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ART FOR LAW'S SAKE:

The National and International Regime of the Importation of Cultural Goods

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*Al mio babbo e alla mia mamma che sono il mio tutto,
Ad Emanuele che è il mio futuro,
A mio zio Aldo per la fiducia incondizionata,
Al FAI che mi ha cambiato la vita,
A me stessa e alla mia pertinacia.*

*«Tutti nascono anonimi come me, in una anonima Ajaccio, in un'anonima isola, in un anonimo 15 agosto, di un anonimo 1769, da due anonimi Carlo e Letizia Romolino; solo dopo diventano qualcuno; e se prima di ogni altra cosa sono capaci di non deludere se stessi, anche la volontà divina si manifesta sull'uomo.» **Napoleone Bonaparte***

FOREWORD

When I had to choose the subject of my dissertation, I asked myself the reason why I am so passionate with the Art and Cultural Property Law, and I found the answer, while reading an article by Richard Posner, entitled *Art For Law's Sake*, which was published in 1989 in *The American Scholar*, the review of the Phi Beta Kappa Society, which is the oldest academic society of the United States of America, based at Harvard University: «[...] We could try to figure out what such durable works as the *Iliad* and *Hamlet* and Raphael's Madonnas and *The Marriage of Figaro* and the *Ode on a Grecian Urn* and the Louvre's *Winged Victory of Samothrace* have in common and call that the key to artistic value: their appeal is robust and resist cultural change».¹

The protection of our cultural heritage is fundamental, because art speaks to our hearts and represents the highest trace of our passage on earth. I believe that protecting cultural heritage is a way for protecting ourselves and our civilization. This dissertation is focused on the new Regulation (EU) n. 2019/880 *on the Introduction and the Import of Cultural Goods*, adopted by the European Parliament and the Council of the European Union on the 17th of April 2019 and recently published on the Official Journal of the European Union on the 7th of June 2019, and aims to demonstrate if it could be an essential tool for international safety. I have started my research analyzing the international structure of the art market, in order to understand the reasons why the European Commission, on the 13th of July 2017, has presented a proposal for a new Regulation concerning the Importation of Cultural Goods.

I have examined the licit market of art and antiquities, which is an environment that is growing incessantly, but which is also characterized by several contradictions, that led the scholars to define it as a « grey market ».

The «grey market» in cultural goods is licit *per se*, but it is permeated by copious goods, whose provenience is illicit, because they have been illegally excavated,

¹ Posner, R., *Art for Law's Sake*, in *The American Scholar*, vol. 58, no. 4, 1989, p. 514.

exported, looted, forged or pillaged, and estimating their real percentage inside the market is extremely complicated.

The 'greyness' is also enhanced by the different legislations concerning the trade in cultural property, which can help the smugglers to dissemble their illicit traffic and to introduce illicit cultural goods into the licit market.

Beside this «grey market», there is also the action of militant and terrorist groups, such as ISIS, which have found new and diversified solutions in order to gather money for financing their illicit activities. The groups exploit the grey market of cultural goods, which is as profitable as the ones of drugs, weapons and counterfeit goods. This source of funds for terrorist groups is the sale of antiquities and other cultural goods which are located within the territories under their control.

The absence of a common discipline concerning the import of cultural property within the Member States, aims to be filled by the new Regulation, which deals with the problem of preventing the importation and the keeping inside the European Union of cultural goods which are illegally exported from a Third Country.

I have continued my studies, examining in depth the International and European legal background, concerning the protection of cultural heritage, in order to understand how much the final text of the Regulation has been influenced by the previous provisions, such as *the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols*, *the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property*, *the 1995 UNIDROIT Convention*, *the 2017 Nicosia Convention on offences related to cultural property*, the Regulation (EU) n. 1210/2003 concerning certain specific restriction on the economic and financial relations with Iraq and the Regulation (EU) n. 1332/2013 concerning restrictive measures in view of the situation in Syria.

This legal excursus was necessary for the analysis of the new measures, especially the introduction of compulsory import licenses and importer statements, established by the Regulation (EU) n. 2019/880.

Subsequently, I have done a comparison among four legal systems on importation of cultural property.

I have analyzed the Italian and German legal systems and the ones of two common law States, the United States of America and Australia.

I have drafted the differences among the above mentioned Countries, such as the Italian *best practice* provided by the *Code of Cultural and Landscape Heritage*, the new *Kulturgutschutzgesetz* (German Act on the Protection of Cultural Property), the American *laissez-faire* policy concerning the import and export of cultural property and the Australian Protection of Movable Cultural Heritage Act.

In the end, I tried to figure out the consequences of the implementation inside the Member States of the new Regulation (EU) n. 2019/880 *on the Introduction and the Import of Cultural Goods*.

Despite the copious critiques, risen by the art world, thanks to the help of the Legal Department of Fondo Ambiente Italiano (FAI), the Foundation for which I have been working since 2014, I have gathered many useful suggestions in support of my thesis, which considers the new Regulation as an essential tool for international safety.

Francesca Maria Montanari

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CHAPTER I
Regulating the Importation of Cultural Goods
as an essential tool for International safety:
the empirical and legal background

1. The empirical background to the New Regulation of the European Parliament and of the Council on the Import of Cultural goods.

On the 13th of July 2017 the European Commission presented a proposal for a new Regulation concerning the Importation of Cultural Goods², which, after the prescribed round of consultations, was adopted at first reading³ on the 12th of March 2019 by the European Parliament. On the 9th of April 2019 the Council of the European Union adopted with qualified majority the new legislative act.⁴

On the 17th of April 2019 the European Parliament and the Council of the European Union, acting in accordance of the ordinary legislative procedure⁵, adopted the Regulation on the Introduction and Import of cultural goods.⁶

On the 7th of June 2019 the Regulation 2019/880 has been published in the L. 151 of the Official Journal of the European Union⁷ and, according to its article 15⁸, it will entry into force on the 27th of June 2019.

The Regulation was the result of a urgent necessity which came to light in the framework of the 2015 European Agenda on Security⁹ and of the 2016 Action Plan to boost the fight against the financing of terrorism¹⁰. As a result of the positive acceptance of the Agenda by the European Parliament and the Council, the

² COM(2017)375 final, SWD(2017) 262 final and SWD(2017) 263 final on 13th July 2017.

³ This position replaces the amendments adopted on 25th October 2018 (Texts adopted, P8_TA-PROV(2018)0418).

⁴ Reference documents for the vote: 7630/19 and PE-CONS 82/18 .

⁵ Position of the European Parliament of the 12th of March 2019 [P8_TA-PROV(2019)0154] , which is not yet published in the Official Journal, and decision of the Council of the European Union on the 9th of April 2019 [ST 8375 2019 INIT].

⁶ PE-CONS 82/1/18 REV 1 approved on the 17th April 2019 by the European Parliament and the Council of the European Union.

⁷ The Regulation (EU) n. 2019/880 of the European Parliament and of the Council on the import of cultural goods is published in the L. 151 of the Official Journal of the European Union, pp. 1-14.

⁸ Article 15 of the Regulation n. 2019/880: «This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*».

⁹ COM (2015) 185 final on 28th April 2015.

¹⁰ Commission Communication the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing [COM(2016) 50 final], 2nd February 2016.

Commission prepared a legislative proposal against the illicit trade in cultural goods. This proposal for a Regulation of the importation of cultural goods just followed the Directive adopted on the 15th March 2017 on combating terrorism, which included also provisions on criminal sanctions for individuals or entities who tangibly supported terrorism.¹¹

Moreover the Regulation refers to the essential European Parliament Resolution of the 30th of April 2015 concerning the destruction and devastation of cultural and archaeological sites perpetrated by ISIS/Da'esh¹², which included also a request for strong actions to disrupt the illegal trade of cultural goods and promoted the necessity of European training programs for judges, police, custom officers, national administrations and market players in order to disincentivize the purchase and sale of cultural goods coming from illicit trade.

The New EU Regulation deals with the problem of preventing the importation and the safekeeping inside the European Union of cultural goods which are illegally exported from a Third Country.

The explanatory memorandum to the Regulation explains the purpose of the new legal tool, which is reducing the traffic of cultural property while hindering the financing of terrorism. It wants to protect the cultural heritage starting from the archaeological finds coming from a country of origin in which there is an ongoing armed conflict.

¹¹ Directive (EU) 2017/541 of the European Parliament and of the Council of the European Union of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; OJ L 88, 31.3.2017.

¹² «The Islamic State organization (IS, aka the Islamic State of Iraq and the Levant, ISIL/ISIS, or the Arabic acronym Da'esh) emerged as a major international security threat amid more than a decade of conflict in Iraq after 2003 and the outbreak of unrest and conflict in Syria in 2011 [...]. The group's core membership remains in Iraq and Syria, and its efforts have been bolstered by a network of foreign fighters and affiliate groups in several countries across the Middle East, Africa, and Asia [...]. The Islamic State's apocalyptic ideology, its revolutionary intent toward the strategically important Middle East, and its embrace of transnational terrorism have alarmed policymakers around the world and spurred global debate over strategies and policy options for defeating the group. As the area under the Islamic State's control in Iraq and Syria has been progressively eliminated [...], policymakers have considered how to address the threats the group still poses as it evolves, and are debating how best to stabilize recaptured areas. » Blanchard C.M., Humund C.E., *The Islamic State and U.S. Policy*, Washington, 2018, Congressional Research Service, p. 1.

According to the opinion of the European Commission, the Regulation on the Importation of Cultural Goods is an essential tool for international safety¹³. Inside the European Union did not exist a common legal framework on the importation and the national legislations are meager and divergent. There were only two Regulations which imposes restrictions concerning the importation of cultural goods and wares only if coming from Iraq¹⁴ and Syria¹⁵, and they are applied when there is the reasonable doubt the goods have been removed illegally without the owner's consent violating the rules of National and International Law and provided the export has been effectuated after they entered into force.

The Regulation has triggered an international debate because the States do not understand clearly its purpose.¹⁶ On the one hand the European Commission seems to have the aim of creating a common discipline within the Member States. On the other hand the European Commission seems to focus the Regulation on preventing looting and importation of goods coming from a country in which there is an ongoing armed conflict.¹⁷ Furthermore if the main goal is a balanced discipline of the importation of cultural goods, it is not clear the reason why the Regulation has fixed the limit of two hundred and fifty years at import. This threshold, that is very limiting for the Member States, could lead the terrorism to concentrate its traffic on more recent cultural goods.¹⁸ The European Commission has stressed that the limit of age, inspired by the National Stolen Property Act of the United States of America, is due to the fact Europe does not want to obstacle the licit trade of cultural

¹³ SWD(2017) 263 final, Commission staff working document – executive summary of the impact assessment, accompanying the document “Proposal for a Regulation of the European Parliament and of the Council on the import” [COM(2017)375 final on the 13th of July 2017].

¹⁴ Council Regulation (EC) No 1210/2003 of 7th July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96.

¹⁵ Council Regulation (EU) No 36/2012 of 18th January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011.

¹⁶ Fitz – Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

¹⁷ Gould, E., *The EU's parting gift to the UK art market?*, in *Institute of Art and Law online*, 2019, (cf. <https://ial.uk.com/publications/art-antiquity-and-law/>), last accessed on the 3rd of June.

¹⁸ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

goods but only halting the illicit traffic that is a phenomenon which cannot be solved using the ordinary commercial rules.¹⁹

1.1 The licit market of art and antiquities

The art market, which includes deals in cultural goods such as art works and antiquities²⁰, is mainly an international market. It is an environment that is growing incessantly, but also characterized by several contradictions. Simon Mackenzie and Donna Yeats, who are preeminent academics in cultural property, outlined that the global art market has been defined as a « grey market ».²¹

Defining the idea of «greyness» in the market has implies the necessity of distinctions. There is a need to distinguish the criminological definition of « grey market » in cultural goods from the one used by Economists. In the international trade a « grey market » is when there are parallel markets, which are not illegal, but the objects which are traded are not for sale in a particular jurisdiction.²²

The « grey market » in cultural goods, instead, is licit *per se*, but it is permeated by copious goods, whose provenience is illicit, because they have been illegally excavated, exported, looted, forged or pillaged, and estimating their real percentage inside the market is extremely complicated. The ‘greyness’ is also enhanced by the different legislations concerning the trade in cultural property which can help the

¹⁹ Redazione AGCult, *Nuovo regolamento Ue su importazione beni culturali, Morgano (Pd): più trasparenza*, in *AGCult online*, 2019, (cf. <https://agcult.it/a/6900/2019-03-20/nuovo-regolamento-ue-su-importazione-beni-culturali-morgano-pd-piu-trasparenza>), last accessed on the 4th of June 2019.

²⁰ « According to the opinions of different international associations of antique dealers, a common definition or standard to define antiquities does not exist. Each country follows its own rules. In Europe an object or a piece of furniture is considered antique if it was realized before 1850 and after that year it is defined as vintage. In the United States of America instead any object or furniture realized at the beginning of the Twentieth Century is still considered antique. The value of the antiquities and vintage pieces depends on the public demand and the integrity of the object.» In absence of an official translation of the website I have provided a personal translation. (cf. <http://www.longoantichita.com>), last accessed on the 8th of May 2019.

²¹ Mackenzie, S.-Yates, D., *What Is Grey about the “Grey Market” in Antiquities?*, in Beckert, J.-Dewey, M., (eds.) *The Architecture of Illegal Markets*, Oxford, Oxford University press, 2017, pp. 70 ff.

²² Mackenzie, S.-Yates, D., *What Is Grey about the “Grey Market” in Antiquities?*, in Beckert, J.-Dewey, M., (eds.) *The Architecture of Illegal Markets*, Oxford, Oxford University press, 2017, p. 75.

smugglers to dissemble their illicit traffic and to introduce illicit cultural goods into the licit market.²³

Preparatory to the description of the characteristics of the illicit trade in cultural goods, it is worthy to analyze the dimensions and values of the global art market.

*Art Market 2019*²⁴, which is the Art Basel²⁵ and UBS Group most recent annual report, has outlined that sales in the global art market, including art works and antiquities, in 2018 reached \$67.4 billion, worth up 6% year-on-year. 2018 was the second year of positive growth which brought the market to its second-highest level in ten years. This result has been achieved after some turbulent years, which started in 2009 with the global financial crisis and the booming of the Chinese market, the arrest in the growth of this latter in 2012²⁶ and the decline of all the major markets in 2016, with sales losing 16% of their value, because the buyers lost their trust in the market due to economic and political uncertainties. In 2017 the market enjoyed a positive gain of 12% and in 2018 the number of sales reached the estimated volume of 39.8 million, that is, the highest level of the art market since 2008.

Initially the art market was divided only into two different categories, namely public auction sales and private sales. Currently these boundaries are blurred, because, during the recent years, new phenomena are emerging, such as private sales by auction houses and new hybrid business models, like online sales where the buyers can buy artworks instantly or bid for them.²⁷

²³ Visconti, A., *Diritto penale dei beni culturali*, in *Diritto online*, 2019, (cf. http://www.treccani.it/enciclopedia/diritto-penale-dei-beni-culturali_%28Diritto-on-line%29/), last accessed on the 10th of May 2019.

²⁴ Art Basel, McAndrews, C. (ed.), *The Art Market Report 2019*, released on the 8th of March 2019, pp. 30-33, (cf. <https://www.artbasel.com/about/initiatives/the-art-market/>), last accessed on the 7th of May 2019.

²⁵ «Art Basel was founded in 1970 by three Basel gallerists for connecting collectors, galleries, and artists. They created the worldwide famous art fairs which are leaders in the art market. Currently Art Basel stages the most prestigious international art show and publishes books and yearly report about the Art Market, the Art Market Principles and Best Practices showing commitment to increasing the transparency and accountability of the art market.» (cf. <https://www.artbasel.com/about/>), last accessed on the 8th of May 2019.

²⁶ «China has grown by around 10% a year on average over the past two decades, making it the world's second-biggest economy, but the threat of a double-dip recession in the west, coupled with signs of over-heating in the Chinese property market, have caused some analysts to predict severe problems ahead », *The Guardian* on the 11th of January 2012 (cf. <https://www.theguardian.com/business/2012/jan/11/china-economic-collapse-global-crisis/>), last accessed on the 7th of May 2019.

²⁷ *Hiscox Online Art Trade Report 2019*, released in April 2019 by Hiscox Insurance Company, has revealed at pages 3-5 « The online art market grew 9.8% in aggregate in 2018 to \$4.64 billion, a

In 2018 the auction houses sector, both online and offline, obtained the 46% of the market, just down 1% year-on-year, whereas the private sector (which includes dealers, galleries and online only retail sales) made up 54%.²⁸

The United States of America, the United Kingdom and China were still the top three markets. Their combined sales reached the 84% share of the global art market's total value. The American market accounted for 44% of sales by value, followed by the United Kingdom and its 21%, while China was the third one with 19%.²⁹

The Art Market Report, released in 2017 by The European Fine Arts Foundation, better known as TEFAF³⁰, has confirmed Europe is the largest market in the world in terms of art sales. The total value of the European market is €19 billion and the United Kingdom represents two-thirds of it.³¹

Now one of the most common question among the buyers and collectors is whether the UK will be able to maintain its position in spite of Brexit. The economist Clare McAndrew asserts: «The most obvious effect of Brexit on the analysis of the art market from 2019 will be the reduction in the size of EU sales. The global share of the EU has fallen over the past decade [...] However the UK has maintained a dominant position in Europe for several decades, and its share increased in 2018 to 66%, up four percentage points on 2017. Without the UK, the EU market would have accounted for just 11% of the global art trade in 2018 ».³²

slowdown from the 12% growth experienced in 2017», (cf. <https://www.hiscox.co.uk/sites/uk/files/documents/2019-04/hiscox-online-art-trade-report--2019.pdf>), last accessed on the 9th of May 2019.

²⁸ Art Basel, McAndrews, C. (ed.), *The Art Market Report 2019*, released on the 8th of March 2019, pp. 30-33, (cf. <https://www.artbasel.com/about/initiatives/the-art-market>), last accessed on the 7th of May 2019.

²⁹ Art Basel, McAndrews, C. (ed.), op. cit., p. 37.

³⁰ «TEFAF, The European Fine Arts Foundation, was founded in 1988 and is widely regarded as the world's pre-eminent organization for fine art, antiques, and design. TEFAF runs three Fairs internationally - TEFAF Maastricht, which covers 7,000 years of art history, TEFAF New York Spring, focused on modern and contemporary art and design and TEFAF New York Fall, covering fine and decorative art from antiquity to 1920», (cf. <https://www.tefaf.com/about/tefaf>), last accessed on the 7th of May 2019.

³¹ TEFAF, Dr. Pownall R.A (ed.), *The Art Market Report 2017*, pp. 80 f., (cf. <http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf>), last accessed on the 7th of May 2019.

³² Art Basel, McAndrews, C. (ed.), op. cit., p. 39.

The firm *Arts Economics*³³ provides the other European values for 2018: Austria represents 2% of the sales by value, France 19%, Germany 4%, Italy 2%, Spain 2%, Sweden 1% and the rest of EU 4%.

Examining in depth, in 2018 global sales inside the online art and antiquities market really soared, reaching an estimated total of \$6 billion. This market share, which grew 11% year-over-year from \$5.4 billion in 2017, now accounts for 9% of the value of global sales of art and antiquities and even though it is somewhat lower than the global online sector, where e-commerce stood at 12%, it is expected to reach 18% by 2021³⁴.

Moreover auction sales are still the leaders of the art market.³⁵ On the one hand the European market of the auction houses is the second one in the world for sales of art and antiquities. In 2016, Europe achieved a profit of almost €4.5 billion and Italy ranked at 10th place in the world reaching the value of €118 million. On the other hand, concerning sales of ancient art, the European market is the third one with an estimated value of €59 million, after the United States of America which overcame the 2016 value of €44 million and China that reached the peak of €250 million. According to the European Commission statistics³⁶, in 2016 six lots out of ten among the ones sold by European auction houses came from Far East. Last but not least, an important segment of the art market is occupied by art fairs which involve an huge amount of money in term of sales and costs. From one side sales of art and antiquities in art fairs were estimated to have reached \$16.5 billion in 2018, but on the other side dealers attended on average four fairs down from five in 2017, because the costs rose of 5% year-on-year.³⁷

³³ «Arts Economics is a research and consulting firm focused exclusively on the art economy. It carries out bespoke research and analysis on the fine and decorative art market for private and institutional clients. Arts Economics was founded by the cultural economist Dr. Clare McAndrew in 2005. The company's current clients include major international art fairs, dealer and trade associations, auction houses and national and transnational public institutions including arts councils and cultural ministries», (cf. <http://artseconomics.com>), last accessed on the 7th of May 2019 .

³⁴ Art Basel, McAndrews, C. (ed.), op. cit., pp. 260 f.

³⁵ Art Basel, McAndrews, C. (ed.), op. cit., pp. 140 - 144.

³⁶ Ufficio Rapporti con l'Unione Europea, *Camera dei deputati, XVII Legislatura – Documentazione per le Commissioni – Esame di atti e documenti dell'Unione Europea*, n. 98, released on the 3rd of October 2017, p. 3.

³⁷ Art Basel, McAndrews, C. (ed.), op. cit., pp. 222 - 224.

Furthermore it is important to mention that Europe stands at the first place among the other continents in terms of exportation abroad of art and antiquities. The estimated value of the exportations is nearby €12.3 billion. Lastly, concerning the importation of cultural goods among European countries, Europe has gained the second place in the global market, a position that is €9.7 billion worth.³⁸

1.2 The illicit traffic in cultural goods

The phenomenon of the illicit traffic of art and antiquities concerns the regime of the importation, exportation and transfer of ownership related to a determined State. It is a segment of the circulation of cultural goods that cannot be ignored especially because the activity of international cooperation is deeply focused on the control and reduction of illicit trade.³⁹

The traffic has been a trouble since ancient times so much so that the necessity of protection started very soon. During the Fifteenth Century the Pontifical State enacted three papal seals concerning cultural property. The first seal was the “Etsi de cunctarum”⁴⁰ by Martinus V in 1425 for the protection and promotion of the roman ancient palaces; then in 1462 there was the “Cum almam nostram urbem in sua dignitate et splendore conservari cupiamus”⁴¹ by Pius II against the pillage and destruction of the ancient monuments, followed, in 1474, by the “Cum Provvida Sanctorum Patrum decreta”⁴² by Sixtus IV against the trade in artworks located in the churches.

Lyndel Prott and Patrick O’Keefe, who were seminal scholars in this field, in order to clear up the difference between the trade of objects with a breach of the national and international dispositions from those which have not been subject of such breach, explained clearly the meaning of the adjective « illicit »: « An object being illicitly trafficked, [...], is one in respect of which some offence has been committed: such offence is defined by the laws of the country of origin and may

³⁸ Ufficio Rapporti con l’Unione Europea, *Camera dei deputati, XVII Legislatura – Documentazione per le Commissioni – Esame di atti e documenti dell’Unione Europea*, n. 98, released on the 3rd of October 2017, p. 3.

³⁹ Frigo, M., *La Circolazione internazionale delle opere d’arte*, in *Il Diritto dell’Arte: la circolazione delle opere d’arte*, vol. 2, Negri-Clementi, G. – Stabile, S. (eds.), Milano, Skira, 2013, pp. 199-209.

⁴⁰ Marocco, Sac. M., *Bollarium Romanum*, Turin, Dalmazzo editore, 1857, Tomo I pp. 714 ff..

⁴¹ Ibi note 40, Tomo V pp. 166 ff..

⁴² Marocco, Sac. M., *Bollarium Romanum*, Turin, Dalmazzo editore, 1857, Tomo I pp., pp. 208 ff.

include clandestine excavation, theft, breach of inalienability or rights of pre-emption, failure to comply with trading regulations or violation of export control».⁴³

Nowadays looted art and antiquities represent a very profitable market, but, as this is a criminal trade, it is very difficult to study it and evaluate its measure. This is because smugglers are very experienced in masquerading their transactions. There are different categories of goods belonging to the illicit trade. There are « [...] looted antiquities not excavated by an authorized person [, such as an archaeologist,] but which have been out of the ground, or other context, for such a length of time that their presence on the market, or (sometimes more accurately) on private collections with the potential in the future to enter the market, is tolerated by those having an interest in the trade of stolen goods»⁴⁴ and mainly recently-looted antiquities whose provenience is masqueraded pretending they were sold in apparently licit and legitimate circumstances. Furthermore the market is also made of archaeological finds and antiquities that are catalogued as accidental finds discovered during roadworks or restorative measures.

All these goods have an illicit provenance, but the international criminal circuit uses fraud to enable possibilities that stolen goods can be viewed as acceptable subject of purchase for the global art and antiquities market. This fraud is allowed by the absence of a common international regime of importation, exportation and transfer of ownership, able to prevent the illicit trade by the introduction of new criminal sanctions, which would ease the decrease of the demand for looted art and antiquities.⁴⁵

In order to frame the problem of the illicit trade, making a clarification of the aspects more contentious is compulsory.

The first element to analyze is the difference between the terms “Provenance” and “Provenience”. The difficulty in defining these terms has been a means for smugglers because they can be used in two different senses. In 1998 the archaeologist Coggins on the *International Journal of Cultural Property* has

⁴³ O’Keefe, P. J., Prott, L.V., *Law and the Cultural Heritage vol.3*, London, Butterworths, 1989, p. 561.

⁴⁴ Mackenzie, S., *Going, gone, gone*, Leicester, Institute of Art and Law, 2005, pp. 3 ff.

⁴⁵ Blake, J., *International Cultural Heritage Law*, Oxford, Oxford University Press, 2015, pp. 23 ff..

explained: « The differences [between provenance and provenience of a cultural good] are exemplified by the difference between the stark English *provenience*, meaning the original context of an object, and the more melodious French *provenance*, used by the art world., which may include the original source but is primarily concerned with a history of ownership»⁴⁶.

The expert's distinction allows and clarifies the identification of the importance of the findspot of a stolen good in legal and artistic terms. The real problem is that market sales of cultural goods very rarely give details of the provenience of an object. As regards to provenance instead, it is provided in different degrees, such as the tracing of ownership in order to assure to the purchaser that the object was not recently looted, or a general reassurance to the buyer, concerning the fact he will get from the owner good title to the object on payment of the purchase price.⁴⁷ As Simon Mackenzie attests, another important theme is the one of the free ports⁴⁸, which often leap out inside the pages of auction houses catalogue advertising antiquities or artworks with the general phrase «from the collection of a Swiss Gentleman». For instance Geneva, in Switzerland, is well known as a free port, which releases export documentation to all the imported goods whether they enter the country with legitimate licenses or not. This oasis is a ruse for antiquities which come from elsewhere.⁴⁹

Moreover in addition to all the elements above mentioned, the purchasers do not ask too much when buying and the sellers do not tell much information while dealing. This indifference, that justifies illicit behavior, was denounced by Lyndel Prott and Patrick O'Keefe. They cited the former director of the Metropolitan Museum of New York, Thomas Hoving⁵⁰, in support of their thesis, explaining that: « Despite the body of evidence that a large portion of material which is illicitly

⁴⁶ Coggins, C., *United States Cultural Property Legislation: Observations of a Combatant*, in the *International Journal of Cultural Property*, n. 7, 1998, p. 57.

⁴⁷ Mackenzie, S., op. cit., p. 5.

⁴⁸ «Imported merchandise may be stored duty-free pending re-export or duty-paid entry into the importing country in this free-trade zone around a port area. Examples are Hong Kong, Isla Margarita, Panama, and Singapore. », in Legal Dictionary, (cf. <https://thelawdictionary.org/free-port/>), last accessed on the 10th of May.

⁴⁹ Watson, P., *Sotheby's: the Inside Story*, London, Bloomsbury, 1997, pp. 113-126.

⁵⁰ Kennedy, R., *Thomas Hoving, Remaker of the Met, Dies at 78 on the New York Times* on the 10th of December 2009, (cf. <https://www.nytimes.com/2009/12/11/arts/design/11hoving.html>), last accessed on the 10th of May 2019.

traded is directly connected with other offences against cultural property in the country of origin, it is difficult to escape the conclusion that some members of the trade are indifferent to the goods being serviced. Though these dealers and experts do not prefer to be engaged in outright dishonest practices, they may not enquire into the provenance or authenticity of an object brought to them for service».⁵¹

The second aspect to focus on are the definitions of “Source States” and “Market States”. In the global art and antiquities market the world is divided into two categories which are Source and Market nations. On the one hand inside Source States « the supply of desirable property exceeds the intern demand [...]. They are rich in cultural artefacts beyond any conceivable local use »⁵². On the other hand inside Market states the demand exceeds the supply. This deficit encourages export from source nations, towards market countries.

The source / market division is very important from a legal point of view because it allows to explore the international law aspect of a determined claim, especially when the claimant and the stolen good are not located in the same country.⁵³

The distinction stresses another important element which is the fragility of the cultural property. Paul Bator’s studies have demonstrated that the trend of the illicit traffic of cultural goods usually goes from a poor source country to a rich market nation. This cases are common because some cultural goods, such as archaeological heritage and religious relics, are more vulnerable to looting, harm and disappearance than others, so they need some special protection.⁵⁴

According to the statistics of Sotheby’s which is one of the most eminent auction houses, Egyptian, Greek, Roman and Middle Eastern finds⁵⁵ have got a considerable and consistent value inside the market. Through the recent years the

⁵¹ As cited by O’Keefe, P.J. – Prot, L.V., op. cit., pp. 538 f..

⁵² Merryman, J. H., *Two ways of Thinking about Cultural Property in American Journal of International Law*, 1986, p. 831.

⁵³ Mackenzie, S., op.cit., pp. 8 f..

⁵⁴ Bator, P.M., *Controlling the international trade in art*, in *The International Trade in Art*, Chicago, University of Chicago Press, 1982, pp. 34-50.

⁵⁵ «Sotheby’s sale of Ancient [Egyptian, Classical, Western Asiatic]Sculpture and Works of Art achieved a remarkable £6.8 million, far surpassing the pre-sale estimate (£2.7-3.9 million) and achieving the highest total for the series since the sales were introduced here in May 2016. 55 of the 58 lots were sold, making for an exceptional sell-through rate of 95% - with 76% of lots selling above the pre-sale high estimate. Sotheby’s leads the market for ancient marbles, holding nine of the top ten prices at auction, and the top three highest prices ever achieved.», (cf. <http://www.sothebys.com/en/auctions/2018/ancient-sculpture-and-works-of-art-118261.html>), last accessed on the 11th of May 2019.

presence of economic crisis and ongoing armed conflicts inside poorer countries have encouraged the illicit traffic. Inside these States there are many archaeological sites, mainly in far away and remote areas, and it is very difficult to keep an up-to-date inventory.⁵⁶

Lastly the third aspect concerns the problem of the determination of the applicable Law and the parameter of *Lex rei sitæ*, which is the law of the State where the object is when it is looted.⁵⁷

The cultural goods, which are present in the international traffic, are mainly movable properties by nature, such as pottery and statues, or by destination, such as part of immovable properties, like mosaics and frescos. In the past the disciplines were different. Movable goods followed the principle *mobilia sequuntur personam*, namely the personal law of the owner (respectively domestic law and national law), while the Immovable goods followed the rules of the State in which they were located, which is the principle *immobilia reguntur lege loci*.⁵⁸

Currently the great majority of jurisdictions, both civil and common law, applies the parameter of *lex rei sitæ* to both categories of goods.⁵⁹ The lawyer and scholar Manlio Frigo affirms: «The choice of a rigid and generalized territorial criterion, whether it is correlated with the principle of the enforceability of *erga omnes* real rights, or that it is more likely to be determined by practical reasons of certainty and protection of absolute rights is now shared by the main legal systems of Romano-Germanic derivation, as well as by common law systems »⁶⁰.

The incidence of the criterion *lex rei sitæ* can be understood only outlining the public discipline of possession and trade of goods. Each State chooses different levels of protection for its goods. Firstly in common law systems is applied the criterion *nemo plus iuris transferre potest quam ipse habet*, which allows the

⁵⁶ Ufficio Rapporti con l'Unione europea, *Camera dei deputati, XVII Legislatura – Documentazione per le Commissioni – Esame di atti e documenti dell'Unione Europea*, n. 98, released on the 3rd of October 2017, p. 3.

⁵⁷ Mackenzie, S., *op.cit.*, p. 4.

⁵⁸ Frigo, M., *La circulation des biens culturels et l'incidence des problèmes de droit international privé*, in *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges: le livres de poche de l'Académie de droit internationale de La Haye*, BRILL, 2016, pp. 162-167.

⁵⁹ Anzilotti, D., *Corso di lezioni di diritto internazionale privato e processuale*, Salerno, F. (ed.), Padova, CEDAM, 1996 pp. 313 ff..

⁶⁰ Frigo, M., *op. cit.*, pp. 162-167.

original owner, with limited derogations, to claim the good even to the possessor of good faith. Secondly civil law systems are guided by the principle *en fait de meubles la possession vaut titre*⁶¹, allowing the purchase to non-domino.⁶²

Despite of these clear and apparently simple rules, Case law demonstrates how much sometimes contradictory solutions proposed by the jurisprudence, when it comes to the application of the *lex rei sitae*, demonstrate the impossibility of satisfying the requirement of certainty that should inspire the application of the law.⁶³

A very important decision is represented by the legal case *Winkworth c. Christie Manson and Woods*⁶⁴, where according to the article 1153⁶⁵ of the Italian civil code, the possessor of good-faith acquires the property from the non-owner, as long as there is a title suitable for the transfer of the property. The case concerns the decision of the English Chancery Division in the controversy on the property of some Japanese works, called *netsuke*⁶⁶, which were stolen in the United Kingdom from the rightful owner and illegally exported in Italy. In Italy they were regularly purchased by good faith by the collector P. D'Annone, who had entrusted them to the auction house Christie's in London. The English judge by whom the former owner claimed his right to restitution applied the Italian law, as a place of property

⁶¹ «Bona fide purchaser for value is a purchaser who purchases in good faith without notice of any defect in title and for a valuable consideration», (cf. <https://www.merriam-webster.com/legal/bona%20fide%20purchaser>), last accessed on the 10th of May 2019.

⁶² Favero, D., Cevoli, T. (ed.), *Lex rei sitae e traffico illecito di reperti archeologici*, in *Archeomafie*, Napoli, Osservatorio Internazionale Archeomafie, 2012, pp.38 ff..

⁶³ Frigo, M., op. cit., p.168.

⁶⁴ *Winkworth v. Christie Manson & Woods Ltd.*, [1980] Ch. 496 All ER.1121, Judgment released by the English Court on the 5th of November 1979.

⁶⁵ In absence of an official translation of the Italian civil code I have provided for a personal translation of the article 1153 c.1, Third Book, Property, Title VII, Possession, Chapter II, Effects of the possession, Section II, Possession in good faith of movable goods: «The one to whom are alienated movable goods by those who are not owner, acquire the property, by possession, provided it is in good faith at the time of delivery. and there is a title suitable for the transfer of the property».

⁶⁶ «*Ne* “root” and *tsuke* “attach“: this is the translation of the two Japanese characters which compose the word. At first, Netsuke was a root or a piece of cut wood hung by strings from the sashes of a Kimono In the 19th and 20th centuries, Netsuke evolved into collectibles par excellence; of different subjects, shapes and material, they catch our attention for the lacquer and the miniature details, but most of all for the feeling to the touch, [because] they are made of, most frequently ivory, boxwood and horn», (cf. <https://www.artecollezione.it/en/product/japanese-ivory-netsuke-fisherman-awabi-edo-period/>), last accessed on the 28th of April 2019.

at the conclusion of the contract of sale and dismissed the plaintiff's claim in tribute to the principle of *possession vaut titre*.

Winkworth c. Christie Manson and Woods represents the symbol of the huge problem of the presence of many different laws of possession inside civil law and common law systems.

However, before dealing with the legal background to the new EU Regulation it is important to stress other two important themes involving the global market of cultural property.

The first theme is a legal issue concerning the doctrinal definition of cultural object. Different experts, such as Janet Blake, defines cultural object as «immaterial», namely physical objects which have got an intangible value: the belonging to a specific culture. The cultural value of an object depends on the history, social life, spirit of a people living in a determined area and it is a value that is different in every State.⁶⁷

This is the reason why States tried to protect their cultural heritage preventing and limiting the circulation and trade of cultural goods especially if they were archaeological finds related to the roots of that particular culture. For instance in Italy the article 826 c.2 of the civil code states that «are part of the State's inalienable Heritage [...] the things of historical, archaeological, paleontological and artistic interest, by anyone and in any way found in the subsoil,[...]»⁶⁸. These cultural goods cannot be sold and the adjective «inalienable» means they are *res extra commercium*.

The legal case *Republic of Ecuador v. Danusso, Matta and others*⁶⁹ was the first one which discussed the problem of Ecuadorian archaeological finds illicitly exported in Italy.

The defendant G. Danusso in April 1975 exhibited in Milan, a series of Ecuadorian archaeological finds at event *Milanese archaeological Summer*. The consular

⁶⁷ Blake, J., op. cit., pp. 1 -12.

⁶⁸ In absence of an official translation of the Italian civil code I have provided for a personal translation of the article 826 c.2, Third Book, Property, Title I, Goods, Chapter II Goods owned by the State, public authority and religious authority.

⁶⁹ Court of Appeal of Turin, Second Civil Section, Judgment of the 25th of March 1982, in *Rivista di Diritto privato e processuale*, pp. 652 ff..

authority of Ecuador, having come to know of the exposition, complained to the Public Prosecutor's Office in Milan. After the investigation emerged that Danusso bought these relics from Ecuadorian citizens with the support of an antiquarian of Quito and then he exported them to Italy from 1972 to 1975.

The criminal proceedings ended on November 10, 1978, in Turin without any condemnation. But in 1979 the Republic of Ecuador acted in civil proceedings in front of the same court of Turin to claim the property of these findings. In the judgement, dated March 25, 1982, the Court, having no doubt that the objects were found in the Andean area of Ecuador, had to distinguish whether the legal dispute verted on the title or on the content of the right of possession of archaeological finds.

If the dispute verted on the content the judge should have applied the Italian law, because at the moment of the beginning of the proceedings the cultural goods were in Italy. But in the Danusso's case was the title from which the right descends to be discussed and moreover the cultural goods arrived in Italy after they were purchased in Ecuador. The Italian judge stated: « From above, it follows that, while the current content of the real right on the good, transferred elsewhere, should be appreciated according to the new law of "situation", the disputes concerning the way in which the holder of the right took advantage of it, when the good was in another State (disputes over title or ownership), will continue to fall under the law to which the good was subjected»⁷⁰ .

Even though the content of the right changes depending on the place in which the goods are located, the title does not. The Ecuadorian *Ley de Heritage Artístico* (LPA) of 1945, established a legal regime characterized by the domain of the State on cultural heritage, and was the applicable law, because the cultural goods when purchased were in Ecuador. At the end, after having verified the connection of the Ecuadorian legislation to the Italian dispositions on the public order, the Italian Court declared that the owner of the confiscated goods was the Republic of Ecuador

⁷⁰ In absence of an official translation I provided for a personal translation of the abstract of the judgment released by the Court of Turin, on the 25th of March 1982: «[d]a quanto sopra discende che, mentre il contenuto attuale del diritto reale sul bene, trasferito altrove, va apprezzato in base alla nuova legge di "situazione", le controversie relative al modo in cui il titolare del diritto ne ha usufruito allorché il bene era in un altro Stato (controversie sul titolo o sulla titolarità) continueranno a cadere sotto la legge alla quale il bene era sottoposto».

and their restitution was immediately disposed.⁷¹

1.3 Militant and terrorist groups funding using the illicit trade of cultural goods.

Militant and terrorist groups have found new and diversified solutions in order to gather money for financing their illicit activities. The groups exploit the black market of cultural goods, which is as profitable as the ones of drugs, weapons and counterfeit goods. This source of funds for terrorist groups is the sale of antiquities and other cultural goods which are located within the territories under their control. The attorneys Vlastic⁷² and De Sousa⁷³, gave a definition of the term «antiquities» related to militant and terrorist funding: « The term ‘antiquities’ encompasses a broad array of cultural property, including, but not limited to, statues, monuments, coins, eating and cooking implements, tools, jewelry, weapons, and objects of religious significance. Generally speaking, this definition includes any object that is ‘expressive of a specific culture or uniquely characteristic of that culture’ ».⁷⁴

Scholars have created an expression to define this illicit trade, which is «blood antiquities»⁷⁵, in order to refer to stolen cultural property used to fund violence. The United Nations Educational, Scientific and Cultural Organization (UNESCO), estimated that the “blood antiquities” market is worth \$6 billion annually.⁷⁶ This way of funding is not at all new. Everything started in ancient times when the maxim of the troops was «to the victor goes the spoils», which meant the

⁷¹ Favero, D., Cevoli, T. (ed.), *Lex rei sitae e traffico illecito di reperti archeologici*, in *Archeomafie*, Napoli, Osservatorio Internazionale Archeomafie, 2012, pp. 38 ff..

⁷² Mark V. Vlastic is an adjunct professor of law at Georgetown University and a senior fellow at Georgetown’s Institute of International Economic Law and its Institute for Law, Science & Global Security. He is a principal at Madison Law & Strategy Group. He has served as: pro bono advisor to the Director-General of UNESCO.

⁷³ Jeffrey Paul De Sousa is an appellate lawyer in Miami, Florida, whose practice focuses on criminal and constitutional litigation. His research interests include constitutional law, international law, and cultural property issues, and his scholarship has been published in the *Georgetown Law Journal*, the *Georgetown Journal of Legal Ethics*, and the *Durham Law Review*.

⁷⁴ Vlastic M.V. - De Sousa J.P., *Stolen Assets and Stolen Culture: The Illicit Antiquities Trade, the Perpetuation of Violence, and Lessons From the Global Regulation of Blood Diamonds*, in *Durham Law Review*, Durham, Durham Law School, 2012, pp. 159-162.

⁷⁵ «The term is an allusion to ‘blood diamonds’ rough diamonds used by rebel movements to finance armed conflicts ‘aimed at undermining legitimate governments», on *Los Angeles Times*, 2012.

⁷⁶ Ufficio Rapporti con l’Unione Europea, *Camera dei deputati, XVII Legislatura – Documentazione per le Commissioni – Esame di atti e documenti dell’Unione Europea*, n. 98, released on the 3rd of October 2017, p. 2.

conquering State was allowed to pillage local treasures. After the Nazis pillage of artworks during World War II, in the 1970s raids of militant groups, such as the Khmer Rouge⁷⁷ and other criminal organizations⁷⁸ like mafia⁷⁹ began.

The criminologist Simon Mackenzie and the cultural heritage lawyer Tess Davis realized an unprecedented study the phenomenon of the antiquities looting in Cambodia during the years of political unrest between 1970 and 1998.⁸⁰

They were able to reconstruct the elements of the ordered system that allowed tens of thousands of antiquities to leave the country during the years of the political regime.⁸¹ Analyzing six major archaeological sites across Cambodia and carrying out interviews, they discovered that in the village of Banteay Chhmar⁸², where it is located one of the most important archaeological complex of Cambodia's Angkor period⁸³, «local villagers were “invited” (in the sense of “instructed”) to loot the temple at night by these various armed factions, who effectively functioned as gang

⁷⁷ «In the four years that the Khmer Rouge ruled Cambodia, it was responsible for one of the worst mass killings of the 20th Century. The brutal regime, in power from 1975-1979, claimed the lives of up to two million people. Under the Marxist leader Pol Pot, the Khmer Rouge tried to take Cambodia back to the Middle Ages, forcing millions of people from the cities to work on communal farms in the countryside. But this dramatic attempt at social engineering had a terrible cost. Whole families died from execution, starvation, disease and over work» on *BBC News*, 2018, (cf. <https://www.bbc.com/news/world-asia-pacific-10684399>), last accessed on the 1st May 2019.

⁷⁸ Campbell, B., P., *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, in *International Journal of Cultural Property*, Cambridge, International Cultural Property Society, 2013, pp. 113 ff..

⁷⁹ «The Sicilian Mafia is probably the best known form of organized crime, so much so, that mass media represents it as sort of a universal Evil. The “octopus” that directly or indirectly controls all criminal activities: from drug to arms trafficking and now even radioactive substances. In reality the Sicilian Mafia can be considered a “winning model” of organized crime (at least up until now) due to its complexity and long-standing role in society, but care must be taken against stereotypes that always see the octopus' tentacles everywhere», (cf. <https://www.centroimpastato.com/fighting-the-mafia-and-organized-crime-italy-and-europe/>), last accessed on the 1st May 2019.

⁸⁰ Mackenzie, S. – Davis, T., *Temple looting in Cambodia: anatomy of a Statue Trafficking Network*, in *The British Journal of Criminology*, 2014, pp. 722 ff..

⁸¹ Seiff, A. - Phnom, P., Penh, *How Cambodia's temples fell to looters*, on *Deutsche Welle*, 2014, (cf. <https://www.dw.com/en/how-cambodias-temples-fell-to-looters/a-17735835>), last accessed on the 31st of May.

⁸² It is a commune in Thma Puok District in Banteay Meanchey province in northwest Cambodia.

⁸³ Russell R. Ross, ed. *Cambodia: A Country Study*, Washington: GPO for the Library of Congress, 1987: «The Angkorian period lasted from the early ninth century to the early fifteenth century A.D. In terms of cultural accomplishments and political power, this was the golden age of Khmer civilization. The great temple cities of the Angkorian region, located near the modern town of Siemreab, are a lasting monument to the greatness of Jayavarman II's successors. (Even the Khmer Rouge, who looked on most of their country's past history and traditions with hostility, adopted a stylized Angkorian temple for the flag of Democratic Kampuchea. A similar motif is found in the flag of the PRK)», (cf. <http://countrystudies.us/cambodia/>), last accessed on the 31st of May 2019.

masters for this looting enterprise,[they were paid the equivalent of USD 12 a day and] faced violent intimidation and possibly death if they refused».⁸⁴

The raids begun in 1970, when a US-backed coup plunged the country into civil war and gave rise to the communist regime of the Khmer Rouge, who ruled the country between 1974 and 1979: « soldiers from the US-backed Lon Nol army closed off the [Banteay Chhmar] complex, raided it during the night and carried off their spoils by helicopter».⁸⁵

When the communist regime collapsed in 1979, guerilla fighters continued to conduct their battle firstly thanks to the help of the Vietnamese army, which occupied Cambodia for ten years, and then with government forces in the 1990s: «[the fighters] surround[ed] the temple at dawn and block[ed] it from the local community, with no explanation... For the next two weeks, heavy machinery was used to break up the complex and when the clamor finally stopped, soldiers loaded an estimated 30 tons of stone—including an entire 30 m of the southern wall, prized for its skilled bas-reliefs of Lokeshvara and Apsaras—onto six trucks and drive off for the Thai border just 15 km away. [...] Thai authorities stopped one of the trucks in Sa Kaeo province and seized over a hundred antiquities, including an 11.5-m span of wall. The two drivers were arrested— and eventually tried and convicted— despite denying knowledge of their illegal cargo. They likewise could not (or feared to) identify who had hired them or to whom they were delivering their shipment. [...] After over a year of political wrangling between Cambodia and Thailand, the seized pieces were finally returned to Phnom Penh. But the rest of haul from Banteay Chhmar which escaped in the other five trucks has, aside from a few opportunistic recoveries, disappeared into the art market».⁸⁶

Nowadays Khmer antiquities are still one of the most wanted by the collectors, adorn auction houses catalogues and are exposed in the most prestigious museums, but their eternal beauty cannot hide the fact most of them are «blood antiquities» which were looted in order to help fund conflicts and criminal enterprises.⁸⁷

⁸⁴ Mackenzie, S. – Davis, T., op. cit., p. 730.

⁸⁵ Ibidem note 84.

⁸⁶ Mackenzie, S. – Davis, T., op. cit., p. 729.

⁸⁷ Mackenzie, S., op. cit., pp. 17-22.

Davis, who is also an Affiliate Researcher at the Scottish Centre for Crime and Justice Research, stated that «A main conclusion of both our published and forthcoming research is that organized criminals and armed factions did indeed seek to fund their operations through antiquities trafficking. This destruction had a financial motive. It's a textbook case of supply and demand, [...]».⁸⁸

One of the first and leading cases in trafficking of cultural property was *United States c. A 10th Century Cambodian Sandstone Sculpture*, better known as *Cambodia v. Sotheby's*⁸⁹. The Government of Cambodia asked to the United States of America for the restitution of a *khmer*⁹⁰ sandstone statue, representing a knight, circa 10th century A.D, illicitly removed from the Prasat Chen Temple at the archaeological site of Koh Ker probably during the controversial period between the Vietnam War and the Pol Pot regime. The statue was offered for sale in New York at the auction house Sotheby's, which affirmed the statue was acquired by an European noble family in 1975, and it was immediately withdrawn from the market. The Cambodian Government declared the United States illegally acquired this good which was traded after the 1970 UNESCO Convention on the prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Nevertheless Sotheby's affirmed was legally sold and exported to the United States of America before the 1993 Cambodian Act against the looting and pillage of national cultural goods. Furthermore the Cambodian Government never mentioned the statue in the annex of stolen goods, so it could not declare that Sotheby's stole it. The Cambodian government also declared its intention to buy the statue by a private sale at Sotheby's, without resorting to the seizure. After a legal battle ended in 2013, the US authorities triumphed in wresting the possession of the sandstone statue, valued at over \$2 million by Sotheby's. This case is the proof of how much the antiquities market is «grey». Recently the Secretary General of the International

⁸⁸ Seiff, A. - Phnom, P., Penh, *How Cambodia's temples fell to looters*, on *Deutsche Welle*, 2014, (cf. <https://www.dw.com/en/how-cambodias-temples-fell-to-looters/a-17735835>), last accessed on the 31st of May.

⁸⁹United States of America District Court, Central District New York Southern on the 4th of April 2012. (cf. <https://www.unl.edu/eskridge/Art%20crime%20complaint.pdf>), last accessed on 6th of May 2019.

⁹⁰«*Khmer*» is an ancient kingdom in South East Asia that reached the peak of its power in the 11th century, when it ruled over the entire Mekong valley from the capital at Angkor. It was destroyed by Thai conquests in the 12th and 14th centuries. (cf. <https://en.oxforddictionaries.com/definition/khmer>), last accessed on 3rd of May 2019.

Council of Museums (ICOM)⁹¹ has remarked that ‘the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen property. This «grey market has proved attractive to terrorist groups».⁹² According to the United States of America Federal Bureau of Investigation (FBI), «[f]undamentalist terrorist groups rely on looted antiquities as a major funding source».⁹³

Unlike other terrorist groups, such as al-Qaida, which rely on the largesse of wealthy benefactors, ISIS takes advantage from the illicit antiquities trade in two ways. Firstly ISIS runs its own excavations and illicit operations and sells cultural property to buyers in the major market countries using its intermediaries. Secondly it imposes a 20% taxation on non-ISIS smuggling operations which take place within its territory. In 2014 *The New York Times* made an outstanding reveal when the journalists Azm, Al-Kunter and Daniels wrote:« The group’s rationale for this levy is the Islamic *khums*⁹⁴ tax, according to which Muslims are required to pay the state treasury a percentage of the value of any goods or treasure recovered from the ground. ISIS claims to be the legitimate recipient of such proceeds. The amount levied for the *khums* varies by region and the type of object recovered. In ISIS-controlled areas at the periphery of Aleppo Province in Syria, the *khums* is 20 percent. In the Raqqa region, the levy can reach up to 50 percent or even higher if the finds are from the Islamic period (beginning in the early-to-mid-seventh century) or made of precious metals like gold».⁹⁵

The most important data of the ISIS’s structure comes from a US Special Operation raid in Syria in 2015 at Abu Sayyaf’s headquarter. Abu Sayyaf is ISIS’s first finance chief and the responsible of the Diwan al-Rikaz, which is the administrative branch for natural resources. The documents seized during the raid revealed the existence

⁹¹ The International Council of Museums is an international organisation of museums and museum professionals which is committed to the research, conservation, continuation and communication to society of the world’s natural and cultural heritage, present and future, tangible and intangible.

⁹² As quoted by Des Portes E., *The Fight Against the Illicit Traffic of Cultural Property in The Law of Cultural Property and Natural Heritage*, Paris 1998.

⁹³ Charney N., Denton P. and Kleberg J., *FBI Law Enforcement Bulletin: Protecting Cultural Heritage from Art Theft; International Challenge, Local Opportunity*, 2012, (cf. <https://leb.fbi.gov/articles/featured-articles/protecting-cultural-heritage-from-art-theft-international-challenge-local-opportunity>), last accessed on the 6th May 2019.

⁹⁴ «Khums» is an Islamic religious obligation.

⁹⁵ Al-Azm A., Al-Kunter S. and Daniels B., *ISIS’ Antiquities Sideline on The New York Times*, 2014, (cf. https://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?_r=0), last accessed on 3rd of May 2019.

of a deep web of illicit trade which includes natural resources such as gas and oil, but mainly cultural property. ISIS created many subdivision to distinguish the different steps of antiquities trade. The scholar Peter Campbell outlined a four-stage model «for the illicit antiquities trade consisting of looter, early stage middleman or intermediary, late stage intermediary and collector»⁹⁶ and each one is very complex because it requires «specialized knowledge, including in locating sites, transportation, transnational smuggling, laundering and art history».⁹⁷

The first step involves looters who use their knowledge of a particular area, known as source country, in order to locate artefacts. Then an intermediary purchases the goods from the source state into market countries. After this early stage the goods meet another type of intermediation conducted by the fences who keep in touch both with the illicit community and the art market and launder the proceeds of the illicit trade by doctoring export licenses. At the end the late stage includes museum curators, scholars, private collectors, and art dealers.⁹⁸

Satellite imagery shows both that looting is more severe in ISIS-held areas and that ISIS is using new methods for excavating and wrecking historical sites, such as «unusual pattern of damage in which large portions of mounded sites are simply removed *en masse*, perhaps to be sorted off site».⁹⁹ This alarm raised by the United Nations Security Council activated many programs of international cooperation, such as a \$5 million reward offered by the United States State Department for «information leading to the significant disruption of the sale and/or trade of oil and antiquities by, for, on behalf of, or to benefit the terrorist group Islamic State of Iraq and the Levant».¹⁰⁰

⁹⁶ Campbell, B., P., op. cit., p.113.

⁹⁷ Ibidem note 96, p.116.

⁹⁸ Vlastic M.V. - De Sousa J.P., *Stolen Assets and Stolen Culture: The Illicit Antiquities Trade, the Perpetuation of Violence, and Lessons From the Global Regulation of Blood Diamonds*, in *Durham Law Review*, Durham, Durham Law School, 2012, pp. 159-162.

⁹⁹ Daniels B. and Hanson K., *Archaeological Site Looting in Syria and Iraq: A Review of the Evidence in Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, ICOM 2015, p. 150.

¹⁰⁰ Public reward published by the US State Department on the web site below: https://rewardsforjustice.net/english/trafficking_oil_and_antiquities.html. Last accessed on the 2nd of May 2019.

1.3.1 Opinions on the scope of ISIS's Antiquities trade.

Militant and terrorist groups' behavior pushed to new attempts and proposals for fighting this long-term scourge, which is still characterized by uncertainties and unclear data.

In recent years different United Nations ambassadors demonstrated that the illicit trade of cultural property pursues the scope of funding violence. And the numbers are incredible.¹⁰¹ In 2015 Iraq's UN ambassador revealed ISIS earned as much as \$100 million annually from the art traffic.¹⁰² Then Vitaly Churkin, who was Russia's UN ambassador declared «[t]he profit derived by the Islamists from the illicit trade in antiquities and archaeological treasures is estimated at U.S. \$150–200 million per year».¹⁰³

Beside all the falsehoods provided by the media, which spread technical information without any empirical analysis, there are some exceptions highlighting shocking news, such as the source claiming that «ISIS sold off looted treasures from Palmyra, a UNESCO world heritage site, before Syrian government forces reclaimed the city, including pieces to European and American buyers for as much as \$60,000».¹⁰⁴

Furthermore a typical practice of ISIS is the one of destroying antiquities as a propaganda. The groups wreck only those cultural goods which are not profitable or can be useful to create a smokescreen to hide their illicit traffic: «[...] they steal everything that they can sell, and what they can't sell, they destroy»¹⁰⁵ has said Iraq's deputy minister for antiquities and heritage, Qais Hussein Rasheed.

¹⁰¹ Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council (cf. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/091/19/PDF/N1609119.pdf>), last accessed on the 30th of May 2019.

¹⁰² Gladstone, R., *U.N. Resolves to Combat Plundering of Antiquities by ISIS*, on *The New York Times*, 2015, (cf. www.nytimes.com/2015/05/29/world/middleeast/un-resolves-to-combat-plundering-of-antiquities-by-isis.html), last accessed on the 30th of May 2019.

¹⁰³ Nacarino G., *How ISIS Makes Millions From Stolen Antiquities* in *Newsweek.com*, 2016, (cf. <https://www.newsweek.com/isis-syria-antiquities-millions-profit-money-russia-islamic-state-palmyra-444805>), last accessed on the 6th of May 2019.

¹⁰⁴ Engel R. - Petropoulos A. - Omar A., *Smuggler of Stolen Artifacts From Palmyra Speaks Out About ISIS' Illicit Operation* in *NBC News*, 2016, (cf. <https://www.nbcnews.com/storyline/isis-terror/smuggler-stolen-artifacts-palmyra-speaks-out-about-isis-illicit-operation-n551806>), last accessed on 6th of May 2019.

¹⁰⁵ Loveday M., *Islamic State Isn't Just Destroying Ancient Artifacts – It's selling them* in *Washington Post*, 2015.

This phenomenon is spreading as far as the eye can see, because also militant groups lacking the funding of the large ones, began a small-scale looting and smuggling operations.¹⁰⁶

Preventing this emergency is the purpose of the recent international agreements providing not only for the restitution and repatriation of «blood antiquities» illegally exported from the country of origin, but also for the introduction of criminal prosecution as a deterrent for dealers, even though the proofs filing the illicit provenance of their cultural goods are still very hard to obtain. Nevertheless the first thing to do, according to Vlastic and De Sousa's thesis, should be raising public awareness « [by]- doing for blood antiquities what the film 'Blood Diamonds' did for the conflict diamond market in Africa—leveraging the power of television and film in order to make people aware that a purchase of unprovenanced antiquities in antiquities in London, Geneva, Munich, or New York might be helping fund terrorism and conflict in the Middle East and elsewhere. The revelation that terrorist and militant groups are profiting from the illicit antiquities trade could provide the impetus the international community needs to truly crack down on the trade». ¹⁰⁷

2. The International legal background to the new EU Regulation

Throughout the years several international legal measures have been introduced against the traffic of cultural goods.

All these acts are concentrated upon the transfer of cultural property and they regard mainly import, export and transfer of ownership of goods in order to protect the interests of the international community.

The most important ones are the 1954 Hague Convention and its two Protocols, the 1970 UNESCO Convention, the 1995 UNIDROIT Convention and the 2017 Nicosia Convention: the first tool to protect offences relating cultural property.

¹⁰⁶ US House Representatives, Committee on Financial Services, Memorandum RE: Task Force to Investigate Terrorism Financing hearing titled 'Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS', 2016, (cf. http://financialservices.house.gov/uploadedfiles/041916_tf_supplemental_hearing_memo.pdf) , last accessed on the 30th of May 2019.

¹⁰⁷ Vlastic M.V. - De Sousa J.P., *The Illicit Antiquities Trade and Terrorism Financing: From the Khmer Rouge to Daesh in The Palgrave Handbook of criminal and terrorism financing Law*, King-Walker - Gurulé Editors 2018, p. 1182.

2.1 The 1954 Hague Convention and its two Protocols

*The Convention for the Protection of Cultural Property in the Event of Armed Conflict*¹⁰⁸ was adopted at the Hague, in Netherlands, in 1954. It represents the first regulation regarding the illicit trade of cultural goods *pendente bello*. It also includes two additional Protocols, signed respectively in 1954 and 1999, concerning the limits to the circulation of cultural goods and the obligation to return goods illegally exported.

The Convention and its additional Protocols represent the core of the international protection concerning cultural goods¹⁰⁹: it is an expression of a new legal conception, according to which « [...] damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world»¹¹⁰ and « [...] the preservation of the cultural heritage is of great importance for all peoples of the world [...]».¹¹¹

The cultural heritage is not a private or State property and must be protected globally,¹¹² because it represents our humanity.¹¹³

The First Protocol as regards to the transfer of cultural property is very clear at its article 1, paragraph 1. The contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property; to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory; to return to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle of the Convention. Furthermore the Contracting Party shall pay an indemnity to the holders in good

¹⁰⁸ The 1954 Hague Convention and the First Protocol have been in force since the 7th of August 1956 and in 2017 there were 128 signatory States. The Second Protocol instead was adopted on the 9th of March 1999.

¹⁰⁹ Maugeri, A., *La Convenzione dell'Aja per la tutela dei beni culturali*, in *La tutela dei beni culturali nel diritto internazionale penale. Crimini di guerra e crimini contro l'umanità*, Milano, Giuffrè Editore, 2008, pp. 25 ff.

¹¹⁰ Second recital of the Preamble of the Hague Convention.

¹¹¹ Second recital of the Preamble of the Hague Convention.

¹¹² Forrest, C. J. S., *The doctrine of military necessity and the prosecution of cultural property during armed conflict*, in *California Western International Law Journal*, 2007, pp. 193-194.

¹¹³ Francioni, F., *Principi e criteri ispiratori per la protezione internazionale del patrimonio culturale*, Francioni, F., Del Vecchio, A., De Caterini, P. (eds.), in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, Giuffrè, 2000, p. 24.

faith of any cultural property which has to be returned in accordance with the preceding paragraph.

This First Protocol aims to protect both private and public cultural property, as defined at article 1 of the 1954 Hague Convention: « [...] For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centers containing monuments"» . The Convention introduces for the first time the term «cultural property» and it is wider¹¹⁴ than the previous statements provided by the *1907 Hague Convention*¹¹⁵ and the *Roerich Pact*¹¹⁶, which simply listed the historical and artistic building and

¹¹⁴ Schairer, S. L., *The intersection of human rights and cultural property issues under international law*, in *The Italian Yearbook of International Law*, vol. XI, 2001, p. 79.

¹¹⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed in Hague on the 18th of October 1907

¹¹⁶ Preamble of the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich signed in Washington, on the 15th of April 1935: «The High Contracting Parties, animated by the purpose of giving conventional form to the postulates of the resolution approved on 16 December 1933, by all the States represented at the Seventh International Conference of American States, held at Montevideo, which recommended to "the Governments of America which have not yet done so that they sign the 'Roerich Pact', initiated by the 'Roerich Museum' in the United States, and which has as its object the universal adoption of a flag, already designed and generally known, in order thereby to preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples, "have resolved to conclude a Treaty with that end in view and to the effect that the treasures of culture be respected and protected in time of war and in peace, have agreed upon the following Articles».

institutions, forgetting to express that cultural property must be protected because it is part of the heritage of humanity.¹¹⁷

Article 4 defines how the Contracting Parties have to be committed in order to grant the respect for cultural property.

The first paragraph imposes that «The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection¹¹⁸ for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property».

Article 4 (1) fills a deep gap, which involved the destruction of many cultural goods during the two World Wars.¹¹⁹

The prohibition is referred both to any land, maritime or aerial attacks and to any kind of demolition of cultural property carried out with explosives, bulldozers or other destructive tools.¹²⁰

«The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver»¹²¹.

The second paragraph was extremely criticized: the Soviet delegation stated that it allowed «a right of destruction», which hinders the aim of the Convention.¹²² The text of the Convention is accused to be too ambiguous and opened to deceptions.¹²³

The experts committee convened by UNESCO to draft the text of the Convention though, declared that the rules concerning the protection of cultural heritage *pendente bello* has always been characterized by the exceptions due to the military

¹¹⁷ Greppi, E., *La protezione generale dei beni culturali nei conflitti armati: dalla convenzione dell'Aja al Protocollo del 1999*, in *La tutela dei beni culturali nei conflitti armati*, a cura di Benvenuti P. - Sapienza R., Milano, 2007, p. 81.

¹¹⁸ Article 2 of the 1954 Hague Convention: «For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property».

¹¹⁹ O' Keefe, R., *The protection of cultural property in armed conflict*, Cambridge, Cambridge University Press, 2006, pp. 101 ff..

¹²⁰ Ibi note 119, p. 126.

¹²¹ Article 4 (2) of the 1954 Hague Convention.

¹²² *Records of the Conference convened by the United Nations Educational and Scientific and Cultural Organization (UNESCO) held at the Hauge from the 21st of April to May 1954*, The Hague, 1961, par. 299.

¹²³ Ibi note 122, par. 275.

necessity.¹²⁴ Although this clarification, the authors of the Convention did not specified the meaning of military necessity, leaving it to the discretion of the Contracting Parties.¹²⁵

The Convention aims also to prevent any traffic and devastation of cultural property stating that: «The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party».¹²⁶

The vagueness of definitions of crimes connected to cultural property emerging from article 4 (3) makes really difficult to understand the content of the disposition.¹²⁷

Lastly article 4 (5) introduces another vague recommendation: «No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard¹²⁸ referred to in Article 3».

The Second Protocol instead, wants to strengthen the impact of the First Protocol by giving specific explanations of all the uncertain elements emerging from the above mentioned articles of the Convention. It was adopted after the destruction of cultural property during the conflicts in Iran, Iraq and Kuwait, because it became evident that the Convention did not provide a «sufficiently rigorous and broadly acceptable protection regime for cultural heritage».¹²⁹

Firstly it introduces two specific articles concerning the protection of cultural goods *pendente bello*, which are respectively article 9 and article 21.

¹²⁴ O' Keefe, R., op. cit. , p. 122.

¹²⁵ O' Keefe, R., op. cit. , pp. 122-123.

¹²⁶ Article 4 (3) of the 1954 Hague Convention.

¹²⁷ Pagella, E. – Panero, E., *Identità perdute: storie di patrimonio e musei*, in *Anche le Statue Muoiono: conflitto e patrimonio tra antico e contemporaneo*, a cura di Museo Egizio e Fondazione Sandretto Re Rebaudengo, Torino, Musei Reali Torino, 2018, pp. 62 ff..

¹²⁸ Article 3 of the 1954 Hague Convention: «The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate».

¹²⁹ Forrest, C., *The 1999 Second Protocol*, in *International Law and the Protection of Cultural Heritage*, Abingdon, Routledge, 2010, p.110.

The article 9 letter a), b) and c) imposes to the State in occupation of the whole or part of the territory of another State, the prohibition of «any illicit export, other removal or transfer of ownership of cultural property», of ‘any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property’ and of ‘any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence». Moreover the article 21, concerning «other violations», dictates to the Contracting States the obligation to adopt specific legal sanctions, both administrative and disciplinaries, in order to prevent «any use of cultural property in violation of the Convention or [the Second] Protocol» and «any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or the Second Protocol».

The eminent scholar and professor Manlio Frigo¹³⁰, who is an eminent scholar of cultural property, has made an interesting comparison between the above mentioned articles of the two Protocols. He explains that article 1 paragraphs (1) and (2) of the First Protocol and article 9 of the Second Protocol do not clarify if they are addressed only to Contracting Parties or also to Occupant States. Moreover the 1954 Hague Convention does not provide any definition, inside its article 18, regarding the application of the Convention, of two fundamental elements which are «occupied territory» and «occupant State». The article 1, paragraph 2, of the First Protocol, indeed, when statutes that «Cultural property coming from the territory of a High Contracting Party [...] shall be returned [by the Importing State], at the end of hostilities, to the competent authorities of the territory from which it came» does not explain the nature of the measure, because it is not clear if the restitution derives from a conservative measure or as a consequence of the property rights that could constitute on the cultural property according to the laws of the Importing State. This shows how much this Convention represents on the first hand a turning-point in the field of protection and prevention of the illicit trade of cultural

¹³⁰ Frigo, M., *La circulation des biens culturels et l'incidence des problèmes de droit international privé*, in *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges: le livres de poche de l'Académie de droit internationale de La Haye*, BRILL, 2016, pp. 225 - 229.

goods, but on the other hand, being the first one to have been adopted, makes it non much coordinated.

2.2 The 1970 UNESCO Convention

The UNESCO Convention *on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property* was adopted by the 16th General Conference of UNESCO on the 14th of November 1970¹³¹ and it is the first international legal framework for the fight against the illicit trafficking of cultural property in times of peace.¹³²

Two fundamental observations, which are considered the basis of the Convention,¹³³ are expressed in its Preamble: The General Conference of the United Nations Educational, Scientific and Cultural Organization «[...] considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations»¹³⁴ and «[...] that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations [...]»¹³⁵ adopts this Convention.

The main duties of the State parties can be divided in three «pillars», which are: the adoption of protection measures in their territories (article 5), the control of the movement of cultural property (articles from 6 to 9) and the return of stolen cultural property (article 7) thanks to emergency international cooperation.¹³⁶

After the definition of what does the term «cultural property» means¹³⁷, having expressed that «The States Parties to this Convention recognize that the illicit

¹³¹ The 1970 UNESCO Convention entered into force on 24th April 1972, in accordance with its article 21, and it has 139 signatory States.

¹³² UNESCO Culture Sector, *The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit*, Paris, 2011, p. 6.

¹³³ Frigo, M., op. cit., pp. 254 - 255.

¹³⁴ Second recital of the Preamble of 1970 UNESCO Convention entered into force on 24th April 1972.

¹³⁵ Third recital of the Preamble of 1970 UNESCO Convention entered into force on 24th April 1972.

¹³⁶ Frigo, M., op. cit., pp. 254 - 255.

¹³⁷ Article 1 of 1970 UNESCO Convention entered into force on 24th April 1972: « For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections

import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from»¹³⁸ and that «[...] the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations»¹³⁹, the Convention exposes its core. The center of the illicit trade in cultural property is the fact that, once the cultural object is out of the jurisdiction of the State of origin, it is free to enter and circulate inside the art and antiquities market in other States.¹⁴⁰

Even though the Convention imposes to the States of origin to protect their cultural property, listed in its article 1, it also aims to regulate both the export and import, which are the essential components of this movement of cultural property.

Forrest stated that « the most effective way to [control the movement of cultural property] is to make the import of any cultural property which have been illicitly exported, illegal, [because] the illegality of any of the acts relating to that property in the state of origin is simply recognized in the receiving, or importing, State».¹⁴¹

During the negotiations of the Convention, the above mentioned wills were expressed, but Article 3 simply imposes that «The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit».

and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest [...]; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments».

¹³⁸ Article 2 (1) of 1970 UNESCO Convention entered into force on 24th April 1972.

¹³⁹ Article 2 (2) of 1970 UNESCO Convention entered into force on 24th April 1972.

¹⁴⁰ Forrest, C., *Law and the Protection of Cultural Heritage*, Abingdon, Routledge, 2010, p.176.

¹⁴¹ Ibidem note 140.

This appears to be that if the export of cultural property is illicit under the provision of the Convention, which has to be adopted by the Contracting States, then the import will be illicit.

The disposition triggered many critiques. On the one hand some scholars, such as O'Keefe, defined this article as the «core provision in the conventional regime»¹⁴², on the other hand Bator criticized the vagueness of the disposition, because it did not have any legal effect.¹⁴³

The reasons behind Bator's opinion are due to the fact that article 3 does not give any definition of what has to be intended as illicit nature of import or export of cultural property. The implementation of this definition is left to articles 6 and 7 of the Convention, thus article 3 is simply a reference to article 6 for the illicit nature of export and to article 7 for the illicit nature of import.

In order to control the export of cultural property, Article 6 provides that: «The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property».

This article means that any export of cultural property, specifically designated as such by article 1, conducted without an export certificate from the State of origin is illicit.

The Convention does not want to impose to each Contracting State to police its borders.¹⁴⁴ The Convention has the aim to create a collaboration between source and market States, and it does not require them to implement a rigorous system of customs controls.

The real problem is that article 6 does not explicitly affirm that any import not accompanied by an export certificate from the State of origin is illicit. This

¹⁴² O'Keefe P., J., *Commentary on the 1970 UNESCO Convention*, Leicester, Institute of Art and Law, 2007, p. 41.

¹⁴³ Bator, P., M., *The International Trade in Art*, Chicago, University of Chicago Press, 1982, p. 377.

¹⁴⁴ Bator, P., M., *op. cit.*, pp. 329-330.

specification was included in the original draft of the Convention, but it was replaced by article 7 as proposed by the delegation of the United States of America, in order not to obstruct the art and antiquities market.¹⁴⁵

The compromise of the Convention was to establish a comprehensive export certification scheme but it leaves the import system opened to a variety of possible State interpretations and implementations, which undermine the effectiveness of the regime.¹⁴⁶

A limited import regime is described in article 7. Article 7 (a) defines the circumstances in which the illicit transfer of ownership of cultural property occurs: « [The States Parties undertake] to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States».

The article does not explicitly refer to the import of illicitly exported cultural property, but it merely prevents the acquisition of this material. The Convention refers only to «museums and similar institutions», while private individuals are not barred from importing and acquiring cultural property illicitly exported from the State of origin. Furthermore it does not require the Contracting States to introduce new national measures to prevent illicit acquisitions, but only to use the existing ones: the limitations which are present in each national legislation constitute a barrier to the effective protection.¹⁴⁷

Unlike article 7 (a), article 7 (b) (i) provides for illicit imports, imposing that: «[The States Parties undertake] to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the

¹⁴⁵ Abramson, R. – Huttler, S. *The legal response to illicit movement of cultural heritage*, in *Law and Policy in international business*, 1973 p. 951.

¹⁴⁶ Forrest, C., *op. cit.*, p. 178.

¹⁴⁷ *Ibidem* note 146.

States concerned, provided that such property is documented as appertaining to the inventory of that institution».

This article is really narrow in its application, because both it prohibits only «the import of cultural property stolen from a museum or a religious or secular public monument or similar institution», provided that such cultural property is listed in the inventory of the institution, and it is applicable only « after the entry into force of this Convention for the States concerned».¹⁴⁸

Article 7 (b) (ii) instead, declares that : «[The States Parties undertake] (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party».

As O’Keefe observed, this provision is very weak because it sums up the duties of the importing State only in one sentence, « [the importing State undertakes] to take appropriate steps to recover and return any such cultural property [...]», which «might simply amount to “advising the requesting State to take legal proceedings” or include granting customs the power to seize certain imported cultural property.»¹⁴⁹

The article drafts also the question of the compensation paid to the *bona fide* purchaser. This issue has been discussed because it can argue with the different approaches taken among the States, especially among common law and civil law ones. According to the article the importing State is obliged to take the above mentioned «appropriate steps», but the payment of the compensation instead, it is not compulsory and depends on the national law of the importing State. At the

¹⁴⁸ Forrest, C., op. cit., p. 178.

¹⁴⁹ O’ Keefe P., J., op. cit., p. 60.

beginning, these differences created many disputes, because some States did not provide for compensation. Since 1970 though, the purchaser's duty to diligently investigate the provenience and provenance of the cultural property has increased and this limited a lot the cases in which compensation should be paid.¹⁵⁰

Manlio Frigo underlines that the provisions of the article 7 are less severe than the ones proposed by the General Conference in the preliminary draft of the UNESCO Convention¹⁵¹. The article 7 (f)¹⁵² established that the seizure of an illicitly imported cultural object had to be followed by appropriate publicity and its return to the requesting state had to be completed within two years from the date of sequestration. The article 10 (d)¹⁵³ instead, drafted the possibility for the State parties of dispossessing for reasons of public utility and with an advance payment of fair compensation, corresponding to the purchase price paid by the bona fide purchaser, borne by the requesting state.

It is interesting to notice that the above mentioned dispositions of the preliminary draft are not present in the 1970 UNESCO Convention, because in the Final Report several States, notably the United States of America,¹⁵⁴ took position against the amend of the provisions concerning the property law.

The aim of the control of the movement of cultural property continues at the articles 8 and 9 of the Convention. The first one imposes penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under above mentioned articles 6 (b) and 7(b).

The second one decrees the adoption of emergency import and export bans whether the cultural heritage of a State party is seriously endangered by intense looting and pillage of archaeological and ethnological artefacts. In recent years the UNESCO

¹⁵⁰ O' Keefe P., J., op. cit., p. 60.

¹⁵¹ Frigo, M., op. cit., p. 266.

¹⁵² The preliminary draft of the 1970 UNESCO Convention, doc. SHC/MD/5, released on the 27th of February 1970, Annex III, p. 3.

¹⁵³ The preliminary draft of the 1970 UNESCO Convention, doc. SHC/MD/5, released on the 27th of February 1970, Annex III, p. 4.

¹⁵⁴ The preliminary draft of the 1970 UNESCO Convention, doc. SHC/MD/5, released on the 27th of February 1970, Annex III, pp. 4 - 8.

increased the numbers of emergency actions¹⁵⁵ in those States such as Iraq¹⁵⁶ and Syria¹⁵⁷. Lastly it is necessary to notice that, while the Convention is an important instrument for the foundation of an international framework for the protection of cultural property, its provisions are susceptible to «a myriad of interpretations».¹⁵⁸ The scholar Merryman argued that the Convention failed to establish a satisfactory regime to prevent and reduce the illicit trade in cultural property, because the compromises reached has done little to create stability.¹⁵⁹ This is because the Convention created an imbalance where the importing States were favored by imposing on the developing the exporting States onerous duties. The exporting States were not able to satisfy them, thus the illicit trade in cultural property has kept flourishing.¹⁶⁰

¹⁵⁵ «Cultural heritage sites around the world are increasingly becoming the collateral victims of both natural disasters and armed conflicts.[...] The Organization deploys field missions to assess damage and prepare for emergency by mobilizing international cooperation. This is done in keeping with UNESCO's conventions on the protection of both tangible and intangible heritage from hazards, including armed conflict and illicit trafficking» in *Threats to cultural heritage*, released by UNESCO press on the 25th of May 2012, «Cultural heritage sites around the world are increasingly becoming the collateral victims of both natural disasters and armed conflicts.[...] The Organization deploys field missions to assess damage and prepare for emergency by mobilizing international cooperation. This is done in keeping with UNESCO's conventions on the protection of both tangible and intangible heritage from hazards, including armed conflict and illicit trafficking.», in *Threats to cultural heritage*, released by UNESCO press on the 25th of May 2012, (cf. <http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/emergency-actions/>), last accessed on the 13th of May.

¹⁵⁶ «During the 1991 Gulf War, 3,000 known antiquities disappeared in Iraq. It's estimated that many thousands of other non-inventoried objects have been removed from ancient sites. At the same time, the number of artifacts for sale in London and New York increased in a marked measure. The spoliation of the Sennacherib Palace at Nineveh is particularly documented: the robbers broke bas-reliefs to carry them more easily. During the operations against Saddam Hussein, around 15,000 artifacts were robbed from the Baghdad Museum. Seven thousand were recovered: 2,000 in the USA, 250 in Switzerland, 100 by Italian Carabinieri, 2,000 were stopped in Jordan, others in Beirut and Switzerland while in transit to New York. But the statue of Entemena, King of Lagash (2,450 BC) has not been recovered to date. The Magistrate of the State of Delaware (USA) has restituted 25 cuneiform slabs to Iraq, from where they had been robbed. They were found in July 2010 by an art dealer in California. Several others processes of restitution are still ongoing», in *Illicit Trafficking of Cultural Property in Iraq*, 2016, (cf. <http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/emergency-actions/iraq/>), last accessed on the 13th of May.

¹⁵⁷ «The Syrian Directorate-General of Antiquities and Museums (DGAM) has recently reported a dramatic rise in illegal excavations of archaeological sites and looting of museums in Syria, which increases the threat of illicit trafficking of cultural property», in *Safeguarding Syrian Cultural Heritage*, 2016, (cf. <http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/>), last accessed on the 13th of May.

¹⁵⁸ Forrest, C., op. cit., p. 195.

¹⁵⁹ Merryman, J., H., *A licit international trade in cultural objects*, in *International Journal of Cultural Property*, 1995, pp. 13 ff..

¹⁶⁰ Abramson, R. - Huttler S., op cit, p. 949.

2.3 The 1995 UNIDROIT Convention

The 1970 UNESCO Convention was the first provision which addressed the problem of illicit trade in cultural goods from a public law perspective. In 1980's the UNESCO solicited the International Institute for the Unification of Private Law (UNIDROIT)¹⁶¹ the writing of two studies, the first in 1986¹⁶² and the second in 1988¹⁶³, in order to enhance the solutions to the most relevant issues of private law, which were present in the 1970 Convention, but had not a clear answer.

As a consequence of these first requests, UNESCO asked the UNIDROIT for the development of a uniform minimum body of private law rules for the international art trade able to complement the discipline also from a private law point of view.

On the 24th of June 1995 in Rome the Diplomatic Conference adopted the UNIDROIT Convention on stolen or illegally exported cultural objects and other international legal instruments on illicit trade, which entered into force on the 1st of July 1998.¹⁶⁴

The Convention aims to be a guide for the State parties, which are characterized by different legal systems, both common and civil law ones, where it is very hard to find consensus when there is a controversy concerning cultural property, even because every State has not only different private law rules, but also different definitions of cultural objects and disciplines concerning their import and export.¹⁶⁵

The Convention deals with the stolen or illegally exported cultural property, establishing rules granting both the return of the object to the real owner when it

¹⁶¹ «The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organization with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.», (cf. <https://www.unidroit.org/about-unidroit/overview>), last accessed on the 24th of May 2019.

¹⁶² Reichelt, G., *Etude demandée à UNIDROIT par l'UNESCO relativement à la protection internationale des biens culturels à la lumière notamment du projet de Convention d'UNIDROIT portant loi uniforme sur l'acquisition de bonne foi d'objets mobiliers corporels de 1974 et de la Convention de l'UNESCO de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels*, Etude LXX, doc. 1 in *Revue de Droit uniforme*, 1986.

¹⁶³ Reichelt, G., *La protection internationale des biens culturels: Deuxième étude- – Etude LXX, doc. 4* in *Revue de Droit uniforme*, 1988.

¹⁶⁴ In 2019 the contracting States of the 1995 UNIDROIT Convention are 46.

¹⁶⁵ Forrest, C., *The return, restitution and repatriation of movable cultural heritage*, in *International Law and the Protection of Cultural Heritage*, Abingdon, Routledge, 2010, p.196.

has been stolen and the return to the State of origin when it has been illegally exported.

According to Forrest, the third recital¹⁶⁶ identifies three beneficiaries of the Convention, which are the cultural objects, the community whose cultural property has to be protected and the importance of considering cultural property as a « [...] “property of all peoples” as all we make up one humanity».¹⁶⁷

Furthermore the fourth and fifth recital define the purpose of the Convention which are both «[the determination of the contracting states] to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,[...]»¹⁶⁸ and «[the determination of the contracting states] to facilitate the restitution and return of cultural objects».¹⁶⁹ And as a consequence of the 1995 Convention the States parties are let free to introduce further rules more conducive to restitution and return of cultural property.¹⁷⁰

It is very interesting and important to notice that these two purposes are followed by a realistic awareness which concludes the preamble to the Convention. The seventh recital states that the Convention « [...] will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance

¹⁶⁶ Third recital of the Preamble of the UNIDROIT Convention which was adopted in Rome on the 24th of June 1995 by the Diplomatic Conference. The Convention entered into force on the 1st of July 1998. In 2019 the contracting States are 46: « the States parties [...] are deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information, [...]».

¹⁶⁷ Forrest, C., op. cit., p. 198.

¹⁶⁸ Fourth recital of the Preamble of the UNIDROIT Convention which was adopted in Rome on the 24th of June 1995 by the Diplomatic Conference. The Convention entered into force on the 1st of July 1998. In 2019 the contracting States are 46.

¹⁶⁹ Fifth recital of the Preamble of the UNIDROIT Convention which was adopted in Rome on the 24th of June 1995 by the Diplomatic Conference. The Convention entered into force on the 1st of July 1998. In 2019 the contracting States are 46.

¹⁷⁰ Prott, L.V., *Problems of private international law for the protection of cultural heritage in les livres de poche de l' Académie de droit internationale de La Haye*, BRILL, 1989, p. 20.

international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges ».¹⁷¹

Chapter I of the Convention introduces its two main scopes which are the restitution of stolen cultural objects and the return of cultural objects which were illegally exported from a Contracting State.

In order to pursue its two scopes the article 2 of the Convention specifies that « [...] cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention».

The requirement that the cultural objects should be «specifically designated by each State» as contained in 1970 UNESCO Convention is omitted by UNIDROIT. The reason of this absence is due to the fact that the UNIDROIT Convention is intended to be applied to cultural property which is owned both by private dealers and corporation as well as States. This choice has been really criticized on the basis that the resulting definition of cultural object becomes too wide and as such could leave the purchasers of cultural objects exposed more frequently to claims for restitution.¹⁷²

The UNIDROIT Convention is addressed to all stolen cultural objects of an «international character». This is a huge difference from the 1970 UNESCO Convention which was restricted to cultural property which had to be stolen from a museum and similar institutions.¹⁷³ The introduction of the phrase «international character» was due to the request of a number of contracting States «[whishing] to ensure that the Convention did not impose on wholly internal matters».¹⁷⁴

Chapter II defines the discipline of the restitution of stolen cultural objects.

It aims to reunite the different approaches to property and negotiation which are present in civil law and common law legal systems. The Convention reconciles the

¹⁷¹ Seventh recital of the Preamble of the UNIDROIT Convention which was adopted in Rome on the 24th of June 1995 by the Diplomatic Conference. The Convention entered into force on the 1st of July 1998. In 2019 the contracting States are 46.

¹⁷² Valentin, P., *The UNIDROIT Convention on the International Return of Stolen or Illegally exported cultural objects*, in *Art Antiquity and Law*, v.4, 1999, p. 108.

¹⁷³ Article 7 (b) (i), 1970 UNESCO Convention: «to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution [...]».

¹⁷⁴ Prott, L.V., op. cit., p. 22.

common law principle of *nemo dat quod non habet*, thanks to which a thief or the subsequent possessor of a cultural object cannot acquire the ownership of a stolen object, and the civil law principle of *bona fide* purchaser, which recognizes the possibility of acquiring real property of the stolen cultural object, which is defensible against claims of the original owner.¹⁷⁵

The article 3 introduces the Chapter and, in its first paragraph, states that «the possessor of a cultural object which has been stolen shall return it». This article is an expression of the principle *nemo dat quod non habet* and it was chosen because the UNIDROIT considered it appropriate in all legal systems. The Convention wants to stress the importance of considering the uniqueness of a stolen cultural objects, by underlining the right to restitution of the original owner, because the loss cannot be compensated by an amount of financial compensation.¹⁷⁶

According to *nemo dat quod non habet* principle, the possessor is the person who owns the cultural object at the moment of its finding. The claimant instead, can be both a private person, a museum and a State.¹⁷⁷

The second paragraph of article 3 examines in depth when a cultural object can be considered stolen, declaring that «[...] a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place».

A typical example of dispute was when a State claimed the ownership of undiscovered and unexcavated cultural objects in that State, because such claims could not be always accepted by the court of an another State.

A famous¹⁷⁸ case was *Government of Peru v. Johnson*.¹⁷⁹ The Government of Peru pretended the restitution of some pre-Columbian artefacts because it affirmed they were illicitly excavated from an archaeological site, exported to the United States of America and then sold to the collector Benjamin Bishop Johnson, who declared that he bought them licitly from an antique dealer. The authorities of Peru, though,

¹⁷⁵ Van Gaalen, M. – Verhij, A., *The consequences for the Netherlands of the UNIDROIT Convention*, in *Art Antiquity and Law*, v.3, 1998, pp. 3-8.

¹⁷⁶ Prott, L.V., op. cit., p. 29.

¹⁷⁷ Schneider, M., *The UNIDROIT Convention on stolen illegally exported cultural objects*, in *Research Paper*, 1995, p. 7.

¹⁷⁸ Forrest, C., op. cit., p. 203.

¹⁷⁹ *Government of Peru v. Johnson* 720 F. Supp. 810 (Judgment of the United States District Court, Central District California, 1989).

were not able to demonstrate the burden of proving, that the cultural objects came from an archaeological site, located within the modern boundaries of Peru. Furthermore, the court also held Peru's national law imposed export restrictions, rather than an ownership law, because it allowed private individuals to possess, keep and sell antiquities, and the government never attempted to enforce its ownership rights over these cultural objects.

The article 3 defines also the procedure for claims which are subjected to time limitations. The general limit is fifty years after the theft and within three years of knowledge of the location of the object and identification of the possessor.¹⁸⁰

The owner, that can be a private or a State, has to bring the procedure for claims before the court of the country where the object is located at the moment of its finding.¹⁸¹

The primacy of the principle declared at article 3 (1) is reaffirmed in article 4 (5), which states that « [a] possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously». The article 4, as a matter of fact, provides also the possibility of compensation paid to the possessor of a stolen object where care was taken to avoid acquiring a stolen cultural object.¹⁸² The possessor has to demonstrate he «exercised due diligence when acquiring the object»¹⁸³, which involves « [...] all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances».¹⁸⁴

¹⁸⁰ Article 3 (3) of the UNIDROIT Convention: «Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft».

¹⁸¹ Article 3 (2) of the UNIDROIT Convention: «For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place».

¹⁸² Article 4 (1) of the UNIDROIT Convention: «The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object».

¹⁸³ Article 4 (1) of the UNIDROIT Convention.

¹⁸⁴ Article 4 (4) of the UNIDROIT Convention.

Chapter III defines the discipline of the return of illegally exported cultural objects. The Convention strives for introducing some clarity among all the different interpretations provided also by the 1970 UNESCO Convention concerning the return of an illegally exported cultural object. The UNIDROIT introduces a regime which allows the claimant to request the return of a cultural object illicitly exported from the territory of a contracting State. Finding a compromise was hard and because of this the issue of ownership and the issue of illicit export and import are separated inside the Convention. The Convention wants to ease the return of illicitly exported objects without necessarily determining who is the figure inside the State entitled to the possession of that cultural property, because the most important aspects are both the physical presence of the object on the territory of the exporting State and the refusal to give support to wrongful actions.¹⁸⁵

The article 5 (1), which opens Chapter III, states that «a Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State». The requirement that must be the contracting State rather than the owner that makes the request for the restitution is a very important aspect, because very often it can be the owner who illicitly export abroad a cultural object in order to enter into a more lucrative art and antiquities market.¹⁸⁶

The first paragraph does not impose the return of a cultural object, but it just declares that a State may request its return. The return though, will be granted only if the cultural object suits the definition provided by the article 2 of the Convention¹⁸⁷ and each exporting State has to define whether the export of cultural objects is illicit or not. Furthermore, when a cultural object was licitly exported, for a determined period of time, and it did not return to the exporting State, it is considered illicitly exported.¹⁸⁸

¹⁸⁵ Protz, L.V., *op. cit.*, p. 52.

¹⁸⁶ Forrest, C., *op. cit.*, p. 209.

¹⁸⁷ Article 2 of the UNIDROIT Convention: «[...] cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention».

¹⁸⁸ Article 5 (2) of the UNIDROIT Convention: «[...] a cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported».

The return of an illicitly exported object can be disposed only if « [...] the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:(a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State». ¹⁸⁹

It is very difficult explaining what does « object of significant cultural importance» mean, because it imposes to the requesting State a considerable burden of proof, which can be interpreted in so many different ways by the Court or other competent authority. ¹⁹⁰ The general expression provided by the Convention is an invitation for the contracting State to be more cautious when a dispute involves a cultural object, which has got not only an economical value, but mainly a moral and social one. ¹⁹¹

Chapter III imposes also that « Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article» ¹⁹²

Lastly the final article of the Chapter refers to the dispositions of compensation ¹⁹³ and of confirming evidence of the due diligence ¹⁹⁴, provided for the restitution of stolen cultural objects.

Article 6 (3) though, completes the discipline of compensation, declaring that «instead of compensation, and in agreement with the requesting State, the possessor

¹⁸⁹ Article 5 (3) of the UNIDROIT Convention.

¹⁹⁰ Forrest, C., op. cit., p. 210.

¹⁹¹ Valentin, P., op. cit., p. 110 f..

¹⁹² Article 5 (5) of the UNIDROIT Convention.

¹⁹³ Article 6 (1) of the UNIDROIT Convention: « The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported».

¹⁹⁴ Article 6 (2) of the UNIDROIT Convention: « In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State».

required to return the cultural object to that State, may decide: (a) to retain ownership of the object; or (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees».

This alternative discipline aims to ease the return of a cultural object, thanks to the meeting of the interest of the State of origin with the interest of the purchaser and his State of origin, to solve the dispute quickly by avoiding the seizing of the object itself. Moreover according to the article 7: «The provisions of this Chapter shall not apply where: (a) the export of a cultural object is no longer illegal at the time at which the return is requested; or (b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person».

Part of the doctrine considers the above mentioned disposition too general¹⁹⁵ and opened to many uncertain interpretations.¹⁹⁶

Another part of the doctrine has stressed that the aim of the Convention was not to allow a certain number of restitutions and returns of cultural goods, but preventing and fighting the illicit traffic of cultural property, by guiding the behaviors of the different actors inside the art market in order to show that if every States protects cultural property within its boundaries it will be easier to improve the international cooperation. This objective though was reached through compromises which could not satisfy all the internal necessities of the State Parties.¹⁹⁷

The UNIDROIT Convention has been really criticized because on the one hand the definition of cultural object provided by its article 2 is too wide, while on the other hand art and antiquities dealers think the Convention has limited their activity. But this second critique should not be heard, because the convention has simply

¹⁹⁵ Catelani, A., *L'azione di restituzione dei beni culturali trasferiti illecitamente all'estero*, in Catelani, A., Cattaneo, S. (eds.), *I beni e le attività culturali*, vol. XXXIII, *Trattato di Diritto Amministrativo*, Milano, CEDAM, 2002, pp. 230 ff.

¹⁹⁶ Caracciolo, I., *Analogie e differenze fra la Convenzione UNESCO del 1970 sui mezzi per vietare e prevenire il trasferimento illecito di proprietà del patrimonio culturale e la Convenzione UNIDROIT del 1995 sulla restituzione dei beni culturali rubati o illecitamente esportati*, in Paone P. (ed.), in *La protezione internazionale e la circolazione comunitaria dei beni culturali*, Napoli, Ed. Scientifica, 1998, p. 58.

¹⁹⁷ Rodinò, V., W., *La Convenzione UNIDROIT sui beni culturali rubati o illecitamente esportati*, in Francioni, F., Del Vecchio, A., De Caterini, P. (eds.), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, Giuffrè, 2000, pp. 103 ff.

achieved one of its scopes. The Convention wanted «to penalize those acquiring cultural objects who fail to make serious inquiries into their origins»¹⁹⁸, because «[its] success lies not with an increase of actions taken to return cultural object, but in changing practices of those in art and antiquities market is making greater efforts to check the provenance of cultural objects in circulation».¹⁹⁹

2.4 The role of UN Security Council Resolutions and of the 2017 Nicosia Convention

The international institutions believe that the coordination between legal systems and the development of common programs against the international traffic in cultural goods are an «essential necessity».²⁰⁰

In addition to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, in 1990 the United Nations adopted a *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*²⁰¹, which was against trafficking of cultural property. The Model Treaty was followed in 2000 by *The United Nations Convention against Transnational Organized Crime*²⁰², which is still the most important treaty of international criminal law.

Subsequently in 2011 the General Assembly, in its resolution 66/180, invoked the cooperation among the member States of the United Nations in order to fight more incisively the illicit traffic. Simultaneously the United Nations Economic and Social Council (UN-ECOSOC), in its resolutions 2010/19 and 2011/42, concerning the implementation of cooperation between the UNESCO and the INTERPOL, demanded the United Nations Office on Drugs and Crime (UNODC) to develop a

¹⁹⁸ Schneider, M., op. cit., p. 11.

¹⁹⁹ Prott, L.V., op. cit., p. 87.

²⁰⁰ Manes, V., *La circolazione illecita dei beni artistici e archeologici. Risposte penali ed extra-penali a confronto*, in *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato, internazionale*, Milano, Giuffrè, 2015, p. 103.

²⁰¹ VV.AA., United Nations Economic and Social Council, *The Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*, was adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1990, and welcomed by the General Assembly in its resolution 45/121.

²⁰² *The United Nations Convention against Transnational Organized Crime*, was adopted in Palermo by the General Assembly in its resolution 55/25 on the 15th of November 2000.

series of guidelines for the prevention and repression of illicit traffic in cultural property.²⁰³

These recommendations led to the constitution of an international group, better known as *The Expert Group on the protection against trafficking in cultural property*, which was charged by the Commission on Crime Prevention and Criminal Justice (CCPCJ) with the duty of drafting the guidelines demanded to the UNODC. Defining a series of guidelines is clearly a soft law instrument, which pursues a scope of integration between administrative and criminal law actions in order to improve the prevention of traffic.²⁰⁴

On the 18th of December 2014, the General Assembly, with the resolution 69/196, adopted *The International Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property and other related offences*. Another relevant effort for facilitating the cooperation of international criminal law systems was represented by the European Convention on *Offences relating to Cultural Property*, adopted in Delphi by the Council of Europe on the 26th of June 1985.²⁰⁵ The Convention in its article 3(1) lists, according to the Annex III, which are the actions and omissions constituting offenses against cultural property.²⁰⁶

The agreement though, never entered into force, because it was not ratified by the requested minimum number of States.

After this first failure, the Council of Europe adopted a new Convention on offences related to cultural property, which was adopted on the 19th may 2017 in Nicosia during an international summit. The scope²⁰⁷ of the Convention is finding a

²⁰³ Castañeda de la Mora, C., *The work of the United Nations Office on Drugs and Crime in the area of illicit trafficking in cultural goods*, in Manacorda, S., Visconti, A. (eds.), *Beni culturali e Sistema penale*, Milano, Vita e pensiero, 2013, p. 14.

²⁰⁴ Visconti, A., *Le prospettive internazionali di tutela penale: strategie sanzionatorie e politiche criminali*, in *Beni culturali e Sistema penale*, Milano, Vita e pensiero, 2013, p. 143.

²⁰⁵ European Treaty System n.119, adopted on the 26th of June 1985 by the European Council.

²⁰⁶ The first paragraph of Annex III, of the 1985 the European Convention on Offences relating to Cultural Property, «(a) Thefts of cultural property, (b) Appropriating cultural property with violence or menace, (c) Receiving of cultural property where the original offence is listed in this paragraph and regardless of the place where the latter was committed».

²⁰⁷ Article 1 (1) of Nicosia Convention: «The purpose of this Convention is to: (a) prevent and combat the destruction of, damage to, and trafficking of cultural property by providing for the criminalization of certain acts; (b) strengthen crime prevention and the criminal justice response to all criminal offences relating to cultural property; (c) promote national and international cooperation in combating criminal offences relating to cultural property; and thereby protect cultural property».

compromise between the international legal systems in order to develop a common strategy of prevention and repression of the illicit traffic in cultural property.²⁰⁸

The intergovernmental Commission, which elaborated the text of the Nicosia Convention, aimed to overcome all the limits which impeded the adoption of the 1985 Convention, such as the irregular definitions of criminal offences concerning the traffic in cultural property, which characterize the international criminal law systems.²⁰⁹

The primary cause of these uneven provisions is the way the illicit traffic in cultural objects is perceived inside Source States, which typically export cultural property, and Market States, whose role is importing cultural objects.²¹⁰ While some offences, such as the looting and the damage, are considered deserving criminal sanctions, many others, instead, for examples the import, the excavations and the purchase of cultural property, are not regarded as actions of criminal value by the Market States.²¹¹

All these differences considered, the Convention has granted to the signatory States the possibility of punishing determined offences to cultural property applying non - criminal sanctions rather than criminal ones.²¹² Article 14 of the Convention clarifies the main role of criminal law for the repression and prevention of criminal offences to cultural property and drafts the possibility of applying non-criminal sanctions as a mere exception.

²⁰⁸ D'Agostino L., *Dalla Vittoria di Nicosia alla "navetta" legislativa: i nuovi orizzonti normativi nel contrasto ai traffici illeciti di beni culturali*, in *Diritto Penale Contemporaneo*, Milano, Università degli studi di Milano, 2018, p. 81 ff..

²⁰⁹ *Ibidem* note 208.

²¹⁰ Merryman, J. H., *op. cit.*, p. 831.

²¹¹ D'Agostino L., *op. cit.*, p. 82.

²¹² Article 14 paragraph (2), (3) and (4) of Nicosia Convention: 14 (2), «Each Party shall ensure that legal persons held liable in accordance with Article 13 of this Convention are subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal monetary sanctions, and could include other measures, such as: (a) temporary or permanent disqualification from exercising commercial activity; (b) exclusion from entitlement to public benefits or aid; (c) placing under judicial supervision; (d) a judicial winding-up order»; 14 (3), «Each Party shall take the necessary legislative and other measures, in accordance with domestic law, to permit seizure and confiscation of the: (a) instrumentalities used to commit criminal offences referred to in this Convention; (b) proceeds derived from such offences, or property whose value corresponds to such proceeds»; 14 (4), «Each Party shall, where cultural property has been seized in the course of criminal proceedings but is no longer required for the purposes of these proceedings, undertake to apply, where appropriate, its criminal procedural law, other domestic law or applicable international treaties when deciding to hand over that property to the State that had specifically designated, classified or defined it as cultural property in accordance with Article 2 of this Convention».

Chapter II of the Convention, titled «Substantive Criminal Law», begins with article 3, concerning thefts and other form of unlawful appropriation, which declares that «Each Party shall ensure that the offence of theft and other forms of unlawful appropriation as set out in their domestic criminal law apply to movable cultural property». The expression «movable cultural property», which refers to the eleventh categories outlined in article 2 (2)²¹³, is very wide in order to ease the international cooperation for the return of cultural objects illicitly stolen.²¹⁴ The following article 4, in its first paragraph, drafts the discipline of criminal sanctions related to the excavation and the illicit removal of cultural objects²¹⁵. The article aims to strengthen and worsen the sanctions related to the types of offences committed by the treasures hunters inside the Source States, which represent the initial phase of the illicit traffic in cultural property. It is very interesting to underline that, the second paragraph of article 4 states: « Any [signatory] State may [...] declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct described in paragraph 1 of this article».

²¹³Article 2 (2) of Nicosia Convention: «For the purposes of this Convention the term “cultural property” shall mean: in respect of movable property, any object, situated on land or underwater or removed therefrom, which is, on religious or secular grounds, classified, defined or specifically designated by any Party to this Convention or to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as being of importance for archaeology, prehistory, ethnology, history, literature, art or science, and which belongs to the following categories: (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history [...]; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old [...]; (f) objects of ethnological interest; (g) property of artistic interest [...]; (h) rare manuscripts and incunabula, old books, documents and publications of special interest [...] singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives [...]; (k) articles of furniture more than one hundred years old and old musical instruments; [...]».

²¹⁴D'Agostino L., *op. cit.*, p. 82.

²¹⁵Article 4 (1) of Nicosia Convention: «Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally: (a) the excavation on land or under water in order to find and remove cultural property without the authorization required by the law of the State where the excavation took place; (b) the removal and retention of movable cultural property excavated without the authorization required by the law of the State where the excavation took place; (c) the unlawful retention of movable cultural property excavated in compliance with the authorization required by the law of the State where the excavation took place».

The authorization of article 4 (2) is repeated also in article 5 (2)²¹⁶, which provides the sanctions concerning the criminal offences related to the «illegal importation» of cultural objects which might have been « stolen in another State, [...] excavated or retained [...] or [...] exported in violation of the law of the State that has classified, defined or specifically designated such cultural property [...]». Moreover in order to apply this article, the importation of cultural property, which is prohibited according to the domestic law of the signatory State where the violation took place, had to be committed intentionally.²¹⁷

Whether finding a common discipline for the offences related to the looting, illicit excavations and illegal import was very complex, outlining criminal sanctions concerning the illegal export (article 6) and acquisition (article 7) of cultural objects instead, was easier.²¹⁸

The discipline of criminal sanctions for the illegal exportation and acquisition of cultural property meet the necessity of the signatory States of both punishing the removal of cultural objects from the State of origin and avoiding their purchase inside the «grey market».²¹⁹

The exportation, committed intentionally, represents a criminal offence when it «[...] is prohibited, carried out without authorization pursuant to [the] domestic law [of the signatory State],[...]»²²⁰, while the acquisition constitutes a criminal offence when the cultural object «has been stolen [...] or has been excavated, imported or exported [violating the provisions of the State of origin]»²²¹ and the person, who acquired, it knew²²² or should have known of such unlawful provenance.²²³

²¹⁶ Article 5 (2) of Nicosia Convention « Any [signatory] State may [...] declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct described in paragraph 1 of this article».

²¹⁷ Article 5 (1) of Nicosia Convention.

²¹⁸ D'Agostino L., op. cit., pp. 82-83.

²¹⁹ Mackenzie, S.-Yates, D., op. cit., pp. 70 ff..

²²⁰ Article 6 (1) of Nicosia Convention.

²²¹ Article 7(1) of Nicosia Convention.

²²² Article 7 (1) of Nicosia Convention.

²²³ Article 7 (2) of Nicosia Convention: « Each Party shall consider taking the necessary measures to ensure that the conduct described in paragraph 1 of the present article constitutes a criminal offence also in the case of a person who should have known of the cultural property's unlawful provenance if he or she had exercised due care and attention in acquiring the cultural property».

The same dispositions of article 7 are applied also in article 8 concerning the act of placing on the market an illicitly removed cultural object.²²⁴

Lastly the most important innovation²²⁵ of the 2017 Nicosia Convention is represented by its article 13, concerning the liability of legal persons: «[...] 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 person [...]».

According to the first paragraph, for the individual offender to be held responsible should have a leading position based on «power of representation of the legal person», «an authority to take decisions on behalf of the legal person» and «an authority to exercise control within the legal person». Furthermore the liability of the legal person have to be ensured also when the criminal offence was the consequence of « [a] the lack of supervision or control»²²⁶ by a person with a leading position.

Furthermore the third and fourth paragraph of the article 13 provides that each signatory State is free of defining the liability of the legal entity as criminal, civil or administrative²²⁷, but the application of such sanctions on the legal entity has not to create any prejudice to the criminal liability of the author of the offence.²²⁸

224 Article 8 paragraph (1) and (2) of Nicosia Convention: (1) «Each Party shall ensure that the placing on the market of movable cultural property that has been stolen [...] or has been excavated, imported or exported [...] constitutes a criminal offence under its domestic law where the person knows of such unlawful provenance»; (2) «Each Party shall consider taking the necessary measures to ensure that the conduct described in paragraph 1 of this article constitutes a criminal offence also in the case of a person who should have known of the cultural property's unlawful provenance if he or she had exercised due care and attention in placing the cultural property on the market».

²²⁵ D'Agostino L., op. cit., p. 83.

²²⁶ Article 13 (2) of Nicosia Convention: « [...] each Party shall ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 of the present article has made possible the commission of a criminal offence referred to in this Convention for the benefit of that legal person by a natural person acting under its authority».

²²⁷ Article 13 (3) of Nicosia Convention: « Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative».

²²⁸ Article 13 (4) of Nicosia Convention: « Such liability shall be without prejudice to the criminal liability of a natural person who has committed the offence».

The Nicosia Convention should be considered as an important tool for the unification of standards in the field of domestic criminal regulations introduced to protect «cultural property».²²⁹

As the doctrine has suggested «[...] The convention complements other, already existing multilateral treaties directed both towards economic and political interests of State Parties in preserving their “cultural property”, as well as towards strengthening the legitimate interest of the world community in gaining the widest possible access to culture and cultural heritage».²³⁰

The Nicosia Convention seems to attempt to merge the contradictory aspects of the protection of cultural heritage: it penetrates the domain of the States and let them free to establish their own legal provisions, which must be compatible with the general framework given by the Nicosia Convention.²³¹

In the end it is interesting to underline that the Nicosia Convention «[...] creates the opportunity to build a real system of international standards while respecting national differences in the development of cultural policies»²³² and «[...] has to be valued also for making an important contribution toward directing significant global attention to the common task of culture heritage preservation and protection».²³³

3. The European legal background to the New EU Regulation

The process of the European integration has been always characterized by the aim of the adoption of common dispositions able to reduce the differences among the national legislations and to improve the cooperation between the States.

As is common knowledge, the European Economic Community (E.E.C.)²³⁴ was structured as a supranational organization for the pursuit of specific economic objectives, which lead to the creation of an area of free trade founded on the four

²²⁹ Bieczyński, M., M., *The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property*, in *Santander Art And Culture Law Review*, 2017, 2/2017 (3), pp. 255-274..

²³⁰ Ibi note 229, p. 274.

²³¹ D'Agostino L., op. cit., p. 83.

²³² Bieczyński, M., M., op. cit., p. 274.

²³³ Bieczyński, M., M., op. cit., p. 274.

²³⁴ The Treaty of Rome brought about the creation of the European Economic Community (E.E.C). It was signed in Rome on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany and came into force on 1 January 1958.

fundamental freedoms, which are the free circulation of people, services, goods and stocks.

The authors of the Treaty of Rome wanted to create a dynamic territorial entity able to strengthen the union among the European peoples.

After the creation of a single European market, the competencies of the Community increased and reached many different branches of the social life that in the past were considered only inside the national legislations.²³⁵

The branch of cultural property is one of them. Communitarian legislators' interest for cultural goods has recently grown and has started a process of harmonization of the national legislations, which is still characterized by some strong resistances perpetrated by the Member States.²³⁶

This is one of the reasons why it does not exist yet a European definition of «cultural good», but only many sectorial legislations.²³⁷

The 1957 Treaty of Rome did not provide any disposition concerning the protection and circulation of cultural goods. Only in the article 36²³⁸ of Treaty is underlined the «exceptionality» of cultural goods, which might require some restrictions to the free circulation. The article 36, recognizing the lawfulness of the restrictions on imports, exports and transit of cultural property, affirms the primacy of their artistic value over their commercial value²³⁹ and qualifies them as goods, which are subject to economic evaluation, but which are mainly «expression of the civilization which produced them».²⁴⁰

At the beginning the Member States decided to continue to protect their cultural heritage within their boundaries, because competent European authorities were not instituted.²⁴¹

²³⁵ Tamiozzo, R., *La legislazione dei beni culturali e paesaggistici*, Milano, Giuffrè, 2009, pp. 284-302.

²³⁶ Ainis, M. – Fiorillo, M., *L'ordinamento della cultura: Manuale di legislazione dei beni culturali*, Milano, Giuffrè, 2015, pp. 255-268.

²³⁷ Ibidem note 236.

²³⁸ Article 36 of the Treaty of Rome: «The provisions of articles 28 to 29 inclusive shall be without prejudice to any prohibitions or restrictions on imports, exports and transit which are justified by reasons of [...] protection of the artistic, historical or national archaeological heritage, or protection of industrial and commercial property. However, such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States».

²³⁹ Pasquali, M., *Il diritto d'Europa*, Napoli, Edizione scientifica, 2004, p. 173

²⁴⁰ Papa, A., *Strumenti e procedimenti della valorizzazione del patrimonio culturale. Ruolo dei livelli di governo e promozione delle identità*, Napoli, Edizione scientifica, 2006, p. 83.

²⁴¹ Tamiozzo, R., op.cit..

Subsequently in the Treaty on the Functioning of the European Union (T.F.E.U.)²⁴² in its article 167 introduced fundamental dispositions. On the one hand the first paragraph still recognizes « [the] national and regional diversity [of the Member States]» but on the other hand aims to « [bring] the common cultural heritage to the fore». Furthermore the second paragraph states that «Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: [...] conservation and safeguarding of cultural heritage of European significance».

This openness to the protection of cultural property led to a creation of a common discipline for the export of cultural property which is represented by the Regulation N. 116/2009²⁴³ *on the export of cultural goods*, the Directive 97/7/EC²⁴⁴ *on the protection of consumers in respect of distance contracts* and the Directive 2014/60/EU²⁴⁵ *on the return of cultural objects unlawfully removed from the territory of a Member State*. Concerning the import and transfer of ownership of cultural property, there are the Regulation N. 952/2013²⁴⁶, which lays down *the European Union Customs Code*, and two specific measures which are the Regulation N. 1210/2003²⁴⁷ *concerning certain specific restrictions on the economic and financial relations with Iraq* and the Regulation N. 1332/2013²⁴⁸ *concerning restrictive measures in view of the situation in Syria*. These two have been, till very recently, the only one EU examples which establish restrictive

²⁴² The TFEU was initially the treaty establishing the European Economic Community (the EEC treaty), signed in Rome on 25 March 1957. On 7 February 1992, the Maastricht treaty, which led to the formation of the European Union, saw the EEC Treaty renamed as the Treaty establishing the European Community (TEC) and renumbered. Following the 2005 referenda, on 13 December 2007 the Lisbon treaty was signed. This saw the 'TEC' renamed as the Treaty on the Functioning of the European Union (TFEU) and, once again, renumbered.

²⁴³ Council Regulation (EC) N. 116/2009 of 18th December 2008 on the export of cultural goods.

²⁴⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

²⁴⁵ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012.

²⁴⁶ Regulation (EU) N. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code

²⁴⁷ Council Regulation (EC) N. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) N. 2465/96.

²⁴⁸ Council Regulation (EU) N. 1332/2013 of 13 December 2013 amending Regulation (EU) N. 36/2012 concerning restrictive measures in view of the situation in Syria.

provisions concerning the illegal import of cultural property, and are still currently the only one in force.

3.1 Regulation N. 1210/2003 concerning certain specific restrictions on the economic and financial relations with Iraq

The Council of the European Union, further to the United Nations Security Council Resolution 661/1990, concerning the situation in Iraq and Kuwait, and the Resolution 986/1995 which authorized the import of petroleum and petroleum products originating in Iraq, as a temporary measure to provide for humanitarian needs of the Iraqi people, imposed a general embargo²⁴⁹ on trade with Iraq. The article 3 of the Regulation is focused on the trade in cultural property, and it declares that the import, the introduction into the territory of the Member States, the export, the removal from the Member States and the purchase of cultural objects are prohibited. Article 3 (1) (c) offers a clear definition of what is a cultural object for this Regulation: « [a cultural object is an] Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance [...] if they have been illegally removed from locations in Iraq, in particular, if: (i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries' conservation collection, or the inventories of Iraqi religious institutions, or (ii) there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq's laws and regulations».

Furthermore the article 3 (2) also specifies that, if cultural objects were exported from Iraq before the 6th of August 1990²⁵⁰ or they are being returned to Iraqi institutions in accordance with the seventh paragraph of the United Nations Security Council Resolution 1483/2003²⁵¹, the prohibitions provided by article 3 (1) must not be applied.

²⁴⁹ «a legal prohibition on commerce», (cf. <https://www.merriam-webster.com/dictionary/embargo>), last accessed on the 26th May 2019.

²⁵⁰ The day of the adoption of the United Nations Security Council Resolution 661/1990, concerning the situation in Iraq and Kuwait.

²⁵¹ Resolution n. 1483/2003 Adopted by the United Nation Security Council at its 4761st meeting, on 22nd of May 2003 and concerning the situation in Iraq and Kuwait.

Finally in order to grant a safe protection of cultural property both the European Commission is empowered to amend the Annex II of the Regulation, which lists the different categories of cultural objects²⁵² and «the Member States shall lay down the rules on sanctions applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The sanctions provided for must be effective, proportionate and dissuasive».²⁵³

3.2 Regulation N. 1332/2013 amending Regulation (EU) N. 36/2012 concerning restrictive measures in view of the situation in Syria

On the 13th of December 2013 the Council of European Union, in order to facilitate the return of cultural property to their State of origin and the development of a common discipline for the fight against illicit traffic in cultural heritage, amended the Regulation (EU) N. 36/2012, by the adoption of the Regulation N. 1332/2013 which introduces the article 11 which statutes that it is prohibited to import, export, transfer «[...]of, Syrian cultural property goods and other goods of archaeological, historical, cultural, rare scientific or religious importance, [...] where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law, in particular if the goods form an integral part of either the public collections listed in the inventories of the conservation collections of Syrian museums, archives or libraries, or the inventories of Syrian religious institutions».²⁵⁴ Lastly the article 11 (2) repeats the provision of the article 3 (2) of the Regulation N. 1210/2003, and declares that the provision of the first paragraph of the article 11 must not be applied if the cultural objects were exported from Syria prior to 9 May 2011²⁵⁵ or they are being safely returned to their legitimate owners in Syria.

²⁵² Article 11 of the Regulation N. 1210/2003: « The Commission shall be empowered to: (a) amend Annex II as necessary; [...]».

²⁵³ Article 15 (1) of the Regulation N. 1210/2003.

²⁵⁴ Article 1 (4) of the of the Regulation N. 1332/2013.

²⁵⁵ The day of the adoption of Regulation (EU) N. 36/2012 concerning restrictive measures in view of the situation in Syria.

CHAPTER II:
**The Regulation of the European Parliament and of the
Council on the import of cultural goods**

1.1 Subject matter and scope

On the 17th of April 2019 the European Parliament and the Council of the European Union, acting in accordance of the ordinary legislative procedure²⁵⁶, adopted the Regulation on the Introduction and Import of cultural goods.²⁵⁷

On the 7th of June 2019 the Regulation 2019/880 has been published in the L. 151 of the Official Journal of the European Union²⁵⁸ and, according to its article 15²⁵⁹, it will entry into force on the 27th of June 2019.

The amendments provided by the European Parliament on the 12th of March 2019 have been confirmed and now the Recital and the text of the Regulation have corrected some of the flaws of the first 2017 Proposal clarifying better what are its objects and scope.

By and large the New European Regulation contemplates different measures which can be summed up under five key-points.

- I. Establish a common definition for «cultural goods» at import.

The Annex to the Regulation has pinpointed three different sections of cultural goods, named Part A, B and C, in order to underline that each category of cultural objects is subjected to different legal provisions and duties.²⁶⁰

- II. Ensure importers exercise diligence when importing cultural goods from Third Countries.

- III. Determine common standards to certify the cultural goods are legal.

The Regulation introduces a brand new system for Importer Licenses and Importer Statements, which will be supported by the creation of a centralized electronic

²⁵⁶ Position of the European Parliament of the 12th of March 2019 [P8_TA-PROV(2019)0154] , which is not yet published in the Official Journal, and decision of the Council of the European Union on the 9th of April 2019 [ST 8375 2019 INIT].

²⁵⁷ PE-CONS 82/1/18 REV 1 approved on the 17th April 2019 by the European Parliament and the Council of the European Union.

²⁵⁸ The Regulation (EU) n. 2019/880 of the European Parliament and of the Council on the import of cultural goods is published in the L. 151 of the Official Journal of the European Union, pp. 1-14.

²⁵⁹ Article 15 of the Regulation n. 2019/880: «This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*».

²⁶⁰ PE-CONS 82/1/18 REV 1 final ANNEX 1 approved on 17th April 2019.

system helping the archiving and the exchange of information between the authorities of the Member States.

IV. Provide for effective deterrents to trafficking.

The new rules order the Importer Statement, that is a signed document which ensures a cultural good has been legally exported from a Third Country. The Importer Statement shall be connected to a standardised document describing the cultural good in question in order to be identified by the customs authorities.

The Regulation should help Custom Offices seize cultural goods, when they cannot verify and the importer cannot demonstrate the goods have been legally exported.

Article 1 of the Regulation establishes the subject matter and the scope of its introduction. The first paragraph describes the regulation as a new tool to control «[...] the introduction of cultural goods and the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity's cultural heritage and preventing the illicit trade in cultural goods, in particular where such illicit trade could contribute to terrorist financing».

The aim of the first paragraph is illustrated in the third Recital of the Preamble of the Regulation: «Cultural goods are a part of cultural heritage and are often of major cultural, artistic, historical and scientific importance. Cultural heritage constitutes one of the basic elements of civilization having, *inter alia*, symbolic value, and forming part of the cultural memory of humankind. It enriches the cultural life of all peoples and unites people through shared memory, knowledge and development of civilization. *It should therefore be protected from unlawful appropriation and pillage.* Pillaging of archaeological sites has always happened, but has now reached an industrial scale and, together with trade in illegally excavated cultural goods, is a serious crime that causes significant suffering to those directly or indirectly affected. The illicit trade in cultural goods in many cases contributes to forceful cultural homogenization or forceful loss of cultural identity, while the pillage of cultural goods leads, *inter alia*, to the disintegration of cultures. As long as it is possible to engage in lucrative trade in illegally excavated cultural goods and to profit therefrom without any notable risk, such excavations and pillaging will continue. Due to the economic and artistic value of cultural goods they are in high demand on the international market. The absence of strong international legal

measures and the ineffective enforcement of any measures that do exist, lead to the transfer of such goods to the shadow economy. The Union should accordingly prohibit the introduction into the customs territory of the Union of cultural goods unlawfully exported from third countries, with particular emphasis on cultural goods from third countries affected by armed conflict, in particular where such cultural goods have been illicitly traded by terrorist or other criminal organizations. While that general prohibition should not entail systematic controls, Member States should be allowed to intervene when receiving intelligence regarding suspicious shipments and to take all appropriate measures to intercept illicitly exported cultural goods».

Article 1 (2), instead, defines what is the boundary of the new Regulation stating that «[it] does not apply to cultural goods which were either created or discovered in the customs territory of the Union». The main reason of this choice is the fact the protection of cultural property of the Member States is already contemplated by Council Regulation (EC) N. 116/2009²⁶¹ and the Directive 2014/60/EU of the European Parliament and Council²⁶². Furthermore the fifth Recital declares that the non-Union cultural goods entering the European Union should be treated following the rules of the Union inside its customs territory, which «[...] should be the customs territory of the Union at the time of import».²⁶³

1.2 The importance of common definitions of «cultural goods»

Prior to analyzing the most relevant dispositions of the Regulation it is compulsory to focus on which are the categories of cultural goods covered by this new legal instrument. Article 2 (1) declares that «[...] 'cultural goods' means any item which is of importance for archaeology, prehistory, history, literature, art or science as listed in the Annex;[...]». The final Annex of the Regulation can be divided into two sectors: the first one, which is composed by Part A of the Annex, lists the

²⁶¹ Council Regulation (EC) N. 116/2009 of 18th December 2008 on the export of cultural goods (OJ L 39, 10.2.2009, p. 1).

²⁶² Directive 2014/60/EU of the European Parliament and of the Council of the European Union of 15th May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (OJ L 159, 28.5.2014, p. 1).

²⁶³ Fifth recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of the European Union.

twelve categories of cultural objects, whose import into the European Union is strictly forbidden in cases of cultural objects «[...] were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country [...]»²⁶⁴; the second one, including its Part B and C, lists the categories of cultural goods, which have to be subjected to the new system of Import licenses²⁶⁵ and Importer statements.²⁶⁶ The content of each categories is based on the definitions used in the 1970 UNESCO Convention *on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and the 1995 UNIDROIT Convention *on Stolen or Illegally Exported Cultural Objects*, because the Member States and many Third Countries are familiar with them.²⁶⁷

The *ensemble* of objects included in the Annex is extremely broad and includes archeological finds, remains of historical monuments, works of art, liturgical icons²⁶⁸ antiquarian books and manuscripts.

In addition to these, the Regulation has introduced further criteria which are «[...] (1) an age threshold of more than 250 years old for certain archaeological finds and dismembered elements of artistic or historical monuments and (2) an age threshold of more than 200 years old plus a minimum financial value of EUR 18,000 or more per item [below which they can continue to be freely imported into the EU]».²⁶⁹

²⁶⁴ Article 3 (1) of the Regulation n.: «The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited».

²⁶⁵ Article 4 (1) of the Regulation n. 2019/880: «The import of cultural goods listed in Part B of the Annex [...] shall require an import license».

²⁶⁶ Article 5 (1) of the Regulation n. 2019/880: «The import of the cultural goods listed in Part C of the Annex shall require an importer statement».

²⁶⁷ Seventh recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe.

²⁶⁸ Thirteenth Recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe: « An icon is any representation of a religious figure or a religious event. It can be produced in various media and sizes and can be monumental or portable. In cases where an icon was once part, for example, of the interior of a church, a monastery, a chapel, either free-standing or as part of architectural furniture, for example an iconostasis or icon stand, it is a vital and inseparable part of divine worship and liturgical life, and should be considered as forming an integral part of a religious monument which has been dismembered. Even in cases where the specific monument that the icon belonged to is unknown, but where there is evidence that it once formed an integral part of a monument, in particular when there are signs or elements present which indicate that it was once part of an iconostasis or an icon stand, the icon should still be covered by the category 'elements of artistic or historical monuments or archaeological sites which have been dismembered' listed in the Annex».

²⁶⁹ Gould, E., *The EU's parting gift to the UK art market?*, in *Institute of Art and Law online*, 2019, (cf. <https://ial.uk.com/publications/art-antiquity-and-law/>), last accessed on the 3rd of June

The only categories which are not covered by the additional criteria of the financial value are: «(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered».²⁷⁰

The above mentioned additional criteria are considered a serious risk of undermining the stated purposes of the Regulation. The time limit of 250 years old is very ambiguous, because it could both include cultural objects which are not at risk, and leave out cultural property at risk that is less than 250 years old from regions, such as e.g. West Africa.²⁷¹ Luigi Morgano, who is a Member of the European Parliament for the Italian Democratic Party (PD) and the shadow rapporteur of the Regulation for the Socialists and Democrats Group inside the Culture Commission, has revealed that he proposed the lowering of the threshold age from 250 years old to 100 years old. But nevertheless his proposal has been initially accepted by his Commission, on the 12th of March 2019 the European Parliament and the International Trademark Association (INTA)²⁷² rejected it, because they wanted to promote a regulation which eases the customs inspections, but does not hinder the licit art market.²⁷³

In support to the above mentioned proposal, the International Council of Museums (ICOM) has suggested the Council of the European Union that it had to target only cultural property, which is effectively at risk, and not comprising the totality of cultural objects. The reason of this proposition is deeply connected with the mission of ICOM, which has been publishing, since the year 2000, «Red Lists»²⁷⁴

²⁷⁰ PE-CONS 82/1/18 REV 1 final ANNEX 1 approved on 17th April 2019.

²⁷¹ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

²⁷² «INTA is a global association of trademark owners and professionals dedicated to supporting trademarks and related intellectual property in order to protect consumers and to promote fair and effective commerce», (cf. <https://euagenda.eu/organisers/international-trademark-association-inta>), last accessed on the 4th of June 2019.

²⁷³ Redazione AGCult, *Nuovo regolamento Ue su importazione beni culturali, Morgano (Pd): più trasparenza*, in *AGCult online*, 2019, (cf. <https://agcult.it/a/6900/2019-03-20/nuovo-regolamento-ue-su-importazione-beni-culturali-morgano-pd-piu-trasparenza>), last accessed on the 4th of June 2019.

²⁷⁴ «Red Lists present the categories of cultural objects that can be subjected to theft and traffic. They help individuals, organizations and authorities, such as police or customs officials, identify objects at risk and prevent them from being illegally sold or exported», (cf.

presenting the cultural objects most vulnerable to looting and illegal traffic. The «Red Lists» aim to facilitate the scientific collaboration of national and international experts, in order to reach also the most vulnerable areas of the world in terms of illicit trafficking of cultural property. The result of these studies has revealed that loads of the cultural objects, in need of enhanced protection, are less than 250 years old and many of them, which are more than 250 years old are not being illicitly trafficked.²⁷⁵

1.3 Introduction and Import of cultural goods

Article 2 of the Regulation makes a distinction of the terms introduction and import of cultural goods. The paragraph 2 declares « ‘introduction of cultural goods’ means any entry into the customs territory of the Union of cultural goods which are subject to customs supervision or customs control within the customs territory of the Union in accordance with Regulation (EU) No 952/2013²⁷⁶», while the paragraph 3 states «'import of cultural goods' means: (a) the release of cultural goods for free circulation as referred to in Article 201²⁷⁷ of Regulation (EU) No 952/2013; or (b) the placing of cultural goods under one of the following categories of special procedures referred to in Article 210²⁷⁸ of Regulation (EU) No 952/2013».

After these specifications, Article 3 identifies whether a cultural object, coming from a Third Country, is prohibited to be introduced into the customs territory of

<https://icom.museum/en/activities/heritage-protection/red-lists/>), last accessed on the 3rd of June 2019.

²⁷⁵ Red Lists Database, (cf. <https://icom.museum/en/resources/red-lists/>), last accessed on the 3rd of June 2019.

²⁷⁶ Regulation (EU) N. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

²⁷⁷ Article 201 of Regulation (EU) N. 952/2013 : «(1) Non-Union goods intended to be put on the Union market or intended for private use or consumption within the customs territory of the Union shall be placed under release for free circulation. (2) Release for free circulation shall entail the following: (a) the collection of any import duty due; (b) the collection, as appropriate, of other charges, as provided for under relevant provisions in force relating to the collection of those charges; (c) the application of commercial policy measures and prohibitions and restrictions insofar as they do not have to be applied at an earlier stage; and (d) completion of the other formalities laid down in respect of the import of the goods. (3) Release for free circulation shall confer on non-Union goods the customs status of Union goods».

²⁷⁸ Article 210 of Regulation (EU) N. 952/2013: « Goods may be placed under any of the following categories of special procedures: (a) transit, which shall comprise external and internal transit; (b) storage, which shall comprise customs warehousing and free zones; (c) specific use, which shall comprise temporary admission and end-use; (d) processing, which shall comprise inward and outward processing».

the European Union or it is allowed to be imported in exchange for the presentation of an import license²⁷⁹ or an importer statement.²⁸⁰

Article 3 (1) expresses the general principle according to which, the introduction of cultural objects, listed in the Part A of the Annex²⁸¹ « which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited». This general principle aims to prevent and to reduce «the exploitation of peoples and territories [which] can lead to the illicit trade in cultural goods, in particular when such illicit trade originates from a context of armed conflict. In this respect, this Regulation should take into account regional and local characteristics of peoples and territories, rather than the market value of cultural goods».²⁸² The final Annex offers a list of cultural goods so detailed and wide, because it wants to declare that the protection of national cultural heritage is the only means for the progress of knowledge and the development of our civilization.

Article 3 (2), instead, introduces the brand new system for the import of cultural goods, consisting of two instruments, which are the Import License and the Importer Statement, whose characteristics are described respectively in article 4 and 5 of the Regulation.

²⁷⁹ Article 4 (1) of the Regulation n. 2019/880: «The import of cultural goods listed in Part B of the Annex [...] shall require an import license».

²⁸⁰ Article 5 (1) of the Regulation n. 2019/880: «The import of the cultural goods listed in Part C of the Annex shall require an importer statement».

²⁸¹ These are the twelve categories listed in the Part A of the PE-CONS 82/1/18 REV 1 final ANNEX 1 approved on 17th April 2019: « (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) objects of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula; (i) old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (j) postage, revenue and similar stamps, singly or in collections; (k) archives, including sound, photographic and cinematographic archives; (l) articles of furniture more than one hundred years old and old musical instruments».

²⁸² Fifth recital of the Preamble of the Regulation n. 375/2017 approved on the 17th April 2019 by the European Parliament and the Council of the European Union.

1.3.1 Import licence

Article 4 exposes the rules which involve the new system of the import licenses. The first paragraph refers to the two categories of cultural goods listed in the Part B of the Annex and subjected to the license, which are products of archaeological excavations or of archaeological discoveries on land or underwater and the elements of artistic or historical monuments or archaeological sites which have been dismembered. These cultural goods have to be at least 250 years old and it is not fixed a minimum financial threshold because of their particular and delicate nature.²⁸³

The license has to be issued by the competent authority of the Member State in which the cultural goods are presented for import, according to the rules provided by the article 201 and 210 of Regulation (EU) No 952/2013, which make the license valid throughout the European Union. Article 4 (11) gives to the Member States the duty of the designation of the above mentioned competent authorities. Moreover they have to communicate «the details of the competent authorities as well as any changes in that respect to the Commission».²⁸⁴

The paragraph 3 of the article though, makes an important and clear distinction, stating that «an import license issued in accordance with this Article shall not be construed to be evidence of licit provenance or ownership of the cultural goods in question».

When an importer, who is the holder of the cultural good²⁸⁵ according to article 2 (4)²⁸⁶, requires a license, he has to apply for it to the competent authority²⁸⁷ of the Member States, by using the new electronic system²⁸⁸.

²⁸³ Fifth recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of the European Union.

²⁸⁴ Article 4 (11) of the Regulation n. 2019/880.

²⁸⁵ Article 5 (34) of the Regulation n. 952/2013: «'holder of the goods' means the person who is the owner of the goods or who has a similar right of disposal over them or who has physical control of them».

²⁸⁶ Article 2 (4) of the Regulation n. 2019/880: «'holder of the goods' means holder of the goods as defined in point (34) of Article 5 of Regulation (EU) No 952/2013».

²⁸⁷ Article 2 (5) of the Regulation n. 2019/880: «'competent authorities' means the public authorities designated by the Member States to issue import licenses».

²⁸⁸ Article 8 (1) of the Regulation n. 2019/880: « The storage and the exchange of information between the authorities of the Member States, in particular regarding import license and importer statements, shall be carried out by means of a centralized electronic system. In the event of a temporary failure of the electronic system, other means for the storage and exchange of information may be used on a temporary basis».

Furthermore the application for the Import license «[...] shall be accompanied by any supporting documents and information²⁸⁹ providing evidence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country or providing evidence of the absence of such laws and regulations at the time they were taken out of its territory».²⁹⁰ But in the cases in which the country of origin, that is where the cultural goods were created or discovered, cannot be reliably determined, or the cultural goods left the country of origin before the 24th of April 1972²⁹¹, article 4 (2) states that « [...] the application may be accompanied instead by any supporting documents and information providing evidence that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transshipment [...]».

The holder of the goods, therefore, has to prove the cultural objects were legally exported, providing « export certificates or export licenses where the country in question has established such documents for the export of cultural goods at the time of the export».²⁹²

This provision has been deeply criticized, because it puts the burden of proof entirely on the importer. It is up to the importer to prove that the good was legally exported,²⁹³ because, according to the provision, the Customs Authorities have not to show that an objected was illegally imported.

The major difficulty concerning the burden of proof is establishing the certain date of export from the source country.²⁹⁴ The cases characterized by documentary evidence are extremely rare. It is sometimes possible to establish that the export of

²⁸⁹ Article 4 (12) of the Regulation n. 2019/880: « The Commission shall lay down, by means of implementing acts, the template for and the format of the application for the import license and shall indicate possible supporting documents to prove licit provenance of the cultural goods in question as well as the procedural rules on the submission and processing of such an application [...]».

²⁹⁰ Article 4 (4) of the Regulation n. 2019/880.

²⁹¹ This is the date when the 1970 UNESCO Convention entered into force.

²⁹² Article 4 (5) of the Regulation n. 2019/880.

²⁹³ Fitz - Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

²⁹⁴ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

a cultural good from a source country occurred «prior to» a specific date, because there are elements which can make us suppose the object was sold in a market country during that given year.²⁹⁵

Even if you know precisely the date of export though, establishing whether was lawful or not, and what documentation might have been required, can be very difficult in practice. After the entrance into force of the 1995 UNIDROIT Convention were introduced two important databases in order to control the art market and reducing the illicit traffic: UNESCO Database of National Cultural Heritage Laws²⁹⁶ and the International Foundation for Art Research (IFAR)²⁹⁷'s database of International Cultural Property Ownership & Export Legislation²⁹⁸. Their role is to supervise the latest legislations concerning export of cultural property, but there is any guarantee that they are up to date or available in different languages in order to be understood by the holder of the goods applying for an importer license. This incompleteness has very expensive consequences,²⁹⁹ because the importer who wants to demonstrate the lawful import of a cultural object will be obliged to go to a specialist lawyer in order to verify if, when the object entered into the art market, an export license or any substitutive documentation was

²⁹⁵ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

²⁹⁶ «The UNESCO Database of National Cultural Heritage Laws was launched in 2005 with the financial support of the US Department of State. It is the unique tool which allows a free and easy access to cultural heritage laws currently in force as well as a rapid consultation of other relevant national cultural rules and regulations», (cf. <https://en.unesco.org/news/unesco-database-national-cultural-heritage-laws-updated>), last accessed on the 4th of June 2019.

²⁹⁷ «The International Foundation for Art Research (IFAR) is a 501(c)(3) not-for-profit educational and research organization dedicated to integrity in the visual arts. IFAR offers impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects», (cf. <https://www.ifar.org/about.php>), last accessed on the 4th of June 2019.

²⁹⁸ «In the mid 1970's, when a rash of thefts consumed the art world, IFAR created the first international archive of stolen art available to the public and became a world-leader on this issue. In 1991, IFAR helped create the Art Loss Register (ALR) as a commercial enterprise to expand and market the database. IFAR managed ALR's U.S. operations through 1997. In 1998 the ALR assumed full responsibility for the IFAR database although IFAR retains ownership. IFAR remains actively involved in the legal, ethical, and educational issues surrounding the ownership and theft of art, and works closely with the ALR to prepare the "Stolen Art Alert" section of the IFAR Journal», (cf. <https://www.ifar.org/about.php>), last accessed on the 4th of June 2019.

²⁹⁹ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

required and if they can count as evidence of lawful export according to the new Regulation.

An example of this process is when a cultural object is bought at an auction house: « the auction house or dealer will not provide the buyer with a copy of the export license from the source country which in 99% of cases, the auction house or dealer will not have in its possession. Nor will the auction house or dealer have in its possession a copy of the export license from the country where the cultural object was last located for a period of more than 5 years».³⁰⁰

These are the reasons why in many cases it is impossible for the importer to proof the lawful export from a third country and, as a consequence, the competent authority will not issue the license, leaving a lot of cultural objects outside the European Union. The Regulation seems to assume that unless an item as an export permit, it was unlawfully exported.

The scholar Fitz-Gibbon has observed: « The classes of objects subject to restriction from entry into the EU under the new agreement are similar to the classes of objects subject to voluntary exclusion from acquisition and loans to U.S. museums under guidelines first set in 2008 by the Association of Art Museum Directors (AAMD)³⁰¹, an organization composed of directors of major museums in the US, Canada, and Mexico».³⁰²

The above mentioned guidelines are known as the «1970 Rule», because they excluded each cultural object imported to the United States of America after the entry into force of the 1970 UNESCO Convention without an export license from their source countries.

³⁰⁰ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

³⁰¹ « In 1916 the directors of twelve American museums founded the Association of Art Museum Directors. The Association began its transformation into a professional organization in 1969 when it formally incorporated. At that time the Association also hired an employee, and increased its meetings from once to twice a year. AAMD's charter members were motivated by a desire to create an intimate forum to share news and ideas. The AAMD has maintained a limited membership bringing the directors into closer contact with their peers at a wide variety of leading art institutions», (cf. <https://www.aamd.org/about/mission>), last accessed on the 4th of June 2019.

³⁰² Fitz – Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

Fitz-Gibbon carries on saying that the new Regulation could lead to the same drastic consequences of the «1970 Rule»: «[...]Regrettably the Association of Art Museum Directors instituted its guidelines without due consideration for the consequences. The result in the U.S. has been to create a body of objects, known as “orphan objects” which are “museum-worthy” in their quality, but cannot find a home in museums because they lack documentation stretching back almost 50 years. Their numbers are currently estimated to be in the hundreds of thousands».³⁰³

After the presentation of the application for the Importer license, the competent authority checks its completeness and it may request any missing or additional information or documents « within 21 days of receipt of the application»³⁰⁴.

When the application is complete the competent authority has to decide to release the license or to reject the application within 90 days. Article 4 (7) illustrates the four cases in which the application is rejected: « The competent authority shall reject the application where: (a) it has information or reasonable grounds to believe that the cultural goods were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country; (b) the evidence required by paragraph 4 has not been provided; (c) it has information or reasonable grounds to believe that the holder of the goods did not acquire them lawfully; or (d) it has been informed that there are pending claims for the return of the cultural goods by the authorities of the country where they were created or discovered».

The reject must be followed by a «statement of reasons and information on the appeal procedure»³⁰⁵ and «be communicated to the other Member States and to the Commission via the electronic system [...]».³⁰⁶

³⁰³ Fitz – Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

³⁰⁴ Article 4 (6) of the Regulation n. 2019/880.

³⁰⁵ Article 4 (9) of the Regulation n. 2019/880.

³⁰⁶ Article 4 (10) of the Regulation n. 2019/880.

1.3.2 Importer statement

Article 5 (1) states that the import of determined categories cultural goods requires an importer statement which has to be issued by the holder of the goods via the new electronic system.³⁰⁷

The cultural objects subject to this procedure are listed in the Part C of the Annex and include a wide range of goods, such as «(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (e) antiquities, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) objects of artistic interest [such as paintings, sculptures, engravings, prints and original artistic assemblages]». Cultural goods belonging to these categories have also to reach the minimum age threshold of more than 200 years old and the customs value of at least €18.000 per item.

If the object covers the above mentioned requirements, its holder has to compile the importer statement which includes both a signed declaration and a standardized document.

The declaration signed by the holder states that « the cultural goods have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country at the time they were taken out of its territory».³⁰⁸

But in the cases in which the country of origin cannot be reliably determined or the cultural goods left the country of origin before the 24th of April 1972³⁰⁹, in order not to impede legitimate trade in cultural goods unreasonably and to prevent the circumvention of the procedures by simply sending illicitly exported cultural goods to another Third Country prior to importing them into the European Union, «the

³⁰⁷ Article 8 (1) of the Regulation n. 2019/880: « The storage and the exchange of information between the authorities of the Member States, in particular regarding import license and importer statements, shall be carried out by means of a centralized electronic system. In the event of a temporary failure of the electronic system, other means for the storage and exchange of information may be used on a temporary basis».

³⁰⁸ Article 5 (2) subparagraph (a) of the Regulation n. 2019/880.

³⁰⁹ This is the date when the 1970 UNESCO Convention entered into force.

declaration may instead state that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a of more than five years and for purposes other than temporary use, transit, re-export or trans-shipment [...]».³¹⁰ The scholar Kate Fitz - Gibbon³¹¹ and Pierre Valentin³¹² have stressed that the exception, provided by the last paragraph of the article 5(2), has the same limits and the weaknesses above mentioned for the article 4 (4).

The standardized document, instead, describes the object in question, in order to ease the identification, the risk analysis and targeted controls of the competent authorities.³¹³

The template of the standardized document shall be laid down by the European Commission³¹⁴ and the Experts Committee³¹⁵, using the model of the Object ID³¹⁶, recommended by the UNESCO.

Object ID is an international standard for describing cultural property, which was initiated in 1993 by the J. Paul Getty Trust in 1993 and then launched in 1997. It facilitates the identification of collections of archaeological, cultural and artistic objects in case of loss or theft and the collaboration between major law enforcement agencies, including the Federal Bureau of Investigation (FBI), Scotland Yard and International Criminal Police Organization (INTERPOL), UNESCO, museums, cultural heritage organizations, valuers of arts and antiquities and insurance companies.

The Object ID standard defines nine detailed categories of information as well as four steps to fulfill the procedure.³¹⁷

³¹⁰ Article 5 (2) of the Regulation n. 2019/880.

³¹¹ Fitz – Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

³¹² Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

³¹³ Article 5 (2) subparagraph (b) of the Regulation n. 2019/880.

³¹⁴ Article 5 (3) of the Regulation n. 2019/880.

³¹⁵ Article 13 of the Regulation n. 2019/880.

³¹⁶ Fifteenth recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe.

³¹⁷ «The categories are: (1) Type of object; (2) Materials; (3) Techniques; (4) Measurement; (5) Inscriptions and markings; (6) Title; (7) Subject; (8) Date or period; (9) Maker. The four steps are divided as follows: (1) Taking photographs of the object; (2) Informing the above mentioned

Since October 2004, the International Council of Museums (ICOM), in close collaboration with UNESCO and other organizations fighting illicit trade, has been actively spreading information about Object ID and also organizing workshops on its implementation.

1.3.3 Exceptions to articles 4 and 5

Article 3 (4) introduces three exceptions to the regime of Import license and Importer statement: cultural objects which return to the European Union³¹⁸ within three years of exports³¹⁹, the ones imported for their safekeeping with an intention to return³²⁰ and the temporary admissions³²¹ for the « purpose of education, science, conservation, restoration, exhibition, digitization, performing arts, research conducted by academic institutions or cooperation between museums or similar institutions»³²² are not subject to the measures provided by articles 4 and 5 of the Regulation.

Article 3 (5) implements a further specification of Article 3 (4) subparagraph (c) stating that Import license is not required for cultural objects under the temporary

categories; (3) Writing a short description including additional information; (4) Keeping the constituted documentation in a secure place», (cf. <http://archives.icom.museum/object-id/checklist.html>), last accessed on the 3rd of June 2019.

³¹⁸ Article 3 (4) subparagraph (a) of the Regulation n. 375/2017: «(a) cultural goods that are returned goods within the meaning of Article 203 of Regulation (EU) No 952/2013».

³¹⁹ Article 203 (1) of the Regulation n. 952/2013: «(1) Non-Union goods which, having originally been exported as Union goods from the customs territory of the Union, are returned to that territory within a period of three years and declared for release for free circulation shall, upon application by the person concerned, be granted relief from import duty».

³²⁰ Article 3 (4) subparagraph (b) of the Regulation n. 2019/880: « the import of cultural goods for the exclusive purpose of ensuring their safekeeping by, or under the supervision of, a public authority, with the intent to return those cultural goods, when the situation so allows».

³²¹ Article 250 (1) of the Regulation n. 952/2013: «(1) Under the temporary admission procedure non-Union goods intended for re-export may be subject to specific use in the customs territory of the Union, with total or partial relief from import duty, and without being subject to any of the following: (a) other charges as provided for under other relevant provisions in force; (b) commercial policy measures, insofar as they do not prohibit the entry or exit of goods into or from the customs territory of the Union».

³²² Article 3 (4) subparagraph (c) of the Regulation n. 2019/880: «(c) the temporary admission of cultural goods, within the meaning of Article 250 of Regulation (EU) No 952/2013, into the customs territory of the Union for the purpose of education, science, conservation, restoration, exhibition, digitization, performing arts, research conducted by academic institutions or cooperation between museums or similar institutions».

admission for commercial art fairs, as long as the holder of the goods presents an Importer statement.³²³

However, if these cultural objects remains within the boundaries of the European Union after the art fair, the holder of the goods will have to apply for the Import license following the general procedure provided by article 4.

These exceptions have been considered such a relief for the museums, because it allows to continue their mission of diffusion of culture, by way of international loans that is considered «the lifeblood of many cultural institutions across Europe».³²⁴

1.4 The role of Competent Custom Offices and the new electronic system

The import of cultural objects must be handled by the competent custom offices which have to be identified by each Member State. The choice of designating just a restrict number of custom offices for each European country has to be communicated as well as any changes in that respect to the Commission.³²⁵

These restrictions have the aim of strengthening and making more focused the control measures. Control measures «[...] should have as broad a scope as possible in terms of the customs procedures concerned in order to prevent circumvention of this Regulation through the exploitation of [free ports], which have the potential to be used for the continued proliferation of illicit trade».³²⁶ In order to grant their effectiveness control measures have not to be applied only to cultural goods under

³²³ Article 3 (5) of the Regulation n. 2019/880: «. An import license shall not be required for cultural goods that have been placed under the temporary admission procedure within the meaning of Article 250 of Regulation (EU) No 952/2013, where such goods are to be presented at commercial art fairs. In such cases an importer statement shall be provided in accordance with the procedure in Article 5 of this Regulation».

³²⁴ Gould, E., *The EU's parting gift to the UK art market?*, in *Institute of Art and Law online*, 2019, (cf. <https://ial.uk.com/publications/art-antiquity-and-law/>), last accessed on the 3rd of June.

³²⁵ Article 6 (1) of the Regulation n. 2019/880: « Member States may restrict the number of customs offices competent to handle the import of cultural goods subject to this Regulation. Where Member States apply such a restriction, they shall communicate the details of those customs offices as well as any changes in that respect to the Commission [...]».

³²⁶ Sixth recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe.

free circulation, as defined in article 201 of Regulation (EU) N. 952/2013³²⁷, but also to the ones placed under a special customs procedure³²⁸.

The measures, though, does not include the control over transit of cultural goods, because their role must not go beyond the primary objective of the Regulation, which is the one of preventing the entrance of illicitly exported cultural goods within the customs territory of the European Union.

Efficient controls are possible only if there is a constant administrative cooperation between customs authorities and competent authorities of the Member States, which have got a main role in the new discipline of the Import licenses.³²⁹

The European Commission has stated that the Regulation will introduce a new electronic system which the holder of goods will have to use both for the the application for the import license³³⁰ and for the presentation of the importer statement³³¹.

The role of the administrative cooperation between customs authorities and competent authorities of the Member States is focused on the verification of the legal soundness of the documents and attachments uploaded by the holders.

This aspect raised an international question: how will Customs officials in the Member States ascertain whether documents accompanying the application for an

³²⁷ Article 201 of Regulation (EU) N. 952/2013 : «(1) Non-Union goods intended to be put on the Union market or intended for private use or consumption within the customs territory of the Union shall be placed under release for free circulation. (2) Release for free circulation shall entail the following: (a) the collection of any import duty due; (b) the collection, as appropriate, of other charges, as provided for under relevant provisions in force relating to the collection of those charges; (c) the application of commercial policy measures and prohibitions and restrictions insofar as they do not have to be applied at an earlier stage; and (d) completion of the other formalities laid down in respect of the import of the goods. (3) Release for free circulation shall confer on non-Union goods the customs status of Union goods».

³²⁸ Article 210 of Regulation (EU) N. 952/2013: « Goods may be placed under any of the following categories of special procedures: (a) transit, which shall comprise external and internal transit; (b) storage, which shall comprise customs warehousing and free zones; (c) specific use, which shall comprise temporary admission and end-use; (d) processing, which shall comprise inward and outward processing».

³²⁹ Article 7 of the Regulation n. 2019/880: «Administrative co-operation For the purposes of implementing this Regulation, Member States shall ensure co-operation between their customs authorities and with the competent authorities referred to in Article 4».

³³⁰ Article 4 (4) of the Regulation n. 2019/880.

³³¹ Article 5 (1) of the Regulation n. 2019/880.

import license or an importer statement are satisfactory evidence of lawful export from the source country?³³²

The preamble and the text of the Regulation give not a clear answer, leaving many aspects pending. The scholars Valentin and Rogers have suggested that the customs controls will require that the European Union officials «have access to a database of specimen export licenses from all source countries from time to time, from the date when export controls were introduced by the source country». This could be a solution, but the task required for creating such a control system is huge and the Commission has said nothing about both the possibility of creating an export database and the costs that its implementation and maintaining would involve.

Furthermore there is another aspect which was not analyzed by the Commission: the language issue. The holder of the goods may be required to apply for the import license or to present his importer statement, using the language of the European country of the import. If the importer does not know the foreign language required, he should provide a certified translation of his application and of the other attachments, such as the export license from the source country. This process not only reveals an additional cost for the importer, but also a big delay in the import process.

A proposition, thought to weaken the problem, could be the introduction in the process of creation of the new electronic system of a team of expert interpreters, who could be able to guide the foreigner holder through the compilation of its request, by providing the automatic translation of the licenses and of the other attachments.³³³

1.5 Penalties

Article 11 imposes that «Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive».

³³² Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

³³³ Gould, E., *The EU's parting gift to the UK art market?*, in *Institute of Art and Law online*, 2019, (cf. <https://ial.uk.com/publications/art-antiquity-and-law/>), last accessed on the 3rd of June.

The role of this provision is to encourage compliance and deter the circumvention of the Regulation. The definition of a common discipline should have an equivalent deterrent effect across the boundaries of the European Union.³³⁴

The article also provides to the Member States two expiry dates for the notification to the Commission of the rules on penalties applicable, respectively, to the illicit introduction of cultural goods, whose import is strictly forbidden by article 3 (1),³³⁵ and to other infringements, such as the making of false statements and the submission of false information, and of the related measures.³³⁶

While the first type of provisions, concerning the penalties applicable to illicit introduction of cultural goods, could be evaluated only after the entry into force of the Regulation, when it will start the discussion about the implementation of an effective common discipline of criminal sanctions, the second type of rules, concerning the consequences of the making of false statements and the submission of false information, have already arisen a discussion.

On the one hand, the text of the Regulation properly introduces sanctions for false statements and information, in order to perturb traffickers in looted cultural goods, but on the other hand, it is quiet about the problem of the exposure to the risk of criminal prosecution of those honest importers, who cannot demonstrate in what circumstances the object left the source country and who has not held it for at least 5 years.³³⁷ It is true that the customs officials and the competent authorities can make assumptions while verifying if releasing or not an import license, but at the moment the Regulation does not establish any safe provisions for the importers who cannot demonstrate the provenance of their goods.

³³⁴ Twenty-ninth recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe.

³³⁵ Article 11 of the Regulation n. 2019/880: «[...] By ...[18 months after the date of application of this Regulation], Member States shall notify the Commission of the rules on penalties applicable to the introduction of cultural goods in breach of Article 3(1), and of the related measures».

³³⁶ Article 11 of the Regulation n. 2019/880: « By ... [six years after the date of application of this Regulation], Member States shall notify the Commission of the rules on penalties applicable to other infringements of this Regulation, in particular the making of false statements and the submission of false information, and of the related measures».

³³⁷ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

1.6 International Cooperation among Third Countries and Member States

The Commission believes that a fundamental tool for the prevention of the illicit traffic is the cooperation among the European Union and Third Countries. The cooperation, according to article 12,³³⁸ will consist in a collaboration of the European Union with international organizations and bodies, active in the field of the protection of cultural property, such as UNESCO, the International Criminal Police Organization (INTERPOL), the European Union's law enforcement agency (EUROPOL), the World Customs Organization (WCO), the International Centre for the Preservation and Restoration of Cultural Property and the International Council of Museums (ICOM).³³⁹ They should organize together training, capacity building activities and awareness-raising campaigns, as well as to commission relevant research and the development of standards.

This text of the article 12 of the Regulation has embraced the amendment presented on the 12th of March 2019 by Luigi Morgano³⁴⁰, who has reaffirmed the leading role of article 5 of 1970 UNESCO Convention, stating that the contracting States have to set up within their territories one or more national services and make them cooperate for the protection of cultural heritage.³⁴¹

³³⁸ Article 12 of the Regulation n. 2019/880: « The Commission may, in matters covered by its activities and to the extent required for the fulfilment of its tasks under this Regulation, organize training and capacity building activities for third countries in cooperation with Member States».

³³⁹ Twenty-third recital of the Preamble of the Regulation n. 2019/880 approved on the 17th April 2019 by the European Parliament and the Council of Europe.

³⁴⁰ Redazione AGCult, *Nuovo regolamento Ue su importazione beni culturali, Morgano (Pd): più trasparenza*, in *AGCult online*, 2019, (cf. <https://agcult.it/a/6900/2019-03-20/nuovo-regolamento-ue-su-importazione-beni-culturali-morgano-pd-piu-trasparenza>), last accessed on the 4th of June 2019.

³⁴¹ Article 5 of 1970 UNESCO Convention: «To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake [...], to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: (a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property; (b) establishing and keeping up to date, [...], a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage; (c) promoting the development or the establishment of scientific and technical institutions [...] required to ensure the preservation and presentation of cultural property; (d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research; (e) establishing, for the benefit of those concerned [...] rules in conformity with the ethical principles set forth in this Convention; [...]; (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention; (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property».

CHAPTER III

Comparison of legal systems on importation of Cultural Goods

PART I. The national legislation of two Member States: The Italian and German cases

I. 1 The Italian Code of Cultural and Landscape Heritage

In Italy the adoption of the first measures concerning the protection of the national cultural heritage dates back to the pre-unitarian Italy³⁴², but only in 1939 an organic regulation was introduced: it was the L. n. 1089, the so-called «Bottai Law» *on safeguarding public and cultural heritage*³⁴³, together with law n. 1497 *and the preservation of natural beauties*.³⁴⁴

This law has regulated the discipline of cultural heritage for over half century and it was repealed and replaced in 1999 by the *Consolidated Law on the protection of cultural heritage*.³⁴⁵

«Bottai Law» does not give a definition of «cultural heritage»: it only refers to «[...] the objects, movable and immovable, which exhibit artistic, historical, archaeological or ethnographic interest [...]».³⁴⁶ The article 1 reveals the legislator's purpose of considering a cultural good as an object. The materiality of a cultural object represents the cause of its particular protection, because it is the

³⁴² Speroni, M., *La tutela dei beni culturali negli stati italiani preunitari*, Milano, Giuffrè, 1988, pp. 2-10.

³⁴³ L. n. 1089 which was adopted on the 1st of June 1939 and published on the n.184 of the Official Journal of the Italian Republic on the 8th of August 1939.

³⁴⁴ L. n. 1497 which was adopted on the 29th of June 1939 and published on the n.241 of the Official Journal of the Italian Republic on the 14th of October 1939.

³⁴⁵ Legislative Decree n. 490 of the 29th of October 1999: *Consolidated Law on the protection of cultural heritage*, drafted following the dispositions of the article 1 of the L. n. 352 of the 8th of October 1997, and published on the n.302 Official Journal of the Italian Republic on the 27th of December 1999.

³⁴⁶ In absence of an official translation of the text of the law I have provided a personal translation of Article 1 of L. n. 1089: « Are subject to this law the objects, movable and immovable, which exhibit artistic, historical, archaeological or ethnographic interest, including: a) the things that affect paleontology, prehistory and primitive civilizations; b) numismatic interest things; c) manuscripts, autographs, correspondence, notable documents, incunabula, as well as books, prints and engravings of a rarity and valuable character. There are also villas, parks and gardens that have an artistic or historical interest. They are not subject to the discipline of this law the works of living authors or whose execution does not date back to more than fifty years».

element that distinguishes it from intellectual works, such as a literary and music works, which have a cultural interest, but are protected as immaterial goods.³⁴⁷

The modern definition of «cultural heritage» begins to be developed between the 1964 and 1966, thanks to the intense work of the «Inter-Parliamentary Investigation Commission for the protection and enhancement of things of historical, archaeological, artistic and landscape interest»³⁴⁸, better known as «Franceschini Commission»³⁴⁹, which was appointed to investigate and analyze the conditions of the national cultural heritage. The results of the investigation were published in three volumes³⁵⁰ in 1967 and reported that the national cultural heritage was dominated by a serious neglect. One of the best qualities of the work of the «Franceschini Commission» is having introduced a first and unitary definition of the idea of «cultural heritage», which is described, in the prologue of the first volume of the Report, as «a material testimony with value of civilization».³⁵¹

The use of the term «property» for describing cultural heritage is substantial, because it hints at the economic value of the cultural heritage, while the use of the term «cultural» alludes to the importance of the promotion and enhancement of the national heritage because it is the tangible expression of the *ethos* of the Italian Republic.³⁵²

The Commission experimented a new approach to the protection of cultural heritage by dividing it into four categories, which were Archaeological heritage Archival property, Artistic and Historical Heritage and Landscape property.³⁵³

³⁴⁷ Cerulli Irelli, V., *I beni culturali nell'ordinamento italiano vigente*, in Chiti, M.P. (ed.), *Beni Culturali e comunità europea*, Milano, Giuffrè, 1994, p. 3.

³⁴⁸ The Italian denomination of the Commission is: *Commissione interparlamentare di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio*.

³⁴⁹ The Commission was founded by the L. n. 310 on the 26th of April 1964. It was composed of the President On. Prof. Francesco Franceschini, sixteen members of the Parliament and eleven external experts.

³⁵⁰ VV. AA., *Per la salvezza dei beni culturali in Italia*, in *Atti e documenti della Commissione interparlamentare di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio*, Roma, Colombo, 1967.

³⁵¹ VV. AA., *Per la salvezza dei beni culturali in Italia*, in *Atti e documenti della Commissione interparlamentare di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio*, Roma, Colombo, 1967.

³⁵² Severini, G., *La nozione di bene culturale e le tipologie di beni culturali*, Caia, G. (ed.), in *Il Testo Unico sui beni culturali ed ambientali*, Milano, Giuffrè, 2000, p. 1.

³⁵³ VV. AA., *Per la salvezza dei beni culturali in Italia*, in *Atti e documenti della Commissione interparlamentare di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio*, Roma, Colombo, 1967.

There was a transition from a static point of view to a dynamic one, focused on the idea that cultural property could be used by the Italian citizens as a tool for the promotion of the Italian Republic.³⁵⁴ In spite of its commitment, the Commission never saw its work turning into a draft law and, as a matter of fact, the expression «cultural heritage» did not enter into the Italian legislation until the 14th of December 1974, when it was adopted the Decree Law n. 675, which instituted the Ministry for Cultural and Environmental heritage.³⁵⁵ This act though, introduced only the locution «cultural heritage», but not its definition.

The Legislative Decree n. 112/1998³⁵⁶ introduced the definition of «cultural heritage» in its article 148 (1): « [...] a "cultural heritage", those that make up the historical, artistic, monumental, anthropological, archaeological, archival and library heritage and the others that constitute testimony with the value of civilization [...]».³⁵⁷

The article looks back at the definition of «Franceschini Commission», but it also removes the idea of materiality of cultural heritage provided by the «Bottai Law».³⁵⁸ This definition merged in the above mentioned Legislative Decree n. 490/1999 the *Consolidated Law on the protection of cultural heritage*.³⁵⁹

³⁵⁴ Santoro – Passarelli, F., *I beni della cultura secondo la Costituzione*, in *Studi in memoria di Carlo Esposito*, Milano, Cedam, 1973, pp. 1421 ff.

³⁵⁵ Decree Law n. 675 adopted on 14th of December 1974 and then converted into L. n. 5 on the 29th of January 1975.

³⁵⁶ Legislative Decree n. 112/1998, *Conferral of administrative functions and tasks of the State to the regions and local authorities, in implementation of chapter I of Law 15 March 1997, No. 59*, which was adopted on the 31st of March 1998 and the published on the n.92 of the Official Journal of the Italian Republic on the 21st of April 1998.

³⁵⁷ In absence of an official translation of the text of the law I have provided a personal translation Article 148 (1) of the Legislative Decree n. 112/1998.

³⁵⁸ Chiti, M., P., *La nuova nozione di bene culturale nel D.lgs. 112/1998: prime note esegetiche*, in *Aedon*, 1998, (cf. <http://www.aedon.mulino.it/archivio/1998/1/chiti.htm>), last accessed on the 11th of June 2019.

The lawmaker in the articles 2³⁶⁰, 3³⁶¹ and 4³⁶² provided a detailed definition of cultural heritage, which aimed to reunite all the suggestions coming from the previous dispositions and reports.³⁶³

The above mentioned dispositions have been modified and integrated by the Legislative Decree n. 42/2004 which included the *Code of Cultural and Landscape Heritage*.³⁶⁴

³⁶⁰ In absence of an official translation of the text of the law I have provided a personal translation Article 2 Legislative Decree n. 490 of the 29th of October 1999: «1. Are cultural assets governed under this title: (a) real and movable things that show artistic, historical, archaeological, or demoeconomic-anthropological interest; (b) The immovable things that, because of their reference with political history, military, literature, art and culture in general, have a particularly important interest; (c) The collections or series of objects which, by tradition, fame and particular environmental characteristics, have an exceptional artistic or historical interest as a whole; (d) the archival assets; and) the book assets. 2. Are included in the things listed in paragraph 1(a): a) The things that concern paleontology, prehistory and primitive civilizations; b) Things of numismatic interest; c) The manuscripts, the autographs, the correspondence, the remarkable documents, the incunabula, as well as the books, the prints, the engravings having a character of rarity and merit; d) Maps and musical scores of a rarity and artistic or historical value; e) Photographs with relative negatives and matrices, with a character of rarity and artistic or historical merit; f) The villas, parks and gardens that have an artistic or historical interest; 3. They are included in the collections listed in paragraph 1 (c), such as testimonies of historical and cultural relevance, library collections belonging to individuals, if of exceptional cultural interest. 4. Are archival assets: a) The archives and individual documents of the state. b) The archives and individual documents of the public bodies; c) Archives and individual documents, belonging to individuals, which are of considerable historical interest. 5. The library collections of State and public bodies libraries, those referred to in paragraph 3 and, whatever their support, the goods referred to in subparagraphs 2 (c) and (d), are library assets. 6. The works of living authors or whose execution does not date back to more than fifty years are not subject to the rules of this title, pursuant to paragraph 1(a)».

³⁶¹ In absence of an official translation of the text of the law I have provided a personal translation Article 3 Legislative Decree n. 490 of the 29th of October 1999: «1. Irrespective of their inclusion in the categories listed in article 2, cultural heritage shall also be for the purpose of the specific provisions of this title which concern them: (a) The frescoes, the coats of arms, the graffiti, the tombstones, the inscriptions, the tabernacles and the other ornaments of buildings, exposed or not to the public view; (b) Artist studies as defined in article 52; (c) Public areas, with archaeological, historical, artistic and environmental value, identified in accordance with article 53; d) Photographs and specimens of cinematographic, audiovisual or sequences of images in motion or in any case recorded, as well as the documentation of sound or verbal events recorded in any case, the production of which goes back to more than twenty-five Years (e) means of transport of more than seventy-five years; (f) The goods and instruments of interest in the history of science and technology of more than fifty years».

³⁶² In absence of an official translation of the text of the law I have provided a personal translation Article 4 Legislative Decree n. 490 of the 29th of October 1999: «Goods not included in the categories listed in articles 2 and 3 are identified by law as cultural heritage as testimony with a value of civilization».

³⁶³ Cammelli, M., *Il Testa Unico, il commento e... ciò che resta da fare*, in *Aedon*, 2000, (cf. <http://www.aedon.mulino.it/archivio/2000/2/cammelli.htm>), last accessed on the 12th of June 2019.

³⁶⁴ Legislative Decree n. 42 of the 22nd of January 2004, *Code of Cultural and Landscape Heritage in accordance with the article 10 of the L. n. 137 of the 6th of July 2002*, which was published on the n. 45 of the Official Journal of the Italian Republic on the 24th of February 2004 and entered into force on the 1st of May 2004. The Code is the so called *Urbani Code*, from the name of the Minister for Cultural Heritage and Activities.

The reform of the Legislative Decree n. 42/2004 aimed to harmonize the discipline of the protection of cultural heritage with the new Fifth Title of the Italian Constitution, which was modified by the Constitutional Law n. 3³⁶⁵ in 2001.

The purpose of the new *Code of Cultural and Landscape Heritage* was to simplify the discipline and to create a coordinated system for the protection and promotion of cultural heritage, which could involve the State, the Regions and the Local Authorities.³⁶⁶ The article 2 of the *Code of Cultural and Landscape Heritage* makes a distinction between the expression «cultural heritage» and «cultural property»:
«1. The cultural heritage consists of cultural property and landscape assets. 2. Cultural property consists of immovable and movable things which, pursuant to

³⁶⁵ Constitutional Law n. 3/2001 modifies the article 117 and 118 of the Italian Constitution concerning the exclusive and alternative competence between the State, the Regions and the Local Authority.

³⁶⁶ Fiorilli, M., *Codice dei beni culturali e del paesaggio – commentario*, Bologna, Il Mulino, 2004, p. 2.

articles 10³⁶⁷ and 11³⁶⁸, present artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilization [...]».

³⁶⁷Article 10 of Legislative Decree n. 42 of the 22nd of January 2004: « 1. Cultural property consists in immovable and movable things belonging to the State, the Regions, other territorial government bodies, as well as any other public body and institution, and to private non-profit associations, which possess artistic, historical, archaeological or ethno-anthropological interest. 2. Cultural property also includes: a) the collections of museums, galleries, art galleries and other exhibition venues of the State, the Regions, other territorial government bodies, as well as any other government body and institute; b) the archives and single documents of the State, the Regions, other territorial government bodies, as well as of any other government Body and institute; c) the book collections of libraries of the State, Regions, other territorial bodies, as well as any other government body and institute. 3. Cultural property shall also include the following, when the declaration provided for in article 13 has been made: a)immovable and movable things of particularly important artistic, historical, archaeological or ethno-anthropological interest, which belong to subjects other than those indicated in paragraph 1; b) archives and single documents, belonging to private individuals, which are of particularly important historical interest; c) book collections, belonging to private individuals, of exceptional cultural interest; d) immovable and movable things, to whomsoever they may belong, which are of particularly important interest because of their reference to political or military history, to the history of literature, art and culture in general, or as testimony to the identity and history of public, collective or religious institutions; e) collections or series of objects, to whomsoever they may belong, which through tradition, renown and particular environmental characteristics are as a whole of exceptional artistic or historical interest. 4. The things indicated in paragraph 1 and paragraph 3, letter a) include: a) the things which pertain to paleontology, prehistory and primitive civilizations; b) things of numismatic interest; c) manuscripts, autographs, papers, incunabula, as well as books, prints and engravings with their relative matrixes, of a rare or precious nature; d) geographical maps and musical scores of a rare and precious nature; e) photographs, with their relative negatives and matrixes, cinematographic films and audio-visual supports in general, of a rare and precious nature; f) villas, parks and gardens possessing artistic or historical interest; g) public squares, streets, roads and other outdoor urban spaces of artistic or historical interest; h) mineral sites of historical or ethno-anthropological interest; i)ships and floats possessing artistic, historical or anthropological interest; j)types of rural architecture possessing historical or ethno-anthropological interest as testimony to the rural economy tradition. 5. Without prejudice to the provisions of articles 64 and 178, the things indicated in paragraph 1 and paragraph 3, letters a) and e), which are the work of living authors or which were not produced more than fifty years ago, are not subject to this Title».

³⁶⁸ Article 11 of Legislative Decree n. 42 of the 22nd of January 2004: « 1. Without prejudice to the application of article 10, the following shall, whenever the premises and conditions occur, be considered cultural property, insofar as they are the object of specific provisions of this Title: a) frescoes, escutcheons, graffiti, plaques, inscriptions, tabernacles and other building ornaments, whether or not they be exhibited to public view, referred to in article 50, paragraph 1; b) artists' studios, referred to in article 51; c) public areas referred to in article 52; d) works of painting, sculpture, graphic art and any art created by a living author or which was not produced more than fifty years ago, referred to in articles 64 and 65; e) the works of contemporary architecture of particular artistic value, referred to in article 37; f) photographs, with their relative negatives and matrixes, samples of cinematographic works, audio-visual material or sequences of images in movement, the documentation of events, oral or verbal, produced by any means, more than twenty-five years ago, referred to in article 65; g) means of transport which are more than seventy-five years old, referred to in articles 65 and 67, paragraph 2; h) property and instruments of interest for the history of science and technology which are more than fifty years old, referred to in article 65; i) the vestiges identified by the laws in force pertaining to the protection of the historical heritage of World War I, referred to in article 50, paragraph 2».

The Code therefore, introduces a mixed system including both the idea of cultural heritage promoted by the «Bottai Law» and the *Consolidated Law on the protection of cultural heritage*, and also leaves the possibility of including inside the category of cultural heritage each item which represents «a material testimony with value of civilization».³⁶⁹

I. 1.1 Chapter V- Circulation within international territory

Before the analysis of the circulation of cultural heritage within international territory, it is necessary to underline the distinction between the circulation of public cultural property and the circulation of private cultural property.

The circulation of public cultural property is established by articles 53-57 of the *Code of Cultural and Landscape Heritage*. The articles aims to coordinate the general discipline of public domain provided by the Italian civil code and the special discipline concerning cultural goods provided by the *Code of Cultural and Landscape Heritage*.³⁷⁰

According to article 822 of the Italian civil code: «They belong to the State and are part of the public domain: the coast, the beach, the sparse and the ports; The rivers, streams, lakes and other waters defined by the relevant laws; works intended for national defense. They are also part of the public domain, if they belong to the State, the roads, the highways and the railways; aerodromes; the aqueducts; the buildings recognized of historical, archaeological and artistic interest according to the relevant laws; collections of museums, art galleries, archives, libraries; and finally the other goods which are from the law subject to the regime of the public domain».³⁷¹ These above mentioned categories belong to the «cultural public domain» and are unalienable and they cannot subject to private law transactions constitutive of rights in favor of third».³⁷²

³⁶⁹ VV. AA., *Per la salvezza dei beni culturali in Italia*, in *Atti e documenti della Commissione interparlamentare di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio*, Roma, Colombo, 1967.

³⁷⁰ Sandulli, M., A., *Codice dei beni culturali e del paesaggio*, Milano, Giuffrè, 2012, pp. 621. 464-497.

³⁷¹ In absence of an official translation of the text of the law I have provided a personal translation Article 822 of the Italian Civil Code.

³⁷² Serra, V., A., *Commento all'articolo 53*, in Cammelli, M. (ed.), *Codice dei beni culturali e del paesaggio*, Bologna, Il Mulino, 2004, p. 250.

The *Code of Cultural and Landscape Heritage* aims to simplify the discipline by creating three different levels of public cultural property.³⁷³

The first level is established by article 54³⁷⁴, which defines public cultural property belonging to the State, Regions or other territorial government bodies, that cannot be alienated because it is part of the «cultural public domain».

The second level is the one provided by article 55³⁷⁵, which lists the categories of cultural goods belonging to the «cultural public domain», which can be exceptionally alienated but which are subject to the issue of an authorization³⁷⁶.

³⁷³ Buonauro, M., *Commento all'articolo 53 del Codice*, in Leone, G. – Tarasco, A., L., *Commentario al Codice dei Beni culturali e del Paesaggio*, Padova, Cedam, 2006, p. 378.

³⁷⁴ Article 54 of the *Code of Cultural and Landscape Heritage*: «1. The following cultural properties belonging to the State cannot be alienated: *a)* buildings and areas of archaeological interest; *b)* buildings recognised as national monuments by measures having the force of law; *c)* the collections of museums, picture galleries, art galleries and libraries; *d)* archives. 2. The following cannot equally be alienated: *a)* immovable and movable things belonging to subjects indicated in article 10, paragraph 1, which are the work of non-living artists and whose production goes back more than fifty years, until release from State ownership occurred, if necessary, following the verification procedures set out in article 12; *b)* movable things which are the work of living artists or whose production does not go back more than fifty years, if these are included in collections belonging to the bodies indicated in article 53; *c)* single documents belonging to the bodies referred to in article 53, as well as the archives and single documents of government bodies and institutions other than those indicated in the aforesaid article 53; *d)* immovable things belonging to the bodies indicated in article 53 which have been declared to be of particularly important interest, testifying to the identity and history of public, collective or religious institutions as set out in article 10, paragraph 3, letter *d)*. 3. The properties and things referred to in paragraphs 1 and 2 may be transferred between the State, the Regions and other territorial government bodies. 4. The properties and things indicated in paragraphs 1 and 2 may be used exclusively according to the modalities and for the purposes provided for in Title I of this Part».

³⁷⁵ Article 55 of the *Code of Cultural and Landscape Heritage*: «1. Immovable cultural properties which are part of the State's cultural property and which are not included among those listed in article 54, paragraphs 1 and 2, cannot be alienated without the authorization of the Ministry. 2. The authorization referred to in paragraph 1 may be granted under the following conditions: *a)* alienation must ensure the protection and enhancement of the properties, and in any case must not hinder public enjoyment; *b)* the authorization provision must indicate designated uses that are compatible with the historical and artistic nature of the buildings and must be such that no harm is done to their conservation. 3. The authorization to alienate entails the release from State ownership of the cultural properties to which it refers. These properties remain subject to protection under article 12, paragraph 7».

³⁷⁶ Article 57 of the *Code of Cultural and Landscape Heritage*: «1. The application for authorization to alienate shall be submitted by the body to which the properties belong and shall be accompanied by the indication of the current designated use and the program of necessary conservation measures. 2. With regard to the properties indicated in article 55, paragraph 1, the authorization may be issued by the Ministry at the recommendation of the Superintendency, after consultation with the Region and, through the Region, with other interested territorial government bodies, under the conditions established in paragraph 2 of the aforesaid article 55. The prescriptions and the conditions contained in the authorization provision shall be included in the deed of transfer. 3. The alienated property may not undergo work of any kind unless the relative project has had prior authorization under article 21, paragraph 4. 4. With regard to the properties indicated in article 56, paragraph 1, letter *a)*, and the properties of the government bodies and institutions indicated in article 56, paragraph 1, letter *b)* and paragraph 2, authorization may be granted when the same properties bear no interest for

The issuing of the authorization by the Ministry, automatically excludes the cultural goods from the «cultural public domain».³⁷⁷

The third level is established by article 56³⁷⁸, that includes all the public cultural property which does not belong to the «cultural public domain», but which can be alienated only if an authorization is issued by the Ministry.

Regards to the circulation of private cultural property, the *Code of Cultural and Landscape Heritage* has established three different levels which are similar to the ones provided for the public cultural property.

The first level includes: «*a*) things immovable and movable, which are the work of non-living artists and whose production goes back more than fifty years».³⁷⁹

They cannot be alienated unless the Ministry excludes them from the «cultural public domain».

The second level includes all the other cultural goods owned by non-profit organizations³⁸⁰, which can be alienated only if the Ministry issues an authorization.³⁸¹

Lastly, the third level includes the rest of the cultural goods belonging to private cultural property, which can be freely alienated after the declaration of the transaction which might be followed by the compulsory purchase by the State.

As regards the circulation of cultural heritage within international territory, it is disciplined by the *Code of Cultural and Landscape Heritage* in its Chapter V, which

public collections and alienation does not seriously harm their conservation or impair public enjoyment. 5. With regard to the properties indicated in article 56, paragraph 1, letter *b*) and paragraph 2, belonging to private non-profit organizations, authorization may be granted when no serious harm ensues from the transfer to the conservation or the public enjoyment of the aforesaid properties».

³⁷⁷ Sandulli, M., A., op. cit., pp. 479 –490.

³⁷⁸ Article 56 of the *Code of Cultural and Landscape Heritage*: «1. The following are also subject to authorization by the Ministry: *a*) the alienation of cultural properties belonging to the State, the Regions and other territorial government bodies, other than those indicated in article 54, paragraphs 1 and 2, and article 55, paragraph 1. *b*) the alienation of cultural properties belonging to government bodies other than those indicated in letter *a*) or to private non-profit associations, with the exception of the things and properties indicated in article 54, paragraph 2, letters *a*) and *c*). 2. Authorization is also required in cases of partial sale of collections or series of objects and of book collections by bodies and associations indicated in paragraph 1, letter *b*). 3. The provisions of the preceding paragraphs shall also apply to the constitution of mortgages and pledges and to legal transactions which may entail the transfer of the cultural properties indicated therein. 4. The deeds which entail the transfer of cultural properties to the State, including transfers in payment of taxes owed, shall not be subject to authorization».

³⁷⁹ Article 54 (2) (a) of the *Code of Cultural and Landscape Heritage*.

³⁸⁰ Article 56 (1) (b) of the *Code of Cultural and Landscape Heritage*.

³⁸¹ Article 57 (5) of the *Code of Cultural and Landscape Heritage*.

introduces a regime more rigorous than the one provided by the Legislative Decree n. 490/1999.

The article 65 (1) imposes the general principle which states that «The definitive exit of movable cultural property indicated in article 10 [...] within the territory of the Republic is forbidden». This restriction derives from the article aims to protect the artistic, historical or national archaeological heritage.

The exceptions to the general principle are established in the *Code of Cultural and Landscape Heritage* in its articles 65³⁸², 68³⁸³ and 69³⁸⁴, which contemplate the cases of definitive exit of cultural heritage from the national territory, and in its articles 66³⁸⁵, 67³⁸⁶ and 71³⁸⁷, which consider the discipline of temporary exit of cultural heritage from the national territory.

In the matter of the definitive exit of cultural heritage from the national territory the *Code of Cultural and Landscape Heritage* makes a distinction between the circulation within the boundaries of the European Union and the one towards Third countries. The distinction was inspired by the L. n. 88/1998³⁸⁸ concerning the circulation of cultural heritage, which implemented inside the Italian legislation the Regulation 3911/2012³⁸⁹ on the export of cultural goods and introduced the difference between «shipping» inside the European Union and «exportation» towards Third Countries: in case of «shipping», from the territory of the Italian Republic, inside the European Union, is required a Certificate of Free Circulation, while in case of «exportation» outside the European Union is required, in addition to a Certificate of Free Circulation, also an Export License.

³⁸² Article 65 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004):Definitive Exit.

³⁸³ Article 68 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004):Certificate of Free Circulation.

³⁸⁴ Article 69 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004):Administrative Appeal Against Denial of Certificate.

³⁸⁵ Article 66 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004):Temporary Exit.

³⁸⁶ Article 67 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004):Other Cases of Temporary Exit.

³⁸⁷ Article 71 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): Certificate of Temporary Circulation.

³⁸⁸ L. n. 88/1998 of the 30th of March 1998 and published on the n. 84 of the Official Journal of the Italian Republic on the 10th of April 1998.

³⁸⁹ Council Regulation (EEC) n. 3911/92 of the 9th of December 1992 on the export of cultural goods.

It cannot be disposed the definitive exit from the territory of Republic of all the categories of cultural goods: article 65 (3)³⁹⁰ lists the ones for which it can be required an authorization for their exit.

The holder of the cultural goods, who wishes to definitely remove a cultural good from the territory of the Italian Republic «[...] must make a declaration to that effect and present them to the competent export office, indicating at the same time the market value for each item, in order to obtain the certificate of free circulation».³⁹¹ He also must effectuate a material presentation of the goods to the competent export office, which has a due date of three days «[to] notify the competent offices of the Ministry, which within the following ten days shall furnish it with any useful cognitive element with regard to the objects presented for definitive exit».³⁹²

The reason of the indication of the «venal value»³⁹³ of the cultural goods is due to the fact that, after the notification to the Ministry of the application for the certificate of free circulation, the Italian State has a due date of ninety days for compulsory purchasing of the goods. The export office must notify this option to the holder of the goods and to the Region where the office is located.³⁹⁴ According

³⁹⁰ Article 65 (3) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): «[...] a) things, to whomsoever they may belong, which present cultural interest and which are the work of no longer living artists and whose production goes back more than fifty years; b) archives and single documents, belonging to private individuals, which present cultural interest; c) properties included in the categories indicated in article 11, paragraph 1, letters f) [photographs, with their relative negatives and matrixes, samples of cinematographic works, audio-visual material or sequences of images in movement, the documentation of events, oral or verbal, produced by any means, more than twenty-five years ago], g) [means of transport which are more than seventy-five years old] and h) [property and instruments of interest for the history of science and technology which are more than fifty years old], to whomsoever they may belong».

³⁹¹ Article 68 (1) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

³⁹² Article 68 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

³⁹³ Nardella, D., *Codice dei beni culturali e del paesaggio – commentario*, Bologna, Il Mulino, 2004, p. 307.

³⁹⁴ Article 70 (2) and (3) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): «[...] (2)The Ministry shall have the option to purchase the thing or property for the value indicated in the declaration. The purchase provision shall be notified to the party concerned within the preemptory term of ninety days from the declaration. Until such time as notification of the purchase provision occurs, the party concerned may decide against the exit of the object and take action to withdraw the same [...] (3) Should the Ministry not wish to proceed to purchase, it shall, within sixty days of the declaration, notify the Region in whose territory the recommending export office is located. The Region shall have the option to purchase the thing or the property in accordance with the provisions of article 62, paragraphs 2 and 3, pertaining to the financial coverage of the costs and the assumption of the relative promise to purchase. The relative provision shall be notified to the party concerned within the preemptory term of ninety days from the declaration».

to article 70 (2), after the notification, the holder of the goods «[...] may decide against the exit of the object and take action to withdraw the same».

This opportunity has to be considered not as a lack of attention and care regarding the holder, but as tool for safeguarding the national cultural heritage from its dispersion.³⁹⁵

After this first phase, the export office must issue or deny the certificate of free circulation within forty days of the presentation of the request, by notifying its decision to the holder and justifying in both cases its choice.

If the certificate of free circulation is issued, it is valid for a three-year period, while, if it is denied, the holder of the cultural goods can appeal to the Ministry against the denial within the thirty days following and if «[...]the Ministry acknowledges the appeal as valid, it shall return the relative documents to the export office, which shall take action accordingly within the following twenty days».³⁹⁶

In case of exportation towards Third Countries instead, the holder must require, in addition to the certificate of free circulation, also an export license, whose issuing relies on the above mentioned offices.³⁹⁷

Article 74 (1) states that: «The exportation outside European Union territory of the cultural properties indicated in Annex A³⁹⁸ of this Code is governed by the EEC Regulation and the present article».

³⁹⁵ Fiorilli, M., op. cit., p. 458.

³⁹⁶ Article 69 (1) and (4) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): « (1) Appeal to the Ministry against a denial of certificate is admissible, within the thirty days following, on grounds of legitimacy or merits. [...] (4) When the Ministry acknowledges the appeal as valid, it shall return the relative documents to the export office, which shall take action accordingly within the following twenty days».

³⁹⁷ In absence of an official translation of the text of the law I have provided a personal translation Article 74 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): « For the purposes of article 3 of the EEC Regulation, the ministry's export offices are competent authorities for issuing export licenses. The Ministry shall draw up the list of such offices and communicate it to the Commission of the European Communities; It shall also indicate any modification of the same within two months of its execution».

³⁹⁸ Annex A the Code of Cultural and Landscape Heritage (D. lgs. 42/2004)« 1. Archaeological finds dating back more than one hundred years [...] 2. Elements, that are an integral part of artistic, historical or religious monuments and are the result of dismemberment of monuments which date back more than one hundred years. 3. Paintings and pictures [...] 4. Water colors, gouaches and pastels, entirely painted by hand on any base. 5. Mosaics[...]6. Original engravings, prints, serigraphs and original lithographs and their relative matrices [...] 7. Original works of statuary art or sculpture and copies [...] 8. Photographs, films and relative negatives. 9. Incunabula and manuscripts, including geographical maps and musical scores [...] 10. Books over a hundred years old, singly or in collections. 11. Printed geographical maps dating back more than two hundred years. 12. Archives and supports, including elements of any nature dating back more than fifty years. 13. a) Collection and samples from zoological, botanical, mineralogical and anatomical collections:

The doctrine³⁹⁹ has considered the expression « governed by the EEC Regulation» as a mistake, because it is an unnecessary statement, because of the immediate applicability of this type of disposition.

The standard model of the export license is provided by article 2 of the Regulation n. 656/2004 and « [...] shall be issued by the Export office in conjunction with the certificate of free movement and shall be valid for six months. That license may be issued by the same office which issued the certificate, even not at the same certificate, but not more than thirty months after the latter's release».⁴⁰⁰

Lastly the provisions concerning the certificate of free circulation and export license «[...] shall not apply to objects entered in the territory of the State with an export license issued by another Member State of the European Union in accordance with article 2 of the EEC Regulation, for the duration of the validity of the same license».⁴⁰¹

In the matter of the temporary exit instead, it can be authorized not only for those categories of cultural goods allowed to the definitive exit according to article 65 (3), but also for those listed in first⁴⁰² and second paragraph⁴⁰³ of article 65.⁴⁰⁴

b) Collections of historical, paleontological, ethnographical or numismatic interest 14. Means of transport dating back more than seventy-five years. 15. Other antique objects not contemplated by categories 1 to 14, dating back more than fifty years».

³⁹⁹ Mazzoleni, M., *La tutela dei beni culturali nel diritto internazionale e comparato*, Venezia, Libreria Editrice Cafoscarina, 2005, p. 64.

⁴⁰⁰ In absence of an official translation of the text of the law I have provided a personal translation Article 74 (3) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴⁰¹ In absence of an official translation of the text of the law I have provided a personal translation Article 74 (5) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴⁰² Article 65 (1) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): « The definitive exit of movable cultural property indicated in article 10, paragraphs 1, 2 and 3 from within the territory of the Republic is forbidden.

⁴⁰³ Article 65 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): « The exit of the following is also forbidden: a) movable things belonging to the subjects indicated in article 10, paragraph 1, which are the work of no longer living artists and whose production goes back more than fifty years, until the verification provided for by article 12 is carried out. b) properties, to whomsoever they may belong, which are included in the categories indicated in article 10, paragraph 3, and which the Ministry, after consultation with the competent advisory body, has preventively identified and for which it has excluded exit, for defined periods of time, because it would be harmful for the cultural heritage in relation to the objective characteristics and the provenance of the aforesaid properties and to the milieu to which they belong.

⁴⁰⁴ Article 66 (1) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): «The temporary exit from the territory of the Republic of the things and cultural properties indicated in article 65, paragraphs 1, 2, letter a), and paragraph 3, may be authorized for art events, exhibits or expositions of great cultural interest, on condition that the integrity and safety of the aforesaid things are ensured».

The first thing to confirm before the issue of the authorization is the guarantee of the safety and integrity of the cultural good: properties which are susceptible to damage during transportation or in unfavorable environmental conditions and properties which constitute the principal collection of a determined and integral section of a museum, picture gallery, art gallery, archive or library or of an artistic or bibliographical collection⁴⁰⁵ cannot be, in any case, removed from national territory.

The temporary exit of cultural goods requires the issue of a certificate of temporary circulation. The discipline provided by article 71⁴⁰⁶ is the same of the demand for the issue of the certificate of free circulation, the only difference is that the holder of the goods must indicate the market value of the cultural objects for the assessment of the amount of insurance necessary to cover the risks that good can run in transport and stay abroad⁴⁰⁷ and the party responsible for its safekeeping abroad.

Within forty days of the request, the competent export office must issue or deny the certificate of temporary circulation by notifying its decision to the holder of the cultural goods and justifying in both cases its choice. If the certificate is issued, it must indicate the conditions of shipment and the time limit for the return of goods, «which may be extended at the request of the party concerned, but may not in any case exceed eighteen months from the time of their removal from the national territory».⁴⁰⁸

Particularly for determined private cultural goods listed in article 65⁴⁰⁹ (1) and (3) is requested also «a security bond, which may consist of a surety policy, issued by a banking institution or an insurance company, for a sum exceeding by ten per cent the value of the property or thing as assessed when the certificate was issued»

⁴⁰⁵ Article 66 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴⁰⁶ Sandulli, M., A., op. cit., p. 621.

⁴⁰⁷ Article 71 (6) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): « The granting of the certificate shall always be conditional to the insurance of the properties on the part of the party concerned for the value indicated in the application. For exhibits and events promoted abroad by the Ministry or, with State participation, by government bodies, by Italian Cultural Institutes abroad or by supra-national organizations, the insurance may be substituted by the assumption of the relative risks by the State[...]».

⁴⁰⁸ Article 71 (5) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004)

⁴⁰⁹ Ministero per i beni e le attività culturali. Ufficio Studi, Ufficio Legislativo, *Dal testo unico al Codice dei Beni culturali e del Paesaggio*, Carletti, D. - Bucci, E. (eds.), Roma, Azienda Grafica Ered, 2004.

The scope of the security bond is the one of avoiding the definitive exit of the cultural goods at the expiration of the temporary exit period, because if they do not come back to Italy, the State cashes the security bond.

The export offices of the Italian Republic represent an European *best practice* concerning the control and the certification of the entrance of cultural goods into the National territory.⁴¹⁰

According to the provisions of article 72 (2), which were inspired by the Legislative Decree n. 490/1999: «Certificates [valid for five years⁴¹¹] declaring that shipment and importation have occurred shall be issued [by the export offices of the Italian Republic] on the basis of documentation suitable for identifying the thing or the property and for proving provenance from the territory of the Member State or third Country from which the thing or property has been respectively shipped or imported».

This commitment is also due to the fact that the Italian Republic has an important role in the international fight against the illicit traffic in cultural property. The restitution of cultural property illegally taken out the territory of a Member State of the European Union is disciplined by Third Section of the Chapter V of the *Code of Cultural and Landscape Heritage*, which includes the articles from 75 to 86, whose content derives from the transposition of the Directive 93/7⁴¹² inside the national legislation.

The article 76 identifies the Ministry as the central authority on the field of the application of the Directive 93/7, while the custom authorities have to verify the validity of the export licenses according to the Regulation 3911/92.⁴¹³

The Italian discipline aims to improve the cooperation between the different actors involved in the fight against the illicit traffic through a constant and mutual communication between the Ministry and the European Commission.⁴¹⁴ The

⁴¹⁰ Article 72 (1) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004): «The shipment to Italy by a Member State of the European Union or the importation from a third country of the things or properties indicated in article 65, paragraph 3, shall, upon application, be certified by the export office».

⁴¹¹ Article 72 (3) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴¹² Council of the European Union Directive 93/7/EEC of the 15th of March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

⁴¹³ Council Regulation (EEC) n. 3911/92 of the 9th of December 1992 on the export of cultural goods.

⁴¹⁴ Article 84 (1) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

Ministry has also to present to the National Parliament an annual report on the implementation of the measures against the illicit traffic as well as «the implementation of the EEC Directive and EEC regulation in Italy and in the other Member States».⁴¹⁵

Furthermore, according to article 86, the Ministry should promote agreements with the corresponding authorities of the other Member States in order to «[...] encourage[...] and foster[...] greater reciprocal knowledge of the cultural heritage, as well as of the legislation and the way in which protection is organized in the other European Union Member States».⁴¹⁶

From a technical point of view, these agreements have not to be qualified as international ones: they are a tool for easing the cooperation and they are created depending on the particular necessity which occurs.⁴¹⁷

A global acclaimed example of the international commitment concerning the cooperation in the field of the protection of cultural goods, are the Carabinieri Unit for the Protection of Cultural Heritage.

Their activity started on the 3rd of May 1969⁴¹⁸ and Italy was the first Nation to be equipped with a specific police department focused on the trafficking in cultural property.⁴¹⁹ Carabinieri Unit for the Protection of Cultural Heritage, better known as TPC, are part of the Ministry of Culture and play a leading role regarding the safety and protection of the national cultural heritage, through the prevention and

⁴¹⁵ Article 84 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴¹⁶ Article 86 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴¹⁷ Sandulli, M., A., *Codice dei beni culturali e del paesaggio*, Milano, Giuffrè, 2012, p.659.

⁴¹⁸ The Carabinieri Unit for the Protection of Cultural Heritage (Comando Carabinieri Tutela Patrimonio Culturale - TPC) was instituted in 1969, one year prior to the UNESCO Paris Convention in 1970, whereby all UNESCO member States were invited to institute specific services with a view to protecting the cultural heritage of the individual nations.”, (cf. <http://www.carabinieri.it/multilingua/en/the-carabinieri-tpc>), last accessed on the 13th of May 2019.

⁴¹⁹ Losengo, R., *Il Traffico illecito di opere d'arte*, Negri Clementi, G. – Stabile, S. (eds.), in *Il Diritto dell'Arte: la protezione del patrimonio artistico*, vol. 3, Milano 2014, pp. 181 ff.

repression of the multiple interrelated criminal activities, according to the provisions of the articles 5⁴²⁰ and 7⁴²¹ of the 1970 UNESCO Convention.

The role of the TPC consists in the identification of the responsible people who perpetrated offences against cultural property, the recovery of cultural objects looted or illicitly exported from Italy, the control of catalogues of auction houses and exhibitions, online sales and art dealers and the protection of archaeological areas which are particularly at risk in collaboration with the Ministry.⁴²²

This activity is mainly international, and it is conducted through the collaboration with other Ministries of Foreign Affairs and the International Criminal Police Organization (INTERPOL), which is an inter-governmental organization, composed by 194 member countries, seeking the cooperation of international police.⁴²³

⁴²⁰ Article 5 of the 1970 UNESCO Convention: « To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: [...] (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage; (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property; [...] (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property».

⁴²¹ Article 7 of the 1970 UNESCO Convention: « The States Parties to this Convention undertake: (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party».

⁴²² Losengo, R., *op.cit.*, p. 194.

⁴²³ « [...] The role of the General Secretariat is primarily to support our member countries and their specialized units in this field. We ensure information is shared among countries, bring experts together in workshops and conferences, and offer training on how to counter the traffic in cultural property. When countries send us information about stolen or trafficked items, we analyze this and enter it into our Works of Art database. As well as being a central global repository for this

Moreover since the 1980s, the TPC introduced an auxiliary instrument to its investigations which is «The Database of illegally removed cultural artefacts».⁴²⁴ This tool is provided by article 85⁴²⁵ of the Italian Code of the Cultural and Landscape Heritage and it is daily kept up to date. Inside the Database there are all the details and pictures of looted and illegally exported cultural objects of Italian or foreign provenance.

The use of technology has made «The Database of illegally removed cultural artefacts» a reference point for all the Carabinieri TPC Headquarters, for the Italian Ministry and for foreign law-enforcement agencies, such as the INTERPOL , which has also elaborated its «Stolen Works of Art database»⁴²⁶, allowing to conduct a careful analysis of criminal phenomenon concerning the illicit trafficking of cultural property.

Lastly, article 78 (1) fixes the time-limit for Restitution, stating : «The action for restitution shall be brought within the peremptory term of one year [and in any case within the term of thirty years⁴²⁷] starting from the day when the requesting State knew that the property illegally taken out of its national territory is to be found in a determined place and identified the possessor or holder of the property by whatever legal right». The code also provides a compensation, upon request of the party

information, our experts can also add value to information received. We analyze emerging trends in art thefts such as the proliferation of counterfeit, faked or forged works, or the use of the Internet for selling works of dubious background. Many countries do not have police units specializing in cultural property or national databases of stolen items, so we encourage and advise on this, to make our global network stronger», (cf. <https://www.interpol.int/Crimes/Cultural-heritage-crime/How-we-fight-cultural-heritage-crime>), last accessed on the 11th of May 2019.

⁴²⁴ The Database of illegally removed cultural artefacts can be consulted on the website: <http://tpcweb.carabinieri.it/SitoPubblico/search>, last accessed on the 11th of May 2019.

⁴²⁵ Decree no.42 dated 22nd of January 2004, named Code of the Cultural and Landscape Heritage, Second Part - Cultural Property, title I – Protection, Chapter V – Circulation Within International Territory, Section III – Restitution of Cultural Property Illegally Taken Out of the Territory of a Member State of the European Union, Article 85 - Databank of Stolen Cultural Property: “1. A databank of stolen cultural property is established within the Ministry, according to modalities established by ministerial decree”.

⁴²⁶ «Our database of stolen works of art combines descriptions and pictures of more than 50,000 items. It is the only database at the international level with certified police information on stolen and missing objects of art. Countries send us information about stolen and missing items, and our experts add this to the database by our experts. In accordance with our strict data processing rules, only information provided by authorized entities (INTERPOL National Central Bureaus and specific international partner organizations, such as UNESCO, and ICOM and ICCROM) can be inserted into the database. Only fully identifiable objects are entered in the database.».(cf. <https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database>), last accessed on the 11th of May 2019.

⁴²⁷ Article 78 (2) of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

concerned, whether he can demonstrate of having exercised due diligence in the act of the purchasing.⁴²⁸

In case of restitution on behalf of Italy instead, the leading actor of the action would be the Ministry, in accord with the Ministry for Foreign Affairs and the Law Officers of the State.⁴²⁹

If the cultural good does not belong to the State, its action for restitution will be published in the Official Journal of the Italian Republic. In cases where the person having a right to the property fails to request the delivery of the cultural good within five years from the date of publication in the Official Journal, the cultural good will become part of the national heritage belonging to the State⁴³⁰, the so-called «public domain».⁴³¹

I. 1.2 The positive opinion of Chamber of Deputies and Senate to the Final document of the proposal of the new EU Regulation

Currently the works, concerning the implementation inside the Italian legislation of the new Regulation (EU) n. 2019/880 of the European Parliament and of the Council of the European Union on the import of cultural goods⁴³², are stationary. In 2017, both Chamber of Deputies and Senate of the Italian Republic expressed a positive opinion and commitment of the Government to conduct the following stages in the negotiations at the EU level.

With regard to the Chamber of Deputies, the proposal of the new EU Regulation was approved on the 19th of October 2017⁴³³ by the Committee on Culture, Science

⁴²⁸ Article 79 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴²⁹ Article 82 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴³⁰ Article 83 of the Code of Cultural and Landscape Heritage (D. lgs. 42/2004).

⁴³¹ In absence of an official translation of the text of the law I have provided a personal translation Article 822 of the Italian Civil Code: « They belong to the State and are part of the public domain: the coast, the beach, the sparse and the ports; The rivers, streams, lakes and other waters defined by the relevant laws; works intended for national defense. They are also part of the public domain, if they belong to the State, the roads, the highways and the railways; aerodromes; the aqueducts; the buildings recognized of historical, archaeological and artistic interest according to the relevant laws; collections of museums, art galleries, archives, libraries; and finally the other goods which are from the law subject to the regime of the public domain».

⁴³² The Regulation (EU) n. 2019/880 of the European Parliament and of the Council on the import of cultural goods is published in the L. 151 of the Official Journal of the European Union, pp. 1-14.

⁴³³ Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 17th of October 2017 by the Committee on Culture, Science and Education.

and Education. The Committee shares the purposes of the Proposal and expresses the national commitment to the fight against illicit traffic of cultural goods and to the protection of cultural heritage, «especially archaeological objects in source countries affected by armed conflict or civil war».⁴³⁴

Nevertheless, the Chamber of Deputies has exposed its personal observations relating to the text of the proposal such as its aversion to the argument of the European Commission «that introducing the 250 year rule is designed to avoid excessively impeding the cultural properties trade»⁴³⁵, because the objective of the Regulation is not interfering in the legal trade of cultural property but preventing and combating crime: «The Committee therefore believes that the Italian negotiators should reduce the time limit within which the proposal for a regulation will not apply to a shorter time limit».⁴³⁶

An attempt in this regard was made by Luigi Morgano, who is a Member of the European Parliament for the Italian Democratic Party (PD) and the shadow rapporteur of the Regulation for the Socialists and Democrats Group inside the Culture Commission, but, as we previously stated, it did not achieve the desired results.⁴³⁷

Moreover the Committee supports the idea of the article 8 of the Regulation of instituting an electronic databank «for archiving and exchanging updated information between Member States» and suggests it should be inspired by the above mentioned «Database of illegally removed cultural artefacts»⁴³⁸ which was created in Italy by Carabinieri Headquarters for the Protection of Cultural Heritage. Lastly, the Committee does not endorse the provisions of the Proposal for a Regulation «[...]whereby only customs authorities are to check the importers’

⁴³⁴ I Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 17th of October 2017 by the Committee on Culture, Science and Education.

⁴³⁵ Ibidem note 434.

⁴³⁶ Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 17th of October 2017 by the Committee on Culture, Science and Education.

⁴³⁷ Redazione AGCult, *Nuovo regolamento Ue su importazione beni culturali, Morgano (Pd): più trasparenza*, in *AGCult online*, 2019, (cf. <https://agcult.it/a/6900/2019-03-20/nuovo-regolamento-ue-su-importazione-beni-culturali-morgano-pd-piu-trasparenza>), last accessed on the 4th of June 2019.

⁴³⁸ The Database of illegally removed cultural artefacts can be consulted on the website: <http://tpcweb.carabinieri.it/SitoPubblico/search>, last accessed on the 11th of May 2019.

declarations.»⁴³⁹, because it would exclude the Export Offices of the Ministry of Cultural Heritage from any function regarding the import.⁴⁴⁰

The Education Committee of Senate of the Italian Republic instead, on the 29th of November 2017⁴⁴¹ adopted a positive resolution of the Final document of the proposal of the new EU Regulation, but it expressed a series of observations.

The Education Committee believes that « the time limit of 250 years should not be applied to all typologies of cultural goods» because it could be the necessity of monitoring the import of more recent objects, such as photographic and cinematographic archives to which the threshold of more than 250 years is unenforceable.⁴⁴² This is the reason why the Senates also demanded for a more detailed Annex to the Regulation.

Furthermore also the Education Committee does not endorse the provisions of the proposal, which focus the control of the importers' statements only on the custom authorities without considering the leading role that the Italian Ministry fulfills in the field of the circulation of cultural property.

In the end the Senate makes two controversial considerations: the first one considers the article 8 of the proposal, which have been deleted from the final text approved on the 17th of April 2019; while the second one the article 11 of the proposal, concerning the « training and capacity building activities» that should be organized by the Commission in collaboration with the member States: the Senate believed that Member States should have the possibility and not the obligation to organise them. This consideration was embraced by the article 12 of the final text approved on the 17th of April 2019.

⁴³⁹ Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 17th of October 2017 by the Committee on Culture, Science and Education.

⁴⁴⁰ Calabi, G., *Italy*, in *ART LAW*, 2018, pp. 41 ff..

⁴⁴¹ Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 29th of November 2017 by the Education Committee.

⁴⁴² Final document of Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375 final) which was adopted on the 29th of November 2017 by the Education Committee.

II. 2 The new Kulturgutschutzgesetz (Act on the Protection of Cultural Property)

In 2016, Germany introduced the new *Act on the Protection of Cultural Property*, the *Kulturgutschutzgesetz*,⁴⁴³ which entered into force on the 6th of August 2016, after it had been adopted by the German Parliament, the *Bundestag*, without any dissenting vote and with the broad support of the Federal Assembly, the *Bundesrat*, in early July 2016. The new act was adopted in order to modernize the German cultural property protection law through the implementation of the European Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State⁴⁴⁴ and to strengthen the implementation of the 1970 UNESCO Convention.⁴⁴⁵

When Germany ratified the 1970 UNESCO Convention in 2007 adopted the *Act on the Return of Cultural Property* in order to implement it.

An analysis conducted by the Federal Government between 2008 and 2013 reported that this act was ineffective⁴⁴⁶, because most of its provisions were inapplicable in practice, such as the ones concerning the import licenses for cultural property.⁴⁴⁷

The new 2016 Act replaces the one adopted in 2007 and «newly implements the UNESCO 1970 Convention in Germany while respecting the new Operational Guidelines for the implementation of the UNESCO 1970 Convention adopted in Paris in July 2014 at the same time».⁴⁴⁸

The Minister of State Monika Grütters stated: «With the reform of the cultural property protection law, Germany takes its responsibility to protect the cultural

⁴⁴³ Cultural Property Protection Act adopted on the 31st of July 2016, published on the Federal Law Gazette [BGBl.] Part I p. 1914.

⁴⁴⁴ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012.

⁴⁴⁵ The 1970 UNESCO Convention entered into force on 24th April 1972, in accordance with its article 21, and it has 139 signatory States.

⁴⁴⁶ Gesley, J., *Germany: Act to Protect Cultural Property Passed*, in *Library of the Congress*, 2016, (cf. <http://www.loc.gov/law/foreign/news/article/germanyacttoprotectculturalpropertyipasssed/>), last accessed on the 10th of June 2019.

⁴⁴⁷ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 6.

⁴⁴⁸ Ibi note 425, p. 7.

heritage of mankind – both on national and international level. With the new act we make a decisive contribution to combat illicit trafficking in cultural property».⁴⁴⁹

The aim of the *Kulturgutschutzgesetz* is the one of protecting both Germany's national cultural property and national cultural property of other States Parties to the 1970 UNESCO Convention, when such cultural property is unlawfully removed from the territory of these States Parties and taken into German boundaries. The Act is a leading example of the collaboration among States in the fight against clandestine excavations and illicit traffic of art and antiquities.⁴⁵⁰

It has revised the import and export rules for cultural property and established new rules concerning the return of unlawfully exported cultural property and due diligence requirements related to placing cultural property on the market.

While the discipline of import of cultural property will be analyzed in the following paragraph, here it is done an analysis of the export rules.

The Chapter III - Part 2 (sections from 21 to 27) of the *Kulturgutschutzgesetz* concerns the export rules.

According to sections 22 and 23, both permanent export and temporary export, within and outside the European Union, require the issue of an export license.

The application for the license must be filed with the German competent regional authority, the *Land*, of the place where the cultural property is located.

For the first time, German authorities can decide whether cultural property may be exported or «whether it is of such outstanding importance and significance for Germany's cultural heritage and cultural identity that it must be listed as being of national cultural⁴⁵¹ significance».⁴⁵²

⁴⁴⁹ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 4.

⁴⁵⁰ Puhze, G. - Henker, M., *Is the German cultural property protection act to be welcomed?*, in *Apollo Magazine*, 2015, (cf. <https://www.apollomagazine.com/is-the-german-cultural-property-protection-act-to-be-welcomed/>), last accessed on the 10th of June 2019.

⁴⁵¹ Section 6 of the Cultural Property Protection Act: « National cultural property shall be cultural property which: 1. is entered in a register of cultural property of national significance; 2. is publicly owned and part of the collection of a public-law institution preserving cultural property; 3. is owned by and part of the collection of an institution preserving cultural property which largely relies on public funding; or 4. is part of an art collection of the Federation or the Länder».

⁴⁵² Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 8.

In the cases of application for the definitive export license, the *Land* may decide that the exit of the cultural property would cause a «significant loss»⁴⁵³ for the national cultural heritage and refuse the issuing of the license.⁴⁵⁴

This classification is provided by a committee of five experts selected by the German State Agency and it includes scholars, art dealers, private collectors and the State representative.⁴⁵⁵

Furthermore the last paragraphs of Section 23 provides for the possibility of a purchase by the German State⁴⁵⁶ in the cases in which the application for the export license was rejected.⁴⁵⁷

⁴⁵³ Philipp, C. – Von Westerholt, M., *Germany; reform of the cultural property law*, in P+P Pollath, 2015.

⁴⁵⁴ Section 23 (2) of the Cultural Property Protection Act: «The license shall be refused where, in consideration of the circumstances of the individual case, there are overriding significant interests of German cultural heritage».

⁴⁵⁵ Section 14 (2) of the Cultural Property Protection Act: «The supreme Land authorities shall convene expert committees which are not subject to directions. The committees shall be composed of five experts and shall be appointed for five years, with the possibility to be reappointed. Competent persons from institutions preserving cultural property, from research, art and antiquarian book trades, and private collectors shall be considered when appointing experts. Associations and organizations from these areas may suggest persons to be appointed. One competent person shall be appointed at the suggestion of the supreme federal authority responsible for culture and the media. The composition of the Länder expert committees shall be published on the Internet portal pursuant to Section 4. Before making a decision, the committees may also hear competent external persons».

⁴⁵⁶ Peters, R., *The Protection of Cultural Property: Recent Developments in Germany in the Context of New EU Law and the 1970 UNESCO Convention*, in *Santander Art And Culture Law Review*, 2016, (cf. [http://www.ejournals.eu/SAACLR/2016/2-2016\(2\)/art/8752/](http://www.ejournals.eu/SAACLR/2016/2-2016(2)/art/8752/)), last accessed on the 10th of June 2019.

⁴⁵⁷ Section 23 (6), (7) and (8) of the Cultural Property Protection Act: «(6) If the application for the permanent export of registered cultural property is rejected, the supreme federal authority responsible for culture and the media shall inform the supreme Land authorities consulted pursuant to subsection 4. At the owner's request, the supreme federal authority responsible for culture and the media and the Land authorities informed pursuant to the first sentence shall, under the organizational leadership of the Cultural Foundation of the Länder, consider the interests of everyone concerned and clarify the conditions deemed appropriate for a possible purchase of the cultural property by or on behalf of an institution preserving cultural property that is located in the federal territory and makes the cultural property publicly accessible. The goal of this clarification process shall be: 1. to clarify which institution preserving cultural property has a collection that would be suitable for the cultural property; 2. to determine an appropriate price that gives due regard to the tax advantages of the owner pursuant to Section 12 (1) and other advantages of the owner; 3. to clarify whether and, if so, when and to what extent an institution preserving cultural property pursuant to no. 1 could receive public or private funding to purchase the cultural property; 4. to clarify all other modalities of a possible purchase. To determine an appropriate price pursuant to the third sentence no. 2, the Cultural Foundation of the Länder shall enlist the help of external experts. (7) Once the conditions of a purchase pursuant to subsection 6 have been clarified, an institution preserving cultural property pursuant to subsection 6 no. 1 may use this as a basis to offer to purchase the cultural property provided that funding is secured. If the owner proves that he or she filed the export application due to economic hardship, the federal and Land authorities shall work to ensure that funding for a purchase is secured and that the institution preserving cultural property makes a bid to purchase the cultural property. Section 12 (2) shall remain unaffected. (8) The owner may accept the bid pursuant

As regards the return of unlawfully exported cultural property, Chapter V – Part 1 (sections from 49 to 57) states that all States Parties to the 1970 UNESCO Convention may claim the return of cultural property, recognized as such according to their national legislation, and illegally exported from the respective State after the 26th April 2007, which is the day when the provisions of the 1970 UNESCO Convention became binding for Germany. As explained before though, the 1970 UNESCO Convention has not a retroactive effect, this is the reason why the *Kulturgutschutzgesetz* has declared that: «cultural property is presumed to have been unlawfully exported from the respective State Party after 26 April 2007, if the possessor of the cultural property in Germany does not present evidence proving that he or she already possessed the cultural property prior to this date».⁴⁵⁸ The introduction of this rule is very pragmatic, because it is due to the fact the requesting State is often unable to provide information about the export from its State territory, which is one of the eminent *laissez-passer* of the illicit traffic.⁴⁵⁹

Lastly, the rules concerning the due diligence requirements related to placing cultural property on the market are provided by Chapter IV (sections from 40 to 48). The introduction of these dispositions is connected to the emerging role of Germany as an art market⁴⁶⁰: the purchasers of cultural property must trust that the seller has controlled the provenance and the lawful export of the property. The new due diligence requirements are based on the codes of conduct of the national and international art trade associations: section 41 imposes that «Anyone who places cultural property on the market shall be obliged to exercise due diligence in checking whether the cultural property: 1. has been lost; 2. has been unlawfully imported; 3. has been unlawfully excavated».

to subsection 7 within six months. If the purchase is not concluded, a new export application may be filed no earlier than five years after the previous application was rejected».

⁴⁵⁸ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 9.

⁴⁵⁹ Valentin, P. – Vere Hodge, T., *Protecting national heritage or stifling the German Art Market?*, in *Art at Law*, 2016, (cf. <https://www.artatlaw.com/archives/2016-jan-dec/protecting-national-heritage-stifling-german-art-market-2>), last accessed on the 10th of June 2019.

⁴⁶⁰ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 11.

These provisions are applied not only for the professional art market, but also for private individuals who trade in cultural property, both in fairs, auctions and online sales.⁴⁶¹

According to section 44 (1) due diligence requirements must be applied also to «[...] cultural property [which] was taken from its original owner between 30 January 1933 and 8 May 1945 due to National Socialist persecution».

In order to assure the buyer of his financial investment, the art and antiquities dealers are required to keep records of their transactions, whose retention period is now 30 years, like in Austria and Switzerland.⁴⁶²

II. 2.1 The sections 28, 29 and 30 of the Act

Chapter III – Part 3 (sections 28, 29, 30) of the *Kulturgutschutzgesetz* concerns the discipline of Import of cultural property into Germany.

The rules are based upon a simple equation⁴⁶³: cultural property illegally exported from a State Party of 1970 UNESCO Convention is considered as illegally imported into Germany, if, upon import, no documents are presented in order to prove that the cultural property has been lawfully exported.⁴⁶⁴

Such a provision considers that most States require an export license for the exit of their cultural property.⁴⁶⁵

It is very important to underline the suggestion coming from the Federal Government Commissioner for Culture and Media: «[...] To ensure the practical effectiveness of these comprehensive import rules, it is absolutely necessary that the German customs and law enforcement authorities, but also the German public including art and antiquities dealers and tourists, are informed about the categories

⁴⁶¹ Peters, R., op. cit. .

⁴⁶² Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 11.

⁴⁶³ Peters, R., op. cit. .

⁴⁶⁴ Section 30 of the Cultural Property Protection Act: «Anyone who imports cultural property classified or defined as national cultural property by a member state or state party shall be required to be able to show relevant documents to prove the lawfulness of the export from the country of origin within the meaning of Section 28 n. 1. Such documents may include export licenses granted by the country of origin and other documents in which the country of origin confirms that it was possible to lawfully export the cultural property».

⁴⁶⁵ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 7.

of cultural property that are protected in other States, that are subject to an export license or must not be exported under any circumstances. UNESCO' s database of national cultural heritage laws offers an overview on national legislation, but predominantly contains relevant legal texts only. Germany is therefore setting up a website providing further information on the protection and export provisions applicable in foreign States».⁴⁶⁶

As the scholar Robert Peters has affirmed, the huge commitment of the German Government concerning the import rules is a first important step that will be completed only by the new Regulation 2019/880 *on the imports of cultural goods*.⁴⁶⁷

In the end it is also appropriate to mention the opinion of some eminent scholars⁴⁶⁸ concerning the *Kulturgutschutzgesetz*: they believe that the German rules, concerning due diligence, import and export requirements, are more efficient than the ones of other countries, because the act provides for detailed and strong penal sanctions, including up to five years imprisonment⁴⁶⁹, in case of their violation.

PART II. Common Law Systems: The US' and Australian cases

I. 1 The American *laissez-faire* in the import and export of cultural goods

The United States of America has almost no restrictions on the export of cultural property, and imposes no duty on cultural property imports.⁴⁷⁰

The lack of export control could drain the United States of America of its own cultural property.⁴⁷¹

⁴⁶⁶ Press Office of the Federal Government Commissioner for Culture and Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, in Federal Government Commissioner for Culture and Media (eds.), Berlin, 2016, DDC BPA, p. 4.

⁴⁶⁷ Peters, R., op. cit. .

⁴⁶⁸ Graf Von Wallwitz, S., VV. AA., , *Germany*, in *ART LAW*, 2018, p. 35

⁴⁶⁹ Section 83 (1) of the Cultural Property Protection Act «(1) Anyone who engages in the following shall be liable to imprisonment not exceeding five years or a fine: 1. in violation of Section 21 nos. 1, 2, 4 or 5 exports cultural property; 2. in violation of Section 21 no. 3 exports cultural property which he knows was unlawfully imported pursuant to Section 32 (1) nos. 1 and 2; 3. in violation of Section 28 imports cultural property which he knows had been removed in violation of legislation referred to in Section 28; 4. in violation of Section 40 (1) places on the market cultural property which was lost or which he knows had been unlawfully excavated or unlawfully imported pursuant to Section 32 (1) nos. 1 or 2; or 5. in violation of Section 40 (3) concludes a contract of obligation or a contract of disposal for cultural property exported through an act referred to in no. 1 or 2».

⁴⁷⁰ Bator, P., M., *An essay on the International Trade in Art*, in *Stanford Law Review*, 1982, p. 314.

⁴⁷¹ Bargher, C., M., *The Export of Cultural Property and United States Policy*, in *DePaul Journal of Art, Technology & Intellectual Property Law*, vol.4, Iss.2, Art.2, 2016, p. 189.

Prior to an analysis of the legislation protecting the cultural heritage of the United States of America, it is necessary to focus briefly on general export controls.

They originated after World War II, in response to threats to the national security imposed by the communist nations. In 1949 the Congress adopted the Export Administration Act (1949 EAA)⁴⁷²: the Act established the structure of the U.S. export regulation system, which endures today.⁴⁷³

The 1949 EAA gave to the President unchecked power, because he could forbid the export of not just weapons, as already provided by the Neutrality Laws of 1935⁴⁷⁴, but any commodities, to communist countries that posed a threat to U.S. «strategic, technological, and military superiority and domestic stability».⁴⁷⁵

Since 1949, the Congress has repeatedly, through amendatory legislation, attempted to limit the President's power over export control, and to encourage free trade.⁴⁷⁶

As regards the protection of cultural heritage it is compulsory to define what kind of objects and goods are considered part of the heritage of the United States of America, because its identification provides for economic benefits such as tourism, stimulation of the scholarship and the building of a national intellectual settlement.⁴⁷⁷

The factors determining, if a cultural object can become part of the national cultural heritage, have to value its significance for the national identity. They consist of the period of time the State has possessed the object, the nature and size of the collection of objects, who is the owner of the cultural property and its historical importance.⁴⁷⁸

An example for the U.S.' cultural heritage is the Statue of Liberty, because even though it was gifted by France, it has been in the United States of America for more than two centuries and it is the symbol of the cultural melting-pot, which portrays

⁴⁷² Export Control Act of 1949, Ch. 11, 63 Stat. 70, at 50 U.S.C. App. §§2021 ff..

⁴⁷³ Riviezzo, D., A., *An iron curtain to free trade: an evaluation of the H.R. 4653, the Export Administration Act amendments*, in *Law and Policy International Business*, 1991, p. 863.

⁴⁷⁴ Ch. 837, 49 Stat. 1081, repealed by the Neutrality act of 1939, Ch. 2, § 1, 54, Stat. 4.

⁴⁷⁵ Riviezzo, D., A., op. cit., p. 863.

⁴⁷⁶ Bargher, C., M., op. cit., p. 198.

⁴⁷⁷ Fishman, J., J. – Metzger, S., *Protecting America's Cultural and History Patrimony*, in *Syracuse Journal of International Law*, 1976, pp. 58-59.

⁴⁷⁸ Bargher, C., M., op. cit., p. 203.

the American society.⁴⁷⁹

It is very interesting the archaeologist Clemency Coggins' opinion: «The concept of American cultural heritage may appear as somewhat as an oxymoron. Because the United States is a composite of other cultures, how could America have its cultural identity? Other than jazz and blues music for example, few artistic forms are “purely” American. But the melting-pot phenomenon creates a cultural heritage. The unique mixture of cultures, religions, and languages [...] is precisely what identifies the United States. Therefore, cultural heritage does not necessarily require cultural homogeneity. The problem with the melting-pot argument is that, taken to its logical extreme, the United States should prohibit the export of almost all cultural property, since all the pieces of American cultural property would be needed to complete the cultural puzzle».⁴⁸⁰

The Congress enacted many provisions for the protection of the cultural property in the United States of America, such as the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990⁴⁸¹, which protects Native American human remains, burial sites and grave goods, and imposes criminal penalties for trafficking⁴⁸², the American Antiquities Preservation Act of 1982⁴⁸³, the Archaeological Resources Protection Act of 1979⁴⁸⁴, the National Environmental Policy of 1969⁴⁸⁵, the National Historic Preservation Act of 1966⁴⁸⁶, the Historic Sites Act of 1936⁴⁸⁷ and the Lieber Code of 1863⁴⁸⁸.

These acts protect both objects and structures of historical, archaeological and architectural value and artistic creations realized by American artists or related to American topics, owned or controlled by the Government.

⁴⁷⁹ Spitzer, N., R., VV.AA., *Communications and Culture: should the United States protect cultural resources?*, in *Transcript of the forum sponsored by the National Endowment for the Arts and the Annenberg Washington Program*, Northwestern University, Northwestern University Press, 1991, pp. 73-79.

⁴⁸⁰ Spitzer, N., R., VV.AA., op. cit., pp. 73-79.

⁴⁸¹ 25 U.S.C. §§3001 ff. (1990).

⁴⁸² Steiner, C., *United States - California*, in *ART LAW*, 2018, p. 72.

⁴⁸³ 16 U.S.C. § 443 (1982).

⁴⁸⁴ 16 U.S.C. §§ 470aa-470ee (1982).

⁴⁸⁵ 42 U.S.C. §§ 4321 ff. (1970).

⁴⁸⁶ 16 U.S.C. §§ 470, 470 (b), 470 (c), 470 (n), (1970).

⁴⁸⁷ 16 U.S.C. §§ 461 ff. (1988).

⁴⁸⁸ Instruction for the Government of Armies of the United States in the field, General Order N. 100 of the 24th of April 1863.

In addition to these provisions, in 1976 the Congress also created the Institute of Museums Services (IMS)⁴⁸⁹ for providing financial assistance to American museums for the conservations of their objects.

In spite of all these protective tools though, the United States of America still does not prohibit the export of significant cultural property owned by art dealers, museum and private collectors.⁴⁹⁰

Over the years the Government examined the possibility of introducing export restrictions concerning cultural property in order to end with their *laissez-faire* policy⁴⁹¹, but scholars believe it could be a double-edged sword.⁴⁹²

On the one hand, the Source States of cultural property with exports controls can preserve their national heritage and «enjoy the resulting benefits, such as a strengthened national identity, richer museums, an increase in tourism, profits from legitimate sales [...]».⁴⁹³

Export controls may also protect the United States of America from the danger of losing fundamental elements of its national heritage, in order to avoid repeating what happened in the past with the loss of a white marble bust of Benjamin Franklin, realized by a French artist, which was sold to an European collector after it had been in the United States of America since 1785.⁴⁹⁴

On the other hand, instead, scholars believe that introducing export controls on cultural property would create enormous disadvantages, such as the reduction of the possibility of purchasing cultural objects and of making them available worldwide inside the museums.⁴⁹⁵

Furthermore, Bator suggested that another disadvantage could be the development of illicit markets of cultural property, because export restrictions do not provide any alternative for purchasers and therefore «embargoes encourage illegal trade».⁴⁹⁶

In the hypothesis of introduction of export restrictions, the new measures should

⁴⁸⁹ The Institute of Museums Services (IMS) was created under the 1976 Museum Services Act, 20, U.S.C. §§ 961-968.

⁴⁹⁰ Fishman, J., J. – Metzger, S., op. cit., p. 66.

⁴⁹¹ Feldman, F. – Weil, S., *Art Works: Law, Policy, Practice*, Practising Law Institute, 1974, p. 527.

⁴⁹² Bargher, C., M., op. cit., p. 202.

⁴⁹³ Rafanelli, L., M., *A comparative study of cultural property import regulation: the United States, the United Kingdom and Canada*, in *Columbia Journal of Law and Arts*, 1991, p. 545.

⁴⁹⁴ Fishman, J., J. – Metzger, S., op. cit., p. 57.

⁴⁹⁵ Rafanelli, L., M., op. cit., p. 544.

⁴⁹⁶ Bator, P., M., op. cit., p. 314.

recognize the general principle of free trade expressed in the 1949 the Export Administration Act (1949 EAA).⁴⁹⁷ As a consequence the export control scheme should not be too restrictive and should try to prevent the above mentioned disadvantages, such as the illicit market.⁴⁹⁸

The export controls on cultural property should include as a primary tool, an export licensing requirement, as it is included for general export controls in the 1949 the Export Administration Act (1949 EAA).⁴⁹⁹

According to the suggestions, the system of export license would be evaluated by an administrative body called Art Export Advisory Council (AEAC)⁵⁰⁰, whose characteristics would be inspired by the Export Administration Review Board created by the EAA. The Council should be composed of art experts, scholars, museum directors and curators.⁵⁰¹

The Art Export Advisory Council (AEAC) in order to decide to issue or not an export license should evaluate if the exit of the cultural property in question would constitute a significant loss for the national heritage and identity of the United States of America and if it would be well-preserved and accessible to the public while it is abroad.⁵⁰²

This commitment should lead to the creation of a priority list of cultural property that cannot be exported in order to «narrow the number of objects which are denied the licenses».⁵⁰³

Another suggestion, which is inspired by other countries such as the United Kingdom and Italy, would be, in case of denial of the export license, to allow the Government to purchase the cultural property which was object of the denied

⁴⁹⁷ §2401 (1) and (2) of 50 U.S.C. 1949 the Export Administration Act: « The Congress makes the following findings: (1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy. (2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by earning foreign exchange, thereby contributing favorably to the trade balance. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries».

⁴⁹⁸ Bator, P., M., op. cit., p. 314.

⁴⁹⁹ Fishman, J., J. – Metzger, S., op. cit., p.72.

⁵⁰⁰ Fishman, J., J. – Metzger, S., op. cit., p.73.

⁵⁰¹ Ibidem note 500.

⁵⁰² Ibidem note 501.

⁵⁰³ Ibidem note 502.

request: «The Government could initiate and endowment [to national museums] to facilitate purchases. [...] The endowment could also provide low-interest loans to museums [...]».⁵⁰⁴

In the end as regards the United States of America import controls on cultural property, the Government provided for some restrictions, which come in different forms.⁵⁰⁵

According to §2314 of the National Stolen Property Act, the import of stolen good is unlawful.⁵⁰⁶

A famous case, *United States v. McClain*⁵⁰⁷ has seen the application of this disposition by the Supreme Court. Object of the case were a series of artifacts exported from Mexico, whose licit provenance was discussed. According to article 27⁵⁰⁸ of the Federal Act on Monuments and Archaeological, Artistic and Historic Zones which entered into force in Mexico in 1972, all the cultural goods, movable and immovable, are considered part of the national heritage. The judgment of the Supreme Court recognized that the cultural property was stolen from the Mexican territory.

⁵⁰⁴ Fishman, J., J. – Metzger, S., op. cit., p.73.

⁵⁰⁵ Mackenzie, S., *Going, gone, gone*, Leicester, Institute of Art and Law, 2005, pp. 66-69.

⁵⁰⁶ §2314 of the 18 U.S.C. National Stolen Property Act (NSPA): «Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5,000 or more; or Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof -- Shall be fined under this title or imprisoned not more than ten years, or both. This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money».

⁵⁰⁷ *US v. McClain*, judgment of the United States Court of Appeal, Fifth Circuit, 545 F 2d 988 (1977).

⁵⁰⁸ Article 27 of the Federal Act on Monuments and Archaeological, Artistic and Historic Zones: «Archaeological monuments, both movable and immovable, are the inalienable and imprescriptible property of the nation».

The scholar Bator has commented critically the judgment saying that, «the exporting country, without affecting any real changes at home, can thus invoke the criminal legislation of the United States to help enforce its export rules simply waiving a magic hand and promulgating this metaphysical declaration of ownership».⁵⁰⁹

The above mentioned case showed that United States of America imposes restrictions on import of cultural property «on what is almost case-by-case basis».⁵¹⁰ This approach was inspired by article 9⁵¹¹ of 1970 UNESCO Convention, and led to the establishment of bilateral agreements between the United States and Source States «before action will be taken by the US to restrict import of the goods which form the subject of that agreement».⁵¹²

Another example of the case-by-case import restriction could be also the 1972 Regulation of Importation of Pre-Columbian Monumental or Architectural Sculptures or Murals, which was adopted, also thanks to the archaeologist Clemency Coggins' intervention⁵¹³, in order to introduce some provision for the protection of Pre-Columbian sites in South America.⁵¹⁴

The act imposes a certificate of authorization from the Source State that has to be presented at the moment of import into the United States of America.

Lastly it is important to observe that, even in absence of a specific regulation of importation of cultural property, there are dispositions which give powers to American customs authorities in order to control the import of art and antiquities. These provisions were listed by the scholars Prott and O'Keefe⁵¹⁵ and concern:

⁵⁰⁹ Bator, P., M., op. cit., p. 350.

⁵¹⁰ Mackenzie, S., op. cit., p. 67.

⁵¹¹ Article 9 of 1970 UNESCO Convention: «Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State».

⁵¹² Mackenzie, S., op. cit., p. 67.

⁵¹³ Coggins, C., *Illicit traffic of Pre-Columbian Antiquities*, in *Art Journal*, 1969, pp. 94-98.

⁵¹⁴ 19 U.S.C. § 2091-2095 (1972).

⁵¹⁵ O'Keefe, P. J., Prott, L.V., *Law and the Cultural Heritage vol.3*, London, Butterworths, 1989, pp. 600-601.

smuggling⁵¹⁶, entry of goods by false statements⁵¹⁷, fraud and false statements⁵¹⁸, failure to declare⁵¹⁹, loading or unloading of merchandise or baggage without permit⁵²⁰ and false prescriptions on oceans bills of lading⁵²¹.

I. 1.1 The American implementation of 1970 UNESCO Convention

On the 2nd of September 1983 the United States of America adopted the 1970 UNESCO Convention. Subsequently they introduced the Convention on Cultural Property Implementation Act (1983 CPIA)⁵²², in order to implement it.

The CPIA is based on the above mentioned article 9 of the 1970 UNESCO Convention, because it is considered by the U.S. Government its main operative disposition.⁵²³

The article establishes the possibility for the States Parties «whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials»⁵²⁴ of introducing bilateral agreements with the United States of America, which, after their conclusion, constitute an obligation for the U.S. custom authorities to implement import restrictions on determined incoming objects, which belong to the categories of protected cultural property.

In order to conclude the agreement the requesting State Party must show that its cultural heritage is in danger and that it has already taken measures to protect it.⁵²⁵

Furthermore the § 2603 establishes that in case of: «(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation; (2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or

⁵¹⁶ 18 U.S.C. – Crimes - § 545.

⁵¹⁷ 18 U.S.C. – Crimes - § 1001.

⁵¹⁸ 18 U.S.C. – Crimes - § 1001

⁵¹⁹ 19 U.S.C. – Custom Duties - § 1497.

⁵²⁰ 19 U.S.C. – Custom Duties - § 1453.

⁵²¹ 46 U.S.C. – Shipping - § 815.

⁵²² 19 U.S.C. §§ 2601 ff. (1983).

⁵²³ Mackenzie, S., op. cit., p. 100.

⁵²⁴ Article 9 of 1970 UNESCO Convention.

⁵²⁵ 19 U.S.C. §2602: « In general: If the President determines, after request is made to the United States under article 9 of the Convention by any State Party: (A)that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;(B)that the State Party has taken measures consistent with the Convention to protect its cultural patrimony; [...]».

threatens to be, of crisis proportions; or (3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation [...]» the U.S. custom authorities must apply the import restrictions provided by § 2606, even though there is not any bilateral agreement in force.

According to § 2606 (a) the cultural object entering into the United State of America, which is not followed by documentation of lawful exportation from the State Party may not be imported into the United States «unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party».⁵²⁶

In absence of the export documentation and if the consignee of the cultural objects is unable to demonstrate that the material was exported from the State Party : « (A) not less than ten years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before that date of entry, or (B) on before the date on which such material was designated under section 2604 of this title», Custom authorities do not release the material from their custody until such evidence is provided.

If after ninety days though, nothing occurs, cultural objects shall be subject to seizure and forfeiture.

Furthermore the CPIA implements also the article 7 (b) of the 1970 UNESCO Convention⁵²⁷, providing, in its § 2607, that «No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen

⁵²⁶ 19 U.S.C. §2606.

⁵²⁷ Article 7 (b) of 1970 UNESCO Convention: «(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party».

from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States».

Stolen objects which are identified by the American custom authorities are protected by the National Stolen Property Act (NSPA), which allows the officers to seizure the inventoried cultural property.

At the moment the United States of America have concluded twenty bilateral agreements⁵²⁸, which are repeatedly updated in order to grant effective protection. An important example of such bilateral agreements is the 2001 *Memorandum of Understanding* (MOU) between the United States of America and Italy, which will be exposed in the following paragraph.

I. 1.2 2001 MOU agreement between US' and Italy: import restrictions

On the 19th of January 2001 the Government of the United States of America and the Government of the Republic of Italy concluded a bilateral agreement, the so-called *Memorandum of Understanding* (MOU), concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy.⁵²⁹

The aim of the agreement was the reduction of pillage of «irreplaceable archeological material representing Italy's rich cultural heritage».⁵³⁰

Article 1 of the MOU stated that the Government of the United States of America shall restrict the importation of the archaeological materials «ranging in date from approximately the IX Century B.C. to approximately the IV century A.C.»⁵³¹ and belonging to the categories listed by the document of the Federal Register «Import restriction imposed on the archaeological material originating in Italy and

⁵²⁸ The bilateral agreements can be consulted on the web site of the Bureau of Educational and Cultural Affairs, (cf. <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions>), last accessed on the 12th of June 2019.

⁵²⁹ Memorandum of Understanding between the United States of America and Italy, which was signed in Washington on the 19th of January 2001, (cf. <https://eca.state.gov/files/bureau/italyprevious.pdf>), last accessed on the 12th of June 2019.

⁵³⁰ Ibidem note 529.

⁵³¹ Article 1 of the 2001 Memorandum of Understanding.

representing the pre-classical, classical and imperial Roman periods»⁵³² which includes: stone statuary, sculpture and architectural fragments, metal sculpture, including Etruscan figures, vessels, personal ornaments, weapons, ceramic sculpture, including Etruscan and South Italian and imported Attic and Corinthian vases.⁵³³

The United States of America undertake to offer for return to the Republic of Italy any material belonging to the above mentioned list.

The following article 2 of the MOU was amended and extended three times after the introduction into the Italian legislation of the *Code of Cultural and Landscape Heritage*⁵³⁴. The first on the 13th of January 2006⁵³⁵, the second on the 11th of January 2011⁵³⁶ and the last one on the 12th of January 2016⁵³⁷.

The present formulation of article 2 recognizes the commitment of both the Governments to publicize the *Memorandum of Understanding* and suggests the Republic of Italy «to use the opportunity of exhibitions of returned objects to educate the Italian and international public about the damage caused by archaeological site looting and the loss of knowledge wrought from such

⁵³² Import restriction imposed on the archaeological material originating in Italy and representing the pre-classical, classical and imperial Roman periods, 66 Federal Register, 7,399-402 adopted on the 23rd of January 2001.

⁵³³ Gerstenblith, P. – Roussin, L., *International cultural property*, in *Review of international legal developments*, 2007, pp. 613-628.

⁵³⁴ Legislative Decree n. 42 of the 22nd of January 2004, *Code of Cultural and Landscape Heritage in accordance with the article 10 of the L. n. 137 of the 6th of July 2002*, which was published on the n. 45 of the Official Journal of the Italian Republic on the 24th of February 2004 and entered into force on the 1st of May 2004. The Code is the so called *Urbani Code*, from the name of the Minister for Cultural Heritage and Activities.

⁵³⁵ Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 13th of January 2006, (cf. <https://eca.state.gov/files/bureau/italyprevious.pdf>), last accessed on the 12th of June 2019.

⁵³⁶ Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 11th of January 2011, (cf. <https://eca.state.gov/files/bureau/italyprevious.pdf>), last accessed on the 12th of June 2019.

⁵³⁷ Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 12th of January 2016, (cf. <https://www.state.gov/wp-content/uploads/2019/02/16-112-Italy-Cultural-Property-Amend-and-Extens.pdf>), last accessed on the 12th of June 2019.

looting».⁵³⁸

The most important responsibility of the Italian Government is to continue its support of research, in order to strengthen the protection of archaeological sites, particularly the ones which are located in areas «at greatest risk from looters»⁵³⁹ by granting their prompt prosecution and increasing the cooperation with Carabinieri Unit for the Protection of Cultural Heritage and other international agencies.

The MOU aims also to create a stronger cultural collaboration between the United States of America and Italy by easing the interchange and loan of cultural property for temporary exhibitions or cultural and academic purposes, in order to spread the knowledge of their national heritages.

In the end the MOU states that «the Government of the Italian Republic and the Government of the United States of America agree to encourage greater collaboration among law enforcement and members of the antiquities trade through increased information sharing for due diligence and research purposes in ways that do not jeopardize active criminal investigations».⁵⁴⁰

The *Memorandum of Understanding* has led to important restitutions to the Italian Government by the United States of America. One of these cases was the restitution of twenty five artifacts that were looted from Italy during the XIX Century and then spread in many American museums and private collections. The objects, which included Etruscan vases, fragments of I Century Pompeian frescoes and II Century Roman marble sarcophagus,, returned to Italy after being recognized by the

⁵³⁸ Article 2 of Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 12th of January 2016.

⁵³⁹ Article 2 of Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 12th of January 2016.

⁵⁴⁰ Article 2 of Extension and amendment of the agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the imposition of Import restriction on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy of the 12th of January 2016.

American custom authorities inside the catalogues of the auction houses Christie's and Sotheby's.⁵⁴¹

II. 2 Australian Protection of Movable Cultural Heritage Act 1986

The Australian Government has established a long commitment to the international community in order to improve the measures for the protection of cultural property. Australia was one of the first Signatory States of *the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*⁵⁴² and on the 30th of October 1989 accessed also *the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.⁵⁴³ When the Australian Government ratified the 1970 UNESCO Convention, it made one reservation in regard to its Article 10⁵⁴⁴: «The Government of Australia declares that Australia is not at present in a position to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject. Australia therefore accepts the Convention subject to a reservation as to Article 10, to the extent that it is unable to comply with the obligations imposed by that Article».⁵⁴⁵

⁵⁴¹ McLaughlin, K., *United States returns 25 artifacts to Italy that had unknowingly been looted from the country before being placed in U.S. museums and universities*, in *Daily Mail*, 2015, (cf. <https://www.dailymail.co.uk/news/article-3097540/US-returns-25-looted-artifacts-Italy-Vases-frescoes.html>), last accessed on the 10th of June 2019.

⁵⁴² The 1954 Hague Convention and the First Protocol have been in force since the 7th of August 1956 and in 2017 there were 128 signatory States. The Second Protocol instead was adopted on the 9th of March 1999.

⁵⁴³ The 1970 UNESCO Convention entered into force on 24th April 1972, in accordance with its article 21, and it has 139 signatory States.

⁵⁴⁴ Article 10 of 1970 UNESCO Convention: « The States Parties to this Convention undertake: (a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject; (b) to endeavor by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports».

⁵⁴⁵ Simpson, S., *Boarders of Culture: the Review of the Protection Movable Heritage Act 1986*, Sidney, Ministry for the arts, 2015, p. 92.

The reasons of the ratification were due to the content of the Australian Protection of Movable Cultural Heritage Act,⁵⁴⁶ which was adopted on the 13th of May 1986. The Act aims both to introduce export restrictions, in order to ensure that cultural objects, which have cultural importance, remain in Australia and also to grant the return to the State of origin of all those cultural objects, which have been unlawfully imported into the Australian boundaries.⁵⁴⁷

The Government has established a list called the National Cultural Heritage Control List, which includes two different classes of objects: Class A Objects consisting of cultural objects «that are not to be exported otherwise than in accordance with a certificate»⁵⁴⁸ and Class B Objects including cultural objects «that are not to be exported otherwise than in accordance with a permit or certificate»⁵⁴⁹.

The National Cultural Heritage Control List have been updated and extended in December 2018, by the Protection of Movable Heritage Regulations⁵⁵⁰.

The Regulations wanted to implement some of the suggestions provided by Shane Simpson, who is a Member of the Order of Australia⁵⁵¹, in the Review of the Protection Movable Heritage Act 1986⁵⁵², which was published in 2015.⁵⁵³

⁵⁴⁶ Act n. 11 on Protection of Movable Cultural Heritage, which was adopted on the 13th of may 1986.

⁵⁴⁷ VV. AA., *Protection of Movable Cultural Heritage Regulations 2018*, in *Australian Museums and Galleries Associations*, 2019, (cf. <https://www.amaga.org.au/news/protection-movable-cultural-heritage-regulations-2018>), last accessed on the 11th of June 2019.

⁵⁴⁸ Section 8 of the Protection of Movable Cultural Heritage Act: «Class A objects are of such significance to Australia that they must not be exported. These include: Victoria Cross medals awarded to named Australian service personnel unless they are owned, or held on loan, by the Commonwealth or a principal collecting institution. Each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880. Aboriginal and Torres Strait Islander material that may not be exported includes: sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock and dendroglyphs (carved trees)».

⁵⁴⁹ Section 8 (2) of the Protection of Movable Cultural Heritage Act: « Class B objects are of cultural significance to Australia and they need permission to be exported. The categories are: Australian Aboriginal and Torres Strait Islander Heritage, archaeology, natural science, including fossils and meteorites, applied science or technology, including heritage machinery, fine and decorative art, documentary heritage, numismatics (coins), philately (stamps), and, historical significance, including sporting trophies/memorabilia export controls».

⁵⁵⁰ Protection of Movable Heritage Regulations 2018 of the 10th of December 2018.

⁵⁵¹ «In the Australian honors system appointments to the Order of Australia confer the highest recognition for outstanding achievement and service. The Member of the Order of Australia is awarded for service in a particular locality or field of activity or to a particular group.», (cf. <https://www.pmc.gov.au/government/its-honour/member-order-australia>), last accessed on the 11th of June 2019.

⁵⁵² Simpson, S., op. cit., p. 1.

⁵⁵³ Explanatory Statement of the Protection of Movable Heritage Regulations 2018, Issued by authority of the Minister for Communications and the Arts on the 10th of December 2018, (cf.

The purpose of the review was « [...] to provide a new model for a legislative framework that would be balanced and nuanced. [...] On the other hand, the Australian community has a public interest in maintaining items of select, important cultural material within the borders so that the Australian story can be told at home». ⁵⁵⁴

A relevant result of the Protection of Movable Heritage Regulations 2018 was the extension of the National Cultural Heritage Control List, which is now deeply detailed and has a special consideration for the cultural property, which is part of the Australian Aboriginal and Torres Strait Islander heritage. ⁵⁵⁵

The protection of the Aboriginal cultural heritage has been ignored by the Australian Ministry for the Arts and museums for decades, because it was not considered attractive by the art market: there was few information about the artists, many private collectors did not register their properties and the art market seemed to ignore the existence of the aboriginal art forms and artifacts by preferring the ones of other primitive cultures. ⁵⁵⁶

The situation changed in 1997 when Sotheby's Australia, after the introduction inside the auction house of a specialist in Aboriginal art in 1995, published the catalogue of an auction of Aboriginal art. ⁵⁵⁷

<https://www.legislation.gov.au/Details/F2018L01710/Explanatory%20Statement/Text>), last accessed on the 11th of June 2019.

⁵⁵⁴ Simpson, S., op. cit., p. 2.

⁵⁵⁵ Schedule 1- Part 1 of the Protection of Movable Heritage Regulations 2018: «1.1 This Part lists objects of the category “Objects of Australian Aboriginal and Torres Strait Islander heritage”. 1.2 An object is in this category if: (a) it is an object: (i) of cultural significance to Aboriginal or Torres Strait Islander people; or (ii) made by Aboriginal or Torres Strait Islander people; and (b) it is not an object created specifically for sale; and (c) for an object mentioned in clause 1.4—it: (i) is at least 30 years old; and (ii) is not adequately represented in Aboriginal or Torres Strait Islander community collections, or public collections in Australia. 1.3 The following objects of this category are Class A objects: (a) sacred and secret ritual objects; (b) bark and log coffins used as traditional burial objects; (c) human remains; (d) rock art; (e) dendroglyphs. 1.4 All objects in this category, other than objects mentioned in clause 1.3, are Class B objects, and include: (a) objects relating to famous and important Aborigines or Torres Strait Islanders, or to other persons significant in Aboriginal or Torres Strait Islander history; and (b) objects made on missions or reserves; and (c) objects relating to the development of Aboriginal or Torres Strait Islander protest and self-help movements; and (d) original documents, photographs, drawings, sound recordings, film and video recordings and any similar records relating to objects included in this category».

⁵⁵⁶ Newstead, A., *The Dealer is the Devil: An Insiders History of the Aboriginal Art Trade*, Australia, Brandl & Schlesinger, 2014, pp.. 298-324.

⁵⁵⁷ Ibi note 556, p. 315.

The success of the auction determined the beginning of what the Australian gallerists and art traders call «the secondary Australian art market», which in only two years gained \$3,764,233.⁵⁵⁸

Through the years the Aboriginal art market increased and this led to the necessity of protecting cultural property in a more cautious and focused way.⁵⁵⁹

The implementation of the protection reached by Protection of Movable Heritage Regulations 2018 represents an important step forward in the fight against the unlawful exports of Australian cultural heritage.

As regards to the discipline of the exportation of cultural property, the 2018 Regulations confirmed the 2016 amendments⁵⁶⁰ of the Protection of Movable Cultural Heritage Act 1986.

According to section 9 of the Protection of Movable Cultural Heritage Act, export of cultural heritage is unlawful when «a person exports an Australian protected object otherwise than in accordance with a permit or certificate, the object is forfeited»⁵⁶¹ and when «a person attempts to export an Australian protected object otherwise than in accordance with a permit or certificate, the object is liable to forfeiture».⁵⁶²

Section 9 paragraph (3)⁵⁶³ and (3A)⁵⁶⁴ list the cases in which the unlawful export leads to the criminal prosecution, which can consist of a fine not exceeding 1,000 penalty units or imprisonment for a period not exceeding 5 years, or both if the

⁵⁵⁸ Newstead, A., op. cit., p. 320.

⁵⁵⁹ Explanatory Statement of the Protection of Movable Heritage Regulations 2018, issued by authority of the Minister for Communications and the Arts on the 10th of December 2018, (cf. <https://www.legislation.gov.au/Details/F2018L01710/Explanatory%20Statement/Text>), last accessed on the 11th of June 2019.

⁵⁶⁰ Extension and amendment of the 1986 Protection of Movable Cultural Heritage Act, which was adopted on the 21st of October 2016.

⁵⁶¹ Section 9 (1) of the Protection of Movable Cultural Heritage Act.

⁵⁶² Section 9 (2) of the Protection of Movable Cultural Heritage Act.

⁵⁶³ Section 9 (3) of the Protection of Movable Cultural Heritage Act: «

A person commits an offence if: (a) the person exports, or attempts to export, an object; and (b) the object is an Australian protected object; and (c) the person's conduct referred to in paragraph (a) is otherwise than in accordance with a permit or certificate».

⁵⁶⁴ Section 9 (3A) of the Protection of Movable Cultural Heritage Act: « A person commits an offence if: (a) a permit or certificate relates to an Australian protected object; and (b) the person engages in conduct; and (c) the conduct contravenes a condition of the permit or certificate».

person is an individual or a fine not exceeding 2,000 penalty units if the person is a corporate body.⁵⁶⁵

Section 8 (2) established that, in order to export a Class B Object of the National Cultural Heritage Control List, the holder of the goods must apply for an export permit, which will be issued by the Minister. The application for the permit must be presented following the prescriptions provided by section 10, 10 A and 11 of the Protection of Movable Cultural Heritage Act. After the application, the Minister has to issue or to deny the permit within 14 days.⁵⁶⁶

Section 12 instead, provides for the certificates of exemptions for which it must apply in case of export of an Australian cultural object, listed in Class A objects. When «a person intends to import an Australian protected object: (a) for temporary purposes; or (b) in circumstances in which the person may wish subsequently to export the object; the person may apply to the Minister for a certificate authorizing the exportation of the object».⁵⁶⁷

The certificate must be issued or denied by the Minister within 14 days.⁵⁶⁸ If the Minister issues the certificate, he has the possibility of including specific export conditions that have to be granted by the exporter.

In the end section 13 declares that, even though a permit or a certificate is in force, the Minister at any time can both add, revoke or impose new conditions, vary the period of effect and also revoke a permit or a certificate.

II. 2.1 Measures concerning unlawful imports

The section 14 of the Protection of Movable Cultural Heritage Act imposes that if a cultural object of a foreign country is imported into Australian boundaries and it is protected by the law of that country, which states that «the export was prohibited by [its] law», the object is liable to forfeiture. Section 14 provides also for a fine of up to 1,000 penalty units or up to five years imprisonment, or both, if the unlawful import was made with knowledge.

Part V of the Protection of Movable Cultural Heritage Act give the powers of

⁵⁶⁵ Section 9 (3B) of the Protection of Movable Cultural Heritage Act.

⁵⁶⁶ Section 10 (7) amended by the Protection of Movable Heritage Regulations 2018.

⁵⁶⁷ Section 12 (1) of the Protection of Movable Cultural Heritage Act.

⁵⁶⁸ Section 12 (6) amended by the Protection of Movable Heritage Regulations 2018.

search, seizure and arrest to the police officers, in order to ease and strengthen the customs controls, which were very inadequate under the first Customs (Prohibited Imports) Regulations, which entered into force in 1956.⁵⁶⁹

In spite of the increased controls, Mackenzie has published a series of interviews of importers of cultural property, who explained that custom authorities have to improve their knowledge of international cultural heritage, because at import they barely recognize the cultural nature of the objects.⁵⁷⁰

In the end, in case of temporary exhibitions and in presence of a bilateral agreement between Australia and a foreign country the measures provided for unlawful imports must not be applied.⁵⁷¹

⁵⁶⁹ Mackenzie, S., op. cit., pp. 73 – 74.

⁵⁷⁰ Mackenzie, S., op. cit., pp. 73 – 74.

⁵⁷¹ Section 14 (3) of the Protection of Movable Cultural Heritage Act: «This section does not apply in relation to the importation of an object if: (a) the importation takes place under an agreement between: (i) the Commonwealth, a State, a Territory, a principal collecting institution or an exhibition coordinator; and (ii) any other person or body (including a government); and (b) the agreement provides for the object to be loaned, for a period not exceeding 2 years, to the Commonwealth, State, Territory, principal collecting institution or exhibition».

CONCLUSIONS

This dissertation has analyzed the international and European legal background, which led to the adoption of the Regulation (EU) n. 2019/880 *on the Introduction and Import of cultural goods* coming from a Third Country, by the European Parliament and the Council of the European Union on the 17th of April 2019 and to its publication on the Official Journal of the European Union on the 7th of June 2019.⁵⁷²

Although it is impossible to disagree with the main goal of the Regulation, which is «[...] to ensure the effective protection against illicit trade in cultural goods and against their loss or destruction, the preservation of humanity's cultural heritage and the prevention of terrorist financing and money laundering through the sale of pillaged cultural goods to buyers in the Union»⁵⁷³, the final text is characterized by a series of uncertain aspects, which have arisen a large-scale international debate.

Firstly, the Annex of the Regulation, which lists the categories of cultural property which are subject to the new import measures, is inspired by the classification made by the 1995 UNIDROIT Convention, to which the European legislator only added a 250 years threshold.⁵⁷⁴

This broad definition of cultural property is considered unrealistic by many art dealers.⁵⁷⁵

The Association of Dealers in Ancient Art (IADAA), Antique Dealers' Association (ADA) and Confédération Internationale des Négociants en Œuvres d'Art (CINOA) believe that the 250 years threshold is too restrictive, because it would not prevent the unlawful importation of more recent cultural goods, which have been illicitly exported from a Third country.⁵⁷⁶

⁵⁷² The Regulation (EU) n. 2019/880 of the European Parliament and of the Council on the import of cultural goods is published in the L. 151 of the Official Journal of the European Union, pp. 1-14.

⁵⁷³ First Recital of the Preamble of the Regulation n. 2019/880.

⁵⁷⁴ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

⁵⁷⁵ Fitz – Gibbon, K., *Art Imports to EU Threatened by Draconian Regulation*, in *Cultural Property News*, 2019, (cf. <https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>), last accessed on the 4th of June 2019.

⁵⁷⁶ Fitz – Gibbon, K., *op. cit.*

The reason of this discontent comes from the studies conducted by the International Council of Museums (ICOM) which have revealed that loads of the cultural objects, in need of enhanced protection, are less than 250 years old and many of them, which are more than 250 years old are not being illicitly trafficked.⁵⁷⁷

Furthermore the art dealers disagree⁵⁷⁸ with the articles 4⁵⁷⁹ and 5⁵⁸⁰ of the Regulation (EU) n. 2019/800, which introduce respectively the import license and the importer statement.

The articles simply state that the import of cultural property listed in the Annex, Part B and C, is subject to the issue of an import license by the competent authority or to the presentation of an importer statement.

The flaw that can be underlined is that all the cultural objects, included in the above mentioned Annex, are subject to these measures, because the text of the Regulation does not make any division between the cultural objects in jeopardy and the ones which are not.⁵⁸¹ The question rises spontaneously: Why the regulation does not provide for specific measures for the those cultural goods which are effectively at risk?

The International Council of Museums (ICOM) has suggested⁵⁸² the Council of the European Union to target cultural property in jeopardy following the criteria of ICOM «Red Lists»⁵⁸³, which present the cultural objects most vulnerable to looting and illegal traffic, but the final text of the Regulation, seems to have not listened to the recommendation.

⁵⁷⁷ Red Lists Database, (cf. <https://icom.museum/en/resources/red-lists/>), last accessed on the 3rd of June 2019.

⁵⁷⁸ Fitz – Gibbon, K., op. cit..

⁵⁷⁹ Article 4 (1) of the Regulation n. 2019/880: «The import of cultural goods listed in Part B of the Annex other than those referred to in Article 3(4) and (5) shall all require an import license. That import license shall be issued by the competent authority of the Member State in which the cultural goods are placed under one of the customs procedures referred to in point (3) of Article 2 for the first time»

⁵⁸⁰ Article 5 (1) of the Regulation n. 2019/880: « The import of the cultural goods listed in Part C of the Annex shall require an importer statement which the holder of the goods shall submit via the electronic system referred to in Article 8».

⁵⁸¹ Fitz – Gibbon, K., op. cit..

⁵⁸² Ibidem note 581.

⁵⁸³ « Red Lists present the categories of cultural objects that can be subjected to theft and traffic. They help individuals, organizations and authorities, such as police or customs officials, identify objects at risk and prevent them from being illegally sold or exported», (cf. <https://icom.museum/en/activities/heritage-protection/red-lists/>), last accessed on the 3rd of June 2019.

Secondly, the article 4⁵⁸⁴ and 5⁵⁸⁵ of the Regulation impose that the import will not be authorized if at the moment of the application for the import license or at the moment of presentation of the importer statement, the holder of the cultural property cannot certify the licit export of the objects from the country in which they have been created or discovered. If the licit export of cultural objects cannot be demonstrated, it will be considered unlawful.

This is the most criticized aspect of the Regulation because it puts the burden of proof of the licit export entirely on the importer.⁵⁸⁶ The art dealers think that these new disposition will be the cause of the collapse of the licit market in art and antiquities, because the production of documentation is very difficult and in many cases it is not available to the holder of the goods. Because of this, the new Regulation will effectively prevent many cultural objects from entering the European Union.

⁵⁸⁴ Article 4 (4) of the Regulation n. 2019/880: «The holder of the goods shall apply for an import license to the competent authority of the Member State referred to in paragraph 1 of this Article via the electronic system referred to in Article 8. The application shall be accompanied by any supporting documents and information providing evidence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country or providing evidence of the absence of such laws and regulations at the time they were taken out of its territory. By way of derogation from the first subparagraph, the application may be accompanied instead by any supporting documents and information providing evidence that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transshipment, in the following cases: (a) the country where the cultural goods were created or discovered cannot be reliably determined; or (b) the cultural goods were taken out of the country where they were created or discovered before 24 April 1972».

⁵⁸⁵ Article 5 (2) of the Regulation n. 2019/880: «The importer statement shall consist of: (a) a declaration signed by the holder of the goods stating that the cultural goods have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country at the time they were taken out of its territory; and (b) a standardized document describing the cultural goods in question in sufficient detail for them to be identified by the authorities and to perform risk analysis and targeted controls. By way of derogation from point (a) of the first subparagraph, the declaration may instead state that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transshipment, in the following cases: (a) the country where the cultural goods were created or discovered cannot be reliably determined; or (b) the cultural goods were taken out of the country where they were created or discovered before 24 April 1972».

⁵⁸⁶ Valentin, P. – Rogers, F., *The Proposed EU Regulations on the Import of Cultural Goods*, in *Art at Law*, 2019, (cf. <https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural>), last accessed on the 3rd of June 2019.

This would be an huge loss for the art market, because, as it often happens, cultural property has passed from hand to hand, and the holder of the goods has a few information for making a sworn affidavit attesting the legal export.

This restriction seems to equate the concept of unlawful export and the one of looting, but as Pierre Valentin has affirmed in his comment to the Regulation: «if cultural property is looted, it is likely to have been illegally exported, however, many items of cultural property have been illegally exported yet their provenance and ownership are perfectly legitimate, and they have not been looted. Their illegality may simply be a matter of a failure by the legal owner to obtain the correct paperwork.[...] to equate looting and illegal export is simply wrong».⁵⁸⁷

Thirdly, the article 8 of the Regulation, which establishes the new electronic system, thanks to which will be possible «the storage and the exchange of information between the authorities of the Member States, in particular regarding import licenses and importer statements»⁵⁸⁸ has to be considered more seriously.

The creation of an European electronic system, able to communicate and cooperate with foreign Governments and custom authorities, is very long and complicated. Furthermore, if the Regulation does not focus itself only on the cultural objects at risk, the costs involved for the creation and the constant update of the database will be extremely high.⁵⁸⁹

Moreover article 8 (2) only specifies that the European Commission shall lay down, by the 28th of June 2021, «the arrangements for the deployment, operation and maintenance of the electronic system» and «the detailed rules regarding the submission, processing, storage and exchange of information between the authorities of the Member States by means of the electronic system»⁵⁹⁰, but it does not give any kind of information concerning the other means that the Member States have to use until the new electronic system will be actionable.

As regards the impact of the Regulation (EU) n. 2019/880 on the Italian legislation, it is interesting to mention the comment of the Fondo Ambiente Italiano (FAI)

⁵⁸⁷ Valentin, P. – Rogers, F., op. cit..

⁵⁸⁸ Article 8 (1) of the Regulation n. 2019/880.

⁵⁸⁹ Valentin, P. – Rogers, F., op. cit..

⁵⁹⁰ Article 8 (2) of the Regulation n. 2019/880.

which has a leading role in the protection and promotion of the Italian cultural heritage.

FAI is worldwide known as the National Trust for Italy and it is a non-profit foundation, that operates thanks to the support of individuals, companies and institutions. Since its founding in Milan in 1975, FAI has drawn inspiration from the National Trust for England, Wales & Northern Ireland⁵⁹¹, and is a member of INTO – the International National Trusts Organization.

The mission of Fondo Ambiente Italiano is to take care, promote and safeguard special places⁵⁹² in Italy for the benefit of current and future generations. It acquires its assets through gifts, donations and bequests. In order to pursue its mission the legal office has constantly to deal with private donors' estate and collections.

In recent years the reputation of the foundation abroad is increased and also foreigner collectors, some of which have Italian origins, have decided to donate their collections. Anna Ughi Gotti, who is the chief of the legal department of FAI, has declared during our interview, that the Regulation (EU) n. 2019/880 will be a reference point for her work. She has stressed that the national legislation, provided by the «*Urbani Code*», can be already considered an international best practice in the protection of cultural heritage against the illicit traffic. Therefore, the introduction of the compulsoriness of the import license will represent an important support to the article 72⁵⁹³ of the *Code of Cultural and Landscape Heritage*,

⁵⁹¹ «The National Trust was founded on 12 January 1895 by Octavia Hill, Sir Robert Hunter and Hardwicke Rawnsley. Over the last 120 years we've become one of the UK's largest charities, caring for historic properties and areas of beautiful countryside», (cf. <https://www.nationaltrust.org.uk/lists/our-history-1884-1945>), last accessed on the 12th of June 2019.

⁵⁹² «Today, the trust has 61 sites under its care, which are open to the public to enjoy, appreciate and use. Over the last 15 years, the trust has been recognized as one of the most authoritative partners for the Italian State which has entrusted to FAI the restoration, the maintenance and the management of eight properties.», (cf. www.fondoambiente.it), last accessed on the 12th of June 2019.

⁵⁹³ Article 72 of the *Code of Cultural and Landscape Heritage*: «The shipment to Italy by a Member State of the European Union or the importation from a third country of the things or properties indicated in article 65, paragraph 3, shall, upon application, be certified by the export office. 2. Certificates declaring that shipment and importation have occurred shall be issued on the basis of documentation suitable for identifying the thing or the property and for proving provenance from the territory of the Member State or third Country from which the thing or property has been respectively shipped or imported. 3. The certificates declaring that shipment and importation have occurred shall be valid for five years and may be extended upon request by the party concerned. 4. Conditions, modalities and procedures for granting and extending certificates may be established by ministerial decree, with particular regard for the ascertainment of the provenance of the thing or property shipped or imported».

because it will ease and accelerate the process of the acquisition of a private donation coming from a Third country. The regulation will allow the Fondo Ambiente Italiano also to strengthen their relationship with the custom authorities whose role will become effectively essential in the process of acceptance or denial of a donation.

In the end, it is compulsory to affirm that we have to wait for the implementations of the Regulation (EU) n. 2019/880 inside the Member States, in order to verify if the uncertainties will be solved, the flaws will be corrected and if this new tool will be bearable by the European legislation.

For the moment, it is undeniable that the European Union has made a huge step forward in the field of the protection of cultural property and, in a world full of discord and indifference, has sent an important message to the illicit trade, declaring that Europe will fight against the destruction of archaeological sites and artefacts, against the illicit trade of cultural property and will do anything to put an end to this illicit business.

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«And what love can do, that dares love attempt»
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