Cultural Property, the Palermo Convention, and Transnational Organized Crime

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Abstract: The international community is concerned about criminal activity involving cultural property and is promoting the use of the United Nations Convention against Transnational Organized Crime to combat looting and trafficking of cultural property. This article discusses how the Convention may be applied, outlines some of the intentions of UN member states with regard to cultural property crime, and the role of the UN Office on Drugs and Crime. It is suggested that cultural property stakeholders should scrutinize this developing effort, particularly in the areas of UNTOC application to specific cultural property cases and the collection and analysis of data specifically to address the connections between cultural property and transnational organized crime.

There is a concern in the international community about criminal activity involving cultural property. This community, whose ideas, concerns, and issues are captured by intergovernmental organizations such as the United Nations, often fails to agree on many issues. However, there is an emerging consensus around two key ideas: first, that cultural property is falling victim to organized criminal activity; second, this criminal activity is transnational in scope and therefore requires a coordinated international response. Whether or not one agrees with these two premises, anyone who even tangentially touches upon international cultural property cannot ignore the effects of the steps currently being taken by intergovernmental bodies to address the perceived problem.

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What is the problem that is garnering this attention? For the sake of discussion, I will focus on two aspects: looting of cultural property and its subsequent trafficking. To quantify the problem, global statistics are generally lacking, although UN bodies provide estimates. According to UNESCO, for example, trafficking in cultural property, that is, the illicit movement of protected cultural objects across international borders, is estimated at $2 to $6 billion per year.\(^1\) Even at the low end, this amount is significant enough to capture the attention of law enforcement bodies, both national and international. UNESCO and numerous individual Member States decry this trafficking and state unequivocally that the source of trafficked goods is the looting of cultural heritage sites, particularly in the less-developed world. Whether or not one accepts these numbers—and they are definitely arguable\(^2\)—they support the pervasive view in the international community that sites are being looted and that looted objects are moving unmolested around the globe. For this reason, numerous countries are pushing an antitrafficking agenda wherever possible within the international arena. One aspect of this agenda is the international crime-fighting role of the UN system.

A recent case can be used to highlight some relevant issues. In 2007, U.S. Customs in Miami, Florida, intercepted ancient objects being imported into the United States from the Central American country of El Salvador. U.S. law enforcement subsequently investigated the situation and uncovered a series of problematic importations involving what came to be recognized as cultural property from El Salvador to various locations in the United States. El Salvador and U.S. law enforcement entities then began a joint operation, involving the Salvadoran National Police, INTERPOL office, public prosecutor, and customs officers. This joint investigative operation on cultural property between the two governments, which included controlled buys in the United States and an undercover operation in El Salvador, uncovered the following facts: a team in El Salvador was looting pre-Columbian archaeological sites, offering the looted objects for sale on websites in the United States, and shipping the objects to intermediaries in the United States as well as directly to buyers around the world. The investigation resulted in the prosecution and conviction of the perpetrators in El Salvador for two violations: (1) trafficking in cultural property and (2) failing to register discovered cultural patrimony. The latter charge is often used when looters are not caught in the act of looting but discovered with looted objects. Ultimately, the individuals were incarcerated in El Salvador and the seized objects were returned to El Salvador and exhibited at the National Museum in San Salvador.\(^3\)

Embedded in this case are some important facts that can be pulled out to analyze the illicit movement of cultural property. First, there were more than three individuals involved in the criminal activities in both countries. Second, the Salvadoran cultural property was being shipped across an international border, from El Salvador to the United States. Third, the penal code in El Salvador sanctions the first violation, which is trafficking in cultural property, with two to four years of incarceration; the second violation, which is failure to register cultural patrimony, is sanctioned with six months to two years in prison.\(^4\)
Before analyzing the implications of the facts of this case, it is worth setting forth the belief of the international community that both looting and trafficking of cultural property has been affected by the influence of organized crime. In particular, there has been increasing attention paid to issues of crime in general and transnational organized crime in particular with respect to cultural property. The UN General Assembly in 1998 expressed its desire for the development of an international convention against transnational organized crime. Following numerous meetings of governmental experts on criminal justice and international cooperation, the UN Convention against Transnational Organized Crime (UNTOC) was signed in Palermo, Italy, in December 2000. UNTOC, or the Palermo Convention, entered into force in 2003.

The Palermo Convention was developed to address criminal activity that crosses international borders, thereby becoming an international problem. Key aspects of the convention include (1) a requirement to create domestic criminal offenses that include participation in an organized criminal group, money laundering, corruption, and obstruction of justice; (2) the adoption of frameworks vital to international cooperation, including extradition, mutual legal assistance, and law enforcement cooperation; and (3) the promotion of training and technical assistance for building the capacity of national authorities. While the various ramifications of the Palermo Convention have been discussed in detail elsewhere, it is worth reinforcing that the convention’s framers intended it as a tool for international cooperation in a broad sense; they wrote it in a manner to provide cooperation for many different types of transnational crimes, as long as the criminal activity fit certain criteria.

Understanding these criteria is fundamental to understanding the convention and its applicability to any form of criminal activity, including cultural property crime. First, the convention applies to the activities of an “organized criminal group,” which is defined as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes…” While the definition of “organized crime” in criminal justice circles is contentious—some limit it only to “mafia type” organization, for example—the convention allows it to be used for a broader set of criminal activity that includes three or more people, which is not a onetime occurrence and is coordinated. The second criterion that activates the convention is a “transnational” crime, which is one that basically is committed in more than one state or involves more than one state in planning, the operations of the criminal group, or the effects of the crime. This is, obviously, a fairly broad definition of “transnational.” The third criterion is that the crime must be considered a “serious crime,” which is defined as a conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. This criterion ensures that the convention will not be used for low-level criminal activity, and also encourages states to increase penalties on crimes that the state takes most seriously, and thereby activating the convention.
In addition to these criteria, the convention considers means by which states can provide assistance to other states when the criteria are met. These “mutual assistance” activities apply across many different types of crime and include taking evidence or statements from persons, executing searches and seizures, providing information and evidence, and any other type of assistance that is not contrary to the domestic law of the requested state. These activities obviously provide a strong tool for cooperation in criminal investigations and could be used in many different types of criminal investigations, including cultural property crime.

Given these criteria and framework, the international community is now interested in using the Palermo Convention to combat criminal activity involving cultural property. The framers actually envisaged this role, stating in the convention’s preamble that it would “…constitute an effective tool for international cooperation in combating, inter alia, money-laundering, corruption, trafficking in endangered species of flora and fauna, offences against cultural property, and growing links between transnational organized crime and terrorist crimes” (emphasis added). While the framers did not need to highlight specific crimes that would be targeted, they did so, and they specifically named cultural property crime.

In the first few years after the convention entered into force in 2003, cultural property was largely ignored by the States Parties. The UN body that acts as secretariat for the convention and handles international crime-related issues in general for the UN system is the UN Office on Drugs and Crime (UNODC). UNODC hosts periodic meetings of the States Parties to the Palermo Convention, and it was during the fifth of these meetings in 2010 that Member States again raised in earnest the issue of cultural property crime. At this time, the States Parties announced a list of types of “emerging” crime on which the convention and its members should focus in the near term; trafficking in cultural property was included, along with cybercrime, piracy, environmental crime, and others. The conference took pains to point out that the “emerging” crimes were not new phenomena, but that offenses—particularly of the transnational organized nature—were becoming increasingly evident.

The international community now believes the Palermo Convention can assist with the cultural property crime, which is comprised of two related issues, the looting and trafficking of cultural property. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property—the current standard international instrument used by states to address the illicit movement of cultural property—succinctly states that “every state [must] protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export” while also avowing that “the protection of cultural heritage can be effective only if organized both nationally and internationally among states working in close cooperation.” This view is also shared by UNODC, which stated in 2010 that illegal “removal,” that is, looting, was taking place in source countries and smuggled to rich market
countries.\textsuperscript{11} UNODC recognizes a legal market in cultural objects, stating “once intermingled with objects from the \textit{licit market}, identifying the objects derived from illicit sources becomes difficult, particularly given the culture of anonymity of buyers and sellers in the antiquities market” (emphasis added).\textsuperscript{12} In fact, UNODC goes further, arguing that not only does a legal market exist, but that this legal market “is particularly vulnerable to organized crime because it is highly specialized, potentially global and requires a high level of expertise.... It is a rich and discreet market characterized by little advertising and the anonymity of buyers and sellers. Such a culture of privacy makes it not uncommon that cultural objects (even legally owned ones) are concealed or made to look like something they are not.” Within UNODC, at least, the legal market also suffers from the effects of criminal activity and, therefore, the application of the Palermo Convention to criminal activity will act to assist the legal trade.

The other component of the problem, and the one that the Convention can purportedly address, is the participation of organized criminal groups in “all forms and aspects of trafficking in cultural property and related offenses.”\textsuperscript{13} This concern has been expressed by the UN General Assembly, subsidiary committees and bodies, and Member States. The UNTOC conference of parties expressed the problem this way:

\begin{quote}
[ Trafficking in cultural property] has links to organized crime, as it relies on modus operandi used by organized criminal groups; the strong demand for illicit objects is highly lucrative for those participating in the trade; its complex nature often requires the involvement of many actors, legal entities and third parties, who tend to operate in a structured and organized way; and the use of modern and sophisticated technologies. There is also evidence that transnational trafficking in antiquities is linked to other illicit activities in which organized criminal groups are involved, including drugs and arms smuggling, violence, corruption and money-laundering.\textsuperscript{14}
\end{quote}

The international community, therefore, has expressed its belief that UNTOC can be a useful tool in combating these problems.

The increased emphasis on UNTOC may be at the expense of other, well-established international instruments. As mentioned, the 1970 UNESCO Convention is the standard international instrument for addressing looting and trafficking in cultural property, with further cooperation laid out in the subsequent 1995 UNIDROIT \textit{Convention on Stolen or Illegally Exported Cultural Objects}. In 2012 and 2013, however, the international community’s displeasure with the efficacy of the 1970 Convention was on full display, resulting in the second meeting of States Parties in 2012.\textsuperscript{15} Of note, both the 1970 Convention and the 1995 UNIDROIT Convention have fewer States Parties (124 and 34, respectively) than UNTOC, at 179. Regional multilateral instruments, such as the 1995 Central America Cultural Patrimony Convention,\textsuperscript{16} are even more limited in membership (six), and therefore, utility. In terms of multilateral instruments, the international community has expressed a need for, at minimum, the full implementation and use of existing instruments that can address the problems of cultural property crime.
In addition to multilateral agreements, many states make use of bilateral agreements for criminal justice matters. UNODC has developed a Model Treaty on Mutual Assistance in Criminal Matters\(^\text{17}\) that provides a useful framework for bilateral cooperation in many of the areas outlined by the Palermo Convention. Similarly, and since much of the transnational criminal activity relates directly to customs violations, the World Customs Organization (WCO) has also developed a model bilateral agreement for a customs mutual assistance agreement\(^\text{18}\) that provides for “administrative assistance in traditional areas of Customs competence, such as valuation, classification, and origin, …[and also] reflects the need to fight organized crime across borders. It complements the [UNTOC], in the area of mutual administrative assistance in Customs matters.”

Obviously the specialties and stove-piping of international bodies plays a role in the creation and deployment of the various instruments; WCO focuses on customs, for example. The recent shift to use UNTOC for cultural property, however, demonstrates not only the international community’s unhappiness with the current use of existing instruments, but also the idealized view of UNTOC as a tool of broad scope that can be applied generally to many different types of crime. UNTOC itself incorporates many aspects of other instruments. For example, according to UNODC, “the flexibility in the interpretation of what makes an offense transnational in nature and of what constitutes an organized criminal group, in conjunction with a broad definition of what constitutes serious crime, ensures that the widest range of traditional, emerging and future forms of criminal activities can be covered by the Convention and that international law enforcement and judicial cooperation efforts may be triggered in relevant investigations and prosecutions.”\(^\text{19}\) UNTOC can be viewed as a tool that, minimally, *complements* existing instruments, and, arguably *replaces* existing instruments for some types of criminal activity.

Having demonstrated the international community’s desire to use the Palermo Convention to address cultural property crime immediately raises the question of whether it has already been used for that purpose. Following a survey of States Parties, UNODC reported in 2012\(^\text{20}\) that the convention has not been widely applied to cases involving trafficking in cultural property. Among the reasons for this was a lack of harmonized criminal legislation, including, importantly, the fact that the criteria outlined earlier, particularly the “serious crime” criterion, were not supported by domestic laws for cultural property crime. As a result, “many countries do not generally apply [the convention] to cases involving trafficking in cultural property.”

As a follow-up, UNODC analyzed whether the convention could be used for cultural property crime, as desired by its States Parties. UNODC concluded that it was indeed possible, at least for the crime of trafficking in cultural property. UNODC laid out a framework for specific activities that the convention could address and facilitate: effective criminalization; jurisdictional concerns; prosecution, adjudication, and sanctions; cooperation with law enforcement; seizure of property; special investigative techniques and units; international investigations; extradition, mutual legal assistance; recovery of illicit assets; and prevention.\(^\text{21}\)
Building on UNODC analysis, States Parties then urged each other to use the convention “for the purpose of combating criminal offenses against cultural property”\(^\text{22}\) (emphasis added). States Parties interpreted the UNODC study broadly to include combating trafficking as well as looting; looting, in particular, was couched in terms of crime “prevention” and as a “related” criminal offense.

In order to retain the momentum of a coordinated desire to address cultural property crime, Member States have laid out a number of activities for the crime-focused arm of the United Nations to undertake in the near future.\(^\text{23}\) While not delving into the details of each activity, a few are worth noting in order to demonstrate the broad scope of the mandates and to suggest that Member States desire an engaged and active UNODC with respect to cultural property. A number of intergovernmental working groups have been tasked with analyzing cultural property crime and producing periodic reports. UNODC itself has been tasked with activities as varied as raising awareness of the utility of UNTOC in cultural property crime; providing technical assistance to Member States for the application of the convention to trafficking in cultural property; developing guidelines for criminal justice and prevention responses to cultural property crime; creating a web portal of cultural property–related tools, including legal instruments; and collecting states’ contact points to facilitate international cooperation. Of note, Member States have also directed UNODC to collect, analyze, and disseminate data on cultural property crime, particularly its link to transnational organized crime, as well as the estimates of illicit money involved. This mandate merits close attention; UNODC has been directed to collect this information through its Crime Trends Survey sent to Member States, to analyze the data, and report back to Member States. Given the unwavering assertions by the international community that there currently exists a strong relationship between cultural property crime and transnational organized crime, one could wonder how this conclusion has been reached prior to the detailed collection and analysis of appropriate data.

The international community is clearly directing UNODC to engage fully on issues of cultural property and criminal activity. This mandate has the potential to conflict with the directives of other intergovernmental organizations. Mandates could become confused, particularly when addressing “prevention” activities versus combating an obvious transnational crime such as trafficking. The UN General Assembly is at least aware of the potential for “mandate creep,” requesting UNODC work “within its mandate” and “in close cooperation, as appropriate, with UNESCO, INTERPOL, and other competent international organizations.”\(^\text{24}\) This concern is echoed by UN subsidiary bodies, which encourage “the UNODC to continue to contribute to the cooperative network established among the UNESCO, ICOM, INTERPOL, UNIDROIT, and WCO in the areas of trafficking in cultural property.”\(^\text{25}\) It remains to be seen, however, how the mandate issues are negotiated by the various organizations that have historically been very protective of their spheres of responsibility, and consequently, the resources dedicated to their activities.
To return briefly to the case described initially involving cultural property trafficking between El Salvador and the United States, the question is whether the Palermo Convention could have been used in that case. The answer is most likely that it could have been since the convention’s criteria were, arguably, met and both countries are party to the convention.\textsuperscript{26} If the convention had been used, however, the outcome likely would have been similar to that achieved, that is, international cooperation, a joint investigation, recovery of property, evidence sharing, and prosecution. All of these are cornerstones of the convention. There may have been additional benefits to using the convention, such as a possible consideration of extradition. Extradition, however, could have also been considered under an existing bilateral extradition agreement between the United States and El Salvador. A major limitation of using the convention, however, would have been that its use would have been limited to the crime of trafficking. The other criminal charge, failure to register cultural property, did not meet the convention’s criterion for a “serious crime.” In sum, the convention can be useful in cultural property trafficking cases, especially if two countries do not have an existing mutual assistance or other bilateral agreement.

In conclusion, stakeholders in the field of international cultural property would be well-served by monitoring and analyzing the use of the Palermo Convention for cultural property crime and the debate over its use in international fora. It is clear that the international community is interested in pursuing as many options as possible in addressing what is viewed as a global problem. This includes using the broadly designed Palermo Convention to address crimes that fit within some specific criteria outlined in the convention. The international community is currently placing two distinct types of crimes within this category—both looting and trafficking of cultural property. While there is a general recognition of the possibility for duplication of efforts and confusion of mandates, this danger has not limited the desire to apply a criminal justice focus to cultural property and therefore involve the crime-related apparatus of the UN system, particularly UNODC. Two types of activities bear close scrutiny over the next few years: first, the efficacy of the implementation of UNTOC to cultural property crime by States Parties, which is a use that the convention has yet to be applied to any significant degree; and second, the varied and broad-ranging activities of UNODC in cultural property, including the collection and analysis of data specifically to address the connections between cultural property and transnational organized crime. It is incumbent on experts in the field to monitor these actions, which are often mandated and undertaken by international bodies staffed primarily with diplomats with contentious and varying agendas, in order to provide an objective and apolitical understanding of the issue of cultural property crime.

ENDNOTES

1. UNESCO, Convention for the Fight against the Illicit Trafficking of Cultural Property, 3.
2. Durney, “Reevaluating Art Crime’s Famous Figures.”


23. See, for example, Resolution of the UN Economic and Social Council 2010/19 (adopted 22 July 2010) and UN General Assembly resolution 66/180 (adopted 19 December 2011).

24. UN General Assembly resolution 68/186 (adopted 18 December 2013).

25. UN Economic and Social Council resolution 2010/19 (adopted 22 July 2010), para. 17.


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