 (2). p. 209.

[10] For more on the 1954 Hague Convention, see chapter 1.2.1

[11] Boylan, Patrick J. (2003). "The Concept of Cultural Property in times of armed conflict: from crusades to the new millennium." *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, N. Brodie and K.W. Tubb (eds). Taylor & Francis. pp. 58-59

[12] Prott, L. & O'Keefe, P. (1992). p. 309

'cultural property' cannot be a substitute for 'cultural heritage,' but only be seen as a narrower interpretation or a sub-group within the notion of cultural heritage.[13]

Continuing with this 'heritage' or 'property' dichotomy, some other problems remain. The basic principle behind the law for the protection of property is the protection of the rights of the possessor, while the basic principle behind heritage law is the protection of heritage for the enjoyment of present and future generations.[14] In this sense, and in considering the aim of legislation to restrain illicit trafficking (to protect heritage for the public good), it would appear that use of the term 'cultural property' can be problematic, since the 'property' aspect of 'cultural property' could imply ownership and commoditization. Furthermore, given that property ownership in law is sometimes identified as a Western concept,[15] the scope of the term has socio-political and geographic limitations.[16] Macmillan notes that this focus on property tends to be market based and prioritises private property interests over public interests.[17] It can be further contradictory when we consider that property is possessed and alienable, while cultural heritage is neither of these things.[18] Mezey adds that it is a reductive term, when considering that the 'property' element overrides

[13] Frigo, M. (2004). "Cultural property v. cultural heritage: A "battle of concepts" in international law?" / *Revue Internationale De La Croix-Rouge/International Review of the Red Cross* Vol. 86 (854) pp. 369-370

[14] Prott, L. & O'Keefe, P. (1992). p. 308

[15] For more on the concept of 'cultural property' as a western tradition, see Handler, Richard. (1991). "Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism" *The Politics of culture*, B. Williams (ed.). Smithsonian Institution Press.

[16] Prott, L. & O'Keefe, P. (1992). p. 311; for more on ownership and indigenous peoples, see Macmillan, Fiona. (2015). "Cultural Property and Community Rights to Cultural Heritage." *Property and Human Rights in a Global Context.* Ting Xu and Jean Allain, (eds). Hart

[17] Macmillan. (2015). p. 11

[18] Mezey, Naomi. (2007). "The Paradoxes of Cultural Property." *Georgetown Law Faculty Publications and Other Works*. p. 2006

the 'cultural' element and places greater emphasis on its economic rather than its universal value.[19] Other lesser used terms exist that also have other meanings, including 'cultural resource,' which on the one hand suggests an exploitable material but also something that has a shared value and interest.[20] The debates can even become more complex when we take into account linguistic considerations: as an example of the complexity, as we shall see, at EU level, we are also faced with another term, that of "national treasures" but their translation into the national language of the EU can result in more extensive interpretations depending on the language used.[21]

Turning away from the legal scholarly debates, in terms of awareness-raising and day-to-day considerations some scholars genuinely ask if these deliberations by lawyers on 'cultural property', 'cultural goods', 'cultural relics' or 'cultural patrimony' are really helpful to the average citizen, who may be filling in a customs declaration to legally import or export cultural heritage.[22] As we have seen, 'cultural property' is a legal term preferred by lawyers, but it is worth noting that it is a term rarely used by anthropologists, archaeologists, art historians, historians or museologists, who more often than not still prefer the term 'cultural heritage'.[23] In this respect, and turning to the day-to-day problems of theft and smuggling, Hardy writes that the terminology often used in public discourse is more

[19] Mezey. (2007). p. 2006

[20] Lazrus, Paula (2003). "Walking a fine line: promoting the past without selling it." *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, N. Brodie and K.W. Tubb (eds). Taylor & Francis. p. 2

[21] Frigo (2004). p. 372; Stamatoudie concurs, pointing out out these problems in terminology are apparent on a daily basis in the EU: many Romance speaking countries of the EU would use the term 'national patrimony' for what Germanic speakers would describe as 'cultural goods', see Stamatoudi, I. A. (2011), *Cultural property law and restitution a commentary to international conventions and European Union law.* Cheltenham: Edward Elgar Press. p. 120

[22] Nafziger, Paterson, & Renteln. (2010). p. 301

[23] Prott, L. & O'Keefe, P. (1992). p. 320

rudimentary, and he notes that objects described as 'art' and 'archaeological' items usually make up the lion's share of materials that are illicitly trafficked and then discussed in the media or by law enforcement.[24] But again, problems remain, since neither of these two terms are synonymous nor inclusive and each have unique characteristics that set them apart as well as problems: for instance, the looting of sites is sometimes seen as an issue largely for archaeological materials, not art;[25] and Niedzielski reminds us that art historians by profession often have much more nuanced concepts of ownership of cultural property, and they therefore tend to remain at the edge of these debates regarding ownership of art.[26]

The above debates are only a small part of a greater terminological cleavage that is both imperfect and polarising.[27] But despite these arguments over 'heritage' or 'property' or the difference between heritage professional, there are unifying factors which will become apparent throughout the course of our inquiry. These include the concepts of demand, which drive theft, and protection from theft. With respect to demand, these objects – whether they be from Italy or Greece – have an aesthetic value that is desired by buyers.[28] Secondly,

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[24] Hardy points to an almost equal 'demand' for art items, as well as archaeological items, not to mention a substantial black market in forgeries of both. This is based on reports from the Italian Carabinieri, see Hardy, Samuel Andrew (2016). *Illicit trafficking, provenance research and due diligence: the state of the art.* American University of Rome, University College London; Charney estimates that 75% of all trafficked materials are likely to be antiquities, see Charney, N. (2015). *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves*: Palgrave Macmillan UK. p.124

[25] Bator, P. (1982). "An Essay on the International Trade in Art." *Stanford Law Review* Vol. 34 (2). p. 285

[26] Niedzielski-Eichner, N. (2005). "Art Historians and Cultural Property Internationalism." *International Journal of Cultural Property* Vol. 12 (2). p. 184

[27] Taşdelen, A. (2016). *The Return of Cultural Artefacts: Hard and Soft Law Approaches*: Springer International Publishing. p.5

[28] Thompson, E. (2016). *Possession: The Curious History of Private Collectors from Antiquity to the Present*: Yale University Press. p. 129; and Brodie, N., Kersel, M.M., Tubb, K.W., Luke,

whether they be paintings from Italy or archaeological objects from Greece, the problems surrounding the protection of these items and how can they be spared from theft and trafficking are shared problems, which are common to many different types of objects.[29]

Finally, as Craufurd Smith has noted, and important to consider for our inquiry, at EU level there has been no formal definition of cultural heritage or cultural property; and though the EU does tend to prefer the use of 'cultural goods' for legislative reasons, this is not always the case, as we shall see in the coming chapter.[30] Given that the illicit traffic concerns *moveable* heritage items, the major international instruments and organisations have used 'cultural property' or terms that carry similar meaning.[31] UNESCO uses 'cultural property' – almost exclusively – with respect the items that are being trafficked.[32] Largely, and considering the problems that this term carries with it, we shall use it mainly in our inquiry, all the while respecting the ongoing and important debates on the other terms at our disposal.

ii. Source Countries and Market Countries

Having (briefly) considered these debates over terminology, let us now move to the 'push' and 'pull' dynamics of the illicit trade itself. As we will see in the first chapter, throughout history, objects of

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C. and Shackel P.A. (2006). *Archaeology, Cultural Heritage, and the Antiquities Trade* University Press of Florida. p.306

[29] Bator, (1982). p. 285

[30] Craufurd Smith p. 875 in de Burca; also see Directive 2014/60 and Import and Export Rules for differences in use of terminology.

[31] The 1954 Hague Convention gave us the term "cultural property"; the 1970 UNESCO Convention uses cultural "property" too, and while the 1995 Unidroit Convention uses "cultural objects," observers still use 'property' in their commentaries on it, see Frigo, M. (2004). p.368; and Prott notes that even though Unidroit uses 'cultural objects,' the spirit of 'objects' is the same as 'property,' see Prott, Lyndel V. (1996). "UNESCO and Unidroit: a Partnership against Trafficking in Cultural Objects." *Uniform Law Review* Vol. 1 (1). p. 46

[32] Taşdelen, A. (2016). p.5

importance to one person, group or nation have been desired by other peoples, groups or nations outside of that jurisdiction. To modern observers, this supply/demand observation is sometimes boiled down to a simple dichotomy between market countries and source countries, with these classifications playing an important role in policy development. Largely rooted within a nationalistic proposition (which we shall explore in the next section) and as Merryman has written, 'source' nations are countries where the supply of cultural property exceeds demand, whereas 'market' nations are countries where demand exceeds supply.[33] Sometimes, it is articulated as art-export vs. art-import; or art-rich vs. art-poor.[34] While this is a simplistic approach, and is most closely associated with Merryman, it is influential, with the most important international cultural conventions routinely framed in the context of 'market' or 'source' states.[35]

'Source' nations are normally identified by their retentive cultural property polices (the reasons for which shall become cleared in the next section), whereby the removal of cultural heritage from the state is regulated, usually by an export licence regime.[36] Examples of some of the most commonly identified source states include Italy and Greece in Europe; Iraq and Syria in the Middle East; Egypt, Libya and Mali in Africa; Cambodia and China in Asia; and Colombia and Mexico

[33] Merryman, (1986). "Two Ways of Thinking about Cultural Property." pp. 831-853
[34] Nafziger, Paterson, and Renteln. (2010). p. 391
[35] For example, by favouring the return of cultural objects to their places of origin, the 1970 UNESCO Convention is routinely said lean more towards the interest of 'source' states rather than that of 'market' states, see Veres, Zsuzsanna (2014). "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention." *Santa Clara Journal of International Law* Vol. 12 (91) p. 109; meanwhile, the 1995 Unidroit Convention, drafted to address the short comings of the 1970 UNESCO Convention, is often said to sit somewhere in the middle between the interests of 'market' and 'source' states, see Blake, J. (2015). *International cultural heritage law.* Oxford University Press. pp. 40-45.
[36] Merryman, John Henry. (2009). "Art Systems and New Cultural Policy." Stanford Public Law Working Paper

in the Americas. This list is by no means exhaustive, but all of these countries are examples of states which have strong patrimony laws that often grant ownership of undiscovered heritage to the state and/or greatly restrict the removal of heritage from their territories.[37] Some of these states are also notable for their level of protection. China is an extreme example, where until 2011 the illegal removal of cultural heritage, or 'relics', from Chinese territory was a capital offence.[38] Mexico not only claims ownerships of all undiscovered heritage but further restricts the export of privately owned Mexican heritage objects.[39] The cultural polices of these countries can also be very heavily managed too. Italy, for instance, it is often regarded as the world's pre-eminent cultural superpower, and not only are the Italians noted for their success in protecting heritage – with the Italian Carabinieri Command for Cultural Heritage widely regarded as one of the world's more successful law enforcement authorities dedicated to combating crimes against cultural heritage[40] – but the Italians too are recognised and respected for the ways and means in which they include their cultural heritage in nearly every other aspect of their State policies. In particular, Winter notes the success of Italian cultural soft power in diplomatic engagements.[41]

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[37] Merryman, (1994). p. 62

[38] Langfitt, Frank. (2014). "China may drop 9 crimes from list of death penalty offences" *NPR*. 28 October. Available at: https://www.npr.org/sections/thetwo-way/2014/10/28/359553334/china-may-drop-9-crimes-from-list-of-death-penalty-offenses

[39] Nafziger, J.A.R., & Paterson, R.K. (2014). "International Trade in Cultural Material". *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited. p. 28

[40] For more on the Italian Carabinieri Command for the Protection of Cultural Property, see Rush, Laurie, and Millington, Luisa Benedettini, (2015). *The Carabinieri Command for the Protection of Cultural Property: Saving the World's Heritage*: Boydell Press.

[41] Winter notes the extent to which Italy uses heritage, and culture more broadly, in foreign affairs and engagement, see Winter, Tim. (2015). "Heritage Diplomacy" *International Journal of Heritage Studies*, Vol. 21. 10 p. 1007; of course, the use of cultural heritage as a tool to support the external affairs of governments is not new (Hausler, Kristin (2019). "Cultural Heritage within the European Union's External Relations: More

'Market' states are generally seen to have a more *laissez-faire* approach. Favouring free trade, they have fewer controls on the import or export of cultural heritage, and they are often unwilling to enforce the foreign export controls of 'source' states.[42] The most high-profile examples of market states are the United Kingdom (the second largest art market globally and by far the single largest art market on the European continent) and the United States (the largest art market in the world). In 2019, the United States accounted for around 40% of global sales by value, with the United Kingdom following at around 20%.[43] With respect to total value, the legitimate art market was estimated at $67.4 billion in 2019.[44] Both the United Kingdom and the United States are also recognised to have quite liberal controls on the movement of cultural goods: the United Kingdom operates an export control system that seeks to balance the interests of heritage protection with the interests of the buyer, all while protecting the international reputation of the London art market (outright bans on export of heritage do not exist, but the Waverly criteria have been established to put a hold on exports, giving officials time to find buyers in the United Kingdom who can keep the objects in the British state);[45] and the United States (in)famously has no controls on removal of cultural property (except for stolen goods of all kinds, certain federal-owned cultural property and native American heritage).[46] Both countries are also notable for their subdued cultural policies, in that the United Kingdom's

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than a Policy Objective?." *Cultural Heritage in the European Union: A Critical Inquiry Into Law and Policy*, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff. p. 365)

[42] See Merryman, (2009)

[43] McAndrew, Clare. (2019). *The Art Market 2019*. Art Basel. p.17

[44] This is a figure for 2018, see McAndrew, (2019). p.16

[45] Chamberlain, Kevin & Hausler, Kristin. (2014). "United Kingdom". *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited. p. 468

[46] Nafziger, James A.R. (2014). "United States". *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited. p.506

government has an 'arm's length' approach to the articulation and management of cultural policy, which has become even more diluted in recent decades with the devolution of power to the regional parliaments of Northern Ireland, Scotland and Wales.[47] Similarly, the United States federal government has no role whatsoever in developing American cultural policy.[48]

This simple source/market comparison can be useful at times, and many observers point to supply and demand economics to explain the phenomenon of illicit trafficking. Wessel posits, for example, that if the demand for stolen cultural property is addressed in market states, its theft from source states will similarly be addressed.[49] However, it must be acknowledged that this dichotomy overlooks other important elements. For example, some countries can be both source and market countries, having rich varieties of cultural heritage within their borders as well as dynamic international art markets.[50] Currently, observers point to China as an example, which ranks alongside the United Kingdom as the second largest art market in the world.[51] And China has – as we briefly discussed – harsh methods to combat illicit trafficking but also has a dynamic market. The United Kingdom too is often seen as both a source and market country, and even though the United Kingdom has relatively liberalised controls, it is also notable for

[47] For more on British state cultural policy, see Quinn, Ruth-Blandina M. (1997). "Distance or intimacy? —The arm's length principle, the British government and the arts council of Great Britain" *International Journal of Cultural Policy* Vol. 4. (1)

[48] For more on cultural policy of the United States, see Lowell, Julia F. & Ondaatje, Elizabeth Heneghan. (2006). The Arts and State Governments: At Arm's Length or Arm in Arm? The Wallace Foundation.

[49] Wessel, Günther. (2015). "Dealers and Collectors, Provenances and Rights: Searching for Traces." *Countering illicit traffic in cultural goods: the global challenge of protecting the world's heritage*, Desmarais, France (ed.) ICOM. p. 3

[50] The UK is often cited as an example of a market and a source country, see Wantuch-Thole, Maria. (2015). *Cultural Property in Cross-Border Litigation: Turning Rights into Claims.* De Gruyter. p. 32

[51] McAndrew, (2019). p.17

having created strong new criminal offences for those who smuggle cultural heritage through the United Kingdom under the *Dealing in Cultural Objects (Offences) Act 2003*.[52] In this sense, both Bowman and Blythe suggest that the source/market dichotomy can overgeneralise the phenomenon, since it overlooks transit states – those states that are neither source nor market but are important for transferring between the source and final destination.[53] Dietzler agrees, but goes as far as to suggest an even more complex chain from source to market, with four distinct steps.[54]

Others have pointed to the undercurrents of paternalism in the dichotomy. 'Source' states are often maligned as poor, with bad security, high levels of corruption, and poor organisation and bureaucracy.[55] While it does appear that low-income countries (but not necessarily impoverished countries) are more susceptible to illicit trade (as poorer people are encouraged to smuggle to make ends meet), there are other factors which are overlooked when this phenomenon is

[52] Mackenzie, S. (2011). "The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market". *Crime in the Art and Antiquities World*. Manacorda, S., Chappell, D. (eds). Springer. p. 70

[53] Switzerland is the most well-known example of a *transit* country, where cultural goods can be laundered through the territory so that a good title can be obtained. Even if the objects were illegally obtained to begin with, once it changes hands in 'good faith' under Swiss civil law, it can subsequently obtain legal export documentation and can circulate legally on the market elsewhere once leaving Swiss territory. Legal loopholes like this only help facilitate the trade, see Bowman, Blythe A. (2008). "Transnational Crimes Against Culture: Looting at Archaeological Sites and the 'Grey' Market in Antiquities." *Journal of Contemporary Criminal Justice* Vol. 24 (3). p. 233; also see Passas, N., Proulx, B.B. (2011). "Overview of Crimes and Antiquities". *Crime in the Art and Antiquities World*. Manacorda, S., Chappell, D. (eds). Springer. p. 59, specifically footnote 12 for a succinct analysis.

[54] Other observers have concluded there are more intricate levels of trade, and Dietzler has identified at least four distinct stages, with her progression model citing: theft (stage one), transit (stage two), facilitation (stage three) and, finally, sale/purchase (stage four), see Dietzler, Jessica. (2013). "On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate." *Trends in Organized Crime* Vol. 16 (3). p. 338

[55] Bator, (1982). pp. 292-293

simplified. There is evidence to suggest that the size of the country, and whether it is landlocked or not, have greater relevance for illicit trafficking rather than the socio-economic condition of the state.[56] Indeed, sweeping paternalistic generalisations overlook the success of source countries like Italy, where the Carabinieri have a proven track record in protecting heritage.[57] This paternalist approach also fails to acknowledge the levels of manpower and bureaucracy needed to manage and protect museums and heritage sites, and even the most economically advanced states (like Italy, a G7 economy) would still never have the resources needed to police every known heritage site or museum.[58] Linking back to our previous section, this paternalist view can in turn dictate the terminology we use with respect to source countries, and it can especially influence the buyers of cultural property; it is often said that there are 'countless', 'numerous' or even 'surplus' objects in source countries. Not only does this emphasise the commodification of cultural heritage, but it also implies that heritage only becomes rare or unique when moved to a market setting, which in turn fuels demand.[59]

Turning once more to the market, in reducing our problem to a buyer/seller analogy, this dichotomy overlooks the complexity of the market, which includes thieves, smugglers and middlemen. Further to this, it is important to recall now that the international art market is one of the most unregulated markets in the world. While there are certainly honourable dealers in cultural property who do not trade in illicitly

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[56] Storti, C., De Grauwe, P., Caulkins, J., Schneider, F., Berger, H., Nitsch, V., Farzanegan, M.R., Marsh, K. and L. Wilson. (2011). *Illicit Trade and the Global Economy*: MIT Press. p.53

[57] Merryman, John Henry. (2009) (note 42)

[58] Cuno, J.B. (2008). *Who Owns Antiquity?: Museums and the Battle Over Our Ancient Heritage*: Princeton University Press. p. 7

[59] Lyons, Claire. (2002). "Objects and Identities: Claiming and Reclaiming the Past " *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* Barkan, Elazar & Bush, Ronald, (eds). The Getty Research Institute Publications Programme. p. 131

trafficked heritage,[60] the reality is that the lack of regulation in the sector has made it impossible to ascertain where the legal market ends and the illicit market begins[61] – something the EU noted when it first began to study this problem in the 1970s.[62] The EU had further criticism for the art market, which it felt carried heavy responsibility in facilitating the illegal trade, given the significant absence of restraints (both legal and ethical) on heritage collecting.[63] In the same period, Interpol largely agreed with the EU's finding, adding that most of the heritage stolen in Italy, for instance, appeared to be bound for markets outside Italian territory and was being laundered to make it indiscernible from illicitly traded heritage.[64] Furthermore, as Charney notes, the modern trafficking phenomenon is often a highly sophisticated operation that the source/market dichotomy does not acknowledge; this overlooks the realities of a modern phenomenon that is constantly evolving and often monopolised by criminal organisations.[65]

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[60] See comments made by art market professionals opposing illicit trafficking in section 2, UNESCO. (2022). "Report on the results of the consultations with the art market on the revisions to the International Code of Ethics for Dealers in Cultural Property." Convention on the Means Of Prohibiting And Preventing The Illicit Import, Export And Transfer Of Ownership Of Cultural Property - Subsidiary Committee Of The Meeting Of States Parties. C70/22/10.SC/9. 16 & 17 May. Paris.

[61] For more on the difficulties on ascertaining the line between the legitimate and illegitimate market, see Bowman, (2008).

[62] Chatelain, Jean. (1976). Means of Combating the Theft of and Illegal Traffic in works of Art in the Nine Countries of the EEC. XII/757/76-E. European Commission. pp. 6-10

[63] Bator. (1982). p. 357

[64] Interpol, (1977). "Interpol Symposium on Thefts of Works of Art and Cultural Property" *Museum, Archive, and Library Security* Fennelly, Lawrence J. (ed.) Butterworths. p. 746

[65] Charney, N. (2015). p. 140; but also see Chouvy, Pierre-Arnaud. (2013). "Introduction: Illegal Trades across National Borders." *An Atlas of Trafficking in Southeast Asia. The Illegal Trade in Arms, Drugs, People, Counterfeit Goods and Natural Resources in Mainland Southeast Asia*, IB Tauris; In addition, when traffickers are caught at borders, they learn, adapt and find new means of trafficking, allowing the phenomenon to evolve, see Basu, Gautam.

The simplification of the dichotomy also overlooks the complexity of demand and the buyer of illicitly traded cultural property. Thompson has noted that these buyers are not always the same as buyers of other illegally traded goods, and it is interesting to think that their motives to buy can be compared to the same paternalism that marks the description and protections made by source countries.[66] Thompson further notes that the buyers may also be driven by a complex mix of aesthetics and power,[67] which are not entirely dissimilar to the motives that drove sovereign princes in Italy to introduce rules to protect their heritage items during the Renaissance, which we shall discuss in the first chapter.[68] And some of the first EU reports had particular scorn for the buyers of these materials, acknowledging that acquisitions were often made out of passion and a desire to own them.[69] Modern analyses of contemporary buyers tends to identify white-collar professionals as the most likely suspects, individuals who often see themselves as above the law and regard the ownership of illicitly traded cultural property as admissible in comparison to the purchase of drugs or other illegal substances or products. And the global art market often backs up this misconception, asserting that there is a lack of proof around the damage caused by illicit trafficking.[70] However, as we shall see throughout this dissertation, there is considerable proof of cultural damage caused by illicit trafficking.[71]

iii. Nationalism and Internationalism

(2014). "Combating illicit trade and transnational smuggling: Key challenges for customs and border control agencies." *World Customs Journal* Vol. 8 (2). p. 21

[66] Thompson, E. (2016). p. 129

[67] Thompson, E. (2016). p. 129

[68] See Chapter 1.1.1

[69] Chatelain. (1976). p.14

[70] Thompson, E. (2016). p. 129

[71] For the security concerns posed by trafficking, for example, see chapter 5.2.1.

Having considered the problems and definitions related to source and market countries, we now move on to another equally influential dichotomy, this time with respect to ownership, one which also contains similarities with our previous source/market cleavage. The concept of ownership of cultural heritage is perhaps one of the most fascinating debates that has been evolving since the 1800s and is clearly discernible in contemporary academic thought as well as policy making. This dichotomy is a distinction made between a universal notion of cultural heritage and a more restricted national vision of ownership, often expressed through national patrimony laws or prohibitions on export,[72] which are one of the key controls used to combat illicit trafficking.[73] While we will not (and could not) replicate the entire debate here nor attempt to add to it, it is still imperative that we consider it, given its influence internationally.

Commonly identified as the 'heritage internationalist' vs. the 'heritage nationalist', the two main international cultural conventions (the 1954 Hague Convention and the 1970 UNESCO Convention, which we shall discuss in greater details in the next chapters) have been said to represent these two competing expressions of heritage ownership.[74] To some, it is an unfair adversarial model. Proponents of heritage

[72] For more on the origins of what is now recognised as heritage internationalism, see Swenson, Astrid. (2016). "The First Heritage International(s): Conceptualizing Global Networks before UNESCO." *Future Anterior* Vol. 13 (1); and for heritage nationalism espoused via patrimony laws or export prohibitions, see Merryman (1994).

[73] For the first modern examples of export controls, see the initiatives of the Italian states in chapter 1.1.1; for modern examples espoused by our three case studies, see chapter 3, and for EU examples see chapter 4.1.2.

[74] As first identified by Merryman, the 1954 Hague Convention represents heritage internationalism, which sees cultural heritage as a common human attribute that must be protected for the good of humanity; in contrast, the 1970 UNESCO Convention has been interpreted as an instrument of cultural nationalism, recognising the special interests of the nation over cultural heritage, allowing – even encouraging – states to enforce export controls to protect cultural property and pursue repatriation efforts, see Merryman, (1986).

internationalism, for instance, generally view heritage as an attribute of humanity that must be protected for the benefit of all mankind. From this point of view, the internationalist renders the nationalist arguments for the retention of heritage by one person or group or people as selfish and counterproductive, even driven by romantic and self-righteous ideas.[75] On the other hand, the heritage nationalist would view heritage as emblematic of a group, nation or people, and as an integral part of their national, cultural and community identity. In turn, through this lens, the heritage nationalist would malign heritage internationalism as a thinly disguised form *laissez-faire* capitalism – a free trade approach that can be used as an argument to maintain collections of dubious provenance in some of the world's most prominent museums.[76] These heritage nationalist would also argue that the internationalist approach actively undermines national efforts to address illicit trade, which they further argue are the only realistic proposals to protect heritage within the borders of their territories.[77]

Once again, Merryman has been instrumental in articulating this dichotomy, and from the nationalist position, he has opined that heritage can be emblematic of a group or nation; it is for this reason that states tend to enforce laws that prohibit the removal of certain cultural objects from their territory, as their loss is considered detrimental to national identity.[78] He also identifies the 1970 UNESCO Convention – which supports states retention of cultural property – as a key pillar behind the nationalist persuasion.[79] Elements of the market/source dichotomy we discussed in the previous section can also be clearly seen here, and source countries are generally seen to have

[75] Merryman, John Henry, Elsen, A.E. & Urice, S.K. (2007). *Law, Ethics, and the Visual Arts*: Kluwer Law International. p. 343
[76] Nafziger, Paterson, & Renteln (2010). p. 392
[77] Nafziger, Paterson, & Renteln (2010). p. 392
[78] See Merryman (1994).
[79] Merryman (1986). p.845

aligned themselves behind this nationalist persuasion of the Convention; and since its opening for ratification, many have called for the repatriation of cultural property taken from their territories, whether as the result of plunder, removal by colonial powers or theft and illegal export.[80] This nationalist interpretation can be seen as becoming further entrenched, as market countries who ratify the 1970 UNESCO Convention are obliged to restrain illegal importation of cultural property from other states (though in practice, few states do).[81] Parallel to this, we have what Merryman has called cultural or heritage 'internationalism', a concept of heritage as representative of human exceptionalism and creativity. Merryman argues that this position is rooted in Enlightenment principles, which grew steadily throughout the 19th and 20th centuries[82] and accelerated after the Second World War, when it was codified in the 1954 Hague Convention. The Convention sought to protect "humanity's common cultural heritage", and essentially, proposed that heritage should be protected for the enjoyment of all peoples, not just one group or nation.[83] As we shall see at the end of this literature review, international private law would tend to support this position as it also espouses an international and free-trade based position. While both conventions aim to protect heritage, it is important to recall that the 1970 UNESCO Convention seeks to retain cultural property, whereas the 1954 Hague Convention seeks to share it.[84]

[80] Merryman (1986). p. 845

[81] Merryman (1986). p. 843

[82] The Lieber Code, drafted during the American Civil War, is often cited as one of the first attempts to codify rules of war that also gave guidance to protect heritage in times of conflict. The principles put forth in this document are often noted to be the seminal guidelines, which would eventually give way to the 1954 Hague Convention, see Merryman (1986). p. 834

[83] Merryman (1986). p. 846

[84] Merryman (1986). p. 846

While both of these positions are equally valid – and the extent to which this cleavage has shaped the debate is undeniable, with many other international instruments being divided along this national/international demarcation[85] – in recent years, there has been more critique of the stark black/white polarisation.[86] Just like the stark source and market classification, Hallman argues that a modern museum's acquisition policy does not fit into either a heritage 'nationalist' or 'internationalist' agenda but can be placed somewhere in between.[87] Similarly, indigenous groups are also left on the side lines of this duopoly, and there are wide-ranging ramifications of their exclusion from this debate, including economic, political, social, territorial and cultural.[88] The national/international approach has also been criticised as being too legal/archaeology-centric, noting that the illicit trade is more dynamic, with other fields of research being left out of the debate, such as art history, which prefers not to associate with the concept of cultural property internationalism.[89] Given the Western origins of this dichotomy and the perceived difficulties applying it to a non-western heritage, Prott has gone so far as to call heritage

[85] The 1972 World Heritage Convention, the 2003 Convention for the Safeguarding on Intangible Cultural Heritage and others have been interpreted in this dichotomy, for more see Peters, Robert. (2020). "Nationalism Versus Internationalism New Perspectives Beyond State Sovereignty and Territoriality in the Protection of Cultural Heritage." *Intersections in International Cultural Heritage Law*, Carstens, A.M. & Varner, E. (eds). Oxford University Press.

[86] Nafziger, in particular, is a stern critic, Nafziger, Paterson, & Renteln. (2010). p. 392

[87] See Hallman, R. (2005). "Museums and Cultural Property: A Retreat from the Internationalist Approach." *International Journal of Cultural Property* Vol. 122.

[88] For more, see Watkins, J. (2005). "Cultural Nationalists, Internationalists, and "Intra-nationalists": Who's Right and Whose Right?" *International Journal of Cultural Property* Vol. 12 (1); Graziadei and Pasa also mention that Merryman's argument is being challenged, and take the EU as an example, as well as indigenous peoples who are not always recognised in this dichotomy, see Graziadei, Michele, & Pasa, Barbara (2019). "The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe." In *Cultural Heritage in the European Union: A Critical Inquiry Into Law and Policy*, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff. p. 104

[89] Niedzielski-Eichner, (2005). p. 184

internationalism a form of "imperialism".[90] And in the 21st century, there are other forms of possession, which no longer reflect traditional modes of ownership.[91] Additionally, others have pointed to the prevailing power of state sovereignty in the international system, which has become more pronounced in recent years and allows cultural heritage to remain a resource that states can control exclusively. As such, the same observers ask if heritage internationalism can realistically be useful or influential in the 21st century.[92]

Critics have also called into question the place of modern international actors – namely the EU – in this division, which is especially important for our inquiry. Under cultural nationalism, the Member States of the EU would remain the ultimate authorities in matters relating to cultural policy and the movement of cultural heritage.[93] Yet, as neither a state nor a traditional international organisation, the EU must deal with an overlapping of protections, including national/international, formal/informal, legislative/judicial and public/private, all of which provide solutions as well as tensions.[94] The EU treaties commit the Member States to "ever closer union", but cultural heritage – cited by Jakubowski as "one of the last bastions of state sovereignty" and one of the most difficult areas of EU integration[95] – could appear to put the dichotomy on a collision course. Indeed, the EU's cultural competencies have grown increasingly in the last few decades, as we shall see. Yet, the EU still has to balance

[90] Prott, Lyndel V. (2005). "The International Movement of Cultural Objects." *International Journal of Cultural Property* Vol. 12 (2). p. 228
[91] Graziadei, & Pasa, (2019). p. 107
[92] Peters, (2020). p. 367
[93] Graziadei, & Pasa, (2019). p. 84
[94] Graziadei, & Pasa, (2019). p.105
[95] Jakubowski, Andrzej. (2019). "Common Cultural Heritage, the European Union, and International Law." *Cultural Heritage in the European Union: A Critical Inquiry Into Law and Policy*, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff. p. 35

national cultural policies of the Member States with its liberalised trade agenda, which again, can appear to fly in the face of the nationalist persuasion.[96] This particular tension in the EU's regime shows a desire to protect freedom of movement (which could be seen to reflect the internationalist approach) while also excluding certain cultural goods from this freedom (which of course leans more towards the nationalist point of view). In general though, the EU system presently leans more towards latter, but there are still many issues in this debate that remain unresolved,[97] which we shall explore in the next chapters. And as we shall see in the final chapter, the recent decision of the EU to enact import rules to protect *non*-EU heritage is especially interesting, as it would appear to reflect the 1954 proposition and see the EU take the side of heritage internationalists.[98]

To conclude, though sovereign states are still the main actors in these debates, many non-state actors are playing increasingly important roles.[99] This makes EU institutions an important field of study, as the entire European continent – including the United Kingdom – accounts for around 40% of global sales of cultural property,[100] and Europe is the largest global exporter of cultural property.[101] Europe also accounts for half the world's art and antique

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[96] Fiorentini, Francesca. (2019). "Cultural Heritage in the EU Trade Agreements: Current Trends in a Controversial Relationship." *Cultural Heritage in the European Union: A Critical Inquiry Into Law and Policy*, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff.
[97] Vitale, Carmen. (2011). "The Protection of Cultural Heritage Between the EU Legal Order and the Global Legal Space." *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, Chiti, E. & Mattarella, B.G. Springer Berlin Heidelberg. pp. 216-219
[98] The incoming EU import rules under Regulation 880/2019 are designed to protect heritage outside the EU, see chapter 5.2.1
[99] Graziadei, & Pasa, (2019). p. 88
[100] McAndrew, (2019). p. 16
[101] These are the 2016 statistics, but still relevant, see Pownall, Rachel A. J. (2017). TEFAF Art Market Report 2017. The European Fine Art Foundation.

dealers.[102] While the global system to protect heritage was drawn up in the post-war world, rightly or wrongly, the EU must navigate in this system.[103] How it responds to this phenomenon will therefore have ramifications for the global illicit trade.

iv. Cultural Policies and Politics

As we touched upon in the previous section, with very few exceptions,[104] most states have some form of export control on cultural heritage, with the scope of controls varying greatly from country to country, which Merryman views as the heritage nationalist position. In a similar vein, most states have policies in place for the protection, promotion and management of culture and heritage, as does the EU. The political usage of culture in the EU – such as with our three case studies – and how it is managed deserve attention; for, as Vitali has written, there is evidence that the effectiveness of the EU mechanisms to regulate the circulation of cultural goods is strongly related to the articulation of the policies in this area.[105]

As Hausler discussed, the creation, multiplication and versatility of the EU policies in this area – which we shall touch upon in chapter four – is interesting for several reasons. First, there is the unusually sudden increase in cultural activities by the EU beginning in the late 1990s and early 2000.[106] Secondly, as we saw with reference to

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[102] McAndrew, (2019). p. 16

[103] Vitale, (2011). p. 214

[104] For a long time, the United States was the main example of a country with little to no restrictions on the export of cultural heritage, save for Native American cultural heritage, see Nafziger, J.A.R., and R.K. Paterson. 2014. *Handbook on the Law of Cultural Heritage and International Trade*: Edward Elgar Publishing Limited. p. 29

[105] Here, Vitali is making the link between the legal mechanism for the return of cultural goods under Directive 2014/60/EU (see chapter 4.1.1) and the policies and procedures that have been created alongside it, Vitale, (2011). p. 217

[106] Hausler, Kristin (2019). "Cultural Heritage within the European Union's External Relations: More than a Policy Objective?." *Cultural Heritage in the European Union: A*

export controls and nationalism in the previous section, cultural policy and cultural heritage are often associated closely with the cultural identity of nation-states, and for this reason, not only was the EU's involvement in cultural activities actively discouraged in the first decades of the EU project, it was also – practically – very difficult to establish. This was due to the multi-national character of the EU, where there were several different and diverging (and sometimes competing) cultures already existing.[107] And here, Calligaro goes as far as to suggest that part of the difficulties faced by the EU in articulating a cultural position was down to the very problems with the definitions of culture itself, which, as we saw in the previous sections, are numerous.[108]

But, turning to cultural polices more broadly, Merryman again contributes to this debate at a global level and cites two main types of patronage of cultural policy that commonly exist: a private system, which is common in the United States where power and responsibility for heritage, arts and museums lie with private actors; and a public system, which is common in Europe and sees governments regulate and subsidise the culture and heritage sectors.[109] As we saw in our analysis of source and market countries, even in Europe, these types of patronages can differ greatly. These include arms-length patronages, where a government funds but largely refrains from interfering in the culture and heritage sector (the UK, as we saw earlier, is cited as a

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Critical Inquiry Into Law and Policy, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff. pp. 366-367

[107] Hausler, (2019). pp. 366-367

[108] Calligaro, Oriane & Vlassis, Antonios. (2017). "La politique européenne de la culture : Entre paradigme économique et rhétorique de l'exception." *Politique européenne*. Vol 56 (8). p. 9

[109] Merryman (2009).

common example,[110] where there is no overreaching legal architecture for the management of culture[111]) and arm-in-arm patronages, where the government takes a keen and active role in the management of culture as a tool of state promotion, further articulating a policy to this aim (like we saw earlier, Italy is often cited as an example, where the government has a far-reaching bureaucracy to support culture and where the importance of heritage is even emphasised in the constitution of the republic[112]). Since a state's cultural policies can play an important part in shaping and strengthening the identity of a nation, it is not surprising that observers have recognised culture as a powerful tool to foster identity and exceptionalism in a nation or state.[113]

If we look at our three case studies briefly, we can see clear yet unique policies at play that have notable wider impacts on each state's heritage protection and illicit trafficking strategies. Cultural policy in Denmark is similar to the British arms-length[114] form of patronage, with its development mirroring the democratisation of the country beginning in the mid-19th century. By and large, emphasis on Denmark's archaeological heritage stems from this period, and it has since been used to represent the national character of Denmark,[115] with observers noting that the Danish government continues to use heritage

[110] Compendium of Cultural Policies and Trends (2023). "Cultural Policy System: United Kingdom." Available at: https://www.culturalpolicies.net/database/search-by-country/country-profile/category/?id=42&g1=1
[111] Compendium of Cultural Policies and Trends (2023). "Cultural Policy System: United Kingdom."
[112] Compendium of Cultural Policies and Trends (2023). "Italy." Available at: https://www.culturalpolicies.net/database/search-by-country/country-profile/?id=20
[113] Calligaro, & Vlassis (2017). p. 20
[114] Compendium Cultural Policies and Trends (2023). "Denmark." Available at: https://www.culturalpolicies.net/database/search-by-country/country-profile/category/?id=10&g1=1
[115] Zipsane, Henrik (2011) "National museums in Denmark" EuNaMus, European National Museums: Identity Politics, the Uses of the Past and the European Citizen, Bologna 28-30 April. p. 213

to emphasise the 'Danishness' of the nation in the face of increasing multiculturalism.[116] Denmark's colonial history and its restitution of heritage to its former colonies[117] have also impacted on policy developments towards the regulation of the movement of cultural objects and illicit trafficking, as Denmark takes a strikingly different approach to the phenomenon compared with other countries in Europe.[118] Since the 1940s, Ireland has also followed a similar arm-length form of patronage, though meaningful change only began with Irish entry in the EU in the 1970s. This saw an increase in funding for culture and heritage from the late 1980s and helped to modernise Irish heritage protection legislation in the 1990s, along the lines of EU norms.[119] Yet, although Ireland places great emphasis on the importance of culture, in reality, heritage protection and cultural policy were, until relatively recently, largely ignored by successive governments.[120] The national cultural institutions remained understaffed and underfunded for much of the 20th century, which was problematic given their statutory obligations to monitor the movement

[116] Compendium Cultural Policies and Trends (2023). "Denmark."

[117] Zipsane, (2011) pp. 215-216; and Styreksen - Danish Agency for Culture. (2015). Report by Denmark on the implementation of 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Copenhagen, where the successful repatriation of objects to the former colonies of the Faroe Islands, Greenland and Iceland are cited as examples for similar 21st century repatriation

[118] See Chapter 3.1.1.

[119] Compendium of Cultural Policies and Trends (2023). "Cultural Policy System: Ireland". Available at: https://www.culturalpolicies.net/database/search-by-country/country-profile/category/?id=19&g1=1, and also Chapter 3.2.1

[120] As Sawyer notes, the National Museum was largely overlook by successive governments and left to decay, see Sawyer, Andrew (2011). "National Museums in the Republic of Ireland." EuNaMus, European National Museums: Identity Politics, the Uses of the Past and the European Citizen, Bologna 28-30 April. p. 435; as for cultural policy, culture was considered an expensive luxury, and so, little was done to promote it, encourage it or protect it, see Compendium Cultural Policies and Trends (2023). "Cultural Policy System: Ireland."

of cultural goods out of Ireland.[121] Ireland's participation in EU and international affairs at cultural level is considered weak by European standards;[122] as Conlon has noted, Ireland's superficial approach is reflected in its systems to protect heritage from theft and trafficking, which are piecemeal.[123] As for Sweden, Widén notes that the country's cultural policy is closely intertwined with Sweden's social-democratic political tradition, with the protection of cultural heritage being at the core of the country's cultural policy.[124] This means Sweden plays an active role on the world stage in regard to international heritage protection,[125] and Sweden's progressive policies are recognisable in its legislation, which sees the descriptions of cultural heritage as amongst the most open-ended and generous in Europe.[126]

Turning to the EU, the Member States of the EU largely retain their competencies over cultural affairs; and as mentioned, Jakuboswki has identified cultural policy as one of the last bastions of state sovereignty in the EU.[127] Part of the reason for this is due to the identity politics often associated with culture; but in addition, given the variety of ways that Member States manage culture,[128] it is also technically

[121] For a history of the Irish border and illicit trafficking see Oakes, Ted (2023). "Securing Borders and Restraining the Illegal Movement of Cultural Property to, from, and within, the Island of Ireland" in *Art Crime in Context.* Oosterman, N. & Yates, Donna. Springer International Publishing.
[122] Compendium of Cultural Policies and Trends (2023). "Cultural Policy System: Ireland"
[123] For more on the legislative history, see Conlon, Patricia. (2014). "Ireland" *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited.
[124] Compendium of Cultural Policies and Trends (2023). "Sweden." Available at: https://www.culturalpolicies.net/database/search-by-country/country-profile/category/?id=39&g1=1
[125] Compendium Cultural Policies and Trends (2023). "Sweden."
[126] See Chapter 3.3.1.
[127] Jakubowski, (2019). p. 35
[128] Calligaro & Vlassis (2017) for arm's length and arms-in-arm processes already described; but some states devolve the management of culture to their regions, like in Spain or Germany, see Klamer, Arjo, Anna Mignosa, and Lyudmila Lyudmila. (2013)

complex for the EU to engage in cultural affairs. Since the 2009 Lisbon Reforms, the EU has had the power to "support, coordinate or supplement the actions of the Member States."[129] But it must be remembered that the EU was founded as an economic Union of six original Member States in 1957, with the aim of enhancing economic development and integrating European market economies so that future conflict could be avoided. The EU and its institutions – the Commission, [130] the Parliament[131] and the Council of Ministers[132] – were never intended nor expected to operate in areas of culture or heritage.[133] And the EUs ability to engage in regulating the movement of heritage arrives primarily from its economic character, where it has exclusive competencies in trade under the principles of conferral.[134] This economic character of the EU does pose other problems, since the EU is built to guarantee the freedom of movement of people, goods, capital and services via its customs union.[135] Unsurprisingly, a union

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"Cultural Heritage Policies: a Comparative Perspective." *Handbook on the Economics of Cultural Heritage*, Edward Elgar Publishing. pp. 37-86

[129] EUR Lex (2023). Article 6, Consolidated version of the Treaty on the Functioning of the European Union, Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E006%3AEN%3AHTML

[130] Article 155 of the TFEU established the Commission, see Egenhofer, C., Kaczynski, P.M., Kurpas, S., & Van Schaik, L. (2011). *The Ever-changing Union: An Introduction to the History, Institutions and Decision-making Processes of the European Union.* Centre for European Policy Studies. p. 6

[131] Unlike most national legislatures, the European Parliament does not possess a legislative initiative, meaning it cannot create or initiate new laws. It can only amend or approve them. See Scully, Roger. (2009). "The European Parliament." In *European Union Politics*, Cini, M. & Borragan, N.P.S; (eds). Oxford University Press. pp. 162-175.

[132] Article 137 established the Parliament and the Council of Ministers, Watts, D. (2008). *The European Union.* Edinburgh University Press. p. 19

[133] Egeberg, Morten (2009). "The European Commission." *European Union Politics*, Cini, M. & Borragan N.P.S. (eds). Oxford University Press

[134] EUR-lex (2023). "EU Trade policy" Available at : https://eur-lex.europa.eu/EN/legal-content/glossary/eu-trade-policy.html

[135] Spanning Articles 9 to Articles 84, topics covered included a common market, including in agriculture. It also set out the free movement of persons, services, capital and transport.

that is built upon freedom of exchange can see a clash with the policies of states and governments seeking to restrain the movement of cultural heritage. As such, one of the greatest tensions of the EU, as Fiorentini reiterates and which we mentioned in the last section, is that the EU must constantly balance the national cultural policies of Member States with its liberalised trade agenda.[136]

As Calligaro notes, reforms coupled with the existing constitutional exceptions have allowed the EU to intervene more actively in cultural affairs which has interesting finding for our inquiry, especially in chapter four, but Member States still remain dominant in cultural protection.[137] Still, the growing competencies have been useful for the EU which uses the cultural clout of the European continent to strengthen its actions in international affairs.[138] The blurring lines between Member States and the EU have led Craufurd Smith to argue that even if the Member States *de jure* retain their supremacy in cultural affairs, *de facto,* their competency is no longer unlimited within the EU.[139] Stamatoudi adds to this, emphasizing that in the 21st century, though culture and cultural policy now have a greater importance in EU affairs, still, this does not mean that the EU can act unilaterally in this area,[140] even if these competences have slowly developed.[141] Still though, Calligaro is correct in noting that the economic elements of the

[136] Fiorentini, Francesca. (2019). "Cultural Heritage in the EU Trade Agreements: Current Trends in a Controversial Relationship." *Cultural Heritage in the European Union: A Critical Inquiry Into Law and Policy*, Jakubowski, A., Hausler, K. & Fiorentini, F. (eds) Brill Nijhoff. p. 190

[137] Calligaro & Vlassis, (2017). p. 24

[138] Craufurd Smith, Rachael. (2011). "'The Evolution of Cultural Policy in the European Union'." In *The Evolution of EU Law*, Craig, P.P. & De Búrca, G. (eds) Oxford University Press. p. 871

[139] Craufurd Smith (2011). p. 871

[140] Stamatoudi, I. A. (2011), *Cultural property law and restitution a commentary to international conventions and European Union law.* Cheltenham: Edward Elgar Press. p. 132

[141] Craufurd Smith (2011). p. 869

EU remain a priority for the EU and its institutions.[142] And any action to protect heritage will still, largely, be framed in this economic character.

v. Borders and Illicitness

Equally pertinent is the need to examine the concept of the border and its impact on illicitness – perhaps the most important discussion of this literature review. Clandestine trade of all kinds is not a new phenomenon; for as long as international and transnational trade have existed, there have been illegal transnational trade and crime.[143] With this in mind, it is also interesting to consider that most cases involving illicit trade, and art crime more broadly, are often smaller and lesser-known infringements (though this should not dismiss their seriousness).[144] Charney notes that the inconspicuous nature of these illegal exchanges across borders poses great problems for law enforcement at borders, since they need time and resources to examine this phenomenon.[145]

Therefore, this is the very first characteristic of illicit trade that must be understood and recalled throughout this entire study: the border. Illicit trafficking cannot exist without the existence of a legal frontier between states, and the very co-existence and symbiotic relationship of illicit trafficking and borders demonstrates the latter's inability to eradicate the practice of the former. There are some observers who believe that borders are in fact an understudied problem

[142] Calligaro & Vlassis, (2017). p. 24
[143] Polner, Mariya (2015). "Customs and Illegal Trade: Old Game." *Journal of Borderlands Studies* Vol. 30 (3) p. 330
[144] Block, Ludo. (2011). "European Police Cooperation on Art Crime: A Comparative Overview " *Journal of Art Crime* 4 (1). p.202
[145] Charney, N. (2015). *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves*: Palgrave Macmillan UK. p.140

in illicit trafficking;[146] these do not just impede trade (both licit and illicit), but in fact lead to the development of customs practices that further shape both legal and illegal trades.[147] Indeed, a border brings with it a bureaucracy and apparatus that must be managed,[148] and some scholars even opine that open borders – like those of the EU – require more regulation than closed borders. At the same time, they may provide more opportunities for smugglers who can evolve and learn to overcome changes in existing regulations and restraints.[149] Furthermore, and again important in the context of our inquiry, when an object is brought across a border, the problem intensifies, as the state that has lost the object is now reliant on the bureaucratic and legal cooperation of the state now holding the object to secure its return.[150] Therefore, once again, it is the very existence of a border – and the illegal passage of an item across it – that creates our problem to begin with. As a result, an action which would otherwise be a perfectly casual act of trade between two or more parties becomes illicit.[151]

As we have seen, and as Nafziger notes, at an international level, export restrictions are the most common methods used to protect moveable cultural heritage from illicit trafficking. Their usage has been

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[146] Chouvy notes that the role of a border in the illicit trade is something that is less studied, which is surprising given that the literal creation of a border makes something illicit that would otherwise be licit, Chouvy, Pierre-Arnaud. (2013). "Introduction: Illegal Trades across National Borders." *An Atlas of Trafficking in Southeast Asia. The Illegal Trade in Arms, Drugs, People, Counterfeit Goods and Natural Resources in Mainland Southeast Asia*, IB Tauris. p. 12

[147] Carter, D., & Goemans, H. (2018). "International Trade and Coordination: Tracing Border Effects " *World Politics* Vol. 70 (1). p. 8

[148] Poland is an example, in 1918, even after reestablishment, trade was complicated within Poland, having spent the last 150 years being conducted across the partitions, Carter, & Goemans, (2018). pp. 8-12

[149] Chouvey, (2013). p. 12

[150] Bator, (1982). p. 286

[151] Chouvey, (2013). p. 12

reinforced by the 1970 UNESCO and 1995 Unidroit Conventions,[152] with export licences often being checked at national borders, and our study will examine many cases of export restrictions being used in this way. Yet, even though they are the nexus of our study, the extent to which border controls restrict or encourage the trade is not entirely understood either. It is still a field in need of research, and many scholars are still debating these issues. For instance, on the one hand, there is ample evidence to suggest that criminal organisations benefit from using the EU's Schengen system of open borders;[153] yet, on the other, there is little evidence to suggest that closed borders are any more effective in tackling the trade.[154] As we mentioned, some scholars believe that open borders require more regulation by State authorities than closed borders,[155] but the levels of enforcement at any given border have also been identified as impacting the price of smuggled goods,[156] with the price of crossing closed frontiers higher than open border.[157] Yet, a greater problem here is that the illicit trade of cultural property is a global phenomenon, and as is common with all illegal activities, we have few reliable statistics from which we can determine the size of the problem.[158] Law enforcement authorities, until recently,

[152] See Nafziger, J.A.R., & Paterson, R.K. (2014). "International Trade in Cultural Material". *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited

[153] Sultan, Jennifer (1998). "Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork." *Northwestern Journal of International Law & Business* Vol. 18 (3) p. 745

[154] Carter, D.B., & Goemans, H.E. (2018). International Trade and Coordination: Tracing Border Effects. *World Politics* 70(1), 1-52. https://www.muse.jhu.edu/article/683402.8'9. p.44

[155] Chouvey, (2013). p. 12

[156] Chouvey, (2013). p. 12

[157] Chouvey, (2013). p. 14

[158] Brodie, Neil; Batura, Olga; op 't Hoog, Gabriëlle; Slot, Brigitte; Wanrooij, Niels van; & Yates, Donna (2019) Illicit trade in cultural goods in Europe: Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade: final report – Study. European Commission, p. 78 with respect to value of illicit market and unreliability of existing figures.

have not always been eager (or able) to share their information with corresponding authorities on the other side of these borders either.[159] Charney recognises that there are various reasons why information is not shared or reported,[160] but given that smuggling changes quickly when detected, existing bureaucratic inefficiencies only help to facilitate the illicit trade.[161] He also notes that the lack of information shared across borders makes it harder to address this phenomenon efficiently.[162] Basu agrees, seeing information exchange – between police forces, customs, as well as heritage professionals and other industries – as invaluable to fighting trafficking,[163] even if the flow of information is not always sufficient to halt the illegal flow of goods.[164] In some countries, there is still a disconnect between vital counter-trafficking agencies, police forces and customs officials,[165] which impacts on the research data available to policy makers[166] and also restricts the scope of our own inquiry. This will become especially apparent in the third, fourth and fifth chapters of this study.

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[159] Bruns, B., & Miggelbrink, J. (2011). *Subverting Borders: Doing Research on Smuggling and Small-Scale Trade*: VS Verlag für Sozialwissenschaften. p. 13

[160] There are various legitimate reasons why art crimes are not reported, such as privacy (victims of theft may not want to draw attention to their private collections or a theft at a small museum might demonstrate a gap in security that staff would wish not to be made known), for more see Charney, (2015). p.140

[161] In particular, bad policing, or corrupt bureaucracy are elements which help illicit trade flourish, see OECD. (2015). *Illicit Trade: Converging Criminal Networks*. Vol. Paris, *Reviews of Risk Management Policies*: OECD Publishing. p. 31

[162] Charney, (2015). p. 127

[163] Basu, (2014). p. 23 who notes that foreign ministries are involved in this work; exchange of information is vital in restraining illicit trades of all kinds, see OECD. (2015). p. 33

[164] International Observatory on Illicit Trafficking (2023). "What is Illicit Trafficking?" *ICOM* https://www.obs-traffic.museum/what-illicit-traffichttps://www.obs-traffic.museum/what-illicit-traffic

[165] See Chapter 4.2.2.

[166] There are various legitimate reasons why art crimes are not reported, such as privacy (victims of theft may not want to draw attention to their private collections, or a theft at a small museum might demonstrate a gap in security that staff would wish not to be made known), for more see Charney, (2015). p.140

Continuing with the problems of borders, Bator notes that the illegal export of heritage does not always render that heritage object illegal on *import.* In fact, it maybe be imported perfectly legally under the laws of the importing state.[167] Additionally, export controls are not necessarily about eradicating the practice of illicit trafficking. Strictly speaking, they only serve to stop the movement of heritage out of a country, and Wantuch-Thole has gone so far as to suggest that export controls are not actually useful for stamping out illicit trade.[168] Since specialised skills are needed at borders, such as those of art historians or archaeologists, customs officials are not always able to identify with any degree of certainty or accuracy whether an item is important cultural heritage, let alone if it is being legally exported or imported.[169] Some of the most pessimistic observers would argue that a border only soaks up resources in trying to manage the problem. But regardless of these polarising opinions, it is accurate to say that borders do not entirely stop or impede trade and trafficking; rather, they shape and

[167] Bator, (1982). p. 327

[168] Wantuch-Thole (2015) "both measures have the function of a legal rack-wheel, however, the strict requisition of European Union legislation prevents the gear to have the necessary practical impact on curbing illegal dealings with cultural property"

[169] This problem is twofold. Let us take an archaeological item as an example: first, even with expertise, training and knowledge, it can be difficult to ascertain whether our archaeological item fits the age thresholds and/or descriptions laid down by a country's export legislation, and therefore, it may be unclear whether our item needs a licence for export or not (see the assessment of EU export licences under Regulation 116/2009 as set out in Wantuch-Thole (2015) p. 134); secondly, even if the age thresholds and descriptions can be clearly identified and met – and therefore our item would require a licence for export (or import) – historic cultures do not always correspond to modern borders, and so it is not always clear which modern region our archaeological item came from and which modern laws apply to this item (this was the case for the EU import embargoes for cultural objects from Iraq and Syria; EU officials could not guarantee that an object was Iraqi, Syrian or other, see European Union (2003) *Council Regulation (EC) No 1210/2003 concerning Iraq and Council Regulation (EU) No 36/2012 concerning Syria*; and see. European Commission (2017). Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods. Commission Staff Working Document. Impact Assessment. (SWD(2017) 262 final). 13 July. European Commission pp. 16-17

institutionalise it.[170] Still though, they remain the frontier of our problem and inquiry, and in the absence of any other alternative means to retrain illicit trafficking, borders and export controls still remain a key component of our inquiry, along with the protection of cultural heritage from illicit trafficking more broadly.

As we began this literature review with an analysis of terminology, it is perhaps appropriate to close it with another terminological investigation. And with respect to the illegal movement of cultural property, we must also grapple with the term 'illicit', which is largely invented and problematic,[171] but which has come to define this trade. Introduced into our international legal vocabulary via the 1970 UNESCO Convention, 'illicit' has been defined as trade in cultural property that is "effected contrary to the provisions adopted under this Convention by the States Parties."[172] The reasoning behind the choice of 'illicit' is partly historical and partly practical. First, the League of Nations and the International Museums Office (OIM) began drafting an international treaty in the 1930s that would attempt to restrain the 'illicit trafficking' of national collections of art and antiquities; although, these admirable efforts were interrupted by the Second World War.[173] When the League's successor cultural organisation, UNESCO, began the process of drafting a new convention in the 1960s, it picked up where the League had left off; and its first drafts from the 1930s (which were written in French) already used the term *'illicite'*,

[170] Carter, D.B., & Goemans, H.E. (2018). International Trade and Coordination: Tracing Border Effects. *World Politics* 70(1), 1-52. p. 8
[171] Brodie & Tubb, (2003). p. 15
[172] Article 3 of 1970 UNESCO Convention.
[173] Hauser-Schäublin, B., and L.V. Prott. (2016). "Changing Concepts of Ownership, Culture and Property." *Cultural Property and Contested Ownership: The trafficking of artefacts and the quest for restitution*, Hauser-Schäublin B. & L.V. Prott, L.V. (eds). Taylor & Francis. p. 12

which in French means 'illegality.'[174] The direct English translation of *illicite* is less clear than the French counterpart, and while it can mean illegality, it also has undertones of impropriety and unethical behaviour, which may not be illegal.[175] Secondly, and touching on the ambiguity of the word itself, during the drafting process of the 1970 UNESCO Convention, some UNESCO Member States were uneasy with the word 'illegal' and were not convinced that 'illegal export' was a criminal offence, even if it was unethical or improper. In the end, Prott surmises that 'illicit' was settled upon as a useful compromise, in part due to the pre-existing usage from the OIM convention, and in part to the more nuanced nature of the term.[176]

But the word is problematic for other reasons. Some observers have noted that it is too expansive, with no agreed-upon definition of what it means or what exactly constitutes 'illicit' in 'illicit trafficking.'[177] Indeed, 'illicit trade' at a basic level always consists of two separate but interconnected activities that relate back to the phenomenon of the border: theft *and* illegal export.[178] We must bear in mind that an object does not need to be stolen to be 'illicitly' trafficked; although the crossing of a border is the main element of the phenomenon and many illicitly trafficked heritage items are indeed stolen, an object does not necessarily *need* to be stolen to be illicitly trafficked. The legal owner of an object can themselves engage in illicit trafficking by removing *their* property – which happens to be heritage – across a border contrary to

[174] The *Le Robert* (2015) dictionary's definition of 'illicite' is 'qui n'est pas licite'; 'licite' is described as 'qui es permis par la loi.'
[175] Prott, L. (2014). "UNESCO's Influence on the Development of International Criminal Law." *Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime: Australasian, European and North American Perspectives*, Hufnagel S.& Chappell, P.D. (eds). Ashgate Publishing Limited. p. 148
[176] Prott, (2014) p. 148.
[177] Merryman, (1986). p. 844, describes "illicit" as a term set by nations of origin that has an expansive meaning, in that it refers to actions contrary to the 1970 UNESCO Convention.
[178] Sultan, (1998). p. 765

law and without declaring it to customs.[179] The EU's first reports into illicit trafficking also noted this peculiarity, acknowledging that illicit trafficking may take place without the need for theft, and even the legitimate owner of an object who removes the object from the country of origin can be seen as engaging in illicit trafficking.[180] They further noted that tourists can also engage in illicit trafficking by unwittingly taking souvenirs – which are in fact heritage items – out of their country of origin.[181]

The term 'illicit' continues to be problematic, as it does not always carry legal weight or significance but is still routinely used to imply this. Brodie and Tubbs note that 'illicit antiquities', for instance, is a scholarly creation used to identify objects with questionable provenance, but it does not and cannot imply that these objects were illegal or have been illegally obtained.[182] This tendency to lend legal weight is especially fraught, since the terms 'licit' and 'illicit' carry strong societal connotations; though an action may be legal, it may not always be licit in the eyes of society or *vice versa*.[183] The distinction between illegal and illicit can similarly depend on opposed cultural meanings,[184] and something that is illegal does not automatically mean illegitimate or illicit.[185] There can also be gaps between formal rules and

[179] 'Illicitly traded' cultural heritage does not always mean 'stolen' cultural heritage; the heritage objects could have been legally purchased in the country of origin but illegally exported, Sultan, (1998). p. 760
[180] Chatelain, (1976). p. 20
[181] Chatelain, (1976). p. 16
[182] Brodie & Tubb, (2002). p. 15
[183] Here, Abraham and van Schendel use the example of marijuana; it is illegal in some countries, but not the Netherlands, so its trade in other countries would be illegal, but rarely seen as illicit. Van Schendel, W., & Abraham, I. (2005). *Illicit Flows and Criminal Things: States, Borders, and the Other Side of Globalization*: Indiana University Press. pp. 17-18
[184] Where something is seen as legitimate but illegal, buyers are less likely to experience guilt in purchasing the illegal object, see Smart, Alan. (2015). "Customs control over illicit international trade: The impact of different forms of illegality." *Anuac* Vol. 4 (1). p. 61
[185] Bruns, B., & Miggelbrink, J. (2011). p. 12

informal practices, relating again to social legitimacy, where people turn a blind eye to certain practices or purchases that are illegal, as they assume they are harmless.[186] This touches again on the buyers of illicitly traded objects, discussed earlier in this literature review. This aspect is especially important to recall throughout our inquiry, as buyers of illicitly traded cultural goods – both historically and contemporaneously as discussed – have long argued that there is no harm in acquiring illicitly traded cultural goods,[187] despite much evidence to the contrary.[188] Legislation can be used to try to eradicate these illegal practices and render them illegal, but in the end, legislation does not wipe out illicit trade. In the same way, the absence of legislation does not mean that people should assume an action is permissible.[189] From another perspective – and taking into consideration that the absence of legislation does not mean that smuggling of cultural property is permissible – the term 'illicit' can be useful precisely because illicit trafficking is not always illegal on both sides of a border.

We must also address less innocuous terms, such as 'trade' and 'trafficking.' Traditionally, trade is a legal activity, whereas smuggling and trafficking are illegal activities.[190] In this sense – and keeping in mind the baggage associated with 'illicit' – the use of 'illicit trade' can be problematic. It is sometimes conflated with 'smuggling', 'trafficking' and 'illicit trafficking', which are often used interchangeably and can

[186] Smart, (2015). p. 52

[187] Thompson, (2015). p. 129; also see the Market in Chapter 5.2.1.

[188] Merryman has noted that the loss of knowledge is one of the most detrimental impacts of illicit trafficking on the scientific community, see Merryman, John Henry. (2003). *Law, Ethics and the Visual Arts*: Springer Netherlands.p.227; in addition, the first EU reports in the 1970s demonstrate clearly the damage caused by illicit trafficking, see chapter 2.1.2.; and the contemporary damage wrought has been further examined in chapter 1.1.2 and used to justify the EU import regulation, see chapter 5.2.1

[189] Van Schendel & Abraham, (2005). p. 19

[190] Bruns, B., & Miggelbrink, J. (2011). p. 11

apply to all types of goods, not just cultural heritage.[191] Smuggling, meanwhile, has a much longer history as a term. It is one of the oldest forms of "deviance"[192] and is defined as a "clandestine conveyance of goods and services from one jurisdiction to another . . . [involving] the importation or exportation of prohibited goods."[193] While these historic connotations might not be relevant today, it is important to consider that the term in the 21st century carries logistical implication, meaning there is a need for storage, transport, packing and distribution when 'smuggling' is used.[194] Smuggling was often historically associated with the avoidance of customs duties, but in recent decades the term 'smuggling' has been replaced with 'trafficking.' This is because globalisation has changed the nature of smuggling, which is no longer exclusively about avoiding customs checks.[195]

There are other terms that we encounter throughout debates on the illegal movement of cultural heritage. For example, under cultural property law and within 'illicit,' we have goods that are 'looted' and 'stolen.' The former can refer to cultural heritage that has been unearthed from the ground or during conflicts, while the latter can sometimes include 'loot' but more generally refers to objects stolen from individuals or institutions; occasionally, 'misappropriated' is used as a catch-all term.[196] 'Looting' is a term often used to refer to the activities carried out by subsistence diggers – those individuals who

[191] Schroeder, Matt (2016). "The Mechanics of Small Arms Trafficking from the United States." *Small Arms Survey Issue Brief* Vol. 6; here, the discussion is related to the smuggling of tobacco and weapons, noting on page two that the terminology is used interchangeably.
[192] Basu, Gautam (2013). "The role of transnational smuggling operations in illicit supply chains." *Journal of Transportation Security* Vol. 6 (4). p. 321
[193] Basu, Gautam (2013). p. 321
[194] Basu, Gautam (2013). p. 316
[195] Smart, (2015). p. 51; Basu (2016) p. 321 notes that smuggling was considered one of the first forms of deviance against the states.
[196] Wantuch-Thole, (2015). p. 32

engage in illegal excavations due to extreme poverty.[197] But on the subject of those carrying out thefts, there is now increasing evidence that theft and looting are becoming much more sophisticated than those carried out by subsistence diggers. With online media or social networks leading new activity, actors can identify objects, locations and sites at a distance and have them burgled on demand.[198] Therefore, looting is not always a relevant term.

Other terms are routinely used by UNESCO in the context of illicit trafficking, with 'stolen objects' being one of the most agreed-upon terms. This refers to goods taken from a rightful owner, which becomes extremely problematic when they are eventually bought by a *bona fide* purchaser, as we shall explore in the next chapter.[199] 'Products of clandestine excavation' is another term which can include heritage taken from sites unknown to anyone but the people who illegally excavated them as well as heritage taken from a legitimate excavation by authorized and unauthorized persons. Another term, 'unlawfully alienated objects,' refers to those objects which have been removed from a country where the state has a pre-emptive right to retain them. 'Illegally exported objects' are those objects which are removed from the country of origin illegally. Finally, 'objects taken from occupied territories' are those taken during armed conflict, and there is consensus that this category is not acceptable for illicit trafficking.[200] Other terms can be exclusive, like 'art.' While this fits within cultural

[197] Yates, Donna & Brodie, N. (2012) "Subsistence Digging." *Trafficking Culture*, Available at: https://traffickingculture.org/encyclopedia/terminology/subsistence-digging/; with respect to the increase in the overall price, see Dietzler (2013).

[198] For this phenomenon more broadly, see Hardy, Samuel Andrew. (2015). "Is looting-to-order 'just a myth'? Open-source analysis of theft-to-order of cultural property." *Cogent Social Sciences* Vol. 1 (1) where he acknowledges the problem of looting on demand and the increasing sophistication that accompanies it.

[199] These issues were rectified in the Unidroit Convention, see chapter 2.2.2.

[200] O'Keefe, Patrick J. (1994). Feasibility Study of an International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property. UNESCO. pp. 8-10

heritage, not all heritage would be considered art, for example, jewellery.[201] The terminological debate continues, and with respect to the purchase of illicitly traded objects, strictly speaking, we are not able to refer to 'sales' or 'purchases' of illicit materials, since these transactions are not legally enforceable.[202]

There is no international consensus on terms and terminology, and the above terms are not exhaustive.[203] Yet, owing to the now widespread ratification of the 1970 UNESCO Convention as well as the diffusion of the English language in the international affairs, 'illicit trafficking' has become the main term used to describe the theft and smuggling of cultural heritage. It is UNESCO that describes illicit trade as the 'illegal trade in stolen objects and illegally excavated objects'.[204] Therefore, despite competing terminology, we shall continue to use this term predominantly in our inquiry.

vi. Idealists and Realists

Finally, it is important to underscore some of the legal problems we will face in finding a solution to the illicit trafficking of cultural heritage. Though these important legal problems and corresponding debates by more qualified authors are not the core of this work and a legal critique outside the overall scope of inquiry – not to mentioned beyond the qualification of the author to adequately pass judgment upon - it is still important that we acknowledge them and the implications they have on the historical narrative and case studies of this work. These problems concern international private law and are not unique to cultural heritage as Frigo[205] and Prott both note, but in

[201] Charney (2015). p. 116
[202] OECD (2015). p. 19
[203] O'Keefe (1994). p.8
[204] O'Keefe (1994). pp. 8-9
[205] Frigo, Manlio. (2016). « Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges ». In The *Pocket Books of The Hague*

the protection cultural heritage they add another layer of complexity.[206] The problems have become more acute in the 20th century as international trade has grown and as dispute often involves more than one legal system. In addition, changing these international rules is not a simple matter.[207]

Firstly, as Nafziger has noted, following the end of the Second World War the GATT (General Agreement on Tariffs and Trade) of 1947, 1994 and subsequent World Trade Agreement of 1995 have established and maintained a system of free and fair trade, with negotiations on many sides seeking to increase the overall level of world trade in goods and services by prohibiting protectionist measures. As we mentioned with the EU, the success of this free trade agenda, however, exposes cultural materials to this trade liberalisation. Article XX of the General Exceptions of GATT 1994 does allow exceptions for cultural materials.[208] Similar provisions exist in the EU treaties which we shall consult in the course of our inquiry, but just like those of the EU,[209] these provisions have never been subject to the analyses of a GATT or WTO panel, which raises two main questions according to Nafziger: what level of significance is needed to satisfy the exception; and does the exception extend to export as well as import controls?[210]

This is only the beginning of the legal problems. In terms of trying to secure the return of cultural property from one country back

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Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye, (Volume: 29) Leiden, The Netherlands: Brill. P 158

[206] Prott, Lyndel V. (1989). "Problems of Private International Law for the Protection of the Cultural Heritage". In The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 217) Leiden, The Netherlands: Brill. p. 223

[207] Prott, (1989). p.236

[208] Nafziger, J.A.R., & Paterson, R.K. (2014). p. 22.

[209] See chapter 3.1.1

[210] Nafziger, J.A.R., & Paterson, R.K. (2014). p. 23

to its place of origin through law and the courts system, there are numerous issues that need to be considered. As Kowalski notes, one of the first problems at hand is that of classification or characterisation of the heritage in question as it matters whether or not we are dealing with something that is immovable or movable cultural property.[211] Kowalski acknowledges this rule is not easy to understand – even for lawyers – and it is sometimes seen as an inconvenience,[212] but it matters in deciding for establishing the rule of choice of law.[213] Prott agrees, and notes that the decision to class something as moveable or immovable will impact on the level of protection afforded.[214] Once classification is settled, there remain other issues, such as the rule of choice of law which can concern whether it is public or private law that is applicable,[215] not to mention ascertaining the rule of standing and whether one can bring a suit to court to begin with; here, Prott notes that though there are many obstacles there are also remedies, yet at the same time these are only open to those who have the resources and, in an international context, if we are serious about heritage protection, it is important consider expanding the possibilities for entities to bring suit

[211] Kowalski notes this is connected to the integrity of the "thing", see Kowalksi, Wojciech W. (2001). "Restitution of Works of Art pursuant to Private and Public International Law". in The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 288) Leiden, The Netherlands: Brill. p.215

[212] He further notes the complexities: for instance, not only does significance matter in term of integrity, but an integral part of a "thing" cannot be a separate object of ownership, but once this integral part is detached from the principle thing, then it becomes independent moveable, see Kowalksi, (2001). p. 216

[213] Kowalksi, (2001). p. 218

[214] Prott, (1989). p 241, continues noting that Common Law systems have similar special classes of object, "fixtures", and though the rules applying to them can still apply when the object has been detached from its property, this does not follow if the objects are moved to another country, classified as movables, and so the protection of the state of origin will not follow them.

[215] Prott, (1989). p.242 here she cites a case of *The Arnamagnaean Foundation v. Ministry of Education* where the ownership of Icelandic manuscripts was debated.

to court.[216] These problems tie back to the transnational character of our inquiry, as the owner who will seek to recover an object in a foreign jurisdiction will be faced with legal problems, as well as financial and administrative issues to which there is not always a clear solution..

But, as Siehr comments, one of the greatest difficulties we face in reconciling the protection of cultural heritage with the international trade of cultural property is that the rules tend to be different from country to country,[217] an opinion shared by Lalive.[218] This shall be clearly apparent throughout our entire inquiry. In addressing this, the dominant view is that of *lex rei sitae*, which posits that the laws of the state in which the object currently is are followed.[219] Frigo notes that the historical justification here was originally out of respect for the principle of sovereignty, though this is not necessarily the rationale in the 20th century.[220] Essentially though, once *lex rei sitae* is established, a conflict can be triggered where the law of the original situation and the law of the successive and current situation clash.[221] As Frigo notes, there is not always consistency in the outcomes of court cases which can pose difficulties.[222] Wantuch-Thole explains that there are a number

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[216] Prott, (1989). P.254

[217] Siehr, K. (1991). "The Protection of Cultural Heritage and International *Commerce" in International Journal of Cultural Property,* Vol. 6, Issue 2. p. 304; also see Siehr, K. (1993). "International Art Trade and the Law" In The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 243) Leiden, The Netherlands: Brill

[218] Lalive d'Epinay, Pierre. (1996). « Une avancée du droit international : la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés ». Unfirom Law Review, Unidroit. Volume 1. p. 44

[219] Jayme, Erik. (2015). ""Narrative Norms in Private International Law – The Example of Art Law" In The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 375) Leiden, The Netherlands: Brill. p.36

[220] Frigo, (2016). p.163

[221] Frigo, (2016). p.167

[222] Frigo, (2016). p.173, here Frigo points to the *Attorney General of New Zealand v. Ortiz and Others* (a state) and *Winkworth v. Christie Manson and Woods* (an individual) as examples with competing outcomes.

of modern policy reasons support the rule: first it is simplicity, and it is seen to facilitate commercial convenience, and that it will protect third party purchases. As well as the view that commercial transparency can only be guaranteed if the rule is applied.[223]

But again, there are challenges as there are several ways in which the rule can be interpreted when it comes to moveable heritage.[224] But of the main shortcomings on *lex rei sitae* with respect to our inquiry, Wantuch-Thole succinctly outlines some of the issues: the rule can enhance the problems as cultural heritage can be moved through different jurisdictions that are subject to constant change of transaction creating insecurity of transaction and uncertainty for those who participate in the art trade.[225] As Kowalski has added, this can suit the thief[226] who can choose the market most suited to launder his/her stolen goods, not to mention the buyer who can also chose a market with better prices.[227] Siehr has noted[228] other issues that come into the equation which further complicate matters, and all of these will appear throughout the course of our inquiry: rules concerning *bona fide* or good

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[223] Which is why, Wantuch-Thole outlines it is it is entranced in many systems, Germany, Switzerland, Spain and Italy, to name a few, see Wantuch-Thole, Maria. (2015). *Cultural Property in Cross-Border Litigation: Turning Rights into Claims.* De Gruyter. p. 237

[224] Prott notes that the law to be applied can be that at the time of litigation; or at the place of the last transaction; therefore the choice of application can impact on the decision Prott, (1989). p.263; Additionally, in the latter case, Prott identified further interpretations: does the law of the country where the relevant transaction apply or, does the law of the country where the goods actually were situated at the time of the last transaction apply? *Lex loci actus* or *lex situs*? In both cases Prott notes that either application would work against the protection of the cultural object, and not only favour the wrongdoer but also the person who has suspicion but does not want to make inquiries for fear of being fixed with knowledge of a possible defect in title see Prott, (1989). p. 263

[225] Wantuch-Thole, (2015). p.237

[226] Lalive d'Epinay, (1996), p.45, also agrees.

[227] Kowalksi, (2001). p., 224, much like other authors, is of the opinion that despite its faults, *lex rei sitae,* is acceptable because the current alternatives are not really any better.

[228] Siehr, (1991). p. 305

faith purchase;[229] the lapse of time since the acquisition of the object[230]; laws relating to the transit and purchase of stolen goods;[231] and whether the objects in question were the property of a State.[232]

Jayme has also noted there are several other interests that come into the equation, some of which bear similarities to the previous themes in this literature review, all of which impact on decision making including: the global interest of civil society and the movement of heritage, which sees the clash between the freedom of movement which has become core principle in the 20th century and allows public enjoyment of art and heritage versus the protection of heritage in situ where it might be less visible for public enjoyment;[233] then there national interests in protecting heritage too, which is the the core of our inquiry and this is largely the rationale behind the export controls we shall examine, as well as the exception in Article 36 of the TFEU;[234] we must also consider the private interests of the owner of the object, and here public interests can clash and limit the private property rights of the owner;[235] as well as the interests of the art and heritage itself and whether it has a function as many object that would now be considered

[229] As Frigo notes, "majority of continental European legal systems protect bona fide purchasers on the basis of the rule that "in the case of movables, possession is equivalent to title", which, in its typical formulation, does not allow the rightful owner to claim ownership unless they can prove bad faith". Yet, common law systems would tend to favour the dispossessed, allowing them the return of their lost property, see Frigo, (2016). p.171

[230] Time limits impose on litigation can vary in many based on the type of the claims as well as the jurisdiction – and sometimes they can be too short – and coupled with the bona fide rule, they can have varying consequences on claims, see Prott, (1989). p.256

[231] The enforcement of illegal contracts is also invalid (Siehr, (1991). p. 307); and under common law systems, one can purchase good title from a thief (Prott, (1989). p.273).

[232] Siehr, (1991). p. 305, though foreign export laws will not normally be enforced in court, for example, though objects owned by a State can see different outcomes.

[233] Jayme, Erik. (2005). "Globalization in Art Law : Clash of Interests and International Tendencies". in Vanderbilt Journal of Transnational Law. Vol. 38. pp.930-932

[234] Jayme, (2005). p. 935

[235] Jayme, (2005). p. 936

art or heritage may have had an different original function;[236] and there are market interests, where the art market has a responsibility to ensure legal certainly of the sale.[237] Not only do each of these issues pose individual problems, but there are also instances where many of these issues can combine.[238] Kowalski, in citing Droz and Chatelain, has surmised that only via the adoption of proper uniform rules changing national law that are detrimental to the situation can improve matter, but this is not something that will happen quickly,[239] something which Prott largely agrees, and has suggested that – as we shall see throughout the inquiry – it is something not so straightforward.

Despite all of these problems, before we begin our inquiry, it is perhaps worth sounding a positive note and as Siehr has noted there are solutions and remedies. Solutions have been found through various international conventions, including the Hague Regulations and the 1970 UNESCO Convention, but notably though the 1995 Unidroit Convention which, as Siehr notes and we shall see throughout this inquiry, has had a positive impact on the EU legal orders to protect heritage, effectively allowing for the enforcement of Member States export license in other EU Member States.[240] Furthermore, Jayme has noted the important role of normative law and how positive public values have been influencing decision making, citing instances where courts have reached decisions based on commonly accepted standards in international trade and heritage protection even though the international rules may not be binding at national level;[241] and he has

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[236] Jayme, (2005). p. 938

[237] Jayme, (2005). p. 941, but as Lalive has noted, the duty of care is common on markets but at the same time the art market has been seen to uphold this, see Lalive d'Epinay, (1996), p.52

[238] Jayme, (2005). p. 943 , here he cites the *Republic of Austria v. Altmann* case.

[239] Kowalksi, (2001). p. 224

[240] Siehr, (1991). p. 318

[241] Here there is the case of goods moved from Nigeria to Germany and though Germany was not party to 1970 UNESCO Convention, the court understood that the conventions

suggested that non-binding principles may also help with the interpretation and construction of legal texts.[242] Lalive also noted that many of these generally accepted public norms have been finding their way into the legal order via the 1995 Unidroit Convention, for example: most would agree that the idea to return stolen cultural goods is by no way revolutionary;[243] and Francioni has concurred with Lalive in nothing that – while there may remain shortcomings – the international order would now largely accept that the legal acquisition is of stolen goods is not acceptable in any jurisdiction.[244] But coupled with this, Francioni has noted that there is an increasing moral imperative to stop illicit trafficking.[245]

And this brings us to a final issue that is vital to acknowledge before we begin our inquiry, and that is the multi-disciplinary nature of the illicit trafficking phenomenon and the emotive discourse that surrounds it. In articulating some of the problems we just discussed in his own commentary on the Unidroit negotiations, Lalive touched on this noting that these problems were often compounded by other more emotional factors:

> "Ici il faut signaler d'emblée une difficulté qu'a dû surmonter la Conférence d'Unidroit, composée, vu son objet particulier, de délégués gouvernementaux représentant souvent des Ministères de la Culture ou des Directions de musées, soit de

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principles were generally accepted stands in international commerce of art and so thein invalidated the contract according got violation of good morals, see Jayme, Erik. (2015). ""Narrative Norms in Private International Law – The Example of Art Law" In The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 375) Leiden, The Netherlands: Brill p.24

[242] Jayme, (2005). p. 943, notes that in cases of conflict of law, there are new techniques guided by codes, like the Washington principles, which can help remedy the problems.

[243] Lalive d'Epinay, (1996), p. 49

[244] Francioni, Francesco (2012). "Public and Private in the International Protection of Global Cultural Goods", In *European Journal of International Law*, Volume 23, Issue 3. P. 723 and Lalive d'Epinay, (1996), p.49

[245] Francioni, (2012). p.723

> personnalités parfois dénuées de toute formation juridique ou, à tout le moins, peu familières des problèmes de conflit de juridictions et de conflit de lois et des techniques particulières de l'unification internationale du droit privé" [246]

Conversely, Prott had has noted that the judges who apply the rules of private international law themselves often have little understanding of issues of significance of the objects they are deciding upon, and as we have just seen the important concepts of cultural heritage law are even difficult for western lawyers themselves to understand (and even more so for non-lawyers),[247] and given the cultural heritage law is a an intersection of public, private, national and international law and interests, it is not always easy to find a perfect solutions.[248]

Conclusion

In this literature review, we have attempted not just to examine the previous studies in this field but to identify the problems that we will face throughout this inquiry. Cultural property or cultural heritage remains a constant source of debate and discussion, and the extent to which source/market or nationalist/internationalist dichotomies dominate our inquiry are undeniable. At the same time, their usefulness is also debateable in the 21st century. For the EU, the tensions between the cultural polices of the Member States and the free trade priorities of the EU are especially problematic as are those discussions of borders in an EU that is largely borderless. But, finally, it must be acknowledge that this is a subject which multiple actors operate, including archaeologists, art historians, historians, lawyers, museum professionals and trade specialist to name a few. Each of these professions carries with it an expertise that is not always easily understood or transferable to another. And yet, only by recognising the

[246] Lalive d'Epinay, (1996), p.41
[247] Prott, (1989). p 237
[248] Prott, (1989). p 238

specific expertise of each will it become possible to find solutions to the illicit trafficking phenomenon. The author of this present inquiry will endeavour to pay head to this fact: not a jurist or archaeologist by training, but an historian and museum professional, from here on in this inquiry, we shall respect the complex ethical, legal, policy and professional issues for which other experts are better qualified to answer, while at the same underscoring the history of this phenomena and recognising its own importance in the wider understanding the problem.

Chapter 1. Illicit Trafficking: History, Origins and First Responses

1. Introduction

The theft of cultural heritage is a problem in much of the world, and many objects of cultural heritage that are stolen are often exported from their country of origin. These objects can subsequently end up in museums, galleries, or private collections across the world, far from their place of origin. Though it is often viewed as a contemporary problem, as we shall see in this opening chapter, it is a tedious and complex phenomenon with a long history that, over time, has evolved into a multi-million-euro black market activity. Given that the contemporary frameworks to protect heritage rests upon this long history, to better understand how we have arrived at our current remedies in the 21st century globalised world, the aim of this chapter is to shed light on these foundations and identify where contemporary policy makers have taken their lead.

1.1 Origins of Illicit Trade: the *Longue durée*

Since the illicit trafficking of cultural property is a largely transnational phenomenon that takes place across national borders, we shall begin with a brief transnational history of illicit trafficking. By 'transnational', we mean a 'transnational' crime which can be illegal in all countries or in just a few,[249] as opposed to an international crime, which is a crime defined by international criminal law.[250] By illustrating a transnational history, the aim here is to create an examination free from the constraints of nation-states and nationalism that will ideally

[249] Bruinsma, G. (2015). "Criminology and Transnational Crime." *Histories of Transnational Crime*, Bruinsma. G. (ed.). Springer New York. p.1
[250] Bruinsma, (2015). p.1

allow for a "possibility of comparisons."[251] Transnational history can be restrictive, but as Savoy has demonstrated, we have spent too long examining the movement of cultural heritage through a national lens; we have an opportunity to tell a history through the objects themselves, along with the ideas and rules that have shaped and controlled their destinies.[252]

1.1.1 **Export Controls: The Italian Precedent**

The Italians were among the first to recognise the problems stemming from the unauthorised and unsupervised removals of cultural materials from their territories, and they were the first to legislate against this. In 1474, Pope Sixtus IV's *Cum provida* bull was enacted, prohibiting the sale of monuments from churches in Rome.[253] The Florentines followed suit in 1571 with a law preventing the removal of coats of arms from public and private buildings mainly to preserve the image and architectural integrity of the city of Florence:

> Che per virtù della presente Legge [...] nissuna persona di qualsivoglia stato, grado o conditione ardisca o presuma in alcun modo rimuovere, cancellare o in tutto o in parte oscurare, o altrimenti offendere le Armi, Insegne, Imprese, Titoli, Inscrittioni, o altre memorie esistenti sopra le Porte, Finestre, Cantonate, Archi o altri luoghi di fuora apparenti di

[251] See Bayly, C. A., Beckert, Sven, Connelly, Matthew, Hofmeyr, Isabel, Kozol, Wendy & Seed, Patricia (2006). "AHR Conversation: On Transnational History." *The American Historical Review* Vol. 111 (5)

[252] Savoy, B. (2017). *Objets du désir. Désirs d'objets : Histoire culturelle du patrimoine artistique en Europe, XVIIIe-XXe siècle*: Fayard. p.33 – 34

[253] Levi, Donata. (2008). "The Administration of Historical Heritage: The Italian Case." *National Approaches to the Governance of Historical Heritage over Time*, Fisch, S. (ed.) IOS Press pp. 103 – 105; also Emiliani, Andrea (1978). *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani, 1571-1860*. Bologna Alfa.

> qual si voglia Palazzo, Casamento, Edifitio o Muraglia così publica come privata [...] posta nella Città di Fiorenza.[254]

This restriction was followed on 24 October 1602 with a further resolution which prohibited the removal of certain paintings from the city of Florence without a licence which must be presented to Customs:

> DELIBERAZIONE 6. Per il Concetto che si ha delle Pitture Buone che non vadino fuori a effetto che la Città non ne perda l'ornamento [... è] proibttione generale generalissima che per qualsivoglia etc. non se ne possa cavare alcuna della Città nè dello Stato respettivamente, sotto pena etc. senza licenza del Luog.te dell'Accademia del Disegno. [...] Questa prohibitione piacendo, pare che basti farla per via della Dogana, comandando espressamente, che senza la licenza non se ne sgabelli di alcuna sorte, ne si permetta in alcun modo che se ne cavi di Firenze nè dello Stato, con ordinare alle porte et alli Passeggieri che senza licenza come sopra non ne lascino passare nessuna sotto pena etc. non lasciando però li modi soliti della Dogana.[255]

This legislation granted sweeping powers to the Florentine state to prohibit the removal of works of certain deceased painters.[256]

By the 1600s, most of the Italian peninsula had some form of protection for art and archaeology, to protect it from the problem we now call 'illicit trafficking'. Consisting mainly of prohibitions on excavation or restrictions on export, these seminal Italian policies were not entirely different from our contemporary policies used to prevent the illicit trade of cultural property: namely, the 'protect and recover'

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[254] '*Legge contro la rimozione di memorie esistenti in edific pubblici e pirivate* Ottenuta nell'Amplissimo Senato et Consiglio de' XLVIII il di 30 di Maggio 1571'. See Emiliani, (1978) p. 25

[255] 'Deliberazione 6 di 24 Ottobre 1602.' Emiliani, (1978) p. 32

[256] 'Deliberazione 6 di 24 Ottobre 1602.' Emiliani, (1978) p. 32

policies espoused by the modern conventions, which we shall discuss throughout this inquiry.[257] The extent to which these Italian policies were successful in preventing the loss of cultural materials from pre-unitary Italy is unclear.[258] It has been argued that by legislating, the only certainty these laws provided was to recognise some forms of art and archaeology as being superior to others.[259] It must also be recognised that the main buyers of these materials, aristocrats, had the economic means to find ways around these prohibitions; even if they could not, they then simply looked to other countries, threatening other forms of art and archaeology elsewhere.[260] Objects could be easily spirited out of Italy and beyond its borders, and very little could be done to secure their return. In many cases, these smuggled materials ceased to be considered 'Italian' heritage, instead becoming important heritage of the new state and nation in which they were now housed.[261] The removal of art and archaeology from its place of origin was not unique to Italy, and nor did it stop. While the Italians were perfecting their own protections, the Danes and Swedes began enacting similar regimes to prevent the alienation of archaeology from royal collections in their domains. By the late 1600s, the entire Scandinavian region had prohibitions not entirely dissimilar to those of Italy.[262] Later, rules were introduced to regulate the finding of coins and other buried precious

[257] Bauer has been particularly scathing of these policies, especially with respect to the damage wrought in Iraq and Syria, and the failure of the international community to prevent the destruction, see Bauer, Alexander. (2015). "The Destruction of Heritage in Syria and Iraq and Its Implications." *International Journal of Cultural Property* Vol. 22 (1); Mackenzie, Brodie, Yates, & Tsirogiannis. (2019), too has been critical here.
[258] Diaz-Andreu, M., & García, M.D.A. (2007). *A World History of Nineteenth-Century Archaeology: Nationalism, Colonialism, and the Past*: Oxford University Press. p. 103
[259] Guerzoni, G. (2011). *Apollo and Vulcan: The Art Markets in Italy, 1400-1700*: Michigan State University Press. p. 146
[260] Guerzoni, (2011). p. 146
[261] Drewery, Gavin. (2008). "Administering the English National Heritage." *National Approaches to the Governance of Historical Heritage over Time*, Fisch, S. (ed.) IOS Press. p.101
[262] Diaz-Andreu., & García, (2007). p. 38

metals.[263] In both the Italian and Scandinavian cases, the purposes were similar: to protect the artistic and cultural patrimony that gave legitimacy to their sovereign rulers.[264]

At the same time around the 1600s, Flemish traders in the Low Countries were known to disguise contraband art from customs officials, and as they moved their merchandise across borders they would mix these items with other legal goods and commodities to avoid detection.[265] Outside of the loss of art by theft, or the destruction of sites that resulted from the search for antiquities, the collateral negative impacts arising from smuggling were also very much apparent. In Amsterdam, where auctions were a quick and effective way of disposing of goods, foreign merchants were known to illegally sell low-quality or unprovenanced artworks at inflated prices. These illegal markets undermined legitimate sales, driving prices down to the point that genuine owners became disinclined to sell their works at a loss.[266] This required officials to act to regulate art markets, for instance in Antwerp, where auction magistrates developed rules to ensure transparency and fairness for both buyers and sellers.[267] The development of these restrictions on the movement of art, and these

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[263] Karlzén, Karin (2010). "Cultural Property and Claims for Repatriation " Juris kandidat, Juridiska institutionen, Göteborgs Universitet p.29

[264] Jenkins, Tiffany (2016). *Keeping their Marbles* Oxford University Press. p. 42

[265] Van Ginhoven, S. (2016). *Connecting Art Markets: Guilliam Forchondt's Dealership in Antwerp (c.1632–78) and the Overseas Paintings Trade*: Brill. p. 63, van Ginhoven is mainly writing about religious prohibition and the smuggling of art works from Europe to Americas in the Atlantic trade, a legacy of Europe's religious wars which were still tender in 17th century Europe, and impacted on Dutch – Spanish relations.

[266] Montias, J.M. (2002). *Art at Auction in 17th Century Amsterdam*: Amsterdam University Press. p. 16; and Diaz-Andreu, M., & García, M.D.A. (2007). *A World History of Nineteenth-Century Archaeology: Nationalism, Colonialism, and the Past*: Oxford University Press where Diaz-Andreu is mainly talking about goods coming from the Spanish Netherlands (modern day Belgium) into the Netherlands.

[225] De Marchi, Neil, & van Miegroet, H. (2006). "The history of art markets." *Handbook of the Economics of Art and Culture*, Ginsburgh, V.A. &Throsby, D. (eds). Elsevier Science. p. 105-106

nascent regulations of the art market, were not a phenomenon that was developing independently. The smuggling of all types of materials – and with it, the avoidance of the apparatus of the state i.e. customs – was growing and becoming increasingly common. Whether through customs duties, taxes, quotas, export or import licenses or quality controls, from the 1700s onwards, states slowly began to establish various methods to regulate trade and expand their influence, which helped them maximize profits during a period where states were monopolising their control over trade routes.[268]

During this period – the late 1600s to late 1700s – the prime suspects acquiring art and archaeology were European aristocrats, usually called the *Grand Tourists*. The market was certainly mixed, and there were also 'middle-class' travellers (often pilgrims) collecting souvenirs, such as modestly priced paintings and objects, as they made their way south from northern Europe.[269] But by and large, it was wealthy landed gentry from northern Europe, on their Enlightenment driven missions towards the Mediterranean, who were responsible for the more serious removals of cultural heritage.[270] Markets – both legal and illegal – developed to cater for these elite buyers where dealers could easily be found selling art and archaeology (as well as forgeries) and the prices were generally high.[271] Although they knew it was illegal, Grand Tourists had few inhibitions in flaunting local laws to acquire cultural objects, and there were willing dealers available to help eager buyers acquire and expatriate these materials.[272] Smuggling was not always perceived as a negative activity and some philosophers

[268] Van Schendel, & Abraham, (2005). p.16
[269] Coen, P. (2018). *The Art Market in Rome in the Eighteenth Century: A Case Study on the Social History of Art*. Brill. p.22
[270] For later examples of the Grand Tour phenomenon, see Boggi, Flavio. (2017). "Viscount Berehaven's tour of Italy in 1842–3: Collecting 'articles of taste' for Bantry House" *Journal of the History of Collections* vol. 29 (2)
[271] Coen, (2018). p.21
[272] Thompson, (2016). p. 131

– who saw trade regulation (and export prohibitions on heritage) as state over-reach – sympathised with smugglers who, in their opinion, had violated only the state law but not natural law.[273] It must also be recalled that during this period, the concepts of ownership of cultural heritage were not as clearly defined as they are today,[274] and Enlightenment concepts of 'universalism' (what some may now call heritage internationalism), were often employed to justify the removal of art and archaeology from their places of origin. Indeed, amongst the Grand Tourists was a perception – especially for antiquities – that these objects were part of a common heritage of the educated elite of western Europe, not simply the preserve of the Italians or the Greeks.[275]

These 'universalist' principles of the Enlightenment period were also the founding philosophies of many of Europe's great museums,[276] and much of the treasures taken from Italy and elsewhere during the Grand Tours would eventually end up in museums in northern Europe, where they would be representative of humanity as a whole.[277] By the late 1700s, the French Revolution began a process of nationalising art and archaeology, and the Enlightenment conversely

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[273] Polner, Mariya (2015). p. 330 Here Polner refers to Adam Smith, the 18th century proponent of free trade, who wrote that government restrictions on trade were harmful, that government monopolies were badly run, and their trade restrictions came from vested interests which were unjust. For more, see Irwin, Douglas A. (2001). "A Brief History of International Trade Policy." *The Library of Economics and Liberty*: Vol. 9.

[274] Higgins, Valerie (2019). "Plunder and Looting: Some Historical Reminders." *The Palgrave Handbook on Art Crime*, Hufnagel, S. & Chappell, D. (eds) Palgrave Macmillan UK. p. 413

[275] Sweet, R. (2012). *Cities and the Grand Tour: The British in Italy, C.1690-1820*: Cambridge University Press. p.282, this 'justification' is still routinely employed by modern collectors to rationalize their acquisition and retention of cultural heritage, as elaborated by Thompson, (2016). pp. 145-147

[276] Cuno, J. B. (2012). *Whose Culture?: The Promise of Museums and the Debate over Antiquities*: Princeton University Press. p.17

[277] Drewery, Gavin. (2008). p. 188; and for deeper analysis, see McGreggor, Neil & de Montebello (2012). "Value of Museums" *Whose Culture?: The Promise of Museums and the Debate over Antiquities*: Cuno, J.B. (ed). Princeton University Press

fuelled European nationalism.[278] As the French nationalised the collections of their late sovereign rulers, these ideals spread across the continent and began a process whereby ownership of art and heritage collections passed from rulers to nations.[279] The materials once protected by the sovereigns largely for their own benefit, which were objects coveted by the Grand Tourists, now became important defining characteristics for European nation-states and their citizens, not just the elites; and so legislation was needed to protect this national heritage and prevent further loss of *the peoples* national heritage.[280] Across the continent, the passage of national ownership laws was seen as an important part of identity construction for these nation-states, but it also destroyed legitimate art markets and drove the art trade further underground.

More importantly, these new laws to prevent the loss of cultural materials did nothing to stop the loss.[281] After all, the same nationalism behind these laws which targeted foreign collectors also encouraged the same foreigners to get around these export embargoes.[282] European collectors were becoming increasingly bourgeois, and as they were encouraged to donate to public museums and galleries, competition to acquire cultural materials – legally or illegal – grew.[283] Even if these museums and galleries were attempting to portray themselves as educational institutions, to modern observers these types of European and North American collections were still

[278] Vecco, Marilena. (2010). "A definition of cultural heritage: From the tangible to the intangible." *Journal of Cultural Heritage* Vol. 11 (3). p. 321
[279] Kohl, P.L., & Fawcett, C. (1995). *Nationalism, Politics and the Practice of Archaeology*: Cambridge University Press. p.267
[280] Dyson, S.L. (2008). *In Pursuit of Ancient Pasts: A History of Classical Archaeology in the Nineteenth and Twentieth Centuries*: Yale University Press. p. 98
[281] Thompson, (2016). p. 206
[282] On diplomats and the removal of archaeological materials from Rome see De Tomasi, Francesca. (2013). "Diplomazia e archeologia nella Roma di fine Ottocento." *Horti Hesperidum. Studi di storia del collezionismo e della storiografia artistica* Vol. III (2)
[283] Savoy, (2017). p.51

essentially nationalistic endeavours, with some developing increasingly colonial, imperialist and paternalist collecting patterns [284]

By now – the mid-1800s – the era of the Grand Tour was over. However, this did not stop the collecting and commodification of art and archaeology. Contemporary middle-class travellers emerged taking advantage of early mass tourism which represented a new threat. Combined with increasing prosperity and individual wealth, this meant collecting and antiquarianism was no longer the preserve of the upper classes.[285] Heritage tourism also became popular, and ruling elites expressed genuine fear for the damage wrought by middle-class tourists on heritage, while also conveying class related anxieties and snobbery at the phenomenon of mass tourism.[286] Many of these old European aristocratic families were now losing their privileged positions, as well as their private collections, which were being snapped up by such middle-class buyers.[287] The increasing loss of European art to the *nouveau-riche* at the end of the 19th century was a conundrum for many governments and private art associations; and it further fuelled a debate over the definition of 'national' patrimony, asking policy makers to define the limits of public interest with respect to privately owned art and archaeological collections.[288] While some

[284] Lyons, (2002). p. 128
[285] Drewery, (2008). p. 187; and on American middle-class buyers coming to Europe, see Thompson, (2016). p.101.
[286] Swenson, A. (2013). *The Rise of Heritage: Preserving the Past in France, Germany and England, 1789–1914*: Cambridge University Press pp.134-5
[287] Thompson, (2016). p.101.
[288] At end of 19th, start of the 20th century the British public were faced with the prospect of losing valuable pieces of art to American buyers. The materials in questions were originally acquired by Grand Tourists and the sales raised important issues about national ownership of heritage. For more, see Rees Leahy, Helen. (1999). "Art Exports and the Construction of National Heritage in Late Victorian and Edwardian Britain." In *Economic Engagements with Art.* De Marchi, N. & Goodwin, C.D.W (eds). Durham: Duke University Press; and Poole, A.G. (2010). *Stewards of the Nation's Art: Contested Cultural Authority, 1890-1939*: University of Toronto Press

governments were reluctant to intervene and regulate the art market or nationalise cultural materials, others extended patrimony laws by restricting the movement not just of undiscovered heritage, but also privately owned collections.[289] However, just like before, buyers simply looked elsewhere, threatening other forms of cultural property.[290] By now, Mediterranean countries like Greece and Italy had become increasingly hostile to outside collectors; and so collectors' attention turned to Europe's colonies, where colonial missions conveniently provided new sources of collectable materials.[291] Ostensibly scientific, these new collecting practices were perhaps even more artificial than the activities of the 'enlightened' Grand Tourists.[292]

1.1.2. Threatened Heritage in 19th and 20th Century Denmark, Ireland and Sweden

By the late 19th century, aesthetics were increasingly important in driving the art trade,[293] as the ownership of these objects carried an increasingly important social status (not that it hadn't before).[294] With nearly all artefacts from all parts of world and from all periods now

[289] Prior to this, in most countries, discovered antiquities belonged to the landowner where there were discovered, with some exception, by now, national ownerships laws were being extended over all non-discovered heritage and even private collections soon came under export prohibitions, for more see Thompson, (2016). p.138-139

[290] In this instance, a rise in forgeries of old European art, as well as import levies by the United States government drove collectors towards contemporary French art, see Vottero, Michaël (2013). "To Collect and Conquer: American Collections in the Gilded Age." *Transatlantica: Revue d'études américaines Vol.* (1).

[291] Diaz-Andreu & García, (2007) p.128

[292] Mahoney, Kristin Mary. (2012). "Nationalism, Cosmopolitanism, and the Politics of Collecting in The Connoisseur: An Illustrated Magazine for Collectors, 1901-1914." *Victorian Periodicals Review* Vol. 45 (2) p.190

[293] European and North American museums were filling with objects which were status symbols, which only helped fuel a desire to collect, as well as to donate, Brodie, Kersel, Tubb, Luke & Shackel, (2006). p.306; Savoy talks about desire to donate in the mid-19th century, Savoy (2014) pp. 30-40

[294] Diaz-Andreu & García, (2007).

seen as art, the desire to collect grew.[295] Improvements in road networks, communications and transportation – not to mention increasing economic prosperity – all meant that trade was happening at an unprecedented level, and exchanges of cultural materials were happening at an increasing rate.[296]

Sweden was particularly affected by these changes. Previously one of the great powers of Europe, defeat in the Napoleonic Wars and the loss of Finland profoundly affected the foreign policy of the Swedish State, which subsequently re-orientated itself towards the Scandinavian Peninsula before becoming increasingly insular.[297] Parliamentary democracy was consolidated during this period and accompanied by a marked industrialisation of Swedish society.[298] The changing economics of the country fuelled emigration, which resulted in a vast and influential diaspora, mainly in the United States.[299] Sweden's socio-economic revolution also impacted interest in the cultural heritage of the region, and fears grew that Sweden would lose heritage that was emblematic of its vanishing rural and agrarian way of life.[300] This was not without reason, and it was becoming clear that private collectors were increasingly keen on gathering physical

[295] Brodie, Kersel, Tubb, Luke & Shackel, (2006). p.306
[296] Baetens, Jan Dirk, & Lyna, Dries (2019). "Art Crossing Borders." *Towards an International History of the Nineteenth-Century Art Trade*, Vol. 1. p.3
[297] Widén, Per. (2011). "National Museums in Sweden: A History of Denied Empire and a Neutral State." EuNaMus, European National Museums: Identity Politics, the Uses of the Past and the European Citizen, Bologna 28-30 April. p. 881,
[298] Widén, (2011). p. 881.
[299] This diaspora was not entirely dissimilar to Irish-American and Italian-American communities, which developed around the same period, see Widén, (2011). p. 889
[300] Carlsten, Susanna. (2017). "'"Property of The Swedish People" - The Basis and Change of the Swedish Export Control in Relation to Current Cultural Policy Objectives." *Historical Perspective of Heritage Legislation: Balance Between Laws and Values*, Riin; Randla Alatalu, Anneli; Ingerpuu, Laura; Haapsal, Diana (eds). Estonian Cultural Foundation. p. 127

evidence of this ethnographic and cultural history;[301] but so too were public museums eager to engage in this popular collecting, as they saw these ethnographic collections as being representative of Swedish people from a certain socio-economic class that needed to be acknowledged, recorded and valorised.[302]

It is interesting to note that at this time Swedish museums' collection policies were also becoming increasingly insular – focusing almost exclusively on Swedish culture inside the Swedish state – to such an extent that the inclusion of 'outside' heritage was almost entirely terminated with the end of the union of the crowns between Norway and Sweden in 1905.[303] This focus exclusively targeted heritage with a connection to Swedish people *within* the borders of modern Sweden. Despite the existence of a large Swedish-speaking community in Finland and a constantly growing diaspora in the United States, little effort was made to represent these other categories of 'Swedish-ness'.[304] And throughout all of this, concerns were increasing that these types of heritage – agrarian items which best represented this 'Swedish-ness' – were the ones most at risk of theft and export, being of growing interest to tourists, dealers and foreign buyers.[305]

While Ireland had had its own Grand Tourists who engaged in collecting activities in Italy and the Mediterranean,[306] in the mid- to

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[301] Kerstin Arcadius, *Museum på svenska: länsmuseerna och kulturhistorien* (Stockholm: Nordiska museet, Diss. Lund: Univ., 1997), 34, 42-53 via Carlsten, Susanna. (2017). p. 127

[302] Widén, (2011). pp. 888–889

[303] Since 1815, Norway and Sweden, although both with independent parliaments, were united in foreign policy under one King from the Swedish Royal Family, see Widén, (2011). pp. 886-887.

[304] Widén, (2011). p. 888

[305] Magdalena Hillström, *Ansvaret för kulturarvet: studier i det kulturhistoriska museiväsendets formering med särskild inriktning på Nordiska museets etablering 1872-1919* (Linköping: Diss. Linköpings universitet, 2006), 226, Carlsten, Susanna. (2017). p. 127

[306] The 2nd Earl of Bantry participated in the Grand Tour and amassed a heritage in Ireland that was, essentially, not of Irish origin, see Boggi (2017).

late-19th century Irish concerns mirrored that of Sweden; and as early as the 1850s, private societies were raising awareness about the destruction and loss of heritage from Ireland,[307] with these fears continuing well into the 20th century.[308] At this stage, Ireland was not an independent state, but still part of the United Kingdom (UK). The most high-profile case relating to the loss of heritage were especially interesting because it was not *per se* illicit trafficking but illustrated well the complexity of Irish relations with its colonial master. In the late 1890s, a hoard of gold Celtic ornaments was unearthed at a small farm near Derry in the north of the island of Ireland (now Northern Ireland). The objects had ended up in the British Museum in London, but though Ireland had been united with the island of Britain since 1801, Irish treasure trove law which governed the ownership of such historic finds remained distinct from British law.[309] A suit in London's High Court against the Trustees of the British Museum found that the objects had been illegal removed from Ireland and should be returned to Royal Irish Academy in Dublin, who were in fact the rightful owners under Irish treasure trove law.[310]

The case was interesting for many reasons. First, it was unusual in that it consisted of a head-to-head between two culturally distinct nations – England and Ireland – that were part of the same polity, the UK.[311] Secondly, it raised questions about the validity of Irish culture:

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[307] Of the first efforts to protect heritage were those by the Kilkenny South East Ireland archaeological society, see Department of the Taoiseach. (1926). *Reports from the Kilkenny South East Ireland Archaeological Society.* National Monuments (Amendment) Act, 1954 (TSCH/3/S8488 C), National Archives of Ireland.

[308] Department of the Taoiseach. (1926). *Letter from Director of National Museum, Mr Bremmer.* National Monuments (Amendment) Act, 1954 (TSCH/3/S8488 C), National Archives of Ireland.

[309] Webb v. Ireland, 50 I.R 353. (Supreme Court of Ireland 1988).

[310] Neill, K. (1993). The Broighter Hoard: Or How Carson Caught the Boat. *Archaeology Ireland,* Vol. 7(2). p.24-25

[311] Bailkin, J. (2004). *The Culture of Property: The Crisis of Liberalism in Modern Britain*: University of Chicago Press. p.33

while Ireland was constitutionally an integral part of the UK, prior to Ireland's incorporation in the Union in 1801 Ireland had been England's first colony, and notions of paternalism and cultural superiority were raised throughout the case. British antiquarians chastised the Irish, claiming they could not take care of such important cultural property,[312] and further claims were made that the Celtic objects were not even Irish to begin with.[313] Important for some was the extent to which Ireland could be said to have a culture of its own or whether Irish 'culture' and the physical manifestations of that culture were merely an extension of a greater British culture.[314] These debates would continue to have repercussions for heritage protection in Ireland for decades to come.

In Denmark, there were not many concerns for the loss of heritage, but conversely there was an inflow of materials. Like Sweden, it has been suggested that Denmark's attitude towards heritage protection developed through its interactions with the outside. With the loss of Norway to Sweden in 1814 and the establishment of the first national museum in the mid-19th century, Denmark's Nordic archaeological heritage became an important tool for Danish nationalism and was used to construct a national identity.[315] The loss of southern German-speaking provinces to Prussia in the Second Schleswig War in 1864 further reduced Denmark's geo-political influence and in turn encouraged new emphasis on other aspects of heritage, including the rural heritage of Denmark.[316] Greenland, the

[312] Bailkin, (2004). p.49
[313] Bailkin, (2004). p.58
[314] Bailkin, (2004). p.59
[315] Zipsane, (2011 p. 215; interestingly we can see a similar approach here with the Swedes emphases the common 'Nordic' traits of Scandinavia in an effort to pursue a pan-Scandinavian political agenda, similar to Italy's Risorgimento or the German Unification, see Hemstad, Ruth. (2018) "Scandinavianism: Mapping the Rise of a New Concept." *Contributions to the History of Concepts.* 13 (1)
[316] Zipsane, (2011). p. 217

Faroe Islands and Iceland – overseas territories of Denmark since they had been colonised by the Vikings – provided a fertile ground to both enhance this Nordic historiography and perfect colonial collecting practices, similar to those taking place in other European colonies. With this rich Viking history in mind,[317] the 'Nordic' past was also part of the rationale behind the transfer of carved church pews from the Faroe Islands to the Museum of Nordic Antiquities in Copenhagen in 1876.[318] This also coincided with an increase in ethnographic research in Greenland, carried out by the Danish National Museum during a period when Copenhagen increased their policy of removing objects from Greenland. These objects had connections to the Nordic Viking Age and the colony's Inuit community, and included many archival, cultural, artistic and prehistoric artefacts, which Denmark used to illustrate its colonial ethnographic history.[319]

Though each of our cases studies has varying and contrasting histories when it comes to the threats to movable cultural property, as we can see threats to heritage – along with the movement of heritage both in and out of jurisdictions – were common to many countries

[317] For Denmark's Viking heritage, see Hjorth-Andersen, Chr. (2004). The Danish Cultural Heritage: Economics and Politics. pp. 3-5, and for the nationalisation of collections, see Zipsane, (2011). p. 212

[318] The pews are believed to have originally come from Norway and were felt to be representative of a greater Nordic shared history dating back to the Kalmar Union that unified the three Scandinavia kingdoms in the 15th century, see Eilertsen, Lill. (2012). "Breaking the ice: Conflicts of heritage in the West Nordic regions" National Museums and the Negotiation of Difficult Pasts Conference Proceedings from EuNaMus, Identity Politics, the Uses of the Past and the European Citizen, Brussels 26-27 January. p.159

[319] Bandle, Anne Laure, Chechi, Alessandro & Renold, Marc-André. (2012). Utimut Process – Denmark and Greenland. *Platform ArThemis*, p.2, for reference, Greenland had first been colonised by the Vikings in the 12th century, and modern Denmark began cementing control over the region beginning in the 1721 with intermittent collecting begging in this period and continuing until l953, the largest phases of collecting began towards the end of the 19th century. For more on the repatriation of Greenlandic materials from Denmark, see Gabriel, Mille. (2009). "The return of cultural heritage from Denmark to Greenland." *Museum International* Vol. 61 (1-2)

across Europe from a very early stage. The same is true of the responses, with many states in Europe regulating to prevent the loss of heritage from their territories for fear of the detrimental impacts to the education, identity or prestige of the people, the nation, or the sovereign ruler. Though clearly each state was operating at a different capacity and with different responses at these early stages.

1.2 Threats in the Post-War World

As we have seen in the first section of this chapter, what we now term the illicit trafficking of cultural property is not a new phenomenon, and has been common throughout the early modern period, just as much as the spoliation of heritage in war. In this next section, we shall see that as the 20th century dawned the problems only worsened, requiring global policy makers to take action and find solutions. Given the transnational character of this problem, however, it should come as no surprise that this was – and remains – complex.

1.2.1. Towards the Hague Convention (1954); Changing Attitudes to Heritage Protection

In the years after the First World War, there was a slow but steady shift in ethics for collecting habits, beginning with the archaeological profession; at the same time, the international exchange of art was also becoming more restricted.[320] The new international order, established after the First World War, was especially active in drafting new international norms to protect cultural heritage with a growing understanding that unregulated collecting was not always a positive nor benign endeavour.[321] Certainly though, there was still a

[320] De Marchi, & van Miegroet, (2006). p.112

[321] Conscious of the problems of increasing illicit trade, a series of initiatives were undertaken in the 1930s to stem the problem. Under the auspices of the League of Nations the International Museums Office attempted to coordinate the first protections in

considerable cohort who felt that archaeology should belong to all peoples and that this should give scholars unfettered access to sites to acquire materials;[322] however, others began to realise they had obligations, not just to the objects they studied but to the people whose lands they were accessing and also their fellow colleagues.[323] National Socialism and the Second World War briefly interrupted this ethical evolution, only for it to accelerate after the War with profound impacts on the management of cultural heritage worldwide.[324]

Owing to the moral atrocities of the War – the amassing of cultural heritage in Germany from French, Italian and other museums; the seizures of privately owned Jewish art; and the active employment and promotion of certain forms of art over other forms deemed by National Socialism as 'degenerate'[325] – there was a monumental shift in attitudes towards heritage protection post-1945. Now, any illicit

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peacetime; though many drafts were made, it was no possible to reach agreement between states who favoured a free-trade approach to cultural goods, and those who favour retention. The efforts were ultimately derailed by the Second World War. See Vrdoljak, A.F. (2006). *International Law, Museums and the Return of Cultural Objects*: Cambridge University Press. pp.106-119. One of the most significant, but under discussed attempts was the Pan-American Union's Treaty on the Protection of Movable Property of Historic Value (Washing Treaty) in 1935. Unlike the Roerich Pact, the Washington Treaty focused on the restitution of moveable heritage in peace time and while its scope was limited, it is significant as it was the first multilateral treaty to institutions these norms in peacetime, see Taşdelen, (2016). p.12

[322] Here we are talking about the *Final Acct of the International Conference on Excavation (1937 Cairo Conference Final Act)* which reflected the prevailing international view at the time that there should be free trade and equal access to all cultural resources, for more see Vrdoljak, (2006). pp.116

[323] Sandis, C. (2014). *Cultural Heritage Ethics: Between Theory and Practice*. Open Book Publishers. pp.117 – 120; and for a brief history of the role of archaeologists, see Chase, Arlen F., Chase, Diane Z. & Topsey. Harriot W. (1988). "Archaeology and the Ethics of Collecting." *Archaeological Institute of America* Vol. 41 (1)

[324] Higgins, (2019). p.419

[325] For an analysis of the National Socialist crimes against art and heritage in the Second World War, see Nicholas, L.H. (2009). *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War*: Knopf Doubleday Publishing Group.

acquisition of cultural property was not just considered problematic but was an 'immoral' practice that needed to be addressed.[326] It was in the context of this destruction that ICOM was amongst the first organisations to denounce illegal excavations and export of cultural heritage, passing resolutions against both in 1947, actions whose important relevance we shall return to and examine in closer detail in the next section.[327]

Soon after (and, incidentally, based on an unratified convention drafted by ICOMs predecessor the OIM) the first international treaty to address the destruction of heritage in conflict was introduced via the 1954[328] Hague Convention.[329] Focusing on heritage protection in times of war, strictly speaking this Convention is not an instrument for tackling illicit trade,[330] and, there is ambiguity over the extent to which non-state actors in conflicts are obliged to stop the looting and smuggling of cultural heritage,[331] but it does require

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[326] Brodie, N., Doole, J. & Watson, P. (2000). *Stealing history: the illicit trade in cultural material*: McDonald Institute for Archaeological Research. p.9

[327] "We declare ourselves strongly opposed to the illegal excavation and exportation, without the authority of the State, of objects which are considered of primary importance and of specific and unique national interest." Point 6. Resolution No. 4, Resolutions adopted by ICOM's General Assembly 1947.

[328] UNESCO, (1954). (*First) Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, No.3511, 249 U.N.T.S. 215 (14 May).

[329] The convention codified into international law for the first time a series of norms with respect for cultural heritage, that had been developing since the 19th century Norms that had been developing since Vattel in the 18th century, to Lieber in the 19th and the Roerich Pact in the Interwar period, as discussed by Sandholtz in Sandholtz, Wayne (2007). *Prohibiting plunder: how norms change.* Oxford University Press. pp. 167-190; also, It was the extent of looting in WWII that lead the London Declarioant and subeseqnt the Hangue Docelartion see Panizza EU do p. 11

[330] Warring, J. (2005). "Underground debates: the fundamental differences of opinion that thwart UNESCO's progress in Fighting the Illicit Trade in Cultural Property." *Emory International Law Review* Vol. 19 (227), p.249

[331] Schorlemer, von. (2009). "Cultural Heritage Law: Recent Developments in the Laws of War and Occupation" *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*, Nafziger, J.A.R. & Nicgorski, A.M.(eds). Brill. p. 144

States to combat illicit trade during times of conflict,[332] and it was the first international treaty to describe cultural property at an international level, with Article 1 declaring that the term should cover:

> movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;[333]

This definition would have important ramifications for the European and international conventions that would follow in its wake.

In the years following the opening for ratification of the 1954 Hague Convention, it was clear that the illicit trade of cultural heritage was continuing to grow, having profound implications on communities, states and peoples. For these communities, the threats were both cultural and scientific, especially if the objects were taken from a place of worship or were illegally excavated from a site.[334] For the people who study these objects, their theft represents an irretrievable loss of historical knowledge;[335] for local communities, the damage wrought during thefts not only threatens the objects themselves but also the integrity (both structural and financial) of the

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[332] Boylan, (2003). p. 65

[333] Article 1, UNESCO, (1954). (*First) Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, No.3511, 249 U.N.T.S. 215 (14 May).

[334] Interpol, (1977) p. 743

[335] Bator, (1982); also Brodie, Doole, & Watson (2000), pp. 16 – 17; and, as mentioned in noted 128, Merryman, (2003) p.227 has highlighted the impacts of illicit trafficking on the academic and scientific community.

locations in which they were held;[336] and smuggling of any kind puts immense strain on state administration and bureaucracies, who are not always able to deal with it effectively.[337] As discussed in the Literature Review, no country is immune to illicit trafficking,[338] but it is true that, more often than not, it is poorer countries that bear the brunt of these problems, and so it should come as no surprise that they were amongst the first to demand international action.[339]

Western states on the other hand – in the 1950s and still to this day, wealthy countries often with dynamic art markets – were reluctant to act and often emphasised that it was not their responsibility to protect another country's cultural heritage.[340] But the changing international climate meant that collecting market states could no longer ignore the extent to which illicit trade was damaging all parties in the debate. Europe's former colonies began demanding justice for cultural heritage taken during times of imperial rule,[341] and indigenous groups began to fight for their rights to their cultural heritage too.[342] Academics[343] and museums professionals[344] also started speaking out,

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[336] Warring, (2005). p.242, here Warring is talking about damaged done to items, but also sites, museums etc. which have a financial cost.
[337] OECD. (2015). p.30
[338] See ii. Source Countries and Market Countries
[339] Nafziger, Paterson, & Renteln, (2010). pp. 248-9
[340] Efrat, Asif. (2015). "Getting Governments to Cooperate against Looting: Insights from the American and British Experience" *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves*, Charney, N. (ed.) Palgrave Macmillan UK. p.339
[341] Pearson, Natali (2019). "Protecting and Preserving Underwater Cultural Heritage in Southeast Asia." *The Palgrave Handbook on Art Crime*, Hufnagel, S. & Chappell, D. (eds). Palgrave Macmillan UK. p.698
[342] Nafziger, Paterson, & Renteln, (2010). pp. 248-9
[343] For example, Coggins, Clemency (1969). "Illicit Traffic of Pre-Columbian Antiquities." *Art Journal* Vol. 29 (1). Indeed, many citing Coggins as the first to vocally criticise the problems, including Merryman, John Henry. (2006) "Museum Ethics." *Art and Museum Law Journal* Vol. 1 (93), Warring, J. (2005) p.236; and Nemeth, Erik. (2015). "Art and International Security: The Evolving Role of Cultural Property in Political and Armed Conflict " *Cultural Security: Evaluating the Power of Culture in International Affairs*. Imperial College Press. Coggins' identification of the link between the criminal organisations who

and scrutiny of publicly funded museums who acquired illicitly traded objects would only increase, as some of the world's most prominent cultural institutions were caught in scandals that prompted revaluations of collecting policies.[345]

1.2.2. Recognising the Extent of the Problems

At the same time as academics and museum professional began speaking out, in 1970 UNESCO opened for ratification the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. While we shall explore the norms of this convention in closer detail in the next section, the context of this new instrument is important to understand now, as it represented a major change in direction for the protection of heritage from illicit trafficking (so much so that 1972 – the date of its entry into force – has become a watershed date for the assessment of provenance[346]). Its opening for ratification was accompanied the optimistic expectation that a swift and widespread ratification of the 1970 UNESCO Convention – and all the major international cultural

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stole these objects, and western museums who would buy them, generated considerable debate among museum professionals and academics, and political circles, see Efrat, Asif. (2015). p.340. This was over 40 years before the EU would also do so, see chapter 5.2.1

[344] Delepierre, S. (2021).

[345] Instances like the acquisition of the Lydian Hard by the Met in the 1960s, or the collecting practices of Dr Marion True at the Getty in the 1990s are the most infamous, and for more detailed analysis see, Amineddoleh, Leila (2013). "The role of museums in the trade of black-market cultural heritage property." *Art Antiquity & Law* Vol. 18 (3) as well as Kuitenbrouwer, F. (2005). "The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance." *European Review* Vol. 13 (4). For a breakdown on controversial accession and de-accessioning practices in the late 1960s and 1970s, see Meyer, Karle E. (2007). "The Deaccessioning Controversy" *Law, Ethics, and the Visual Arts*; Merryman, J.H., Elsen, A.E. & Urice, S.K. (eds.). Kluwer Law International.

[346] Nafziger, James A.R., & Nicgorsk, A.M. (2009). *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*: Martinus Nijhoff Publishers.p. 267

conventions for that matter – would help restrain illicit trade in cultural heritage once and for all.[347]

The reality is that the Convention did not stop illicit traffic.[348] Questions were asked about the extent to which weaknesses in the internationally accepted norms to address of illicit trafficking were in fact undermining global efforts to address the problem; with some of the most pessimistic observers identifying these norms at the core of the Convention – the 'protect and recover' policies, encouraged by States via export controls – as key weaknesses in the international efforts to restrain illicit trafficking effectively.[349] Questions were also asked to the extent of the failures of the international organizations that instigated these treaties, such as UNESCO, which some criticized as weak and ineffective.[350] But these calls often overlooked the fact that most analyses of the international cultural conventions – including the

[347] Veres, (2014). p.7

[348] Clement, Etienne. (2010). "The Aims of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and Action Being Taken by UNESCO to Assist in Its Implementation." *Cultural Law: International, Comparative, and Indigenous* Nafziger, James A. R., Paterson, Robert K. & Renteln, Alison Dundes (eds). Cambridge University Press. p. 406; and Soderland, Hillary A. & Lilley Ian A., (2015) 'The fusion of law and ethics in cultural heritage management: The 21st century confronts archaeology', *Journal of Field Archaeology*, Vol. 40 (5) p. 2

[349] These policies which Mackenzie et al. believed have failed, firstly, the expectation that all heritage sites globally can be appropriately protected is unrealistic; secondly the reactive nature of these policies initiative means they come too late to stop the worst damage; thirdly that these a 'knee-jerk' reactions, emergency policies that follow excessive scrutiny and on usually focus on only one area or element of the problem; and fourthly while it is important to return stolen goods, ultimately these policies do nothing to help deter or stem the trade, Mackenzie, S., Brodie, N. Yates, D. & Tsirogiannis. C. (2019). *Trafficking Culture: New Directions in Researching the Global Market in Illicit Antiquities*: Taylor & Francis. **p.** 126

[350] Yet, here we must acknowledge at the same time – despite the effects of globalisation in breaking down barriers between states – that UNESCO and the UN system is not a global government, and states are still the main players on the international stage, and this reality is especially true for cultural heritage where the networks of cooperation and integration are still developing, Winter, (2015).p. 1006

1970 UNESCO Convention – show that the conventions are not the problem; they are well designed and well-intended, but in fact the problems are with their implementation at national level, which need improvement.[351] And despite the best efforts at international level, it must be acknowledged that until the 21st century action to tackle illicit trade was mainly been taken by state actors.[352]

Another criticism during this period was and remains the absence of a strong international convention on criminal law,[353] since all the current conventions focus on legal administrative aspects for the return and restitution of stolen cultural heritage.[354] Calls were made for an international treaty to implement strong criminal provisions, and though such efforts were taken at a European level they were unrealistic,[355] and the idealistic ideals here overlook the reality that states were and remain unlikely to surrender their competencies in criminal affairs under a common treaty to protect heritage.[356] Criminal justice largely remains a competency of states, and even where international conventions have been enacted to deal with international crimes, heritage issues have largely been outside of the scope of

[351] Remarks from Boylan, Patrick. (2021). The creation of the Blue Shield, 6 June 1996, interview with the founding signatories of the Blue Shield and the first President of the Association. Blue Shield International, 9 June.
[352] World Economic Forum. (2015). State of the Illicit Economy: Briefing Papers. Global Agenda. p. 6
[353] The Delphi Convention addresses criminal law, but is not without its own challenges, see chapter 3.1.1
[354] A reminder that the 1970 UNESCO Convention nor the 1995 Unidroit Convention deal with criminal issues, Hufnagel, Saskia (2019). "INTERPOL and International Trends and Developments in the Fight Against Cultural Property Crime." *The Palgrave Handbook on Art Crime*, Hufnagel, S. & Chappell, D. (eds). Palgrave Macmillan UK.p.98; in addition, states are often reluctant to create an international system for criminal enforcement, see Prott, (2014). p.137
[355] See Chapter 3.1.1
[356] Bieczyński, Mateusz Maria (2017). "The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property" *Santander Art and Culture Law Review* Vol. 2 (3) p.,262,

international criminal tribunals, with only a few exceptions.[357] While well intended, some of these criticisms and suggested remedies following the opening of ratification of the 1970 UNESCO Convention to the problems of illicit traffic tend to illustrate the extent to which debates to protect heritage from illicit trafficking can become oversimplified and emotional.[358]

Despite the revolutionary nature of the 1970 UNESCO Convention, the problems of illicit trafficking were increasing throughout the remainder of the 20th century and becoming sufficiently obvious for national actors and other international partners to begin seriously examining alternative proposals to address illicit trafficking. The problems were clearly extensive enough to warrant the establishment of Interpol's *Stolen Works of Art Database* in 1971,[359] and to encourage Interpol to stress the importance of circulating information on the problems,[360] which included renewing its policy advice to museums to secure their premises.[361] From 1977, Interpol began a series of symposiums on the subject – and these symposiums have continued on an annual basis since and aim to bring interested parties together on the subject[362] – which aimed to emphasise the magnitude of these problems to national authorities. It was during this period that these actors realised that solutions could not be found unless there the global

[357] Nafziger, Paterson, & Renteln, (2010). pp. 348
[358] Bator, (1982). p. 294
[359] Interpol, (1971). Resolution on the Theft of Cultural Property. AGN/40/RES/6
[360] Interpol, (1977) p.754. Along with ICOM (see chapter 1.3.1), Interpol was one of the early outliers who realized that the sharing of information of stolen cultural heritage could play a constructive role in both raising awareness of the threats and securing the identification and return of stolen objects. Since 2000, both have organizations cooperated to share information amongst museum professionals and police officers, see, ICOM & Interpol (2000). Memorandum of Understanding on Countering the Theft of and Trafficking in Cultural Property.
[361] Interpol, (1972). Resolution on the Theft of Cultural Property. AGN/41/RES/9. In 1972, calls were made in Interpol to bring museum security manuals up to date.
[362] Interpol, (1977) p. 742-745

community could ascertain the precise extent, nature and size of the problem.[363] However, Interpol has never been able to garner accurate statistics on this trade despite high profile attempts to do so,[364] and it remains one of the biggest obstacles police and policy makers have long faced in tackling illicit trafficking: the absence of statistics on illicit activities of all kinds.[365]

Success was achieved in other areas though, the statistics from thefts or the number of objects recovered by police provided enough information to extrapolate the extent of the problem. Reports commissioned by the EU in the 1970s – which we shall further explore in the next chapters – followed this model and they illustrated a volatile situation across the entire European continent. Italy appeared to bear the brunt of the problem in Europe, with the theft of artworks from museums, churches and private homes steadily increasing in the early 1970s, reaching 10,852 objects in 1974.[366] While it was impossible to ascertain the number of items stolen from Italy's numerous archaeological sites, reports remarked that over 41,552 archaeological

[363] Interpol, (1977) p. 742-745

[364] In the 1990s, INTERPOL issued a statements saying the traded is worth US$6 billion annually, however in the 2020s, after further analysis, it transpired that this statistic was not based on accurate research and INTERPOL withdrew the assertion. See Noce, Vincent (2020) "UNESCO, stop citing 'bogus' $10bn figure, art trade pleads" *The Art Newspaper* 12 November. https://www.theartnewspaper.com/2020/11/12/unesco-stop-citing-bogus-dollar10bn-figure-art-trade-pleads

[365] It must be acknowledged, that it is impossible to garner statistics on illicit activities, as given their nature, these activities have no records, see DG HOME & CECOJI-CNRS (2011). Study on preventing and fighting illicit trafficking in cultural goods in the European Union. European Commission. p. 17; furthermore, though export reports commissioned by the European Commission concluded that it is hard to find evidence on the extent of the trade, neither could dismiss it either, and they said there was little doubt illicit trade was getting work, see Experts Group on Customs issues related to Cultural Goods (2016). Minutes of the 2nd Meeting of Experts Group. (Taxud.B1/CG (2016)), 11 April. European Commission.

[366] Prof. Chatelain (Chatelain, (1976) p.7) cited figures from the Italian Police, which noted that 2,466 artworks had been stolen in 1970, 5,927 in 1971, 5,843 in 1972 and 8,520 in 1973.

objects had been seized by Italian police between 1970 and 1974.[367] In 1977, experts at Interpol and the Italian delegation to Interpol largely agreed with these figures, adding that most of the heritage stolen in Italy was probably bound for markets outside Italian territory.[368] France was also highly vulnerable, with the theft of paintings increasing in the early 1970s, reaching 5,190 in 1974,[369] and ICOM experts were especially concerned about church property, including statues, service artefacts and furniture.[370] Outside of these countries, the scale of the threat was less daunting[371] but still significant enough to warrant specialised police units[372] or mechanisms to share specific information between law enforcement authorities and third countries.[373] However, in many cases, the means to address the problem was difficult, and poor security and record-keeping in churches, galleries and museums meant stolen objects were not always easy to recover.[374] As we shall see later in this inquiry, the problems of sharing information and dialogue between national authorises would remain a considerable obstacle for most of the 20th century.

Although not the core of our inquiry, darker problems which posed immensely ethical challenges to museums and heritage institutions began to appear through the 1980s and 1990s when it

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[367] Chatelain, Jean. (1976) p. 8.
[368] Interpol, (1977). p.746
[369] Prof. Chatelain (Chatelain, (1976) p. 9) cites 1,261 works stolen in 1970, 1,824 in 1971, 2,712 in 1972, 3,300 in 1973 and 5,190 in 1974.
[370] ICOM (2001). *One Hundred Missing Objects: Looting in Europe*. International Council of Museums. p. 16
[371] Prof. Chatelain (Chatelain, (1976) p. 10) notes that 300 incidents were reported in Belgium, between 1970 and 1973. Dutch delegates at Interpol reported 900 thefts in 1976 alone.
[372] The Danish delegates noted that there was a specialized, albeit small, unit for cooperation between police, customs and museums experts, see Interpol, (1977) p. 749.
[373] Both the Dutch and the Germans had systems for sharing information, photos and documentary information on stolen objects, Interpol, (1977). p. 749.
[374] Chatelain, (1976). pp. 6-10.

became clear that looted Jewish owned art – confiscated from its rightful owners by the Nazi's before and during the Second World War – had ended up in prominent public collections.[375] Even though galleries, museums and private collectors were aware of the illegality of acquiring this misappropriated Jewish art,[376] little to no questions were asked about the origins of works until the magnitude of the problems became painfully obvious in the 1990s.[377] The restitution of these art works – often in very public circumstances with complex court cases – would see litigators and policy confronted with many of the problems we discussed in the Literature Review, no least of all public interest in art versus the rights of the disposed. Coupled with yet more scandalous accusations by prominent cultural institutions,[378] in a global context where international legal norms were still not enough to stop this continuously growing illicit trade, provenance and due diligence – practices often associated with the museum professional – were being

[375] For more on this topic, see Nicholas, (2009); Gill, D, & Chippindale, C. (2002) "The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry." *International Journal of Cultural Property* Vol. 11 (1); and Lubina, K. (2009). "Contested cultural property: the return of Nazi spoliated art and human remains from public collections." PhD, Universitaire Pers Maastricht

[376] Although the extent of Nazi looting was apparent in the immediate aftermath of the war, recovering stolen art was complex, expensive, and deeply emotional battle for survivors, as articulated in Campfens, E. (2014). *Fair and Just Solutions?: Alternatives to Litigation in Nazi-looted Art Disputes: Status Quo and New Developments*: Eleven International Publishing. p.ix

[377] Davidson, Douglas (2014). "Just and Fair Solutions: A View from the United States " *Fair and Just Solutions?: Alternatives to Litigation in Nazi-looted Art Disputes : Status Quo and New Developments*, Campfens, E. (ed.) Eleven International Publishing. p. 95

[378] The scandal concerning the Getty's acquisition policies did a lot to change museum provenance policies in the United States, see Brodie, Neil, & Proulx, Blythe Bowman (2014). "Museum malpractice as corporate crime? The case of the J. Paul Getty Museum." *Journal of Crime and Justice* Vol. 37 (3); as did those of the Met and the Giacomo Medici scandal, see Watson, Peter, & Todeschini, Cecilia (2007). *The Medici Conspiracy: The Illicit Journey of Looted Antiquities- From Italy's Tomb Raiders to the World's Greatest Museum*: Public Affairs.

adopted as vital tools that could "sanitise" or "moralise" the art market.[379]

1.3 ICOM and UNESCO; Codes and Conventions

Despite the growing problems and the inability of the international system to address illicit trafficking effectively, the concerns of this period did give way to two tools that could help mitigate (though not halt) the problem of illicit traffic, tools which have become indispensable. Though they are international in character, their influence on regional, and indeed European legislation, is significant and they therefore must be examined before we delve further into the European element of our inquiry. These are the ICOM Code of Ethics, and the UNESCO 1970 Convention, which we already briefly mentioned. Neither are perfect, and they have had varying degrees of success in stopping illicit trafficking, but as we have hinted to already, and as we shall see throughout the rest of this dissertation, they are standard setting instruments that have played a key role in shaping policy at EU and member state level.

1.3.1. ICOM, Ethical Norms and Provenance

As mentioned in the previous section, ICOM was an early opponent to illicit trafficking, and perhaps one of the most important developments in the field of heritage protection in the second half of the 20th century was the degree to which museum professionals organised themselves to fight against illicit trafficking. Beginning in 1968, museum experts at the ICOM headquarters in Paris started drafting rules which would guide museums in their acquisition of

[379] As Schneider notes, due diligence is sometimes used to "sanitise" or "moralise" the art market, see Schneider, Marina. (2016). "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive." *Santander Art and Culture Law Review* Vol. 2 (2).

cultural heritage. As mentioned briefly earlier in this chapter, ICOM had positioned itself quite firmly against the phenomenon of smuggling and illicit excavations in 1947 but, more precisely, it stated in its first General Assembly:

> We declare ourselves strongly opposed to the illegal excavation and exportation, without the authority of the State, of objects which are considered of primary importance and of specific and unique national interest."
>
> Point 6. Resolution No. 4,
> ICOM's General Assembly 1947. [380]

Still, through the 1940s, 1950s and early 1960s, ICOM and western museum experts had largely expected it to be the responsibility of museums in source countries, along with their governments, to ensure the adequate protection of sites and museums, and stop the export of materials from their countries and territories. There was little to no acknowledgement that the acquisition policies of western museums in market countries could in fact be driving the theft, smuggling and illicit excavations of cultural heritage in source countries.[381] But alongside a trend in this period that saw ICOM slowly evolve from a national delegate based association to a grassroots and individual membership based organisation,[382] there was a growing consensus that museums could and *should* do more to combat the smuggling of cultural goods, not to mention a realisation of the

[380] ICOM (1947). Point 6. Resolution No. 4. General Assembly

[381] Delepierre, S. (2021). Provenance Research as a Tool in the Fight against the Illicit Traffic of Cultural Property: The Role of ICOM with the Global Museum Community. Orphan Works, The University of Geneva, UNIDROIT and the Fondation Gandur pour l'Art, Geneva, 4 & 5 February.

[382] Murphy asserts that ICOM had been evolving through the 1960s and 1970s. Previously, ICOM had been a delegate-based organization, like UNESCO or Interpol, with each state sending representatives. The reforms in the 1960s and the 1970s saw it change into a membership-based, fee-paying organisation, vastly expanding its numbers, Murphy, Bernice L. (2016). "Charting the Ethics Landscape for Museums in a Changing World" *Museums, Ethics and Cultural Heritage*. Murphy, Bernice L. (ed). Routledge. p. 21

immoral and unscientific practices of museums who were acquiring unprovenanced objects,[383] more specifically ICOM declared that:

> Du point de vue moral, un objet d'origine douteuse présentait un danger pour le bon renom du musée acquéreur et pour la coopération entre ce musée et les autres institutions similaires.[384]

This demand for accountability was coming especially from museums and museum experts in newly decolonised states, but not exclusively, and museum professionals in Europe and North America were ethically evolving and maturing and began demanding higher standards of themselves and their institutions. In 1969, international museum experts in ICOM finalised the Recommendations on the Ethics of Acquisition, which were approved by ICOM's Executive Board that year[385] and by the ICOM General Assembly in 1971, to coincide with the opening for ratification of the 1970 UNESCO Convention.[386]

The importance of the Recommendations on the Ethics of Acquisition cannot be overstated. They were the first clear statements and expressions of concern for illicit trafficking, and the first call for greater vigilance regarding the provenance of cultural heritage, by and amongst the international museum community.[387] The emphasis on provenance checks – that is inquiring about the origin of the cultural object and its ownership history to ensure it has changed hands legally – was especially important in fighting illicit trafficking, and this was first emphasised in the Recommendations and it will continue to be an important theme of this dissertation. They were also the first international guidelines for museum professionals that provided

[383] ICOM (1969), "Ethique des Acquisitions", *ICOM News - Nouvelles de l'ICOM* Vol.22, No.3. p.18
[384] ICOM (1969), p.18
[385] ICOM (1969), p.18
[386] Murphy, B. (2016), p.25
[387] Murphy, B. (2016), p.25

explicit advice to abide by rules in the countries of origin when acquiring cultural heritage, and the guidelines advised not to acquire unprovenanced objects. The key positions were outlined in paragraph 4 and 5 which stated:

> 4. The significance of the object (cultural and scientific) will depend upon its being fully documented. As a matter of principle no acquisition should be made without this full documentation
> 5. In most fields, direct acquisitions are best obtained by scientifically conducted research missions. They may occur in the mission's own country or abroad. In the latter case they must be conducted with the agreement or the cooperation, and according to the laws of the host country.[388]

Though neither 'illicit trafficking' nor 'provenance' are not mentioned in these paragraphs, the sentiment is clear, and the importance of the Recommendations has been long lasting in that they laid the foundations for the ICOM Code of Ethics for Museums, the drafting of which began at the 1974 General Assembly only a few years after the Recommendations were written.[389]

Formally adopted at the ICOM General Assembly in Buenos Aires in 1986 (and updated in 2004), the ICOM Code of Ethics is more concerned with guiding the overall work of the museum professional. But building on the Recommendations, it provides clear and unambiguous guidance on the ethical acquisition of cultural heritage, especially in its second section which focuses mainly on the acquisition of collections,[390] outlining clear direction to museum and heritage professionals not simply to avoid acquiring illicitly traded objects but

[388] ICOM, (1970). Recommendation on Ethics of Acquisition.
[389] Boylan, Patrick J. (1996), "ICOM at Fifty", *Museum International* Vol.48, (3) p.50
[390] Section II "Museums that maintain collections hold them in trust for the benefit of society and its development", ICOM, (2017). ICOM Code of Ethics for Museums. ICOM.

to actively check their provenance to ensure objects crossing their path are legally obtained: [391]

> 2.3 Provenance and Due Diligence: Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production.[392]

Here it is important to underscore the relevance of the neutralising term and practice we shall encounter throughout this study, 'provenance', which is crucial in discerning the licit from the illicit.[393] But here it should be recalled that 'provenance' is also complex, there is no agreed definition, and what is 'provenance' for a museum professional may not be the same for a police officer.[394] This shall become apparent later in this dissertation. The importance of provenance is therefore instrumental, even if most countries do not have a legal definition for it, with different codes of conduct and national regimes having different descriptions and understandings of the practice.[395] For this reason and with respect to the movement of cultural goods, the ICOM definition is often accepted as one of the key definitions to be used at international level.[396] As well as ensuring provenance, and considering the damaging effects of illicit trafficking on communities, the Code specifies ethical engagement with

[391] Section II, Articles 2.1, 2.2, 2.3 & 2.4., ICOM, (2017).
[392] Article 2.3, ICOM, (2017).
[393] Brodie & Tubb, (2003). p.7
[394] Van Heese, Marja, Feys, Marja, Versluys, Patrick & Becker, Justus (2019). End report of the Project Group on Guidance for customs controls at the export of cultural goods. (CPG/133) DG TAXUD. 31 October.
[395] DG HOME & CECOJI-CNRS (2011). pp. 168-9
[396] Van Heese, Feys, Versluys, & Becker, (2019).

stakeholders and collections are expected to be obtained with due respect for the communities in which they come from:[397]

> 6.1 Cooperation: Museums should promote the sharing of knowledge, documentation and collections with museums and cultural organisations in the countries and communities of origin. The possibility of developing partnerships with museums in countries or areas that have lost a significant part of their heritage should be explored.[398]

Museums are expected to conform to any local, regional, national and international laws in regard to their operations:[399]

> 7.1 National and Local Legislation: Museums should conform to all national and local laws and respect the legislation of other states as they affect their operation.[400]

And even the professional conduct of museum personnel is referenced, with museum experts advised to avoid conflicts of interest or engage in activities that could be seen to promote illicit trafficking:[401]

> 8.5 The Illicit Market: Members of the museum profession should not support the illicit traffic or market in natural or cultural property, directly or indirectly. [402]

The Code and its predecessor Recommendations have been, and continue to be, a standard heritage protection policy for ICOM since 1969, and ICOM members are expected to abide by all its

[397] Section VI, ICOM, (2017).
[398] Article 6.1, ICOM, (2017).
[399] Section VII, ICOM, (2017).
[400] Article 7.1, ICOM, (2017).
[401] Section VIII, ICOM, (2017).
[402] Article 8.5, ICOM, (2017).

principles in their work.[403] As an industry-aligned code of conduct, the Code and the Recommendations are a form of soft law and, like all professional codes, they carry no legal weight to help enforce them.[404] Therefore, both are only as strong as the level of enforcement and disciplinary consequences set by ICOM.

The extent to which codes like ICOM's are helpful is debatable, since they are not enforceable in court, but they still represent a drive for higher standards.[405] But since museums in Europe are usually publicly funded or philanthropic institutions dedicated to the preservation and study of cultural objects, rightly or wrongly there is an expectation that they operate in an ethical way. For this reason, codes of ethics like ICOM's are useful and generally operate well as they serve to act as indicators of responsible governance.[406] Codes of conduct are becoming increasingly common as they are easier and

[403] In instances of high-profile malpractice by museums – including the Getty in the 1980s and the Met in the 2000s – ICOM stressed that the Code and Recommendations were still important principles and should be followed, see ICOM (2006), Promoting the use of Mediation in Resolution of disputes over the Ownership of objects in Museum Collections: Statement by the President of ICOM Alissandra Cummins.

[404] Stamatoudi, (2011), p.160, and here, Stamatoudi here does note that the codes associated with the CINOA and IADAA are ambiguous and open to interpretation, and so the interests of the private market and the profession prevail over the interests of the object. More critical observers have noted that they are often self-serving instruments, can be written to serve the interests of the few, not the many, and have varying degrees of effectiveness with little evidence to show they alone are useful in mitigating illicit trade, Brodie, N. (2006), "An archaeologist's view of the trade in unprovenanced antiquities", *Art and Cultural Heritage: Law, Policy and Practice*. Hoffman, B.T. (ed). Cambridge University Press.p. 6

[405] Vigneron, Sophie. (2014) "Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects" *Art, Cultural Heritage and the Market: Ethical and Legal Issues.* Vadi, V., & Schneider, H.E.G.S. (eds). Springer Berlin Heidelberg.p. 129

[406] Bator, (1982). p.361

faster to draft, and as soft legal instruments, they complement areas where the law is lacking or ambiguous.[407]

The importance and influence of the ICOM's Code and Recommendations stretches beyond museums. Firstly, in the years after the adoption of the Recommendations, the 1970 UNESCO Convention (which we introduced in the previous section and shall examine in detail in the next) was still not signed by many of the world's largest art market states until the late 20th century (though still influential[408]). The United States did not sign it until 1983, and even then its ratification was considered piecemeal, as it did not ratify the Convention in its entirety.[409] The United Kingdom only signed it in 2002 and until recently, the majority of countries that did ratify it were largely source countries: with no major market states party to its terms, the Convention's practical effect (though not symbolic effect) was considered negligible.[410] However, until there was widespread ratification of the Convention internationally, the ICOM Code of Ethics could be seen to play an important role in providing a minimum level of international regulation and protection for cultural heritage, especially since the Code referenced the international cultural conventions and required its members to abide by them:[411]

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[407] Stamatoudi, (2011). p.160; also see Clement, (2010). p. 408 who notes that given the lack of effective national restraints and a weak international system to protect cultural heritage, self-regulating ethics codes can be helpful.

[408] For influences of normative law, see Jayme, Erik. (2015). ""Narrative Norms in Private International Law – The Example of Art Law" In The *Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, (Volume: 375) Leiden, The Netherlands: Brill

[409] Amineddoleh notes that the Convention is not self-enforcing, Amineddoleh, (2013). p.233, and for more on ratification of the Convention, see chapter 3.1.2.

[410] Herman, Alexander (2020) "Fifty years on: the meaning of the 1970 UNESCO Convention" The Institute of Art & Law. 18 June

[411] Nafziger, J.A.R. (1972), "Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process", *Denver Journal of International Law & Policy* Vol.2 (2). p.242

> 7.2 International Legislation: Museum policy should acknowledge the following international legislation that is taken as a standard in interpreting the *ICOM Code of Ethics for Museums*:
>
> - *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention* ("The Hague Convention" First Protocol, 1954, and Second Protocol, 1999);
> - *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (UNESCO, 1970); […]
> - *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (UNIDROIT, 1995); […].[412]

Secondly, at a national level, the Code has played another important role. As we shall see in the third chapter, the extent of legal protections and guidelines for protecting heritage can vary dramatically from country to country. In the absence of political will at national level to better legislate for museum and heritage protection against illicit trafficking, the Code has again stepped in. For instance, in the Netherlands, the Dutch version of the code has been endorsed by all registered Dutch museums who have also created an Ethical Code Committee for Museums which oversees the enforcement of the Code in the Netherlands.[413] In the absence of national regulations for the import and acquisition of cultural goods,[414] some member states of the EU have given legal weight to the ICOM rules. Nationally funded museums in Belgium and Denmark, for example, are legally obliged to apply the principles of the Code when acquiring cultural heritage for

[412] Article 7.2, ICOM, (2017).
[413] ICOM Nederland (2022) *Code of Ethics*. Available at: https://icom.nl/en/activities/code-of-ethics
[414] EU uses the term cultural goods, see in Chapter 3.1.1 for more on cultural goods and national treasures.

their institutions.[415] And at EU level, other aspects of the Code have provided guidance. For example, with the new EU import controls – which we shall discuss in the final chapter – ICOM's definition of provenance, as outlined in its Code, has been adopted as the official interpretation of provenance for customs officials at EU level, where it is applied to cultural goods for import and export.[416]

The work of ICOM in protecting heritage and highlighting provenance checks on cultural object has also been important in other aspects, and these other facets will occasionally be referenced elsewhere in this inquiry. Experts in ICOM have long promoted the use of shared databases between museums, police and customs (at national and international level) to help combat illicit trafficking;[417] the same experts have also developed training manuals aimed at supporting police to help museums in crisis situations.[418] To raise awareness to stolen and trafficked objects, ICOM began publishing extracts of museum databases via its *100 Missing Objects* series, which highlighted objects lost to thieves across the world.[419] In turn, this developed into the *Red List* series, an important tool to assist customs and police, which

[415] DG HOME & CECOJI-CNRS (2011). p. 111.

[416] Van Heese, Feys, Versluys, & Becker, (2019).

[417] In 1986 ICOM experts organized a study on databases and illicit trafficking, the findings of the study showed that national databases of collections were useful for protecting heritage and recovering stolen objects, ICOM began working to strengthening links and initiative between museums and databases and police; see Robert, A. (1993), 'Documentation muséologique et protection du patrimoine', *ICOM News - Nouvelles de l'ICOM* (pp.1-26), Vol.46 (3). p. 3 ; and And in 1992 CIDOC was participating in meetings in Italy which pushed for establishment of national databases to inventory collections as a means to address illicit trafficking, see Robert, A. (1993), "Atelier international sur la protection du patrimoine artistique et culturel", *ICOM News - Nouvelles de l'ICOM* (pp.1-26), Vol.46, (3) p.5

[418] In 1986, it published *Manuel de base de sécurité dans les musées* to assist museums in developing countries that were at risk. Dovey, B. (1993), "Comité international pour la sécurité dans les musées (ICMS)". *Nouvelles de l'ICOM* Vol.46, (3)

[419] Lillehoj, E. (2016). "Stolen Buddhas and Sovereignty Claims." *Art and Sovereignty in Global Politics*, D. Howland, Lillehoj, E. & Mayer, M. (eds). Palgrave Macmillan US.p. 147

highlights the types of objects most susceptible to illicit trafficking by providing images of similar objects from museum collections, alongside standard museum descriptions.[420] Today, 20 Red Lists have been published, and 20 years after the first, they continue to secure the return of looted and trafficked objects.[421] ICOM is also the custodian of Object ID, a museum standard, which was inspired by the 1970 Convention that we will soon discuss.[422]

But while there has been a change of collecting patterns since the 1980s, and museum professionals have played a role in this, one area in need of improvement is private museums and collectors, as there is concern that the same level of ethical standards for publicly funded philanthropic museums has not been matched by private collectors and collections.[423] In addition, the global museum community is not able to influence the antiquities market,[424] a sector that is lacking in regulation. But, the extent of involvement of ICOM and the museum community in addressing illicit trafficking goes beyond the museum sector, and the same people who lobbied for ethics codes also lobbied for the 1970 UNESCO Convention,[425] as we shall now discuss.

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[420] ICOM (2021). "New ICOM Red List to focus on objects from Southeast Europe" *ICOM* 21 October. Available at: https://icom.museum/en/news/new-icom-red-list-to-focus-on-objects-from-southeast-europe/

[421] A recent example of ICOM's Red List securing the return of objects of African origin being sold illegally in Belgium, see Islamaj, Doruntina, Steffens, Eric & Brems Peter (2022). "La Belgique plaque tournante d'antiquités volées" *VTR* 20 April. Available at : https://www.vrt.be/vrtnws/fr/2022/04/20/la-belgique-plaque-tournante-dantiquites-volees/

[422] For more on ICOM and Object ID, see Fanizzo, Kelly Yasaitis, (2005) "Object ID: A Model of Global Collaboration" *Journal of Museum Management and Curatorship, Vol.* 20, (21)

[423] Lillehoj, (2016). p. 148

[424] Merryman. (2006) p.2

[425] Merryman. (2006) p.2

1.3.2. The 1970 UNESCO Convention

Perhaps the single most important legal development on the global stage, with respect to the illicit trafficking of cultural property, was the opening for ratification of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[426] in 1970, which entered into force in April 1972[427] – as already mentioned a date which has now become a threshold for the provenance of cultural goods.[428] As will be clear throughout this inquiry, despite its challenges (some of which we already discussed), the 1970 UNESCO Convention remains one of the most important standardising norms for the protection of heritage from theft and smuggling, and it has a long history.

The roots of the 1970 UNESCO Convention stretch back to the failed illicit trafficking treaty started by the League of Nations and OIM in the 1930s,[429] efforts which were interrupted by the Second World War. The draft treaty contained passages that, it was hoped, would restrain illicit trafficking, notably allowing all states parties sweeping rights to reclaim illicitly trafficked heritage:

> Article 1er - Chacune des Hautes Parties Contractantes s'engage à reconnaître à toute autre Haute Partie Contractante le droit de réclamer le rapatriement des objets mobiliers ou immobiliers d'intérêt paléontologique, archéologique, historique ou artistique, perdus ou volés ou se trouvant sur son propre territoire à la suite d'une aliénation

[426] UNESCO, (1970) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823 U.N.T.S. 231 (14 Nov.)
[427] O'Keefe, P. (2007), *Commentary on the 1970 Convention*. Institute of Art and Law. p. 1
[428] Nafziger, James A.R., & Nicgorsk, A.M. (2009). p. 267
[429] See note 219 and Vrdoljak, A.F. (2006) as well as chapter 2 of O'Keefe's commentary (2007).

> ou exportation illicite selon la législation de l'Etat réclamant.[430]

Before the drafts of that treaty were co-opted and redeveloped for a new international convention, certain elements were first used to draft two UNESCO Recommendations: one in 1956 on ethical archaeological excavations and another in 1964 on illicit trafficking.[431] Much like ICOM's Code of Ethics, neither of these Recommendations were legally binding, and so between 1964 and 1968, experts and consultants from the UNESCO Member States met to prepare a new draft convention that would bind Member States to legally combat illicit trafficking. The first draft of this was presented to a Special Committee of Governmental Experts in April 1970.[432]

Throughout most of the initial drafting phase before April 1970, it is interesting to note that most major art market states were not involved in this preliminary work; and though the United States was part of the Convention's Drafting Committee, it was largely uncommitted at this point. When the Americans did engage more closely, they objected to many of its draft provisions,[433] so much so that there was fear that the entire process could unravel.[434] Eventually,

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[430] Office international des musées (1935) *Projet de Convention Internationale pour le Rapatriement des Objets D'Intérêt Paléontologique, Archéologique, Historique ou Artistique, Perdus ou Volés ou ayant donné lieu à une aliénation ou exportation illicite.* UNESCO Archives

[431] As Forrest notes, in 1956, UNESCO adopted its *Recommendation on International Principles Applicable to Archaeological Excavation*, and in 1964, UNESCO adopted the *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property*, both of these non-binding recommendations would prepare the ground for the legally binding Convention in 1970, see Forrest, Craig. (2010). *International Law and the Protection of Cultural Heritage*: Routledge. p. 135.

[432] O'Keefe, (2007), p.7

[433] The United State opposed any form of import controls and considered the initial proposal as requiring overly burdensome Customs operations, O'Keefe, (2007), p.7.

[434] O'Keefe, (2007), p.7; Forrest notes this Forrest, (2010), p. 166. It has been noted by observers that art market lobbyists were instrumental in shaping opposition in the United State to many of its draft provisions.

when it was brought over the line, the final Convention had heavily incorporated many requests from the American delegation (and given the lobbying of the art market, these new elements largely reflected the interests of market, rather than source, countries).[435]

Several articles of the Convention are significant for policy reasons. Article 1 introduced the terms and descriptions for 'cultural property', which means property (either religious or secular) that is designated by a State as being of "importance for archaeology, prehistory, history, literature, art or science", and here the Convention greatly expanded on the definitions for cultural property first introduced in the 1954 Hague Convention,[436]

> For the purposes of this Convention, the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

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[435] O'Keefe, (2007), p. 28, notes that the monitoring of imports was opposed due to American reservations. Strong import regulations were also dropped as it was felt this would suggest that responsibility for ineffectiveness of exporting controls for art would fall with the importing country, not the exporting country, see Cuno, J. B. (2006). "View of the Universal Museum." *Imperialism, Art and Restitution*, Merryman, J.H. (ed). Cambridge University Press.p.24; Nafziger et al. agree and emphasise that there was art market influence behind these decisions, see Nafziger, Paterson, & Renteln, (2010). p.290.

[436] Boylan, (2003). p. 66

> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs ; (iv) original artistic assemblages and montages in any material;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
> (i) postage, revenue and similar stamps, singly or in collections;
> (j) archives, including sound, photographic and cinematographic archives;
> (k) articles of furniture more than one hundred years old and old musical instruments.

As we shall see throughout this dissertation, these expanded definitions have remained as benchmark definitions for other international organisations, including the EU,[437] even if some observers view the Convention's descriptions as narrow.[438] Articles 2 and 3 are significant in that they formally declare that States should combat the "export, import and transfer of ownership" of cultural property contrary to the Treaty. These articles also formally introduce the term 'illicit'[439], which has become synonymous with the phenomenon:[440]

> Article 3: The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted

[437] As we shall see with the description for export controls in Chapter 3.2.3
[438] Both O'Keefe, (2007), and Bator (1982) believe this.
[439] Article 2 and 3 UNESCO, (1970), and O'Keefe, (2007), pp. 39-43.
[440] See note 323, and Article 1 of draft OIM Convention, Office international des musées (1935).

under this Convention by the States Parties thereto, shall be illicit.

Article 5 has had far reaching practical influence, in that it brought forward to international level the concept of a standard descriptor of cultural property. This descriptor would eventually be developed and become known as 'Object ID', which is a standard international norm to describe cultural property.[441] Article 7[442] is also interesting, in that it provides protection for the innocent purchaser of an illicitly traded object. However, its terms on a 'good faith' or *bona fide* purchase were considered vague and needed updating in the Unidroit Convention some 25 years later, which we will discuss in the next chapter.[443]

Despite its standard-setting fame, the Convention was faced with difficulties (some of which we discussed already[444]) and confusion during its implementation stage. Firstly, there have been numerous concerns from potential States party about the extent of the

[441] For a history of the Object ID, see Thornes, Robin w. Dorrell, Peter & Lie, Henry (1999), *Introduction to Object ID: Guidelines for Making Records that Describe Art, Antiques and Antiquities*, Getty Information Institute. For Article 5 leading to Object ID, see, Fanizzo, (2005) p. 26 as well as O'Keefe, (2007) pp. 49-50.

[442] Article 7 (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

[443] O'Keefe, (2007) pp. 63-66.

[444] See Chapter 1.2.2

Convention's application and retroactivity.[445] Even though retroactivity is not the norm for international treaties, it was requested by certain States during the drafting process to make the Convention retroactive, but this was vetoed by the Americans. Still, to this day, certain States have refrained from ratifying the Convention out of (baseless) fears that it will lead to retroactive claims on cultural property in their territories.[446] Furthermore, potential States party have also voiced concerns about import controls and the potential burden on national customs authorities should they ratify the Convention, not to mention their fears that it would interfere too much with the art trade.[447] These fears are largely unfounded, as the flexible application[448] of the Convention in national jurisdictions can allow a State to establish a mechanism that best suits their system.[449] But such concerns over increased bureaucracy when working to restrain illicit trade still remain an issue, as we shall see in the EU examples in later in this inquiry.

The Convention did fall short in some areas: it was not able to resolve questions relating to private law, so private individuals had no course of action under it.[450] Definitions can be problematic too, as only known and listed cultural material come under the scope of the convention since States must designate items of importance.[451] This requirement to list items of importance has been identified as a weakness because it disincentivises ratification – and this is especially

[445] Blake, (2015). p. 47.
[446] Thailand delayed ratification for fears of retroactivity, and this delay is said by observers to have had a implications on the illegal art market, O'Keefe, (2007) p.7
[447] Wantuch-Thole, (2015). p. 149
[448] This flexible application is subject to some concern by observers. States are largely able to amend the treaty to their systems, and essentially, they can pick and choose what elements to adopt. As such, there are varying degrees of interpretation and enforcement from state to state. See Forrest, (2010). p.195.
[449] O'Keefe, (2007). p.7
[450] Weller, M. (2018). *Rethinking EU Cultural Property Law: Towards Private Enforcement*: Nomos Verlagsges. MBH + Company. p.23
[451] Wantuch-Thole, (2015).p. 149

the case for States, which has traditionally taken an 'arm's length approach' to administering cultural heritage and cultural policy.[452] Certain issues were also overlooked during the drafting process, which would later be addressed in other treaties and conventions. For instance, *bona fide* purchase, as mentioned in the last paragraph, would need to be revisited in the Unidroit Convention.[453] One particularly strong legal critique has been the Convention's inability to reconcile various legal traditions, which has given rise to various interpretations of the treaty.[454] And as it is not self-executing, states can cherry pick provisions they want to enforce (though this same aspect also allows for its flexible application in national jurisdictions, as discussed in the last paragraph).[455] References to underwater heritage were also absent, since the laws of the sea do not come under the jurisdiction of States. As such, another treaty was needed to protect sunken heritage.[456] The Convention also makes no reference to illicit trafficking in times of conflict, a matter that was addressed by the provisions of the 1954 Hague Convention,[457] which proposes stronger obligations that were further extended by its Second Protocol[458] in 1999.[459] Other aspects of the Convention have also come in for more subtle criticism. While the

[452] Prott, (1996) p.62 here Prott notes that with states that have arm's length approaches to heritage, it becomes too burdensome on their part also to go through with designation and ratification, as they would not normally legislate for this. The United Kingdom is a prime example of arm's length, so is Ireland.
[453] O'Keefe, (2007). p. 13, and see chapter 3.2.1 of this dissertation for a further analysis of this Convention.
[454] Prott, (1996).p. 70
[455] Amineddoleh, (2013).p.233
[456] UNESCO (2001) *Convention on the protection of the underwater cultural heritage* No. 45694 U.N.T.S. 2562 (2 Nov.), see O'Keefe, (2007). p. 17.
[457] UNESCO, (1954). (*First) Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, No.3511, 249 U.N.T.S. 215 (14 May).
[458] UNESCO, (1999) *Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, 249 U.N.T.S. 358, amended by *The Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Mar. 26, 1999, 38 I.L.M. 769.
[459] O'Keefe, (2007). p. 13.

Convention aims to prevent illicit export *and* import and supposedly aims to balance the interest of market and source states,[460] in reality, the primary duties are placed on exporting or source states.[461]

Despite these and other more academic criticisms,[462] the Convention has seen more success than failure. As of 2021, it has widespread ratification worldwide, including in most major art market states and 25 of 27 EU Member States.[463] ICOM has also campaigned and lobbied States to ratify it, and regional museums associations have also been active in encouraging States to sign up to the Convention.[464] While in reality, the Convention has assisted in ensuring only a modest number of returns of cultural property, at the same time its establishment of dedicated diplomatic mechanisms to aid returns, via UNESCO, has been recognized as beneficial in an area where these previously did not exist.[465] Such a mechanism would also be employed by the EU in the 1990s, as we shall see in the third chapter.[466] And more broadly, these mechanisms feed into the wider debate about the ethical movement of cultural property – past and present, including themes that are outside the scope of our inquiry[467] – which has allowed for the

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[460] Blake, (2015), pp. 38-40

[461] Forrest, (2010). p. 195

[462] For other commentary including scope and application of the Convention, see Gerstenblit, Patty (2010) "Models of Implementation of the 1970 UNESCO Convention: Can Their Effectiveness be Determined?" *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* Prott, Lyndel V., Redmond-Cooper, Ruth, Urice, Stephen K. (eds). Institute of Art & Law.

[463] Only Ireland and Malta have not signed the Convention, for full list of States Parties, see UNESCO (2022) States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. Paris, 14 November 1970. Available at: https://en.unesco.org/sites/default/files/list_142_states_parties_1970_convention_en.pdf

[464] Clement, (2010). p. 408

[465] Blake, (2015), pp. 38-40

[466] See chapter 3.2.2 of this dissertation for more analysis.

[467] In 2003, one of the first debates during the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in

establishment of forums where this topic can be discussed.[468] Indeed, the most important elements of this instrument have perhaps been the most understated: it has shaped debate since the 1970s, carries a broad influence, and plays an important educational role in the protection of cultural property.[469] Furthermore, much like the ICOM Code of Ethics for Museum Professionals, the 1970 UNESCO Convention has galvanised change in societal attitudes towards illicit trafficking[470] and has influenced national frameworks.[471]

1.4. Conclusion

In this opening chapter, we have attempted to illustrate a clear – but brief – history of the illicit trade of cultural property and the first attempts to restraint it at international level. In doing so, we illustrate that the numerous problems we face today – problems we shall continuously see in the coming chapters, and which we shall discuss in further detail – have a long history, and that the first responses to these

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Case of Illicit Appropriation was that of the Parthenon/Elgin Marbles, a topic which few would consider a case to be remedied by the 1970 UNESCO Convention, see note 3, p.2, UNESCO (2003). Return or restitution of cultural property to the countries of origin: note/by the Secretary-General, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation; 11th session, 6-9 Mar, (A/58/314) UNESCO. Available at: https://digitallibrary.un.org/record/502765?ln=en

[468] In particular, as Forrest notes, following the 1970 UNESCO Convention, the UN General Assembly adopted a resolution in 1973 calling for the return of works of art expropriated from countries, including through colonialism. Furthermore, the 1970 UNESCO Convention created the framework for the 1978 UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. Forrest, (2010). p. 135

[469] Forrest, (2010). pp. 193-196

[470] Nemeth, (2015). p.107

[471] The 1970 UNESCO convention helped influence national frameworks, like the United States, but its role in recognising indigenous groups is regarded as trendsetting. Australia, Canada and New Zealand developed frameworks for restitution of goods for indigenous groups along the lines of 1970, see Nafziger, Paterson, & Renteln (2010). p. 425

problems took the form of export restrictions, trade embargoes and regulations. In the 20th century, these national forms of protection have been given further credibility via the international legal order, though the success of these instruments and the norms they codify (both national and international) is debatable. At the same time, these attempts to protect cultural property from illicit trafficking expose deep cleavages. Illicit trafficking as a transnational phenomenon relies heavily on the existence of a jurisdictional border between states, and even then, what is illegal on one side of the border is not necessarily illegal on the other. This is especially the case for the EU that, much like the phenomenon of illicit trafficking itself, is often considered *sui generis*. But this exceptionalism aside, given the growing global role of the EU, it is now important to better understand how the EU has attempted to overcome these problems, as it may help us find answers and, in the long run, help us better protect heritage on a global scale.

Chapter 2. Northern Member States: The Case Studies of Denmark, Ireland and Sweden

2. Introduction

As discussed in the first chapter, states have long used export prohibitions as the key tools to combat illicit trafficking. As we shall see here, our three case studies have their own tools and policies in place to protect heritage from trafficking, some of which have long and complex histories of their own. Yet, findings from the European Commission demonstrate that individual Member State legislation – including our three case studies – is often ineffective in tackling illicit trafficking.[472] Furthermore, as we shall see, our northern case studies do not appear to be any less affected by illicit trafficking than other Member States in the EU.[473] To better understand this global problem, let us now examine these three countries in closer detail, how their protections first came into being, how effective they have been in protecting cultural property, and what types of heritage are under threat. No state is free from illicit trafficking, and even though the phenomenon changes from state to state, in understanding the controls, protections and threats at national level, through this lens the aim is to better analyse and understand the problems – and the responses – at EU level.

2.1. Denmark: The Liberal Model

[472] European Commission (2017). Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods. Commission Staff Working Document. Impact Assessment. (SWD(2017) 262 final). 13 July. European Commission. p. 20

[473] Europol (2021). EU Serious and Organised Crime Threat Assessment (SOCTA) 2021. Publications Office of the European Union. p. 89

As we discussed in the literature review and chapter one, Denmark's colonial period ended in 1979,[474] though much earlier, beginning in 1925, it started slowly returning cultural materials taken from its colonies,[475] a restitution process which continues to this day and that has been notably amicable and a positive experience between Copenhagen and its former colonies.[476] Despite these remarkably early and progressive policies towards the repatriation of colonial heritage,[477] in the years after the end of the colonial period, Denmark still did not have prohibitions on the removal of cultural material from the Danish state, and when they were introduced, they were done so at a much later stage than any of our other case studies. In addition, as we shall see, Denmark continues to be surprising in the extent to which it goes against traditionally accepted conventional norms for policies to combat illicit trafficking.

2.1.1. An Arm's Length approach to Illicit Trafficking

As we mentioned in the first chapter,[478] Denmark and the other Scandinavian states quickly followed the Italians in producing some of Europe's first legislative responses to protect certain types of heritage from illicit trafficking, banning the removal from their kingdoms of art

[474] Home Rule was achieved for Greenland in 1979, a date which is now considered as the end of the colonial period, though Faroe Islands and Greenland remain Danish overseas territories, see Eilertsen, (2012). p. 154; and iv. Cultural Policies and the Politics of Culture.

[475] Denmark began returning manuscripts to Iceland in 1925, with the pace increasing in the 1940s, 50 and 60s. For more on the first returns, see Eilertsen, (2012). p. 154, and Karlzén, (2010). p. 38

[476] Zolkos, Magdalena, (2021). "Cultural Heritage Repatriation in Greenland from a Tupilak's Point of View" Goethe-Institut. March. Available at: https://www.goethe.de/prj/zei/en/pos/22165206.html

[477] UNESCO has labelled Denmark and Greenland as a model case for colonial restitution, see Zolkos, (2021).

[478] See Chapter 1.1.1

objects and antiquities that belonged to the royal collections.[479] Prior to this Denmark had traditions which are somewhat comparable to modern national patrimony laws in other countries: *danekrae* and *danefae*, ancient treasure trove laws that gave certain archaeological finds and precious metals to the King.[480] Similar to those discussed in the first chapter, these laws and traditions were not designed to protect cultural heritage or combat illicit trafficking *per se*[481] but were more concerned with protecting the prestige of the sovereign,[482] and like other early examples of export prohibitions and treasure trove laws, they shaped the legislation that would come later. The first modern attempts to introduce heritage protection legislation in Denmark departed vastly from these medieval royal decrees, and it is interesting to note that the National Museum in Copenhagen was amongst the first institutions to put in place ethical guidelines which advised against acquiring illicitly traded materials for fear of fuel unregulated excavations in 1893:

[479] Diaz-Andreu, & García, (2007). p. 38

[480] The two traditions can seem somewhat similar to British Treasure Trove La, see Styreksen - Danish Agency for Culture. (2015). Report by Denmark on the implementation of 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Copenhagen. p.2;, but there are marked differences: Danefae dating back to 1241 mainly concerns unclaimed coins, and a 1752 law granted all these finds to the King of Denmark, see Korsell, L.E. (2005). Cultural Heritage Crime: The Nordic Dimension. Swedish National Council for Crime Prevention. Stockholm. p. 55 and Young, James O. (2006). "Cultures and the ownership of archaeological finds." *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice*, Scarre, Chris & Scarre, Geoffrey (eds). Cambridge University Press. p. 16; Danekrae is similar but concerned fossil, see Manacorda, Stefano, & Chappell, Duncan (2011). *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*. Springer New York. p. 286

[481] As discussed in Chapter 1.1.2 and the Literature review, these concepts were ill-defined before the 20th century.

[482] See Chapter 1.1.1

> Le Musée National de Copenhague n'accepte pas les antiquités qui [...] apparaissent avoir été cherchées dans un but de lucre, car ce serait encourager les fouilleurs.[483]

After these rules, in the early twentieth century, the first legislation would focus on the need to preserve the rural and Viking archaeological remains that are widespread across Denmark.[484] Still, the first protections to come into force for moveable heritage were surprisingly late comparted to our other two case studies: protection for archaeological objects only came into force in 1958 via the *Museum Act (1958)*[485] which incorporated reformed versions of the *danekrae* and *danefae* traditions into modern law, stipulating that these finds should go to the State and local museums rather than the King,[486] which was further articulated in later amendments:

> Chapter 9.30. (1) Objects of the past, including coins found in Denmark, of which no one can prove to be the rightful owner, shall be treasure trove (danefæ) if made of valuable material or being of a special cultural heritage value. (2) Treasure trove shall belong to the state.
> 31. (1) A geological object or a botanical or zoological object of a fossil or subfossil nature or a meteorite found in Denmark is fossil trove (danekræ) if the object is of unique scientific or exhibitional value. (2) Fossil trove shall belong to the state.[487]

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[483] Point 6a, Denmark (1893). *Règles relatives au Musée national de Copenhague*. National Museum of Denmark.
[484] Hjorth-Andersen, Chr. (2004). "The Danish Cultural Heritage: Economics and Politics". Institute of Economics. Copenhagen University p. 5
[485] Denmark (1958). *L 124 Lov om de kulturhistoriske lokalmuseer. (L 124 Act on local cultural history museums)* (3 June).
[486] Christiansen, Torben Trier (2016). "Recreational Metal Detecting and Archaeological Research: Critical Issues Concerning Danish Metal-Detector." *Pløyejord som Kontekst*, Martens, J. & Ravn, M. (eds). p. 1; the museum act regulated all finds, see Styreksen - Danish Agency for Culture. (2015). and Manacorda, & Duncan (2011). p. 286.
[487] Denmark (2001). *Lov nr. 473, museumsloven med de ændringer (Act no. 473, the museum act with the amendments)* (7 June).

With the incorporation of the Danish treasure trove laws into modern law, the 1958 Act also decentralised the museums in Denmark. It granted autonomy to provincial museums and in doing so gave them a large degree of responsibility for monitoring and protecting archaeological sites; interestingly though and again pointing to the steady pace of legislating, these sites were only accorded protection for the first time under Danish law following further amendments to the 1958 Act in 1969.[488]

By the 1970s there was a growing interest in Denmark in amateur metal detecting which began placing strain on the preservation and protection of archaeological sites,[489] a practice which is widely acknowledged to contribute to the problems of illicit trade,[490] problems which were also recognised at EU level, including by Prof. Chatelain.[491] However, here Denmark went against normal conventional wisdom used elsewhere in Europe: rather than pursue a model based on the confrontation and criminalise the practice of metal detecting and un-professional excavation, beginning in the 1970s Denmark started to pursue a model where the practice was and remains legal and regulated.[492] Under further amendments to the 1958 Act, metal detecting is legal, and any finds at archaeological sites must be turned over to the local museums, in fact metal detecting is only prohibited on specifically identified and protected areas and modest

[488] This was done through a 1969 amendment, and local museums throughout Denmark were made responsible for the protection of local archaeological sites, Lyne, Ed. (2013). "Heritage legislation: The Republic of Ireland and Denmark's heritage laws and their consequences for archaeology and archaeologists." *Arkæologisk Forum* Vol. 28. pp. 1-3

[489] Thomas, Suzie. (2013). "Multiple-Role Actors in the Movement of Cultural Property: Metal-Detector Users." Current Trends in archaeological Heritage Preservation: National and International Perspectives, Iasi, Romania, 6-10 November.

[490] Christiansen, (2016). p. 23

[491] Chatelain, (1976). p. 48

[492] Dobat, AS. (2016). "Metal Detecting in Denmark: Advantages and Disadvantages of the Liberal Model." *Pløyejord som Kontekst: Nye perspektiver for forskning, forvaltning og formidling - artikelsamling*, Martens J. & Ravn M (eds). Portal Forlag. p. 51

finders' fees are awarded to those who return discovered archaeological items to local museums.[493]

Yet, by the 1980s Denmark still had no regulation in place to prohibit the removal of cultural materials and combat illicit trafficking. Change only commenced in 1982, when a Committee on the Protection of Cultural Heritage was established to examine the merits of Danish ratification of the 1970 UNESCO Convention. The Nordic Council had been pushing for a harmonisation of heritage protection laws across the entire Nordic region at the same time, and the Committee also took on the task of evaluating Denmark's situation.[494] While the calls for a harmonisation of Nordic laws were deemed unfeasible, the Committee did recommend Danish ratification of the 1970 UNESCO Convention (contingent on simultaneous ratification by all Nordic states), but other events in Denmark had exposed the problems arising from the lack of protections for moveable cultural heritage.[495] The 1976 loss of unique paintings from a Danish collection at Gavnø, south of Copenhagen, prompted a change in policy. Considered valuable Danish patrimony, the paintings were sold and taken out of Denmark, and the Government of the day was accused of dragging its heels when it promised (but failed) to raise the required DKKr 5 million to acquire them and keep them in Denmark.[496] Largely on the foot of this, the Committee began examining proposals to ensure there would be no similar losses of cultural heritage in the future, eventually recommending an arm's length regulatory approach to avoid too much

[493] Christiansen, (2016). p. 1; and Styreksen - Danish Agency for Culture. (2015). p.2
[494] Banke, L. M. (1996). "Beskyttelse af kulturværdier i Danmark " *Fortid Og Nutid* Vol. 1. p. 182
[495] Banke, (1996). p. 183
[496] 'Kulturværdiudvalget (2022) Legislation of importance for the Commission on Export of Cultural Assets. The Danish Commission on the Export of Cultural Assets. Available at: https://kulturvaerdier.kb.dk/en/legislation/ and Staines, Judith, & Pinel, Julio. (2007). *Moving art – a guide to the export and import of cultural goods between Russia and the European Union*. Delegation of the European Commission to Russia. p. 10

interference with the art market: the *Act on Protection of Cultural Assets in Denmark (Cultural Assets Act) (1986).* [497]

The 1986 Act follows this historical trend from Denmark, whereby the Danish state has been hesitant to allow any interference in the cultural sector.[498] In aiming to prevent the depletion of national cultural heritage,[499] the Act was heavily influenced by another non-interventionist system to prevent the depletion of heritage: the British system of export control.[500] The legislation itself is short, running to 16 sections in total and under the Act certain cultural objects need a licence to leave Denmark:[501]

> Cultural objects of the period before 1660; cultural objects older than 100 years and valued at DKK 100,000 or more; photographs (regardless of age) if they have a value of DKK 30,000 or more.[502]

The Minister for Cultural Affairs is given a wide degree of power to extend the protection of the Act to other types of heritage under special

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[497] Denmark (1986). *Lov nr. 332 om sikring af kulturværdier i Danmark med de ændringer, der følger af lov nr. 473 af 7. juni 2001 og lov nr. 141 af 10. februar 2010. (Act No. 332 on the safeguarding of cultural assets in Denmark is hereby promulgated, with the amendments resulting from Act No. 473 of 7 June 2001 and Act No. 141 of 10 February 2010)* (4 June)

[498] For example, in 1935, when the OIM was drafting the League of Nations treaty that would directly address illicit trafficking and heritage under threat in times of conflict, the Danish Government of the day, though largely supportive of the aim of the treaty, had reservations about the bureaucracy of the treaty, see Office internationale des musées. (1935). L'avant-Projet de convention visant le rapatrient des objets d'intérêt artistique, historique ou scientifique, perdus, volés ou ayant donné lieu à une aliénation ou exportation illicite: état actuel de la question. UNESCO Archives.

[499] Korsell, (2005). p. 54

[500] Kulturarvsutredningen. (1995). *Kulturegendomar och kulturföremål: [del]betänkande*. Fritze. p. 98; for more on the British system of export control, the Waverly system, see, "United Kingdom" by Chamberlain, Kevin & Hausler, Kristin. (2014).

[501] Chapter 2, Section 3, Denmark (1986).

[502] See Chapter 1, Section 2, Denmark (1986).

circumstances,[503] and the Act declared it illegal to export these items without a licence.[504] The process of getting a licence for export is outlined in Part 3 of the Act,[505] with licences issued by a Cultural Assets Commission.[506] Where a licence is not granted, the State must buy the item refused an export licence.[507] If acquired by the Commission, the object will be turned over to a State museum.[508] Where an application for a licence has been made and the decision by the Cultural Assets Commission has not been returned within three months, the export licence is regarded as granted.[509] Furthermore, the rules for non-Danish heritage are considered generous: objects created outside Denmark may be granted a licence automatically, and if the owner is leaving Denmark to live abroad permanently, they are similarly automatically granted a licence.[510] Once the license is issued, it is valid for five years. The Act does not extend to the Danish autonomous region of Greenland.[511] Though the concept of national treasures – which we shall discuss in chapter three – has not been introduced into Danish law, the current consensus regards national treasure as a cultural asset as defined under the 1986 legislation as 'national treasure'.[512]

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[503] Chapter 1, Section 4, Denmark (1986).
[504] Chapter 2, Section 3, Denmark (1986).
[505] Chapter 3, section 5 and 6, Denmark (1986).
[506] The Cultural Assets Commission consists of the State Antiquary, the Director of the National Archives, the Director of the Royal Museum of Fine Arts, the Chief Librarian at the Royal Library as well as the Chairman of the National Council of Museums see Kulturværdiudvalget (2022).
[507] Chapter 4, Section 11, Denmark (1986); and Banke, L. M. (2017). "Kulturværdiloven" *Den Store Danske, Gyldendal*. 24 August. Available at: http://denstoredanske.dk/index.php?sideId=112144
[508] Banke. (2017).
[509] Chapter 3, Section 6, Subsection 2, Denmark (1986).
[510] Chapter 3, Section 7, Subsection 1 and 2, Denmark (1986).
[511] Chapter 5, Section 16 Denmark (1986).
[512] With respect to national treasures, anything under the Danish law could be considered national treasures, without the description being exhaustive or specific, see the Annex DG HOME & CECOJI-CNRS (2011). p. 69.

As for the international cultural conventions, Denmark ratified the 1970 UNESCO Convention in March 2003 and for the purposes of its ratification (as mentioned in the first chapter, States are allowed to decide which elements off the 1970 Convention they will incorporate into their national legislation[513]), Denmark designated cultural property as heritage that is "of importance for archaeology, prehistory, history, literature, art or science", in accordance with Article 1 of the Convention, as objects identified under the 1986 Act,[514] furthermore, those finds from *danefæ* and *danekræ* as well as underwater heritage are in the scope of the convention, and the Minister of Culture was given wide ranging powers to further expand the scope, and place any other objects under protection, if he/she deemed in necessary.[515] Denmark ratified the 1995 Unidroit Convention in 2011, and passages of Denmark's criminal code were also enhanced via the ratification meaning there is now a legal definition for the theft of cultural goods, including the handling of cultural goods, as well as a definition of due diligence.[516] Trafficking cultural property now carries a jail sentence of up to 1 year's imprisonment,[517] and fines are issued for those violating export bans.[518] However, cases of non-compliance appear to be rare and few fines have been issued,[519] though the country's arm's length policy means there is a focus on preventative action, which aims to avoid

[513] See Chapter 1.3.2.
[514] Cornu, Marie. (2012). Implementation of the 1970 UNESCO Convention in Europe - Background Paper. Second Meeting of States Parties to the 1970 Convention Paris, 20 - 21 June. UNESCO
[515] UNESCO (2003). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823 U.N.T.S. 231 (14 Nov. 1970). ratification by Denmark (LA/DEP/2003/012)
[516] Annex DG HOME & CECOJI-CNRS (2011). p. 104
[517] Annex DG HOME & CECOJI-CNRS (2011). p. 104
[518] Korsell, (2005). p. 57
[519] Wantuch-Thole, (2015). p.76

illicit trafficking before it begins.[520] This can be seen in the case of passages of the ICOM Code of Ethics[521] which have been given legal weight under amendments to the Museum Act in 2001:[522]

> No museum may acquire an object if the object has been exported from another country contrary to the legislation of that country and the matter is subject to an international agreement which has been signed by the country in question and Denmark.[523]

A similar situation is pursued by members of the Antique Booksellers Association, their code of conduct is also given legal weight through Danish law and members must abide by their professional association's ethics code.[524] It is still the police and customs authorities' duty to monitor issues concerning illegal import and export,[525] but in another nod to the preventative approach, the Cultural Assets Commission monitors auction catalogues and the Danish art market to advise potential overseas buyers of the objects that need licences for export.[526] Where objects are identified as 'cultural assets', auctioneers are obliged to inform potential buyers and retain custody of the auctioned materials until an export licence has been granted.[527]

This arm's length and preventative approach has remained the core of the Danish model, and there have only been minor amendments

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[520] Oosterman, Naomi (2019). "Regional Overviews of the Policing of Art Crime in the European Union." *The Palgrave Handbook on Art Crime*, Hufnagel S. & Chappell D. (eds). Palgrave Macmillan UK. p. 219

[521] The Code's second chapter contains important articles on professional integrity to avoid promoting or encouraging illicit traffic, see, ICOM, (2017).

[522] DG HOME & CECOJI-CNRS (2011). p. 152; and Styreksen - Danish Agency for Culture. (2015) p.7.

[523] Chapter 10. Section 33, Denmark (2001).

[524] DG HOME & CECOJI-CNRS (2011). p.153

[525] Styreksen - Danish Agency for Culture. (2015). p.4

[526] Styreksen - Danish Agency for Culture. (2015). pp.5-7

[527] Kulturværdiudvalget (2022)

to the model since it was first created, which have mainly focused on procedural and bureaucratic details.[528] The extent to which the Danish model can be considered anymore successful at addressing illicit trade than other models is debatable.[529] On the one hand, it has many champions, for example where other countries in Europe have chastised metal detectorists as those who drive the illicit trade of cultural goods (and also damage cultural heritage in the process of digging up their finds), Danish observers note that their progressive model encourages cooperation between metal detectorists and regional museums.[530] These observers go so far as to point out that the model has resulted in local museums in Denmark having some of the most impressive archaeological collections in Europe.[531] However, at the same time, academics have criticised the emphasis on treasure hunting at the expense of research and academia, which the Danish model seems to encourage.[532] Furthermore, while some observers point to the low refusal rate for export, the rare cases of noncompliance, the few fines issued, and the success of the finder's fee as a deterrent to theft,[533] others have pointed out that prices at foreign markets are often higher than the finders' fees offered by Danish museums,[534] as such, there is still a very real incentive for finders to sell artefacts abroad.[535]

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[528] Kulturværdiudvalget (2022)

[529] Taking in many states with different model, Hardy ascertains that – when it comes to metal detecting, there is not enough information to ascertain which model is best, but restrictive models appear to be better, Hardy, Samuel Andrew. (2017). "Quantitative analysis of open-source data on metal detecting for cultural property: Estimation of the scale and intensity of metal detecting and the quantity of metal-detected cultural goods." *Cogent Social Sciences* Vol.3 (1). p.44,

[530] Dobat, (2016) p.56

[531] Christiansen, (2016). p. 1

[532] Christiansen, (2016). p. 1

[533] Dobat, (2016) p.56 observers have suggested (without evidence) the modest monetary compensation for finds has made the sale of antiquities on the black market unattractive to metal detectorists in Denmark.

[534] Christiansen, (2016). p. 24

[535] Christiansen, (2016). p. 24

2.1.2. Trafficking to and From Denmark: The Reality of Arm's Length

The Danish arm's length approach – with its focus on preventative action and avoiding illicit trafficking before it even begins[536] – presents us with a markedly different method to the regulation of the movement of cultural goods and measures to address illicit trafficking. In comparison to its other northern counterparts, Denmark appears to have experienced less theft from museums, with credit usually given to Denmark's well-organised museums system, under the 1958 Museum Act.[537] A correlation between the objects stolen museums and the aims of the 1958 Act would appear to confirm that the progressive management of archaeological sites[538] has helped reign in the theft of archaeological materials.[539] And in turn, this would explain why the tackling of cultural heritage crimes is a low priority for the Danish Police,[540] with the low rate of reported crime further appearing to support the hands-off policy of the Danish police.[541] Court decision have also been interpreted as supportive of the Danish model and a prominent ruling of the Copenhagen municipal court in favour of exporters would also appear to confirm this.[542]

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[536] Oosterman, (2019). p. 219

[537] Korsell, (2005) p. 66

[538] And while, municipal and local museums are given a large degree of responsibility for the protection and excavation of archaeological sites throughout Denmark, see Lyne, (2013).

[539] In a five-year period in the early 2000s, an average of 7% of museum in Denmark reported thefts and of the museum who reported thefts, more than a third of said the stolen items were everyday items, art works made up 14% and – interestingly – archaeological items only made up 8%, Korsell, (2005). p. 68

[540] Oosterman, (2019). p. 219

[541] Balcells, (2019). p.45, this is an average for the period 2007 – 2010, and very few cases of theft are reported to police, on average between 50 and 80 per year

[542] This case was the acquittal of Sotheby's for the illegal export of a Christian Albrecht Jensen painting to an auction in London in 1992 would appear this further. Banke, (1996). p. 196

However, tensions remain. In the above mentioned court case, the Cultural Assets Commission had argued that Sotheby's valuations of painting due for export had been too low, and that if they had followed the Commission valuations, the painting would have required an export licence.[543] In effect, the Cultural Assets Commission – though accepting the ruling – strongly complained that the court did not understand the importance of heritage nor the implications of their ruling, which the Commission felt undermined the 1986 Act and set a dangerous precedent whereby private individuals could set their own values for Danish heritage and by-pass the 1986 Act and remove heritage from the State.[544] Other critical observers have noted that the number of export bans in comparison to the number of annual exports is marginal, interpreting this as an example of poor enforcement of the existing rules[545] Further to this, and in the absence of hard statistics, there is little evidence to show that the 1986 Act has helped reign in illicit trafficking.[546] The assessment from other heritage professionals is that illicit trade is a significant problem in Denmark that the arm's length model is unable to effectively restrain, and even if it is difficult to ascertain whether the model fares better or worse than its European neighbours, the phenomenon is taking place regardless.[547]

These observers point to reports of churches being systematically robbed across Denmark, with the assumption that professional thieves and criminal organisations are responsible,[548] and the existence of a dedicated database for Danish church materials would seem to demonstrate that there is more of a problem than the

[543] Banke, (1996). p. 196
[544] Banke, (1996). p. 197
[545] Banke, (1996). p. 197, this is in 1995.
[546] Banke, (1996). p. 208
[547] Korsell, (2005) p. 90
[548] Korsell, (2005) p. 72 and p. 84

arm's length regime is prepared to acknowledge.[549] Given the difficulty in selling these liturgical materials within Denmark – which would be familiar to Danish citizens – heritage professionals have concluded that these objects are probably being sold at markets abroad,[550] with the same observers noting that there is a market in Eastern Europe for furniture, books, art, archaeology and weapons, as well as liturgical items, with these same items being targeted in regional Danish churches, museums as well as other museums across the Nordic region.[551]

The traffic appears to go both ways, with observers noting a crossover in objects being sold on markets in Denmark and Sweden,[552] and Norwegian experts have reported seeing Norwegian heritage objects at markets in Denmark.[553] Due to its location, Denmark has been highlighted as an important transit country for objects being illegally removed from other Nordic countries, with objects passing through Denmark on their way south to central Europe.[554] Though the extent to which open or closed borders impact on the trade is unclear, as we discussed in the literature review,[555] some observers argue that Europe's open borders have made this increasingly difficult to

[549] DG HOME & CECOJI-CNRS (2011). p.113
[550] Korsell, (2005) p. 72 and p. 84
[551] Korsell, (2005) p. 72 and p. 84
[552] Korsell, (2005) p. 95
[553] Korsell, (2005) p. 93
[554] Korsell, (2005) p. 91, this has been noted to be the case, particularly for Swedish antique furniture which passes through Denmark, however, European Union studies conclude Denmark is a market state, with more objects coming in, than going out. Of course, with all black-market activities, it is difficult to ascertain the extent to which one trait of illicit trade is worse than the other., Brodie, Neil; Batura, Olga; op 't Hoog, Gabriëlle; Slot, Brigitte; Wanrooij, Niels van; & Yates, Donna (2019) Illicit trade in cultural goods in Europe: Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade: final report – Study. European Commission. p. 234
[555] See Literature Review, v. Borders and Illicitness

address,[556] though part of the problem here is also due to the considerable difficulty in accurately identifying cultural property under threat, especially if it is cultural heritage that comes from another country, and customs officials are not always trained nor have the necessary resources to accurately assess potential heritage objects.[557] One such example in 1992 involved an inaccurate declaration of heritage where an historic typewriter was falsely declared a modern office accessory, and following a court case an exporter was fined DKKr5,000 for attempted illegal export, one of the few case of someone being found guilty of violating the 1986 Act.[558]

Denmark has also witnessed several high-profile scandals of illicit import in recent decades, which, though rare, are enough to demonstrate that Denmark is party to a global problem. In the late 1990s, Copenhagen's *Ny Carlsburg Glyptotek* was implicated in the Medici scandal, which exposed the non-transparent acquisition practices of several high profile museums, including the Getty in Los Angeles and the Metropolitan Museum in New York.[559] The failure of these three museums to exercise due diligence and appropriate provenance research when buying items saw illicitly traded items, some with forged provenance, enter their collections.[560] The scandal was enough to elicit a statement from the normally neutral ICOM General Secretariat in Paris, advising museums to exercise due diligence and follow the ICOM Code of Ethics to ensure that illicitly trafficked heritage did not enter museum collections.[561] In the case of the Glyptotek, staff would have been legally bound by the ICOM Code

[556] Banke, (1996). p. 196.
[557] See chapter 3.2.3.
[558] Banke notes that the number export bans in the recent years have been few, Banke, (1996). p. 208
[559] For more on Medici case, see Watson, & Todeschini, (2007).
[560] Watson, & Todeschini, (2007)
[561] ICOM (2006).

of Ethics through the Museum Act.[562] After long and drawn-out negotiations, a bilateral agreement between Italy and Denmark was reached in 2016, and the Glyptotek returned the cultural property to Italy that had been acquired illicitly.[563]

Around the same time as the Glyptotek scandal, two further and notable cases of illegal import of cultural heritage were credited with driving the Danish ratification of the 1995 Unidroit Convention.[564] In 2002, an amicable agreement between a private buyer and the Chinese government saw the return of 156 objects to China; the Chinese government had originally gone to court to secure the objects, but the case collapsed due to a lack of evidence that the objects had been stolen and illegally exported from China in the first place.[565] Another case in 2008 saw the return of 644 objects to Colombia, Costa Rica, Ecuador, Mexico and Peru. [566] Again, this was an amicable return conducted on the part of the Danish Government,[567] and though this is not the official reason, the quick ratification of the 1995 Unidroit Convention in the aftermath of these scandals has led observers to conclude that it was, at

[562] Chapter 10, Section 33, Denmark (2001).
[563] Chasing Aphrodite (2013) "The Danish Connection: Holding on to Loot at the Ny Carlsberg Glyptotech of Copenhagen" *Chasing Aphrodite-The Hunt for Looted Antiquities in the World's Museums* 14 March. Available at:https://chasingaphrodite.com/2013/03/14/the-danish-connection-holding-on-to-loot-at-the-ny-carlsberg-glypotech-of-copenhagen/ and Polak, Peter M (ed.). (2017). Art law: Restrictions on the export of cultural property and artwork. International Bar Association p. 69
[564] Styreksen - Danish Agency for Culture. (2015). p. 6
[565] Styreksen - Danish Agency for Culture. (2015). p. 6; Ying, Wang, & Shanshan, Wang (2008). "Smuggled relics to be sent home." *China Daily*, 9 April. Availabel at; https://www.chinadaily.com.cn/china/2008-04/09/content_6600892.htm; and Liu, Z. (2016). *The Case for Repatriating China's Cultural Objects*. Springer. p.21
[566] Styreksen - Danish Agency for Culture. (2015). p. 6; and see EFE (2016). "Ecuador prevé repatriar al menos cinco lotes de bienes patrimoniales en 2016." *Agencia EFE*, 21 February. Available at : https://www.efe.com/efe/america/cultura/ecuador-preve-repatriar-al-menos-cinco-lotes-de-bienes-patrimoniales-en-2016/20000009-2845937
[567] Styreksen - Danish Agency for Culture. (2015). p. 6

least in part, the impetus for Denmark to join the treaty.[568] While the Glyptotek scandal, and the objects from China and Latin America were certainly high profile, they were not isolated cases. More recently, objects looted from war-torn Syria have been discovered for sale in Denmark,[569] and Danish auctions houses were also found to be selling unprovenanced archaeological materials from Syria.[570]

Illegal export out of Denmark has also been a problem, and there have been several high-profile cases. From the 1960s until 1970s, over 3,200 rare books were lost in unknown circumstances from the Royal Library in Copenhagen.[571] While the thefts ended, and no culprit was found, in 2003 Christies contacted the Royal Library making them aware that some of the stolen books had made it into their sales catalogue. After further investigation, it transpired that between 1998 and 2003 a substantial part of the collection had been sold at markets in London, New York and Hong Kong.[572] Eventually, the thefts were pinned to a former employee, his widow, son and daughter-in-law, as well as friends, who were all handed prison sentences for their roles in the thefts.[573] In 2017, a different (and admittedly unusual) but still equally high-profile case of theft and illegal export was discovered following appropriate due diligence checks by an auction house in the

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[568] Styreksen - Danish Agency for Culture. (2015). p. 6

[569] Olsen, Morten (2017) "Dansk politi undersøger sag om krigstyvegods fra Syrien" *DR*. 24 January. Available at: https://www.dr.dk/nyheder/kultur/historie/dansk-politi-undersoeger-sag-om-krigstyvegods-fra-syrien

[570] Lundén, Staffan. (2004). "The scholar and the market: Swedish scholarly contributions to the destruction of the world's archaeological heritage." *Swedish archaeologists on Ethics* p. 116

[571] Olsen Jan, (2003) "Police close to solving library thefts 25 years on" *The Guardian*. 11 December. Available at: https://www.theguardian.com/world/2003/dec/11/books.booksnews

[572] Tijhuis, Edgar. (2013). "Legal and Illegal Actors around Art Crime: a Typology of Interfaces." *The Journal of Art Crime* Vol. 9. P.9

[573] Jørgensen, J.D. (2007). "The Anatomy of a Crime Discovery after 25 Years. A Notable Case of Book Theft and its Detection." *LIBER Quarterly* Vol. 17 (1)

United States. A collection of paintings by Carl Vilhelm Holsøe, which were stolen from a Danish private property in 2000, emerged 16 years later when an auction house selling one of the paintings contacted the Art Loss Register as part of its standard due diligence procedure.[574] Following an investigation, Danish police traced the painting back to a Danish auction house, which had failed to carry out a due diligence check when selling the painting 16 years earlier. From there, the police found the original thief, as well as the remaining paintings, only an hours' drive from where they had been originally stolen in 2000.[575]

Of course, just like the cases of import, these above export cases are only a handful of high-profile examples of what is a much larger problem. Denmark has also been susceptible to other trans-European robberies, including those carried out by the pathological French thief Stephan Breitweiser, who stole ivory artefacts from Danish museums between 1995 and 2001.[576] Though these were only a small part of his entire $1.4 billion haul over the course of his career.[577] Another major theft was that of a Rodin sculpture – incidentally from the Glyptotek – regarded as one of the single most expensive thefts in Danish history (estimated at €270,000) and believed by Interpol to have been organised by an international criminal organisation.[578] Very recently, Denmark

[574] Nazif, Perwana (2017). "16 Years Later, Stash of Stolen Paintings Found Near Crime Scene." *Artnet News*, 15 March. Available at https://news.artnet.com/art-world/16-years-stolen-paintings-found-892184

[575] Nazif, (2017).

[576] Finkel, Michael. (2019). "The Secrets of the World's Greatest Art Thief." *GQ*, 28 February. Available at: gq.com/story/secrets-of-the-worlds-greatest-art-thief and see Charney, (2015). "A History of Transnational Trafficking in Stolen and Looted Art and Antiquities." p. 129

[577] Fouquet, Hélène. (2005). "Arts, Briefly; Art Thief Sentenced." *The New York Times*, 11 January. Available at : https://www.nytimes.com/2005/01/11/arts/arts-briefly-art-thief-sentenced.html

[578] Stockman, Camilla (2015) "Tyve forklædt som turister stjal værdifuld buste fra Glyptoteket" *Politiken* 19 August. Available at: https://politiken.dk/kultur/kunst/art5586115/Tyve-forkl%C3%A6dt-som-turister-stjal-v%C3%A6rdifuld-buste-fra-Glyptoteket and Cascone, Sarah. (2015). "$300,000 Rodin Bust

suffered from the same spat of thefts affecting other countries in Europe, which targeted Nazi uniforms and other Second World War memorabilia,[579] and even human remains.[580]

Like all forms of illicit trafficking, it is difficult to ascertain the scale of the trade of objects entering or leaving Denmark illegally.[581] Statistics on criminal activities are impossible to gather, mainly since thieves do not want to highlight that they are smuggling and buyers do not want to draw attention to such purchases; and once an object arrives in the destination country, it is not always possible to identify if it has been illicitly trafficking.[582] But from the above examples, it is clear that there is a black market for illicit trade of cultural goods in Denmark, there are illegal imports as well as exports; and despite the existence of a strong, yet unorthodox heritage protection model, just like many other countries, the legal market in Denmark is opaque and hard to differentiate from the illegal market, with heritage moving in and out of the country contrary to law.

2.2. Ireland: Luck and Goodwill

Ireland's experience in protecting heritage from illicit trafficking cannot but be examined through the lens of its relationship with its former colonial master, the UK. Even before Irish independence in 1921, these tensions between the Ireland and Britain

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Stolen From Danish Museum in Broad Daylight." *Artnet News*, 20 August. Available at: https://news.artnet.com/exhibitions/stolen-rodin-glypoteket-museum-copenhagen-326464

[579] Jedicke, Philipp. (2020). "Growing rate of theft of Nazi objects across Europe." *DW*, 9 November. Available at : https://www.dw.com/en/growing-rate-of-theft-of-nazi-objects-across-europe/a-55540127

[580] Huffer, Damien; Chappell Duncan; Charlton, Nathan & Spatola, Biran F. (2019). "Bones of Contention: The Online Trade in Archaeological, Ethnographic and Anatomical Human Remains on Social Media Platforms." *The Palgrave Handbook on Art Crime*, Hufnagel, Saskia & Chappell, Duncan (eds) Palgrave Macmillan. p. 537

[581] Korsell, (2005). p. 90

[582] Styreksen - Danish Agency for Culture. (2015) p. 90

played out in the London High Court over the Broighter Hoard in 1903, a collection of gold Celtic ornaments unearthed at a small farm near Derry in the north of Ireland in 1896 and eventually acquired by the British Museum, which we discussed in the first chapter. As mentioned, both Britain and Ireland, though at this stage still part of the same polity, retained distinct legal systems, as well as culture and heritage, and the Attorney General for Ireland alleged that this had been an illegal acquisition.[583] Ireland would gain independence in the decades after the Broighter Hoard case was settled, though as we shall see, Ireland would continue to use heritage to emphasise its distinctive characteristic as a nation in comparison to the rest of the UK.

2.2.1. Protecting Irish Cultural Property

The Broighter Hoard was returned to Ireland and the custody of the Royal Irish Academy in 1904. Its return rested on Irish treasure trove law, which was distinct to English treasure trove law, and gave all finds of precious metals and treasure without an existing known owner to the King; since the 18th century, the King had vested this right in the academic and cultural institutions in Dublin.[584] In the case of the Broighter Hoard, the High Court found, very clearly, that Irish treasure trove law had been broken and the court ruled that the Hoard had been illegally removed from the island of Ireland, and it was subsequently returned.[585] As with the case of Denmark, these treasures trove laws were never intended to be considered heritage protection instruments in the modern sense, but later scholarly analysis in the 20th century has suggested that by the time of the Broighter Hoard controversy, by virtue of the transfer of claims from the King to Ireland's cultural

[583] Bailkin, (2004). p.30

[584] The Royal Irish Academy – and later the National Museum – held the right to objects found under Irish Treasure Trove Law, see Bailkin, (2004). p.58; see also paragraph 50, *Webb v Ireland* (1988)

[585] Neill, (1993). p. 25

institutions, the laws had come to be seen as *de facto* heritage protection tools.[586]

Ireland inherited protections afforded to non-moveable heritage through the *Ancient Monuments Act (1882)*,[587] enacted by the British it applied throughout the UK at that time, including Ireland.[588] Aside from this law, there were no protections in the UK – including Ireland at this time – for moveable heritage, and it was largely up to private actors (including polite society in London;[589] and academic groups in Ireland[590]) to organise themselves to raise awareness to the threats. In London, these campaigns would ignite a civic debate in public interest over lost heritage,[591] though they would fail to bring

[586] Paragraph 49 *Webb v Ireland* [1988] IR 353.
[587] United Kingdom (1882). *An Act for the netter protection of Ancient Monuments* (18 August)
[588] Halfin, Simon (1995). "*The Legal Protection of Cultural Property in Britain: Past, Present and Future*", DePaul J. Art, Tech. & Intell. Prop. L. Vol 6 (1) p. 5
[589] Mainly, heritage was being lost to American buyers, see Rees Leahy, (1999). p.196-199
[590] Early efforts were made by the Kilkenny Southeast Ireland Archaeological Society in 1857 to protect monuments throughout the country as the society expressed concerns at the time that heritage was under threat, see Department of the Taoiseach (1949), *Report to the Government on Institutions and Activities Concerned with the Arts in Ireland*. (TAOIS/8488B), National Archives of Ireland.
[591] In April 1909 the Duke of Norfolk informed the trustees of the National Gallery, London that he intended to sell his portrait *Christina of Denmark, Duchess of Milan* by Hans Holbein. The Dukes property, it hung in the National Gallery on loan for over thirty years and that it might be removed from the public display was disconcerting to many members of the public. The Duke offered the painting for sale to the Gallery trustees who declined citing lack of funds whereupon it was sold to art dealers, Colnaghis, for £61,000. Colnaghis in turn guaranteed to postpone any potential sale to American buyers, allowing the National Gallery more time to raise funds to by the painting for its own collections, not before increasing the price to £72,000. With support from the National Art Collection Fund (NACF) and last-minute donations, the National Gallery managed to purchase the painting and keep it in the Britain. The inability of the National Gallery to grasp the severity of such a loss and the (perceived) inability to aptly manage its collections came in for heavy criticism from a public who were becoming more concerned at the lack of effective stewardship of 'English' heritage, Poole, (2010). p.109-111

about meaningful legislative change.[592] For Ireland, similar debates would converge with the Irish Revolution which began in 1912 and would eventually lead to the partition of the island in 1920; the new Irish State would occupy the larger southern portion of the island, sharing a permeable border with the UK who retained the province of Northern Ireland, which was granted limited self-rule within the UK.[593]

Cultural nationalism was most certainly on the agenda of the Dublin administration in independent Ireland where academics and museum professionals were conscious of the increasingly large quantities of archaeological materials leaving Ireland in the years before and after independence.[594] Irish civil servants in Dublin took a poor view to the British legislation they had inherited, which they did not consider fit for purpose,[595] and rather than emulating the British legal order, Ireland's first legislators looked to continental Europe for inspiration, notably to Italy[596] which only a few years previously enacted its own system of protection across the peninsula.[597] In the mid-

[592] For the first half of the 20th century, the British had no controls on the removal of cultural goods from the United Kingdom. The Second World War saw the reorganisation of the British economy with all resources being put into the war effort, including cultural goods. The *Import, Export and Customs Powers (Defence) Act 1939* ensured no items of cultural heritage could leave the United Kingdom during the conflict. See "United Kingdom." Chamberlain, & Hausler (2014).

[593] For more on the border, see Ferriter, D. (2019). *The Border: The Legacy of a Century of Anglo-Irish Politics.* Profile Books Limited; and for divisions on the island of Ireland, see Gerwarth, R. (2007). *Twisted Paths: Europe 1914-1945*. Oxford University Press.

[594] Dr Bremmer, Director of National Museum, lamenting citizens putting "pocket before patriotism" and selling archaeological materials to buyers from abroad. See Department of the Taoiseach. (1926) (TSCH/3/S8488 C).

[595] Memorandum in November 1928 from the Parliamentary Draftsman citing the British colonial era legislation (the 1882 Act) as "clumsy and unhelpful," see Office of the Attorney General. (1928). *Memorandum to the Government.* National Monuments Act, 1930 (2002/14/690), National Archives of Ireland.

[596] Bourke, Séamus Aloysius (Parliamentary Secretary to the Minister for Finance). (1929). "National Monuments Bill, 1929—Second Stage." Ireland. *Dáil Éireann Debate,* Vol 3.2. (24 Oct). Available at: https://www.oireachtas.ie/en/debates/debate/dail/1929-10-24/16/.

[597] For more on Italian legislation, see Levi, (2008).

1920s, Dublin began drafting a new legal order which, civil servants hoped, would keep certain cultural materials inside the new State to protect Irish identity.[598] Largely, this meant archaeological materials associated with Ireland's Gaelic past and though there were attempts to include non-archaeological materials, these efforts were eventually abandoned[599] as civil servants were eager to focus on protections for solely Irish materials and nothing else.[600]

The intended focus on exclusively Irish materials is striking considering the rich heritage that had been gathered in Ireland by its own gentleman scholars, the likes of those we discussed the first chapter, who participated in the Grand Tour and amassed a heritage in Ireland that was, essentially, not of Irish origin.[601] But the resulting *National Monuments Act (1930)* only protected objects that had an "association with any Irish historical event or person"[602] and prohibited

[598] Office of the Attorney General. (1928). (2002/14/690).
[599] It was envisaged that art works would be protected by a bill entitled *Prohibition on Exportation from the Free State of Works of Art*, drafted alongside the then National Monuments Bill, but these efforts were shelved, as describe in a government memorandum on 12 November 1925, see Department of the Taoiseach. (1925). *Government Memorandum of 12 November*. National monuments and antiquities: protection and prohibition of export (TSCH/3/S4633). National Archives of Ireland.
[600] The Parliamentary Secretary of the Minister for Finance pressed the Attorney General to ensure that legislation should focus solely on *Irish* materials and nothing else, Office of the Attorney General. (1928). *Letter to the Attorney General from the Parliamentary Secretary of the Minister for Finance.* National Monuments Act, 1930 (2002/14/690), National Archives of Ireland.
[601] For more on Irish Grand Tourists, see Boggi, (2017).
[602] Section 2. Definitions' Ireland (1930) *An Act to make Provision for the Protection and Preservation of National Monuments and for the Preservation of Archaeological Objects in Saorstát Éireann and to make Provision for other matters Connected with the matters aforesaid*. (26 February). Number 2 of 1930.

the removal of these mainly archaeological materials from Ireland without a licence:[603]

> Section 2 The expression "archaeological object" means any chattel whether in a manufactured or partly manufactured or an unmanufactured state which by reason of the archaeological interest attaching thereto or of its association with any Irish historical event or person has a value substantially greater than its intrinsic (including artistic) value, and the said expression includes ancient human and animal remains and does not include treasure trove in which the rights of the State have not been waived.
> Section 24. (1) It shall not be lawful for any person to export or attempt to export or sell for export any archaeological object without or otherwise than in accordance with a licence issued by the Minister for Education under this section.

The 1930 Act also prohibited the excavation of archaeological sites without a licence.[604] The Act is striking in that it is now seen to have been building on constitutional developments which had seen the transfer of sovereignty from the Crown to the State, and with that, the transfer of ownership of undiscovered cultural heritage from the sovereign to the people.[605] In the end, the legislation did not mirror that of Italy's owing to the bureaucratic mechanisms needed, and also because the civil servants in Dublin were aware that the Italians struggled to implement their own burdensome legislation.[606]

The 1930 Act has been amended several times, largely as a result of illegal or unethical movements of cultural heritage in and out

[603] Conlon, Patricia. (2014). "Ireland" *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited. pp. 204 – 205
[604] Section 26, Ireland (1930)
[605] Paragraph 53 *Webb v Ireland* [1988] IR 353.
[606] Bourke, (1929).

of Ireland.[607] But even before these instances, the legislation was problematic. During the drafting process of the 1930 Act, the Attorney General raised concerns of infirmities, mainly to do with terminology and potential conflicts with property rights, especially for export regulation, as well as a potential burden of the State to provide compensation in cases of refusal of a licence for export.[608] These concerns were quickly proven correct as the loss and near-loss of several important items of heritage from Ireland over the following decades after the passage of the 1930 Act demonstrated the weaknesses of the new legal order. In the 1930s, the export of the Galway City regalia (a silver guild sword and mace set) became a legal headache for the Irish Government that would drag on for nearly 30 years. Despite confirmation from the Irish Attorney General that the terms of the 1930 Act applied to the regalia, they were still illegally removed from Ireland, (bizarrely) with the full knowledge of the Government[609] which lead the Attorney General to declare the new law unenforceable.[610] The regalia were finally returned in 1961 through an act of goodwill from

[607] Conlon, (2014). p. 206

[608] In a letter from the Attorney General to Mr Banam, dated January 1925, the Attorney General was concerned about potential conflict between private property rights and state interests and feared that the potential legislation "interfere[d] too drastically with the rights of private property", see Attorney General of Ireland. (1925). *Letter to Mr Banam dated January 1925*. Ancient Monuments Protection Bill (Preliminary) (2002/14/338), National Archives of Ireland; furthermore, in a memorandum, the Attorney General felt that appropriate compensation would be necessary for buyers who bought items for export but were refuse permission to do so, see Department of the Taoiseach. (1925). *Government Memorandum of 12 November*. National monuments and antiquities: protection and prohibition of export (TSCH/3/S4633).

[609] Letters from the Attorney General's Office to the Taoiseach in 1931 stated that although the regalia were offered for £5000 to the State, the offer was refused, furthermore, because there was no physical proof that the object had been exported out of the state, no case could be brought, see Office of the Attorney General of Ireland. (1931) *Correspondence to the Taoiseach.* Galway mace and sword (TSCH/3/S6076 A.), National Archives of Ireland

[610] Idib. Letter from the Attorney General's Office to the Taoiseach describing laws as unenforceable and impractical in that anyone can hide antiquities in their luggage and remove them from the state.

the American owner who had purchased them in the 1930s.[611] Events like this were not unique and for the rest of 20th century, illegal happenings that threatened heritage in Ireland usually led to the amendment of the National Monuments Act,[612] or the adoption of new legislation entirely.

Confusion over the exact coverage of the 1930 Act was apparent again in the 1940s, with the near loss of the Ormond papers to buyers from abroad.[613] And just like the National Monuments Act some twenty years previously, following this near loss there was intense lobbying by academics, this time from the National Library, who called for protection for other non-archaeological items.[614] The Government responded with the *Documents and Pictures (Regulation of Export) Act (1945)*[615] which was passed to extend protections to other forms of non-archaeological heritage, mainly paintings and archival collection:

> 1.—In this Act— the word "document" includes any writing, drawing, map, chart, plan, photograph or film; the expression "export licence" means a licence granted under section 4 of this Act; the expression "the Minister" means the Minister for Education. Articles to which this Act applies.

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[611] Galway Library. (2014) "From Galway to California and Back Again - the Galway Civic Sword and Mace". *HardiBlog* 26 May. Available at: http://hardimanlibrary.blogspot.com/2014/05/from-galway-to-california-and-back.html.

[612] Conlon. (2014). p.205

[613] When the Ormonde Papers were threatened with export from Ireland in the 1940s, attention was drawn to the lack protection for art works, books and manuscripts, Office of Secretary of the President. (1945). *Notes, August 1945*. Documents and Pictures (Regulation of Export) Act, 1945 (2005/3/104), National Archives of Ireland.

[614] Similarly to the lobbying of academics for the National Monument Act, Dr James Haye, Director of the National Library, was instrumental in drawing attention to the lack protection for art works, books and manuscripts when the Ormonde Papers were threatened with export from the State for sale in the 1940s; Office of Secretary of the President. (1945). (2005/3/104).

[615] Ireland (1945) *An Act to Regulate the Export of Documents and Pictures with the Object of Preserving Records of those which are of National, Historical, Genealogical or Literary interest*. (4 August). Number 29 of 1945.

> 2.—(1) Each of the following shall be an article to which this Act applies—
> (a) any document (other than a document wholly in print) which is over one hundred years old,
> (b) any painting,
> (c) any document declared by an order made by the Minister under subsection (2) of this section to be an article to which this Act applies
> (2) The Minister may from time to time by order declare any document, which is in his opinion of national, historical, genealogical or literary interest, to be an article to which this Act applies and may revoke any such order.
> (3) The Minister may from time to time by order declare that any particular document or painting or any document or painting belonging to a particular class shall be excluded from the operation of this Act and a document or painting so declared to be excluded shall, so long as the order is in force, cease to be an article to which this Act applies, and the Minister may revoke any such order.[616]

However, it was drafted hastily and soon recognised as wholly inadequate and, for a time, it inadvertently obliged banks to require export licenses to move necessary paperwork north of the border to Northern Ireland.[617] Other controversies lead to the amendments of the original 1930s legislation. The passage of the *National Monuments (Amendment) Act 1954*[618] was in part due to the unethical acquisition of the Emly shrine by the Museum of Fine Arts in Boston.[619] The *National*

[616] Sections 1, 2 and 3, Ireland (1945).
[617] Department of Justice. (1946). *Export of Bank Documents.* Documents and Pictures (Regulations of Export) Act, 1945, (90/9/40), National Archives of Ireland
[618] Ireland (1954). *An act to amend the national monuments act, 1930*. (22 December). Number 37 of 1954.
[619] Kelly, Eamonn P. (2015). "Treasure-hunting in Ireland – its rise and fall." *Antiquity* Vol. 67 (255) p.378; and Conlon, (2014). p.205,

Monuments (Amendment) Act 1987[620] was enacted in response to the use of metal detectors to search for buried heritage,[621] with one find from metal detectors – the Derrynaflan hoard – in turn leading to the famous *Webb v. Ireland* where one Justice of the court famously said that cultural heritage was part of the national identity and sovereignty of a nation. This led to the introduction of the *National Monuments (Amendment) Act 1994*,[622] which codified the Justice's ruling and expressly made archaeological objects the property of the State:

> 2.(1) Without prejudice to any other rights howsoever arising in relation to any archaeological object found before the coming into operation of this section, there shall stand vested in the State the ownership of any archaeological object found in the State after the coming into operation of this section where such object has no known owner at the time when it was found.[623]

In turn, it also made unregulated trading of antiquities or the withholding information on finds an offence.[624]

Returning to non-archaeological objects, problems remained with the 1945 Act. Though its more absurd elements relating to the Irish border had been amended, larger swathes of the Act which were

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[620] Ireland (1987*). An act to make further provision for the protection and preservation of national monuments and archaeological objects, including provision for the regulation of the use and possession of detection devices, to make provision for the protection and preservation of historic wrecks, to amend and extend the national monuments acts, 1930 and 1954, and to provide for connected matters*. (22 July). Number 17 of 1987.

[621] Conlon, (2014). p.205

[622] Ireland (1994) *An act to make further provision for the protection and preservation of archaeological objects, to define archaeological objects to include treasure trove, to amend and extend the national monuments acts, 1930 to 1987, and to provide for related matters*. (6 July) Number 17 of 1994.

[623] Section 2, Ireland (1994).

[624] While the previous Acts had implied undiscovered heritage was the property of the state, the 1994 amendment codified it, Conlon, (2014). p.206

made redundant following the Irish entry in the EU in 1972 remained in force unamended until it was finally repealed in 2015 in response to a scandal involving the illegal export of artworks from Ireland by a public gallery.[625] Prior to this scandal, in 1997 a new act was introduced as part of a whole scale reform of the Irish heritage and cultural sector. The *National Cultural Institutions Act (1997)*[626] introduced for the first time a register of cultural objects, and for the purpose of EU law and Article 36 TFEU, national treasures in Ireland are understood to refer to those on this list, which currently numbers 203 objects that are part of the State collections.[627]

There was never any official reason for the nearly 20 year delay for the replacement of the 1945 Act with the relevant passages of the 1997 Act, but more cynical observers suspected government apathy and indifference to the protection which has often been considered a burdensome drain on the government expenditure.[628] But this slow response was not unique in Ireland. Turning to the international cultural conventions, Ireland was the slowest of our three case studies in many respects: though it signed the 1954 Hague Convention in the 1956, it was not ratified until 2018, a period marked as one of the longest between signature and ratification of any States party.[629] And

[625] Oakes, Ted. (2017). "Exporting Art from Ireland: The Alfred Beit Foundation and the Protection of Cultural Property." *Irish Journal of Arts Management and Cultural Policy* Vol. 4
[626] Ireland (1997). *An act to provide for the establishment of a board to be known as bord Ard-Mhúsaem na hÉireann and a board to be known as bord Leabharlann Náisiúnta na hÉireann, to make further provision in relation to the National Gallery of Ireland, to provide for the giving of indemnities by the state against the loss of, or damage to, cultural objects loaned to certain institutions, to amend certain enactments, to make further provision in relation to the national heritage and to provide for other matters connected with the matters aforesaid.* (2 April). Number 11 of 1997.
[627] See Annex, DG HOME & CECOJI-CNRS (2011).
[628] Compendium Cultural Policies and Trends (2023). "Cultural Policy System: Ireland"
[629] Gartland, Fiona (2017) "Ireland to ratify cultural-protection convention 63 years after signing it" *The Irish Time* 27 October. Available at: https://www.irishtimes.com/news/crime-and-law/ireland-to-ratify-cultural-protection-convention-63-years-after-signing-it-1.3270292

though recent years have seen changes, and Ireland is preparing for the ratification of the 1970 UNESCO Convention and the 1995 Unidroit Convention as part of a root and branch reform of the entire heritage protection system which will also see the repeal of the 1930 Act, its amendments and their consolidations into one instrument,[630] this has also stalled.

Returning to the 1997 Act and the 1930 Act and its amendments, the movement of cultural goods out of the State was – and remains – regulated in the form of export licences issued by the cultural institution of the State. The National Museum of Ireland issues export licences for archaeological objects,[631] while the National Gallery of Ireland issues export licences for artworks and rare books.[632] The 1930 Act and its amendments also prohibit unauthorised excavation of national monuments and historic sites, and it is the National Museum that issues these excavation licences.[633] Metal detecting with the intention of searching for archaeological objects is also a crime in Ireland and is punishable under the 1930 Act and its amendments with a penalty of up to €63,486 and/or up to 3 months in prison.[634] Fines have been handed out in the past, thought they are rare and baring some high profile cases (which we shall see in the next section) imprisonment is unusual, with the National Museum and police authorities concluding that it is better to maintain good relations with

[630] Ireland (2021).
[631] Section 50, Ireland (1997).
[632] First under Documents and Pictures (Regulation of Export) Act, 1945, and since 2017 under Section 50, Ireland (1997).
[633] See National Monuments Acts 1930-2004 (Ireland (1930); Ireland (1987*).* Ireland (July 1994); and Ireland (2004).
[634] National Monuments Acts 1930-2004 (Ireland Ireland (1930); Ireland (1987*).* Ireland (July 1994); and Ireland (2004).

metal detectorists and secure returns following illegal removal.[635] Despite the legislation, recent reports appear to indicate there is an increase in amateur metal detecting, with local police forces often underequipped to respond appropriately.[636]

Two perennial problems in Ireland complicate the protection of heritage and tackling of illicit trafficking. The first is the open border with Northern Ireland. As part of the United Kingdom, Northern Ireland has entirely different export regulations and operates under a different heritage protection regime, one that is decidedly more liberal than in Ireland.[637] The second is the Irish Constitution of 1937, which strongly favours rights to private property; so much so that these constitutional rights have been felt to preclude any attempts to legislate to strengthen heritage protection in Ireland, and to restrain the loss of heritage at its borders.[638]

Despite the many infirmities, it is worth noting the Irish system of protection (for archaeological materials at least) is much more stringent than others, including its closest neighbour the UK, and this has remained the case. For the first half of the 20th century, the British had no controls on the removal of cultural goods from the UK, despite

[635] Ryan, Michael. (1981). *Reports from the Keeper of Antiquities at the National Museums of Ireland.* Documents and Pictures (Regulation of Export) Act, 1945. (2018/184/1) National Archives of Ireland.

[636] Hogan, Senan (2021). "Kildare Gardaí report rise in people using metal detectors at historic sites" *Leinster Leader* 4 June. Availabe at : https://www.leinsterleader.ie/news/home/638928/kildare-gardai-report-rise-in-people-using-metal-detectors-at-historic-sites.html

[637] For history of the Irish border and illicit trafficking, see Oakes (2023)

[638] Memo from the State-Solicitor (1983) expressing conflicts between Constitution and possible expanding of prohibition of export under 1945 Act (Departments of Education, and of Foreign Affairs (1983) Memo State-Solicitor. *National Library of Ireland:* Documents and Pictures (Regulation of Export) Act, 1945 (2018/185/1). National Archives of Ireland.

vocal calls from certain sections of society.[639] The Second World War – during which Ireland remained neutral – saw the reorganisation of the British economy with all resources being put into the war effort, including cultural goods. The British *Import, Export and Customs Powers (Defence) Act 1939* ensured no items of cultural heritage could leave the UK during the conflict.[640] It remained in force for the rest of the 20th century, although the restrictions were relaxed when Germany was defeated, and the *Waverly Criteria* were established to balance the interests of the art market, the buyer and the public.[641] The massive and profitable London art market is often cited as the main reason why the UK has been reluctant to introduce controls on cultural goods as Italy and Ireland have done.[642] More recently, the withdrawal of the UK from the EU has again posed problems, with fears that the EU's stricter controls could be undermined by the Irish border, allowing smugglers to take objects out of the EU – or in to it – via this porous frontier. Largely, these concerns have been addressed in the EU-UK Protocol,[643] but problems still remain.

2.2.2. Theft and Trafficking from Ireland: A Stretched Protection System?

Despite having this purpose-built system of protection, the illegal removal of heritage from Ireland has long been a problem that legislative responses have not been able to address entirely. Throughout the 20th century, as we have seen in analysis of the laws, there were several high-profile illegal removals from the State that stretched the legislative system, and these often resulted in a clash

[639] For more on the development of UK protections from illicit trafficking, and fears over the loss of heritage see Poole, (2010).
[640] Chamberlain, & Hausler (2014). ".
[641] For more on Waverly Criteria, Chamberlain, & Hausler (2014)
[642] As noted by many, including Blake, (2015). p. 46
[643] For the Irish Protocol Negotiations and concerns, see Oakes (2023)

between the best intentions of the law and the political realities of the State. For instance, and as mentioned, the loss of the Galway regalia was one of the first instances where the legislative system was tested.[644] These objects were returned, and this fact could be said to demonstrate that Ireland's system operates with *luck* and *goodwill*, without which the threats to heritage might be greater.

The Irish border has been especially problematic in restraining loss of cultural heritage through trafficking. The Attorney General noted this at an early stage in the 1930s, saying that even if the State had customs officials at every port and official crossing trained as cultural experts to identify every object coming their way (they were not, for the record, trained to identify heritage), there was nothing to stop smugglers crossing north of the border and eventually taking these materials to Britain.[645] The Swedes would also have similar concerns, as we shall see in the next section.[646] But for Ireland, with over 200 crossings with Northern Ireland, most of them unguarded, even the most efficient governments would struggle to manage a frontier of this scale,[647] and it is worth noting that the border continues to be problematic for Irish efforts to protect heritage from illicit trafficking.[648]

Later in the 20th century, officials from the National Museum expressed similar concerns at the unpatrolled border and explicitly warned the Government that heritage items were being taken across it; once in Northern Ireland – which had a much more laissez-faire import/export regime than Ireland – the heritage could then be moved

[644] Chapter 2.2.1
[645] Department of the Taoiseach (1956) *Memorandum to Taoiseach on history of regalia*. Galway sword and mace (TSCH/3/S6076B/94) National Archives of Ireland
[646] Chapter 2.3.1
[647] Ferriter, (2019)
[648] See Conclusion, Oakes (2023).

on to a third country.[649] This may be how the Killymoon hoard ended up in London in the 1960s. A remarkable find from Ireland, the National Museum in Dublin was only made aware of its existence when it was notified of the sale of the hoard by the British Museum as an act of goodwill.[650] The British Museum had been approached by a dealer, and upon investigation, the museum discovered the hoard must have originated in Ireland. But with no way to prove that it had been stolen or illegally exported, Irish officials had to buy the hoard items back and could only afford to do so when the British Museum agreed they would not outbid the Irish museum.[651]

Thefts from museums and galleries have also been common and, as expected, have drawn a lot of media scrutiny. An unusual case in the 1980s and 1990s was the loss of materials from the Chester Beatty Library in Dublin. A national museum housing the Middle Eastern and Far East art collection of wealthy industrialist Alfred Chester Beatty, the thefts only came to light when a former employee familiar with the collection came across a manuscript page being auctioned in New York. When contacted, the Library denied any official sales (deaccession of national collections in Ireland are not legally allowed) and an investigation found IR£45,000 worth of materials had been stolen.[652] It transpired that the Library's renowned curator, Dr David James had been stealing and selling manuscripts from the collection abroad.[653] Dr James eventually served three years in prison for the theft,

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[649] Ryan, (1981).
[650] Department of the Taoiseach. (1968). *Note on discovery of Killymoon Hoqrd 1967.* Killymoon Hoard of Irish Bronze Age gold ornaments, (98/6/966.) National Archives of Ireland
[651] Department of the Taoiseach. (1968). (98/6/966.)
[652] Tobin, Brenda. (2011). The Caretaker. *Documentary on One*. RTE. Available at: https://www.rte.ie/radio1/doconone/2011/0217/646638-radio-documentary-chester-beatty-islamic-art-david-jame/
[653] Siggins, Lorna. (1996). "Man charged over stolen artefact." *Irish Times*, 19 March. Available at: https://www.irishtimes.com/life-and-style/homes-and-

and another man was also charged in connection with buying the stolen materials in London. Further investigations and a raid recovered some of the materials (many of which were voluntarily returned), and it was understood to be linked to Dublin criminal networks and larger art thefts in Ireland.[654] More recently, antiques and paintings also belonging to the Irish national collection were discovered on sale in London. The auctioneers who were responsible for the export and sale of the items had carried out due diligence checks with the Art Loss Register, but the Irish authorities had not recorded them as missing. It was only by chance, when Irish curators recognised the objects on sale, that the authorities were alerted.[655]

The Alfred Beit Foundation at Russburough House, an 18th century country mansion outside of Dublin, also had a series of high-profile thefts. Often cited as one of the finest private art collections in Europe, security was a constant headache for the Beit family, and their collection was targeted by Irish Republican terrorists and criminal drug lords from Dublin on numerous occasions during the 1970s, '80s and '90s.[656] The first – and perhaps most infamous theft – happened in 1974 when an IRA gang, including British society heiress and Irish Republican convert Rose Dugdale, raided the house and stole 19 paintings worth an estimated IR£8 million.[657] The main aim of the theft was to ransom the paintings to secure the release of Irish prisoners in Northern Ireland. However, the plot failed, and all paintings were

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property/2.732/mystery-of-stolen-state-owned-art-1.1314123; and Siggins, Lorna. (1996). "House search yields missing Arabic atlas." *Irish Time*, 12 June. Available at: https://www.irishtimes.com/news/house-search-yields-missing-arabic-atlas-1.57651

[654] Siggins, (June 1996).

[655] Siggins, (March 1996).

[656] Cooke, Pat (2016). Public Policy and Private Interests: Lessons of the Beit Paintings Controversy. Paintings & Drawings from Russborough House. Chester Beaty Library, Dublin. 18 November.

[657] RTE, (2001). "Russborough House has history of art thefts." *RTE*, 26 June. Available at: https://www.rte.ie/news/2001/0626/16372-paintings2/

recovered eleven days later, with Dr Dugdale being jailed for nine years for her part in the robbery.[658] A second equally infamous robbery took place in 1987, which was masterminded by Dublin crime lord Martin Cahill. IR£30 million worth of paintings were stolen, and it took several years and extensive European police cooperation before all the paintings were recovered in 1993.[659] After this, the most valuable paintings were transferred to the National Gallery of Ireland. Still, two more minor robberies of the Beit collection were attempted in 2001 and 2002, but the paintings were recovered in both instances.[660] These events, though high profile and certainly rare, do not appear to be anomalies: there is strong – albeit unsubstantiated – evidence to suggest that the IRA are the current custodians of thirteen paintings taken from the Isabella Stewart Gardner Museum in Boston in 1990.[661] Furthermore, another Irish criminal organisation was identified as carrying out a spate of thefts of rhino horns from museums in Ireland, Britain and mainland Europe, with speculation that they had been using the open border with Northern Ireland as a means to speed material out of Ireland to the British market and on to Europe.[662]

Despite these headline-grabbing robberies, the majority of thefts of cultural property in Ireland are assumed to be much more

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[658] RTE, (2001).

[659] RTE. (2001). and see Power, Edward. (2002). "Gardaí recover stolen Beit masterpieces from Dublin house." *Irish Times*, 27 September. Available at: https://www.irishtimes.com/news/gardai-recover-stolen-beit-masterpieces-from-dublin-house-1.1096731 ; and Irish Times, (2002). "Stealing beauty: the three thefts from the Beit collection." *Irish Times*, 2 July. Available at: https://www.irishtimes.com/culture/stealing-beauty-the-three-thefts-from-the-beit-collection-1.1087178

[660] Power, (2002).; and Irish Times (2002) for robbery in 2002

[661] Harris, Gareth (2020). "Criminal claims 13 works from legendary Isabella Stewart Gardner Museum heist are hidden in a Dublin house." *The Art Newspaper*, 19 October. Available at: https://www.theartnewspaper.com/news/stewart-gardner-heist-saga-deepens

[662] Melia, Paul & Brady, Tom (2013). "Rhino horns stolen in National Museum raid were not insured" *Irish Independent* 19 April. Available at : https://www.independent.ie/irish-news/rhino-horns-stolen-in-national-museum-raid-were-not-insured-29207084.html

discreet. Smaller private homes have been targeted, with police believing that criminal organisation identifying art works and heritage items expressly. In one case, a home in the south of Ireland was targeted and three valuable painting by promote Irish artists Jack B Yeats and Sir John Lavery were stolen and never recovered.[663] The National Museum certainly believes the majority of these theft are carried out quietly, with museum professionals concluding that most robberies in Ireland are being organised by international criminal organisations.[664] Recent research also appears to demonstrate that stolen-to-order heritage is now more common than had been previously thought.[665]

The 1990 theft of one object, a Sheela-na-Gig (a figurative carving often of a woman exposing her vulva, commonly found ancient church grounds in Ireland but also in many other north-western European nations[666]) from the grounds of an ancient church in the south of Ireland exposed the extent of international trafficking rings, some of which had their roots in Ireland.[667] The National Museum believed this Sheela-na-Gig in particular was stolen-to-order, meaning it was identified by buyers in Europe or the United States and then stolen.[668] This particular theft lead to the discovery of a transatlantic

[663] Irish Independent (2015) "Gardai renew appeal for help in tracing three stolen paintings" *Irish Independent*. 17 April. Available at: https://www.independent.ie/irish-news/news/gardai-renew-appeal-for-help-in-tracing-three-stolen-paintings-31150884.html

[664] Desmond, Tim. (2019). "A Tale of Two Sheels". *Documentary on One*, RTE. Available at : https://www.rte.ie/radio1/doconone/2018/0906/992135-a-tale-of-two-sheelas/

[665] For more on this phenomenon, see Hardy, (2015).

[666] Desmond, (2019); and for the Sheila-na-Gig taken from Fethard see Reilly, Jerome. (2005). "Celtic sex symbol has new gig in cyberspace." *Irish Independent*, 20 February. Available at: https://www.independent.ie/irish-news/celtic-sex-symbol-has-new-gig-in-cyberspace-26205191.html .

[667] Desmond, (2019)

[668] For the information of the National Museum, and the types of archaeological objects stone from graveyards, see Lally, Michael. (1991). "Burial Stones Return After FBI Sting."

operation that ended with prospective buyers of Irish cultural objects in Miami and Boston.[669] The ringleader of this transatlantic operation ran a simple but sophisticated network: using store-bought metal detectors to find buried cultural materials and his own boat to take them across the Atlantic to the United States.[670] The ringleader of this theft was never convicted (there was never enough evidence to pin the theft to him), though he was eventually arrested in another operation by the Irish Police and the FBI where he was found trying to sell other stolen Irish cultural materials to Boston University. He was given a four-month jail sentence, and the stolen objects were repatriated to Ireland.[671] The Sheela-na-Gig mentioned above has never been recovered. It is estimated to have been worth €6.5 million (in 2020 value), and National Museum staff believe most objects like it (including coins, ancient Celtic crosses and numerous other archaeological items taken from castles, churches and archaeological sites across Ireland) are destined for the London art market.[672]

As previously mentioned, while statistics can be complex to find, in the 1990s the Law Reform Commission (which had encouraged Ireland to ratify the 1995 Unidroit Convention) estimated that more than IR£2million worth of heritage was being illegally taken out of Ireland every year.[673] And with regards to the quantities of objects removed from Ireland, a 2013 return of 899 artefacts[674] – again, another case that was only discovered following a tip-off from the British

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RTE, 17 August. Available at: https://www.rte.ie/archives/2016/0811/808546-burial-stones-returned/.

[669] Desmond, (2019)

[670] Lally, (1991).

[671] Lally, (1991).

[672] Desmond, (2019)

[673] See Law Reform Commission. (1997). Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - Ireland. Dublin.

[674] Croffey, Amy. (2013). "Dead treasure hunter's loot of 899 artefacts returned to Irish museum." *The Journal*, 21 May. Available at : https://www.thejournal.ie/dead-treasure-hunters-loot-of-899-artefacts-returned-to-irish-museum-919430-May2013/

Museum[675] – demonstrated the extent to which Ireland and the Irish authorities rely on collaboration and cooperation to ensure the return of lost heritage. In this 2013 case, no one was prosecuted. As in the case of the four-month jail sentence for the ringleaders of the transatlantic smuggling operations relating to the Sheela-na-Gig, the same problem was demonstrated: even where people were arrested, the penalties were weak and fines low[676] when compared to the inflated prices of the objects they had sold.[677] There was and remains no real deterrent to stop these thieves in Ireland who are driven by profit and sometimes considered respectable members of their local society.[678]

2.3. Sweden: A Social Democratic Culture

Sweden, our third Member State case study, presents us with yet another approach to the protection of heritage that is markedly different from both Denmark and Ireland. Just as both Danish and Irish systems can be viewed through the lens of the colonisers and colonised respectively, so too has it been suggested that the Swedish system must be view not just through its history as a great power in the Nordic region, but also its association with the workers movement and social democracy, which has dominated Swedish politics for most of the 20th century, playing an undeniable role in shaping Swedish attitudes not just to heritage, but how it is protected.

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[675] BBC. (2013). "Irish treasure hunter's loot tracked down in England." *BBC Northern Ireland*, 21 May. Available at: https://www.bbc.com/news/uk-northern-ireland-22595925

[676] See Consolidated National Monuments Acts 1930-2004 (Ireland Ireland (1930); Ireland (1987). Ireland (July 1994); and Ireland (2004).

[677] Estimates are in the thousands, if not millions of euros, see Desmond, (2019).

[678] Generally, it is considered that it is middle-class professionals who also operate in these crimes, and with low fine and penalties, there is a feeling they have nothing to lose. For example, in another case relating to a different Sheela na Gig, it was a local police officer and his brother who were found to have stolen and illegally exported materials. The brother was given a fine and suspended sentence, while the police officer resigned from his position to escape any conviction, see Desmond, (2019)

2.3.1. The Agrarian and Apolitical as Cultural Heritage in Sweden

As discussed in the first chapter, and like Denmark, the first rules to protect moveable heritage in Sweden had been introduced in 1666, mainly to protect moveable religious heritage, and later rules were introduced to regulate the finding of coins and other precious metals buried,[679] rules we can now recognise as treasure trove law like those in Denmark and Ireland. In addition, and like Denmark, the Swedish monarch also moved to protect certain objects within the Royal collection beginning in the 1600s.[680]

The museum and heritage preservation policies of late 19th and early 20th century Sweden greatly departed from this early history; they reflected the changed political realities of modern Sweden and focused on ethnography and geography and (for a brief period) Scandinavianism.[681] As we discussed in the first chapter, these policies gradually became more insular, focusing almost exclusively on Swedish culture and Swedish people *within* the borders of the Swedish state.[682] This introspective point of view was reflected in collecting practices where emphasis was placed on heritage that was ancient, archaeological, and rural; at the same time, concerns were increasing that these types of heritage were of growing interest to tourists, dealers and foreign buyers.[683] These fears were shared with many other Europe countries – some newly independent – who were beginning to discuss

[679] Karlzén, (2010). p.29
[680] Kohl., & Fawcett, (1995). p.266
[681] Similar to the unification movements in Germany and Italy, some in Denmark, Norway and Sweden were pushing for unification among the three Scandinavian kingdoms, for more, see Hemstad (2018)
[682] Widén, (2011). p. 888
[683] Hillström, Magdalena (2006) "Ansvaret för kulturarvet: studier i det kulturhistoriska museiväsendets formering med särskild inriktning på Nordiska museets etablering 1872-1919," PhD, Linköping University, Department of Culture Studies. p. 226, via Carlsten, Susanna. (2017). p. 127

the use of heritage in building and shaping the character of the nation at the same time social democratic political ideals were taking hold across the continent, including in Sweden.[684] Similar to what happened in other parts of Europe,[685] depopulation, the reorganisation of rural societies, and increasing tourism strained traditional heritage protection, and there were claims of important cultural materials being taken from Sweden by collectors and tourists,[686] a damaging phenomenon addressed by other scholars.[687]

It was in this climate that in the 1920s research was carried out by officials in the Swedish Government to examine protections to prevent the depletion of heritage from the Swedish State. The French system of cataloguing all important items of cultural heritage was examined but found to be too burdensome administratively for Sweden, while at the same time the British system of export delays to find time for buyers (which would later be known as the Waverly system) was considered insufficient and did not go far enough.[688] Since consensus could not be found, attempts to introduce protections were abandoned.

This changed in 1927, when a curator at Stockholm's Nordic Museum wrote to the Ministry of Ecclesiastical Affairs to express his concern at the loss of folk furniture and other older related objects from Sweden. He concluded that only a permanent export ban could stop the loss of heritage and that all cultural objects like those described above older than 50 years should be included in a ban.[689] The United

[684] Kulturarvsutredningen. (1995). pp.94-95
[685] Swenson, (2013). p. 134
[686] Carlsten, (2017). p. 126
[687] Winter opines that heritage tourism is more damaging than beneficial, Winter, (2015). p.340
[688] Kulturarvsutredningen. (1995). p. 122
[689] Kulturarvsutredningen. (1995). p.106

States appeared to be the destination for most of these Swedish materials. One case reported was that of an antique dealer visiting 600 farms in rural Sweden, with shipping officials recording 25,000 square feet of cultural goods being exported from Sweden to the United States between April 1926 and February 1927.[690] Officials responsible for heritage in the government largely agreed with the curator, and the Ministry of Trade was tasked with drafting temporary and emergency legislation to protect cultural objects made in Sweden before 1860, which were essentially agrarian and rural in description.[691] The curator had proposed to prioritise heritage that emphasised the agrarian and rural characteristics of the Swedish nation, and the Government of the day took his concerns seriously and (reflecting the influence of the growing social democratic movement in Sweden) fine art, paintings, portraiture and antiquities with high market value that were representative of a powerful, noble and wealthy elite Swedish minority were not to be included in any legislation; as far as the Swedish Government was concerned, the agrarian, archaeological and rural items of the country were to be protected under the emergency legislation; they mattered more because they reflected the reality of the Swedish nation. The more they were protected and valorised, the more Sweden could learn about its own history of its own people, the vast majority of whom had been poor.[692]

Following the concerns of the curator, 'temporary' measures were introduced in 1927 to stop the loss of certain cultural materials

[690] The antique dealer was reported to have frequented farms in Nordland to search for cultural materials, see Kulturarvsutredningen. (1995). p.121

[691] In particular the objects were as mundane as "furniture, household utensils and wood, also […] objects such as friezes, mouldings, wall panels, shelves, doors, windows and window jugs, unframed roofs, roof boards or ceiling paintings, tiled stoves, floor tiles, luxurious logs, processed stones, profiled bricks, fittings and other forging, wall and […] clocks" see Kulturarvsutredningen. (1995). p.107

[692] Kulturarvsutredningen. (1995). pp. 122-123

from Sweden until a more permanent legislative and policy measure could be found.[693] These temporary measures protected:

> [...]the following ancient cultural objects, namely furniture and household utensils made of wood, even in combination with other materials, buildings and building parts and fixed interior objects belonging to buildings, such as friezes, mouldings, wall panels, shelves, doors, windows, window frames, ornamented ceilings, ceiling boards or ceiling paintings, tiled stoves, floor tiles, illuminated logs, processed stones, profiled bricks, fittings and other forgings, wall and bounce clocks in linings and loose linings[…] This announcement does not apply to items manufactured in 1860 or later.[694]

This first regulation – a royal proclamation rather than an act of parliament – was remarkably strict and reflected the extent of the fears of the loss of cultural heritage relating to rural Swedish life.[695] It is worth noting that the Swedish Customs Board was not convinced that such a ban was practical or enforceable.[696] Similar to comments made by the Irish Attorney General we discussed in the last section, and like those of the Danish officials in the previous section, the Customs Board felt that a specialist knowledge of heritage would be needed if export controls staff were to implement the law effectively.[697] Furthermore, Customs officials would need to be able to differentiate Swedish from non-Swedish heritage, and with this, they would also need an

[693] Sweden, (1927) *Kungörelsen (1927:129) angående förbud mot utförsel från riket av vissa äldre kulturföremål. (The Royal proclamation (1927:129)* concerning a ban on exports from the kingdom of certain older cultural objects. 6 May
[694] 5Dok (2023). Utförselreglering av kulturhistoriska föremål genom tiderna. *5Dok*. Available at: https://5dok.org/article/utf%C3%B6rselreglering-av-kulturhistoriska-f%C3%B6rem%C3%A5l-genom-tiderna.zx506vpv
[695] Carlsten, (2017). p. 127
[696] Kulturarvsutredningen. (1995). p.106
[697] Kulturarvsutredningen. (1995). p.122

understanding of the legislation to protect heritage in other countries. Like Ireland, they made reference to the French and Italian examples, which were felt to be too much of an administrative burden to protect heritage effectively.[698]

These 'temporary' measures described the royal proclamation were subsequently extended through most of the 20th century, and as the decades rolled on – and, again, similar to other happenings elsewhere in Europe[699] – other areas of heritage came under threat, firstly, the collections and estates of the Swedish nobility which were expressly not considered in the 1920s, as we just discussed. After the Second World War, no longer affordable for these families to maintain, these collections were broken up as a consequence of the post-war consensus and the Welfare State. By the 1960s, there was a growing fear that these collections of nobility would be lost outside of Sweden. Efforts were started to repeal and replace the 'temporary' 1927 protections, but in 1965, these proposals were dropped in favour of an expansion of the 'temporary' measures to introduce a stay on the export of heritage items at risk, very similar to Britain's Waverly Criteria, which allowed extra time for the State to buy item(s) back.[700] At the same time, the Swedish Government also petitioned the Nordic Council to harmonise legislation across Scandinavia – the same actions which spurred the Danes to legislate – but as we saw in the previous sections – and in our Literature Review – this is not always easy, and these attempts failed while also facing intense opposition from the art

[698] Kulturarvsutredningen. (1995). p..122

[699] Like those in the UK in the early 20th century, see Rees Leahy, (1999).

[700] The comparison to Waverly are the authors own, for breakup of estates see Carlsten, (2017). p. 127 the. Interestingly, at the same time, the Government considered introducing new changes to encourage the return to stolen heritage that may end up in Sweden, which had been taken by the German and/or the Japanese occupying forces during the Second World War, Kulturarvsutredningen. (1995). pp. 112-113

and antiquities markets in Sweden.[701] One final important shift in policy coincided with the increased recognition of the rights of Sweden's indigenous minority, the Sami. Starting in the 1970s, laws were drafted which would recognise Sami heritage objects as Swedish heritage and prohibit their removal from Sweden. Eventually, all these considerations were included in a long-awaited permanent law.[702]

The 'temporary' measures had been therefore extended until 1985 when the *Act on Protection against Export of Certain Old Cultural Objects*[703] was finally introduced.[704] Eventually incorporated into the 1988 *Heritage Conservation Act*[705] as the law's 5th chapter,[706] it went much further than the 1927 proclamation and identified vast swathes of heritage that needed to be protected in Sweden, including:

> Section 3. Any person wishing to export an item of historic interest from Sweden must obtain permission to do so if the item is of the kind referred to in Sections 4 and 5.
> Section 4. Swedish items of historic interest:
> 1. Items made before 1600, whatever their value:
> (a) printed works, maps and pictures and
> (b) manuscripts on parchment or paper.
> 2. Items more than 100 years old, whatever their value:

[701] The markets felt any reforms would be too far reaching, Kulturarvsutredningen. (1995). pp. 109-111
[702] Carlsten, (2017). P. 129
[703] Sweden, (1985). *Lag (1985: 1104) om skydd mot utförsel av vissa äldre kulturföremål (Act (1985: 1104) on protection against removal of certain older cultural objects)* 4 November.
[704] Aldercreutz, Thomas (2014) "Sweden" *Handbook on the Law of Cultural Heritage and International Trade.* Nafziger, J.A.R., & Paterson, R.K. (eds). Edward Elgar Publishing Limited. pp. 381-407
[705] Sweden, (1988). *Lag (1988:950) om kulturminnen m.m (Act (1988:950) on cultural monuments etc)* 30 June
[706] Carlsten, (2017). p. 128; and see Act as its Chapter 5: Protection against the Export of Certain Older Cultural Objects (*5 kap. Skydd mot utförsel av vissa äldre kulturföremål*), Sweden, (1988).

(a) drinking vessels, harness and textile implements if they are made of wood and have painted or carved decorations,

(b) folk costumes and embroidered or pattern-woven traditional textiles,

(c) tapestry paintings,

(d) furniture, mirrors and caskets,

(e) long-case clocks, wall clocks and bracket clocks

(f) signed faience

(g) musical instruments and

(h) firearms, edged weapons and defensive weapons.

3. Items more than 100 years old and worth more than SEK 50.000, insofar as they are not referable to point 2:

(a) paintings, drawings and sculptures,

(b) items of pottery, glass and porphyry,

(c) items of gold, silver and bronze, with the exception of coins and medals, and

(d) chandeliers and woven tapestries.

4. Items more than 50 years old and worth more than SEK 2.000, insofar as they are not referable to point 1 or 2:

(a) Lapp (Sami) items,

(b) unprinted minutes, letters, diaries, manuscripts, music and accounts,

(c) hand-drawn maps and drawings, and

(d) technical models and prototypes and scientific instruments.

Section 5. Foreign items of historic interest which presumably came to Sweden before 1840 and are worth more than SEK 50.000:

(a) furniture, mirrors and caskets,

(b) long-case clocks, wall clocks and bracket clocks,

(c) musical instruments,

(d) firearms, aged weapons and defensive weapons,

(e) paintings, drawings and sculptures,

(f) items of pottery, glass and ivory,

(g) items of gold, silver and bronze with the exception of coins and medals, and

(h) chandeliers and woven tapestries.[707]

These descriptions for cultural property in need of protection in Sweden would also serve as the template for the descriptions under Sweden's ratification of the 1970 UNESCO Convection[708] which Sweden ratified in 2003 (though it is interesting to note that the Swedish government initially opposed the 1970 UNESCO Convention, mainly due to Article 6 and the monitoring of imports, which Sweden felt was too resource intensive and could not be implemented[709]); in 2011 Sweden also ratified the 1995 Unidroit Convention which saw the entire provisions of the convention directly incorporated in to the 1998 Act as its 6th chapter on restitution of stolen cultural heritage.[710] For the purposes of national treasures in the EU, just like Denmark and Ireland, though the concept of a national treasure has not been introduced into Swedish law, civil servants have interpreted cultural objects as defined under the 1988 Act as 'national treasure' for the purpose of Article 36 TFEU.[711]

The 1988 Act remains in force with a notable amendment. In 2017, a change in the description of cultural goods was implemented which has resulted in Sweden having one of the most opened-ended assessments for cultural goods in Europe, with any moveable heritage that is over 75 years old and considered important for national cultural heritage now protected:[712]

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[707] Chapter 5 (Unamended), Sweden, (1988).
[708] Delegation of Sweden to UNESCO and the OECD (2015). Report by Sweden on the implementation of 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris. 25 June.
[709] Kulturarvsutredningen. (1995). p.145
[710] Chapter 6, Sweden, (1988).
[711] Annex, DG HOME & CECOJI-CNRS (2011).
[712] Carlsten, (2017). p. 128 ; and Sverker, Jenny & Romander, Clas (2017). "Sweden". *Art law: Restrictions on the export of cultural property and artwork: A report by the IBA Art, Cultural Institutions and Heritage Law Committee*, Polak, Peter M (ed). International Bar Association. p.110

> Section 1 Cultural objects that may be presumed to have been in Sweden for at least 75 years and may be of great importance to Sweden's cultural heritage may not be taken out of the country without a specific licence. Act (2017:562).[713]

In determining the second requirement (importance to Sweden's cultural heritage), it is up to those issuing the licence for export to decide if the object is rare and of a particular period or cultural historical context. If it is not Swedish, then it must be connected to an event or person in Swedish history; it must have an association with the cultural heritage of Sweden; be important for research purposes; or be preserved in the country for another reason.[714] Exceptions do exist. If an owner is leaving the country, they can take their private property with them, and this includes cultural goods. Objects received through an inheritance can also be exported out of Sweden; and objects can be removed for temporary exhibition, for instance; permission may also be granted if the object is being acquired by another cultural institution abroad. The Swedish Government may consent at any time to an object being taken out of the country. In short, there are numerous exemptions.[715] Sweden also differentiates between export to the European Union (which requires a permit) and export to a third country (which requires a licence).[716] In practice, refusals for licences/permits are rare, and there is no deferral system for export, or duty on the State to purchase objects that have been denied a licence/permit.[717]

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[713] Chapter 5, Section 1 (amended), Sweden, (1988).

[714] License applications are submitted to the National Heritage Board, and – depending on the object – are reviewed and issued by the National Library of Sweden, the Swedish National Archives, the National Art Museum, Prince Eugen's Waldemarsudde and the Nordic Museum, see Sverker, & Romander, (2017). pp. 110-111

[715] Sverker, & Romander, (2017). p.111

[716] Aldercreutz, (2014). p. 384

[717] Aldercreutz, (2014). p. 384

Breaking any of these rules carries heavy penalties. Intentional illegal export is defined under Swedish law as smuggling[718] and is punished with up to six years imprisonment and/or a fine. Failure to seek permission for export is a violation of the 1988 Act and is similarly punishable. Furthermore, a person who assists, packages, transports illicit cultural goods, or buys and sells stolen property can also be charged with smuggling and face a fine or imprisonment.[719] Sweden has provisions for the illegal movement of cultural property under a 2000 amendment to the 1988 Act and further penalties for smuggling under the Smuggling Act.[720] While Sweden has no import regulation,[721] foreign export law is valid in Sweden if someone introduces something into Sweden that was removed illegally from another country.[722] Sweden also operates an effective (although complex) blanket ban on the use of metal detectors to scavenge for buried heritage.[723] The finder of an archaeological object (with or without a metal detector, and the find must be unintentional) may claim the object for themselves *provided* they offer it to the State first and the State declines ownership. Though, following the discovery of any archaeological object, the site immediately becomes a protected heritage site and so further metal detecting is prohibited. Permits (issued by regional and county museums) are required to use metal detectors, though they are rarely

[718] Swedish National Heritage Board (2017)." Breach of the rules" *Swedish National Heritage Board* 20 November (Updated: 17 April 2018). Available at: https://www.raa.se/in-english/exporting-cultural-goods/breach-of-the-rules/

[719] Sverker, & Romander, (2017). p.112

[720] 'Swedish National Heritage Board (2017); and see Korsell, Lars (2015) 'Cultural Heritage Crime – the Nordic dimension (2006). Reflections ten years after the report. The way forward in 2016: Separately or together?' Nordic Council of Ministers Workshop, 2-3 December 2015. p. 60

[721] Sverker, & Romander, (2017). p.107

[722] Sverker, & Romander, (2017). p.114

[723] Chapter 2, Section 18, Sweden, (1988).

issued, which further restricts their use in scavenging for buried heritage.[724]

The intention of the Swedish legalisation – temporary or otherwise – was always to prevent the depletion of national patrimony,[725] though the scope of the legislation has changed vastly throughout the 20th century depending on the patrimony at risk. The evolution of the Swedish legislation over the past 100 years reflects internal changes in Swedish identity and demonstrates a maturing sense of cultural awareness, as well as a broader acknowledgement of the complexity of Scandinavian culture.[726] Indeed, in recent years, of all our three case studies, Sweden has played a leading role in coordinating efforts to restrain illicit trafficking, not just through the EU but also at international level via UNESCO and through the Nordic Council.[727]

2.3.2. "A favourable climate" – Illicit Trafficking in Modern Sweden

What is perhaps surprising with the Swedish case is that there have been no apparent singular moments or illegal incidents that have

[724] Rundkvist, Martin. (2009). "How You Metal Detected Legally In Sweden In 2009." *Aardvarchaeology* 29 May. Available at: https://aardvarchaeology.wordpress.com/2009/05/29/how-to-metal-detect-legally-in/.
[725] Carlsten, (2017). p. 129
[726] Carlsten, (2017). p. 129. In addition, an example of the complexity and fluidity of the nature of Swedish/Scandinavian and Scandinavian/foreign identity which is reflected in the legislation can be seen with respect of heritage in the province of Scania, in southern Sweden. The province has long changed hands between Denmark and Sweden, and through the legislation (prior to the removal of age thresholds, that is) heritage that was Danish, and had been produced in Scania during the Danish period of occupation, could have been claimed by Sweden under Swedish law, if that heritage had ended up in Sweden (via a travelling exhibition, for example), see Aldercreutz, (2014). p.389
[727] Nordic Council of Ministers (2017). *Illicit trade in cultural artefacts: Stronger together: How can the Nordics join forces to stop the illegal import and export of cultural objects?* Nordisk Ministerråd

directly impacted on the need to legislate,[728] like that of the Gavnø sale in Denmark of the Emly Shrine in Ireland. Rather, legislation has evolved slowly, almost reflecting the societal change of Swedish demographics. This is not to imply that Sweden has no problems with loss of heritage or illegal import from elsewhere. Far from it. While the main official reason for the legislation has been to avoid the depletion of national heritage, in recent years one of the underlying motives for the legislation has been to regulate an increasingly liberal and unwieldy art market.[729]

In recent years, there has been an intense focus on art and antiquity markets in Sweden. The Swedish national committee of ICOM has been championing the translations of ICOM's Red Lists of Heritage Under Threat into Swedish, and one of the main reasons for this has been the increased interest in foreign cultural materials on the Swedish market.[730] Recently, the Swedish National Heritage Board has been focusing resources on this largely unregulated market, with evidence demonstrating an increasing number of objects looted from

[728] Korsell, Lars (2015) 'Cultural Heritage Crime – the Nordic dimension (2006). Reflections ten years after the report. The way forward in 2016: Separately or together?' Nordic Council of Ministers Workshop, 2-3 December 2015. p. 43, but, following a pan-Nordic area report on cultural heritage crime, Sweden did introduce special crime codes for the theft and burglary of cultural artefacts from churches, museums and other cultural institution

[729] Carlsten, (2017). p. 129

[730] Currently, the Red List of Chinese objects are available in Sweden. The main reason has been the share of objects on the market, and the feeling that these objects are being illegally sold.see ICOM Sweden (2020). "Publicering av svenska översättningar av ICOMs röda listor för Jemen och Kina." *ICOM Sverige* 23 July. Available at: http://icomsweden.se/senaste-nytt/publicering-av-svenska-oversattningar-av-icoms-roda-listor-for-jemen-och-kina/.

war zones. As such, monitoring the market has become a priority for Swedish authorities.[731]

Independent researchers have verified an opaque nature of the Swedish art market,[732] concluding that a major problem is a lack of awareness or understanding, with some antique dealers not even aware of the exact origin of some of the objects they are selling. [733] With this, recent surveys have also demonstrated that half of antique dealers have no measures to check the provenance of objects arriving into their auction houses.[734] More broadly, while there is an acknowledgement that laws and rules exist, there are few strategies amongst auction houses, dealers and even museums to deal with the problems of illicit trade.[735] Of course, many dealers are very aware of the rules and that they are breaking them: there are several cases of dealers having used loopholes to export objects, including a once-famous (and now closed) loophole that allowed objects to be removed from China via Hong Kong.[736] One high-profile dealer – who had once boasted to the Swedish Queen of the attention and care given to the provenance of objects in his possession – was discovered to have smuggled many objects out of China via this loophole.[737] This display of double standards is not unique, as exemplified by another case where the Nordic Museum in Stockholm allowed a Grand Antiquities fair to host

[731] Lundgren, Frida Larsdotter, Korsell, Lars & Ellior.Maria (2019). Swedish market for cultural objects from war and conflict zones: A risk analysis. National Heritage Board & Polisen, Stockholm & Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p.131
[732] See Lundén, (2004) for a full analysis.
[733] Korsell (2005). p. 95
[734] Korsell (2005). p. 117
[735] Korsell (2005). p. 118
[736] Lundén, (2004). p. 204: for more on the Hong Kong Market and this famous loophole, see Gallagher, Steven. (2017). ""Purchased in Hong Kong": Is Hong Kong the Best Place to Buy Stolen or Looted Antiquities?" *International Journal of Cultural Property* Vol. 24 (4).
[737] The objects were smuggled out in cigarette boxes, and in clothes, see Lundén, (2004). p.200

people and companies who were known to be selling looted objects.[738] Observers also point to these double standards where in public there is the appearance of upholding ethics and laws, but behind the scenes it can be a different story.[739] The same researchers conclude that the majority of objects on the Swedish market lack provenance.[740] Chinese objects have been identified as a particular problem.[741] But there are also problems with Mediterranean objects[742] and heritage from the Middle East and India.[743] Objects have also come from closer regions, including coins from England and Bulgaria.[744] The problems of unregulated antique markets run deep, with evidence to suggest Norwegian objects are also ending up in the Swedish market, and dealers report the ease with which objects can be imported into Sweden.[745]

Moving to criminal activities, thefts from archives,[746] museums[747] and churches[748] are considered a problem in Sweden.

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[738] Lundén, Staffan (2012). "Perspectives on Looting, the Illicit Antiquities Trade, Art and Heritage." *Art, Antiquity and Law* Vol 17 (2). p. 126

[739] Here, Lundén points to a case where case where an archaeologist provided illegally obtained objects to a dealer who had previously said they would no acquire such material see, Lundén, (2004). p.205

[740] Lundén, (2004). p.198

[741] Lundén, (2004). p.199

[742] In one instance, The Museum of the Mediterranean was found to have acquired stolen objects between 1993 and 1998, and after the scandal, the museum adopted the ICOM acquisition code, see Lundén, (2004). p. 220. The objects acquired came from dealers who had also been supplying illegal antiquities to museum the United States, in particular the JP Getty Museum, see Lundén, (2004). p.222; In this case, there was not enough due diligence carried out by museum, see Lundén, (2004). p.226

[743] Lundén, (2004). p.200

[744] Lundén, (2004). p. 213

[745] Korsell (2005). p. 93

[746] Korsell (2005). p. 71

[747] Korsell, Lars, Hedlund, Göran, Elwér, Sofia & Vesterhav, Daniel (2006). *Cultural Heritage Crime: the Nordic Dimension*. Stockholm: Swedish National Council for Crime Prevention. pp. 80-96

Thefts from religious institutions are so problematic that the Church of Sweden – like its Danish counterpart[749] – maintains a register of stolen religious items.[750] There are no similar databases for other heritage institutions in Sweden,[751] but recent high-profile thefts have shifted public and government opinion, and there is now an acknowledgement that more needs to be done to protect objects in Swedish cultural institutions.[752] The single most high-profile theft was that of several valuable paintings from the National Museum in 2000. Upwards of US$30-40 million worth of paintings were stolen and eventually recovered.[753] Looting-to-order has too been identified in Sweden.[754] Cases include the Royal Library that was broken into in 2005,[755] the Royal Coin Museum that suffered a theft in 2017,[756] some of the crown jewels that were stolen in broad daylight from a church in central Stockholm in 2018,[757] and a valuable bell that was stolen from another church in 2020.[758] In certain cases, it has not been possible to recover the

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[748] Reliquary stolen form a church in 1999, see Lundén, (2012).p.125; and Churches are under threat too, with over 200 objects lost since 1994, see Lundén, (2012).p.114; there, it is assumed Churches in Sweden are under threat across the region, but suffer from more threats than in the others, see Korsell (2005). p.160

[749] See Chapter 2.1.2.

[750] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p.177

[751] Korsell (2005). p.169

[752] Korsell (2005). p.101

[753] CODART. (2005). "Rembrandt recovered! Self-portrait stolen from Nationalmuseum in Stockholm recovered in Copenhagen." *CODART* 16 September. Available at: https://www.codart.nl/museums/rembrandt-recovered-self-portrait-stolen-from-nationalmuseum-in-stockholm-recovered-in-copenhagen/.

[754] Hardy, (2015).

[755] Korsell (2005). p.102

[756] Backe, Annika. (2017). "Theft at the Stockholm Royal Coin Cabinet." *CoinsWeekly*, 27 April. Available at: https://coinsweekly.com/theft-at-the-stockholm-royal-coin-cabinet/

[757] Anderson, Christina. (2018). "In Crown Jewels Heist in Sweden, 2 Thieves Escape by Speedboat." *The New York Times*, 1 August. Available at : https://www.nytimes.com/2018/08/01/world/europe/sweden-theft-crowns.html.

[758] RT. (2020). "Theft suspected after bulky historic 17th century cracked bell disappears without trace from Stockholm church." *Russia Today*, 28 December. Available at : https://www.rt.com/news/510893-historic-bell-stolen-sweden/.

lost heritage, including paintings taken from the Museum of Modern Art in 1993[759] and the Strindberg Museum in 2006.[760] Swedish heritage has also been victim to politically motivated thefts, and there were a series of large scale thefts from churches in Sweden by AKBR, an activist group that threatens to destroy objects it has stolen unless amnesty is given to deported fathers of children in Sweden.[761] Swedish folk art has also been at risk, and stolen objects were seized by Swedish police as part of the Europol Pandora project in 2015.[762]

Theft of buried heritage is especially problematic. Despite an almost nationwide ban on unregulated excavating and metal detecting,[763] Sweden still struggles to implement its metal detecting rules, especially on the island of Gotland.[764] Initially, under the 1988 Act, the restriction of metal detecting only affected the islands of Gotland and Oland, which are heritage-rich areas of Sweden. However, upon realising the scale of the problem throughout the country, it was quickly extended across Sweden.[765] It is clear that metal detecting

[759] Georges Braque's *Still Life* (taken from the Moderna Museet, Stockholm, Sweden), missing since 8th November 1993, see Lindsay, I. (2014). *The History of Loot and Stolen Art: from Antiquity until the Present Day*. Unicorn Press Limited. p28

[760] And August Strindberg's *Night of Jealousy* (taken from the Strindberg Museum in Stockholm, Sweden), missing since 15th February 2006, Lindsay, (2014). p. 491

[761] Korsell, (2005). p.124

[762] https://www.europol.europa.eu/media-press/newsroom/news/over-56-400-cultural-goods-seized-and-67-arrests-in-action-involving-31-countries

[763] It is an effective ban, although in practice metal detecting is allowed with a permit, but with regulations so strong, it is an effective ban, Swedish National Heritage Board (2017)

[764] Estonian to UNESCO. (2010). Report on the application of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. UNESCO 1970 Secretariat.

[765] Ulst, Ingrid. (2012). "The Role of Community Archaeology in Heritage Protection: Responsible Metal Detecting as a Tool for Enhancing the Protection of Archaeological Heritage." MA, Faculty of Philosophy, University of Tartu. P.21; this is also noted by Wennberg who writes that at first there was no ban in Gotland, until there was a realisation of the number of silver hoards that had been looted, see Wennberg, Brian Kristian. (2014). "Understanding and Attitudes – Heritage Crime in Norway." *Heritage Crime: Progress, Prospects and Prevention*, Grove L. & Thomas, S. (eds) Palgrave Macmillan

continues regardless[766] (with some claiming it is worse than all other Nordic countries[767]), and given that Sweden requires permits for metal detecting, it can be assumed that finders usually keep objects for fear of being prosecuted for acting without a permit.[768] Given that there is a keen interest in Viking-related materials, such as knives and pottery, which are in high demand on foreign markets,[769] it can be concluded that unregulated excavations and metal detecting continues to satisfy these market demands.

It can also be concluded that many of the stolen objects are leaving Sweden, as demonstrated in the return to Sweden of an historic book that ended up on a market in the United States.[770] The rise in interest in purchase of materials, coupled with the dwindling number of export permits has given rise to the suggestion that buyers and sellers not following the law and simply are taking advantage of open borders to remove cultural property from Sweden without a permit.[771] Swedish law enforcement authorities have admitted that the legal climate in Sweden is 'favourable' to these criminal activities,[772] and as a result, the Swedish police have recently established a full-time unit dedicated to art crime[773] though Swedish Customs still lacks a dedicated cultural unit.[774] Particularly since the southern

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UK. pp. 166-167; The loss of coins from the region has been noted too, see Lundén, (2004). p.214; and see O'Mahony, Paul. (2009). "Three arrested for Viking treasure theft." *The Local SE*, 6 November. Available at: https://www.thelocal.se/20091106/23120/.

[766] Looting is happening, and there is even evidence of registered and protected sites being looted, with a new focus on underwater heritage, see Lundén, (2004). p. 215

[767] Korsell, (2005). p.37

[768] Korsell, (2005). p.169

[769] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p.74

[770] Cascone, Sarah. (2015). "US Returns to Sweden Millions in Antique Books Stolen by Suicidal Librarian." *Artnet News*, 17 June Available at: https://news.artnet.com/art-world/stolen-books-return-to-sweden-309156.

[771] Aldercreutz, (2014).

[772] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 165

[773] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p.132

[774] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p.133

Øresund/Öresund crossing between Copenhagen and Malmo was established, the loss of heritage from Sweden via this bridge has been identified as a major problem.[775] While theoretically, export licences and permits must be presented at frontiers when leaving Swedish territory, this is not always considered straightforward since most border posts between EU member states have been removed.[776] Finally, although officials from the national museums carry out information checks on auction sales, advising what objects can and cannot leave the country,[777] observers have suggested the system is counterproductive. Although it aims to keep cultural property in Sweden, there is no incentive to acquire the cultural property for public benefit or consumption, and so materials that are refused export remain in private hands where they may be free to leave via unguarded borders.[778]

2.4. Conclusion

As we can see from these short analyses of three EU Member States, we have three different legislative and policy systems at play. Admittedly an unorthodox selection of case studies, Denmark, Ireland and Sweden have each elaborated systems built upon their unique histories to respond to threats which are equally individual. But across the three countries, the controls and protections bear similarities (all three have system of control at borders, as well as at heritage sites, and heritage professionals play and important role in controlling them). With the notable exception of Ireland, the case studies also have interesting policy procedures in place to monitor the art market and

[775] Lundèn (2004).
[776] Aldercreutz, (2014) p. 384-385
[777] Officials from the Nordic Museum and the National Art Museum operate an informal system whereby their officials visit auctions houses to advise on objects for sale which would require licences/permits if being bought for export. Informally, these pre-judgments are called "export bans" Aldercreutz, (2014) and Sverker, & Romander, (2017).
[778] Aldercreutz, (2014) p. 406

stamp out trafficking before it happens. Yet, problems remain, and they too have commonalities, chiefly among them that all three countries appear to struggle enforcing their individual rules at borders, and administrative authorities in all three countries are not well equipped to address the problems. The identification of heritage would appear to be a major obstacle common to all three countries. Perhaps the most interesting set conclusions that can be drawn from our three case studies is the fact that no system has been able to successfully restrain illicit trade and the loss of heritage from each of these case studies remains a problem and continues to be so. Despite the importance of these controls, and the history of export controls they have built on, it is also fair to conclude that these initiatives do not appear to protect heritage from trafficking, and the extent to which they can be said to be successful is debatable. One final conclusion would indicate that while it may be straightforward to legislate to protect heritage, in practice the implementation is not always so clear.

Chapter 3. 'Within its Sphere of Jurisdiction': First Responses to Illicit Trafficking in Europe

3. Introduction

As we saw in the first chapter, the problems of illicit trafficking have a long and complex history. But by the 1970s, policy experts were becoming more and more concerned with the problem at an international level. The process of decolonisation, which was in full swing during this period, played an important role in drawing Western observers' attention to the problem. Policy makers in European countries were also raising concerns. At the same time, Europe was undergoing an unusual experiment in supranationalism. To avoid a repeat of the Second World War, a select few countries began operating under a structure where Member States would pool and share their sovereignty and resources to improve their socio-economic situation. Though it was a strictly economic experiment, all of these factors and the threats to heritage would combine in Europe and compel policy makers to act, and, as we shall see, test the limits of this new European project to protect heritage.

3.1. Defining Heritage and Identifying Actors in Europe

In the late 1960s and early 1970s, the issue of illicit trafficking was increasingly being discussed at international level. The EU was not the first, nor was it alone in considering this urgent problem. In 1971, 1972 and 1973, for instance, various national delegations[779] at the General Assembly of Interpol requested its Secretariat to investigate the issue more thoroughly.[780] Non-governmental art market organisations,

[779] The Indian delegation raised the matter in 1971, see Interpol, (1971); and the Italians in 1972, Interpol, (1972).
[780] Chatelain, (1976). p. 2

such as CINOA, were also advising their members to change their behaviour.[781] Though these organisations are largely outside the scope of our inquiry, their international actions and respective outcomes are not insignificant, and they contributed to the EU and its Member States' efforts to address this phenomenon. In particular, we shall include in the beginning of this chapter an examination of another continental institution, and though an entirely separate organisation from the EU, its activities have had important implications for EU heritage protection.

3.1.1. 'European' Heritage and the Council of Europe Conventions

Questions about the protections afforded to European art treasures were first raised in July 1973 in the European Parliament,[782] and a parliamentary report and resolution in May 1974 identified the "many dangers threatening historic and artistic works," calling upon the European Commission to adopt "measures to wage a more effective fight against the theft of and traffic in works of art and archaeological treasures."[783] Largely on foot of the Parliament's call for action,[784] the Commission's civil servants would begin a much broader examination of the cultural parameters of the EU as well as an analysis into the problems of illicit trade.[785]

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[781] At the Interpol symposium, the chair of CINOA noted that there were changes, while the French delegation noted that this was lip service. See p. 746.

[782] Mr Müller and Mr Delia Briotta. 16 July 1973. Written Question No. 227/73 to the European Commission: Protection of European art treasures. edited by European Parliament. Brussels.

[783] See point 15, Elles, (1974).

[784] See introduction note 7, DG XII (1974). p. 7.

[785] There were many other summits and meetings that took place, which spurred on action in the cultural sectors, see DG XII (1974), however, with respect to illicit trade and heritage protection, it was largely the resolution of the Parliament that put heritage and cultural on the agenda, see Dumont, Georges (1980). Cultural Action in the European Community. European Commission.

As we discussed in the literature review, cultural policy and heritage protection were never envisaged as domains within which the EU should operate,[786] and though the principle of conferral in the TFEU did give the EU exclusive competency in common commercial or trade policy,[787] the Treaty did not allow for any deviation from these strictly economic elements of the European integration project as it was founded in 1957, and any deviation (especially into areas as sensitive as heritage protection and cultural policy) could even be interpreted as part of a federalist agenda – a prospect that was entirely unacceptable to most Member States at this time.[788] Furthermore, there was no appetite amongst the first EU Member States for a cultural policy at EU level, let alone competencies to legislate in cultural affairs, and this largely remained the case for most of the rest of the 20th century; and just as criminal law is still regarded as a sovereign matter to States, so too has cultural affairs remained a prerogative exclusive to national governments.[789]

The extent to which Member States are allowed to retain their control over their cultural policies and their prerogatives in heritage protection is demonstrated by Article 36 of the TFEU, which allows:

> "Restrictions […] of importation, exportation or transit […] justified on grounds of […] the protection of […] national treasures of artistic, historical or archaeological value".[790]

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[786] Calligaro, & Vlassis, (2017). p.12. Also, with respect to cultural policy, see Ferrazzi, Sabrina (2019). "EU National Treasures and the Quest for a Definition." *Santander Art and Culture Law Review* Vol. 2 (5) p. 60-61; and Talbot, Nicholas J. (1993). "EEC Measures on the Treatment of National Treasures." *Loy. L.A. Int'l & Comp. L. Rev.* Vol. 16 (127). p. 131.
[787] EUR-lex (2023). "EU Trade policy" Available at : https://eur-lex.europa.eu/EN/legal-content/glossary/eu-trade-policy.html
[788] Calligaro, & Vlassis, (2017). p.12
[789] Calligaro, & Vlassis, (2017). p.12
[790] Article 36, European Union, (1957) *Treaty Establishing the European Community (Consolidated Version), 'Rome Treaty'*, 25 (March)

Through Article 36, Member States can designate certain cultural property as 'national treasure', which exempts it from the freedom of movement clauses set out in the TFEU. Essentially it is a type of export ban to protect heritage within the borders of its Member State of origin. Without this article, cultural property of all kinds can be treated the same as any other good, and Member States would not be able to keep important cultural heritage inside their territory. The two main criteria usually (though not exclusively) set down to distinguish a national treasure are: firstly, the property must of particular importance, that justifies the need for its protection; and secondly that the property has been specifically classified or defined by virtue of ownership of a Member State.[791]

The extent of the protections was tested by Italy in the court case *Commission v. Italy* (1968), but the Courts of Justice of the EU ruled that Italy's imposition of an export tax to restrict the export of cultural goods that are not national treasures was contrary to the TFEU.[792] The aim of the Italian law had been to restrain the export of cultural materials from the Italian state, and in effect stem the loss of cultural heritage via the imposition of an export tax,[793] the Court ruling upended this declaring that:

> Under Article 9 of the Treaty [the EU] is based on a customs union 'which shall cover all trade in goods'. By goods, within

[791] UNESCO & European Union (2021). Fighting Illicit Trafficking in Cultural Objects: Searching for Provenance and Exercising Due Diligence in the European Union. Pg. 4 Available at: https://en.unesco.org/sites/default/files/la_lutte_contre_le_trafic_illicite_en_01_0.pdf

[792] The Court of Justice of the EU noted that restrictions in trade between EU Member States under the Article 16 of the TFEU: "Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest," Article 16, European Union, (1957)

[793] See Coccolo, Francesca (2017) "Law no. 1089 of 1 June 1939: The Origin and Consequences of Italian Legislation on the Protection of the National Cultural Heritage in the Twentieth Century" *Cultural Heritage. Scenarios 2015-2017*, Pinton, Simona & Lauso, Zagato (eds)

> the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.
>
> The articles covered by the Italian Law, whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money and so be the subject of commercial transactions. That view corresponds with the scheme of the Italian Law itself, which fixes the tax in question in proportion to the value of the articles concerned.[794]

The ruling has meant that Member State's may impose restriction on cultural heritage leaving their territories but only if that heritage is a national treasure as per Article 36, and still these restrictions cannot take the form of an export tax or customs duty which are disallowed under the TFEU.[795] The ruling in turn led to a new class of cultural objects which are not national treasures, what the EU now terms 'cultural goods', goods that despite being heritage items, are under EU law no different to any other commodities being trade in the Common Market of the EU.[796] As a general rule, while this means national treasures do receive greater protection from theft and smuggling, it also means that there is a considerable amount of other heritage that

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[794] European Court of Justice (1968). Commission of the European Communities v Italian Republic. Case 7/68. (10 December).

[795] European Court of Justice (1968); In a sense, Article 36 allows for a form of export prohibition (though it cannot be called this) on certain cultural heritage that is designated 'national treasure', which protects objects from leaving their Member State of origin. More specifically, Articles 30 to 34 laid out the freedom of movement of all goods. Essentially, it is a prohibition on export prohibition from Member States of certain items of cultural heritage, Ferrazzi, (2019). p.59; also more broadly on national treasures see Kyriakou, T. (2015). "The Protection of National Treasures in the EU Single Market." *Cultural Governance and the European Union*, Psychogiopoulou E. (ed). Palgrave Macmillan.

[796] DG HOME & CECOJI-CNRS (2011). p.40 and 46

remains unprotected within the EU.[797] As mentioned in the literature review,[798] Article 36 and the national treasure moniker represent an area of overlap between the cultural policies of Member States and the internal market prerogatives of the EU.[799]

The repercussions of this on heritage protection and illicit trafficking are interesting. Even though the EU was never intended to interact in cultural affairs, through Article 36 and the ruling in *Commission v. Italy* (1968), and taking into consideration the principles of conferral, the EU is allowed to intervene to regulate the movement of cultural goods across the EU which are not national treasures.[800] The resulting contradictions are further interesting: the Commission is expected to promote policies to increase free trade within the EU, including reducing barriers to the freedom of movement of cultural goods, actions which can run the risk of increasing illegal trade.[801] Therefor the EU must recognise that its measures to extend the freedom of movement must be countered by measures to enhance heritage protection.[802] Furthermore, through this the Commission also retains the right to regulate the framework of definitions of national treasures under Article 36,[803] meaning the Member States do not have an

[797] European Commission (2013). Proposal for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (Recast) (COM(2013) 311 final) 30 May. European Commission

[798] See iv. Cultural Policies and the Politics of Culture

[799] Ferrazzi, (2019). p. 59

[800] DG HOME & CECOJI-CNRS (2011). p.40 and 46

[801] Not only does a report from 1982 mention this, see European Commission. (1982). Stronger Community Action in the Cultural Sector (Communication to Parliament and the Council). (COM(82)590 final). European Commission; but previous reports, including European Commission. (1977), and DG XII (1974) IIA, all indicated that they mean to mitigate the illegal trade of cultural heritage, while simultaneously working to facilitate the legal movement of "cultural goods" as allowed under the Treaties. Yet, they not this would conversely risk an increase in illicit trade.

[802] European Commission. (1982). p. 9. paragraph 9.

[803] Ferrazzi, (2019). p. 61-63

unqualified competency to designate their property as national treasure.[804]

Some Member States have transposed the concept of a national treasure into their own legislations: in France, the notion of a national treasure is wide in scope and not constrained by age or financial thresholds; while in Belgian (Wallonia) law, a national treasure must be of considerable interest to the French-speaking community of Belgium for historical, archaeological, ethnological or scientific reasons.[805] These examples aside, most Member States have avoided interpreting national treasures in law, with some observers going so far as to suggest it demonstrates mistrust by the Member States with EU indicators or markers for important cultural heritage, some suggesting that Member States have also rejected the notion of 'national treasure' for fear it could allow the Commission to encroach on their sovereignty in heritage protection.[806] And it is interesting to consider that even though the Commission has retained the right to define a national treasure under EU law, it has never done so.[807]

One explanation for the hesitance on the part of the EU can be do with the diversity of European cultures; given the fact that heritage in the EU can change markedly from Member State to Member State, it is unsurprising that the definition of a national treasure depends heavily on a country's interpretation of this term.[808] In addition, further

[804] Ferrazzi, (2019). p. 61-63
[805] DG HOME & CECOJI-CNRS (2011). p. 71
[806] DG HOME & CECOJI-CNRS (2011). p. 72
[807] See, European Commission. (1982). Stronger Community Action in the Cultural Sector (Communication to Parliament and the Council). (COM(82)590 final). European Commission. This asserts that the Commission cannot hinder trade in works of art, as this against Article 36 and would be contrary to Articles 30 and 34. It makes it explicitly clear that these are not cultural policies.
[808] See 4.1, European Commission (2009). Third Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully

complexities have been identified owing namely to the different translations of the term "national treasure" could result in a more extensive interpretation in different Member States.[809] Though the translation of "national treasure" poses no great difficulties in our three case studies,[810] there are different degrees of designation for objects. In Denmark, 'national treasures' are identified through *Act no. 332 of 4 June 1986 on safeguarding cultural values in Denmark* as objects of "inalienable national cultural values" and are identified as such by the Cultural Assets Commission;[811] Ireland maintains a register of cultural objects in the *National Cultural Institutions Act (1997),* and these are prohibited from leaving the country;[812] and in Sweden, under the *Cultural Environment Act (1988: 950),* the National Heritage Board maintains a list of object that are prohibited from being removed from the Sweden. Where heritage is a 'national treasure' by virtue of state ownership, the actual extent of the protections afforded by the 'national treasure' designation have been also been questioned. This is because the protection afforded by Article 36 can essentially be negated, as these 'national treasures' are already subject to certain protections afforded by property law of individual Member States. In addition, the item may not be at high risk of theft and, as the property of a Member

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removed from the territory of a Member State. (COM(2009) 408 final). European Commission, and the issues raised by France, Italy and Hungary p. 6; Calligaro, & Vlassis, (2017). p.12.

[809] Frigo, (2004). p. 372, notes that Italian, Spanish and Portuguese translation of national treasure are rendered national *heritage*, which could have a more expansive interpretations than the English or indeed French or German translation; Graziadei, & Pasa, (2019). p. 97 agree.

[810] The Danish and Swedish translations *nationale skate* and *nationella skatter* are not problematic, nor is the Irish *seoda náisiúnta*.

[811] Nielsen, Erland Kolding (2016). *Beskyttelsen af kulturværdier i Danmark*. Cultural Values Committee. Available at: https://kulturvaerdier.kb.dk/wp-content/uploads/2016/09/Beskyttelsen-af-kulturvaerdier-i-Danmark.pdf

[812] DG HOME & CECOJI-CNRS (2011). Annex. p.40

State, may be unlikely to be moved out of the country or exported at any stage, other than for international exhibitions.[813]

While these theoretical and constitutional discussions were playing out in the EU, another European actor was considering actions to address illicit trafficking. While both the EU and the Council of Europe were both founded in the aftermath of the Second World War, only the Council of Europe – an organisation to promote democracy and human rights in the aftermath of the tyranny of National Socialism, distinct and separate from the EU – was the only one of the two in a position to focus on cultural affairs on the European continent. As we saw, the EU was founded as an economic and trading partnership, and despite the revelations we discussed just now, there was still no desire in the EU to engage in cultural affairs.[814] However, since the Council of Europe were already engaging in cultural activities, there was also no practical need for the EU to duplicate any of this work.[815]

In 1964, the Italian Delegation to the Council of Europe expressed concerns at the apparent increase in theft and smuggling of cultural heritage in Europe.[816] Other Member States of the Council of Europe shared Italy's concerns, especially regarding the increasingly international nature of the illegal trade, not to mention illegal

[813] The fact that these objects would be owned by the State means the restrictions were not due only trade regulations, but controls as property owners, therefore, a state would be unlikely to export its own cultural property outside of its territory permanently. Voudouri, D. (1994). "Circulation et protection des biens culturels dans l'Europe sans frontières." *Revue du Droit Public* 110. p. 488.

[814] As Calligaro writes, any deviations away from the economic and trades aspects of the EU were not envisioned to begin with, but also considered unacceptable was the development of a European cultural policy, which could have been seen as part of a federalist agenda, Calligaro & Vlassis (2017). p.12

[815] Elles, (1974). p. 9 4

[816] Council for Cultural Cooperation (1964). Proposed new Cultural Programme to be Submitted to the Ad Hoc Committee. (CCC(64)2). Council of Europe. p. 16

excavations across Europe, which they saw as both damaging and problematic.[817] In particular, the Italians noted:

> In the framework, of measures to safeguard the cultural heritage, whose importance to Europe need hardly be stressed the Italian Delegation proposes that the Council for Cultural Co-operation consider the desirability of concluding a European Convention designed to check the large-scale international trade which has grown up in-recent years in objects of artistic and archaeological interest, especially such as are obtained from clandestine excavation. [818]

Upon this request, the Council of Europe began investigating whether a convention at European level could be drafted – similar to the framework of the 1964 UNESCO Recommendation, which itself was the normative framework for the 1970 Convention. Initially foreseen as a soft legal instrument like a recommendation, they felt this would provide guidance to help restrain the illicit import and export of cultural property across the European continent. Eventually, it was decided that a more ambitious and binding convention should be considered, so as to restrain illicit trafficking and regulate the trade of cultural heritage as much as possible. This would involve institutionalising European cooperation in protecting heritage, which would increase the search for and restitution of stolen cultural heritage and bind national authorities to issue official documentation for the movement of any objects.[819]

What is most surprising about the Council of Europe's actions is how quickly they diverged from their originally stated aims. Under the chairmanship of the Italians, specialists from France, Germany, Greece, Sweden and the UK met in December 1966 to discuss how to

[817] Council for Cultural Cooperation (1964). p. 30
[818] Council for Cultural Cooperation (1964). p. 30
[819] Council for Cultural Cooperation (1964). p. 30

best protect only *archaeological* heritage from theft and trafficking.[820] Soon, the work carried out by the drafting committee gave way to a treaty with a remarkably different character than the originally intended version proposed by the Italians in 1964.[821] Under *the European Convention on the Protection of the Archaeological Heritage (1969)*,[822] also known as the London Convention,[823] illicit trade was entirely overlooked and the scope of the Convention was much more restricted, instead including passages that focused only on illicit excavation, rather than illicit trafficking: [824]

> Article 3: To give full scientific significance to archaeological excavations in the sites, areas and zones designated in accordance with Article 2 of this Convention, each Contracting Party undertakes, as far as possible, to:
> a) prohibit and restrain illicit excavations
> b) take the necessary measures to ensure that excavations are, by special authorisation, entrusted only to qualified persons;
> c) ensure the control and conservation of the results obtained.

[820] Council for Cultural Cooperation (1965). Tenth Session, Draft Report. (CCC(66)Misc5). Council of Europe. p. 46; The meeting of the States Parties with the specified aim of the Italian Government in preventing theft can be found at Council for Cultural Cooperation (1966). Eleventh Session, Working Party on the Problem of protecting the European archaeological heritage (fifth draft). (CCC/AC(66)164). Council of Europe.
[821] Council for Cultural Cooperation (1967). Thirteenth Session, European Convention on the protection of the archaeological heritage (fifth draft) Addendum. (CCC(67)100Addendum). Council of Europe.
[822] Council of Europe (1969). *European Convention on the Protection of the Archaeological Heritage.* E.T.S. No. 66, (6 May).
[823] See O'Keefe, Patrick J. (1993). The European Convention on the Protection of the Archaeological Heritage. *Antiquity*, Vol. 67(255).
[824] In addition to Article 3, Article 10 obliged Parties to raise awareness to illegal excavations, to cooperate with competent authorities in other States to stop illicit trafficking, and to take measures to ensure acquiring institutions did not obtain objects from illicit excavations, see Article 10. Council of Europe (1969).

Indeed, the overall Convention did little to combat the theft or illicit trade of cultural goods, as the Italians and the Council had originally intended.[825] The Convention was revised in 1992 as the Valletta Convention,[826] where some of its major deficiencies were addressed with respect to the protection of archaeological heritage,[827] and certain elements concerning illicit trafficking were improved: Article 3 was expanded to reference illicit *removal* of archaeological from its place of origin; and a new Article 10 included holistic passages on 'Prevention of the illicit circulation of elements of the archaeological heritage' which mainly involved awareness raising and education. But, on the whole, the Valletta Convention – like its predecessor – has remained an international treaty for heritage protection and not necessarily illicit trafficking.[828]

As for illicit trafficking, the Council launched another effort to address this in the 1980s, and the resulting 1985 *European Convention on Offences relating to Cultural Property*[829] indeed had illicit trafficking firmly in its sights. Also known as the Delphi Convention, it took inspiration from the 1970 UNESCO Convention but its descriptions for moveable cultural heritage, and the scope of the definitions[830] were somewhat wider:[831]

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[825] On a second front, as O'Keefe notes, the treaty also failed to foresee the economic expansion in Europe and the growing industrialization of the continent that would threaten archaeological heritage, and in this respect, he writes that it failed in its primary aim, see O'Keefe, (1993).

[826] Council of Europe (1992). *European Convention on the Protection of the Archaeological Heritage (Revised)*. E.T.S. No. 143, (25 May)

[827] Again, see O'Keefe, (1993).

[828] O'Keefe, (1993).

[829] Council of Europe (1985). *European Convention on Offences relating to Cultural Property* E.T.S. No. 119, (23 June).

[830] An annex of the Convention allowed the States Parties to expand the scope where necessary, see Annex Council of Europe (1992).

[831] Pickard, Rob (2002) *European Cultural Heritage: A review of policies and practice*. Council of Europe. p.63, and Bieczyńsk, Mateusz Maria (2018). "The Nicosia Convention 2017: A

a) products of archaeological exploration and excavations (including regular and clandestine) conducted on land and underwater;
b) elements of artistic or historical monuments or archaeological sites which have been dismembered;
c) pictures, paintings and drawings produced entirely by hand on any support and in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
d) original works of statuary art and sculpture in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view and items resulting from the dismemberment of such works;
e) original engravings, prints, lithographs and photographs which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
f) tools, pottery, inscriptions, coins, seals, jewellery, weapons and funerary remains, including mummies, more than one hundred years old;
g) articles of furniture, tapestries, carpets and dress more than one hundred years old;
h) musical instruments more than one hundred years old;
i) rare manuscripts and incunabula, singly or in collections.

These definitions would in turn feed into the EU descriptions in the 1990s, which we shall discuss later.[832]

The Delphi Conventions' focus on criminal provisions within the illicit trade was seen as innovative (especially since no other treaty

New International Instrument Regarding Criminal Offences against Cultural Property." *Santander Art and Culture Law Review* Vol. 2 (3). p.261

[832] Pickard (2002). p.63 also see Committee on the export and return of cultural goods (2013) Guidance for the Interpretation of Categories of Cultural Goods as listed in Annex I to Council Regulation (EC) No 116/2009. (Annex to GC(2013)19-2). 25 October. European Commission. p.11

at the time, or since, has focused on criminal elements[833]), but it never entered into force; it only received six signatures;[834] and was never fully ratified by any State.[835] Indeed, its ambitious focus on criminal matters was considered its main weakness,[836] as many States were, and remain, reluctant to relinquish their supremacy and sovereignty in criminal matters, as we discussed briefly in the first chapter.[837] The Convention was reformed in 2017 as the Nicosia Convention, which still retains key elements relating to criminal law; and as of 2022, it has entered into force with ratification by five states,[838] but some observers feel it is still far too ambitious to guarantee widespread acceptance.[839]

Despite its limited success, the actions of the Council of Europe are interesting from several points of view in the context of our inquiry. As an international organisation focusing on the promotion of democracy, human rights, and the rule of law in Europe, the Council of Europe seemed the like perfect vehicle to draft and promote a European treaty aimed at limiting the illicit trafficking of cultural property. This can be seen mainly in the perceptions of policy makers, for whom illicit trafficking was a *cultural* issue.[840] Unlike the EU and its

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[833] Graziadei, & Pasa, (2019). p. 90

[834] Greece 23/06/1985, Italy 30/07/1985, Liechtenstein 23/06/1985 Portugal 23/06/1985, Turkey 26/09/1985/.

[835] Cyprus (25/10/1985), Greece (23/06/1985), Italy (30/07/1985), Liechtenstein (23/06/1985), Portugal (23/06/1985) and Turkey (26/09/1985)

[836] Aside from criminal affairs, its inability to address issues around the acquisition of cultural heritage in good faith has also been cited as a key reason for its failure, Bieczyński, (2018). p.262

[837] See chapter 1.2.2; as well as Bieczyński, (2018) p.262.

[838] Cyprus 07/12/2017, Greece 02/03/2021, Hungary 02/12/2021, Italy 01/04/2022, Latvia 30/04/2021, and Mexico 06/09/2018

[839] Fincham, Derek. (2019). "The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction" *Cardozo Arts & Entertainment Law Journal* Vol. 37 (2) and Bieczyński, (2018).

[840] For example, at times even the EU would direct questions on illicit trafficking to the Culture Commissioner, believed it to be a cultural policy issue when it was an internal market issue, see in European Commission (1997). Communication from the Commission

institutions, which as know were founded primarily for economic integration, the Council of Europe has been engaged in cultural activities since its foundation. In 1954, the Council opened the European Cultural Convention[841] to strengthen, deepen and create a European Culture, beginning what has become an annual series of art exhibitions to further develop a common culture across the continent.[842] The Council of Europe also considered practical methods to protect heritage, including the encouragement of a European-wide 'record card' system which would establish a standardised system of documentation to record heritage. These efforts would later be seriously considered by EU policy makers in the 1980s, as we shall see in the next section.[843] The work of the Council of Europe was so extensive that EU institutions often had to indicate they did not intend to duplicate any of the Council's activities, but merely hoped to complement them.[844] Formal relations between the two European organisations were strong, especially concerning cultural affairs,[845] with EU institutions in Brussels further encouraging their own Member

concerning the evaluation of the IDA programme and a second phase of the IDA programme. (Com(97) 661 final) 12 December. European Commission.

[841] Council of Europe (1954). *European Cultural Convention.* E.T.S. No. 18, (19 Dec).

[842] For more on the history of these exhibitions, see Council of Europe (2015). *50 years of Council of Europe art exhibitions.* Council of Europe.

[843] Elles, Diane. (1974). Report on the motion for a resolution submitted by Mr Premoli on behalf of the Liberal and Allies Group (Doc. 73/73) on measures to protect the European cultural heritage. (Doc 54/74). European Parliament. Strasbourg. P. 9

[844] DG XII (1974). Community Action in the Cultural Sector (SEC(74)3485) 17 Sept. European Commission. Since cultural heritage projects were not part of the Commissions remit, the EU was happy to leave the Council of Europe work on this, but this policy to leave the Council work on cultural affairs was also seen as important in terms of strengthening international cooperation between the two organisations, see introduction, European Commission. (1977). Community action in the cultural sector. (COM(77) 560). 2 December. European Communities. pp. 4-5.

[845] Here, the Commission said it would not duplicate the work of the Council of Europe but would continue to maintain close collaboration with them on cultural affairs. European Commission. (1977). pp.4-5.

States to consider the Delhi Convention for ratification.[846] But despite the flurry of activity in the 1970s and 1980s, it is notable that after the opening of the Delphi Convention in 1985 and until the opening of the Nicosia Convention in 2017, the Council of Europe subsequently refrained from any further activities on illicit trafficking.[847]

3.1.2. Heritage Protection in the EU Constitutional Framework

As we mentioned in the beginning of the last section, it was the European Parliament that first proposed the EU should act to protect heritage collections from theft and trafficking. Parliamentarians raised concerns of the threats to "European art treasures" in 1973; and although the Commission agreed with these concerns, in line with the TFEU (and despite the revelations we learned in the last section) it preferred refrain from involvement in heritage protection efforts and maintained that this was an issue for individual Member States and not the responsibility of the Commission.[848] Unconvinced, the Parliament commissioned its own report in May 1974 which concluded there were significant threats to European heritage from natural and human behaviours, which must be addressed at European level.[849] As well as calling upon the Member States to ratify the 1970 UNESCO Convention,[850] the Parliament specifically requested that the Commission "propose to the Member States that they should take all measures to fight more effectively against theft of and traffic in works

[846] Galle, Marc (1991). Report on the movement of object of cultural interest in the context of the single market. (A3-0331/91) 26 November. European Parliament.
[847] After the Delphi Convention, the Council of Europe largely withdrew from efforts to combat illicit trade, see DG HOME & CECOJI-CNRS (2011). p.36
[848] While the Commission was concerned, they also noted, as they would many times, that heritage protection was a Member States responsibility and they could not take up action in this area, see European Parliament (1973). Müller and Delia Briotta.
[849] See Elles, (1974).
[850] Elles, (1974). point 16.

of art and archaeological treasures".[851] However, since the EU has no remit in cultural policy and could not propose heritage protection, other avenues needed to be investigated to see *how* the EU *could* act.

On foot of the 1974 Parliament report, the Commission drafted a memorandum on *Actions in the Cultural Sector*, which acknowledged the cleavages created by Article 36 and 'national treasures' and the complexities of protecting heritage noting:

> If, however, the criteria [under Article 36] made it possible to prohibit almost all exports, there is a danger that the Member States might fail to fulfil the conditions of Article 36: the Member States must not go beyond what is justifiable for the protection of their heritage; and at the same time, the export ban "shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between· Member States."[852]

The Commission expressed concern with the illicit trafficking of cultural heritage, but there was also apprehension that any direct involvement to address the problem on the part of the EU could be used to the advantage of thieves and smugglers.[853] For this reason, at this early stage, the Commission was more concerned with understanding how national systems of regulation and protection across Member States – some of which we examined in closer detail in our case studies – were being used to address illicit trafficking. With a better understanding of this, the Commission could perhaps propose a replacement system to balance the free trade agenda of the EU while still protecting national treasures.[854] The Commission also noted areas of concern inside the EU, including a disconnect between national

[851] Elles, (1974). point 15.
[852] DG XII (1974). p. 15, section 28
[853] DG XII (1974). p. 14, section 26
[854] DG XII (1974). p. 13, section 25

treasures (which were afforded protection under the TFEU) and other items of heritage that may also possess unique characteristics:

> [identifying heritage at an EU level must] not be restricted to "national treasures", [and] must also take account of cultural goods which, although not "national treasures", are one of the riches of each country - their value being intangible rather than material.[855]

Cultural goods here were those identified in the *Commission v. Italy (1968)* ruling and the EU now viewed these as objects of heritage akin to national treasures but not being afforded the protection allowed under Article 36.[856] One proposal to protect other forms of heritage from trafficking was the introduction of a 'community' heritage (as in European Economic Community heritage).[857] The idea here was that 'community' heritage would provide protection across the EU, while also respecting the freedom of movement set out in the TFEU and still respect Member States prerogatives under Article 36. This concept of a 'community' heritage could also help remedy other problems encountered with heritage that had not been designated a 'national treasure'.[858] Furthermore, with the establishment of a 'community'

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[855] DG XII (1974). p. 15, section 28

[856] On an interesting note, the Commission does not identify illicit trade but makes reference to two interconnected issues: theft and illegal export. DG XII (1974). p. 14. Here, the Commission mentions that UNESCO is a key player in the prevention of thefts, and that the Commission will support them (paragraph 27). The next the section (paragraph 28) on national treasures and export. The document notes that there are important cultural goods which are not national treasures and therefore do not come under EU protection. The Community must examine how these are protected. This document in question was reviewed at a Commission meeting (309th meeting), and they were keen to emphasise that it an internal document and not an official position, also see European Commission. (1974). Séance du 24 septembre 1974 - XVI: Action communautaire dans le secteur culturel. (COM(74) PV 309). 24 September. European Commission.

[857] DG XII (1974). p. 13, section 25

[858] As Prof. Chatelain – and many others have pointed out before and after him – private heritage was doubly at risk. First, private heritage did not always have the same security

heritage for certain cultural goods, the Commission hoped that the formalities and administrative burdens of protecting heritage between states would be reduced and the likelihood of losing heritage of one Member State to a third country via another Member State could be avoided.[859] In an interesting display of constitutional gymnastics, to overcome the lack of cultural policy competencies on the part of the EU, the Commission heavily emphasised that these were *ideas* and not true attempts to draft cultural policy, and the Commission further stated these were brainstorming ideas that came at the request of the Parliament.[860] Despite the informality of these ideas, the concept of a 'community heritage' or 'European' heritage label can be considered a shift and would remain on the cards well into the late 1980s.[861]

Keeping the initial request of the Parliament in mind, a more detailed report was requested by the Commission, which it was hoped would provide a more focused analysis as well as immediate methods of addressing the Parliament's concerns. The 1976 report on the *Means*

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as nationally owned heritage, and since it was private, it was less well known and so could be moved without raising suspicion. This latter part was very problematic, as not only could it be moved easily, but generally, owners would not want to make their collections known and would be reluctant to register them or even inform police if there were thefts, see Chatelain, (1976). p.46

[859] DG XII (1974). paragraph 29, the discussion here is about theft and export controls, which is essentially illicit trade.

[860] The document in question was reviewed at a Commission meeting (309th meeting), and they were keen to emphasise that it was not an official position but an internal document, European Commission. (1974). Furthermore, although constitutionally forbidden from initiating a cultural policy, the Commission could elaborate "ideas" and "experiments" within the socio-economic scope of action in which it was allowed to operate. When the Commission produced its first report, it was still at pains to emphasise that the report did not and was not executing a cultural policy, see European Commission. (1977). This was the same in subsequent reports, see European Commission. (1982). p. 5.

[861] European Commission. (1989). Communication from the Commission to the Council on the Protection of National Treasures possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992. (COM (89) 594 final). 22 November. European Commission, paragraph 2,

of Combating the Theft of and Illegal Traffic in works of Art in the Nine Countries of the EEC by Prof. Jean Chatelain, Director of the Louvre and Musées de France, was the most comprehensive of its kind up to this period.[862] At times verging on academic, Prof. Chatelain clearly outlined potential measures that could be applied to alleviate the problems in Europe. Preventative measures ought to be strengthened, including increased security in cultural locations, such as museums, galleries, churches and archaeological sites.[863] Another measure proposed was to have a standard form of identification for objects to help secure their return if they were stolen and recovered by police. This measure was inspired by a Council of Europe initiative and Prof. Chatelain proposed it could be adopted across the EU (called the Record Card system, it was not entirely dissimilar to the description of Article 5 of the UNESCO Convention and Object ID).[864] Acknowledging that archaeological sites were at great risk, Prof. Chatelain advised that increased regulation of excavation was also needed.[865] Spot-checks near borders (but not border checks) could also be increased to search for stolen goods, and art fairs could be further regulated at national and

[862] Prof. Chatelain provided the following recommendations: 1) EU-wide ratification of the international cultural conventions and establishment of an EU-wide measure to protect cultural property of public interest against theft; 2) through harmonisation, stronger national controls over the export of cultural goods, controls on excavations, and regulation of the internal art market; 3) administrative action to ensure uniform methods of description and the completion of a European inventory of cultural goods., Chatelain, (1976). p. 132.

[863] Chatelain, (1976). p. 28

[864] Essentially, a protect-and-return policy as identified by Prof. Chatelain, it was not revolutionary, and the plan would require a pre-existing knowledge of public cultural heritage collections in Europe. Failing that, a massive inventorying of heritage (which would be costly in terms of finance and human resources) would have been required. However, it was practical, Chatelain, (1976). p. 130 and pp. 113-114. On p. 46, Prof. Chatelain notes the inconsistent use of terminology, and that a common method of description was needed. This would eventually be achieved – to some extent – with the creation of Object ID in the 1990s, see chapter 1.3.2.

[865] Chatelain, (1976). p. 62

EU levels to avoid stolen materials being laundered onto the market.[866] In acknowledging that museums were also part of the problem, Prof. Chatelain recommended the EU scrutinise museums more closely to ensure their collection practices were ethical.[867] Criminal sanctions should be increased by the Member States,[868] with legal mechanisms also being introduced to secure the return of stolen cultural property.[869]

Recognising the divergences in national legislation, Prof. Chatelain noted that many of these objectives – including the protection, regulation and control of museums, the art market and archaeological sites – would require the enhancement of national legislation in certain countries.[870] But he also believed that most of these aims could be achieved with the ratification of existing international cultural conventions (the 1970 UNESCO Convention, as well as the London Convention[871]). And in acknowledging the limited capacities of the Commission in cultural affairs, he proposed the possibility of an EU treaty between the Member States that could bypass the limitations of the TFEU, and specifically enhance the cultural policy competencies of the EU.[872]

Many observers acknowledged that the global art market had been growing since WWII, and that the looting of sites was feeding this demand, where it was (and often still is[873]) usually carried out by local diggers who sell objects to middlemen.[874] Prof Chatelain's report

[866] Chatelain, (1976). p. 74 and p.135
[867] Chatelain, (1976). p. 77
[868] Here, Prof. Chatelain was practical, noting that criminal law was and still is a preserve of the Member States, Chatelain, (1976). p. 80; and p. 20-21 which recognizes the criminal law issue in the 1970s.
[869] Chatelain, (1976). p. 80
[870] Chatelain, (1976). p. 116
[871] Chatelain, (1976). p. 132
[872] Chatelain, (1976). p. 104 and 135
[873] See Chapter 4.2.1.
[874] Bator, (1982). p. 292

agreed with this observation and he wrote that the thefts were especially problematic at archaeological sites (particularly in Italy), where lost objects were especially difficult to recover since they were not documented and security was difficult to maintain given the number of sites, limited human and financial resources.[875] For fine art, assumptions were that objects were being stolen from private residences, as well as museums, churches and other collections. Similarly to what we discussed in our Literature Review, when they were moved across a border, it was problematic to secure their return.[876] Prof Chatelain also noted that security was a great problem for churches, where it was practically non-existent.[877] Heritage objects stolen from churches presented further challenges since they were considered to be privately owned; but in many cases, these heritage objects were also important national items and so straddled a public/private divide.[878]

Many of Prof. Chatelain's recommendations were unlikely to ever be accepted,[879] and, it is worth noting that some member states were strongly opposed to some of his suggestions including Ireland, who felt these matters were for the Members State to act upon:

> At first glance it seems difficult to justify having rules for cultural goods [and] in any event the Joint Committee [of the Irish Parliament] believes that as far as Ireland is concerned

[875] Chatelain, (1976). p. 6-10.
[876] Bator, (1982). p. 294
[877] Chatelain, (1976). p. 8
[878] Chatelain, (1976). p. 17
[879] Indeed, Prof. Chatelain noted that all the EU could do was implement administrative legal procedures, while recommending that Member States introduce harsher penalties and harmonize their laws, Chatelain, (1976). pp. 77–87.

> the matter is one solely for the Oireachtas [Irish Parliament].[880]

However some of his proposals were positively received by the Commission[881] and would later become standard policy and law within the EU.[882] Other more feasible and less intrusive proposals received more acceptance from Member States in the immediate aftermath of his report's publication. For example, his suggestion that cultural cooperation with international organisations including ICOM and Interpol be increased[883] echoed a similar call from the Parliament.[884] Cooperation with UNESCO and the Council of Europe was indeed intensified through the 1970s and 1980s (though by this stage, as the Council began to retrain is own activities on illicit trafficking, while the EU would increase its own as the Commission would begin to clarify that it was operating in its own sphere with its own cultural ideas).[885] Prof. Chatelain's suggestion for a 'Record Card' system was actively promoted by the Commission for almost a decade[886] (while supported

[880] Point 13, Views of the Joint Committee, Oireachtas (1978) Report No. 21 - Community Action in the Cultural Sector. Oireachtas na hEireann. Available at: http://archive.oireachtas.ie/1978/REPORT_28111978_0.html

[881] European Communities. (1978). Opinion on Community action in the cultural sector (Communication from the Commission to the Council) from Economic and Social Committee. European Communities, Sections B:3.2.1 and B: 3.2.2. where the Committee note its support for harmonising legislation and calls on the Commission to legislate to fight the theft of cultural goods. They also felt the record card system should be considered but should be voluntary.

[882] As evidence with the Return Directive, see in Chapter 3.2.1.

[883] Chatelain, (1976). pp. 129 and 137, ccooperation with international bodies should increase, including with ICOM and Interpol, and national agencies must be strengthened to foster cooperation.

[884] The Parliament also encouraged further cooperation between the EU and UNESCO and the Council of Europe on this matter see, Elles, (1974). point 17.

[885] European Commission. (1977). pp. 4-5

[886] European Commission. (1977). p. 7 paragraph 9. This was based on Prof. Chatelain's work, Chatelain, (1976). p. 56 where it was emphasized that the definitions need to be clear if protection measures were to work. The record card proposal was still considered an option in 1982, albeit watered down, European Commission. (1982).

by the Commission and some Member States, others felt it was merely a replication of Interpol's Stolen Works of Art database[887]), and to avoid duplicating the work of the Council of Europe – as mentioned earlier in this chapter – the Parliament proposed that the Commission work together with the Council of Europe to create an European wide inventory card system as a means of protection and information storage.[888] These proposal was particularly well received by some Member States, including Ireland, who perhaps viewed it as less intrusive:

> The Joint Committee believes that the proposed record card system could be useful in preventing fakes and assisting in tracing stolen works of art. It is informed that neither the record card system nor the establishment of a national service as envisaged by the UNESCO Convention would present problems in Ireland from a police point of view.[889]

Building on Prof. Chatelain's report, the Commission continued to be ambitious and soon started work on identifying potential areas of action for the EU in cultural affairs. Recognising that the Member States' legislation to protect heritage was too broad and some national protections too restrictive, it would suggest a harmonisation of national legislation in this area,[890] though there would

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[887] Response from Commission to MEP on actions taken by Commission to tackle illicit trade, European Parliament (1987). Question No 57 by Mr Romera i Alcazar Blatant irregularities in international transactions in works of art (H-17/87). 8 April November. European Parliament. According to another report from the Parliament, in 1989, the location was intended to be Villa Arrivabene, but it was eventually dropped by the Commission, ee Benhamou, G. (1989). Report on the return of objects of cultural interest to their country of origin. (Doc. A 2-104/89) European Parliament.

[888] Elles, (1974) p.9.

[889] Point 14, Vies of the Joint Committee, http://archive.oireachtas.ie/1978/REPORT_28111978_0.html

[890] European Commission. (1977). p. 7 paragraph 9. This was based on Prof. Chatelain's work Chatelain, (1976). p. 56, where Prof. Chatelain emphasized that the definitions needed to be clear if protection measures were to work.

be still some way to go until Member States would accept this[891] (and retuning to our literature review, it would not be so straightforward).[892] But for now, the Commission would actively encourage Member States to ratify the international cultural conventions.[893]

3.1.3. Single European Act (1987) and Opening the Borders

Despite the promise of an ever-closer union under the TFEU, the establishment of the Customs Union aside, little progress was actually made in establishing a more integrated Europe in the immediate years after 1957.[894] But beginning in the 1970s, the character of the EU began to change greatly, owing to periods of economic stagnation in the late 1970s and the enlargement of the EU with the inclusion of Denmark, Ireland and the United Kingdom in 1973, Greece in 1981, and Portugal and Spain in 1986. By the 1980s, reform was on the cards to address the realities of the new continent that the EU was operating within.[895] These reforms would also have marked implications for the protection of heritage from illicit trafficking as well as for other potential threats to heritage. At the same time, there would be calls from southern Member States for the restitution of cultural materials now housed in northern Member State museums;[896] and one by one, it became apparent that museums and galleries would soon begin to grapple with the problems of Nazi-looted art.[897] Coupled with

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[891] Again, Ireland was strongly opposed to this, see Point 13, Views of the Joint Committee, Oireachtas (1978)

[892] See literature review, section vi, especially Prott (1989)

[893] European Commission. (1977). pg. 9, paragraph 11

[894] Watts, D. (2008). *The European Union*. Edinburgh University Press. p. 35

[895] Watts, (2008). p. 30-34

[896] The Parthenon/Elgin marbles issue was raised, which the Commission, as always, refused to discuss, and as expected, the Commission reiterated that it had no policy with regards to restitution, European Parliament (1985). Question Ecrite Mme Raymonde Dury Restitution des biens culturels (No. 2299/85). 12 December. European Parliament

[897] In Benhamou, G. (1989). Report on the return of objects of cultural interest to their country of origin. (Doc. A 2-104/89) European Parliament, questions were raised

diverging national approaches to solve these issues, there was a sense the problem of illicit trafficking and heritage protection was becoming increasingly more complex.[898] While the EU had encouraged and worked towards close cooperation with UNESCO and Council of Europe, by the 1980s, the Commission was now beginning to operate on its own, within its own sphere of jurisdiction to find solution to the problems.[899]

In 1984, the European Council – the assembly of European Heads of State and Government that gives overall direction to the EU – commissioned a study on how European integration could be improved.[900] And the resulting study proposed an ambitious drive toward European unification and the promotion of common cultural values, and further suggested that the safeguarding of European cultural heritage was a prerequisite as part of a plan for the promotion of a common cultural identity,[901] as well as common security and defence policies,[902] both of which would long term impacts on heritage protection. At the same time, the Commission proposed complementary reforms which identified over 300 legislative measures

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regarding Second World War loot. It was noted that Parliament had no remit here, but that it called upon Member States to engage in agreements to ensure the exchange and return of cultural goods.

[898] By 1989, Parliament was aware of trafficking issues with Nazi-looted art from Germany and Italy. This was happening not just outside Europe but also inside Europe and was a problem they acknowledged as being very complex. See Benhamou, (1989) advised the Parliament and the Commission to stay out of issues of restitution and focus on bilateral negotiations.

[899] European Commission. 1977. Community action in the cultural sector. Luxembourg: Office for the Official Publications of the European Communities pp. 4-5

[900] The Dooge Report, see Deschamps, Étienne & Maufort, Laurence (2016). Preparations for the Single European Act (SEA). CVCE. Available at: http://www.cvce.eu/obj/preparations_for_the_single_european_act_sea-en-7c34ff97-f690-4b88-aac5-5e2020055c06.html

[901] Dooge, James (1985). Ad hoc Committee for Institutional Affairs Report to the European Council (Brussels, 29-30 March 1985). European Council. p.20 point 4

[902] Dooge, (1985). p.20

to stimulate economic recovery and bring down physical, technical and fiscal barriers between all Member States.[903] Combined, both sets of reforms gave way to the Single European Act[904] (the SEA – signed in 1986), which significantly amended the TFEU,[905] and committed the EU to drive towards the completion of the European Single Market that had been envisaged under the TFEU, but which had not been pursued practically. Specifically, Article 13 of the SEA amended the TFEU to commit the EU to the establishment of the internal market, which would include abolishing all internal frontiers between Member States by 1 January 1993:[906]

> [The EU] shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article […] the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.[907]

The opening of Europe's internal borders under Article 13 would be problematic for efforts to combat illicit trafficking, as the policy change was a direct challenge to the unique cultural competencies of the Member States and impeded their ability to protect heritage and hinder illicit trade under Article 36.[908] As we noted in the Literature Review, is worth recalling that for a smuggler a border makes little to no difference to their illegal activities, and thieves and criminal organizations will always find ways around borders as they

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[903] Watts, (2008). p. 35

[904] European Union, (1987) *Single European Act.* (29 June)

[905] Watts, (2008). p. 35

[906] Article 13, European Union, (1987) amended Article 8, European Union, (1957), adding this subsection.

[907] Article 13, European Union, (1987)

[908] Voudouri, (1994). p. 17. This feeling of problems worsening was raised in Parliament, see Benhamou, (1989).

always have,[909] however Article 13 led to fears amongst the Member States that any open and unpoliced borders would risk an immense loss of cultural heritage from their territories.[910] From the point of view of the Commission, the fears were even more perfunctory as Commission civil servants were concerned that Article 36 on national treasures would become entirely unenforceable.[911]

To address potential losses to an EU Member State or to a third country, the Commission recognised that the Customs Union would need to be strengthened to ensure national treasures did not leave the EU, and internal movement of national treasures would also need to be monitored.[912] More broadly, the Commission understood that efforts to protect Member States' national treasures would need to take two forms: some form of mutual recognition of Member States heritage so that national treasures could not be lost to a third country; and measures to ensure the return of national treasures that had been unlawfully transferred from one Member State to another.[913] Though the long-term aim of the Commission was still to find a way to protect all types of heritage across the EU, and the reports from the Parliament continued to raise awareness to the growing problem of illicit

[909] See Literature Review v. also see Gimbrere, Sabine, & Tineke Pronk. (1992). "The protection of cultural property: from UNESCO to the European Community with special reference to the case of Netherlands." *Netherlands Yearbook of International Law* Vol. XXIII (1). p.251.

[910] Not only could they lose these to other Member States, but there were fears that an object could be lost to a third party, outside the EU, via another Member State with less stringent export controls, Galle, (1991). p. 9 note 8.

[911] European Commission. (1989). B10 and 11

[912] European Commission. (1989). Section II B 33-34. This would require common forms of definitions, but the most complex would be determining the Member State of origin, resolutions of which could become bureaucratically intensive. Also, the Commission suggested that if an object was of uncertain origin, then all 12 Member States could agree to allow it to leave the EU, European Commission. (1989). Section II B 34-37

[913] European Commission. (1989). Section III Conclusion

trafficking across Europe,[914] the ramifications of the SEA due to come into force in 1992 meant that national treasures had to be prioritised immediately.[915]

The Commission could not implement specific heritage protection actions[916] and this was reiterated and underscored in the SEA with a non-binding resolution which restated the Member States' supremacy in cultural affairs, especially anti-trafficking laws and policies:

> [the Member States may] take such measures as they consider necessary for the purpose of controlling […] illicit trading in works of art and antiques [917]

However, following the ruling of the *Commission v. Italy* case, and taking into consideration the principles of conferral, the Commission could engage in protection efforts allowed via existing competencies under Article 36 so long as they were framed as actions to reconcile the EU principle of freedom of movement with the Member States retaining a right to protect their own heritage and formulate their own cultural policy.[918] It is interesting to note here that even though there was a deviation from the purely economic aspects of the EU, the Commission recognised that the rationale for controls on the movement for cultural goods was markedly different from other controls, which found their rationale in protecting public health,

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[914] The Parliament quoted a University of Paris paper which found that there were at least 60,0000 works of art stolen annually during the 1980s Galle, Marc (1991). Report on the movement of object of cultural interest in the context of the single market. (A3-0331/91) 26 November. European Parliament., p.10 via footnote 5

[915] European Commission. (1989). Part 2

[916] Stewart, Catherine (1992) "Count down to 1993 and the United States of Europe — are you prepared? Everything you need to know about the European Commission and the Maastricht Treaty" *The Art Newspaper*. 1 April. London

[917] General Declaration on Articles 13 to 19, European Union (1987).

[918] European Commission. (1989), Section III Conclusion

financial regulation or the environment etc.[919] But given this deviation, the Commission believed it would still have difficulty justifying controls, owing to the fundamentally different nature of cultural heritage to other forms of moveable goods.[920] For this reason, the opinions of Member States were important and necessary here, and they were consulted extensively to ensure the Commission was not being perceived as overstepping its constitutional functions: the British, for instance, were consulted and were noted to be opposed to any actions which would lead to increased bureaucracy; meanwhile, Italy, Greece and Spain were in favour of stringent and far reaching forms of controls which may or may not include a large administrative and legal apparatus.[921]

By far, the most straightforward option would have been the EU-wide ratification of the 1970 Convention, and this was considered by policy makers.[922] However, the Convention is not open for signature to international organizations. The EU moved to investigate initiatives which could allow for a general recognition of national laws for the protection of national treasures, similar to those that emerged following Prof. Chatelain's report,[923] but given the extent to which national laws vary (as we saw in the last chapter), it was decided that such a proposal would to be too complex and would still require some form of EU definition for heritage which was not acceptable to the Member States.[924] There was also the prospect (however remote) that such an initiative could open the door to historic restitution cases,

[919] European Commission. (1989). Section I, A 7
[920] European Commission. (1989). Section I, A 7
[921] Marsan, Giulia Ajmone. (1991). "Ministers for the Arts meet to discuss art exports under new EEC regulations." *The Art Newspaper*. 1 July. London. and Marsan, (February 1991).
[922] European Commission. (1989). Section II C 1 & 46
[923] Chatelain (1976). p.26
[924] See back to Chapter 3.1.1. and Member States unease at EU role in defining national treasures.

where Member States could reclaim heritage owned by another if it was temporarily located in its own territory.[925]

The Commission also proposed that Member States introduce tougher criminal laws to dissuade illegal export and incentives to encourage legal export[926], with random checks away from borders elsewhere,[927] proposals which were largely based on Prof. Chatelain's report a decade earlier; but again, these were areas of Member States competencies for which the Commission could only advise and there was little appetite from the Member States for such reforms. The Commission did have the power to legislate on matters concerning the internal market of the EU but proposals to regulate the internal transfers of cultural heritage faced the same practical difficulties, as any controls could still be interpreted as essentially an internal form of export regulation intent for the internal market, which was not possible under the TFEU,[928] and questions about state ownership and definition of heritage and national treasures further complicated any proposed internal controls.[929] Mandatory registration of cultural property was also envisioned – along the lines of Prof Chatelain's record card system, and interestingly, this was foreseen as a type documentation that would be for cultural goods and separate from a register of national

[925] The Commission thought this was remote and more likely to be a problem in the 21st century, as it would only apply to materials moved *after* the Treaty of Rome in 1957, European Commission. (1989), Section II C 1, 42, 43, 44, 45, 46 & 47. Part of the issue here also touched on the perennial problem of definition. It proved difficult to find a common EU-wide definition that would transcend national boundaries and help in protection efforts, Marsan, Giulia Ajmone. (1991). "Art export law: DGIII still has the upper hand to the relief of the British" *The Art Newspaper*. 1 February. London

[926] European Commission. (1989), Section II A 29 & 30

[927] European Commission. (1989), Section II A 31

[928] Here ,the Commission suggested a type of 'dispatch', but in the absence of controls Member states would still have to notify other EU member states of the arrival of treasures into their territory, European Commission. (1989), Section II C 1, 39, 40 & 41

[929] The Commission asked how long could the Member State of origin claim an object as a national treasure if it were exported to another Member State and were to stay there for five or ten years, or indefinitely European Commission. (1989), Section II C. 1,41

treasures.[930] But while this would have benefits in the long run, including a buyer/owner being aware of the provenance of an object, it was recognised as being burdensome, especially to the art market.[931]

Increasingly concerned that removing borders would open the floodgates for the trafficking of cultural goods, the Commission[932] and the Parliament[933] continued building on the research from the previous decades, but in the end the results were much more measured and nuanced.[934] The external frontiers of the EU would controlled by common EU rules of export rule,[935] and a mechanism to ensure the protection of national treasures within the EU – the Return Directive, a mechanism highly influenced by the international legal order – which we shall discuss in the next section.

3.2. Combatting Illicit Trafficking at EU Level: The Reality

Returning to the impending dissolution of the EUs internal borders, as we mentioned the Commission had been pushing[936] for a harmonisation of national law across the EU to secure the return of lost heritage.[937] And although the abolition of the internal frontiers in 1993

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[930] European Commission. (1989), Section II C 5 & 59

[931] European Commission. (1989), Section II C 4, 55, 56, 57 & 58.

[932] European Commission. (1989). Section I 1

[933] This feeling of the problems worsening was raised in Parliament too, Benhamou, (1989), p. 9 note 8

[934] Marsan, (February 1991).

[935] European Commission. (1989). Section II B 33, 34; This would require a common form of definitions, but the most complex would be determining the Member State of origin, resolutions of which could become bureaucratically intensive, and the Commission suggested that if an object was of uncertain origin, then all 12 MS could agree to allow it to leave the EU, see Section II B 34, 35, 36 & 37

[936] The Commission had also suggested an export certificate for internal movement of art and the exporter would need authorization from the Member State in which the object came from to export it out of EU, Galle, (1991).

[937] Another suggestion was to ensure that there were common definitions and scopes that would protect all national treasures in the EU, see European Commission. (1989).

would technically not impede Member States from legislating on issues of cultural heritage, it was felt that the opening up of borders would end up facilitating the illicit trade,[938] and any solution therefore needed to be European in character, not national. However, in the end, the types of harmonisation efforts proposed by the EU – and discussed in the previous section – were rejected by the Member States,[939] and therefore an alternative EU legal instrument was proposed which was hoped would help prevent illicit trafficking post-1993.

3.2.1. The Return Directive (1993) and the Unidroit Convention (1995)

Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (herein referred to as the Return Directive) was somewhat unique: part of neither an import nor export regime, the Return Directive would significantly incorporate many of the principles we already discussed – both issues from the literature review, as well as concepts of provenance and due diligence, principles that were now being accepted at international level as vital to protecting heritage from illicit trafficking – into the EU legal order, mainly owing to its close association and influence from another international initiative, the 1995 Unidroit Convention.[940] Given its important influence on the Return Directive, it is necessary to discuss the 1995 Unidroit Convention first.

The origins of the *1995 Unidroit Convention on Stolen or Illicitly Exported Cultural Objects*[941] date back to the mid-1980s when observers

[938] Voudouri (1994) p. 494
[939] Marsan, Giulia Ajmone. (1991). "Ministers for the Arts meet to discuss art exports under new EEC regulations." *The Art Newspaper*. 1 July. London.
[940] Cornu, Marie. (2018). Fighting Illicit Trafficking in Cultural Objects, Search for Provenance and Exercising Due Diligence in the European Union. Engaging the European Art Market in the fight against the illicit trafficking of cultural property. Joint UNESCO-European Commission Project, 20-21 March.
[941] Unidroit (1995) *Convention on Stolen or Illicitly Exported Cultural Objects* (24 June).

were aware of the shortcomings of the 1970 UNESCO Convention.[942] Chief among these was the transfer of title ownership of an object, and the conflict of interest that this could cause with the person who was disposing of it – a juncture which represented a conflict between civil and common legal systems.[943] As well as this, and as discussed in the first chapter, the 1970 UNESCO Convention provided no remedy for private citizens to pursue claims: only states party to the Convention can lodge a claim.[944] To remedy these concerns, UNESCO invited the International Institute for the Unification of Private Law (Unidroit) to draft another convention, which could find a compromise for the various national legal systems as well as overcome the loopholes in the 1970 UNESCO Convention.[945]

Drafting for this treaty commenced in 1988 and eventually reached completion in 1995,[946] when the Italian Government convened an international summit in Rome where various governments and organisations met to review the final draft. But even at this late stage, its adoption was not guaranteed, and for a time it appeared that the talks would fail. Out of this concern, an informal working group was set up 10 days into the negotiations (Ireland included), which played an important role in securing consensus on the civil/common law issues.[947] Delicate compromises were also reached to overcome the gaps between various legal orders – the likes of which we discussed in the Literature Review – and also shift the burden of proof from the buyer

[942] Here, the Parliament felt that the problems of "good faith", in the 1970 UNECOS was a reason behind the request for 1995 Unidroit, see Galle, (1991) note 24 section V
[943] Unidroit convention Explanatory note p. 20
[944] Balcells, Marc. (2019). "One Looter, Two Looters, Three Looters … The Discipline of Cultural Heritage Crime Within Criminology and Its Inherent Measurement Problems." *The Palgrave Handbook on Art Crime*, Hufnagel S. & Chappell, D. (eds) Palgrave Macmillan UK. p. 38
[945] Blake, (2015). p. 41
[946] Prott, (1996). p.61
[947] Explanatory note pg. 25-26 Unidroit (1995) *Convention on Stolen or Illicitly Exported Cultural Objects* (24 June)

to the seller.[948] Like the 1970 UNESCO Convention,[949] issues surrounding retroactivity were constantly raised during drafting,[950] and since it is not the norm for international treaties to be retroactive, it was decided that the Convention would not be backdated, although in an example of its subtle nature it also was agreed that this would not legitimise pervious illicit movements of cultural property.[951] The influence of the ICOM Code of Ethics and the Recommendations on the Ethics of Acquisition were also clearly discernible in the Convection, with the key provisions of the Convention on due diligence and provenance reflecting these same elements of ICOM's ethical standards.[952] ICOM has since strongly supported and encouraged its member to abide by the principles of the 1995 Unidroit Convention once it was adopted, and it continues to endorse it to this day.[953]

Said to sit somewhere in between the interests of market and source states,[954] as an instrument of private international law, the

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[948] The position of burden of proof, compensation and 'good faith' purchasers was complex, but a delicate compromise was reached which allows for buyers compensation for returned stolen objects, but only where buyers can show they practiced due diligence and can prove they exercised appropriate provenance research on the object before purchase. Whereas the 1954 Hauge Convention and 1970 UNESCO Convention required compensation for the *bona fide* buyer, by 1995 it was recognised that this protection facilitated the passing of illegally acquired cultural objects to the licit trade. Changing this legal principle was deemed far too complex for certain States, and so Unidroit negotiated the 'due diligence compromise'. For more, see Prott, (1996). p.68; furthermore Nafziger et al. also note that Unidroit helps resolves what had been an intractable problem: that stolen and other illegally traded objects could enter with relative ease into the legal trade, thus fuelling damage and destruction of sites and theft of movables, see Nafziger, et al. (2009). p.268

[949] See Chapter 1.3.2.

[950] Requests which Lalive noted were wholly unrealistic, see Lalive d'Epinay, (1996), p.56

[951] Prott, (1996). p. 195

[952] Prott, Lyndel V. (2021). *Commentary on the 1995 Unidroit Convention* [Second Edition] Institute of Art Law. p. 196

[953] ICOM (1995). Resolutions Adopted by ICOM's 18th General Assembly. Availabe at : https://icom.museum/wp-content/uploads/2018/07/ICOMs-Resolutions_1995_En.pdf

[954] Blake, (2015). pp. 40-45.

Convention has allowed for a path of restitution for non-state actors, which was not possible under the 1970 UNESCO Convention,[955] and it provides for more direct access to courts and restitution.[956] And unlike the 1970 UNESCO Convention, the 1995 Unidroit Convention is self-executing meaning it does not require States to designate items as heritage in order for them to be protected,[957] The First and Second Articles of the Convention set out the character of the Convention and the description of *cultural goods*, which were further detailed in an annex, and largely these were inspired by the UNESCO definitions;[958] and its use of 'cultural goods' in lieu of 'cultural property' is seen as an attempt to de-politicise the terminology surrounding cultural heritage and property.[959] The Third and Fourth Articles focused on the restitution of stolen objects,[960] and in a departure from the 1970 Convention, the 1995 Unidroit Convention explicitly considered archaeological objects taken from sites as being within its scope:[961]

> For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.[962]

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[955] Balcells, (2019). p. 38
[956] Blake, (2015). p.42
[957] Prott, (1996). p.61; and Veres, (2014). p.12
[958] Articles 1 and 2, UNESCO, (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823 U.N.T.S. 231 (14 Nov.).
[959] Blake, (2015). p. 43
[960] Articles 3 and 4, UNESCO, (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823
[961] Schneider, (2016). p.154
[962] Article 3(2), UNESCO, (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823

Furthermore, in a significant departure from the status quo, Article 4, introduced concept of due diligence – long captioned by ICOM – into the international legal order, which would ensure that provenance checks were conducted to ensure any purchases were legal:[963]

> The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.[964]

The same article reversed the burden of proof, which was no longer presumed to exist and made it explicitly clear that it was the buyer's responsibility to ensure that they were buying legally obtained cultural goods.[965] It is also interesting to note that these passages for *bona fide* purchases, which attempt to address and reverse of the burden of proof, were based on early drafts of the Council of Europe's 1985 Delphi Convention – drafts that never made it to the final Convention at the insistence of certain Council of Europe Member States.[966] The remaining articles focused on return, compensation for disposed owners (provided they could demonstrate they exercised due diligence), and on general provisions.[967]

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[963] Schneider, (2016). p.154

[964] Article 4(1), UNESCO, (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823

[965] As Schneider notes, this emphasis also rectified a long standing issue on *bona fide* purchases that had been overlooked in the 1970 Convention, as discussed earlier. Schneider, (2016). p.154

[966] See Prott (1996). p.60

[967] See UNESCO, (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823.

In a world where the principles of provenance and due diligence are sometimes seen as tools to educate the art market,[968] the incorporation of these principle into the international order for cultural property protection was a significant achievement.[969] But some detractors feel the 1995 Unidroit Convention is not enough,[970] pointing to the limited number of States Party (indeed, there are still no major art market nations party to the Convention); while its supporters similarly point out that the 1970 UNESCO Convention only began to enjoy more widespread acceptance after its 30th year in force.[971] Recent years have seen the Unidroit Convention achieve further ratification in Europe: in Sweden the Convention was passed into law with the *Heritage Environment Act (1988:950)* in 2011;[972] and Denmark fully ratified it in 2011 (though it had been incorporating elements of the convention into its law soon after the drafts of the convention were concluded, and reforms to its *Museum Act (2001)* with reference to restitution were inspired by Unidroit[973]); additionally, Ireland is preparing ratification as of 2023.[974] Ratification aside, the Convention

[968] As Schneider notes (ff.31), due diligence was becoming a standard to "sanitise" or "moralise" the art market. See Schneider, (2016). p.157

[969] In particular, Swiss cases where goods could be laundered, Unidroit helped overcome problems like this, Schneider, (2016). p.157; And see positive influence of Unidroit, in Lalive d'Epinay (1996).

[970] As it did not address increasing criminal activities in illicit trade (some have described it as a 'stopgap', see Galle, (1991) note 20, section V where Galle identified that Unidroit will help overcome difficulties of the UNESCO 1970 Convention and the Council of European 1985 Convention).

[971] Prott, (2021). p.2 11

[972] See Swedish Permanent Representation to UNIDROIT (2004) Practical Operation of the 1995 Unidroit Convention. Unidroit. Rome.

[973] Tamm, Ditlev & Østrup, Anne (2010). *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* Konō, Toshiyuki (ed.) Martinus Nijhoff Publishers, p. 317

[974] Ireland (2021). *Revised General Scheme of Monuments and Archaeological Heritage Bill*. (2 December).

has been instrumental in shaping other national legal orders,[975] not just that of the EU, which we shall now return to.[976]

Though the Return Directive preceded the 1995 Unidroit Convention by two years, it was still heavily influence by the early drafts of the 1995 Unidroit Convention.[977] As we have seen in the previous sections, since the 1970s the EU was long concerned with the protection of all forms of heritage, however with the EUs internal borders soon to open, it was recognised that of the two types of cultural heritage – national treasures and cultural goods – it would only be possible to monitor and protect national treasures.[978] For this reason, the Return Directive only deals with national treasures important to Member States which, and as discussed, it is up to Member States to designate important items that are in need of protection (even if the Commission retains the right to regulate the framework of these definitions).[979] In the same way that the 1995 Unidroit Convention

[975] Mauritius introduced a law based on the drafts of the convention see explanatory note pg. 20, Unidroit (1995) *Convention on Stolen or Illicitly Exported Cultural Objects* (24 June)
[976] Not only has Unidroit been influent on EU Directive 2014/60 on the Return of Stolen Cultural Goods, but it has influenced the Dutch and Swiss codes, see Delepierre, Sophie, and Marina Schneider. (2015). "Ratification and Implementation of International Conventions to Fight illicit Trafficking of Cultural Property." *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage.* Desmarais, France (ed.) ICOM. p. 134
[977] As Stamatoudi notes, when Directive 93/7 was being drafted it was modelled on the 1995 Unidroit Convention, but the possibility of conflict of laws between Directive 93/7 and the Convention meant that Directive 93/7 was eventually watered down. Still, the guiding hand of Unidroit in the Directive is noticeable, see Stamatoudi, (2011). p. 143
[978] European Commission (2005). Second Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2005) 675 final). European Commission. p. 5 4.3
[979] See Article 2, Directive 2014/60. In addition, the recast Directive 2014/60 had freer definitions national treasure based solely on national law, see Weller, (2018). pp.39-40, furthermore, the Member States designation of 'national treasure' has a decisive role to play, as it is only when national definitions are met that the terms of the Directive come into effect, see Stamatoudi, (2011). p.120, also see Psychogiopoulou, (2019). p.69 who says

could provide a path to recovery of illicitly trafficked cultural objects, the Return Directive was intended to provide a path to recovery for illicitly trafficked cultural objects taken from one Member State to another Member State in the now borderless EU.[980] It is also interesting to note that when informed that the EU would be drafting its own solutions to its border problems, the Unidroit organization re-oriented its own Convention so as not to duplicate the work of the EU.[981] The primary reason for this was practical, to ensure that there were no conflicting laws between Member States of the EU who would automatically have to apply the Directive in their jurisdictions and those Member States who would also seek to adopt the Convention.[982]

The First Article of the Directive provided descriptions for 'cultural objects,' which essentially limited the Return Directive's scope to national treasures belonging to public collections (including museums, archives or libraries) or to ecclesiastical institutions, and it is interesting to note that the descriptions used were taken directly from the Council of Europe's definitions for the 1985 Delphi Convention.[983] In addition, the EU included an annex further stipulating age and price thresholds which must apply:

> Cultural object shall mean an object which […] is classified, before or after its unlawful removal from the territory of a Member State, among the national treasures possessing

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the same, it is up to Member States to designate something a national treasure. Essentially, this means that only public collections which have been unlawfully removed from their Member State come into consideration of the Directive, see Stamatoudi, (2011). p.146.

[980] A reversal made possible via Unidroit reforms, see Siehr, (1991).

[981] Prott, (1996). p. 62

[982] Schenider, (2016). p. 159

[983] See Annex 2, European Commission (1992). Proposal for a Council Regulation (EEC) on the export of cultural goods and Proposal for a Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State. (Com(91) 447 final). European Commission. 10 February.

> artistic, historic or archaeological value under national legislation or administrative procedures within the meaning of Article 36 of the Treaty;[984]

Article 2 stipulated the return of stolen objects:

> Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive;[985]

And Article 3 and 4 outlined the mechanisms and the administrative authorities and procedures that should be in place to share information on thefts of cultural goods and secure their return.[986] One of the most successful, and perhaps understated, successes of the Return Directive (and the Export Regulation which we will next address in later in this chapter) was Article 16.1, where it was required that each Member State furnish a report on the functioning of the Directive every three years:

> Member States shall send the Commission every three years, and for the first time in February 1996, a report on the application of this Directive. [987]

Although unassuming, this requirement to submit a report on its operation would in effect keep the topic of illicit trafficking on the agenda over the coming decades and ensure the Commission would be regularly informed of current affairs on the subject matter, and the importance of this article will become relevant later in this work.

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[984] Article 1, European Union (1993) *Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State* (15 March)
[985] Article 2, European Union (1993)
[986] See Articles 2 and 3 , European Union (1993)
[987] Article 16.1, European Union (1993)

Even though the Return Directive (and with it the Unidroit Convention) represented a break from conventional means to combat illicit trafficking,[988] it was only begrudgingly accepted by the Member States, who felt it was probably a step too far.[989] Its passage through the European Parliament was delayed,[990] and as it was a directive of the Council and not a regulation of the Parliament, the provisions of Return Directive would need to be enacted at national level by Member States via their national legislation. The choice of a directive rather than a regulation of the Parliament, could be seen to reflect to the sensitive nature of the topic, and the hesitancy of many Member States to allow the EU institutions a role in cultural policy.[991] Still, its transposition into various national laws was a tedious process, hampered by slow progress and conflicting national interpretations:[992] some Member States employed ambiguous and differing wording for certain articles, and in one instance there was no clear distinction between "person", "holder" or "possessor";[993] meanwhile other Member States reinterpreted the "due care" passages[994] (which had sought to

[988] Schneider, (2016). p. 154, in this sense, the Directive and Convention represented a clear break with the established norms, as its ultimate objective was not to prevent illegal export or illegal import but to expedite the return of stolen heritage objects

[989] Bertolozzi (1993) mentioned that the Directive was a hard pill for States.

[990] The Netherlands said it was ready to implement it in its national law, see Marsan, Giulia Ajmone. (1992) "Agreement reached on EEC exports and restitution" *The Art Newspaper*. 30 November. London.

[991] As many have noted, there was a North-South divide on the issues, and many initial drafts of the Directive were rejected, see Jernigan (1993)

[992] European Commission (2000). Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) nº 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 final). European Commission. p. 12. 4.1

[993] For instance, there were differing views from Member States as to "the person" (the individual who removed the object in the first place) against whom action should be taken in the event of a theft see European Commission (2000). p. 13

[994] Article 9, European Union (1993), where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems

introduce the Unidroit previsions on due diligence into the European system of protection) only as "good faith," which was seen by the Commission as watering down the original intention of the term and lacking in rigour.

Some Member States went above and beyond and 'gold plated'[995] the Return Directive, adding extra conditions to the return of objects (in one instance, a Member State included provisions to make compensation legally binding, and in instances of where an item was requested for return, if the Member State failed to provide compensation it would be interpreted as the Member State waiving their right to ownership).[996] It is also worth noting that some of the more innovative aspects of the 1995 Unidroit Convention were not included in the Return Directive: it had shorter time limits than the Convention which (in theory) were expected to allow for a speedy return of cultural objects;[997] and unlike the 1995 Unidroit Convention, the Return Directive did not reverse the burden of proof for *bona fide* purchases, leaving it to the Member State to decide:[998]

> The burden of proof shall be governed by the legislation of the requested Member State.

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fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object. The burden of proof shall be governed by the legislation of the requested Member State. In the case of a donation or succession, the possessor shall not be in a more favorable position than the person from whom he acquired the object by that means. The requesting Member State shall pay such compensation upon return of the object.

[995] ICJP (2021) Gold Plating in EU Law. ICJP. Available at: https://www.icjp.pt/sites/default/files/cidp/projectos/docs/gold-platingu2019_in_implementing_eu_law_2021.02.12.pdf?716

[996] European Commission (2000). p. 13

[997] Schneider, (2016). p. 160

[998] Schneider, (2016). p. 158

Since it only provided an avenue to protect and return national treasures, this meant that vast amounts of other heritage items remained at risk.[999]

In Denmark, the transposed legislation was entitled *Act on the return of cultural goods that have been illegally removed from the territory of an EU member state, etc,*[1000] which directly implemented all aspects of the Return Directive without amendment. For the purposes of the Directive, the Danish authorities identified the Cultural Heritage Committee as the competent authority to establish cooperation between the Member States, seek returns and assist in recovery of stolen heritage. In Ireland, the Return Directive was dissected and implemented paragraph by paragraph via the *European Communities (return of cultural objects) Regulations, of 24 June 1994*, where the Minister of Culture was identified as the competent authority to oversee the Return Directive, though they had the right to delegate authority to the directors of the National Museum, National Library or National Gallery.[1001] Meanwhile, in Sweden, it was implemented by the *Act amending the Act (1988: 950) on cultural monuments, etc., Swedish Constitution (SFS) 1994:1523*[1002] and the *Ordinance amending the ordinance (1988: 1188) on cultural monuments, etc., Swedish Constitution (SFS) 1994:1524*.[1003] The National Heritage Board was selected as the competent authority to oversee its implementation.

3.2.2. The Practicalities of the Return Directive

[999] European Commission (2000). p. 4.
[1000] Denmark (1993) *Lov om tilbagelevering af kulturgoder, som ulovligt er fjernet fra et EU-medlemslands område m.v.* (22 December)
[1001] Ireland (June 1994) *Statutory Instrument No. 182/1994 European Communities (return of cultural objects) Regulations* (24 June)
[1002] Sweden, (1994). *Lag om ändring i lagen (1988:950) om kulturminnen m.m., Svensk författningssamling (SFS) 1994:1523* (23 December)
[1003] Sweden, (December 1994). *Förordning om ändring i förordningen (1988:1188) om kulturminnen m.m., Svensk författningssamling*

With Article 13 of the SEA entering into force on 1 January 1993,[1004] the internal frontiers between the then twelve Member States of the EU[1005] were abolished. From this point onwards, there were no regular customs checks on goods, persons, services and capital moving from Member State to Member State. As we discussed, there was concern that opening the borders could lead to a flood of trafficked cultural goods, and certainly, the institutions of the EU were concerned about such effects during this period.[1006] The Return Directive we just discussed was part of a package of protections that also included export controls, which we will soon examine. However, the Return Directive produced more problems rather than solutions, which were similar to those discussed in our case studies in the previous chapter.

As we discussed, the Return Directive was a novel instrument heavily influenced by the 1995 Unidroit Convention. However, in its operation, it was cumbersome and had little practical impact in restoring heritage to its rightful owners.[1007] Its problems became

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[1004] Article 13 European Union (1992) *Treaty on European Union* (29 July), stipulated "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article […] the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

[1005] In 1993, the Member States were: Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom,

[1006] In 1996, there was an acknowledgement of the problems of illicit trafficking by the European Commission (1996). 1st Report on the Consideration of Cultural Aspects in European Community Action. (COM(96) 160 final). European Commission. This report was cited in Parliament in subsequent years, where it was noted that if there was no action taken, the problems would worsen, see European Parliament (2001). Report on the Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (A5-0122/2001) European Parliament Cultural Affairs Committee.

[1007] European Commission (2000). Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of

apparent very quickly. Certain aspects of the Return Directive, including its transposition into national law and its passage through the European Parliament, were delayed, as discussed earlier. Indeed, some Member States wholly failed to transpose entire passages of the Directive into their national legislation,[1008] and for many of these transgressions, the Commission initiated infringement proceedings against the Member States in question.[1009]

But further problems emerged, and it exacerbated some practical issues long faced by Member States in their efforts to combat illicit trafficking. As demonstrated in our case studies in chapter two, where national authorities struggled to identify heritage for export control, it was also difficult for a Member State to identify another Member State's national treasures under the Return Directive, as this required an extensive expertise of the national treasures of every Member State.[1010] Additionally, the Return Directive exposed the extent to which many Member States had a poor understanding of their neighbouring Member State's administrative procedures and the corresponding authorities for protecting heritage; as such, in cases where cultural heritage was identified correctly as a national treasure of another Member State and seized, it was not always straightforward

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Council Regulation (EEC) nº 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 final). European Commission. p. 4; it was queried that there did not seem to be any real threat to national treasures, or at least no greater threat than those faced by all other forms of cultural heritage, see European Parliament (2001).

[1008] Here, on the sharing of information to protect heritage, some states did not do this, European Commission (2000). p. 13

[1009] Paragraph 4.1 European Commission (2000). p. 12.

[1010] Committee on the export and return of cultural goods (2015) Minutes of the 21st Meeting of the Committee on the export and return of cultural goods on 25 March, (CG(2015) 2355488) 19 June. European Commission

to identify where or whom it should be returned to.[1011] Articles of the Directive, which were intended to require effective communications between law enforcement officials and administrative authorities at Member State level failed to operate as intended (and in some cases this was put down to poor transposition of the Return Directive into national law,[1012] which in turn meant the Directive could not function as intended[1013]). These failures in turn exposed the bureaucratic inadequacies of some Member States, which sometimes struggled to communicate effectively within their own jurisdictions and with their own respective agencies, not to mention with those of another Member States.[1014] Genuine questions were asked about the extent of the threats to national treasures, as opposed to the threats facing other cultural goods, and whether the Return Directive was actually necessary.[1015] Due to this, the actual progress in restoring national treasures to their

[1011] See points 7, 8 and 9, Comité Consultatif des Biens Culturels (1999). Compte-rendu succinct de la 8ème réunion du Comité Consultatif des Biens Culturels le 30 novembre 1999. (D25705) 13 décembre. Commissionne européenne. Interestingly, a working group did draw up guidelines for administrative cooperation in 2002 but nothing more came of this, see note 6 Advisory Committee for Cultural Goods (2002) Minutes of the 11th Meeting of the Advisory Committee for Cultural Goods 4 July 2002. (doc 1051/2002 rev.1) 12 July. European Commission

[1012] Here, the Commission was unambiguous in saying that many member States had failed "totally or in part" to implement this element of the Return Directive. The extent of the lack of sharing was clear early on, but it was emphasised throughout the years, to the extent that the third report cited the Greek delegation noting that information for objects removed from its territory came from Interpol, not the Commission, even though the directive was supposed to assist with this information sharing, see paragraph 4.2 European Commission (2009). p. 7

[1013] And the Commission felt that the lack of information sharing, the inability to trace missing objects and the lack of alarm when they do go missing fed into the failure of the Directive, failures which only amplified the problems of the Directive, see point 2 Comité Consultatif des Biens Culturels (1999). Procès-verbal de la 8eme réunion du comite consultatif des biens culturels le 30 novembre 1999. 21 décembre. Commission européenne.

[1014] European Commission (2000). p.14

[1015] European Commission (2000). p.14

rightful owners was markedly slow in the first few years of its operation.[1016]

But the problems were such a sticking point that the Return Directive was often not applied,[1017] and more returns were agreed out of court or through mediation than through the mechanisms provided by the Directive.[1018] In our three case studies, the transposition and implementation of the Return Directive was largely uncomplicated, but in the twenty years of its existence, it has rarely been used by Denmark, Ireland or Sweden.[1019] More broadly, it has only been used sparingly across all other Member States.[1020] As such, less than a decade into its

[1016] With regards to restitution, the Commission noted that there was no real feedback from Member States on how to improve this, which the Commission said was regrettable, see point 2, Advisory Committee for Cultural Goods (2001)

[1017] Paragraph 5.1., European Commission (2005). Second Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2005) 675 final). European Commission. p. 7; this is also stated in the subsequent report see European Commission (2009). Third Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. (COM(2009) 408 final). European Commission

[1018] Paragraph 4.2, European Commission (2013). Fourth Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2013) 310 final). European Commission. p. 8

[1019] In Denmark, it was only used once in practice; a second return was based on a technicality, in that an object was exported without a licence, following which a retrospective licence was issued, see the annex in European Commission (2000); Throughout its existence, Ireland never used the Directive, and no requests were ever made for assistance or restitution (no returns were noted in any of the Reports); and in Sweden, only one request of a return under the Directive was made between 1999 and 2014, see European Commission (2005).

[1020] See Annex III of the first report (European Commission (2000)) where only 16 items, belonging to four Member States, were requested in the first six years. The annex for the second report (European Commission (2005)) indicated that only two member states had requested returns.

operation, the Parliament began to realise that the Return Directive was inadequate.[1021] The extent of its weaknesses were so great that the Commission concluded it was often easier for Member States to use mechanisms under the 1970 UNESCO Convention or the 1995 Unidroit Convention rather than to use the Return Directive.[1022]

Despite all these upsets, it is interesting to consider that Member States still believed that the Return Directive had a preventative effect on illicit trade and was an important educational and awareness-raising tool.[1023] As such, they were keen to emphasise that its serious deficiencies were to some extent counterbalanced by its strong awareness-raising effect on the art market. Member States also credited it with playing a standard-setting role for professional associations in Europe, which appeared to be organising themselves to operate under the Return Directive and were adopting codes of practice with its provisions in mind.[1024] Member States in turn believed this awareness-raising role was having a preventive effect on illicit trafficking and was discouraging illegal removals of cultural goods

[1021] The Parliament considered the Directive inadequate, European Parliament (2001); also see point 12, Advisory Committee for Cultural Goods (2001) Minutes of the 10th Meeting of the Advisory Committee for Cultural Goods 4 December 2001. (TAXUD/1148/2001). 12 December. European Commission

[1022] European Commission (2013). Commission Staff Working Document Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast). (SWD(2013) 188 final). 30 May 2013/ European Commission; also discussed, in particular, was the EU joining the Unidroit 1995 Convention, see European Parliament (2001).

[1023] See point 5.2.3, European Commission (2005). The third report also acknowledged the strengths of the Directive, despite its many weaknesses, with Member States mostly agreed that the Directive and Regulation were very good for raising awareness, but they were divided on how it would impact the illicit trade. For instance, while Germany, Finland, Ireland, Italy and the Netherlands considered the situation unchanged, Sweden and Greece thought the problem was getting worse, and Spain thought it was improving, European Commission (2009).

[1024] Note 4.2, European Commission (2000). p. 13

(though it must be noted that Member States opinions varied considerably[1025]).

With the problems of the Return Directive so apparent, by just 1999, the Member States were unanimous in their opinion that the Directive needed to be reformed.[1026] As a result, it was recast as the *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*.[1027] Recalling that the first version of the Directive was vague in terms of burden of proof and due diligence,[1028] the recast Return Directive reversed the burden of proof, bringing it closer in line with the final version of the 1995 Unidroit Convention. This placed responsibility on the possessor of an object, who had to demonstrate that they had exercised "due care and attention." With due diligence further fleshed out and clarified for acquiring objects, greater emphasise was put on the importance of provenance:

> In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step

[1025] Point 5, European Commission (2009). p. 9
[1026] Point 7, Comité Consultatif des Biens Culturels (1999, 13 déc.). It was stipulated that reforms were necessary but needed to be discussed in advance, see 2.1 Comité Consultatif des Biens Culturels (1999, 31 déc.).
[1027] European Union (2014). *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* (15 May)
[1028] See Chapter 3.2.1

> which a reasonable person would have taken in the circumstances.[1029]

It also extended the time limit to seek the return of cultural objects, which was one of the weaknesses identified with the Directive in its original form.[1030] To enhance dialogue and exchange between the Member States and overcome the type of problems experienced in the first version of the Return Directive, the reformed version encouraged dialogue between Member States. Appropriate modes of communication and information exchange were established through the Internal Market Information System (the IMI[1031]), which helped states to notify corresponding national authorities about the loss of national treasures and the return of stolen goods:[1032]

> In order to cooperate and consult with each other, the central authorities of the Member States shall use a module of the Internal Market Information System ('IMI') established by Regulation (EU) No 1024/2012 specifically customised for cultural objects. They may also use the IMI to disseminate relevant case-related information concerning cultural objects which have been stolen or unlawfully removed from their territory. The Member States shall decide on the use of the

[1029] Article 10, European Union (2014)

[1030] Point 2a, Committee on the export and return of cultural goods (2014). Minutes of the 20th Meeting of the Committee on the export and return of cultural goods on 28 February. (taxud.b.1(2014)1215934) 11 April. European Commission. p.2; Other issues included the extension of the time limit for verifying cultural objects to six months; and the rule that the burden of proof of due care and attention lies with the possessor; and the provision of common criteria for the interpretation of due care and attention for the purposes of compensation; also see Schneider (2016) p. 161

[1031] Internal Market Information System (2022). What is IMI?. European Commission. Available at: https://ec.europa.eu/internal_market/imi-net/about/index_en.htm#whatsimi

[1032] Employment of the Internal Market Information System (IMI) was expected to aide administrative cooperation and exchange of information see Jakubowski, Olgierd (2016). "The Internal Market Information System (IMI) on the Return of Cultural Objects – Its Principles, Application, and Evaluation of Its Effectiveness for the Protection of Cultural Heritage" *Santander Art and Culture Law Review*, Vol 2. p. 296

IMI by other competent authorities for the purposes of this Directive.

Another important improvement to the legislation was the removal of an annex classifying what type of cultural heritage applied to the Return Directive, and national treasures were no longer restricted by age or financial thresholds.[1033] While making returns contingent on "hard core" descriptions, age thresholds and financial value[1034] was originally intended to frame the Return Directive under the context of Article 36. In the end, it was felt that this was unnecessary and only ended up limiting the effectiveness of the Return Directive.[1035]

The means of arriving at a decision to reform the Return Directive are also worthy of analysis here, as it is reflective of the approach that EU institutions began taking in assessing the broader changes and questions in the realms of cultural policy in Europe. As mentioned in the earlier in this chapter, the Return Directive stipulated that Member States submit a report to the Commission every three years on the application of the Directive, which ensured that the issues of illicit trafficking would be kept on the agenda in Brussels.[1036] As well as this, beginning with the Return Directive and the Export Regulation (that we will examine shortly),[1037] a series of deliberative and consultative bodies representing the civil administrations of each Member State were established so that the operation of these legislative instruments could be discussed and the most pressing issues of concern for cultural policy for the Member States could be aired:

[1033] Point 2a, Committee on the export and return of cultural goods (2014). p. 2
[1034] European Commission (1993) The Large Market of 1993 and Cultural Objects: Commission tables measures to protect National Treasures. (P/92/3). European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/P_92_3
[1035] Point 4.2 European Commission (2013).
[1036] See back to Chapter 3.2.1
[1037] Article 17, European Union (2014).

> The Commission shall be assisted by the Committee […] The Committee shall examine any question arising from the application of the Annex to this Directive which may be tabled by the chairman either on his own initiative or at the request of the representative of a Member State.[1038]

The importance of this Committee cannot be overstated, and most of the problems with the Return Directive that we have discussed until now were raised in this very Committee, which when it first met settled on the name *Advisory Committee on Cultural Goods*.[1039] Not only would the Committee play an important role in identifying areas of concern, but it would also serve as a template for similar initiatives. For example, when the failures of the Return Directive in its first form became apparent,[1040] the Committee decided to establish an *ad hoc* Working Group on the Return of Cultural Goods that would examine in greater detail the concerns and suggested amendments, which were largely accepted and resulted in the recast Directive in 2014.[1041] The Advisory Committee and the Working Group had been very useful; so,

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[1038] Article 17, European Union (2014).

[1039] See agreement on name of committee in first minutes

[1040] European Commission (2019). Fourth Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of December 2008 on the export of cultural goods (COM(2019) 429). 26 September. European Commission.

[1041] Committee on the export and return of cultural goods (2011). Minutes of the 17th Meeting of the Committee on the export and return of cultural goods on 24 October, (TAXUD.B1 D(2011) 1351188). 18 November. European Commission; also see Point 3, European Commission (2009), p.9; First meeting in 2009, this *Working Group on the Return of Cultural Goods* operated under the guidance of the *Advisory Committee*, see Point 10, Committee on the export and return of cultural goods (2009). Minutes of the 16th meeting of the Committee on the Export and Return of Cultural Goods 10 July 2009 (TAXUD/-EN/224431/09). 7 August. European Commission; on the sole purpose of reforming the Directive, delivering its conclusions in 2011, see Note 11, Committee on the export and return of cultural goods (2011), which largely finds that the Directive was perfunctory and suggested legal modifications to the Directive, as well as increased cooperation for exchange of information. Also, cited in the fourth report, see European Commission (2013).

given the growing interest at EU level on the subject of illicit trafficking, when the Return Directive was reformed in 2014, the Commission took the opportunity to separate the tasks of the Advisory Committee. Until now, the Committee had monitored both the Return Directive and the Export Regulation, but the recast Directive stipulated that:

> Since the tasks of the committee set up by Regulation (EC) No 116/2009 are rendered obsolete by the deletion of the Annex to Directive 93/7/EEC, references to that committee should be deleted accordingly. However, in order to maintain the platform for the exchange of experience and good practices on the implementation of this Directive among Member States, the Commission should set up an expert group, composed of experts from the Member States' central authorities responsible for the implementation of this Directive, which should be involved, inter alia, in the process of customising a module of the IMI system for cultural objects. [1042]

Now entitled the *Expert Group on the Return of Cultural Goods*,[1043] this new statutory body would exclusively monitor the Directive as well as the internal movement of cultural goods, and it has proven to be an important source of information and dialogue for the Members States and researchers (including the author of this dissertation).

Ongoing issues with the Return Directive remain, including the sharing of information, which remains a significant problem,[1044] and the practical use of IMI for information exchange:[1045] as of 2023, the extent

[1042] See recital 21, European Union (2014).
[1043] Note 2 Committee on the export and return of cultural goods (2014).
[1044] Note 4.1, European Commission (2013).
[1045] Expert Group "Return of Cultural Objects" (2016) Summary Minutes Fourth meeting of the Expert Group "Return of Cultural Objects" 16 September. GROW/B4/ACS/el (2016)6411331) 11 October. European Commission.

to which IMI is useful in assisting the return of stolen cultural heritage is debatable, and in its first year of operation, only 58 notifications for returns were submitted.[1046] Partly, this has been put down to the technical nature of IMI, which is often ill-understood by the Member States.[1047] The removal of the annex of descriptions did not necessarily solve the problems of definition either,[1048] and enforcement officials in other Member States still cannot always recognise national treasures coming from outside of their territories.[1049] Indeed, the Member States noted that it has never been easy to verify if an object has left its Member State of origin legally to begin with.[1050] And if recovered, they have also noted that the process of beginning legal restitution is still not clearly understood. As such, its practical assistance in facilitating returns remains debatable.[1051]

But perhaps one of the most significant observations we can draw upon here comes from comments made at the *ad hoc* Working Group on the Return of Cultural Goods. When suggesting reform in 2011, the Working Group's recommendations found that the main issues with the Return Directive were with the exchange of information and cooperation between competent authorities, as we have seen. This could suggest that the problems could be remedied without the need for wholly reforming the Directive. This, in turn, can lead us to a

[1046] Jakubowski (2016). p. 221
[1047] Conclusion, European Commission (2021). First Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of 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 (Recast) (COM(2021) 705 final). 18 November. European Commission.
[1048] Note 3.2, European Commission (2013) p. 5; and note 4.1 European Commission (2013) p. 7, which cites the burdensome nature of the annex.
[1049] DG TAXUD & Deloitte (2017). Fighting illicit trafficking in cultural goods Analysis of customs issues in the EU: final report. European Commission. p. 141
[1050] Advisory Committee for Cultural Goods (2001).
[1051] Conclusion, European Commission (2021).

similar conclusion regarding the problems with international treaties, as discussed in the literature review.[1052] To a certain extent, perhaps these problems have not related solely to the legal aspects of the Return Directive but the capacity of the Member States to practically implement it at national level.

3.2.3. Tried and Tested: Customs and the Export Regulation

We shall now address another instrument that was brought into force in 1993 alongside the Return Directive. While the opening of the internal borders of the EU was welcomed by businesses, anticipating that it would ease the flow of goods around the continent, smugglers also recognised the potential benefits.[1053] There was increased concern that not only could heritage be lost from one Member State to another, but that it could be lost to third country, outside the EU, by moving the heritage object to a Member State with less stringent controls. The EU's concerns were not unjustified: in the early 1990s, Japan and the United States had been identified as areas outside the EU where heritage was leaking to.[1054] There were 5,000–7,000 thefts of cultural heritage items in France between 1997 and 1998 (with similar figures for Belgium, Germany and Italy),[1055] and ICOM had identified heritage of French and Italian origin ending up on North American markets.[1056] To stem this loss of heritage from the EU at the same time that the Return Directive was being considered, it was also

[1052] Boylan (2021).
[1053] Dietzler, J. (2013). p. 339
[1054] The Parliament issued a resolution in 1993 calling for action and more databases, see European Parliament (1993). Report on preserving the architectural heritage and protection cultural assets. 29 January. 36/96
[1055] European Parliament (June 2001). Resolution on the Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. 12 June. 0122/2001
[1056] ICOM (2001). pp. 25-31

decided that uniform exit controls would be applied at the frontiers of the EU, with the aim of preventing the loss of cultural goods via Member States with less stringent rules.[1057] While the initial suggestion of an EU-wide export regime raised more objections than the Return Directive,[1058] in the end, those Member States who were most opposed relented.

Coming into force on 1 January 1993, *Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods* (herein referred to as the Export Regulation) was not intended to replace or harmonise[1059] existing Member States' export licences regimes for cultural heritage, many of which remain in place. Rather, the Export Regulation was intended to operate alongside the existing protection regimes of the Member States.[1060] The scope of Export Regulation was different from the Return Directive, in that it applied to a much wider category of cultural heritage, not just 'national treasures'. Article 1 set out the definitions for 'cultural goods', and here, the Commission did not attempt to define cultural goods on its own but simply took inspiration from the 1970 UNESCO Convention and included:[1061]

[1057] European Commission (2000). Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) nº 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 final). European Commission. p. 3, note 2.1

[1058] Minister for the Arts meets to discuss art exports under new EEC reg; Denmark was originally hesitant of the export regulation and supported the British who felt the bureaucracy would be too much, see Marsan, (February 1991)

[1059] Peters, Robert (2015) "The Protection of Cultural Property in EU Law: Status Quo and the Future Perspectives" in Desmarais, France. 2015. C*ountering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage.* Paris: ICOM. p. 142.

[1060] Wantuch-Thole, (2015). Chapter 4; and Stamatoudi (2011). p. 139

[1061] European Commission (2013). Fourth Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2013) 310 final). European Commission. Section 4.2

1. Archaeological objects more than 100 years old which are the products of:
- excavations and finds on land or under water
- archaeological sites
- archaeological collections
2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years
3. Pictures and paintings executed entirely by hand, on any medium and in any material
4. Mosaics other than those in categories 1 or 2 and drawings executed entirely by hand, on any medium and in any material
5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters
6. Original sculptures or statuary and copies produced by the same process as the original,
7. Photographs, films and negatives thereof
8. Incunabula and manuscripts, including maps and musical scores, singly or in collections
9. Books more than 100 years old, singly or in collections
10. Printed maps more than 200 years old
11. Archives, and any elements thereof, of any kind or any medium which are more than 50 years old
12. (a) Collections (2) and specimens from zoological, botanical, mineralogical or anatomical collections;
(b) Collections (2) of historical, palaeontological, ethnographic or numismatic interest
13. Means of transport more than 75 years old[1062]

Financial thresholds applied to certain descriptions, and Articles 2, 3, 4, and 5 laid out the administrative procedures for licences, including the provision for refusing a licence if objects were considered as the

[1062] For a more detailed description, see annex of the European Union (2009). *Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods*. (9 December)

national treasure of a Member State.[1063] The Export Regulation also stipulated that *competent authorities* are to issue the licences[1064] to be presented to customs authorities as the goods leave the EU.[1065] Just like the Return Directive, the Member States would be required to report regularly on the Regulation's operation.[1066] As we discussed in the end of the previous section, the Advisory Committee on Cultural Goods – the deliberative body that would play an important role in keeping the topic of illicit trafficking on the EU agenda – was formally established via the Export Regulation:

> Article 8 1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission. The committee shall examine any matter concerning the implementation of this Regulation raised by its chairman either on his own initiative or at the request of a representative of a Member State.
> 8.2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote. The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes. The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account. [1067]

As mentioned earlier in this chapter, this Committee proved to be one of the most unexpected successes of both the Return Directive and

[1063] See Article 2.1. European Union (2009)
[1064] See Article 2 European Union (2009)
[1065] Article 4, European Union (2009)
[1066] Article 8 European Union (2009)
[1067] Article 8 1. European Union (2009)

Export Regulation. Though initially envisaged as a forum to monitor the implementation of both instruments, in addition, it served as a setting to air grievances, raise questions or share examples of good practice. For example, the Germans used the Committee as a forum to voice their concerns about the movement of Nazi-era looted art (which was a problem for several Member States). [1068] On another occasion, the Belgians raised the problem of illicit trafficking by politicians via diplomatic pouch.[1069] The extent to which the subject of illicit trafficking was being raised in these meetings led some Member States to propose the creation of a working group to deal exclusively illicit trade matters, with one representative per Member State allowed, supplemented by interdisciplinary experts.[1070]

Upon its introduction, most Member States feared that the Export Regulation would lead to increased bureaucracy and would inevitably involve an added layer of protection sitting on top of national protections; this largely proved to be correct.[1071] Just like the Return Directive, additional material and human resources – including museum specialists – were needed to aid customs officials, who were not always equipped to assess exports or correctly identify cultural heritage.[1072] Administrative cooperation also needed improvement, but

[1068] Expert Group On Customs Issues Related To Cultural Goods (2019) Minutes of the 6th Meeting of the Expert Group On Customs Issues Related To Cultural Goods. (Taxud.A5/CG (2019)1183771) 20 April. European Commission
[1069] Expert Group On Customs Issues Related To Cultural Goods (2019)
[1070] Committee on the Export and Return of Cultural Goods (2008). Minutes of the 15th meeting of the Committee on the Export and Return of Cultural Goods. (TAXUD/-1817/09). 2 October. European Commission.
[1071] Here, British free-trade advocates were strongly opposed to restrictions and added bureaucracy in their relatively laissez-faire art market, see Stewart, Catherine (1992) "Count down to 1993 and the United States of Europe — are you prepared? Everything you need to know about the European Commission and the Maastricht Treaty" *The Art Newspaper*. 1 April. London
[1072] European Commission (2013). Section 4.13

not to the extent of the Return Directive.[1073] And like the Directive, the Export Regulation also required increased communication and cooperation between the Member States. Although this was not institutionalised in 1993, over the years it has improved through the provision of training for Member States' licencing authorities, customs, police and museums. International cooperation was also fostered via agencies such as Interpol and Europol,[1074] even if Member States often felt these areas could benefit from improvement.[1075]

Despite the challenges mentioned above, the Export Regulation proved to be a more successful instrument compared to the Directive. It is widely used across the EU,[1076] and the general view is that it is a successful initiative: in Member States where there were less onerous export controls in place, it has been found to operate smoothly, and in those with a history of bureaucratic controls, it was also believed to operate well.[1077] Its application of uniform rules was also felt to assist in stamping out unlawful removal from one Member State to another.[1078] And its two-step process for export – licence approval via competent authorities and then exit under the supervision of customs – was felt to be an important protection and dialogue mechanism, where capacity-building exercises were employed to strengthen each element. For example, provenance was to be demonstrated by the exporter to competent authorities before the securing of a licence; customs officials would then implement best practices for border control and verification of the licence.[1079] Considering it was designed to deal with twelve

[1073] European Commission (2013). Conclusion.
[1074] European Commission (2010). Section 3.4
[1075] European Commission (2010). Section 3.6 and information exchange
[1076] European Commission (2010). Section 4
[1077] European Commission (2000). Section 3.2
[1078] European Commission (2000). Section 3.2
[1079] Conclusion, European Commission (2019). Fourth Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on

member states and eventually took in twenty-seven, it is a testament to its success that it largely continued to function well.[1080]

It is worth pointing out that there is very little that is controversial about export regimes. As we saw in chapter two, export regimes have long been used to regulate the movement of cultural heritage and protect it, and their usage is further reinforced by the 1970 UNESCO Convention.[1081] The Member States viewed the Export Regulation positively, noting both its practical effects in protecting heritage and its awareness-raising potential.[1082] Indeed, some Member States ran awareness-raising campaigns upon the introduction of the Export Regulation in an effort draw attention to the need for greater vigilance regarding heritage protection.[1083] Refusals for licences have been rare, with less than 1% of licences being refused;[1084] this is usually because the object for export was found to be a national treasure or because the licence application was incomplete.[1085] Noncompliance with the Regulation is also rare,[1086] and where there were issues of non-compliance, the Advisory Committee suggested enforcing the policies to highlight compliance and doing more research into the object's origin before provision of a licence.[1087]

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the implementation of Council Regulation (EC) No 116/2009 of December 2008 on the export of cultural goods (COM(2019) 429) 26 September. European Commission.

[1080] Conclusion European Commission (2019). Third Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of December 2008 on the export of cultural goods (COM(2015) 144) 1 April. European Commission.

[1081] Nafziger, J.A.R., & Paterson, R.K. (2014).

[1082] European Commission (2000). Section 3.2

[1083] European Commission (2000). Section 3.2

[1084] Only 0.3% of all licenses issues between 2000 and 2010 were refused, European Commission (2010). Section 3.1.4

[1085] European Commission (2010).

[1086] European Commission (2015). Section 5.5 with only 0.2% refused between 2010-2013

[1087] European Parliament (June 2001).

Unlike the Return Directive, as a regulation of the parliament, the Export Regulation entered into force directly across the EU. As such, it did not require legislation on the part of Member States and so avoided the problems experienced with the transposition of the Return Directive. The only action Member States needed to take was to identify competent authorities to implement the administrative features of the law; in this respect, the levels of enforcement varied from Member State to Members State, with the Commission noting that the level of enforcement often reflected the country's attitude to culture and heritage in general.[1088] In Denmark, licences were issues by the Commission on the Export of Cultural Assets,[1089] and between 1993 and 2008, the Commission approved 670 licences for objects leaving the EU from Denmark,[1090] with only one licence refused during this period.[1091] In Ireland, representing a change from the previous regime under national legislation, it is the Ministry of Culture who issues licences rather than the National Museum and National Gallery, who had previously shared this administrative responsibility under the *National Monuments Acts* and *Documents and Pictures Act* for EU-bound materials. Here, from 1993 to 2009, 143 licences were issued for objects leaving the EU from Ireland,[1092] with Ireland never having refused a licence.[1093] In Sweden, the National Heritage Board issued licences, with the Board issuing 1,630 licences for objects leaving the EU from Sweden between 1995 and 2008. [1094] Sweden refused four licences during this period.[1095]

[1088] European Commission (2000). Section 3.2
[1089] Chapter 2.1.1
[1090] Combined annexes, European Commission (2000) and European Commission (2010).
[1091] Combined annexes, European Commission (2000) and European Commission (2010).
[1092] Combined annexes, European Commission (2000) and European Commission (2010).
[1093] Combined annexes, European Commission (2000) and European Commission (2010).
[1094] Combined annexes, European Commission (2000) and European Commission (2010).
[1095] Combined annexes, European Commission (2000) and European Commission (2010).

While the Return Directive was revised to rectify serious issues with its functioning, the decision to recast the Export Regulation in 2008 was mainly taken to make it more transparent and accessible, as well as remove obsolete provisions and harmonise terminology.[1096] Recast as *Council Regulation (EC) No 116/2009 on the export of cultural goods,* descriptions of cultural goods previously seen as complex, unclear and open to interpretation – which impacted the recognition of cultural goods from another Member State – were amended.[1097] Information sharing, which was also considered difficult – and which Member States felt needed improvement to help them identify another Member State's heritage and fight illicit trafficking – was also strengthened.[1098] Broadly, in its recast version, the Member States have still found the Export Regulation useful, and it has been identified as a useful tool for protecting European heritage from illicit trafficking on several occasions.[1099] Indeed, the Commission cites low levels of seizures and infringements as indicators of success of the Export Regulation at preventing the illicit trade of cultural heritage,[1100] and its awareness-raising potential is also felt to be far superior to that of the Return Directive (though this is not surprising given art dealers would have to use the system on a daily basis, which they would be unlikely to do with the Directive).[1101]

[1096] European Commission (2010). Section 2.1, where coins and postage stamps considered cultural heritage, but there was debate on whether watercolours were heritage.

[1097] For the Regulation, there were also issues to do with interpretations of cultural goods, which was unclear and open to interpretation; and the working Group on interpretation met as established to address this, see European Commission (2015). Section 6.2

[1098] European Commission (2019).

[1099] European Commission (2019). Conclusion

[1100] European Commission (January 2015). Customs Union Performance: Guidance Notes. TAXUD/A1/DB/D(2015) 394984 where the Commission notes that the figures are falling and the Regulation must be working.

[1101] European Commission (2000). Section 3.2

However, there have been more pointed critical analyses from observers and Member States. Some Member States (mainly Member States who are source countries), while acknowledging that export controls are a primary means to protect heritage against trafficking, have asked if these traditionally accepted methods – now endorsed by the EU via the Export Regulation – are appropriate in addressing illicit trafficking in the 21st century.[1102] Member States who are also transit countries have asked the same questions,[1103] with market countries also wondering about the usefulness of export controls for heritage protection.[1104] On this subject, it is worth considering that, throughout the nearly 20 years of the Regulation within our three case-study states, there have not been any penalties or measures taken against regulatory infringements; this is despite the fact that Member States may lay down penalties for violating the terms of the Regulation.[1105] And though Member States feel that the measures employed by the Export Regulation are effective, proportionate and dissuasive, the absence of criminal convictions for those who have broken the Export Regulation does not appear to support this.[1106] Indeed, violations of the Export Regulation are very low in comparison to violations for currency or weapons smuggling, which have thousands of infringement each year. In contrast, the average number of violations of the Export Regulation are around 120 per year.[1107] A majority of Member States report never having had to seize cultural goods that were to be exported from the

[1102] Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). A1.18 and A1.19
[1103] Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). A1.18 and A1.19
[1103] Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). A1.18 and A1.19
[1104] Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). A1.18 and A1.19
[1104] Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). A1.20
[1105] Article 9 European Union (2009).
[1106] European Commission (2019). Section 4.11
[1107] This is for a three year period, 2016-2018, with 96, 141 and 117 infringements in 2016, 2017 and 2018, respectively. European Commission. (2020). Customs Union Performance: Guidance Notes. 10 January. TAXUD/A1/ and European Commission (2017). Customs Union Performance (CUP) Figures and Trends for 2017. Accompanying the document CUP Annual Report 2017 (Ares(2018)3417954). 27 June.

EU in violation of the Regulation.[1108] While the Export Regulation managed to standardise export procedures across the EU, there is no evidence that this standardisation has been mirrored by behaviours and attitudes at Member States' borders.[1109] This has raised concerns from observers about potential 'export paradises', where a more relaxed enforcement of the Export Regulation's provisions in one Member State makes it a more desirable location to export, compared to another Member State with more a stringent application of the rules.[1110] Additionally, informal surveys of museum professionals, law enforcement authorities and art market professionals take the view that the Export Regulation has had little impact on restraining illicit trade.[1111]

Suggestions of improvement have taken various forms. For law enforcement authorities, it is believed that stricter interpretations of the categories of objects in the Export Regulation – including further extending its scope – could be helpful in stamping out illicit trade.[1112] On the other hand, customs authorities have taken a more nuanced view; in another example reflective of broader changes in cultural policy and deliberations within EU institutions, another *ad hoc* working group of Member States' customs agencies concluded that the Export Regulation could be improved by strengthening due diligence and provenance research. Arguing for this, they pointed out that different interpretations of 'provenance' – both nationally and professionally – were impacting the usefulness of the Export Regulation.[1113] Here, the *ad*

[1108] DG TAXUD & Deloitte (2017). Fighting illicit trafficking in cultural goods Analysis of customs issues in the EU: final report. European Commission. p. 67
[1109] European Commission (2000).
[1110] Stamatoudi (2011). p. 140
[1111] Researchers felt it was more of a factor, but still a lesser concern; art market officials also seemed to be of the opinion that the export regulations had little impact in regulating the trade. Brodie, Batura,op 't Hoog, Slot, Wanrooij, & Yates, (2019). p. 235
[1112] E Brodie, Batura,op 't Hoog, Slot, Wanrooij, & Yates, (2019). p. 246,
[1113] Van Heese, Marja, Feys, Marja, Versluys, Patrick & Becker, Justus (2019).

hoc working group specifically recommended that the ICOM definition of provenance – as described in the ICOM Code of Ethics – be used as the key definition for provenance with respect to the export of cultural goods from the EU.[1114]

3.4. Conclusion

In this third chapter we have attempted to map the early European and EU efforts to understand and respond to illicit trafficking and to protect cultural property on the European continent. Beginning in the 1960s, many international organisations were concerned with the increasing growth of this phenomenon, and so each organisation responded using individual methods and tools to attempt to restrain illicit trafficking. As this chapter has demonstrated though, the EU was no different and in this sense it cannot be seen as unique, indeed the EU has taken inspiration from other international and national efforts to protect heritage; however, it must be acknowledged that – even if there were other actions like those of UNESCO or the Council of Europe – the initiatives taken by the EU to enter this realm of heritage protection and address this phenomenon were indigenous, of European character and driven by internal factors within the EU. That said, the realities of EU efforts to restrain illicit trafficking demonstrate the EU has experienced the same difficulties with its Export Regulation as our case studies did with previous regimes, though it has not been without success. The Return Directive, on the other hand, has struggled since its implementation, with key problems surrounding the exchange of information and identifying vulnerable heritage. It is difficult to conclude where the problems of the Directive really lie; like the international system discussed in the literature review, it can be argued here that the problems with the Directive are

[1114] Van Heese, Marja, Feys, Marja, Versluys, Patrick & Becker, Justus (2019).

not in the laws but in their administration and implementation, not to mention the complex legal issues that come with international private law. But one of the most interesting findings in this chapter is the early extent to which the EU became concerned with and began addressing illicit trafficking. This demonstrates that far from being a passive observer, concerned only with the economic interests, the EU has been from the beginning an active partner in the fight against illicit trafficking in Europe.

Chapter 4. Bamiyan to Bataclan: Internal Changes and External Influences on EU Decision Making

4. Introduction

As we saw in the previous chapter, the EU's competencies used to tackle illicit trafficking have been steadily growing, mainly with EU-wide legislation to regulate the movement of cultural property and limit the possibility of illicit trafficking. But other changes – further treaty reform coupled with increasing external threats to heritage – would also impact on EU decision making with respect to illicit trafficking. In this final chapter, we shall continue this analysis, first observing the non-legislative actions allowed by further treaty reform that would see the EU expand its own analysis of this problem, as well the external threats to heritage, of which the EU was becoming increasingly concerned. Indeed, it would be external threats, exemplified by the commercialisation of looting by Daesh in Syria and Iraq, and increasing terrorist activities that were threatening EU citizens, which, in the end, would push the EU to embark on its most ambitious illicit trafficking plan to date.

4.1. Works Plans for Illicit Trafficking

While the Return Directive and Export Regulation are often interpreted as the EU's first-developed heritage protection tools, in reality, they are mechanisms to reconcile the freedom of movement of cultural goods with the protection of national treasures.[1115] However, further treaty reform with the entry into force of the Maastricht Treaty[1116] or Treaty on European Union (TEU) in 1993,[1117] followed by

[1115] European Commission (2000). Section 2.1

[1116] The Maastricht Treaty or the Treaty on European Union (TEU) would expand many areas of EU competency, including economic, monetary and foreign policy, and also

the Lisbon reforms in 2009,[1118] would give the EU a broader remit in culture. The first actions carried out following Maastricht reforms are interesting in many respects: in one way, they were cautious, in that they focused on funding initiatives for cultural projects; but at the same time (albeit somewhat outside of the scope of our inquiry) they could be described as ambitious since they explicitly sought to use culture at an EU level to develop a European 'identity'[1119] – something that was unthinkable only a few decades before.[1120]

4.1.1. Exploring EU Strategies Towards Illicit Trafficking

In 1995 – two years after the TEU came into force – the European Commission launched what would be the first set of EU-wide initiatives in culture; and though they did not address illicit traffic, they are important to understand as they were the first in a series of initiatives that would see the EU engage with culture, (including measures to protect heritage from a variety of threats such as illicit trafficking) by its own initiative.[1121] Relevant to the topic of our

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cultural issues, see Watts, (2008). p.40; but culture was the most complex area to reach a consensus, see Stewart, (1992)

[1117] With the entry into force of the TEU in 1993, the EU for the first time had an explicit (though ill-defined) remit in the cultural sector under Article 128 of the TEU, this stated that the EU could "contribute to the flowering of the cultures of the Member States" and would be further possible through the principle of subsidiarity under Article 5(3), see Craufurd Smith (2011), p. 890-891; the Article further specified that the EU could, if necessary, support and supplement the actions of the Member States to protect and safeguard cultural heritage, see Article 128.2, European Union (1992).

[1118] EUR Lex (2023). Article 6, Consolidated version of the Treaty on the Functioning of the European Union, Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E006%3AEN%3AHTML

[1119] Craufurd Smith, (2011), p. 891, and also Craufurd Smith, Rachael (2016), 'The Cultural Logic of Economic Integration', in E. Psychogiopoulou (ed.), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (Palgrave Macmillan UK), 7-24. p. 11

[1120] Calligaro & Vlassis, (2017). p. 12

[1121] Raphael targeted cultural heritage, and illicit trafficking fell within its remit under the project scope, see Craufurd Smith (2016). p. 18

inquiry, the modestly funded Raphael programme[1122] was designed to address and fund heritage protection projects in the EU. Though this programme was not designed specifically for illicit trafficking,[1123] its more holistic approach to the protection of European heritage[1124] meant that it could address more contentious heritage protection topics; this could and did include actions to address illicit trafficking in individual Member States and candidate countries:[1125]

> The aim of the Raphael programme is to support actions at European level in all categories of moveable and immoveable cultural heritage, in compliance with the principle of subsidiarity […]
> Cooperation for the exchange of experiences and the development of techniques applied to the heritage [... including]:
>
> > Support for exchanges of experience through conducting studies, surveys and working meetings,

[1122] As the Parliament felt the initial budget of €30 million to be too low, Parliament proposed that it be tripled to €86 million, see European Commission (1997), 'EU cultural programmes - ARIANE advances but no agreement on RAPHAEL', (Brussels); eventually, the Commission met the Parliament halfway in terms of funding, with €67 million being budgeted, see European Commission. (1996), 'RAPHAEL pilot projects selected', (Brussels).

[1123] The Parliament also pushed for explicit references to illicit trafficking, amongst other amendments; but, the following was removed by the Commission: "the theft of cultural assets and vandalism are among the most serious causes of the impoverishment of the European cultural heritage," see European Parliament, Committee on Culture and Education (1995), 'Legislative resolution embodying Parliament's opinion on the proposal for European Parliament and Council Decision establishing a Community action programme in the field of cultural heritage - the Raphael Programme' (COM(95)0110 - C4- 0141/95 - 95/0078(COD))

[1124] European Commission (2004). 'Report on the implementation of the Community programmes Kaleidoscope, Ariane and Raphael', (Brussels).

[1125] Questions were asked about the involvement of third countries, including Cyprus (which at this stage was not a Member State of the EU) and if Raphael could be used to support restoration of monuments in Turkish-occupied Cyprus, see European Parliament (1996), 'Written Question by Alexandros Alavanos (GUE/NGL) to the Commission on Restoration of monuments damaged in Turkish-occupied Northern Cyprus', (Strasbourg).

> as well as through seminars, in the following fields in particular: preventive protection of cultural objects, works and monuments against disaster and conditions for their conservation.[1126]

It is interesting to note that the European Parliament had wished Raphael to have a specific focus to address illicit trafficking, but the Council of Ministers removed any references to illicit trafficking in the final drafts of the programme. As an initiative under the auspices of the Commission that aimed to identify areas where the EU could coordinate and contribute to the better preservation of heritage through funding,[1127] it set a precedent for European action in the cultural sector that would continue under many other European Commission-orientated projects to the present day, including Culture 2000 and the Culture Programme (2007-2013); programmes which in turn were followed by the Creative Europe programme, which has pursued the same soft policy of promoting and funding that was commenced under Raphael.[1128] Though significant, it is important to remember that these were only Commission-administered funding activities, approved on by the Council of Ministers.[1129] Reforms begun by of the TEU now allowed the coordination of cultural initiatives by the EU, but only led by the Council of Ministers, representing the Member States, and not initiated the European Commission. The rationale here was that the Council – the second legislative chamber of the EU that represents the Member States governments – was the most appropriate institution

[1126] European Commission, (1996), 'Common position on RAPHAEL programme', (Brussels).
[1127] Craufurd Smith (2011), p. 890
[1128] COM72004(469 1-2004-469-EN-1-0); there was nothing on illicit trafficking for this either, see mid-term report https://ec.europa.eu/programmes/creative-europe/sites/default/files/culture-programme-interim-evaluation-2010_en.pdf
[1129] As stipulated by the Treaties and following the reforms ushered in by TEU, the Commission still had no remit in the area of cultural policy, so these measures were limited to funding and support, see Psychogiopoulou, E. (2016). *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* Palgrave Macmillan UK. p. 238

that could support and supplement the sensitive cultural actions of the Member States at EU level at where it was controversial (and impossible) for Brussels to unilaterally lead. [1130]

The rotating six-month EU Council Presidencies are therefore important to consider here as they allowed Member States to set the agenda for cultural priorities via what have become known as "Work Plans", all the while respecting Member States cultural competences. The concept of a work plan was to streamline the previous *ad hoc* initiatives of the EU in culture (like Raphael)[1131] and give overall direction to the Commission and the EU.[1132] To this day, the Council agrees on policy goals via these work plans, and these goals are then transferred to the Member States for implementation,[1133] with the Commission playing a further supportive role via funding. As we shall see, the goals of the work plans are broad; they last several years, with each plan contributing and inspiring subsequent plans.

The First Work Plan for Culture 2002-2004 was agreed upon in 2001;[1134] its scope was modest,[1135] and it was expected to prioritise cooperation between the Member States, as well as increase links with UNESCO and third-party countries.[1136] The plan was broad and

[1130] As specified in Article 128 of TEU, because of its unique position, the Council had the right in certain areas to initiate policy and legislation whereas the Commission could not act, this included foreign policy and culture as per Article 151.5 European Union (1992).
[1131] Dutch Presidency of the European Union. (2004). Call for Culture. Paper for informal meeting of culture ministers, Rotterdam, 13-14 July. (OCW/IB/2004/45968).
[1132] Dutch Presidency of the European Union. (2004).
[1133] Culture Action Europe (2013) Glossary.
[1134] Council of the European Union. (December 2002). Council Resolution implementing the work plan on European cooperation in the field of culture: European added value and mobility of persons and circulation of works in the cultural sector. (2003/C 13/03)
[1135] Its focus was: (i) European added value (ii) Access to, and visibility of, cultural action of the Community (iii) Horizontal aspects (iv) Dialogue among cultures (v) Cooperation between Member States and participation of new Member States (vi) International cooperation in the field of culture.
[1136] Council of the European Union. (2002).

sometimes vague, with no clear aims, and merely encouraged the Commission and Member States to focus on culture and heritage that had:

(i) European added value
(ii) Access to, and visibility of, cultural action of the Community
(iii) Horizontal aspects
(iv) Dialogue among cultures
(v) Cooperation between Member States and participation of new Member States

The protection of moveable heritage was not directly addressed; but under the Council Presidencies of Greece and Italy – and reflecting a broader theme of mobility in the museum and heritage sector specified under item three – the concept of mobility was fleshed out at smaller meetings with stakeholders. These meetings helped to expand this third theme, which in turn identified collections as an area in need of examination, specifically addressing the three topics below:[1137]

(i) State guarantees
(ii) Immunity from seizure
(iii) Long-term loans and deposits of works

The expansion of this topic would prove instrumental for further policies relating to moveable heritage more broadly, as it was subsequently decided to include 'mobility of collections' as a topic in its own right in the Second Work Plan 2005-2007, which was agreed under the Dutch Presidency of the Council in 2004.[1138]

[1137] Finnish Ministry of Education (2006). Encouraging the Mobility of Collections: Conference report European Conference Helsinki, 20-21 July 2006 p. 2
[1138] Dutch Ministry of Education, Culture and Science. (2005) Lending to Europe Recommendations on collection mobility for European museums. p. 9

This Second Work Plan was more extensive than the first, and the Commission and Member States were directed to follow a much more ambitious programme:

> [Under the theme] Mobility (works of art and art collections and exhibitions), Member States in cooperation with the European Commission [will]
> - Develop on a representative basis a Committee of museum experts to advise on ways to facilitate European Collection Mobility
> - The Committee should particularly advise on:
> - insurance (indemnities)
> - standards setting on couriers and loan agreements
> - Registration
> - Digitisation
> - European Commission, Council, [and] Member States [will]
> - Develop and implement an action plan on European collection mobility[1139]

The Second Work Plan clearly identified the need to develop a committee of museum experts, which would author and prioritise an action plan on lending between European cultural institutions. This Committee is interesting for our inquiry, as the inclusion of independent experts was instrumental in a decision to formalise an extensive consultation process with civil society in future work plans.[1140]

Recognising the usefulness of including grassroots opinions, the Council decided that these future initiatives would be supplemented by extensive consultation and coordination with civil

[1139] Dutch Ministry of Education, Culture and Science. (2005) p. 31
[1140] Dutch Ministry of Education, Culture and Science. (2005) p. 31

society.[1141] These consultations would be dubbed OMCs – Open Methods of Coordination[1142] – and they developed into engagement strategies largely directed by the Member States,[1143] with the aim that, on the one hand, Member States' competencies in cultural affairs at national level would be respected, while on the other, states would avoid any potential administrative overreach or bureaucratic burden that could accompany an EU cultural unit or department.[1144] The OMCs would further allow for even more direct involvement of Member States,.[1145] and the institutionalisation of this consultative approach to cultural policy would allow for a structured dialogue between the cultural sector, civil society and the EU.[1146]

Returning to the committee of museum experts, their 2005 report, *Lending to Europe,* broadly examined the situation for the movement of cultural goods in Europe.[1147] And through these external experts and their report, Member States and the Commission were made aware of periphery discussion panels organised by the Italians

[1141] The organized, orientated and structured approach to culture would be supported through the OMCs, see p. 2 which explicitly says the Agenda set by an OMC is a tool to identify priorities under the third Work Plan https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0390:FIN:EN:PDF

[1142] An OMC is a form of policy creation at EU level which can advise the Commission on actions but is not legally binding. Instituted in the 1990s, it can provide a framework for cooperation between the Commission and EU member states, see European Commission. (2010). Commission report to the European parliament, the council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the European Agenda for Culture (COM(2010)390 final).

[1143] Psychogiopoulou, (2016). p. 38

[1144] Council of the European Union (2007). Resolution of the Council of 16 November 2007 on a European Agenda for Culture. (2007/C 287/01)

[1145] While there has been a lot of discussion on their positive aspects, the OMCs have been criticized because they can be seen to override, or supersede, national policy, Psychogiopoulou, (2016). p. 38

[1146] European Commission. (2010). Report on the implementation of the European Agenda for Culture (COM(2010)390 final).

[1147] Council of the European Union. (2004). PRESS RELEASE: 2616th Council Meeting Education, Youth and Culture Brussels, 15-16 November 2004 (14380/04 (Presse 310))

and operating under the umbrella of the Work Plan, which had identified illicit trafficking as a cause for concern.[1148] For this reason, the Council directed the Commission to supplement the Member States' work with a separate study on the same topic that explicitly recognised the implications for museums from the loss and theft of works.[1149]

Toward the end of this Second Work Plan, under the Austrian Presidency, another expert team was assembled and tasked with drawing up a plan on loans and exhibitions, amalgamating the findings of the six previous presidencies. The resulting *Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards* was agreed upon in Helsinki during the Finnish Presidency in late 2006 and was eventually endorsed by the Council's Cultural Affairs Committee in October 2006, which in turn drew attention to the security of collections in European museums.[1150] In a separate development that eventually came under the umbrella of the Second Work Plan, the European Council – the assembly of European Heads of State and Government that gives overall direction to the EU – was becoming concerned with illicit trafficking and issued a broad call for greater traceability of cultural goods,[1151,] directing the Commission to conduct a study on this subject.[1152] This study in turn recommended a model for inter-EU

[1148] Dutch Ministry of Education, Culture and Science. (2005); comments on illicit trafficking conference in Naples: Illegal Trade: Fighting illicit traffic in cultural goods within the European Union conference also recommended an anti-seizure law

[1149] Etablissement Public a Caractere Industriel et Commercial (Epic) & Staatliche Museen Zu Berlin Preussischer Kulturbesitz (2003) Study No. 2003-4879 ordered by the European Commission to inventory national systems of public guarantees in 31 countries. Available at : https://uk.icom.museum/wp-content/uploads/2015/03/EU_State_Indemnity_Schemes.pdf

[1150] Finnish Ministry of Education (2006). Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards

[1151] DG HOME & CECOJI-CNRS (2011). p. 85; Council of the European Union (2008). Conclusion of the Council on Preventing and Combatting Illicit Trafficking in Cultural Goods. (14224/2/08) 3 November.

[1152] European Commission. (2010). 5.2.3; and 3.2; and European Commission. (2009).

regulation of cultural objects, and an EU-wide database for shipping and export licences, as well as marking systems for cultural goods and increased cooperation between Member States.[1153]

It was in this context of these activities that the Third Work Plan was drafted. Running from 2008-2011, the Plan continued with a much more developed theme of collections, stipulating that a report be published by 2010;[1154] and under the EU-trio presidencies of France, the Czech Republic and Sweden (2008-2009), there was an agreement that illicit trade was a growing problem that should be addressed under this plan.[1155] Building on the work from the first and second plans, an OMC was tasked with examining the prevention of theft and illicit trafficking.[1156] The final report from the Expert Working Group on the Mobility of Collections, published in June 2010, followed seven formal plenary meetings with independent experts from all 25 Member States who collectively produced a series of 40 recommendations on the mobility of collections more broadly.[1157] However, they went beyond their mandate and included much broader and ambitious suggestions for the protection of moveable cultural heritage with an entire chapter

[1153] European Commission. (2009). 3.2 p. 4, and European Parliament (2005). Answer given by Mr Kovács on behalf of the Commission to a written question - Export of cultural objects. (E-2695/2005(ASW))
[1154] European Commission (2010) Report on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods 1 January 2000 - 31 December 2010 (COM(2011)382)
[1155] Council of the European Union (June 2008). The future French, Czech and Swedish Presidencies. (11249/08) 30 June.
[1156] ECORYS & DG EAC (2013) Evaluation of the Open Method of Coordination and the Structured Dialogue, as the Agenda for Culture's implementing tools at European Union level. July 2013. p. 10; also see Council of the European Union. (May 2008).Council Conclusions on the Work Plan for Culture 2008 – 2010. 21 May 2008, priority 2.
[1157] OMC Expert Working Group on the Mobility of Collections (2010). Final Report And Recommendations To The Cultural Affairs Committee On Improving The Means Of Increasing The Mobility Of Collections. Available at: https://www.obs-traffic.museum/sites/default/files/ressources/files/EU_Commission_Report_Mobility.pdf pg.12

focused on the prevention of illicit trafficking.[1158] In particular, the report called for the EU and the Member States to:

> … promote among museum professionals and institutions awareness of adopting provisions (as promoted by Codes of Ethics, relevant international Conventions) to exercise due diligence.
>
> To adopt the essential requirements of due diligence in researching the provenance of cultural objects, inter alia, as a means to deter the illicit trafficking of cultural goods.
>
> To exercise transparency in the policies of cultural heritage institutions by adopting common standards and procedures regarding acquisitions, loans, legacies, donations as well as acting responsibility and, if necessary, introducing new administrative or legal measures or sanctions.
>
> To guide the relevant authorities in taking the appropriate measures in order to find means to achieve the interoperability of relevant databases at the European level. The wide availability of digital records related to cultural goods is considered critical for increasing the traceability of cultural goods and a valuable tool in the efforts towards prevention of theft and illicit traffic. [1159]

Their conclusion explicitly warned the Council, Commission and Member States that they could not expect to find a solution to the problem of illicit trade unless there was coordinated action directed by the EU, combined with increased cooperation between the Member States, further adding that:[1160]

[1158] OMC Expert Working Group on the Mobility of Collections (2010). Priority D: Prevention of theft and illicit trafficking / Due diligence - Interoperability of database - Internet sale.

[1159] OMC Expert Working Group on the Mobility of Collections (2010).

[1160] Conclusion, OMC Expert Working Group on the Mobility of Collections (2010).

> of illicit traffic in cultural goods […this] will require the input of more time and energy in order to produce further results.[1161]

In greater detail, the report stated that to target illicit trafficking, the EU should adopt EU-wide import restrictions for cultural goods, flesh out concepts of due diligence for sales transactions,[1162] and ensure the adoption of the ICOM Code of Ethics across the EU. This, it asserted, would guarantee uniform acceptable standards for the acquisition and safe transfer of objects.[1163] The lack of sanctions for violating existing rules was also cited as a problem in need of addressing.[1164] The Expert Working Group also proposed the tracing of cultural objects around the EU by using a form of documentation; this would improve transfer but also assist with recovery and the Export Regulation.[1165]

A separate report by academic experts from across Europe, *Study on preventing and fighting illicit trafficking in cultural goods*, was also commissioned and concluded in 2011. Though at times academic, it broadly identified areas of concern (including the poor regulation of

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[1161] OMC Expert Working Group on the Mobility of Collections (2010). p. 4

[1162] Due diligence was recognized as key here, and the report stated that preventing theft and trafficking required increased due diligence, as well as interoperability of databases and addressing of online sales. OMC Expert Working Group on the Mobility of Collections (2010).

[1163] With due diligence in mind, it says the Codes of Ethics should be adopted. Member States should also look into ensuring that all acquisitions are overseen to ensure that they are not tainted. This should be followed by a procedure for confiscation and legal proceedings and restitution if necessary, see OMC Expert Working Group on the Mobility of Collections (2010).

[1164] The report found most Member States did not have sanctions in place, OMC Expert Working Group on the Mobility of Collections (2010).

[1165] The group recommended the introduction of some sort of system to improve traceability and make databases on the legal circulation of goods available. OMC Expert Working Group on the Mobility of Collections (2010).

the art market) and suggested using the EU's growing external network as a remedy to this international problem:[1166]

> The current state of play, and the problems encountered by the actors and institutions directly concerned by the issue of trafficking in cultural goods, suggest a number of priority objectives both in terms of prevention and penalties, which should lead, on the one hand, to regulation of the art market and on the other, to better protection of the heritage of States […]
> With a view to drawing up a "European strategy that makes culture a consistent and systematic part of the external relations of the Union and contributes to the complementarity of actions of the Union with those of its Member States", the project of more effectively combating trafficking in cultural goods at the European level could be based on certain key provisions, from which a number of actions could be derived. The actions that the Union might take, in the form of binding legal or technical instruments (regulations, directives and accreditation techniques) or non-binding ones (Council recommendations, conclusions, etc.) are presented here. [1167]

More precisely, the report proposed 33 recommendation in all.[1168] The diversity of protections at national level was a problem which needed harmonisation, and this lack of cooperation needed to be addressed between Member States.[1169] There was also a disparity between States in terms of training, as not every State had the same levels of preparedness.[1170] The study further identified current legal and

[1166] DG HOME & CECOJI-CNRS (2011).
[1167] Executive summary DG HOME & CECOJI-CNRS (2011).
[1168] Executive Summary DG HOME & CECOJI-CNRS (2011).
[1169] Executive Summary DG HOME & CECOJI-CNRS (2011).
[1170] Executive Summary DG HOME & CECOJI-CNRS (2011).

operational obstacles to preventing illicit trafficking in cultural goods, such as the difficulty of sharing information between Member States and the need for specialised training for customs officials in order to identify suspect goods. The report recommended that the Commission create a coordination department that would be responsible for facilitating contact between concerned authorities and organising trainings for officials.[1171]

4.1.2. Culture and Heritage in EU External Affairs

The strategies that we have examined until now largely relate to the role and use of heritage both from and within the European continent. But, as the legal personality of the EU was being strengthened in the early 2000s, increasingly cultural heritage was being used in the EUs external relations, with actions to fight illicit trafficking often used as an engagement technique to encourage cooperation.

There first small examples of the role of culture in the external affairs of the EU were in the 1990s.[1172] Raphael and its successor programme Culture 2000 also contained elements that focused on the external affairs of the EU, and certain projects financed under both of these programmes focused on the illicit trafficking of cultural property in countries outside the EU and heritage that was essentially of non-European character.[1173] It is also interesting to note that one of the earlier statements from the EU regarding illicit trafficking was issued in the context of external affairs. In 2000, at a meeting of EU and African

[1171] European Commission (2010)

[1172] Countries agreeing to EU common market rules were required to take EU anti-illicit trafficking policies on board, under EEA, Third countries had to accept anti-illicit-trafficking rules, see EEA Joint Committee (1997). Decision of 12 December 1997 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms. (98/97)

[1173] Mainly in the Balkans.

leaders, under "Cultural Issues," the final declaration by the joint meeting of leaders pledged:

> […] to accord importance to cultural cooperation between Africa and Europe as an integral aspect of development [and as part of this it was agreed that] "legal and practical consequences" concerning "cultural goods stolen or exported illicitly" would be examined "within reasonable time."[1174]

Although small, this declaration was the first in a series of exchanges between the EU and the African continent that saw proposals to address the phenomenon further fleshed out over the coming years;[1175] and as these themes developed, it led to a growing understanding inside the EU that not only were these policies useful for strengthening bilateral exchange, they also raised awareness that threats to heritage in Africa also threatened heritage and protection policies in the EU.[1176] Taking into consideration the growing calls for restitution of colonial materials from the 2000s onwards, the use of illicit trafficking and heritage protection within the foreign policy of the EU meant that by 2007, EU and African Union leaders were reaching broader agreements to encourage the exchange of best practice amongst the two regions to combat illicit trafficking, including the sharing and exchange of

[1174] European Commission (April 2000) Africa-Europe Summit under the Aegis of the OAU and the EU. 3-4 April. Conseil/00/901

[1175] Further meetings were in Brussels, Belgium in 2001 and Ouagadougou, Burkina Faso in 2002, and wrapped within these exchanges was a desire to retrieve lost objects from illicit trafficking as well as correct the mistakes of the past by securing the return of cultural objects taken during the colonial period, see European Commission. (2003). EU Africa Dialogue. COM(2003) 316 final. 23 June.

[1176] Also, the EU promised to promote the ethical management of cultural goods, encourage ratification of the 1970 UNESCO and 1995 Unidroit Conventions, enhance capacity building and training amongst professionals, and increase cooperation with UNESCO, European Commission. (2003).

databases, improved cataloguing of museum collection, and assistance in the return of recovered stolen cultural property.[1177]

However, the usage of cultural heritage in the external affairs of the EU notably accelerated after 2009.[1178] The Lisbon reforms gave a new legal identity to the EU and the use of cultural heritage as an engagement strategy could be extremely beneficial: abroad, the EU was seen in a positive light, and the exercise of its culture as a soft power could be seen to form part of this positive assessment.[1179] This cultural clout of the EU was further recognised as important because it could potentially mitigate the effects of unpopular pieces of EU policy, such as its response to the migrant crisis in 2016, which was not viewed favourably by observers.[1180] As such, the active use of culture in the EU's international engagements, especially its active role in protecting heritage from theft and trafficking elsewhere in the world, could help deflect negative association of the EU external relations policies.[1181] As

[1177] An EU Africa Lisbon Strategy in 2007, likewise, continued these policies by making references to illicit trafficking, continuing to acknowledge that it was a priority for African governments and that it could be seen as a key supporting factor in the cultural relations. EU support was also part of a wider strategy to foster political relations with Africa, see Council of the European Union (December 2007). Africa-EU Strategic Partnership. 16344/07. 9 December.

[1178] Part of the reason for this is that until 2009, owing to decades of overlapping and staggered constitutional reform, the EU had no real legal personality on the international stage. Legally, it remained three distinct and separate intergovernmental policy areas, called pillars, which collectively formed the EU. Wholescale reform of the EU constitutional structure – ushered in by the Lisbon Treaty in 2009 – abolished this pillar model and gave to the EU an official legal presence and personality on the world stage for the first time, which in turn further facilitated the use of European 'culture' by the EU to strengthen this new identity, see Hausler (2019). p. 376

[1179] PPMI, NCRE & NFG (2015) Analysis of the perception of the EU and EU's policies abroad. Available at: https://www.cultureinexternalrelations.eu/downloader/download-file?file=2016/11/2016_FPI_Study-External-Perceptions-of-the-EU_Executive-Summary.pdf p. 16

[1180] PPMI, NCRE & NFG (2015). p. 18

[1181] Craufurd Smith (2016). p. 21

well as playing a strategic role in global geopolitics, culture and heritage are also seen as increasingly important for the EU's economic potential,[1182] and the articulation by the EU of heritage protection activities could further be seen to contribute to the founding ideals and aims of the EU.[1183] However modest they were, it is still worth underlining that these actions represented a stark change in direction from the 1960s, when culture and heritage was not only outside of the EU's remit, but any issues of attaching culture to the identity of the Union were simply anathema.

Following the reforms ushered in by the Lisbon Treaty, the EU's encouragement to fight against illicit trafficking rapidly extended to other regions beyond Africa; bilateral relations between different organisations has also increased, which has included ongoing recommendations to restrain illicit trafficking.[1184] Heritage protection policies were being mainstreamed into other policy domains, such as sustainable development, economic growth, and peace and stability in engagement with Southeast Asian states, the Middle East and also Southeast Europe.[1185] Even in the Balkans, policy areas were grouped around anti-illicit trafficking measures; for example, under the premise that employment in the heritage sector is largely dominated by women, the enhancement of gender equality and visibility was included[1186] as part of a prerequisite for EU support on anti-illicit trafficking projects

[1182] Vitale (2011). p. 212
[1183] EEAS & ECDPM (2020). The role of the European Union in the protection and enhancement of cultural heritage in conflict and post-conflict contexts in the Middle East region. (EEAS-606-DVPRISM-SER-FWC). 1 October.
[1184] Council of the European Union (2019). Council conclusions on an EU strategic approach to international cultural relations and a framework for action. (2019/C 192/04)
[1185] European Commission. (2014). Towards an integrated approach to cultural heritage for Europe. (COM(2014) 477 final). 22 July
[1186] DG NEAR. (2019). Instrument for pre-accession assistance (IPA II) 2014-2020. Multi-country: Fighting illicit trafficking of cultural property in the Western Balkans

in Serbia/Kosovo.[1187] In terms of trade agreements, cultural clauses were also now becoming more common parts of the these bilateral relations, with the EU Neighbourhood and Mediterranean Policy specifically recommending increased action to protect heritage from illicit trade, as part of their framework.[1188] Cultural heritage was also taking a key role in external policies for crisis situations, mainly in Iraq and the Middle East; and protection for culture heritage in the Middle East was, at this stage, forming part of an EU strategy for conflict prevention, peace building, dialogue and mediation.[1189] The institutions of the EU also recognised the strengths here: in 2011, the Parliament encouraged the Commission and Member States to continue strengthening the use of policies to fight illicit trafficking as part of expanding its external relations strategy;[1190] and in 2015 the European Council and the EEAS similarly recognised the merits of including heritage protection in the foreign affairs of the EU.[1191] The Commission, too, agreed in 2016 that encouraging action on the fight against illicit trafficking was a useful component of developing international relationships.[1192]

It was during the articulation of the Lisbon reforms that the Council and Commission recognised that all of these policies, and those of the Work Plans for Culture, were clearly beneficial for the EU. For this reason, in 2007, the Commission proposed that all cultural initiatives at EU level – relating to internal and external affairs across broad swaths of policy matters – should be better coordinated so as to

[1187] DG NEAR. (2019).
[1188] Fiorinetini (2019). p. 209
[1189] EEAS & ECDPM (2020). p. 6
[1190] European Parliament (201). Committee on Culture and Education Report on the cultural dimensions of the EU's external actions. (2010/2161(INI)). 31 March.
[1191] See Council of the European Union. (2016). Towards an EU strategy for international cultural relations. 10082/16. 10 June.
[1192] Council of the European Union. (2016).

maximise their effects. Under the European Agenda for Culture in a Globalizing World (2007),[1193] all actions from the EU's diplomatic service (those actions described above)[1194] the Commission (the Culture Programme) and the Council (Work Plans) would now be coordinated together over the next decade.[1195] The belief was that in gathering all policies and proposals, aligning and harmonizing them, the EU could better mobilize culture for the benefit of the EU and its citizens more broadly,[1196] as well as yield even greater benefits for European diplomacy and engagement at an international level.[1197] This proposal was supported unanimously by the Council.[1198]

This cross-sectoral approach became especially clear by the time of the Fourth Work Plan, running from 2011-2014, which was the first work plan to identify the fight against illicit trafficking as an outright priority.[1199] Here, the Council directed the Member States and the Commission to develop strategies that would utilise culture and

[1193] Conseil de l'Union européene (2007). Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions relative à un agenda européen de la culture à l'ère de la mondialisation. (9496/07). 14 mai.
[1194] Their actions developed from a 3rd summit in 2010 which had encouraged the protection of cultural goods in Africa, see European Union. (2014) Pan-African Workshop: The protection of cultural goods against plunder, theft and illicit trafficking. Husa Plaza Hotel, Casablanca (Morocco). 9-11 January. Available at: https://europa.eu/capacity4dev/culture-and-development-international-cooperation/node/40508
[1195] European Commission. (2007). Communication on a European agenda for culture in a globalizing world. (COM(2007) 242 final). 10 May.
[1196] The agenda was about mapping culture with EU and civic organizations, see Craufurd Smith, Rachael (2016), p. 14; European Commission. (2007).
[1197] B3, Council of the European Union. (2007).
[1198] Council of the European Union. (2007).
[1199] Council of the European Union. (2010). Work Plan for Culture 2011-2014. Conclusions of the Council and of the representatives of the governments of the member states, meeting within the Council. (117795) 18-19 November.

heritage protection in the external relations of the EU.[1200] On this occasion, it was the Dutch and Cypriot Presidencies who were prioritising illicit trafficking,[1201] as encouraged by the 2011 Commission *Study on preventing and fighting illicit trafficking in cultural goods*, which drove home the realisation that illicit trade had a strong criminal element.[1202] Taking the criminal and security aspects into consideration, the Cypriot Presidency proposed the creation of a cross-sectoral network of law enforcement authorities and experts in the field of cultural goods that could address the issue of illicit trade.[1203] Christened CULTNET, the initiative was approved by the Council in 2012, and we shall explore it in greater detail in the next section in the context of security.[1204]

The Fifth Work Plan for Culture 2014-2018 continued this shift in priorities, where more innovative proposals to combat illicit trade were a clearly identified;[1205] but on this occasion, the Council directed the Commission to examine the growing security threats, with no

[1200] Point E Priority area E: Culture and external relations, Council of the European Union. (2010), and Council of the European Union. (2010).
[1201] European Commission. (July 2010). Report on the implementation of the European Agenda for Culture (COM(2010)390 final). 19 July; also see Council of the European Union. (2007), which outlined Mobility as part of the agenda.
[1202] Statement from the Council of the European Union. (2011); Also, long term, it was hoped there would be a secretariat in the future to monitor the problem, Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 151
[1203] European Commission. (2018). Commission Staff Working Document: A New European Agenda for Culture - Background Information Accompanying the document Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. SWD(2018) 167 final.) 22 May. p. 53
[1204] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 151
[1205] Council of the European Union. (2014). Draft Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a Work Plan for Culture (2015-2018). (16094/14). 26 November

instruction given to the Member States.[1206] In particular, there was growing concern of the security threats that accompanied illicit trafficking, and with this in mind, the Council proposed an examination of legislation on the import of stolen or illicitly trafficked cultural goods into the EU from third countries.[1207] Though we shall examine these threats in greater detail in the next section, during this period, there was now a growing focus on heritage being targeted during times of conflict, with these problems indeed escalating outside of European borders.[1208] For this reason, the Work Plan prioritised increased cooperation with UNESCO;[1209] and alongside a study on import controls, technical and financial assistance to countries in the Middle East and North Africa was to be increased to fight illicit trafficking,[1210] in cooperation with UNESCO.[1211] Certain Member States took a leading role in these policies too: the French and Italian governments launched the Blue Helmets programme with UNESCO in 2014 to raise awareness of increasing threats to heritage outside of the EU, including threats of illicit trafficking.[1212] The Commission also provided over €2 billion for heritage projects which contributed to

[1206] Council of the European Union. (December 2014). Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a Work Plan for Culture (2015-2018) (2014/C 463/02). 23 December.
[1207] Experts Group on Customs issues related to Cultural Goods. (2015). Minutes of the 1st Meeting of Experts Group.Taxud.B1/CG(2015). 30 September. European Commission
[1208] Council of the European Union. (2015). Acting together against the destruction and illicit trafficking of cultural heritage in conflict areas. (13647/1/15). 12 November
[1209] European Commission.(1) (May 2013). Section 3.3.5
[1210] Expert Group Return of Cultural Objects. (2016) Summary Minutes Fourth meeting of the Expert Group "Return of Cultural Objects" 16 September. GROW/B4/ACS/el (2016)6411331) 11 October. European Commission. p.5
[1211] Expert Group Return of Cultural Objects. (2017) Summary Minutes Fifth meeting of the Expert Group "Return of Cultural Objects" 16 September. (grow.ddg1.b.1 ACS/el (2017)4667206) 22 August. European Commission. p. 3
[1212] Expert Group Return of Cultural Objects. (2016)

stability and peace,[1213] with actions in Syria and Lebanon run in conjunction with UNESCO and ICCROM.[1214]

The activities to promote culture in the EU reached their peak in 2018, when the EU celebrated the European Year for Cultural Heritage, a yearlong awareness-raising and promotional campaign to highlight heritage across the EU and spur action to protect and valorise heritage.[1215] As with all the previous initiatives we have seen in this chapter, the campaign was more concerned about the holistic aspects of cultural heritage in the EU, including inclusivity, sustainability, research and international cooperation, as well as heritage protection.[1216] However, a key focus was on fighting illicit trade and managing risks at heritage sites:[1217]

> The Year aims to encourage synergies between the EU and its Member States to strengthen initiatives to prevent the illicit trafficking of cultural goods. This initiative aims, on the one hand, at enhancing cooperation on risk management for cultural heritage in Europe and, on the other hand, at raising awareness about the implications of illicit trade in cultural goods – both within and outside of the EU.[1218]

Over the course of this year, these aims were further articulated, with research activities focusing on the use of provenance to fight illicit trafficking; this resulted in policy advice for customs and police

[1213] ECDPM. (2017). Mapping of EU funding for culture in the ENP. Creative Europe Programme. April 2017. p. 66
[1214] ECDPM. (2017). p. 89
[1215] European Commission. (2018). p. 27
[1216] European Commission (2) (2019). 2018 European Year of Cultural Heritage. European Framework for Action on Cultural Heritage. Commission Staff Working Document.(NC-03-19-331-EN-N) p. 10
[1217] European Commission (2) (2019). p.27
[1218] European Commission (2) (2019). p. 27

officials, as well as private actors.[1219] The use of technological development to address trafficking was also prioritised; applications and tools were developed to assist those fighting illicit trafficking, alongside research to allow a deeper understanding of the criminal aspect and how to curb it.[1220] The Commission also aimed to strengthen the capacity of local authorities to investigate heritage-related crimes; in cooperation with UNESCO, it raised awareness of the European art market on the implications of illegal trading, and to this effect, the Commission sponsored a series workshops at UNESCO with representatives of the European art market.[1221] Through the Horizon 2020 funding programme for research and academia, the Commission also sponsored actions to establish platforms on endangered cultural heritage and illicit trafficking of cultural goods,[1222] with the NETCHER Programme taking a lead here.[1223]

It is interesting to note a proposal for import controls on cultural goods was cited as the follow up from this Year of Cultural Heritage,[1224] but as we shall see, the primary rationale for this came from greater external threats that were developing beyond European frontiers.

4.2. Cultural Property and EU Security

As we saw in the last section, from the late 1990s onwards, the EU – along with the Member States in the Council – was becoming

[1219] European Parliament. (2021). Achieving an effective policy legacy for the European Year of Cultural Heritage. (P9_TA(2021)0008). 20 January.
[1220] European Commission (2) (2019). p. 25
[1221] European Commission (2) (2019). p. 25
[1222] European Commission (2) (2019). p. 26
[1223] Expert Group Return of Cultural Objects (2020). 7th Meeting of the Expert Group "Return of Cultural Objects". (GROW/B1/AKB/el (2020)) 17 October.
[1224] European Commission (2) (2019). p. 26

increasingly active in trying to understand the illicit trafficking phenomenon, simultaneously pouring money and resources into addressing it. However, it was also becoming clearer the extent to which criminality and security threats were associated with it. These security threats posed by criminal organisations who profit from the illicit trafficking were of course known to the Member States and EU. By the 1980s, the TREVI Group – an *ad hoc* intergovernmental network of Member State representatives of justice and home affairs ministries[1225] – had established working groups to address crimes other than terrorism, and by the early 1990s, they were already monitoring crimes against cultural property.[1226] Non-binding resolutions in the TEU in 1992 referenced this also, noting that illicit trafficking was an internal and external security threat that needed European cooperation.[1227] But by the 2000s, the global geopolitical security situation was changing rapidly and significantly. This would have profound implications for EU decision making and would affect one of the most ambitious protections proposed by the EU: import controls for cultural goods to tackle illicit trafficking.

4.2.1. Increasing International Threats

Although it could not have been imagined at the time, US President George W. Bush's 2001 'War on Terror' and the 2003 invasion of Iraq had profound implications for heritage protection at a global level. In Iraq, not only did it result in a power vacuum and the loss of

[1225] Founded in the 1970s, it was originally one of the pillars of the EU, as discussed in the previous section, see European Parliament. (2020). Fact Sheets on the European Union – Police Cooperation. Available by : https://www.europarl.europa.eu/factsheets/en/sheet/156/police-cooperation

[1226] Block, (2011).

[1227] The declaration called on Member States to "cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques." See Political declaration by the Governments of the Member States on the free movement of persons, European Union, (1987) *Single European Act.* (29 June).

hundreds of thousands of lives,[1228] Iraqi cultural heritage was also placed at great risk. In the days and weeks after the invasion, the extent of looting at cultural sites, including archives, libraries and museums, became clear to the international community, as images of the destruction were broadcast around the world.[1229] Looting of heritage in times of crisis is not unheard of, nor was this a seminal experience for Iraq;[1230] but as the extent of the looting became evident,[1231] international actors scrambled to respond to these growing threats, with these solutions having varying degrees of success.[1232] Many governmental and non-governmental actors stepped up: in 2003, following a meeting of experts from ICOM and UNESCO at Interpol, Lyon, tools to identify heritage at risk in Iraq were produced.[1233] EU Member States were active too, with the Italians taking the lead in an EU Assistance Mission to protect heritage in Iraq, which continues to this day.[1234]

In response to these threats to Iraqi heritage, the United Nations (UN) Security Council passed Resolution 1483 (2003); this was

[1228] Zelig, Joshua M. (2005). "Recovering Iraq 's Cultural Property: What Can be Done to Prevent Illicit Trafficking" *Brooklyn Journal of International Law* Vol 31(1)
[1229] Zelig, (2005)
[1230] Following the introduction of international sanctions on Iraq in response to Hussein's failed annexation of Kuwait in the 1990s, as the economy contracted, the protections normally afforded to heritage sites and museum waned; the humanitarian crisis deepened, and cultural heritage became an easy target for looters who were keen to profit from the chaos and take advantage of increasing interest in Iraqi antiquities on the international art market, see Daniels, Brian I. & Hanson, Katryn (2015). *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage.* Desmarais, France (ed.) ICOM. p. 85
[1231] Daniels, & Hanson, (2015). p. 91
[1232] UNESCO launched a mission to protect heritage, and they believed they recovered around 25% of objects looted from the National Museum in Baghdad, see Rossler, Mechtild & Hayashi, Nao (2016). "UNESCO's action and international standards concerning museums". *Museums, Ethics and Cultural Heritage*. Murphy, Bernice L. (ed). Routledge. p. 89
[1233] See ICOM. (2003). Emergency Red List of Iraqi Antiquities at Risk, & ICOM. (2015). Emergency Red List of Iraqi Cultural Objects at Risk
[1234] See EEAS & ECDPM. (2020). p. 13

part of a package of measures that restricted the movement of many different types of goods, not just cultural heritage, and called for the prohibition of trade in Iraqi cultural property where there was reasonably evidence that it had been illegally removed.[1235] The EU, in turn, incorporated the Security Council Resolution into EU law via *Regulation (EC) No 1210/2003 concerning certain specific restrictions on economic and financial relations with Iraq*.[1236] Like its UN counterpart, the entire regulation focused on broader economic and financial affairs, but certain aspects directly applied to the import of Iraqi cultural property, where goods had been illegally removed from Iraq without the consent of their legitimate owner or in breach of Iraqi legislation.[1237] With respect to cultural goods, the following imports were banned:

> Article 3 1. The following shall be prohibited:
> (a) the import of or the introduction into the territory of the Community of,
> (b) the export of or removal from the territory of the Community of, and
> (c) the dealing in, Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq, in particular, if:
> (i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries' conservation collection, or the inventories of Iraqi religious institutions, or
> (ii) there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their

[1235] DG TAXUD & Deloitte. (2017). p. 54
[1236] Cornu, Marie. (2018). Fighting Illicit Trafficking in Cultural Objects: Search for Provenance and Exercising Due Diligence in the European Union. Engaging the European Art Market in the fight against the illicit trafficking of cultural property. Joint UNESCO-European Commission Project, 20-21 March.
[1237] European Union, (2003) *Council Regulation (EC) No 1210/2003 concerning Iraq and Council Regulation (EU) No 36/2012 concerning Iraq* (7 July).

> legitimate owner or have been removed in breach of Iraq's laws and regulations.
> 2. These prohibitions shall not apply if it is shown that either:
> (a) the cultural items were exported from Iraq prior to 6 August 1990; or
> (b) the cultural items are being returned to Iraqi institutions in accordance with the objective of safe return as set out in paragraph 7 of UNSC Resolution 1483 (2003).

It is interesting to note that there were plans at this stage to update the Export Regulation, which we discussed in chapter three. But the growing instability in Iraq and further afield had changed priorities, and so, protection of world heritage – beginning with Iraq – was put ahead of reforms to the EU Export Regulation.[1238] What is further interesting, and especially important for our inquiry, is that this was the first time the EU had moved to regulate the import of any cultural goods into the EU.

The UN Iraq embargoes were similar to others implemented by the international community following the invasion of Afghanistan.[1239] The US invasion of the country in 2001 placed further strain on heritage that had already been suffering under revolution, occupation and civil war since the 1960s. Indeed, some observers estimate that 80% of Afghan heritage sites had been looted already, and the problems only further deteriorated following the US invasion.[1240] The flow of cultural

[1238] Advisory Committee for Cultural Goods. (2005). Minutes of the 14th Meeting of the Advisory Committee for Cultural Goods. (TAXUD/1018/2005-EN). 18 March.
[1239] Simpson, St John (2015). "Back to Kabul: Case Studies of Successful Collaboration". *Countering illicit traffic in cultural goods: the global challenge of protecting the world's heritage*, Desmarais, France (ed.) ICOM. p. 183
[1240] Afghanistan began to experience systematic looting in the late 1960s, and also experienced it following revolution in the 1970s, the Soviet occupation in the 1980s and civil war the in the 1990s, Simpson, (2015). p. 185; The driving factors were many: impoverished locals familiar with knowledge of heritage resorted to subsistence digging and trading to make money; and Taliban commanders were accused of using heritage objects as a source of revenue for their soldiers, Simpson, (2015). p. 183

property out of Afghanistan increased after the invasion, with objects being laundered through Pakistan, the United Arab Emirates and other transit countries before making their way to the market in Europe and North America.[1241] Objects illegally removed from Afghanistan were also ending up in private collections in Europe, with one particular case in Norway[1242] causing such a scandal that observers concluded the scale of the problem was in part the impetus behind Norway's ratification of the 1995 Unidroit Convention.[1243] The turmoil in the Middle East and the wider region continued though the 2000s, and following the Arab Spring in 2010, instability and violence spread further across the area, placing an even greater swathes of heritage under threat.[1244]

By 2011, the main focus was on Syria, where a civil war ravaged the country; the reports of looting at heritage sites gained media attention, the magnitude of which had not been seen since the invasion of Iraq less than a decade previously.[1245] The power vacuum in Syria was similar to that of Iraq and resulted in the fundamentalist

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[1241] Simpson, (2015). p. 184

[1242] With one especially high profile case being the Norwegian industrialist Martin Schøyen, who acknowledged irregularities in his collecting methods of Afghan materials, some of which were noted to have been looted from the National Museum in Kabul, which were then loaned to the Norwegian National Library; the library quickly distanced itself from Schøyen when the extent of his crimes was revealed. Chabiera, Aleksandra (2011). Stop heritage crime: Good practices and recommendations. National Heritage Board of Poland. p. 52

[1243] Some observers noted that Norwegian military presence in the NATO mission in Afghanistan since 2001 perhaps played a role in establishing links, see Chabiera, (2011). p. 52; and as many autocratic rulers held onto power in Libya, Syria and elsewhere, civil wars erupted, with heritage sites – as normally happens during war – being caught up in the crossfire, see Zeitlian Watenpaugh, Heghnar. (2016). "Cultural Heritage and the Arab Spring: War over Culture, Culture of War and Culture War" *International Journal of Islamic Architecture* Vol 5 (2). p. 249

[1244] While examples of civil society forming a ring around the Egyptian National Museum to prevent looters accessing the museums were inspiring, such actions were rare, see Zeitlian Watenpaugh, (2016). p. 249

[1245] Zeitlian Watenpaugh, (2016). p. 249

Islamist group, Daesh,[1246] seizing control of much of Syria. This spread into neighbouring Iraq, where clerical leaders practiced a brutal form of religious government that was accompanied by the destruction of cultural monuments deemed offensive to Islam. The context of this destruction, and the cultural erasure it epitomised, was not exactly new (the Taliban had destroyed the Bamiyan Buddhas for similar reasons in 2000). But rumours of Daesh's taxation of the antiquities market, their monopolisation and control of the excavation and exportation of antiquities to financially fuel their war, concerned policy makers, representing a significant development and change from previous threats.[1247] The extensive media coverage in the Middle East, showing the growing threats, led to increased questions in the European Parliament on the EU's regulation of the movement of cultural heritage and the usefulness of the EU's regulations, which were modelled on the UN resolutions.[1248]

In 2015, responding to the crisis in Syria, the United Nations Security Council passed another resolution 2199,[1249] which implemented further measures on Iraqi goods and extended these to Syria. These measures were designed to counter terrorism and included trade controls on the movement of cultural property coming from the region. Like the previous resolution for Iraq, this new resolution was part of a wider package of economic and trade measures that sought to restrain problems in the region. But article 17 specifically focused on the protection of cultural heritage from theft and trafficking:[1250]

[1246] Also known as ISIL or ISIS
[1247] Daniels, & Hanson, (2015). p. 91
[1248] European Commission. (2015). 6.5
[1249] United Nations (2015) *Security Council Resolutions 2199* (12 February)
[1250] DG TAXUD & Deloitte. (2017). p. 44-45

> 17. [The United Nations Security Council] reaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting crossborder trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.[1251]

Following on from the example set by the Iraq measures, the EU in turn applied *ad hoc* trade prohibitions on cultural goods coming from Syria. Based on the UN resolution,[1252] and like the Iraq regulations, this was designed to address wider issues related to security in armed conflict, not just the spoliation of cultural heritage. Still, it included a specific article on threats to heritage:[1253]

> Article 11c It shall be prohibited to import, export, transfer, or provide brokering services related to the import, export or transfer of, Syrian cultural property goods and other goods of archaeological, historical, cultural, rare scientific or religious importance, including those listed in Annex XI, where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their

[1251] United Nations (2015)

[1252] European Union (2012). *Council Regulation (EU) No 36/2012 concerning Syria* (18 January); and see European Commission. (1). (July 2017). Commission Staff Working Document and Executive Summary of the Impact Assessment. (SWD(2017) 263 final). 13 July.

[1253] See Urbinati, Sabrina (2018) "The European Union Legal Framework and the Fight against the Illicit Trafficking of Cultural Property Coming from Situations of Armed Conflict?" in *Santander Art and Culture Law Review* Vol. 2

> legitimate owner or have been removed in breach of Syrian law or international law, in particular if the goods form an integral part of either the public collections listed in the inventories of the conservation collections of Syrian museums, archives or libraries, or the inventories of Syrian religious institutions.[1254]

It has been noted by observers that the Iraq and Syria regulations can be seen as diplomatic tools of the EU.[1255] In addition, the adoption of these import restrictions indicated the extent to which EU policy in illicit trafficking was changing, and how far the EU was willing to go to protect heritage.[1256] Still, despite the unique nature of these regulations (which were only intended to be temporary), they were not deemed very successful and led to very few seizures of cultural goods leaving either country.[1257]

The Commission noted that "the main issues limiting the number of seizures included obtaining proof of origin that the goods in question [came] from the prohibited countries, the burden of proof and lack of expert information".[1258] Customs officials could not always, with any degree of certainty, verify whether an object actually came from Iraq or Syria or whether it was trafficked through a transit country.[1259] In one instance, Dutch officials highlighted an example where one object from the region was seized by their customs officials as per the regulations, but in another instance, a similar object slipped

[1254] European Union. (2013). *Council Regulation (EU) No 1332/2013 of 13 December 2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.* (13 December).
[1255] Hausler, (2019). p. 380
[1256] Graziadei & Pasa, (2019). p. 86
[1257] Council of the European Union. (2015).
[1258] Council of the European Union. (2015).
[1259] European Commission. (1). (July 2017). p. 16-17

through, only to be seized at market sometime later by Dutch police.[1260] The Commission believed instances like these demonstrated the problems that officials had in proving an object's provenance or proof or origin, as well as the complexities in demonstrating whether an item had been stolen or illegally excavated in the first place.[1261] It also demonstrated that there was a need for customs officials to be familiar with the heritage of other countries. The Commission moved to provide technical support to address these concerns,[1262] and there was training on identifying cultural goods from this region.[1263] But broadly, the Iraq and Syria embargoes demonstrated the complex realities of regulating the movement of cultural goods into the EU.

The Expert Groups we discussed in the previous chapter were also grappling increasingly with issues of security in the Middles East and debating the appropriateness of returning cultural goods to conflict zones.[1264] The other institutions of the EU, as well as the Member States, were also concerned about the threats from trafficking in 2015,[1265] with the Parliament passing a resolution specifically on Daesh and its profiteering of the antiquities market in March 2015.[1266] At the same time, France, Germany, Italy, Latvia, the Netherlands and Romania approached the Commission calling for a common EU strategy to address the expanding illegal market for illicitly obtained antiquities.[1267] In the Nordic region, the Scandinavian governments

[1260] DG TAXUD (2016). Examples of illicit trafficking in cultural goods. (Ares(2016)527349). 1 February.
[1261] Experts Group on Customs issues related to Cultural Goods. (2015).
[1262] EU Risk Information Module in Experts Group on Customs issues related to Cultural Goods. (2015).
[1263] Experts Group on Customs issues related to Cultural Goods. (2015).
[1264] Experts Group on Customs issues related to Cultural Goods. (2016).
[1265] Experts Group on Customs issues related to Cultural Goods. (2015).
[1266] European Parliament. (2015). Resolution of 11 June 2015 on Syria: situation in Palmyra and the case of Mazen Darwish (2015/2732(RSP)). 11 June.
[1267] DG TAXUD. (2015). Note sur la lutte contre le trafic de biens culturels (Ares(2015)2015108). 7 May.

were also taking action:[1268] the increasing threats were in part the impetus of the Swedes to establish a Cultural Heritage Crime unit within the national police force.[1269] Sweden, in particular, also used its position in the United Nations to call for global action.[1270] Eager to better understand the phenomenon and these changing dynamics, the EU provided funding to projects in this respect for ICOM and other university researchers.[1271] Meanwhile, France – together with the United Arab Emirates – launched the ALIPH Foundation in 2015 as a direct response to these concerns, which now operates to protect heritage in conflict zones, placing a particular emphasis on illicit trafficking.[1272]

It was in the context of this external disorder that, in 2015, the Council[1273] called on the Commission to investigate ways to fight the trafficking of cultural goods, recognising that this was a source of financial backing for Daesh. It is worth noting that, though import controls were being considered informally, the EU did not espouse an official position on the matter, and reference was frequently made to the existing controls on Iraq and Syria noting they were inefficient; for this reason, import controls were not foreseen as a feasible option from

[1268] Nordic Council of Ministers. (2017). *Illicit trade in cultural artefacts: Stronger together: How can the Nordics join forces to stop the illegal import and export of cultural objects?* Nordisk Ministerråd. p. 7

[1269] Government of Sweden. (2017). Statement by Sweden at the UN Security Council Briefing on the Destruction and Trafficking of Cultural Heritage by Terrorist Groups and in situations of Armed Conflict. 30 November. Available at: https://www.government.se/statements/2017/11/swedish-statement-at-unsc-briefing-cultural-heritage/

[1270] Government of Sweden. (2017).

[1271] The EU sponsored the ICOM Observatory, and Project NETCHER to this effect, see Council of the European Union. (2015).

[1272] EEAS & ECDPM. (2020). p. 13

[1273] European Commission. (2016). Communication on an Action Plan for strengthening the fight against terrorist financing. (COM(2016) 50 final). 2 February; the destruction of heritage was raised by the Council of Ministers in 2015, Council of the European Union. (2015).

the point of view of the Commission.[1274] Furthermore, through the Expert Groups, the Commission stressed that the prioritization of illicit trafficking and import controls could only come about if a firm link between smuggling and funding of terrorism could be identified.[1275] In the meanwhile, other initiatives would be examined to address the trafficking of cultural goods, including a wider customs plan aimed at disrupting sources of revenue to terrorist organisations, cash controls and financing. Meanwhile, the Commission began to prioritise counter smuggling and the identification links between terrorism and illicit trafficking.[1276] Reports from the Commission published in February 2016 were some of the first EU documents to link the conflict in the Middle East with EU security.[1277] Independent experts also gathered evidence to demonstrate growing links between smuggling and terrorist organisations,[1278] and in response the Commission began to consider legislative solutions in the summer of 2017.[1279]

Two distressing events accelerated the decision by the EU to address the illicit trafficking of cultural goods. These were the November 2015 attack in Paris, in which over 130 people were killed at a concert venue in central Paris, and the bombings in March 2016, where 32 people were killed in coordinated attacks in the Belgian – and *de facto* EU – capital.[1280] It is interesting to note that it was at a meeting of the Council's foreign affairs committee following the Bataclan

[1274] European Commission. (2016).
[1275] Committee on the export and return of cultural goods. (2015)
[1276] Committee on the export and return of cultural goods. (2015)
[1277] European Commission. (2016). p. 12
[1278] Niglia, Alessandro, & Letizia Torretta. (2017). "Preventing Terroristic Attacks Against Cultural Heritage as Part of a Critical Infrastructure Protection strategy " *Countering Terrorism, Preventing Radicalization and Protecting Cultural Heritage: The Role of Human Factors and Technology*, A. Niglia, A.A. Sabaileh and A. Hammad (eds) IOS Press. p. 16
[1279] European Commission. (2016). p. 12
[1280] The financial means of the attacks in Paris were identified in the EU Security Report European Commission. (2016).

attacks where illicit trafficking was prioritized, with the Council noting that:[1281]

> A strategic approach at the EU level would also enable current challenges, such as the migratory crisis, radicalisation and xenophobia, the destruction of and threat to cultural heritage and the illicit trafficking in cultural objects, to be addressed more efficiently.

The 2016 Security Report similarly began to investigate the causal links between terrorism and illicit trade in the Middle East,[1282] but also the western Balkans, which was recognised as an important transit region for goods coming into the EU.[1283] And the EU Action Plan for strengthening the fight against terrorist financing called for legislative action by the EU to address these threats of smuggling.[1284] But while some form of import controls were now being suggested, again it was also noted by the EU that the experience of the *ad hoc* Iraq and Syria prohibitions had made such a course of action complex.[1285]

However, other actions on the world stage would have important ramifications for EU decision. First, was UN Security Council Resolution 2347, tabled by France and Italy and passed in 2017. This was the first resolution that specifically focused on the trafficking of cultural goods and acknowledged the links between the smuggling of cultural property and the financing of terrorism:[1286]

[1281] Council of the European Union. (2) (November 2015). Council conclusions on culture in the EU's external relations with a focus on culture in development cooperation. (14443/15). 24 November
[1282] Expert Group Return of Cultural Objects. (2016)
[1283] Expert Group Return of Cultural Objects. (2017)
[1284] European Commission. (2016). p. 74
[1285] European Commission. (2016). p. 74
[1286] DG TAXUD & Deloitte. (2017). p. 44

> 8. Requests Member States to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance originating from a context of armed conflict, notably from terrorist groups, including by prohibiting cross-border trade in such illicit items where States have a reasonable suspicion that the items originate from a context of armed conflict, notably from terrorist groups, and which lack clearly documented and certified provenance, thereby allowing for their eventual safe return, in particular items illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, and recalls in this regard that States shall ensure that no funds, other financial assets or other economic resources are made available, directly or indirectly, by their nationals or persons within their territory for the benefit of ISIL and individuals, groups, entities or undertakings associated with ISIL or Al-Qaida in accordance with relevant resolutions;

At the same time, in 2017, the G7 countries met in Florence to oppose the threats to heritage.[1287] Other actors were equally concerned by this stage. The Council of Europe began preparing what would become known as the Nicosia Convention (which we discussed in chapter three; at this early stage, given the situation, it was being referred to by some as the Blood Antiquities Convention[1288]). By 2017, these combined threats and actions on the part of international actors and Member

[1287] Baj, Giulia. (2020). Cultural heritage during armed conflict. The UN Security Council resolution 2347 (2017), its scope and its consequences. Summer School, Institut de la Paix et du Développement de l'Université Nice Cote d'Azur. September; and DG TAXUD & Deloitte. (2017). p. 47-48

[1288] Caponigri, Felicia& Pirri, Felicia. (2017). Summary Report of Conference on "A new perspective on the protection of cultural property through criminal law. Aedon. 2.

States had pushed the EU to act, and a new initiative was launched which:[1289]

> aims to prevent the import and storage in the EU of cultural goods illicitly exported from a third country, thereby reducing trafficking in cultural goods, combatting terrorism financing and protecting cultural heritage, especially archaeological objects in source countries affected by armed conflict.[1290]

4.2.2. Ongoing Criminal Concerns

Despite these severe international threats, before we conclude this dissertation, it is important to underline another prominent threat, and experts employed by the EU to examine the role of law enforcement in the phenomenon would note that while threats from terrorism were serious, they were in reality a secondary concern, and it was in fact organised crime that were a more concerning problem.[1291] Serious examinations into links between organised criminality and illicit trafficking were made as early as 1998, with anecdotal evidence from the same period suggesting that over 90% of looted antiquities in Europe were taken by organised criminal groups.[1292] And in 2002, for the first time, art crimes – including illicit trafficking – were considered an offence severe enough to issue an EU-wide arrest warrant.[1293] Europol began playing an active role in investigating art crimes at this stage, and the European College of Police (CEPOL) began offering

[1289] European Commission. (2). (July 2017). Proposal for a Regulation of The European Parliament and of The Council on the import of cultural goods. (COM(2017) 375 final). 13 July.
[1290] European Commission. (2). (July 2017).
[1291] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 16
[1292] Charney (2015) 142 where he is mainly discussing the Medici group; also see European Commission. (2000).
[1293] Block, (2011). p. 198

relevant training in this period as well.[1294] In 2005, illicit trafficking was recognised for the first time in the EUs organised crime report,[1295] and studies were being commissioned in 2006 as part of an analysis of cross-border crime.[1296]

But greater problems remained in tackling the criminal natures of this problem, the likes of which we saw in our case studies, but which were further confounded by other issues. For example, most EU Member States did not always consider illicit trafficking to be a serious crime; in cases where illicit trafficking was discovered, the severity of the penalties depended on the profession of the guilty party;[1297] which in turn added credence to the belief that illicit trafficking was a white-collar crime and not as serious as other transgressions.[1298] At an EU level, difficulties garnering consensus amongst the Member States on the best course of action persisted: warrants and arrest procedures for illicit-trafficking crimes were rarely being used and differ from Member State to Member State. The monitoring of sales was often inconsistent and in some cases not monitored at all; police databases were insufficient and are often not publicly accessible;[1299] and differing notions of due diligence and good faith also led to legal loopholes, allowing the illicit market in Europe to grow.[1300]

Other more innocuous obstacles to cooperation were noted, including the problem of multiple languages, which further complicate

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[1294] Block, (2011). p. 200
[1295] Council of the European Union. (2005). 2005 EU Organised Crime Report. (13788/1/05). 17 November.
[1296] European Commission. (2006). Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006-2010. (COM(2006) 437 final) 7 August.
[1297] DG HOME & CECOJI-CNRS. (2011). p. 132
[1298] Thompson, E. (2016). p. 129
[1299] DG HOME & CECOJI-CNRS. (2011). p. 137
[1300] DG HOME & CECOJI-CNRS. (2011). p. 7

matters.[1301] It has also been noted that, since most art crimes are small in nature, involving lesser-known types of heritage under threat, and because stolen property will often be moved out of its place of origin quickly, a slow response on the part of law enforcement was not ideal.[1302] In addition, though some of these problems could be remedied through the formalising of the existing informal networks of communication, police and customs officers were not always art and heritage experts, and not always in a position to identify threatened heritage quickly.[1303] Surveys from law enforcement authorities tended to reflect thism and suggested that increased harmonisation and cooperation would help them combat illicit trafficking at EU level,[1304] but as we saw in our literature review, as well as chapter three, this as complex to achieve in reality. The multifaceted nature of the problem also made it complex to monitor: illicit trade routes were difficult to identify which suggested that smugglers used the same routes for trafficked goods as legal goods;[1305] and contemporary observations suggested traffickers would employ various methods to cross borders by mixing legal and illegal commodities together.[1306] In brief, contemporary reports were concluding that the illegal trade was getting increasingly more sophisticated – and sinister – with a growing link between criminal organisations and terrorism, as we saw in the last section.[1307]

[1301] Aside from the fact that not everyone speaks the same languages, there is also the problems that ways of defining heritage are not easily translatable or understandable across borders, Block, (2011). pp. 203-4

[1302] Block, (2011). p. 202

[1303] Block, (2011). p. 202

[1304] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 262

[1305] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 16

[1306] Chouvy, (2013). p. 13

[1307] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 16

Certain Member States recognised these problems early on and were more active than others in moving to encourage cooperation. Member States normally associated with heritage protection were especially active, including the French, who saw discrepancies in civil, criminal and specialised laws as a growing risk and pushed for action;[1308] France was driving efforts to put it on the political agenda in 2008, following conclusions from a Council meeting in November 2008, which found that close cooperation between Member States' police forces was important but lacking; and the French also pushed for a common EU database on stolen art at this time.[1309] Beginning in 2012, the EU – with impetus coming from Cyprus – pushed for investment on mechanisms to overcome the problems faced between Member States, but Germany, the Netherlands and the United Kingdom opposed any measures which would lead to harmonisation.[1310] The main reason for this was that new initiatives could lead to increased bureaucracy, which states wanted to avoid.[1311]

In 2013, these three Member States rescinded their opposition and, at a Council meeting the Cypriots, formally proposed the *Informal Network of the Law Enforcement Authorities and Expertise Competent in the Field of Cultural Good*s – commonly known as CULTNET.[1312] This would be a body of Member States representatives, including police agencies and justice ministries, with the main objective of the network being to improve the exchange of information related to the prevention of illicit

[1308] DG HOME & CECOJI-CNRS. (2011). p. 7
[1309] Block, (2011). p. 198
[1310] Council of the European Union. (2012). Draft Council Resolution on the creation of an informal network of law enforcement authorities and expertise competent in the field of cultural goods (EU CULTNET). (14232/12). 4 October.
[1311] Council of the European Union. (2012).
[1312] Council of the European Union. (June 2012). Outcomes of Proceeds of Law Enforcement Working Party (including Mixed Committee EU/Iceland, Norway, Switzerland and Liechtenstein). (10825/12). 5 June.

trafficking in cultural goods; this could help to identify and share non-operational information on, for instance, criminal networks suspected of being involved in illicit trafficking or information about obstacles to cross-border cooperation. The EU expressed hope that CULTNET would act as a "contact point for preventing and combating crime against cultural goods which have already been designated for the purpose of strengthening coordination at national level between law enforcement and culture authorities and private organisations (e.g. antique shops, auction houses, online auctions)."[1313]

Broadly, CULTNET functioned as intended, being a forum for Member States, with many meetings including close cooperation with other organizations, such as UNESCO, Interpol, Unidroit, EUROJUST and EUROPOL.[1314] And in certain respects, its use as a forum drew

[1313] The aims of CULTNET were: 1) ensuring that Member States become aware of countering crime against cultural goods at a strategic level, 2) identifying and sharing, in compliance with data protection rules, non-operational information on criminal networks suspected of being involved in illicit trafficking of stolen cultural goods in order to determine the links between such networks and other forms of (organised) crime and to identify routes, destinations, modus operandi and trends and types of criminal activities in close cooperation with the different national and international stakeholders, 3) identifying the indicators of cross-border or even domestic criminal activity in connection with crime against cultural goods, 4) improving the exchange of information as well as contributing to risk and threat assessment studies where appropriate, 5) exchanging information about the law enforcement systems in each Member State and identifying possible legal and practical obstacles to cross-border cooperation, 6) exchanging best practices (i.e. new technologies, etc.), operational experiences and priority setting methods, 7) sharing information regarding auction houses and websites used for the trading of cultural heritage objects, 8) sharing best practice on procedures for recording crime against cultural goods that will where possible improve the comparability and consistency of information , see Council of the European Union. (2012)

[1314] DG TAXUD & Deloitte. (2017). p. 58; also, The first meeting in 2013 in Cyprus focused on how the network would constitute itself (see Council of the European Union. (July 2012). Outcomes of Proceedings Law Enforcement Working Party (including Mixed Committee EU/Iceland, Norway,) with representatives from UNESCO, INTERPOL and the WCO in attendance and offering their support (see Council of the European Union. (2013). Draft Report of the 1st Meeting of the Informal Network of Law Enforcement Authorities and Expertise, Competent in the Field of Cultural Goods (EU CULTNET).

similarities to the expert groups developed under the Export Regulation and the Return Directive. Criticism has been levelled at the limited cooperation with heritage organisations; and in 2022 the Commission acknowledged that more work was needed to engage heritage experts.[1315] The informal nature of the group also came under scrutiny from observers, who have also pointed to the lack of financial resources allocated to CULTNET;[1316] and though there have been calls to formalise the CULTNET network and establish a Secretariat,[1317] as of 2023, there has been no further development on this.

Though it is difficult to discern the licit from the illicit trade and statistics are very complex to obtain on illegal activities,[1318] evidence from police and customs have demonstrated the growing problems. In 2016, the first in a series of annual programmes – entitled Pandora – was launched in cooperation with Member States' police authorities and Interpol. The first operation – Pandora I – was led by the Cypriots and Spanish, and resulted in 3,561 cultural objects being seized, with objects ranging from Greco-Byzantine religious icons to

(10949/13). 13 June.) The 2014 meetings examined the reform of Return Directive, support for training for police, and how museums can be better secured against theft. (see Council of the European Union. (2014). Report on the 2nd meeting of the informal network of the law enforcement authorities and expertise competent in the field of cultural goods (EU CULTNET). (15809/14). 28 November.) IN 2018 the Italians invited the Carabinieri to offer their experience, and the role of EUROPOL in combating crimes against cultural heritage was presented at the same meeting. (see European Commission (2019) Minutes of the 3rd Project Group Meeting on the Import of Cultural Goods (CPG 185). 22 & 23 October (no IRIS number)), and in 2020, the German presented their technical developments to monitor illicit trafficking (see Cultural Property News. (2021). "Germany Funds €600,000 NEXUD AI App for Antiquities" Cultural Property News. 29 October Available at : https://culturalpropertynews.org/germany-funds-e600000-nexud-ai-app-for-antiquities/))

[1315] European Commission. (2022). Communication on the Fifth Progress Report on the implementation of the EU Security Union Strategy. (COM(2022) 745 final). 13 December.

[1316] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 151

[1317] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 169

[1318] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 16

Roman coins to Ottoman tombstones.[1319] Thousands of searches of individuals and vehicles resulted in 75 people being arrested and 92 new investigations being opened.[1320] Its follow-up operation in 2017, Pandora II, was led by the Spanish Guardia Civil, and Europol saw over 41,000 cultural goods seized, including coins, paintings, drawings, furniture, musical instruments, porcelain, archaeological and paleontological objects, books, manuscripts and sculptures, with some objects having market values in excess of €6,000.[1321] Here, Europol emphasized that the internet was becoming a key market for illicitly trafficked cultural heritage.[1322] Pandora III in 2019 was led exclusively by the Spanish and saw 59 individuals arrested and over 18,000 goods seized, with increasing support of Customs, which recognised that the transnational dimension of the crime necessitated 24/7 operational coordination between different professions.[1323] Pandora IV in 2020 saw 19,000 archaeological objects seized; 8,760 were destined for online sales, representing a third of all seizures.[1324] Pandora V continued

[1319] Europol. (2017). 3561 artefacts seized in Operation Pandora. Europol. 23 Jan. Available at: https://www.europol.europa.eu/media-press/newsroom/news/3561-artefacts-seized-in-operation-pandora

[1320] Europol. (2017).

[1321] Europol. (2018). Over 41 000 artefacts seized in global operation targeting the illicit trafficking of cultural goods. Europol. 21 February. Available at: https://www.europol.europa.eu/media-press/newsroom/news/over-41-000-artefacts-seized-in-global-operation-targeting-illicit-trafficking-of-cultural-goods

[1322] Europol. (2018).

[1323] Europol. (2019). Over 18 000 items seized and 59 arrests made in operation targeting cultural goods. Europol. 29 July. Available at: https://www.europol.europa.eu/media-press/newsroom/news/over-18-000-items-seized-and-59-arrests-made-in-operation-targeting-cultural-goods

[1324] Kingham, Tony. (2020). INTERPOL, Europol and World Customs Organization join forces during Operations Athena II and Pandora IV. *Border Security Report.* 6 May. Available at: https://www.border-security-report.com/interpol-europol-and-world-customs-organization-join-forces-during-operations-athena-ii-and-pandora-iv/
and Europol. (2020). 101 arrested and 19,000 stolen artefacts recovered in international crackdown on art trafficking. Europol. 6 May. Available at:

despite COVID-19 and saw 56,400 object seized.[1325] Six objects seized in Greece had a combined value of €150,000.[1326] Fifty metal detectors were also seized in this raid, indicating this technology was a threat.[1327] Pandora VI in 2021 saw a smaller amount seized, 9,408 objects; but this time, 90 metal detectors were seized.[1328] The Pandora projects are continuing but under four-year cycles focusing on crime priorities; and since its inception, Pandora operations have seized over 150,000 cultural goods.[1329]

European Customs too were increasing their activities, occasionally with the cooperation of European police. In the years after the Export Regulation was introduced, the EU introduced various initiatives that it hoped could complement the Regulation. One of the first initiatives launched by the EU was the PHARE programme in 1998, and this was used to help build customs' capacities and help officials stem the loss of cultural heritage from Southeast Europe, in particular North Macedonia.[1330] In 2010, the World Customs Organizations and Europol initiated one of the first Joint Police and Customs Operations (JPCO) – code named ATHENA – which yielded

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https://www.europol.europa.eu/media-press/newsroom/news/101-arrested-and-19000-stolen-artefacts-recovered-in-international-crackdown-art-trafficking

[1325] Europol. (May 2021). Over 56 400 cultural goods seized and 67 arrests in action involving 31 countries. Europol. 11 May. Available at: https://www.europol.europa.eu/media-press/newsroom/news/over-56-400-cultural-goods-seized-and-67-arrests-in-action-involving-31-countries

[1326] Europol. (May 2021).

[1327] Europol. (May 2021).

[1328] Europol. (2022). A total of 52 arrests in operation across 28 countries targeting trafficking in cultural goods. Europol. 9 March. Available at: https://www.europol.europa.eu/media-press/newsroom/news/total-of-52-arrests-in-operation-across-28-countries-targeting-trafficking-in-cultural-goods

[1329] Europol. (2022).

[1330] On illegal trade in antiquities in FYROM, European Parliament. (2) (1996).

moderate success.[1331] The problem of online sales was also becoming obvious at this stage.[1332] And largely, the focus on online sales has continued to be a concern at EU level.[1333] The Customs procedures continued, in 2011, with a Joint Customs Operation (JCO) led by the Italian's in cooperation with Greece, Cyprus and Malta. Entitled JCO COLOSSEUM, it brought together Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Germany, Hungary, Luxembourg, Romania, the Netherlands, the Slovak Republic, Spain, Russia, Switzerland, Turkey, Ukraine and the United States in targeting goods at borders.[1334] The largest numbers of seizures were in Greece, Switzerland, Italy and Russia.[1335] In just 10 days of operation, it saw 134 objects seized.[1336] In an effort to share information, the WCO began its ARCHEO project, a real-time information exchange network that could share information on fraud and seizures,[1337] and in 2014, COLOSSEUM was succeeded by another JCO – code named ODYSSEUS[1338] – which again emphasized linkages between crime and illicit trafficking and focused on illicit trafficking in the Mediterranean region.[1339] In total, 19 Member States

[1331] Interpol. (2018). Over 41,000 artefacts seized in global operation targeting trafficking of cultural goods. Interpol. 21 February. Available at: https://www.interpol.int/fr/Actualites-et-evenements/Actualites/2018/Over-41-000-artefacts-seized-in-global-operation-targeting-trafficking-of-cultural-goods; and Kenny, Nancy. (2020). "International crackdown on art trafficking leads to 101 arrested and 19,000 artefacts recovered". *The Art Newspaper*. 8 May. Available at: https://www.theartnewspaper.com/2020/05/08/international-crackdown-on-art-trafficking-leads-to-101-arrested-and-19000-artefacts-recovered

[1332] DG HOME & CECOJI-CNRS. (2011). p. 181; there has been considerable focus on internet sales, and as early as 2001, the links with internet sales were being discussed.

[1333] Brodie; Batura; op 't Hoog; Slot; Wanrooij; & Yates, (2019). p. 16

[1334] Committee on the export and return of cultural goods. (2014); and OLAF (2021). Joint Customs Operation Colosseum. July. Available at: https://anti-fraud.ec.europa.eu/system/files/2021-07/operation_colosseum_en.pdf

[1335] OLAF (2021).

[1336] European Commission. (2015).

[1337] DG TAXUD & Deloitte. (2017). p. 56

[1338] Committee on the export and return of cultural goods. (2014).

[1339] Committee on the export and return of cultural goods. (2014) Agenda point 2: info doc. JOINT CUSTOMS OPERATION (JCO) "ODYSSEUS". (Cmtee28022014). 28 February.

were invited to participate in the operation (and ICOM was also invited as an observer[1340]).

COLOSSEUM had two operational phases that concentrated on collecting data related to detection and seizures of illegal consignments of cultural goods and on reinforcing controls.[1341] Focusing on cultural heritage fraud in the Mediterranean region,[1342] eventually it recovered cultural goods worth an estimated €8 million [1343] Completed in March 2015, the final report found that the most common source countries were Syria, Egypt, France and Switzerland, with markets for their objects in China, the Czech Republic, Cyprus, France, Russia and Spain. Meanwhile, France, Serbia and Hungary were identified as the most important transit countries.[1344] In terms of objects being smuggled, coins, military objects and old religious items (including documents and icons) were routinely moved in vehicles across borders, but national postal systems were also discovered to be dispatching smuggled materials.[1345] Other seizures by other national customs showed similar results with diverse types of goods seized across the EU ranging: from antique books to statues, paintings, archaeological materials and numismatics; with most seizures at airports, others were intercepted in posted packages, shipping containers and from travellers

[1340] Committee on the export and return of cultural goods. (1) (2013) Minutes of the 18th Meeting of the Committee on the export and return of cultural goods on 23 November. (TAXUD.B1.EA D(2013) 31068). 10 January.
[1341] Committee on the export and return of cultural goods. (2014); and European Commission. (2015). p. 7
[1342] European Commission. (2015).
[1343] Committee on the export and return of cultural goods. (2015)
[1344] Since no customs administrations from crisis areas, such as the Middle East and North-Africa, participated in JCO Odysseus, the reports from these countries were hard to verify. But the report noted the strong commitment of the Turkish and Spanish Customs and allowed a deep insight into the phenomena of smuggling – after lootings from Syrian and Egyptian historical sites by criminals with possible links to terrorists, see WCO, RILO, ZKA. (2015). JCO Odysseus. March;
[1345] WCO, RILO, ZKA. (2015).

at EU borders.[1346] The COLOSSEUM report noted that expertise from heritage experts was still needed and noted the use of illicitly trafficked cultural heritage for money laundering and tax evasion.[1347] The report concluded that the creation of specific platforms for sharing information – including the ARCHEO platform – had added value for Customs Administrations in the fight against illicit trafficking.[1348] Some of the more technical findings of ODYSSEUS were not new to our inquiry, and the WCO and Europol cited the clear links between tax evasion, crime and money laundering; they felt that many countries had inconsistent legislation, which offered too many loopholes, while the diversifying of financial transactions also represented a problem.[1349]

But customs authorities in the EU have noted the extent to which the control of borders is complex for cultural goods, and though customs are usually trained to identify and confiscate counterfeited items, illegal goods like drugs or weapons, or things of value; heritage does not always fit clearly into these categories.[1350] The problems are compounded by many other factors, with customs authorities having noted that smugglers often hide cultural goods amongst other items, lying about the place of origin on customs declarations.[1351] With these problems in mind, there has been an increasing trend among Customs authorities to turn to the cultural heritage sector for support in identifying objects and their provenance.[1352] To conclude, the role played by Customs in controlling frontiers in the EU has been progressively strengthened over the years to the extent that addressing the illicit trafficking is now considered a priority by customs staff at an

[1346] DG TAXUD & Deloitte. (2017). p. 67
[1347] WCO, RILO, ZKA. (2015).
[1348] WCO, RILO, ZKA. (2015).
[1349] WCO, RILO, ZKA. (2015).
[1350] DG HOME & CECOJI-CNRS. (2011). p. 197
[1351] DG HOME & CECOJI-CNRS. (2011). p. 198
[1352] European Commission. (2000). Section 3.2

EU level.[1353] But all the above problems appeared to concur with contemporary WCO reports which suggested that illicit trafficking was continuing to grow.[1354]

4.2.3. Closing the Circle: Deciding on Imports

In 2017, the Commission made a proposal to address illicit trafficking that was, for the purpose our inquiry, quite radical:

> In the framework of the 2015 European Agenda on Security and of the 2016 Action Plan to step up the fight against the financing of terrorism the Commission will prepare a legislative proposal against illicit trade in cultural goods.[1355]
> In accordance with the Action Plan for strengthening the fight against terrorist financing, the Commission is to consider a wider response than at present, including a legislative initiative, to tackle illicit trade in cultural goods.[1356]
> [The general objective is to] prevent the import and storage in the EU of cultural goods illicitly exported from a third country; thereby reducing trafficking in cultural goods, combatting terrorism financing and protecting cultural heritage, in particular in source countries affected by armed conflict.[1357]

It is interesting to note also that the Commission admitted there were very few successful examples of such an initiative existing

[1353] Since customs – and EU Customs in particular – are the first line of defence against dangerous and criminal activities related to commercial trade, and this includes cultural smuggling, which is a new threat; see European Commission (July 2018). Second Progress Report on the implementation of the EU Strategy and Action Plan for customs risk management. (COM(2018) 549 final). 20 July.
[1354] WCO (2016). Annual Report 2015-2016. WCO. Available at: http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/annual-reports/annual-report-2015_2016.pdf
[1355] Introduction, European Commission. (July 2017).
[1356] Why the EU should act, European Commission. (July 2017).
[1357] General Objectives, European Commission. (July 2017).

anywhere else in Europe or, indeed, internationally.[1358] And it is also interesting to note that until 2017,[1359] the Commission had not been seriously considering such a proposal, preferring to focus on the types of *ad hoc* measures that we have discussed in other aspects of this dissertation until now.[1360] Import restrictions for cultural heritage do exist, though they can be problematic, especially when enforcing foreign export controls at import.[1361] However, with the problems we have described so far, it was becoming clear that further actions were needed to protect cultural heritage, both inside and outside of Europe, with the aim of protecting the citizens of the EU. Though there were many actors in favour, there was also strident opposition, as we shall now explore, not to mention enormous administrative, bureaucratic, and technical hurdles. But, if reasonably drafted and justifiable, these could at the very least influence international policy.[1362]

Looking back, it was in 2005, responding to the destruction of heritage in Iraq, when the British were amongst the first Member States to suggest checks on imports from third countries, with the stated aim of protecting non-EU heritage.[1363] This attitude was part of a very early mood change amongst Member States, with other delegations sharing the view that there should be some forms of import controls on cultural

[1358] Reference to Greece, European Commission. (July 2017).
[1359] In addition, Commission officials had emphasised to the Member States as late as 2016 that there were import regulation that were not being considered, see Expert Group Return of Cultural Objects. (2016)
[1360] The Commission addressed import restrictions but in the context of Iraq and Syria noted they were not effective, see European Commission. (2016).
[1361] See Nafziger, J.A.R., & Paterson, R.K. (2014)
[1362] Writing more than 30 years ago, Bator argued that import restrictions might nurture an environment where there are more proactive and reciprocal responses to the problems facing import and export countries; therefore, import restrictions – if employed – might become an awareness-raising tool, see Bator, (1982) p. 333
[1363] The UK suggests that there should be checks on import, with other Member States agreeing, see Advisory Committee for Cultural Goods. (2005).

heritage into the EU, so long as they were framed in the 1970 UNESCO Convention.[1364]

Import controls were not seriously being considered by the Commission at this stage, and instead, the Commission was developing strategies to counter illicit trafficking in 2006, including a study which was mainly in the context of security and countering crime,[1365] the outcomes of which we discussed in the previous section. The French also voiced their concerns in 2008 and insisted on the importance of documentation to prove *licit* import into the EU for cultural goods coming from Member States and third countries to ensure traceability; the Greeks and Italians also supported such a drive.[1366] As we mentioned previously, import restrictions were also suggested by the working group on the movement of cultural goods – the *ad hoc* committee largely made up of museologists, archaeologists and art historians, the findings of which we already discussed[1367] – and this group made reference to the existing *ad hoc* trade prohibitions on cultural goods coming from Iraq as a potential avenue.[1368] Other issues were also being discussed in the Expert Group, such as passports for cultural goods moving in and out of the EU;[1369] the Member State representatives of the expert group that was established to monitor the Return Directive[1370] also suggested import restrictions.[1371] Outside of these expert groups, Member States were also petitioning the Commission to address the problem, and by 2015 – with evidence of Iraqi and Syrian objects being laundered through Jordan and Dubai

[1364] Advisory Committee for Cultural Goods. (2005).
[1365] European Commission. (2006).
[1366] Committee on the Export and Return of Cultural Goods. (2008).
[1367] OMC Expert Working Group on the Mobility of Collections. (2010). p. 31
[1368] European Union, (2003).
[1369] Committee on the export and return of cultural goods. (2011).
[1370] Discussed in chapter 3.2.1.
[1371] Experts Group on Customs issues related to Cultural Goods. (2015).

before arriving in Europe [1372] and the Parliament estimating that over 40,000 illicit objects were coming into the EU every year[1373] – the Portuguese[1374] and the Germans[1375] were also asking the Commission to examine import restrictions, to which the Commission said it was too early to tell if this was necessary.[1376]

But in December 2015, France, Germany and Italy addressed the importance of import regulations in a joint statement to the Commission in December 2015, only weeks after Bataclan attacks in Paris.[1377] Inside the EU institutions, the smuggling of antiquities was now routinely being identified as a source of revenue by terrorist organisations in the Middle East, to such an extent that the EEAS were becoming more and more concerned by 2016.[1378] Yet, there was also an acknowledgement that the existing import restrictions in the EU – the *ad hoc* Iraq and Syria restrictions – were not working as intended, with emphasis being placed on the burden of proof required, showing that objects had been obtained and exported legally to begin with.[1379] This, combined with historically recognised administrative and technical issues,[1380] would make enforcing wider import restrictions at EU level problematic. Inside the institutions, there was wide acknowledgement that establishing EU import controls would be an endeavour that would require the mass training of personnel, the sharing of information and the enhancement of cooperation between Member

[1372] Peters, (2015) p. 146
[1373] Kyriakou, T. (2015).
[1374] Experts Group on Customs issues related to Cultural Goods. (2015).
[1375] Peters, (2015) p. 147
[1376] Experts Group on Customs issues related to Cultural Goods. (2015).
[1377] Peters, (2020). p. 383
[1378] European Commission. (2016)
[1379] European Commission. (2016).
[1380] Bator, (1982). p. 338

States, third countries and international partners.[1381] The events at the Bataclan, alongside terrorist attacks in Brussels in March 2016, changed the narrative; and in April 2016, the Commission notified parliament of an action plan to fight terrorist financing, with illicit trade being recognised as a funding source, and the Commission outlined an intention to examine import regulations.[1382] A study was outsourced to Deloitte,[1383] with instruction that any proposals be framed within existing international norms, with the 1970 UNESCO Convention set as the highest possible standard in terms of descriptions and controls.[1384]

The Deloitte report returned a series of directions for the EU and the Member States to consider. Five policy options were considered, which addressed many of the issues and concerns we have already discussed throughout this dissertation. The first option was a retention of the status quo: no further EU action could be taken other than what was already being implemented or planned, taking into account the current and planned initiatives of the EU Member States and third countries.[1385] This type of action would essentially be what we have discussed in our case studies throughout this work. A second policy option was to continue to increase EU awareness-raising campaigns on the import of cultural goods from third countries and the fight against illicit trafficking of cultural goods. These proposals were innovative, but law enforcement authorities were not convinced that such initiatives could provide concrete results either.[1386] Similarly, policy option three offered EU guidelines and recommendations for

[1381] Council of the European Union. (2016). Towards an EU strategy for international cultural relations. (10082/16). 10 June.
[1382] Experts Group on Customs issues related to Cultural Goods. (2016).
[1383] Experts Group on Customs issues related to Cultural Goods. (2015).
[1384] European Commission. (2019).
[1385] Deloitte. (2016). Fighting illicit trafficking in cultural goods. 2nd Meeting of Expert Group on Customs and Cultural Goods, DT TAXUD, Brussels. 11 April 11
[1386] LEA Survey in Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019).

competent authorities to monitor the import of cultural goods from third countries; but these could also be seen as unhelpful given the problems we discussed with the directive in chapter three and the *ad hoc* proposal for Syria and Iraq. Policy option four proposed EU 'soft law' measures on the import of cultural goods from third countries and the fight against illicit trafficking of cultural goods. This could be seen to be similar to ICOMs Code of Ethics; but, although this is an important and influential code, as an industry-aligned code and given that existing art market codes were deemed to have no effect, this option was also unlikely to succeed. Surveys from law enforcement officials also rejected this position.[1387] But policy option five was a departure from EU norms, offering a proposal for an EU binding legal instrument on the import of cultural goods from third countries.[1388]

In 2016, the EEAS was increasingly concerned with the potential economic elements of cultural heritage and the profits that could be made from the smuggling of heritage;[1389] and in February 2016 – after the Bataclan attacks in Paris – the European Council called for action on the illicit trafficking of cultural goods, as part of an anti-money-laundering initiative:

> [Recalling] the importance of urgently enhancing the fight against illicit trade in cultural goods and [the Council] calls

[1387] Surveys by criminal law enforcement officials found codes of ethics had no effect in helping stem the illicit trade of cultural heritage (Brodie, Batura,op 't Hoog, Slot, Wanrooij, & Yates, (2019). p242). Researchers also did not see them as overly useful. (Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). p. 243). But there was division, with some feeling that codes are helpful (Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). p. 244) It appears that some feel the introduction of *new* codes could be useful (Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019). p. 259).
[1388] Deloitte. (2016).
[1389] High Representative of The Union For Foreign Affairs And Security Policy. (2016). Towards an EU strategy for international cultural relations. (JOIN(2016) 29 final). 8 June.

> on the Commission to propose legislative measures on this matter as soon as possible.[1390]

The Commission study was published in 2017, with stark findings to inform policy formation for potential EU import regulations for cultural goods:[1391]

> This study proposes regulatory and policy options which would support the overall objective of combating the illicit trafficking in cultural goods by addressing the importation of those goods into the European Union. [. . . This study finds] that the current frameworks in place, such as *ad hoc* measures at EU level as well as the international 1970 UNESCO Convention will not be adequate enough to solve the problem of illicit trafficking of cultural goods into the EU. Additional actions will be needed. [. . . This study finds] that EU Member States would support the further harmonisation of the legal framework combating trafficking in cultural goods. The European Commission could consider proposing a legal instrument on the import of cultural goods, in particular in order to strengthen the fight against financing of terrorism and organised crime.[1392]

The Deloitte report created much discussion amongst the Member States. The Dutch and the French were concerned that an instrument which focused on only import and countering the financing

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[1390] Council of the European Union. (May 2016). Council conclusions on the EU Regional Strategy for Syria and Iraq as well as the Da'esh threat. (9105/16). 23 May.

[1391] Published in 2017 and DG TAXUD, and their external consultants Deloitte concluded that the absence of regulations regarding the import of cultural good was fuelling illicit trafficking; furthermore, there was an absence of practical restrictions, which fuelled trafficking; and the lack of common understanding on the definition of cultural goods was unhelpful. The study pointed to the profitable commerce for cultural goods in the EU, with high demand, which also contributed to illicit trade, see DG TAXUD & Deloitte. (2017).

[1392] Executive summary, DG TAXUD & Deloitte. (2017).

of terrorism would be too narrow in scope, while the Commission emphasized that the time constraints could not allow for a more detailed instrument.[1393] The British were concerned about the rationale for such stringent controls and asked if there was strong enough evidence to link the looting of heritage with the financing of terrorism; to this, Deloitte confirmed that, though evidence was hard to come by and though the art market cited this as a reason why import controls were not needed, there was and remains little doubt that illicit trade is happening, which in turn demonstrated that there was a need to find out the extent to which this happens.[1394] The Germans in turned empathised that a bureaucracy would be needed, and it would need to be strong in order to avoid the problems that had arisen from the Syria and Iraq regulations;[1395] the Commission agreed here, noting:

> It is simply beyond the means and expertise of customs services to establish the exact provenance of an artefact, when it was exported from which country, and whether it did so legally; that necessitates years of investigation and police/judicial co-operation with an unforeseeable number of third countries.[1396]

Provenance would therefore need to be established without much doubt, and existing mechanisms would have to be examined;[1397] furthering this, the Belgians and Dutch established amongst themselves a short project to examine the best definition of provenance, concluding

[1393] Experts Group on Customs issues related to Cultural Goods. (2016).

[1394] The Germans conducted the ILLICIT report to find out more, Cultural Property News (2021)

[1395] Also, there was a problem in identifying goods and how could this be done; see Committee on the export and return of cultural goods. (2015). There was also an issue in ascertaining when goods had been taken out of Iraq or Syria, and what do you do with seized goods; see Committee on the export and return of cultural goods. (2015).

[1396] Experts Group on Customs issues related to Cultural Goods. (2016).

[1397] Experts Group on Customs issues related to Cultural Goods. (2016).

that the ICOM definition[1398] in the Code of Ethics should be used with respect to the management of import and export of cultural goods at EU level.[1399] The Commission drew parallels with the Kimberly Process' diamond certification and the UNESCO-WCO model export certificate for cultural objects to provide traceability and proof of good faith on the part of the buyer.[1400] Meanwhile, the Dutch and Portuguese pointed to the certificate verification system of the 'Convention on International Trade in Endangered Species of Wild Fauna and Flora' (CITES) and the EU-FAO 'Forest Law Enforcement, Governance and Trade' Programme (FLEGT), with the Germans adding that databases would be needed to support all of these models.[1401] In terms of definition, the French favoured a system based on the 1970 UNESCO Convention,[1402] and consensus emerged on the use of the Object ID description standard for cultural goods,[1403] with the Commission and Member States in turn agreeing to develop a model that would be inspired by the Convention.[1404]

In July 2017, the Commission published a proposal for the regulation,[1405] with the attacks in Paris and Brussels cited as a key

[1398] Provenance: the full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined.

[1399] Experts Group on Customs issues related to Cultural Goods. (2016).

[1400] Experts Group on Customs issues related to Cultural Goods. (2016).

[1401] Experts Group on Customs issues related to Cultural Goods. (2016).

[1402] Experts Group on Customs issues related to Cultural Goods. (2016).

[1403] Object ID was seen as a model to follow, Experts Group on Customs issues related to Cultural Goods. (2016).

[1404] Commission said new definition would not be helpful and preferred to stick with UNESCO definitions, European Commission. (2019).

[1405] European Commission. (2017). Ninth progress report towards an effective and genuine Security Union. COM(2017)407. 26 July. p. 8

reason behind the need for such a regulation.[1406] Working documents based on the Deloitte report concluded that there were three broad options available to the Commission: one option was to improve capacities and foster stakeholder good will through 'soft' legal options, such as those recommended in the Deloitte report;[1407] the second and third options included regulatory initiatives of different levels, one to create legal definitions of cultural goods under threat and a second to require documentary evidence to verify the licit nature of the goods.[1408] In the end, an amalgamation of the latter two was decided, which included a wide typology of goods, narrowed down by an age threshold; and traders were required to obtain an import licence for archaeological finds and elements of monuments and to submit an importer's statement for other goods.[1409] The options presented challenges, namely specialised expertise from issuing authorities to be able to identify and stop cultural goods from coming in to the EU.[1410] And in certain cases, the Commission was concerned that Member State competent authorities could struggle to ensure coverage in terms of expertise in third-country cultural heritage.[1411] This would not be enough though; since these measures were new and unprecedented, there would be a need to collect factual data on incoming trade flows in archaeological objects and elements of monuments that have been dismembered, as well as for other cultural goods within the scope of the regulatory measure; there would also be a need to assess the

[1406] The main reasons were because of the attacks in Paris and Brussels DG TAXUD (2016). Email Exchange Battiscombe-Maidou. Fighting Illicit Trafficking in Cultural Goods. (Ares(2016)2752223). 14 June.
[1407] Grouping A, European Commission. (July 2017). p. 23
[1408] Grouping B and C; European Commission. (July 2017). p. 23
[1409] European Commission. (July 2017). p. 48
[1410] European Commission. (July 2017). p. 45
[1411] European Commission. (July 2017). p. 44

performance of certification requirements and soft-law measures.[1412] It is worth noting that the Commission preferred a more stringent option, but the mix of options B and C was decided upon, as it was felt it would not be as burdensome on Member States' customs authorities.[1413]

In April 2019, the EU adopted *Regulation (EU) 2019/880 on the introduction and the import of cultural goods*[1414] (herein, referred to as the Import Regulation), which stipulated that:

> 1. The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited. The customs authorities and the competent authorities shall take any appropriate measure when there is an attempt to introduce cultural goods as referred to in the first subparagraph.
>
> 2. The import of cultural goods listed in Parts B and C of the Annex shall be permitted only upon the provision of either: (a) an import licence issued in accordance with Article 4; or (b) an importer statement submitted in accordance with Article 5.

The provision of the Regulation meant that large amounts of cultural property – including fauna; palaeontological objects; historic and scientific objects of national importance; products of archaeological excavations (regular and clandestine); artistic or historical monuments; antiquities, pictures, paintings and drawings; manuscripts, archives,

[1412] European Commission. (July 2017). p. 49
[1413] European Commission. (July 2017). p. 45
[1414] European Union (2019). *Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods*. 17 April

and furniture – would have restricted entry into the EU.[1415] Chief among the controls though were that any archaeological objects over 250 years old would need a licence to enter the EU from 2025.[1416] Though the age threshold of 250 years was felt to be limiting,[1417] observers recognised that the Import Regulation would unify and strengthen protections for non-EU cultural property coming into the EU.[1418] The Italian Government, though concerned about the limited scope of the age threshold, broadly welcomed the Regulation, hoping it would regulate legitimate trade while stamping out illicit trafficking;[1419] and the Portuguese Government too expressed its optimism about the new Regulation.[1420] The European Parliament also welcomed the Regulation, though they did call for more references to the 1954 Hague Convention, the 1970 UNESCO Convention and the 1995 Unidroit Convention to be incorporated.[1421]

The realities of the Import Regulation were further fleshed out in the implementing act passed by the Parliament in 2021. Under the implementing legislation, certain types of documents were outlined as acceptable for securing import licences. Under Article 8:

> (a) [a licence application should include] a signed declaration by which the applicant explicitly assumes responsibility for the veracity of all statements made in the application and states that they have exercised all due diligence to ensure

[1415] See the Annex, European Union (2019).
[1416] See the Annex, European Union (2019).
[1417] Peters, (2020). p. 384
[1418] Peters, (2020). p. 385
[1419] Commission to Italy Camera deputation Brussels,14.12.2017 C(2017) 8496 final
[1420] Commission to Portuguese Assembly, Brussels, 27.3.2018 C(2018) 1834 final
[1421] The Parliament also proposed a lot of additions for recitals, which were mainly cosmetic. But they did raise important issues, such as using 'import' instead of 'entry,' because entry was vague. They also suggested adding the caveat of the export licence and expanding on the meaning of 'source country.' (Opinion of Culture Committee 2017/0158(COD) 8 June 2018)

> that the cultural good they intend to import has been exported legally from the country of interest.
>
> (b) Where the laws and regulations of the country of interest subject the export of cultural goods from its territory to the obligation to obtain a prior authorisation, the applicant shall upload to the ICG system copies of the relevant export certificates or export licences issued by the competent public authority of the country of interest, certifying that the export of the cultural good in question was duly authorised by them.[1422]

In the case where the country of origin does not have an export license, the rule stipulated the other document that could suffice, including:

> (i) customs documentation providing evidence as to past movements of the cultural good; (ii) sales invoices; (iii) insurance documents; (iv) transport documents; (v) condition reports; (vi) property titles, including notarised wills or handwritten testaments declared valid under the laws of the country were they were established; (vii) declarations under oath of the exporter, the seller or other third party, which were made in a third country and in accordance with its laws, testifying as to the date on which the cultural good has left the third country where it was created or discovered or other events supporting its licit provenance; (viii) expert appraisals; (ix) publications of museums, exhibition catalogues; articles in related periodicals; (x) auction catalogues, advertisements and other promotional sales material; (xi) photographic or cinematographic evidence, which supports the legality of export of the cultural good

[1422] European Union (2021). *Commission Implementing Regulation (EU) 2021/1079 of 24 June 2021 laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods.* 24 June.

> from the country of interest or allows to determine when it was located there or when it exited its territory.[1423]

Essentially, the requirements under the Import Regulation would mean that the importer would have to prove, with extensive documentation, that the goods they were seeking to bring into the EU had been lawfully obtained and exported.[1424] Another important feature was the reversal of the burden of proof. This subject was sensitive during the drafting of the 1970 UNESCO Convention;[1425] but the EU was concerned that retaining the status quo would overburden Customs, and so, to improve the effectiveness of the Import Regulation, an importer would have to prove that an object was legal to transport.[1426] More broadly, efforts like this demonstrated the extent to which the EU was willing to go to in order to ensure the Import Regulation was effective, as there was concern that if it failed, or struggled in the same ways that the Return Directive, there could be reputational damage to the EU from third parties and external stakeholders.[1427]

But there were some concerns about the Import Regulation. As we saw in the previous sections, the lack of interoperability of information-sharing platforms between Member States made things difficult for the Member States to effectively tackle trafficking,[1428] and there were fears that the Import Regulation could suffer the same fate. For this reason, a considerable amount of effort has gone into creating an electronic system to ensure the proper communication and exchange of information between enforcement authorities, along with a database of legislation from third countries that can verify an object's origin and

[1423] European Union (2021).
[1424] DG EAC. (2017) and European Commission. (2019). p. 4
[1425] Chapter 1.3.2.
[1426] Expert Group Return of Cultural Objects. (2016)
[1427] DG TAXUD. (2015).
[1428] See Chapter 3.2.3. and information sharing with the Return Directive.

explain the laws in place to control its movement.[1429] Cooperation with international organisations with experience in this areas – notably ICOM – was strengthened during this process.[1430] The Import Regulations will come fully into force in July 2025, whereupon import licences will be needed to bring in certain heritage into the EU.

Just as the Export Regulation and the Return Directive are viewed through the lens of market regulation, the Commission has stressed that the Import Regulation refrains from explicitly addressing heritage protection; instead, the EU considers it primarily as part of a security strategy to counter the financing of terrorism and criminal organisations.[1431] In theory, import restrictions would be more fool proof than export prohibitions, since if cultural heritage was to get past customs officials, it could still be confiscated if found at a later date.[1432] And this is certainly the case with the incoming EU rules: if an object is found to have been illegally imported after its date of import, then the EU will be able to seize these objects.[1433] But, it is one thing for a state to mark out and protect heritage that is its own and located within its own borders; but import restrictions essentially require states to protect heritage that comes from outside their territory, heritage which is not

[1429] European Commission. (November 2022). Report from the Commission pursuant to Article 14(3) of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods. (COM(2022) 580 final). 10 November. p. 10

[1430] European Commission. (November 2022). Report from the Commission pursuant to Article 14(3) of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods. (COM(2022) 580 final). 10 November. p. 10

[1431] See European Commission *Proposal for a Regulation of the European Parliament and of the Council* European Commission. (July 2017). And see European Commission. (July 2020).

[1432] Bator, (1982). p. 327

[1433] European Union, (2019).

theirs.[1434] For this reason, some observers assert that the Import Regulation demonstrates how the EU is now aligning itself more with Merryman's heritage internationalism, rather than nationalism.[1435]

The Commission has acknowledged that an import system will never be perfect nor entirely end illicit trafficking,[1436] but still the new Import Regulation has been met with furious opposition from the art market. A response to an EU study[1437] by the International Association of Dealers in Ancient Art (IADAA) made reference to the how the study for the "draconian import licensing regulations" failed to "find any reliable statistics […] pointing to trafficking patterns or routes,"[1438] with the IADAA going as far as to suggest that the evidence in the report was manipulated to the benefit of the EU.[1439] Further to complaints that the art market had not been consulted on these reforms, the Commission stressed that many representatives of the art market in Europe – and internationally[1440] – had been invited by the Commission to engage in a public consultation process for the Import Regulations, but that there had been no engagement from the art market.[1441] The Commission was also keen to peruse the IADAA's own research, and in response to the IADAA's assertion of there being "no

[1434] Bator, (1982). p. 331; Nafziger et al. highlight the interesting case of Piet Mondrian, a Dutch modern artist and one of his pieces based on his cultural experiences in exile in the United States during the Second World War; they questioned whether the piece was a Dutch or American work of art and where the limits of national cultural heritage lay. See Nafziger, James A. R., Paterson, Robert K. & Renteln, Alison Dundes (2010). p. 298
[1435] Peters, (2020). p. 377
[1436] Expert Group Return of Cultural Objects. (2016).
[1437] Study by Brodie, Batura, op 't Hoog, Slot, Wanrooij, & Yates, (2019).
[1438] IADAA. (2019). IADAA analysis of Illicit trade in cultural goods in Europe, a study for the European Commission. July 2019. Available at: https://iadaa.org/wp-content/uploads/2019/09/IADAA-analysis-of-Ecorys-report-for-EU-2019.pdf
[1439] DG TAXUD. (July 2016). Email exchange TAXUD - IADAA, CINOA, LAPADA, SNA France. (Taxud.b.1(2016)4372595). 26 July.
[1440] IADAA, but also CINOA, LAPADA and SNA France, see DG TAXUD. (July 2016).
[1441] DG TAXUD. (July 2016).

evidence of trafficking funding terrorism," the Commission invited the IADAA to share their own research on this subject with the EU.[1442] Tellingly, the IADDA did not respond.

4.3. Conclusion

In this chapter, we began by exploring the EU's actions in the cultural heritage sector outside of the Export Regulation and Return Directive. Not only was the EU active in trying to find solutions through the Work Plans, with impetus coming from the Member States, but it is interesting to note the extent to which external affairs have impacted on the EU, both the use of heritage to enhance the EUs global image, but also the impact of external crisis on EU decision making. But it is the latter, the role that external threats combined with serious and ongoing criminality and security concerns that have driven the EU to act. In particular, it was the crises beyond Europe's borders, especially in the Middle East, notably with Iraq and Syria and fears of increased illicit trafficking from these regions following the outbreak of conflict, which resulted in *ad hoc* provisions that would shape debate a decade later. Even if these *ad hoc* provisions were not ideal – suffering from the same anomalies ad infirmities as that of national legislation in our cases studies, as well as the Return Directive and Export Regulation – the decision to attempt them, and the subsequent Import Regulation that stems from them, could be described as a watershed moment. The extent to which the Import Regulation will be useful and succeed in restraining illicit trafficking, however, remains to be seen.

[1442] IADAA. (2019).

Conclusion

Throughout the course of this inquiry, we have attempted to articulate and illustrate a history of responses to the illicit trafficking of culture property at EU level. As we have seen, this illicit trade is an age-old phenomenon, and following the seminal responses from the Italians in the 1500s, export prohibitions have remained the most prominent means with which to restrict and restrain illicit trafficking. Since then, these administrative controls largely continue to be the preferred methods employed by states to mitigate the phenomenon, even if increasing levels of international trade and exchange from the 19th century onwards have led to a corresponding increase in illicit trafficking. Their usage has been reinforced by the international legal order and, following ethical advancements in the latter part of the 20th century that saw the unregulated acquisition of cultural materials as immoral, the global museum and heritage community have supplemented these legal orders with ethical norms and tools that remain key to current efforts in fighting illicit trafficking at a global level. Yet, as the world has become more globalised, and as restrictions in global trade have gradually and continuously come down between states, this illegal and transnational trade has continued to grow, demonstrating the inability of the established norms to address it. This has necessitated responses both from the traditional players and new global organisations established after the Second World War. Still, the findings of this dissertation would suggest that the controls at borders – the traditional means of protection – struggle to restrain illicit trafficking, mainly due to administrative and institutional failings. The nature of cultural heritage and its diversity from region to region mean that it is exceptionally difficult to successfully identify and requires specialist expertise as well as administrative support. This would suggest that if actors and policy makers are serious about this problem, then the appropriate means and resources need to be dedicated to address it. Here, the EU efforts to engage in efforts to address illicit trafficking are interesting, as they appear to suggest an innovative

attempt to establish alternative and new means to address illicit trafficking. In particular, the most recent attempts of the EU to adopt import controls (taken in the context of growing security concerns) represents a stark and remarkable departure from the internationally accepted *status quo* that has traditionally focused on export restrictions. The positive influence of international cultural actors on these actions, as well as the heritage professions in general, is also particularly striking and welcome. It remains to be seen whether the recent positive activities of the EU will yield success, but history has shown that an active, concerted and long term effort is needed to address this problem, and a lack of administrative and procedural support from the EU and its Member States could still undermine the best intentions we have seen.

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