

Protecting Cultural Heritage Through Criminal Law: The Italian Experience

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Abstract

Being characterized by an immense cultural heritage, Italy started to deal with its preservation centuries before the country's unification, progressively building one of the most developed legal frameworks on the safeguarding of cultural property, whose peculiarities and complexities are analyzed in this paper.

Following the ratification of the 2017 Nicosia Convention, in 2022 Italy introduced in its Criminal Code a new section expressly dedicated to 'Crimes against cultural heritage', providing for new offences, increased penalties, and an extension of corporate liability for legal entities working in the cultural sector. Being the 2022 reform quite ambitious compared to the attempts previously made by other countries, the paper highlights the main contents, strengths and weaknesses of the new section. The paper also reflects on whether the Italian experience might represent a successful model in preventing and mitigating the enduring phenomenon of illicit trafficking of cultural goods.

I. Introduction

In times of armed conflict or political instability, cultural heritage has constantly been under threat of being damaged or looted. The persistence of organized networks,¹ which facilitate the trafficking of artworks and antiquities, especially in ongoing war zones,² is still significant, requiring increased interest in developing new and improved criminal policies and market-targeted measures aimed at safeguarding cultural property.

An increasing number of international and national legal provisions are devoted

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¹ On the role of organized networks and intermediaries in facilitating trafficking of artworks and antiquities, see L. Natali, 'Patrimonio culturale e immaginazione criminologica', in Centro Nazionale di Prevenzione e Difesa Sociale ed, *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato e internazionale* (Milano: Giuffrè, 2015), 57-60; V. Manes, 'La circolazione illecita dei beni artistici e archeologici', *ibid* 87-92; A. Visconti, *Problemi e prospettive della tutela penale del patrimonio culturale* (Torino: Giappichelli, 2023), 145-148.

² For a historical overview of looting during war, see E. Tjhhuis, *Transnational Art Crime* (Italia: ARCA Publications, 2020), 230-234; A. Thompkins, 'Art in War', in Id ed, *Art Crime and its Prevention* (London: Lund Humphries, 2016), 325-327; N. Charney, 'Introduction to Part IV', in Id ed, *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves* (London: Palgrave Macmillan, 2016), 264-279.

to the protection of cultural property. The aim of this paper is to analyse some recent developments, particularly in the criminal protection of cultural property. After a brief summary of the general international framework for the protection of cultural property (section II), the paper will focus on the 2017 Council of Europe Convention on Offences relating to Cultural Property (so-called Nicosia Convention) (section III). The paper will then delve into the effects that the ratification of the Nicosia Convention has implied for Italy, by comparing the Italian legal framework on the protection of cultural property before and after the enactment of legge 9 March 2022 no 22 that implemented the Nicosia Convention (sections IV and V). Conclusions will follow (section VI).

II. Cultural Property in International Law

Historically speaking, cultural property has developed into a specific branch of law sometime ago. It was not until the second half of the 19th century that the expression became part of the lexicon of international law.³ The Brussels Declaration of 1874⁴ and the two Hague Conventions of 1899⁵ and 1907,⁶ introduced to mitigate the disruptive effects of armed conflicts, enforced some innovative provisions related to safeguarding historic monuments and works of art in general. However, those instruments did not establish a unified concept of cultural property, inasmuch as they only provided a heterogeneous list of protected items that included sites unrelated to culture, such as hospitals and charity institutions.⁷

The unprecedented and systematic looting of cultural goods during the Second World War highlighted the inadequacy of the Hague Conventions, sparking interest in improving the legal response to contrast the devastation and loss of cultural items during political instability. The establishment of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945 provided the impetus to finally consider cultural property as a distinct object of international protection, emphasizing the inherent connection between cultural heritage and individual fundamental rights.⁸ This vision resulted in the 1954 Hague Convention for the

³ On this topic, see A. F. Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage', in M. Orlando and T. Bergin eds, *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (London: Routledge, 2016), 3-4.

⁴ Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.

⁵ See Arts 28, 47 and 56 of the Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

⁶ See Arts 27 and 56 of the Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁷ See Art 8 of the Brussels Declaration, Art 56 of the Hague Convention (II), and Arts 27 and 56 of the Hague Convention (IV).

⁸ On this topic, see S. Manacorda, 'Criminal Law Protection of Cultural Heritage: An

Protection of Cultural Property in the Event of Armed Conflict⁹ ('1954 Hague Convention') and, in time, its two (1954¹⁰ and 1999¹¹) Protocols, all adopted under the auspices of UNESCO. Under the Convention and its First Protocol, state parties undertake to safeguard and preserve cultural property situated within their territories during peacetime, armed conflict, or belligerent occupation.¹²

The 1954 Hague Convention introduced for the very first time a comprehensive normative definition of cultural property,¹³ subsequently adopted in many soft law provisions and case law. However, several deficiencies and shortcomings quickly became evident, especially after the armed conflicts that took place between the late 1980s and the early 1990s in Cambodia,¹⁴ the Middle East,¹⁵ and the former Yugoslavia.¹⁶ It remains for instance uncertain whether the Convention applies directly to 'non-state actors' – a somewhat flexible description intended to encompass active and organised participants in armed conflicts who, even if not formally nation-states,¹⁷ systematically perpetrate acts of looting, extensive destruction, and vandalism against cultural property.¹⁸ Moreover, the effectiveness of the 1954 Convention has frequently been undermined by the lack of a mandatory criminal sanction regime. The only provision that deals with sanctions is Art 28, which introduces a general commitment for state parties

‘to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed

International Perspective', in Id and D. Chappell eds, *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (New York: Springer, 2011), 24.

⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 240.

¹⁰ Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 UNTS 358.

¹¹ Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999, 2253 UNTS 21.

¹² See Arts 3 and 5 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. On this topic, see A.F. Vrdoljak, n 3 above, 6-7.

¹³ Art 1 of the 1954 Hague Convention, on which see A. Visconti, *Problemi* n 1 above, 22-23; S. Manacorda, 'Criminal Law' n 8 above, 26; A. Thompkins, 'Art in War' n 2 above, 327-344.

¹⁴ On looting and the trafficking networks that operate in Cambodia, see S. Mackenzie and T. Davis, 'Cambodian Statue Trafficking Networks: An Empirical Report from Regional Case Study Fieldwork', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity* (Milano: ISPAC, 2014), 149-164.

¹⁵ On the conflicts that took place in Afghanistan, Iraq, and Libya, and their impact on the illicit trafficking of cultural property, see L.W. Rush, 'Looting of Antiquities: Tearing the Fabric of Civil Society', in N. Charney ed, *Art Crime* n 2 above 133-136. On the effects of the first Gulf War of 1990-1991 on Iraqi cultural heritage, see L.W. Rush, 'Looting and Antiquities', in A. Thompkins ed, *Art Crime* n 2 above, 373-374.

¹⁶ On the impact of the conflict in former Yugoslavia, most regarding the case of the bombing of Dubrovnik, see A.F. Vrdoljak, n 3 above, 8-11; A. Thompkins, 'Art in War' n 2 above, 344-351.

¹⁷ On the application of the 1954 Convention to non-state actors, see A. Thompkins, 'Art in War' n 2 above, 342-343.

¹⁸ *ibid*

a breach of the present Convention’.

The vagueness of Art 28 entails too much room for interpretation, leaving each state free to determine the most appropriate way to enforce sanctions on their territories, therefore giving rise to uneven standards.

To mitigate these deficiencies, the First Protocol to the 1954 Convention strengthens the safeguarding duties of the state parties by introducing the notion of ‘enhanced protection’¹⁹ and by determining the conditions and the sanctions for individual criminal responsibility.²⁰ However, the adoption of these measures is left to each State Party, thus opening again the way to non-uniform and ineffective application.²¹ The situation has not substantially improved with the adoption of the 1999 Second Protocol, which currently includes eighty-seven state parties.²² As a result of this limited number of ratifications, for many years the Second Protocol has not been in force in countries, such as Iraq, Syria, and Yemen, in which a non-international armed conflict was underway,²³ and thus was not able to prevent the massive looting and illicit trafficking of local cultural goods.

Some of the weaknesses of the 1954 Hague Convention and its First Protocol were addressed by the 1998 Rome Statute, the founding instrument of the International Criminal Court (ICC). The Rome Statute recognises the importance of investigating and prosecuting crimes against or affecting cultural heritage, and highlights the importance of the preservation and protection of cultural heritage as a broad concept, which includes both tangible and intangible manifestations of human life and identities. In its Arts 8(2)(b)(ix) and 8(2)(e)(iv), the Rome Statute expressly includes in the list of war crimes attacks on cultural heritage perpetrated respectively during international and non-international armed conflicts, paving the way to persecute these offences internationally and raising awareness on their seriousness.²⁴

¹⁹ Art 10 of the Second Protocol to the 1954 Convention.

²⁰ On this topic, see A. Visconti, *Problemi e prospettive* n 1 above, 27-28.

²¹ Art 15(2) of the First Protocol, on which see F. Caponigri and A. Pirri, ‘Summary Report of Conference on “A new perspective on the protection of cultural property through criminal law”’ (2019), available at <https://tinyurl.com/5hd6zhkc> (last visited 30 September 2024).

²² The full list of States Parties to the 1954 Conventions and its two Protocols is available at <http://tinyurl.com/327t2wdc> (last visited 30 September 2024).

²³ On 6 April 2022, Iraq deposited with the Director-General its instrument of accession to the Second Protocol. On 1 June 2023, Yemen deposited with the Director-General its instrument of ratification of the Second Protocol. Syria signed but did not ratify the Second Protocol; nonetheless, the signature indicates the intent to be bound by the Second Protocol’s provisions.

²⁴ The Office first brought charges relating exclusively to cultural property in 2015 in the Al Mahdi case. On this topic, see *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgement of 27 September 2016, available at <http://tinyurl.com/y5k5bwaa> (last visited 30 September 2024). See also A. Thompkins, ‘Art in War’ n 2 above, 352-354; V. Rainò, ‘La distruzione del patrimonio culturale e religioso come crimine di guerra. La Corte Penale Internazionale conferma l’imputazione a carico di Ahmad Al Faqi Al Mahdi’ (2016), available at <https://tinyurl.com/> (last visited 30 September 2024).

III. Setting out New Criminal Law Provisions in Europe: The Nicosia Convention

Before we deal with Italy's regulatory framework, we still have to clarify the major novelties introduced at the regional-international level by the Council of Europe Convention on Offences relating to Cultural Property ('2017 Nicosia Convention').²⁵

Being the leading political organization dedicated to the protection of human rights and common European identity, the Council of Europe has a long history of co-operation in the field of the protection of cultural property, raising awareness of the social value of cultural heritage²⁶ through conventions, recommendations, resolutions, and guidelines.

In 1985 the Council of Europe adopted the European Convention on Offences relating to Cultural Property ('Delphi Convention').²⁷ The Delphi Convention remained as a 'dead letter' since so far it has been signed only by six States, none of which ratified it. Yet, the Delphi Convention represents the earliest attempt by the Council of Europe to deal with crimes against cultural heritage, extending the scope of criteria for the application of criminal law²⁸ and paving the way toward the adoption of the Nicosia Convention in May 2017.

The Nicosia Convention, which for the time being has been ratified by six countries,²⁹ is the first international treaty aimed specifically at unifying standards in the field of domestic prevention and criminalization of offences against cultural property. More specifically, the purposes of the Nicosia Convention are to

²⁵ Council of Europe, Convention of 15 May 2017 on offences relating to cultural property (CETS no 221).

²⁶ The Council of Europe uses both the notion of 'cultural heritage' and 'cultural property' in its legal framework. The first expression mainly refers to tangible cultural manifestations considered as artistically, archaeologically, ethnologically, or historically valuable, and does not specifically deal with property issues. Conversely, the term 'cultural property' puts more emphasis on the question of legal title and is usually connected to the tangible dimension of culture. Both terms may refer to the same objects, although seen from a different perspective. This kind of differentiation between the tangible and intangible dimensions does not appear in every legal instrument related to cultural items. For example, the 1954 Convention uses to the term 'cultural property' without explicitly referring to national ownership. On this topic, see M.M. Bieczyński, 'The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property' 2 *Santander Art and Culture Law Review*, 259 (2017); A. Visconti, 'Esigenze di riforma alla luce degli impulsi internazionali', in Centro Nazionale di Prevenzione e Difesa Sociale ed, *Circolazione dei beni* n 1 above, 137-145; Id, *Problemi e prospettive* n 1 above, 90-98.

²⁷ Council of Europe, Convention of 23 June 1985 on offences relating to cultural property (CETS no 119).

²⁸ On the specific provisions set out in the Delphi Convention, see S. Manacorda, 'Criminal Law' n 8 above, 37-38; M.M. Bieczyński, n 26 above, 260-261; A. Visconti, 'Esigenze di riforma' n 26 above, 165-167.

²⁹ These countries are Cyprus, Greece, Hungary, Italy, Latvia, and Mexico. As of now, the Convention has been signed, but not ratified, by Armenia, Montenegro, Portugal, San Marino, Slovenia, Ukraine and the Russian Federation.

‘prevent and combat the intentional destruction of, damage to, and trafficking of cultural property by providing for the criminalisation of certain acts’ (Art 1(1)(a)); ‘strengthen crime prevention and the criminal justice response to all criminal offences relating to cultural property’ (Art 1(1)(b)); ‘promote national and international co-operation in combating criminal offences’ (Art 1(1)(c))

across nations, disciplines and sectors, favoring co-operation with and between international bodies such as INTERPOL, EUROPOL, the EU, UNESCO, and UNIDROIT. The last objective has further been encouraged by extending the possibility to any non-Council of Europe Members to become a Party to the Convention. The ratification by Mexico and the signature by the Russian Federation, which both took place in 2018, proved that this plan of action can be successful.³⁰

The Convention gives new impetus to criminal law as a tool in the fight against offences against cultural property by establishing new criminal offences, as well as preventive and administrative measures designed to fill in the gaps within the existing international law system. By doing so, the Convention provides a direct response to the transnational trafficking of artworks and antiquities both on the black market and the official sales channels. In this regard, the new instrument is intended to complement and enhance the system of global protection of cultural property by bringing national legislation up to a uniform protection standard. For this reason, its regime safeguards cultural property – both movable (Art 2(2)(a)) and immovable (Art 2(2)(b)) – that has been ‘classified, defined or specifically designated’ not only by any State Party to the Convention but also by any State that is Party to the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, thus resulting in a much wider scope than previous treaties.³¹

Chapter II represents the core of the Convention, dealing with ‘Substantive criminal law’. The Chapter provides a catalogue of crimes against cultural property that constitute a criminal offence under each Party’s domestic law. The drafters concentrated on introducing common standards and legislative measures to address the most common and serious offences related to cultural property, also in the context of action against transnational organized crime and terrorism. Their work was based on a comprehensive review of the national legislation in force, carried out between 2016 and 2017 by the European Committee of Crime Problems (CDPC) in close co-operation with the Steering Committee for Culture, Heritage and Landscape (CDCPP), which led to the introduction of the following offences: theft and other forms of unlawful appropriation of cultural property (Art 3); its unlawful excavation and removal (Art 4); illegal importation (Art 5),

³⁰ On this topic, see M.M. Bieczyński, n 26 above, 266.

³¹ On the updated definition of cultural property introduced by the Nicosia Convention, see F.D. Iacopino et al, *La tutela penale dei beni culturali e del patrimonio artistico* (Milano: Key Editore, 2022), 20-22.

illegal exportation (Art 6), acquisition (Art 7) and placing on the market (Art 8) of movable cultural property with unlawful provenance; falsification of documents (Art 9); destruction and damage of cultural property (Art 10).³²

Two other provisions that are worth mentioning are Art 11 and Art 13. Art 11 establishes that ‘the intentional aiding or abetting the commission of a criminal offence referred to in (this) Convention’ constitutes a criminal offence under each Party’s domestic law. Art 13, acknowledging the frequent connections between the licit and illicit art market, introduces corporate liability for crimes against cultural property,³³ therefore holding auction houses and companies that operate in the art trade responsible for their wrongdoings.³⁴

As far as sanctions and measures are concerned, according to Art 14(1);

‘(e)ach Party shall ensure that criminal offences (...) when committed by natural persons, are punishable by effective, proportionate and dissuasive sanctions, which take into account the seriousness of the offence’. The same principle also applies to ‘legal persons held liable in accordance with Article 13’ (Art 14(2)).

At first glance, these obligations seem to penetrate the domain traditionally reserved for sovereign states much more strongly than previous international instruments. It should however be considered that the Nicosia Convention recognizes states’ freedom to establish their own sanctions too, respecting national differences in the development of cultural policies.³⁵

IV. The Italian Framework: From the Rosadi Act of 1909 to the 2022 Reform Implementing the Nicosia Convention

In order to appreciate the way in which Italy implemented the obligations set forth by the Nicosia Convention, it is necessary to clarify how Italy has historically tackled the problem of protecting its immense cultural heritage. Legal protection of cultural heritage in Italy dates back centuries before the country’s unification.³⁶ The proclamation of the Kingdom of Italy in 1861 fostered a complex

³² M.M. Bieczyński, n 26 above, 265.

³³ A. Oriolo, ‘The Nicosia Convention: A Global Treaty to Fight Cultural Property Crimes’ (2022), available at <https://tinyurl.com/4vp3w6h6> (last visited 30 September 2024).

³⁴ S. von Schorlemer, ‘Fighting Terrorist Attacks Against World Heritage – An Integrated Approach’, in M.T. Albert et al eds, *50 Years World Heritage Convention: Shared Responsibility – Conflict & Reconciliation* (Cham: Springer Nature, 2022), 207.

³⁵ M.M. Bieczyński, n 26 above, 270.

³⁶ Before the unification, many states located on the Italian Peninsula had introduced some provisions aimed at safeguarding cultural property from spoliation and intentional destruction. Several scholars believe that the first legislation related to Italian cultural property is the Decision enforced on 24 October 1602 by Ferdinando I de’ Medici, Grand Duke of Tuscany, which established a control system on the circulation of artworks based on export licenses granted by the Academy

and long process of coordination and rationalization of the existing framework that culminated in the adoption in 1909 of legge Rosadi,³⁷ the first comprehensive statute on ‘movable or immovable things with an historical, archaeological, ethnographic, (...) or artistic interest’ (Art 1).

During the fascist regime, considering the prominent role assumed by cultural heritage as an emblem of excellence and national identity,³⁸ the legal framework became more detailed and stricter. The 1930 Italian Criminal Code (ICC) introduced three offences concerning crimes against cultural heritage.³⁹ Further, legge Bottai⁴⁰ of 1939 improved the safeguards for cultural items,⁴¹ regulating, among other things, their preservation (Chapter II); transfer (Chapter III); exportation (Chapter IV, Section I), and importation (Chapter IV, Section II). Legge Bottai also introduced new criminal provisions (Chapter VIII).⁴²

Following the downfall of the fascist regime in 1943, the Constitution of the newborn Italian Republic of 1948 introduced an explicit duty to safeguard the ‘natural landscape and the historical and artistic heritage of the Nation’, as well as to promote ‘the development of culture and of scientific and technical research’ (Art 9).⁴³ Among its ramifications, the newly established constitutional rank of

of the Arts of Drawing. Nevertheless, the most remarkable contribution before Italy’s unification was Editto Pacca, introduced by the Papal States in 1820, which inspired the adoption of the national legislation almost a century later. On the historical development of cultural property legislation in Italy, see F.D. Iacopino et al, *La tutela penale* n 31 above, 12-14; F. Lemme, ‘Prefazione’, in G.N. Carugno et al eds, *Codice dei beni culturali. Annotato con la giurisprudenza* (Milano: Giuffrè, 2006), V-VII; A. Visconti, *Problemi e prospettive* n 1 above, 8-10, 14.

³⁷ Legge 20 June 1909 no 364.

³⁸ On this topic, see M. Ainis and M. Fiorillo, *L’ordinamento della cultura. Manuale di legislazione dei beni culturali* (Milano: Giuffrè, 2022), 25-30.

³⁹ See Art 733 of the Italian Criminal Code; cf also Arts 635(2)(1) and 639(2) also dealt with ‘things of an historical or artistic interest’. For uniformity purposes, Arts 635(2)(1) and 639(2) have been repealed by the 2022 Reform. On this topic, see C. Perini, ‘Itinerari di riforma per la tutela penale del patrimonio culturale’, 17-19 (2018), available at <https://tinyurl.com/46373txn> (last visited 30 September 2024).

⁴⁰ Legge 1 June 1939 no 1089.

⁴¹ Like the other legal instruments enforced before the 1954 Hague Convention, both the Rosadi and Bottai Acts did not use the notions of ‘cultural heritage’ or ‘cultural property’, rather opting for a list of heterogeneous items with cultural, historical, and archeological interest, subsequently limiting the scope of protection.

⁴² On the main contents of the Bottai Act, see F. Coccolo, ‘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’, in S. Pinton and L. Zagato eds, *Cultural Heritage. Scenarios 2015-2017* (Venezia: Edizioni Ca’ Foscari, 2017), 195-209; A. Visconti, ‘The Reform of Italian Law on Cultural Property Export and Its Implications for the “Definitional Debate”: Closing the Gap with the European Union Approach or Cosmetics? Some Systemic Considerations from a Criminal Law Perspective’ 2 *Santander Art and Culture Law Review*, 161 (2019).

⁴³ Even after the promulgation of the Italian Constitution, a statutory duty to enhance cultural heritage was established only in 1998, and later codified by the 2004 ‘Code of the Cultural and Landscape Heritage’ (CHC). On this topic, see S. Manacorda, ‘Introduzione’, in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 10-11; F.D. Iacopino et al, *La tutela penale* n 31 above, 19; F. Florian, ‘Il diritto dei beni culturali tra tutela e valorizzazione’, in A. Negri-Clementi ed, *Economia dell’arte. Mercato, diritto e trasformazione digitale* (Milano: Egea, 2023), 187; L.

cultural heritage paved the way for a progressive increase in the use of criminal offences, as Art 9 of the Constitution came to legitimize the enforcement of criminal provisions for the protection of cultural heritage.⁴⁴

The existing body of national laws was first rationalized in a single text in 1999, when Italy adopted the ‘Consolidated Act on Cultural and Landscape Assets’.⁴⁵ Fifteen years later, the Consolidated Act was replaced by the 2004 ‘Code of the Cultural and Landscape Heritage’ (CHC).⁴⁶ Made of 184 Articles, the CHC is divided into five parts, which deal respectively with: general provisions; cultural property protection, conservation, circulation, and enhancement; landscape assets; sanctions (both administrative and penal); interim provisions and abrogation. The Code harmonized several existing legal instruments, and provided for a broader scope of cultural items, together with a more refined regime for their circulation.

In particular, Art 2(1) CHC defines cultural heritage as ‘consist[ing] of cultural property and landscape assets’. Art 2(2) adds that cultural property

‘consists of immovable and movable things which, under Arts 10 and 11, present artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilisation’.⁴⁷

The CHC thus combines a broad definition of cultural heritage which includes even the most recent contemporary art expressions with a list of more specific items that are textually made subject to protection.

Casini, *Ereditare il futuro* (Bologna: il Mulino, 2016), 50-52; L. Casini, ‘Oltre la mitologia giuridica dei beni culturali’ (2012), available at <https://tinyurl.com/bddcjy5r> (last visited 30 September 2024); N. Recchia, ‘Una prima lettura della recente riforma della tutela penalistica dei beni culturali’, 92 (2022), available at <https://tinyurl.com/3e8kep52> (last visited 30 September 2024); A. Visconti, ‘The Reform of Italian Law’ n 42 above, 161-162.

⁴⁴ On this tendency, see A. Visconti, ‘The Reform of Italian Law’ n 42 above, 166; C. Perini, n 39 above, 5-8, 11-10 (2018); G.P. Demuro, *Beni culturali e tecniche di tutela penale* (Milano: Giuffrè, 2002), 45-49.

⁴⁵ Decreto legislativo 29 October 1999 no 490. The Consolidated Act also transposed the EU legislation enacted in the meantime.

⁴⁶ Decreto legislativo 22 January 2004 no 42. The English version of the CHC is available on the UNESCO website at <http://tinyurl.com/43zt8vjk> (last visited 30 September 2024)..

⁴⁷ In 1964, the Franceschini Commission, which had been designated to carry out a study on the state of conservation of cultural goods situated in Italy, introduced into the Italian political and legal debate the notions of ‘cultural property’ (*beni culturali*) and ‘cultural heritage’ (*patrimonio culturale*). Taking into consideration the international soft law instruments and conventions, the Commission promoted a broader and more dynamic notion of cultural property, claiming that cultural goods are represented by any item that testifies to the values of civilization (*testimonianza avente valore di civiltà*). This expression, introduced in the Declaration I of the Franceschini Commission, persisted, with small changes, in Art 2(2) of the 2004 Code of the Cultural and Landscape Heritage. On this topic, see R. Mazzocca, ‘La nozione di bene culturale dalla commissione Franceschini al nuovo Codice’, available at <http://tinyurl.com/zz43hbkk> (last visited 30 September 2024); A. Visconti, ‘The Reform of Italian Law’ n 42 above, 167.

The CHC also provides for new criminal sanctions.⁴⁸ Many of these provisions aim to complement and support the enforcement of the administrative processes established by the CHC itself, therefore lacking in incisiveness.⁴⁹ Furthermore, the CHC criminal offences condemn behavior in violation of the law that endangers, but not necessarily damages, cultural heritage, called *reati di pericolo*). The most relevant consequence of this statutory choice is that these provisions can only apply to formally declared cultural property, mainly identified under Art 10 CHC.⁵⁰

Conversely, the approach changes in reference to the ICC offences, which do not provide for a definition of cultural property, even after the 2022 reform. For this reason, whenever the asset was not already identified as ‘cultural’ by sectorial laws, many scholars maintained that it was up to the penal judge, when applying criminal offences, to ascertain the cultural relevance of the affected object.⁵¹ Criminal courts were thus expected to ascertain on a case-by-case basis whether the affected item had an ‘artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest’ or, more broadly, whether it ‘testify[ing] to the values of civilisation’, as established by the CHC.⁵² More specifically, several courts started to follow an a principle known as *concezione sostanzialistica*, according to which any good characterized by an intrinsic cultural value fits in the notion of cultural heritage, regardless of the prior and formal recognition of their value by the competent authorities. While this approach increases the protection of cultural assets, especially the most recent ones and those that are owned by private citizens, it also provides judges with a wider margin of interpretation, which can result in a risk of incoherence among case law.

Considering this context, for a long time, many scholars tried to explore and suggest possible reform scenarios for the protection of cultural property through criminal provisions.⁵³ However, it was not until the recent ratification of the 2017 Nicosia Convention that Italy took the opportunity to enhance its legal framework, introducing a new section (Section VIII-*bis*) in its Criminal Code expressively

⁴⁸ See Arts 169-180 of the 2004 CHC. On this topic, see N. Asini and G. Cordini, *I beni culturali e paesaggistici. Diritto interno, comunitario comparato e internazionale* (Padova: CEDAM, 2006), 174-177.

⁴⁹ A. Visconti, *Problemi* n 1 above, 69; A. Massaro, ‘Diritto penale e beni culturali: aporie e prospettive’, in E. Battelli et al eds, *Patrimonio culturale. Profili giuridici e tecniche di tutela* (Roma: RomaTre Press, 2017), 187-188.

⁵⁰ A. Visconti, ‘The Reform of Italian Law’ n 42 above, 171; Id, *Problemi e prospettive* n 1 above, 66-68; G.P. Demuro, ‘I delitti contro il patrimonio culturale nel Codice penale: prime riflessioni sul nuovo titolo VIII-*bis*’ *sistemapenale.it*, 5-6 (2022).

⁵¹ On this topic, see A. Massaro, ‘Illecita esportazione di cose di interesse artistico: la nozione sostanziale di bene culturale e le modifiche introdotte dalla legge n. 124 del 2017’ *dirittopenaleuomo.org*, 118-122 (2017).

⁵² N. Recchia, n 43 above, 92; A. Visconti, ‘The Reform of Italian Law’ n 42 above, 170; C. Perini n 39 above, 19-20.

⁵³ A. Massaro, n 51 above, 190-192; C. Perini, n 39 above, 21-22; L. Lupària, ‘La tutela penale dei beni culturali nella dimensione processuale’, in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 265-267.

dedicated to crimes against cultural heritage.

V. The Main Provisions of the 2022 Reform

As mentioned in section I, following the ratification in January 2022 of the Nicosia Convention, Italy adopted legge 9 March 2022 no 22, concerning 'Provisions on criminal offences against cultural heritage'.

The reform amended the Italian Criminal Code (ICC) in many aspects. First, the ICC consolidated some of the criminal offences that were introduced by the CHC, relocating them in the Criminal Code. Secondly, the ICC created new criminal provisions against cultural heritage and introduced new aggravating and mitigating circumstances applying to these crimes. Lastly, the reform extended the scope of application of corporate liability so as to cover most of the newly established crimes.

Before delving into the analysis of the offences introduced by legge no 22/2022, it is also necessary to clarify what the reform did not do. As discussed in section IV, since the introduction of the first crimes against cultural heritage in the 1930 ICC, doubts arose in the case law about the very definition of cultural heritage and cultural assets. These doubts persisted after the 2022 reform. Notwithstanding the fact that almost every provision included in the new Section VIII-*bis* of the ICC refers to these notions, legge no 22/2022 neglected to provide a definition of both cultural heritage and assets.

Luckily, such a gap has been already filled by courts. Shortly after the reform came into force, in September 2023, the Supreme Court of Cassation was called upon to apply the newly established crime of 'misappropriation of cultural assets' under ICC Art 518-*ter*.⁵⁴ Following the approach already embraced by courts before the 2022 reform, the judges demonstrated their adherence to the so-called *concezione sostanzialistica*, confirming that any good characterized by an intrinsic cultural value fits in the notion of cultural heritage protected by the provisions of Section VIII-*bis* of the Criminal Code.⁵⁵

The opinion in question reflects a clear standpoint by the Supreme Court of Cassation in the longstanding and vibrant debate on how cultural goods should be identified from a criminal law perspective.

1. New Criminal Offences Introduced by Law no 22/2022

Before the adoption of legge no 22/2022, when cultural property was endangered or affected by any criminal conduct which was different from the ones that specifically refer to cultural property,⁵⁶ general ICC offences (such as,

⁵⁴ Corte di Cassazione-Sezione penale II 27 September 2023 no 41131, available at <http://tinyurl.com/ms3x6hv8> (last visited 30 September 2024).

⁵⁵ On this topic, see D. Colombo, 'La 'culturalità' del bene nei reati contro il patrimonio culturale. Anche dopo la riforma la Cassazione accoglie la tesi 'sostanzialistica' *sistemapenale.it*, 1 (2023).

⁵⁶ See n 39 above.

eg, those on theft) applied. Now, since the new criminal provisions established in Section VIII-*bis* of the ICC specifically mention cultural assets, according to the ‘*lex specialis doctrine*’ (*principio di specialità*),⁵⁷ their application overrides that of the traditional ICC offences.

More in particular, Art 1(1)(b) of legge no 22/2022 introduced the following offences in the newly created Section VIII-*bis* of the ICC:

- theft of cultural property (ICC Art 518-*bis*);
- misappropriation of cultural assets (ICC Art 518-*ter*);
- fencing of cultural assets (ICC Art 518-*quarter*);
- use of cultural assets from criminal origin (ICC Art 518-*quinqüies*);
- laundering of cultural assets (ICC Art 518-*sexies*);
- self-laundering of cultural assets (ICC Art 518-*septies*);
- forgery of a private contract related to cultural assets (ICC Art 518-*octies*);
- violations regarding the sale of cultural assets (ICC Art 518-*novies*);
- unlawful importation of cultural assets (ICC Art 518-*decies*);
- unlawful exit or exportation of cultural assets (ICC Art 518-*undecies*);
- destruction, dispersion, deterioration, defacement, soiling, and unlawful use of cultural or landscape assets (ICC Art 518-*duodecies*);
- devastation and looting of cultural and landscape assets (ICC Art 518-*terdecies*);
- counterfeiting of works of art (ICC Art 518-*quaterdecies*).

While some of these crimes are new,⁵⁸ others are a reformulation of previous CHC norms,⁵⁹ and still others combine elements of the CHC with the ICC’s general pre-existing norms.⁶⁰

As far as prosecution is concerned, adopting the principle of universal jurisdiction, ICC Art 518-*undecies* (‘Offences committed abroad’) states that the offences listed under Section VIII-*bis* ‘[...] apply also in case the crime is committed abroad to the detriment of the national cultural heritage’. Considering the transnational component that frequently characterizes heritage crimes,⁶¹ the provision seeks to ensure the broad application of Italian law. However, this provision neglects to introduce means to facilitate cross-border enforcement and investigative cooperation with criminal authorities abroad.⁶² Case law will soon

⁵⁷ See Art 15 of the Italian Criminal Code.

⁵⁸ This is the case, for instance, of the crimes under ICC Arts 518-*decies* and 518-*undecies*, as well as the new offence introduced in ICC Art 707-*bis* (concerning ‘Unjustified possession of ground scanners or metal detectors’), which has been included in a different Section of the ICC. On ICC Art 707-*bis*, see L. Mazza, ‘Il Possesso ingiustificato di strumenti per il sondaggio del terreno o di apparecchiature per la rilevazione dei metalli’, in Id ed, *Le disposizioni in materia di reati contro il patrimonio culturale* (Pisa: Pacini Giuridica, 2023), 195-206.

⁵⁹ This holds true for ICC Arts 518-*novies*, 518-*undecies*, and 518-*quaterdecies*, whose penalties were however increased by the 2022 reform.

⁶⁰ See for instance ICC Arts 518-*undecies* and 518-*duodecies*.

⁶¹ See n 1 above.

⁶² On this topic, see F. Mazza, ‘Il “fatto commesso all’estero”’, in Id ed, *Le disposizioni* n 59

reveal whether foreign prosecutors, especially outside the European Union, will be willing to cooperate with the Italian courts, thus making Art 518-*undevicies* truly effective.

2. Aggravating and Mitigating Circumstances

Among the innovations of the 2022 reform lies the introduction of new aggravating (ICC Art 518-*sexiesdecies*) and mitigating circumstances (ICC Art 518-*septiesdecies*) applicable to every crime now included in Section VIII-*bis*.⁶³

ICC Art 518-*sexiesdecies* is based – with some variations – on Art 15 of the Nicosia Convention. The latter includes a list of four aggravating circumstances that each Party shall take into consideration when ‘determining the sanctions in relation to the criminal offences referred to in this Convention’. More specifically, the Convention establishes that penalties should be increased when the offence is ‘committed by persons abusing the trust placed in them in their capacity as professionals.’⁶⁴ Trying to widen the scope of application of this circumstance, Art 518-*sexiesdecies* of the ICC does not mention the requirement of ‘trust’, but rather applies whenever the crime is committed ‘in the scope of a professional, commercial, banking, or financial activity’. Sanctions are increased by one-third to one-half.

Furthermore, both Art 15 of the Nicosia Convention and Art 518-*sexiesdecies* of the ICC establish increased penalties when the crime is ‘committed by a public official entrusted with the conservation or the protection of movable or immovable cultural property’ or ‘in the framework of a criminal organisation’.⁶⁵ Given the recurrent and close connection between some specialists working in the cultural sector and members of transnational organized crime, both circumstances reflect the Nicosia Convention’s main purpose to prevent and fight the illicit trafficking of cultural property.

As far as mitigating circumstances are concerned, the Nicosia Convention omits this topic. Conversely, using quite broad wording, ICC Art 519-*septiesdecies* decreases penalties by one-third to two-thirds when the person involved in the crime helps with the identification of the accomplices, provides evidence of the committed crime, takes steps to ensure that the criminal activity did not lead to further consequences,

above, 189-194.

⁶³ Before the 2022 reform, Arts 177 and 178 of the Italian CHC dealt with the same topic. However, these provisions had a quite specific scope. According to Art 177 CHC, mitigating circumstances applied only in the case of unlawful exit and exportation and unlawful appropriation. Art 178(2) CHC provided for an aggravating circumstance only in reference to forgery of works of art. Anyway, both articles were repealed by legge no 22/2022.

⁶⁴ See Art 15(1)(a) of the 2017 Nicosia Convention.

⁶⁵ Art 518-*sexiesdecies* especially mentions Art 416 of the Italian Criminal Code which applies when ‘three or more persons associate together in order to commit more than one crime’. On this topic, see F. Mazza, ‘Il sistema delle circostanze aggravanti’, in Id ed, *Le disposizioni* n 59 above, 202-203.

or has recovered – or has made someone – recover the cultural assets which were affected by the crime. Penalties are also reduced when the criminal behaviour is not particularly serious or does not produce dangerous consequences, thus creating the opportunity to commensurate sanctions with the seriousness of each specific crime.⁶⁶

3. The Introduction of Corporate Liability for Legal Entities Operating in the Cultural Sector

As noted above in section III, one of the main novelties brought about by the 2017 Nicosia Convention concerns the rules on the liability of legal persons. More specifically, according to Art 13(1) of the Convention,

[e]ach Party shall ensure that legal persons can be held liable for criminal offences referred to in this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within that legal person⁷.

Art 13(2) also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent, thus enabling them to commit any of the offences referred to in the Convention for the benefit of the legal person. As far as the kind of liability is concerned, Art 13(3) specifies that ‘the liability of a legal person may be criminal, civil or administrative’, according to the legal principles of each Party. It does not exclude individual liability (Art 13(4)). Lastly, Art 14 provides for a catalogue of sanctions, which include criminal or non-criminal monetary sanctions, temporary or permanent disqualification, or placing under judicial supervision.

Moving on to the Italian framework, it should be noted that the concept of corporate liability is well-known in the country. Under decreto legislativo 8 June 2001 no 231,⁶⁷ corporations and associations may incur administrative liability for crimes perpetrated in their interest or to their advantage.

Implementing Art 13 of the Nicosia Convention, legge no 22/2022 introduced two new provisions in decreto legislativo no 231/2001, thus expanding the list of crimes that may give rise to corporate liability under the latter. The newly inserted Art 25-septiesdecies of decreto legislativo no 231/2001, concerning ‘Crimes against cultural heritage’, now provides for the imposition of quota-based financial penalties and disqualification on legal entities which commit most of the crimes mentioned in Section VIII-*bis* of the ICC.⁶⁸ Similarly, Art 25-*duodevicies* of decreto legislativo no 231/2001, dealing specifically with the laundering of cultural assets⁶⁹ and the

⁶⁶ On the reasons that led to the introduction of mitigating circumstances in Section VIII-*bis*, see A. Visconti, *Problemi e prospettive* n 1 above, 206-209.

⁶⁷ Decreto legislativo 8 June 2001 no 231. On this topic, F.D. Iacopino et al, n 31 above, 147-162.

⁶⁸ Art 25-*septiesdecies* does not mention Art 518-*quinquies* of the ICC (‘Employment of cultural property of criminal origin’).

⁶⁹ Art 25-*duodevicies* of decreto legislativo no 231/2001 however omits to mention the

devastation and looting of cultural and landscape assets, now imposes quota-based financial penalties and disqualification on the legal entities involved in, or benefitted by, this conduct.

Considering these amendments and according to Art 6 of decreto legislativo no 231/2001, companies and legal entities that operate in or in close connection with the art market and cultural sector will need to internalize appropriate compliance measures to avoid the risk of being held liable. After carefully carrying out a risk assessment on the new criminal offences against cultural heritage, the Italian art industry will presumably need to update its existing protocols or adopt enhanced organizational models based, among other things, on reporting, traceability, and digitalization procedures, in order to mitigate the risk of illicit behaviors.⁷⁰

VI. Concluding Remarks: The Exceptionalism of Italian Criminal Law

With the variety of multilateral instruments surveyed in this paper, the international community has consistently confirmed, since the mid-nineteenth century, its commitment to fight the intentional destruction of cultural heritage. However, the implementation of international conventions and resolutions necessarily depends on their incorporation into national legislation. Even in cases in which implementation follows, the discretion left to each state inevitably leads to a substantial lack of harmonization.⁷¹

Among the countries with a distinctive set of criminal penalties dedicated exclusively to cultural heritage safeguarding, only a few – such as Spain⁷² and the Russian Federation⁷³ – have inserted these provisions in their respective Criminal

crime of ‘self-laundering’ (punished under ICC Art 518-*septies*). On this controversial drafting choice, see I. Conti, ‘La responsabilità delle persone in materia di delitti contro il patrimonio culturale’, in L. Mazza ed, *Le disposizioni* n 59 above, 225-226.

⁷⁰ On this topic, see *ibid* 226-227; L. Ponzoni and F. Dimaggio, ‘I reati contro il patrimonio culturale e l’aggiornamento dei Modelli 231’ *giurisprudenzapenale.com*, 22-26 (2023); L. Troyer and M. Tettamanti, ‘Reati contro il patrimonio culturale e responsabilità degli enti: questioni interpretative e suggerimenti pratici’ *Diritto penale commerciale Opinioni*, 1179-1182 (2022).

⁷¹ On this topic, see A.F. Vrdoljak, n 3 above, 26; F. Caponigri and A. Pirri, n 21 above.

⁷² Art 46 of the Spanish Constitution promote the preservation and enrichment of the historic, cultural and artistic heritage of Spain, underlining that ‘(...) Offences committed against this heritage shall be punished under criminal law’. The Spanish Criminal Code from 1995 is based on a mixed safeguard system. On the one hand, Chapter II in Section XVI deals specifically with crimes against historical heritage. On the other hand, many traditional crimes like theft, fraud, and embezzlement provide increased penalties when they have been committed against items of ‘artistic, historic, cultural or scientific value’ (see Arts 235(1)(1), 250(3)). On this topic, see D. Vozza, ‘Prevenzione e contrasto al traffico illecito di beni culturali mobili’, in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 192-202.

⁷³ The Russian Federation’s Criminal Code does not provide a specific section dedicated to cultural heritage. However, Arts 164, 190, and 243 deal specifically with items of the artistic, historical, and archaeological heritage. On circulation of cultural objects in Russian law, see Y. Vertinskaya, ‘Circulation of Cultural Objects in Russian Law – An Overview’ 2 *Santander Art and Culture Law Review*, 159-184 (2018).

Codes, while others have opted to introduce the new rules in general acts on the protection of cultural property.⁷⁴ In this context, the Italian 2022 reform can be considered unique for at least two reasons. Firstly, the reform represents an unprecedented attempt to enforce in a criminal codification a comprehensive framework expressively dedicated to cultural heritage. Secondly, the reform carefully takes into account many of the peculiarities of the art market, including its frequent intersections with the illicit domain; for instance, it rightly provides for long-awaited rules on the liability of the legal entities operating in the cultural sector.

It can be stated that, following the enforcement of the 2022 reform, the Italian legal framework has become even more exhaustive, turning into a model that other countries interested in reforming their cultural heritage framework could take into consideration. However, since the reform chose not to repeal all the previous regulations, some coordination issues persist, making it difficult for lawyers and actors in the art market especially if not familiar with the Italian legal infrastructure to orientate themselves among different legal sources.

While the introduction of new criminal provisions and the increasing of penalties will presumably make criminals less inclined to endanger the Italian cultural heritage, at least in the short term, criminal networks are also well known for their ability to engage in forum shopping, to exploit legal loopholes and shortcomings to maximize profits, and to avoid prosecution in the jurisdictions that are known for the severity of their criminal responses.⁷⁵ This massive use of criminal law may therefore lead to an impoverishment of the Italian art market in favour of foreign cultural venues.

As of now, we can confirm that legge no 22/2022 has been positively approved by many Italian legal experts, and has drawn the attention of foreign scholars as well. What has been most appreciated is the fact that the reform emphasizes the prominent position of the penal instrument, clearly acknowledging the significant economic impact that is generated by criminal conducts against cultural heritage, whose seriousness has been underestimated for too long.⁷⁶ However, several art market operators have already complained about the increase in their risk assessment duties, which in their opinion will be burdensome to carry out due to an alleged lack of time and resources.⁷⁷ This kind of reaction, although foreseeable,

⁷⁴ Some examples are represented by France, the United Kingdom, and Malta, which have enforced criminal provisions respectively in the Code du patrimoine (France), the Dealing in Cultural Object (Offences) Act 2003 (UK), and the Cultural Heritage Act (Malta).

⁷⁵ S. Manacorda, 'Criminal Law' n 8 above, 23; on how jurisdictions can play the role of interfaces in facilitating the illegal importation and exportation of cultural goods, see E. Tjhuis, n 2 above, 121-123.

⁷⁶ On this topic, see G. Melillo, 'La cooperazione giudiziaria internazionale nei reati contro il patrimonio culturale' in S. Manacorda and A. Visconti eds, *Beni culturali e sistema penale* (Milano: Vita e Pensiero Editrice, 2013), 56-67; L. Natali, 'Patrimonio culturale e immaginazione criminologica' n 1 above, 74, 76-78; L. Lupària, n 53 above, 243-245.

⁷⁷ S. Reyburn, 'Britain Moves to Regulate Its Art Trade. Bring Your ID' *The New York Times*, available at <http://tinyurl.com/stc429r6> (last visited 30 September 2024); J. Dalley, 'Can

could represent a huge obstacle in counteractions against cultural heritage crimes.

Time will tell whether the 2022 reform is effective in fighting crimes against the Italian cultural heritage. Criminologists have already confirmed that the fight against these conducts cannot be successful if it is not combined with the establishment and strengthening of preventive actions and operational mechanisms, both at a local level and at the international one, to reduce the presence of illicitly acquired items in the art market.⁷⁸ As long as art world professionals are unwilling to properly undertake their due diligence duties, any legal framework, as exhaustive as it may be, cannot be considered fully effective.

the Art World Clean Up Its Act?' *Financial Times* available at <http://tinyurl.com/4cm2rwtm> (last visited 30 September 2024).

⁷⁸ On the role preventive measures and operational mechanisms can play in contrasting the illicit trade, see L. Natali, n 1 above, 75-76; F. Shyllon, 'Intergovernmental and Non-governmental Organizations Grasping the Nettle of Illicit Trafficking in Cultural Property', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity*, (Milano: ISPAC, 2014), 75-76; D. Fincham, 'Two Ways of Policing Cultural Heritage', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity* (Milano: ISPAC, 2014), 91-92; A. Visconti, 'Strategie sanzionatorie e politico-criminali', in S. Manacorda and A. Visconti eds, *Beni culturali e sistema penale* n 77 above, 143-155.