

Treaty Law and the Protection of Cultural Property: Recent Developments

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On 19 March, we remembered the Mexican note of protest issued 80 years ago, with which Mexico, precisely one week after the invasion by the troops of Nazi Germany, protested before the League of Nations against the illegal occupation of Austria by the Wehrmacht under international law and the subsequent political “Anschluss”.

This official note of protest, submitted by the Mexican delegate Ambassador Isidro Fabela by direction of President Lazaro Cárdenas, described the Nazi invasion as a severe attack on the multilateral system of peaceful coexistence and the principles enshrined in international law.

In 1938, no other country had the courage to protest - in a similarly public and clear manner - before the multilateral forum of the League of Nations against the “Anschluss” of Austria by Nazi Germany.

To commemorate such decision, I intended to address an issue that is also related to the ideal of defending the rights of the people through international law. The topic I will be presenting today is the protection of cultural property in treaty law.

1. Cultural Property

In order to discuss cultural property and its legal protection it seems convenient to stipulate what we mean by culture. In doing so, it is worth to remember that at its origin the Latin word *cultura* appears linked to agriculture, to the cultivation of the fields and the vines.

Cicero was probably the first to use the word culture in a metaphorical sense when he spoke of *cultura animi*, the cultivation of the human soul that extirpates vices and allows the flourishing of virtue.¹ From there on, culture was to be used not only to refer to philosophy, as Cicero intended in his *Tusculanes* (II, 13). Culture was linked to a vast array of human activities that encompass efforts to transform and recreate nature, to depict and represent objects as well as emotions; it covers buildings and constructions, colour and light, as well as sequences of sounds and silences. In the eighteenth century, a renowned anthropologist, E. B. Tylor, coincidentally after a trip to Mexico, coined a classical definition of culture as the “complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.”²

In modern times, several definitions of culture have been coined. I would refer to two. One by André Malraux, who in a short phrase encapsulates the essence of the word: “*la culture... ce qui a fait de l'homme autre chose qu'un accident de l'univers*”.³ For him, culture is not only a body of knowledge, but also “the particular inheritance of the nobility of mankind”.⁴ A second definition, more akin to our subject, is the one used in the UNESCO’s Declaration on Cultural Policies adopted in Mexico in 1982.⁵ In this declaration the international community, while expressing trust in the ultimate convergence of the cultural and spiritual goals of humankind stated “in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a

¹ Antoinette Novara, ‘Cultura: Ciceron et l’origine de la métaphore latine’ (Vol. 1, 1986) *Bulletin de l’Association Guillaume Budé*, pp. 51-66.

² Edward Tylor, *Primitive Culture: Research into the Development of Mythology, Philosophy, Religion, Art, and Custom* (London: 1871, Volume 1), p. 1. On his trip to México, see *Anahuac: or, Mexico and the Mexicans, Ancient and Modern* (London: 1861), a recent translation into Spanish by Leif Korsbaek was published in 2009 *Anáhuac o México y los mexicanos antiguos y modernos, México, UAM-Iztapalapa*.

³ “Culture is what makes man something other than an accident of the universe.” <http://www.ina.fr/contenus-editoriaux/articles-editoriaux/andre-malraux-la-culture-au-pantheon/> (1 November 2018).

⁴ “*Une culture n'est pas seulement un ensemble de connaissances mais aussi un héritage particulier de la noblesse du monde*”. Intervention at the Conférence des Pays Francophones, Niamey, 17 février 1969.

⁵ UNESCO, World Conference on Cultural Policies, Mexico City, 26 July-6 August 1982, CLT/MD/1, Paris, November, 1982.

society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs”.

This concept includes both tangible and intangible works through which the creativity of people finds expression and transcends from generation to generation, constituting what we commonly call cultural heritage.⁶ As such, cultural property and cultural heritage become substantive parts of national identity. From this standpoint, it is clear that cultural property deserves both legal recognition and legal protection. Most nations control cultural property in the interest of its retention, preservation, study and enjoyment. As early as the eighteenth century, States undertook the task of protecting and preserving cultural property. Laws were passed, and sanctions applied to those who destroyed monuments and relics; some countries enacted prohibitions to export antiquities, others created museums in order to protect and exhibit cultural objects deemed valuable.⁷

Unfortunately, this legal framework of protection proved to be insufficient. Since ancient times and regrettably up to our days, cultural property has been plundered and destroyed, stolen and looted in wars and in peace times by soldiers, mercenaries, collectors, art merchants and even archeologists and scientists.

Another threat to cultural property emerged when a distinctive appetite for the exotic developed in Western Europe and with it, explorers and traders started to move cultural property from the countries where it had flourished into museums and collections located abroad. The international trade with antiques had started and national legislation was no longer good enough to secure its protection.

Wars and armed conflicts have destroyed numerous works of art and buildings of significant cultural value. The ominous phrase *“Delenda Carthago”*, attributed to Cato the Censor, has resounded across Europe and beyond all through the centuries. From the Punic Wars to the conquest of the Americas and the colonial wars, the European wars, the Balkan wars, the Persian Gulf wars and the civil war in Syria

⁶ The use of the expression cultural heritage began during the 1970’s as a broader concept that refers to object that are not exclusively “art objects”. André Malraux, *Le Musée Imaginaire* (Paris: 1965). Cultural property and cultural heritage are, in law, not necessarily synonyms. See, among others, Manlio Frigo, ‘Cultural property v. cultural heritage: A “battle of concepts” in international law?’ (Vol. 86 No 854, 2004) *IRRC*, pp. 367-378. In a somehow similar direction, cultural diversity was to be understood “as the common heritage of humanity”, Claude Lévi-Strauss, ‘Cultural diversity: The Common Heritage of Humanity’, in UNESCO (ed.) *Echoing Voices: Cultural diversity a path to sustainable development* (2011) p. 14.

⁷ The 18th century saw the flowering of the Enlightenment and the encyclopedic spirit, as well as a growing taste for the exotic. These influences, encouraged by increased explorations and trade, centered on northwestern Europe, are evident in the opening of two of Europe’s outstanding museums, the British Museum, in London, in 1759 and the Louvre, in Paris, in 1793, this one was to be renamed in 1803 as “Musée Napoléon” in order to store and exhibit objects brought into France during the Napoleonic wars.

provide ample examples of this regrettable practice. Oftentimes conquering powers undertook the destruction of cultural property of conquered territories, just because they wanted to express their supremacy and to suppress the values of the conquered.

The idea that cultural property constitutes a part of cultural heritage and is a common good that belongs to mankind, made it almost inevitable that international law was called in to protect it.⁸

Even if for customary international law, the destruction, pillage, looting or confiscation of works of art and other items of public or private cultural property in the course of armed conflicts is considered unlawful. However, repeated violations of this rule have prompted the international community to revisit the subject in order to establish rules that could make such prohibitions and, in general, the protection of cultural property binding and effective.

2. International Law and Cultural Property

It comes as no surprise that the term cultural property itself was first used and defined in an official document at the international level in 1954, in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁹. This Convention widely regarded as a direct reaction to the tragic events of 1914–1918 and 1939–1945, recognizes that “cultural property has suffered grave damage during armed conflicts” and seeks to address the inadequacies of the 1907 Hague Regulations in light of the destruction and plunder of cultural property.

The 1970 UNESCO Convention followed this groundbreaking instrument some years later by the Convention on the Means of Prohibiting and Preventing the Illicit

⁸ In 1758, in his major treatise, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Emer de Vattel writes: “For whatever reason a belligerent plunders a country, he should spare buildings that are the pride of mankind and do not strengthen the enemy. Temples, tombstones, public buildings, and all other works of art distinguished for their beauty; what can be the advantage of destroying them? Only an enemy of mankind can thoughtlessly deprive humanity of those monuments of art, the exemplars of artistry.” (Vol. II, Book III, Chapter IX, Geneva, 1983). Along these lines, the Hague Conventions of 1899 and 1907 were the first multilateral instruments that addressed the protection of cultural property during wartime. The 1907 Hague Regulations failed to protect cultural property during the Great War (1914–1918) and as a result, the ineffectiveness of the international law contributed to a cycle of failures. See David Keane, ‘The Failure to Protect Cultural Property in Wartime’ (Vol. 14, 2004), DePaul J. Art, Tech. & Intell. Prop. L., p. 1 and Ashlyn Milligan, ‘Targeting Cultural Property: The Role of International Law’ (Vol. 19, 2008) *Journal of Public and International Affairs*, pp. 91–106.

⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, adopted by the General Conference in The Hague, 14 May 1954 http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (1 November 2018).

Import, Export and Transfer of Cultural Property.¹⁰ In 1972, UNESCO enacted its Convention concerning the Protection of the World Cultural and Natural Heritage.¹¹ Later on, in 1995, UNIDROIT came forward with its Convention on Stolen or Illegally Exported Cultural Objects¹² to be followed five years later by the United Nations Convention against Transnational Organized Crime¹³ as well as the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage¹⁴ and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The notion of common heritage of humankind also found expression in the realms of the Law of the Sea¹⁵ and in the field of environmental protection and biological diversity.¹⁶

The key purpose of these instruments, as set out in their preambles, is twofold: States must develop a legal framework for the protection of their cultural property and cultural heritage through rules that protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export. Secondly, international instruments postulate that the protection of cultural heritage can be effective only through close cooperation among States.

At the same time, these conventions have in mind that the cultural heritage is, and has been, increasingly threatened with destruction by not only wars, greed and natural decay, but also by changing social and economic conditions. All these risks can only be address through an effective system of collective and multilateral protection in order to preserve cultural heritage for present and future generations.

¹⁰ Convention on the means of prohibiting and of ownership of cultural property, preventing the illicit import, export and transfer adopted by the General Conference at its sixteenth session Paris, 14 November 1970 <http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf> (1 November 2018), followed by its Operational Guidelines adopted in 2015.

¹¹ UNESCO Convention concerning the Protection of the World Cultural and natural Heritage, Adopted by the General Conference at its seventeenth session (Paris, 16 November 1972) <http://whc.unesco.org/archive/convention-en.pdf> (1 November 2018).

¹² Unidroit Convention on stolen or illegally exported cultural objects (Rome, 24 June 1995) <https://www.unidroit.org/instruments/cultural-property/1995-convention> (1 November 2018).

¹³ United Nations Convention against Transnational Organized Crime in Palermo, Italy, December 2000, https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERE_TO.pdf (1 November 2018).

¹⁴ Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001) <http://unesdoc.unesco.org/images/0012/001260/126065e.pdf> (1 November 2018).

¹⁵ United Nations Convention on the Law of the Sea, 1982, Part IX, articles 136-145 and 311.

¹⁶ United Nations Framework Convention on Climate Change (1992) and the Convention on Biological Diversity (1992).

When placed in the context of armed conflicts, the protection of cultural property has become an element for innovation and development of humanitarian law¹⁷. However, just as the 1907 Hague Regulations proved to be inadequate during the Great War and the World War of last century, the 1954 Hague Convention was also inadequate to protect cultural property during the conflict in the former Yugoslavia. In order to remedy these shortcomings, essentially the concept of unavoidable military necessity and the limiting of immunity to cultural property included in the so-called system of special protection,¹⁸ a Protocol was adopted in 1999. This Protocol introduces a new system of enhanced protection for cultural property of “the greatest importance for humanity” which must also be protected by adequate national legislation. It is also provided that, under no circumstances, cultural property can be used for military purposes nor to shield military sites. Cultural property under the enhanced protection regime, only loses its protection if “by its use, becomes a military objective”.¹⁹

Successive instruments of international law aimed at the protection of cultural property have addressed the shortcomings of its predecessors, but overall there seems to be consensus as to their inability to prevent the widespread destruction of cultural property when armed conflicts occur. The overall effect of international regime has been quite limited.²⁰

These rules were particularly concerned with wars conducted by professional armies that could be in a position to follow guidelines in order to spare certain places and objects. They did not consider two additional important factors. One, the destruction of cultural property as a sign of supremacy aimed to vandalize and eradicate the cultural identity, the historical memory, of the enemy.²¹ Destruction of cultural property can take place outside the limits of a military conflict; gangs and irregular forces can also perpetrate it. These actions generally fall outside the personal scope of application and validity of the conventions.

Another significant limitation is that in peacetime, relevant pieces of cultural property have been stolen, illegally excavated, exported, sold and acquired on the open and

¹⁷ See, among many, Ishwara Bath, ‘Protection of Cultural Property under International Humanitarian Law: Some Emerging Trends’ (Vol. 1, 2001) ISIL Y.B. Int'l Human. & Refugee L., p. 47.

¹⁸ UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) Chapter II. Articles 8 to 11.

¹⁹ UNESCO Second Protocol to The Hague Convention of 1954 (26 March 1999). Articles 12 to 14.

²⁰ Patrick J. Boylan, Review of the Convention for the Protection of Cultural Property in the event of Armed Conflict (Paris: UNESCO, 1993).

²¹ Clear examples of this trend are the destruction of the Buddhas of Bamiyan in 2001 by the Taliban fighters determined to erase all traces of a rich pre-Islamic past in Afghanistan, the Isis destruction of the Temple of Bel in Palmyra, Syria, in 2015 or the destruction of historical monuments in Timbuktu, Mali, by al-Qaida forces in 2012.

on the black markets. UNESCO tried to address this later issue more than forty years ago when it adopted, in 1970, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

The 1970 Convention considers that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export. It is the duty of State parties to take the necessary measures to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party, which has been illegally exported. Additionally, they have the duty to inform the State of origin of an offer of such cultural property illegally removed from that State. State parties shall also prohibit the import of cultural property stolen from a museum, a religious or secular public monument or similar institution in another State Party, as long as such property is documented in an inventory and, more relevantly, that at the request of the State Party of origin, appropriate steps are taken to recover and return any such cultural property illegally imported. However, it is also provided that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.²² The implementation of the rule that prescribes recovery and return contained in Article 7 proved to be extremely cumbersome, opening the field for lengthy and protracted litigation.

To overcome the limited enforcement of the provisions contained in the 1970 Convention, UNESCO requested UNIDROIT to draft a new convention concerning stolen cultural property with the purpose of establishing a new framework applicable to the restitution of stolen cultural objects and to reconcile differences between civil- and common-law countries in the implementation of the 1970 Convention.

In June 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, was adopted. This instrument greatly expands the rights of foreign governments seeking the return of illegally exported property by providing them with locus standing in private litigation and by requiring the possessor of a stolen cultural object to return it, without considering as a defense the “bona fides” of the purchaser or possessor. Under the Convention, the return of the stolen cultural property is mandatory. The major shortcoming of UNIDROIT 1995 Convention is that, notwithstanding that it entered into force 20 years ago, it has as of today only 42 contracting States, none of them being a relevant market for the trade of stolen cultural property.

At the regional level, the Council of Europe has also played a role in the creation of international law instruments related to the protection of cultural property. One of

²² Article 7 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

its aims being the development of agreements and common actions in cultural matters for the maintenance and further realization of human rights and fundamental freedoms,²³ the Council has adopted several treaties related to the protection of cultural property.²⁴ They put the emphasis on archeological and architectural works, but also developed specific criminal sanctions. In this respect, it is relevant to mention the European Convention on Offences relating to Cultural Property (ETS n° 119), opened for signature in Delphi on 23 June 1985.

Based on the concept of common responsibility and solidarity in the protection of European cultural heritage, and considering that cultural property is stolen and destroyed by organized criminals that bring the loot to market, usually in a country other than the one from where it comes, the Delphi Convention aims to protect cultural property by enhancing public awareness of the need for protection, to cooperate in the prevention of offences against cultural property, to acknowledge the seriousness of such offences and to provide for adequate sanctions. It also contains a scheme for the restitution of cultural property illegally removed. Notwithstanding its merits, only six countries signed it, none of them ratified it. It has been argued that the rules on restitution (Articles 6 to 11) were the main obstacle for its entering into force. In any event, the Convention remained dormant for more than three decades without any developments at the European level.

3. Terrorism and cultural property: towards a renewed protection regime

The emergence of terrorism at the beginning of the current century brought to light a new threat to cultural property. Terrorist groups and organized criminals destroyed and looted antiquities of significant value. They also engaged in illicit traffic of significant archeological pieces illegally put into the market. Proceeds of such activities were frequently channeled towards the financing of terrorist activities. All these prompted the action of the UN Security Council. Through these actions, a new chapter began in the international law related to cultural property.

Resolution 2199 (2015), adopted by the Security Council of the United Nations on 12 February 2015, condemned the destruction of cultural heritage in Iraq and Syria, particularly by the Islamic State of Iraq and the Levant (ISIL) and Al-Nusra Front (ANF), generating income from the looting and smuggling of cultural heritage. The Security Council called all Members of the UN to take appropriate steps to prevent

²³ Statute of the Council of Europe, ETS n° 1, 1949, Article 1, b.

²⁴ Convention for the Protection of the Architectural Heritage of Europe, ETS n° 121, 1985; European Convention on the Protection of the Archaeological Heritage, ETS n° 66, 1969, revised in 1992, ETS n° 143; European Landscape Convention, ETS n° 196, 2000, as well as the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, CETS n° 199, 2005.

the trade in Iraqi and Syrian cultural property by prohibiting cross border trade in such items and allowing for their “eventual safe return to the Iraqi and Syrian people”. This resolution is probably the first one in which the UN Security Council addresses the issue of illegal trade of cultural property, even if it does so only with respect to Iraq and Syria.

Resolution 2199 was followed by Resolution 2253 (2015). In it, the Security Council reiterates the condemnation of the destruction of cultural activities and calls upon Member States to report interdictions on the trade of antiquities, as well as to report the outcome of proceedings brought against individuals and entities as a result of any such activity.

In 2016 and again in 2017, the Security Council adopted new resolutions (Resolutions 2322 and 2347) urging States to cooperate with UNESCO and INTERPOL in broad law enforcement and judicial cooperation in preventing and combating all forms and aspects of trafficking in cultural property and related offences that benefit, or may benefit, terrorist or terrorist groups. It also called for the introduction of effective national measures at the legislative and operational levels to prevent and combat trafficking in cultural property and related offences, including considering the designation of such activities that may benefit terrorist or terrorist groups as a serious crime punishable by domestic legislation.

The adoption of domestic measures to protect cultural property and prevent its trafficking, as mandated by the Security Council, created certain divisions between Western states and those members of the United Nations who emphasize the importance of respecting sovereignty. It is also important to recall that the Security Council had strongly condemned, on 20 January 2017, the destruction of the tetrapylon and other parts of the theatre of Palmyra (Syria).²⁵ It is fair to say that the efforts of the Security Council were essentially linked to terrorist activities in Syria and Iraq, but its call for actions directed towards the prevention of illicit trafficking in cultural property was not limited to such area. Furthermore, the Security Council made a strong appeal for cooperation in such endeavor.

²⁵ Press Statement issued by Council President Olof Skoog, UN Security Council Press Release SC/12690 (20 January 2017). <https://www.un.org/press/en/2017/sc12690.doc.htm> (1 November 2018).

4. The 2017 Council of Europe Convention on Offences relating to Cultural Property²⁶

Echoing the UN Security Council resolutions mentioned above, and aiming to contribute to the establishment of a multilateral legal framework to foster cooperation in the prevention of the destruction of cultural heritage as well as the illegal trafficking of cultural property, the States Parties to the European Cultural Convention of 1954 adopted, in April 2015, the “Namur Call”. The declaration adopted strongly condemns destruction and illegal trafficking of cultural property.

In March 2016, the Committee of Ministers of the Council of Europe instructed the European Committee on Crime Problems to prepare a convention to combat the trafficking of cultural property and fill the gaps in the existing international legal framework. In just ten months, a rather short period (that is, short by the Council of Europe standards), the Committee prepared a new convention.

The Council of Europe Convention on Offences relating to Cultural Property, opened for signature in Nicosia in May 2017, sets out substantive criminal law provisions aimed to address the serious challenges posed by the involvement of organized crime and terrorist groups in the trafficking and destruction of cultural property.

It is important to note that even if one of the main concerns that prompted the action of the Council of Europe was to address the illicit trade in cultural property, as a financial source for terrorist groups, the drafters considered that it was not necessary to include express provisions relating to terrorism offences in the text of the Convention. For the drafters, crimes with the intent to finance terrorist activities would be investigated and prosecuted as terrorism offences rather than as cultural property offences. They also considered that existing international and national counter-terrorism instruments were sufficient for law enforcement actions. Thus, the scope of the Nicosia Convention is expressly limited to the prevention of and the fight against offences relating to tangible items of cultural heritage, either movable or immovable, that fall within the definition of cultural property.

The drafters recognized that what is lacking in the legal structures aimed to protect cultural property is, essentially, the lacunae and gaps that exist in domestic legislation as well as the absence of effective controls on the illicit trading.

The definition of movable cultural property contained in the Nicosia Convention is inspired in the UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, and in the EU Directive 2014/60 on the

²⁶ Council of Europe, Convention on Offences relating to Cultural Property CETS No.221 (Nicosia, 19 May 2017).

return of cultural objects unlawfully removed from the territory of a member State. It covers objects that have been found in (or removed from) places located on land, but also cultural property found in (or removed from) underwater sites. In its turn, the definition of immovable cultural property reproduces the classification contained in the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 1972. In doing so, the Nicosia Convention contains a definition of cultural property that has largely been accepted at a global level. The classification, definition or specific designation of an object as cultural property is a prerogative of State authorities. This is one of the key aspects of the new Convention, aimed to facilitate its adoption.

The core of the Nicosia Convention is composed of two elements. First, substantive criminal law provisions. Their purpose is to strengthen local, national and international efforts to protect cultural property. These address the most common and serious offences that may bring about the destruction, deterioration or loss of cultural property, such as theft and other forms of unlawful appropriation, as well as unlawful excavation and removal carried on by individuals or by transnational organized crime or terrorist groups. Secondly, the criminalization of the different components of the trafficking in cultural property, considering the dynamics of the trafficking in cultural property stolen or illicitly excavated both in peacetime or during armed conflicts. The transnational nature of illicit activities is because experienced thieves and smugglers are well aware of the legal differences between countries and seek to exploit gaps or weaknesses in the national laws to increase profits from their wrongdoing and lower the chances of being caught. It is well documented that stolen or illicitly excavated artefacts are frequently moved to countries where they can be concealed from customs and border officials, where tainted titles can be laundered (for instance, through norms protecting good faith purchasers or the expiry of limitation periods). Once these actions are completed, goods are sold to private individuals or institutional collectors, as well as to established art trade companies, art dealers or private galleries.

With the purpose of criminalizing illicit trafficking of cultural property, State parties are obliged to criminalize the intentional importation of movable cultural property stolen in another State. That is to say, cultural objects excavated without authorization or exported in violation of the law of the State that has classified, defined or specifically designated such items as cultural property. Thus, the obligation to criminalize the import depends on whether such import is prohibited under the importation laws of the importing State. It also presupposes that a Party has domestic legislation in place prohibiting the importation of cultural property into its territory when such property has been stolen, excavated or exported in violation of the export law of another State. With respect to exports, the Nicosia Convention obliges State parties to criminalize exports of objects that have been declared as cultural property

and that have been defined as non-exportable, or that have not received a legal authorization for its export. This applies equally State-owned property or legally owned private persons. Property illegally imported into a State cannot be legally re-exported. This specific prohibition addresses the transnational nature of trafficking in cultural property.

Furthermore, the Nicosia Convention mandates States Parties to ensure that its domestic law criminalizes the acquisition and placing on the market of stolen cultural property, or excavated, acquired, imported or exported under circumstances constituting a criminal offence. In particular, the Convention obliges State parties to criminalize the acquisition of cultural property only where offenders, be they experienced collectors or ordinary citizens, know of the unlawful provenance of the cultural property at issue. It also recommends States to take special preventive measures in respect of certain persons, particularly professionals or collectors, who should have known of the unlawful provenance of the cultural property but failed to exercise an appropriate level of due care and attention.

Taking into account the egregious demolitions by terrorist groups at major cultural sites, such as those in Mali, Syria and Iraq, the Convention also criminalizes the destruction and damaging of cultural property.

Additionally, and in line with the majority of the criminal law conventions adopted by the Council of Europe, the Convention obliges States to criminalize aiding and abetting as well as attempts to commit the criminal offences referred to in the Convention. It also calls for the establishing of rules that criminalize any of the conducts sanctioned in the Convention when committed by legal persons.

Sanctions and measures, aggravating circumstances and the possibility of taking into account final sentences passed by another Party in assessing the penalty to be imposed, are to be determined by domestic legislation. In this regard, the Convention calls for the adoption of sanctions and measures that are “proportionate and dissuasive”. States are bound to establish jurisdiction over the criminal offences when the offence is committed in its territory or anywhere by one of its nationals and when the alleged offender is present in its territory and when extradition is not possible.

An important rule incorporated into the Convention provides that where in the course of criminal proceedings cultural property has been seized, but is no longer required for those purposes, the seized property can be handed over, returned, to the State that had specifically designated, classified or defined it as cultural property. This provision can play a significant role in securing the rights of the State and persons that have suffered an illegal deprivation of their cultural property.

Finally, the Nicosia Convention sets a standard regime for international cooperation in criminal investigations and prosecution, with the aim of both preventing and

combating the intentional destruction of, damage to, and trafficking of cultural property. It also contains provisions aimed to ensure effective implementation of the Convention by the Parties. The follow-up system foreseen in the Convention essentially appertains to the Committee of the Parties, a body composed of representatives of the Parties to the Convention. Experts can assist Parties to the Convention.

Council of Europe member States and nonmember States which had participated in its elaboration (Holy See, Japan and Mexico), were invited to sign the Convention on 19 May 2017. As of today, it has been ratified by Cyprus and has been signed by nine States (Mexico, Armenia, Greece, Italy, Latvia, Portugal, San Marino, Slovenia and Ukraine).

From the above, it is clear that the success of the new convention depends heavily on the political will of States to ratify and, above all, to implement the convention within their domestic legislation. It also presupposes significant efforts of each State in identifying and classifying its own cultural property.

5. Some international law judgments related to cultural property

A final reflection on the evolution of international protection of cultural property can be made in relation to the relatively recent trend to be found in the decisions that several international tribunals have rendered in cases related to the destruction of cultural property and the protection of cultural identity.

Interesting in this respect are the rulings of the International Criminal Court in the Al Mahdi case, convicted on September 2016 for the war crime of destruction of cultural property, the nine historic mausoleums and the Sidi Yahia mosque in Timbuktu, Mali. The ICC prosecuted the destruction of culture heritage as a war crime. Another example is to be found in the indictments and sentences of Karadzic and Mladic before the ICTY for the systematic damage to and destruction of Muslim and Roman Catholic sacred sites (violation of the laws of war) in the territory of the Republic of Bosnia and Herzegovina between 1992 and 1995. On its turn, the Inter American Court of Human Rights has taken due account of the right to cultural identity, as a component of other rights protected under the American Convention, in the cases of Aloeboetoe and Others versus Suriname (1993), of Bámaca Velásquez versus Guatemala (2000-2002), and of the Community Mayagna Awas Tingni versus Nicaragua (2001). Cultural identity has also been at the center of various rulings by

the European Court of Human Rights, mainly referred to the protection of the Roma.²⁷

In its turn, the International Court of Justice observed in its decision on the Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* recalls that under Article 6 of the World Heritage Convention, to which both States are parties, Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage. In addition, each State is under an obligation not to “take any deliberate measures which might damage directly or indirectly” such heritage. In his separate opinion, Judge Antonio Cançado Trindade affirmed that “by protecting cultural property, one is attempting to protect not only monuments and objects, but a people’s memory, its collective consciousness and its identity, and indeed the memory, consciousness and identity of all the individuals who make up that people”.²⁸

²⁷ European Court of Human Rights, *Cultural Rights in the Case Law of the European Court of Human Rights* (2017) pp. 14-17.

²⁸ *Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2011*, p. 596.

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