MUSINGS OF THE MONTH

AUGUST 2025

CONTENTS

Introducing: August Musings of the Month

At the ever-evolving intersection of creativity, culture, and the law, fresh perspectives continue to illuminate the ways we safeguard, critique, and reimagine our shared heritage. HALO's August *Musings of the Month* uplifts these voices — spotlighting diverse and timely contributions that push the conversation forward on art, ethics, and cultural policy.

In this August edition, we turn to pressing questions of financial crime, restitution, conflict, and globalization in the art world. From money laundering in art markets to our first ever piece in French with an accompanying translation, our muses this month examine how legal frameworks, international conventions, and ethical debates shape the global cultural landscape.

This month, we feature five thought-provoking muses:

- **Aisling Twomey** investigates whether money laundering is inherent to art crime, arguing that despite limited data, high-profile cases from the Knoedler Gallery scandal to museum thefts show laundering as an unavoidable reality in the art trade.
- **Ruth Teklu** analyzes the Native American Graves Protection and Repatriation Act (NAGPRA), tracing its role in advancing Indigenous justice through the return of remains and cultural property, while also exposing the law's shortcomings in cases like *Kennewick Man*.
- **Alonso Hernández-Pinzón García** draws on the metaphor of Botticelli's muse, La bella Simonetta, to explore the legacy of the 1995 UNIDROIT Convention.
- **Bruno Kalala Ambuyi** offers a powerful essay in French (translated in English) surveying the protection of cultural heritage in times of armed conflict. From the Hague Conventions to the landmark *Al Mahdi* case at the ICC, he traces the legal evolution of safeguarding cultural property against destruction and loss.
- **Mika (Jaeyun) Noh** examines South Korea's newly enacted *Art Promotion Act*, positioning it as a global model for regulating appraisal systems, resale royalties, and art services.

Together, these August musings reveal how deeply law is entangled with cultural preservation, commerce, and ethics — and how reforms, precedents, and debates are continually reshaping the future of heritage protection. More importantly, our musings reflect the geographical and topical breadth within art and cultural heritage law.

Through *Musings of the Month*, we seek to nurture a space of reflection and dialogue, bridging scholarship, practice, and advocacy at the crossroads of art and law. As we rapidly approach the end of Summer, join us in turning a new leaf as we celebrate our muses and look towards our new ones. And, as always, we would be delighted to welcome you as a muse, as art and cultural heritage law is for all, and without critique, we would be aimless curators, without challenges to the conscience of our collective creativity.

Yours,

Renée Ramona Robinson

Is Money Laundering Inherent to Art Crimes?

Image Credit

Aisling Twomey

Introduction

In recent years, the art market has become subject to money laundering regulation, both across the European Union via the 5th Anti Money Laundering Directive and in the United States via the Money Laundering Act of 2000. The adoption has not necessarily been smooth. Art market professionals in the United Kingdom have voiced concerns, with one gallery employee telling Politico in November of 2024 that "the money laundering regulations are the bane of my life." Just a month prior, the Chair of the British Art Market Federation (and now CEO of Philips) noted that the current implementation of money laundering regulations is "unduly burdensome." It seems that art market professionals are struggling with the scale and demands of money laundering regulation.

Coupled with this, academics in law and criminology have argued that there is little evidence of money laundering in art markets. Tijhuis contends that money laundering in art is rare in practice, while Van Duyne, Louwe and Soudjin noted in 2015 that there is minimal data about money laundering and art and that in literature about organised crime and money laundering, art has hardly been considered. Burroughs argues that there is a significant lack of tangible evidence of money laundering through fine art and antiquities, while Shea wrote that money laundering in art markets is usually discovered incidentally. In 2023, the FATF noted

that the anti-money laundering community has yet to recognise cultural objects as vehicles vulnerable to money laundering schemes. .

With a noted lack of evidence and regulated parties contesting the purpose of money laundering regulation, we might question whether there's a connection between art crime and money laundering at all. This article argues that money laundering is in fact inherent to art crime, and that plenty of data exists to demonstrate money laundering does happen in art markets. This in turn demonstrates a need for cross-collaboration to mitigate the risk of money laundering in the global art trade.

Defining Money Laundering

Money laundering was criminalised in the U.S. in 1986 and across the EU in 1991. Like defining art itself, defining money laundering is somewhat nebulous and unhelpfully jargonistic. Gilmour and Hicks argue for the standardised use of the definition provided in the Vienna Convention, which defines money laundering as "[t]he acquisition, possession or use of property… derived from an offence."

Modern pop culture provides us with an example. In *Breaking Bad*, Walter White runs a successful narcotics business and then launders the cash through a car wash to legitimise his operation, making him guilty of the narcotics offences as well as money laundering.

Walter White's narcotics offences are "predicate offences," or components of more complex crimes. The FATF recommends that countries criminalise money laundering relative to all serious offences. The EU details a list of 22 predicate offences, including terrorism, organised crime, fraud, corruption, counterfeiting, theft and illegal trafficking in cultural goods including artworks. The US has also adopted a wide range of predicate offences. This means that many of the art crimes which are most familiar— theft, fraud, forgery and trafficking— may well be money laundering offences. .

Connecting Art Crime and Money Laundering

Pryor writes that "it is broadly accepted that the majority of art crime is conducted for financial motives." This would mean that the majority of art crime can result in money laundering.

We can bring this logic to life with some examples, starting with the fall from grace of the Knoedler Gallery. From the 1990s to the early 2010s, Knoedler & Co. sold almost 40 Abstract Expressionist paintings, including work by Mark Rothko and Jackson Pollock. The paintings were fraudulent, forged in New York and sold to the gallery by art dealer Glafira Rosales, who knew the paintings were fake. Rosales generated the proceeds for the sale of these works, making her guilty of money laundering. She was later convicted of wire fraud, money laundering and tax evasion.

Then, i n 2023, the British Museum announced the theft of thousands of items from its collection, mostly but not exclusively gems and jewellery. The items were all listed on the

Art Loss Register and some 626 have been recovered, with more leads being worked at the time of writing. The items had been sold on Ebay, often at low prices. The British Museum has commenced a civil action against a former museum curator for the thefts, and in May 2024, the FBI got involved in the investigation, though no criminal charges have been brought. When antiquities stolen from a museum are sold online, the money from these sales are the proceeds of crime— indeed, the items themselves are also the proceeds of crime, even before they are sold. As a result, the alleged thief is also an alleged launderer.

Law enforcement, art businesses and academics might benefit from taking a broader look at criminal circumstances to recognise money laundering. It would be remiss to say that there is little evidence of money laundering in art markets if we're not looking at a crime from multiple perspectives. When we examine a painting hanging in a gallery, we don't just think about the brushstrokes and the colours. We think about the artist, the cultural and historical context, how the frame was made, who or what is in the painting and why. If we applied the same thoroughness of consideration to art crime, we might find trends and risks that have thus far evaded us, causing us to wonder whether the data on this phenomenon even exists.

We can hypothetically consider the Isabella Stewart Gardner Museum theft in 1990, when 13 works of art were stolen from the Boston Museum overnight, including works by Rembrandt, Degas, Manet and Vermeer. The paintings, which are the proceeds of crime, have not been recovered. The thieves are launderers just by having possession— and if the artworks were sold or given to a party who knows them to be stolen, that party is also liable for money laundering charges. The theft aspect of this story is famous, but it's just one part of a bigger picture.

We can also look tothe Beltrracchi case, in which a forger received 6 months imprisonment for his forgeries, which had resulted in some €16 million of damages. Lothar Senke received nine years for dealing fraudulent Giacometti sculptures, raking in over €8 million. These crimes were also predicate offences to money laundering, but you'd be forgiven for not realising it when reading the media sources. We might argue that a conviction is a conviction, and therefore it doesn't necessarily matter what the conviction is for— but if art businesses are expected to prevent money laundering, art professionals need to know what it looks like if art businesses are expected to prevent money laundering, art professionals need to know what it looks like and that their efforts to report it will result in tangible outcomes.

There are more than 700,000 items listed on the Art Loss Register and 52,000 thefts recorded on Interpol's Database of Stolen Works. Collectors consider art fraud to be a top risk to their collections and Purkey notes that between 1970 and 1990, Italy recorded 2530,000 art thefts. Given the amount of evidence we have of predicate offences, it seems likely that money laundering is as inherent to the art trade as it is to any other trade.

Building a Fuller Picture

Art crimes often have multiple parts, including the predicate offence and the laundering. There is also a third component, because crimes against art are crimes against a civilisation's shared cultural heritage. The large-scale spoliation by the Nazis during World War II has resulted in efforts like the Washington Principles and there is a growing amount of literature about provenance checks, which protect buyers and sellers while supporting restitution efforts. It's evident that the art market, far from being a black hole of criminality, is instead full of people who are deeply invested in doing the right thing.

Since crimes against art generate the proceeds of crime, there is an added risk that these proceeds might be used to buy more art. Depending on the criminal, that art might disappear for generations. Art historian Allyson Healey notes that academic work about Vermeer's *The Concert* has been depleted since 1990, suggesting that if artworks are lost in time, our cultural heritage suffers. It's therefore critical that artworks are protected from being used by launderers, as much as they are protected from offences like theft.

This is not a fairytale notion. We know of instances where narcotics traders have invested in art, and in 2020, the U.S. Senate Permanent Subcommittee on Investigations detailed a complex web of art transactions via some of the world's biggest auction houses which were used to circumvent sanctions. When the sovereign wealth fund of Malaysia was embezzled, the proceeds were laundered to purchase some of the finest art in the world, which was later surrendered to the FBI by actor Leonardo DiCaprio.

Adams has noted that the art market is growing closer to the luxury goods industry, with works produced that are "made for the market." In the author's view, art is an " alternative currency with the accompanying temptations." Some of the examples in this article read like a thriller novel, but they are real— and so is the risk that there are similar ongoing situations that we're missing, perhaps because we're not looking closely enough.

Need for Collaboration

Art market operators are the new kid on the block for money laundering regulation, but banks have been experiencing forms of money laundering regulation since the 1970s. These banks have developed decades of expertise that may prove useful to art businesses applying new regulatory obligations. Purkey points out that people investigating art crime may not be fully educated about the actual art at issue, indicating a need to build capacity across local and international law enforcement in both money laundering and art crime to join the dots. This knowledge gap could be filled by the art market itself: between institutional art history knowledge and investment in due diligence by provenance, the art market already has a ton of information on hand to prevent money laundering.

In 2023, FATF hosted a webinar on money laundering and terrorist financing in the art and antiquities market. The participants noted that art market participants currently feel like they're boxing in the shadows because they don't have enough information. This article suggests that some helpful data may well exist in the glut of information we have on hand about art crime, but a more joined-up approach is needed to uncover it. There is a shared need to

build capacity across art businesses, law enforcement and money laundering professionals to better understand how money laundering works relative to art and antiquities. Before we reach that lofty goal, we must first accept that where there's art crime, money laundering will follow.

Conclusion

The art world is facing significant change with increased regulations requiring the market to actively prevent money laundering. Evidence indicates that there is a large volume of art crime globally, and we should consider whether data on these crimes could allow us to extrapolate evidence about money laundering schemes and trends in the art trade.

The art market has many hundreds of years of history which it can use to support robust provenance and restitution efforts and to support money laundering due diligence. With support from experts within other regulated entities, as well as cross-jurisdictional law enforcement cooperation, art market professionals could be extremely well placed to offset money laundering, which is just as much a crime against cultural heritage as any other art crime.

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Repatriation of Remains and Cultural Property under NAGPRA

Image Credit

***Ruth Teklu**

Introduction

The law in the United States, absent federal legislation, has at best, an inconsistent and substandard ability to return art and cultural property looted during armed conflict and genocide to original owners and their heirs. Federal legislation aimed at facilitating repatriation is the most effective way of lowering legal barriers sufficiently for such claims to be heard.

The debate surrounding the return of looted art and cultural property demands that parties and stakeholders articulate what justice looks like. In the context of Native American remains and cultural property, the debate has a different set of stakeholders with unique motivations. Indigenous groups and activists who advocated for the passage of the Native American Graves Protection and Repatriation Act ("NAGPRA") sought to prioritize the religious significance of human remains and cultural property in advocating for reburial or retrieval. On the other side of the debate is the scientific community and museum professionals who believed that requiring repatriation and reburial would inhibit scholarly research and public learning.

In particular, archeologists, anthropologists, and museum professionals feel an ethical duty to protect and preserve these remains because they are physical evidence of our collective past. In opposing the enactment of NAGPRA however, that sense of duty came directly at odds with the movement towards "cede[ing] decision-making power to the Native peoples represented in [museum] collections, exhibits and programs." There are plenty of examples where the interests of academic institutions and the scientific community are diametrically opposed to the wishes of Native American tribes who seek the return of their cultural property and the reburial of their ancestors' remains. Some scholars object to such broad characterizations of the perspectives of each side and point out that there are Native Americans who work with archeologists on various projects. Other scholars offer a more nuanced view that the push for repatriation and reburial is a clash between religion and science and feel that the government should not prioritize an ethnic

group's religious beliefs over scientific progress. Nonetheless, there remains a consistent sentiment among Native American groups seeking restoration of their cultural identity and heritage through repatriation after experiencing deep loss. This view, while forcing all of us to confront inconvenient truths and take difficult positions on an emotionally charged debate, is the vision of justice that this paper embraces.

NAGPRA

NAGPRA is the most significant federal law providing for the restitution of cultural property and human remains of Native Americans. NAGPRA was enacted in 1990 following decades of activism among Indigenous communities objecting to the use of their ancestors' remains by museums and the scientific community without their consent and in contravention of their cultural beliefs regarding sanctity of the dead. NAGPRA's primary function is to provide a legal mechanism for the identification, protection, and repatriation of Native American remains and cultural property and criminalizes the illegal trafficking of such objects. Members of the scientific and museum communities initially opposed NAGPRA due to fear that it would reduce scholarly research, but such claims have not been seen. NAGPRA has actually increased archaeological research and improved knowledge of museum collections through its inventory process requirements.

NAGPRA did not successfully withstand a challenge to its application to ancient remains in the famous "Kennewick man" case. In *Bonnichsen v. United States*, scientists successfully precluded the application of NAGPRA to remains found in Kennewick, Washington determined to be between 8340 and 9200 years old. Scientists felt that the rare discovery of a well-preserved ancient skeleton such as the Kennewick Man was of international significance for its potential to provide insight on the origins of humanity in the Americas. As such, they disputed whether the remains were "Native American" under NAGPRA's definition. NAGPRA designates remains as "Native American" if they relate to "a tribe, people, or culture that *is* indigenous to the United States." The court found the definition's use of the present tense, reflects Congress's intention that remains must be related to a presently existing tribe, people, or culture to be considered Native American under NAGPRA and therefore, NAGPRA does not apply to the remains of Kennewick Man.

This unfortunate ruling by the Ninth Circuit narrowed NAGPRA's protections on the basis of the age of the remains. Neither the court nor NAGPRA specifies the type of relationship a tribe must have to human remains for them to qualify as "Native American" under the law. Yet the court rests its opinion that the remains lack a satisfactory relationship to the tribal claimants on the lack of genetic or cultural evidence connecting Kennewick Man to a modern tribe. The lack of evidence regarding group continuity beyond 5000 B.C., and the lack of written history among the tribal claimants prevented them from achieving repatriation.

Bonnichsen represents a huge blow to NAGPRA by creating an avenue for the statute to lose its teeth with respect to ancient remains still viewed as sacred by Indigenous groups. The *Bonnichsen* court leaves open questions as to NAGPRA's application because it does not shed light on what constitutes remains as being too old to be considered Native American. Human rights

activists have since pushed to amend NAGPRA so it explicitly covers "all Indigenous human remains" and the Department of the Interior promulgated a rule requiring museums and federal agencies to offer transfer of possession of "culturally unidentifiable" remains to "[t]he Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed."

NAGPRA's goal of repatriation of cultural property and human remains to Indigenous groups has proven to be difficult for courts to navigate. While the law has received criticism and pushback, it has made strides in improving awareness of what exists in museum collections and constructing a process for the interests of Indigenous groups to regain their cultural property and human remains to be recognized.

Conclusion

The debate around repatriation of cultural property forces us to reckon with the past and decide who has a right to remains and artifacts. It presents courts with the complicated legal challenge of attempting to provide present day remedies for past harms. National legislation, although not without its weaknesses, plays a critical role in facilitating negotiation and repatriation among Indigenous tribes and research institutions when remains are discovered. In discussing the emotional debate around repatriation and NAGPRA, anthropologists Nash and Colwell-Chanthaphonh aptly write:

> NAGPRA … is emotional because the law is not in itself a solution to colonialist practices so much as a framework that establishes a process of restitution; NAGPRA … provides a mechanism to craft values, forge relationships, and configure social institutions. … Most of all, NAGPRA is emotive because it requires Native Americans and museum professionals to come to terms, on an uncertain and unequal footing, with a contentious past and an ill-defined future.

This articulation of the NAGPRA debate can be applied to any national law that seeks to address art and cultural property looted as a result of genocide and armed conflict. The conversation is charged and legal disputes require courts to assign winners and losers. However, federal laws such as NAGPRA provides necessary pathways for those who were wronged–and their heirs–to reclaim fragments of their cultural identity stolen during a painful time in American history.

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La bella Simonetta in the Purgatory of Oblivion: The 1995 UNIDROIT Convention and the Art market

Image Credit

Alonso Hernández-Pinzón García

"*The death of the divine Simonetta, in alignment with the learned of her time, (...) melancholy and abandoned*"
Gabriele D'ANNUNZIO, *Il piacere*

I. From Simonetta Vespucci to our days

Many may not know who she is (actually, who she was) by her name. But most of us have seen her, radiant with flowers or disguised as Venus on her way to Cyprus on a shell. She was "la modella" (the model) of great Renaissance painter Sandro Botticelli (though he was not the only Florentine artist who during the XV century portrayed her, as other old masters such as Ghirlandaio, Pollaiuolo and Piero di Cosimo also did it). And her name was Simonetta Cattaneo Vespucci, also known as La bella Simonetta.

Simonetta was not only to Botticelli's paintings what Beatrice was to Dante's literature, but she represents, in the context of this essay, the old salvation of masterpieces through being in the purgatory of the art. Whereas some Renaissance paintings ended in the hell of Savonarola's vanity bonfires or were considered so heavenly as to be in the paradise of some European Courts, the relative oblivion that Botticelli suffered (and that put Simonetta - as his omnipresent model - in a fictional purgatory) may have been the salvation of all his masterpieces. To some extent, such artistic purgatory was the best option for the preservation of objects of art until the second half of the XX century. After that point, based on previous work carried out during the

Athens Conference of Architects and Technicians of Historic Monuments (1931), by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the Venice Charter on the Conservation and Restoration of Monuments and Sites (1964), there was the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), which celebrated its 50th anniversary in 2020. The importance of this Convention is beyond question, but some academics (e.g. M. CARTA) are of the opinion that the difficulty of defining cultural property was translated into a categorisation of different objects that could fit under the term "cultural property", which at the time was reflected in an unnecessarily extensive catalogue of goods.

Even if the achievements of the 1970 UNESCO Convention cannot be argued with, we had to wait till 1995, with the 1995 UNIDROIT Convention, to avoid putting other *Simonettas* in the purgatory of oblivion to avoid consigning other 'Simonettas' to the purgatory of oblivion in the name of protection. Indeed, this is the key contribution of the UNIDROIT Convention: true art will not need to suffer an oblivion to avoid being at the mercy of the illegal appropriation of those who prefer to admire beauty in private rather than allow it to be contemplated by the majority.

II. The end of the purgatory of oblivion for art works: the 1995 UNIDROIT Convention

In 1964, a group of fishermen who worked on the coast out of Fano (Italy) found in their nets an object that would have made them aware of a possible pecuniary gain. But, most probably, they would never have thought that this object would be the centre of a controversy that would last more than 50 years. In fact, this issue became the object of international legal litigation that had its most recent chapters, though not finals, in 2018 (with a judgement of the Italian Supreme Court) and in 2024 (with a judgment of the European Court of Human Rights). The facts behind this episode have two components. First, the object that the fishermen recovered from the bottom of the sea was a sculpture dating back to 300-100 BC and attributed by some experts (not without controversy) to the Greek sculptor Lisippo. Second is the date when it was found and when the transaction that is the object of the litigation was undertaken i.e.,1977, when the American J.P. Getty Museum acquired it. We cannot know whether similar litigation would have arisen had the statue—known as the Getty Bronze or the Victorious Youth—not been attributed to the renowned sculptor Lysippos. . But we certainly know that at the moment of purchase of the statue by the Getty, important international rules applicable to the international traffic of art works were not yet in place. In fact, the posterior existence of these rules has helped some States to prevent the loss of some of their cultural heritage, as we witnessed some years ago in the case of Botticelli's portrait of Michele Marullo Tarcaniota, that Spain avoided being (legally) auctioned by its private owners due to the legal protection granted to the painting.

The 1995 UNIDROIT Convention is paramount in the protection of cultural objects. Even if the Convention cannot resolve the problem linked to the *Getty Bronze* (as the United States is not a party to the Convention), its impact goes beyond the mere prevention of cultural losses. The reason is the footprint of the Convention in the international private law arena. In this

context, and in relation to the competent court in the matter of the restitution of stolen cultural objects (Chapter II of the Convention) and the return of illegally exported cultural objects (Chapter III), the 1995 UNIDROIT Convention included in its art. 8.1 the *foro rei sitae*, which was unknown to the legal systems of some States such as Italy and Germany in relation to movable goods (see M. GEBAUER, *La circolazione dell'opera d'arte. Prolifi processuali*, in G. LIBERATI BUCCIANTI: *L'opera d'arte nel mercato. Principi e regole*, 116). Indeed, the establishment of the *foro rei sitae* by the Convention is one of its most important milestones, as this provision has been introduced, for instance, into Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), which supposes a special rule on jurisdiction applicable to cultural goods when the defendant has domicile in an EU Member State: art. 7.4 of the Brussels I Regulation includes the provision that a cultural object is to be recovered "*in the courts for the place where the cultural object is situated at the time when the court is seized*".

The important relationship between the 1995 UNIDROIT Convention and the EU goes beyond the provision of art. 7.4 of the Brussels I Regulation and is evident in other legislative acts enacted by the EU as well as in terms of its policy. Starting with the latter (i.e., policy), the Council of the EU emphasised in its Conclusions on preventing and combatting crime against cultural goods of December 2011 the importance of the 1995 UNIDROIT Convention, and recommended that Member States ratify it. Regarding legislative work undertaken by the EU in relation to the 1995 UNIDROIT Convention, the influence of the Convention is especially visible in Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast). The parallelism between the Convention and the Directive in the respective objectives they pursue is clear because whereas the Convention's purpose is to "*reduce illicit trafficking by gradually, but profoundly, changing the conduct of the actors in the art market and of all buyers*", the Directive aims "*to ensure that all those involved in the market exercise due care and attention in transactions involving cultural objects*". Indeed, according to D. FINCHAM, Directive 2014/60/EU follows the Convention in relation to return obligations if the export was undertaken in violation of the internal rules of the State of origin of the cultural good, as the Convention endorsed the principle that the law of the situs of origin is controlling when an object has been stolen or illegally exported therefrom.

At national level, the impact of the 1995 UNIDROIT Convention has also been significant, particularly in the so-called *source nations* (i.e. art-rich nations), as the 1995 UNIDROIT Convention introduced a valid mechanism to help avoid irreversible damage and loss of their cultural heritage. For instance, the influence of the Convention in Italy is reflected in article 87 of its Code on the cultural and landscape heritage, which states that the restitution of those cultural objects indicated in the annex to the 1995 UNIDROIT Convention will follow the provisions of the Convention and the rules of ratification and execution (in the case of Italy, the UNIDROIT Convention was ratified by Law on 7 June 1999).

The considerable influence of the 1995 UNIDROIT Convention at regional and national level is just one of the testimonials of the contribution of the Convention that celebrated the 25th anniversary since its adoption in 2020.

III. Conclusion

La bella Simonetta has allowed us to contextualise the impact of the 1995 UNIDROIT Convention on the art market and how it may be usefully applied in today's economy, where art continues with its role as a preferred investment vehicle for large fortunes. It is clear that not only Renaissance works have been stolen or illegally exported. Mycenaean and Roman art (just to mention a few other eras) are also objects of desire by many collectors. Hence, Simonetta has been introduced into this essay because of the relative oblivion that the painter who most often used her as a muse (S. Botticelli) experienced for many years. The fact that Botticelli's works slept the sleep of the just protected these works at the same time that it deprived many people from witnessing the genius of this Florentine master. And, as the prestigious art dealer P. HOOK highlights (see: *Rogues' gallery. A history of Art and its dealers)*, art market is about something intangible, immeasurable but infinitely desired: genius.

Owning examples (pictures, drawings, sculptures, etc) of artists' genius is, most of the time, the fuel for the illegal art market. As a consequence, non-exhibited private art collections have been increasing since the XX century, which has put art pieces at risk. Indeed, the days of big hoarders is not completely over and, consequently, cultural heritage is under permanent threat (see, for instance, J.M. MERINO DE CÁCERES, and M.J. MARTÍNEZ, M.J. *La destrucción del patrimonio artístico espanol*). Some key players, along with various museums, have adopted guidelines and code of ethics that, as in the case of the American Alliance of Museums (AMA), discourage illicit trade. Further, some museums have welcomed the clearer regulatory framework that was initiated by the UNESCO Convention and consolidated by the 1995 UNIDROIT Convention, as it provides them with rules for acquisitions that, at any rate, will not have retroactive effect (as they understand that objects acquired in the past, as indicated by M.E. JONES, "*were done so under vastly different conditions that do not exist today, and, therefore, should be adjudged under a different legal, cultural, and ethical lens*").

Overall, the importance of the 1995 UNIDROIT Convention lies in its being not only a cross-border tool to facilitate cooperation between States but also as a proven and effective legal instrument to help States in successfully recovering stolen and illegally exported cultural objects. This cannot be undervalued, as States are the main parties responsible for ensuring the conservation of their heritage and guaranteeing that it can be transmitted to future generations. There is no doubt that the 1995 UNIDROIT Convention is a reliable instrument that provides an alternative fate for cultural objects, between being destroyed and falling into the purgatory of oblivion.

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Les nouvelles considérations juridiques du droit relatif à la protection du patrimoine culturel en cas de conflit armé

Bruno KALALA MBUYI

Il faut d'emblée préciser que le patrimoine est une notion polysémique dont il faut préciser les contours. L'épithète « culturel » étant moins évident qu'il n'y paraît, doit également être explicité pour cerner ce qu'est le « patrimoine culturel » avant d'envisager sa protection dans les différentes branches du droit. (Voir. HERITIER, *Genèse de la notion juridique de patrimoine culturel*, L'Harmattan, 2003, p. 101-102 ; D. HIEZ, *Étude critique de la notion de patrimoine en droit privé actuel*, Paris, LGDJ, 2003, p. 1-3 ; A. DIONISI-PEYRUSSE & B. JEAN-ANTOINE (dir.), *Droit et patrimoine*, PURH, 2015, p. 13 et s.). Ce groupe de mots se définit comme l'ensemble des biens, matériel ou immatériel, ayant une importance artistique et/ou historique certaine. Une déduction évidente fait jour à cet égard. Elle met parfaitement en corrélation ce caractère « matériel et immatériel » du patrimoine culturel.». (Lire J. M. LENIAUD, *Les Archipels du passé : le patrimoine et son histoire*, Paris, Fayard, 2002).

La protection des biens à caractère civil trouve sa source à l'article 23g *du règlement de La Haye* du 18 octobre 1907 qui présente un caractère coutumier. Ce dernier interdit de détruire ou de saisir des propriétés ennemies, sauf nécessité militaire impérieuse. L'article 52 du Protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole additionnel I) dispose que « les biens de caractère civil ne doivent faire l'objet ni d'attaques ni de représailles. Sont biens de caractère civil tous les biens qui ne sont pas des objectifs militaires… ». (Voy. l'article 52 du Protocole additionnel (I) aux Conventions de Genève du 12 aout 1949 relatif à la protection des victimes des conflits armés internationaux, adopté à Genève le 8 juin 1977.)

Il faut noter que parmi les biens civils qui sont protégés par le droit international humanitaire, les biens culturels font partie.

En effet, au lendemain de la deuxième guerre mondiale*, la Convention de La Haye de 1954 pour la Protection des biens culturels en cas de conflit armé* dans son article premier a défini le bien culturel comme étant centré autour des notions :

> « des biens meubles et immeubles ayant une grande importance pour le patrimoine culturel des peuples, tels que les monuments d'architecture ou d'histoire, les sites archéologiques, les œuvres d'art, les livres, ainsi que les édifices dont la destination principale effective est de contenir des biens culturels. »

Il faut préciser par ailleurs que la volonté de préserver certains biens et certains bâtiments des dégâts collatéraux des conflits remonte à l'Antiquité. Le traité de Westphalie signé a imposé des modalités de restitution des archives ou des œuvres d'un État, qui auraient été confisquées lors d'un conflit. Les conférences internationales de La Haye de 1899 et de 1907 vont également considérablement développer le droit de la protection des biens culturels. Mais ce sont surtout la Convention IV (particulièrement son Règlement concernant les lois et coutumes de la guerre sur terre) et la Convention IX adoptées en 1907 à La Haye qui vont mettre l'accent sur la préservation du patrimoine culturel dans les conflits armés. Le Pacte Roerich de 1935 parfois aussi appelé Traité de Washington a également abordé la question. L'article premier du Pacte Roerich affirme ainsi que les biens culturels immeubles que sont les *« monuments historiques, les musées, les institutions dédiées aux sciences, aux arts, à l'éducation, et à la culture seront considérés comme neutres* » et seront protégés. Les mêmes dispositions sont accordées au personnel faisant partie de ces institutions et aux biens meubles abrités dans les bâtiments mentionnés dans l'article 1 (Traité pour la protection d'institutions artistiques et scientifiques et de monuments historiques, ou *« Pacte Roerich »,* adopté à Washington le 15 avril 1935*, Recueil des Traités de la Société des Nations,* vol. CLX-VII, 1936, pp. 290 à 294.)

Il existe une règle de droit international humanitaire coutumier qui préconise :

> « qu'il est interdit d'attaquer les biens culturels à moins qu'ils ne deviennent un objectif militaire et qu'il n'existe pas d'autre solution réaliste pour obtenir un avantage militaire équivalent ».

A dire vrai, aucun argument juridique ne permet de justifier l'attaque d'un bien culturel lorsque celui-ci n'est pas, au moment de l'attaque, un objectif militaire ou lorsqu'il existe d'autres moyens permettant d'obtenir un avantage militaire équivalent à celui envisagé dans le cadre de l'attaque du bien. Les attaques intentionnelles illicites portant sur des biens culturels sont constitutives de crimes de guerre et il est arrivé que certains de leurs auteurs aient été condamnés pour ce chef par des cours et tribunaux pénaux internationaux et nationaux. (voy. . MULET-WADY, « La protection du patrimoine culturel lors des conflits armés comme manifestation possible d'un marqueur de la relation entre l'humanité et son patrimoine »*, in* F. VIOLET (dir.), *Personne et patrimoine en droit, Recherche sur les marqueurs d'une connexion*, Bruxelles, Bruylant, 2015, p. 141.)

Le préambule de la *Convention de La Haye* de 1954 entérine l'importance du bien culturel en affirmant une vision universelle de l'art selon laquelle :

> « les atteintes portées aux biens culturels, à quelque peuple qu'ils appartiennent, constituent des atteintes au patrimoine culturel de l'humanité entière étant donné que chaque peuple apporte sa contribution à la culture mondiale ».

La Cour internationale de Justice a été amenée à ne traiter cette question que de manière subséquente par rapport au reste de sa décision :

> « dans ces conditions, la question des restitutions ne peut être tranchée par la Cour en faveur du Cambodge qu'en principe, sans que les conclusions de la Cour visent des objets déterminés » (CIJ, *Affaire du Temple de Préah Vihéar* (Cambodge c Thaïlande), Arrêt du 15 juin 1962 in *Recueil* 1962 – 6, p. 34)

Elle rebondira plus tard dans l'affaire *des Activités militaires et paramilitaires au Nicaragua et contre celui-ci* en faisant mention de concept « système culturel » de l'État comme partie intégrante des « matières » protégées par le principe de souveraineté, s'opposant à l'intervention d'États tiers. (CIJ, *Affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c Etats-Unis d'Amérique), Arrêt du 27 juin 1986. CIJ. *Recueil 1986*, p 98)

Encore plus récemment, dans l'affaire relative à *l'Application de la Convention pour la prévention et la répression du crime de génocide* (Bosnie-Herzégovine c. Serbie-et-Monténégro), la CIJ était saisie d'un argument de la Bosnie-Herzégovine selon lequel les actes délibérés de destruction de son patrimoine historique, religieux et culturel commis par la Serbie-et-Monténégro étaient qualifiables de génocide. La Cour juge dans cette affaire comme suit :

> « La Cour prend note de la conclusion du demandeur selon laquelle la destruction d'un tel patrimoine a été une composante essentielle de la politique de nettoyage ethnique' et a constitué une 'volonté d'effacer toute trace de l'existence même' des Musulmans de Bosnie. Elle estime toutefois que la destruction du patrimoine historique, culturel et religieux ne peut pas être considérée comme une soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique. Bien qu'une telle destruction puisse être d'une extrême gravité, en ce qu'elle vise à éliminer toute trace de la présence culturelle ou religieuse d'un groupe, et puisse être contraire à d'autres normes juridiques, elle n'entre pas dans la catégorie des actes de génocide énumérés à l'article II de la Convention [pour la prévention et la répression du crime de génocide adoptée le 9 décembre 1948 par l'Assemblée générale des Nations Unies] » (CIJ, *Affaire sur l'Application de la convention pour la prévention et la répression du crime de* génocide (Bosnie-Herzégovine c Serbie-et-Monténégro), Arrêt du 26 février 2007, C.I.J. *Recueil 2007* 43, para 344.)

A dire vrai, toutes ces affaires devant la CIJ ne concernent pas le droit international du patrimoine culturel principalement. Disons qu'une référence timide y étant peut être faite dans ce dernier extrait d'arrêt – et n'ont fait qu'effleurer les notions qui intéressent le sujet. L'idée c'est de démontrer l'importance que la CIJ et les Etats accordent au patrimoine culturel. Par contre, l'absence d'un diffèrent dont l'objet porte sur cette question semble banaliser l'apport du droit international public.

De son côté, la Cour pénale international s'est montré très flexible en traitant de la question dans l'Affaire Ahmad Al Mahdi. Ceci est un tournant décisif dans la protection de l'identité culturelle. Dans ce procès, le juge de la CPI a tranché que :

> « Le crime pour lequel Monsieur Al Mahdi est reconnu coupable est très grave car c'est une question relevant de la protection du patrimoine de l'humanité et en conséquence la chambre l'a condamné à 9 ans d'emprisonnement ». (CPI, 27 septembre., Le Procureur c. Ahmad Al Faqi Al Mahdi, *jugement portant condamnation*, 27 septembre 2016, (ICC-01, 12, 15), pp. 3- 16.)

Afin d'étoffer notre réflexion, il conviendra de s'interroger sur les points suivants :

- La destruction des biens culturels en cas des conflits armés constitue-t-elle un crime, et si oui lequel, au regard du Statut de Rome ? ?
- La condamnation de Monsieur Ahmad Al Mahdi par la Cour pénale internationale constitue-t-elle une protection efficace des biens culturels en cas des conflits armés ?
- Peut-on considérer cette condamnation comme un bon référentiel dans la répression des atteintes aux biens culturels en cas des conflits armés ?

Pour y parvenir, l'étude tente d'y apporter un début de réponse dans les lignes suivantes.

Premièrement, Philippe Currat affirme sans regret ni remords que l'interprétation du statut de Rome repose avant tout sur la convention de Vienne sur le droit des traités. Il renchérit en disant que la spécificité de l'interprétation des règles pénales doit être prise en considération - ce qui exige notamment une interprétation restrictive de la définition des crimes. (P. CURRAT, « Interprétation du statut de Rome », *in Revue québécoise de droit international,* Volume 20, numéro *2*, 2007, p.137.)

En effet, prenant en compte les acquis du droit international humanitaire et pénal, le Statut de Rome intègre expressément la destruction délibérée du patrimoine culturel au sein de la définition du crime de guerre contenue à l'article 8 et érige le fait de :

> « Diriger intentionnellement des attaques contre des bâtiments consacrés à la religion, à l'enseignement, à l'art, à la science ou à l'action caritative, des monuments historiques, des hôpitaux et des lieux où des malades et des blessés sont rassemblés, pour autant que ces bâtiments ne soient pas des objectifs militaires »

Les éléments constitutifs du crime de guerre qui entrent en ligne de mire de la compétence de la Cour pénale internationale sont effet similaire à ceux que le TPIY exigeait en son temps. . (TPIY, Le Procureur c. Dario Kordic et Mario Cerkez, jugement relatif à la sentence, IT-95-14/2-T, 26 février 2001, p. 15, par. 8.)
À ce jour, l'affaire Al Mahdi constitue le premier et unique arrêt rendu par la CPI en la matière. L'article 8 du statut de Rome en a constitué l'assiette juridique. ,. Toutefois, prenant exemple sur les considérations émises par le TPIY, rien ne semble s'opposer à ce que la Cour rende, à l'avenir, une décision bien fournie qui condamnerait les crimes de génocide et celui contre contre l'humanité. (CPI, 27 sept., Le Procureur c. Ahmad Al Faqi Al Mahdi, jugement portant condamnation, 27 septembre 2016, (ICC-01, 12, 15), pp. 3- 16.) Il semble donc permis de considérer que l'arrêt Al Mahdi ne constitue qu'un pas supplémentaire dans l'évolution d'un droit international pénal dont les objectifs visant à préserver le patrimoine culturel ne font plus l'objet d'un doute. Ceci est un enjeu actuel de la communauté internationale.

La condamnation d'Ahmad Al Mahdi est un acte qui mérite les applaudissements de tous, car elle a pu ralentir l'hémorragie de ce que Raphaël LEMKIN qualifie de « génocide culturel ». Elle a en conséquence constitué une sorte de prophylaxie criminelle en la matière. L'affaire Al Mahdi est la première affaire en droit international public qui nous offre un matériau plus complet que la jurisprudence du Tribunal pénal international pour l'ex Yougoslavie. (Raphaël LEMKIN, « *Axis Rule in occupied Europe »,* Washington, 1944.)

En effet, il ne peut exister de meilleure protection sans juge habilité à connaître des contentieux relatifs aux violations des droits garantis par un texte.

Le fait pour la Cour de condamner monsieur Ahmad al mahdi pour destruction des biens culturels, constitue dans une certaine manière une protection de ces biens, en ce qu'ilest déclaré dans le Préambule du Statut de Rome que *« les crimes les plus graves qui touchent l'ensemble de la communauté internationale ne sauraient rester impunis* ».

Il sied de rappeler que les États parties étaient « *déterminés à mettre un terme à l'impunité des auteurs de ces crimes et à concourir ainsi à la prévention de nouveaux crimes* » lorsqu'ils créaient l'institution pénale spécialisée de La Haye Par conséquent, la Chambre de première instance considère que le Préambule établit la rétribution et la dissuasion comme étant les principaux buts du châtiment à la CPI. L'affaire constitue une exclusivité parce que la Cour pénale condamne un individu uniquement pour destruction intentionnelle du patrimoine culturel. Cette décision constitue ainsi un apport essentiel et déterminant dans l'évolution du droit international pénal de protection des biens culturels .

Cette affaire est une parfaite illustration de la protection des biens culturels et mérite d'être analysée afin d'intensifier la lutte contre l'impunité des atteintes graves du patrimoine culturel.

Dans l'angle pratique, le procès de Tombouctou constitue un tournant intéressant pour la justice pénale internationale, tant au fond, en raison de la typicité de l'infraction (la destruction des biens culturels relevant de la catégorie des crimes de guerre) qu'au niveau de la procédure, en raison de l'application de la reconnaissance de la culpabilité, une première devant la CPI. La condamnation d'Ahmad Al Mahdi constitue en outre une sorte de prophylaxie criminelle, d'où l'importance de la rétribution et la dissuasion, lesquelles découragent les personnes qui envisagent de commettre des crimes similaires.

Résumant tous les développements antérieurs faits dans le cadre de cette étude, la présente réflexion est destinée à combler les lacunes du droit existant au profit d'une prise en charge rationnelle et réaliste du patrimoine culturel.

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New legal considerations of the Law Relating to the Protection of Cultural Heritage in the Event of Armed Conflict

Bruno KALALA MBUYI

From the outset, it should be pointed out that heritage is a polysemous notion whose contours need to be clarified. The epithet "cultural", which is less obvious than it might seem, must also be clarified in order to define what "cultural heritage" is, before considering its protection in the various branches of law. (See. HERITIER, *Genèse de la notion juridique de patrimoine culturel*, L'Harmattan, 2003, p. 101-102 ; D. HIEZ, *Étude critique de la notion de patrimoine en droit privé actuel*, Paris, LGDJ, 2003, p. 1-3 ; A. DIONISI-PEYRUSSE & B. JEAN-ANTOINE (dir.), *Droit et patrimoine*, PURH, 2015, p. 13 et seq.) This phrase is defined as all property, tangible or intangible, of significant artistic and/or historical importance. This definition reveals an obvious conclusion: the “tangible and intangible” character of cultural heritage is intrinsically linked. (Read J. M. LENIAUD, *Les Archipels du passé : le patrimoine et son histoire*, Paris, Fayard, 2002).

The protection of civilian property is based on Article 23g of the Hague Regulations of October 18, 1907, which has customary character. This provision prohibits the destruction or seizure of enemy property, except in cases of imperative military necessity. Article 52 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) stipulates that "civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives...". (See article 52 of the Protocol Additional (I) to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed

Conflicts, adopted in Geneva on June 8, 1977).

It should be noted that cultural property is among the civilian goods protected by international humanitarian law.

Indeed, in the aftermath of the Second World War, Article 1 of *the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* defined cultural property as being centered around the notion :

"movable and immovable property of great importance to the cultural heritage of peoples, such as monuments of architecture or history, archaeological sites, works of art, books, as well as buildings the principal actual purpose

The desire to preserve certain goods and buildings from the collateral damage of conflict goes back to antiquity. The Treaty of Westphalia laid down procedures for the restitution of a state's archives or works confiscated during a conflict. The Hague International Conferences of 1899 and 1907 also considerably developed the law on the protection of cultural property. However, the most impactful were the 1907 Hague Conventions IV (particularly its Regulations Respecting the Laws and Customs of War on Land) and Convention IX, adopted in 1907 at The Hague, which placed the emphasis on the preservation of cultural heritage in armed conflicts. The Roerich Pact of 1935, sometimes referred to as the Washington Treaty, also addressed the issue. Article 1 of the Roerich Pact states that immovable cultural property such as *"historic monuments, museums, institutions dedicated to science, art, education and culture shall be considered neutral*" and shall be protected. The same provisions are granted to the personnel forming part of these institutions and to the movable property housed in the buildings mentioned in Article 1 (Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments, or *"Roerich Pact"*, adopted in Washington on April 15, 1935, *League of Nations Treaty Series*, vol. CLX-VII, 1936, pp. 290-294).

There is a rule of customary international humanitarian law which advocates :

> " it is prohibited to attack cultural property unless it becomes a military objective and there is no realistic alternative means of obtaining an equivalent military advantage".

In fact, there is no legal justification for attacking cultural property when it is not, at the time of the attack, a military objective, or when there are other means of obtaining an equivalent military advantage to that envisaged in attacking the property. Intentional unlawful attacks on cultural property constitute war crimes, and some of the perpetrators have been convicted by international and national criminal courts and tribunals. (see . MULET-WADY, "La protection du patrimoine culturel lors des conflits armés comme manifestation possible d'un marqueur de la relation entre l'humanité et son patrimoine", *in* F. VIOLET (ed.), *Personne et patrimoine en droit, Recherche sur les marqueurs d'une connexion*, Brussels, Bruylant, 2015, p. 141).

The preamble to the 1954 Hague Convention endorses the importance of cultural property by affirming a universal vision of art, according to which:

> "damage to cultural property, to whichever people it belongs, constitutes damage to the cultural heritage of all mankind, since each people makes its own contribution to world culture".

The International Court of Justice (ICJ) has addressed this issue tangentially:

> "In these circumstances, the question of restitutions can only be decided by the Court in favor of Cambodia in principle, without the Court's conclusions being aimed at specific objects" (ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand), Judgment of June 15, 1962 in *Recueil* 1962 - 6, p. 34).

Later, in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court referred to the State's "cultural system" concept as an integral part of the "matters" protected by the principle of sovereignty, opposing intervention by third-party States. (ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of June 27, 1986. ICJ. *Reports 1986*, p 98)

Even more recently, in the case concerning *the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v. Serbia and Montenegro*), the ICJ was seized of an argument by Bosnia-Herzegovina that the deliberate acts of destruction of its historical, religious and cultural heritage committed by Serbia and Montenegro qualified as genocide. In this case, the Court ruled as follows:

> "The Court takes note of the applicant's conclusion that the destruction of such heritage was an essential component of the policy of ethnic cleansing' and constituted a 'will to erase all trace of the very existence' of the Bosnian Muslims. However, it considers that the destruction of the historical, cultural and religious heritage cannot be regarded as an intentional subjection of the group to conditions of existence leading to its physical destruction. Although such destruction may be extremely serious, in that it is aimed at eliminating all traces of a group's cultural or religious presence, and may be contrary to other legal norms, it does not fall within the category of acts of genocide enumerated in Article II of the Convention [on the Prevention and Punishment of the Crime of Genocide adopted on December 9, 1948 by the General Assembly of the United Nations]" (ICJ, *Case on the Application of the Convention on the Prevention and Punishment of the Crime of* Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, C.I.J. *Reports 2007* 43, para 344).

To be fair, not all these ICJ cases concern international cultural heritage law. Perhaps we can say that a slight reference may be found in this last excerpt of the judgment, and even then, it only brushed against some notions on the topic. The idea is to illustrate the importance that the ICJ and States attach to cultural heritage. On the other hand, the absence of a dispute on the subject seems to trivialize the contribution of public international law.

For its part, the International Criminal Court has shown great flexibility in dealing with the issue in the Ahmad Al Mahdi case. This marked a decisive turning point in the protection of cultural identity. In this case, the ICC judge ruled that :

> "The crime for which Mr. Al Mahdi is convicted is very serious because it is a matter of protecting the heritage of humanity, and consequently the Chamber sentenced him to 9 years' imprisonment". (ICC, September 27, Prosecutor v. Ahmad Al Faqi Al Mahdi, *sentencing judgment*, September 27, 2016, (ICC-01, 12, 15), pp. 3- 16.)

In order to flesh out our reflection, it will be appropriate to consider the following points:

- Does the destruction of cultural property in the event of armed conflict constitute a crime, and if so, which one, under the Rome Statute?
- Does the conviction of Mr. Ahmad Al Mahdi by the International Criminal Court constitute effective protection of cultural property in the event of armed conflict?
- Can this conviction be considered as a good benchmark for the repression of attacks on cultural property in the event of armed conflict?

To this end, the study seeks to provide an initial response in the following sections.

First, Philippe Currat asserts, without hesitation, that the interpretation of the Rome Statute is primarily based on the Vienna Convention on the Law of Treaties. He further emphasizes that the particular nature of criminal law must be takin into account–requiring, in particular, a restrictive interpretation of the definition of crimes. (P. CURRAT, "Interprétation du statut de Rome*", in Revue québécoise de droit international,* Volume 20, Issue *2,* 2007, p.137.)

Indeed, taking into account the achievements of international humanitarian and criminal law, the Rome Statute expressly includes the deliberate destruction of cultural heritage within the definition of war crimes contained in Article 8, and establishes the fact of :

"Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided that such buildings are not military objectives.

The constituent elements of a war crime which fall within the jurisdiction of the International Criminal Court are indeed similar to those required by the ICTY in its time. . (ICTY, Prosecutor v. Dario Kordic and Mario Cerkez, Sentencing Judgment, IT-95-14/2-T, February 26, 2001, p. 15, par. 8. To date, the Al Mahdi case remains the first and only judgment handed down by the ICC on this matter. Article 8 of the Rome Statute provided the legal basis, however, following the example set by the ICTY, there seems to be nothing to prevent the Court from issuing, in the future, a comprehensive decision condemning the crimes of genocide and crimes against humanity. (ICC, Sept. 27, Prosecutor v. Ahmad Al Faqi Al Mahdi, Sentencing Judgment, September 27, 2016, (ICC-01, 12, 15), pp. 3- 16.) It therefore

seems safe to consider that the Al Mahdi judgment is just another step in the evolution of international criminal law whose commitment to safeguarding cultural heritage is no longer in doubt. This remains a pressing concern for the international community.

The conviction of Ahmad Al Mahdi is an act that deserves to be applauded by all, as it has slowed the hemorrhaging of what Raphaël Lemkin describes as "cultural genocide". As a result, it has become a kind of criminal prophylaxis in this field. The Al Mahdi case is the first case in international public law to provide us with more comprehensive material than the case law of the International Criminal Tribunal for the former Yugoslavia (Raphaël LEMKIN, "*Axis Rule in occupied Europe*", Washington, 1944).

Indeed, there can be no better protection without a judge empowered to hear disputes relating to violations of the rights guaranteed by a text.

The Court's decision to convict Mr Ahmad al-Mahdi for the destruction of cultural property constitutes, in a way, a protection of this property, since the Preamble to the Rome Statute states that *"the most serious crimes of concern to the international community as a whole must not go unpunished*".

It should be recalled that the States Parties were "*determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of new crimes*" when they created the specialized criminal institution in The Hague. Consequently, the Trial Chamber considers that the Preamble establishes retribution and deterrence as the main purposes of punishment at the ICC. The case is unique in that the Criminal Court convicts an individual solely for intentional destruction of cultural heritage.

This decision thus constitutes an essential and decisive contribution to the evolution of international criminal law for the protection of cultural property. This case is a perfect illustration of the protection of cultural property, and deserves to be analyzed in order to intensify the fight against impunity for serious damage to cultural heritage. From a practical point of view, the Timbuktu trial represents an interesting turning point for international criminal justice, both in terms of substance, due to the nature of the offence (the destruction of cultural property falls into the category of war crimes), and in terms of procedure, due to the application of the recognition of guilt, a first before the ICC. Ahmad Al Mahdi's conviction also constitutes a kind of criminal prophylaxis, hence the importance of retribution and deterrence in discouraging those contemplating committing similar crimes. Summarizing all previous developments in this study, the present reflection is intended to fill the gaps in existing law in favor of a rational and realistic handling of cultural heritage.

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Translation by Renée Ramona Robinson

Globalizing Art Law: South Korea's Art Promotion Act as a Model for Appraisal Systems and Legal Frameworks

Mika(Jaeyun) Noh

I. Introduction

South Korea is experiencing a dynamic transformation in its art sector, driven by legislative innovation and increasing market globalization. The impending enforcement of the Art Art Promotion Act in July 2024 and the ongoing controversies surrounding the nation's art appraisal system have highlighted critical gaps in legal infrastructure, market transparency, and cultural policy. This article examines the intersection of these developments, offering insights into the challenges and opportunities inherent in South Korea's evolving art ecosystem.

II. The "Art Promotion Act" : A Legislative Milestone Before the "Art Promotion Act," the South Korean art sector operated under the "Culture and Arts Promotion Act," a general policy framework that left many specific needs unaddressed. Recognizing this, the new law introduces a phased rollout across three pillars.

Public Art Bank (2024)

The Public Art Bank aims to democratize access to art by acquiring and distributing artworks for public spaces, promoting cultural engagement across communities. While the initiative is aligned with global trends in public art investment, the legal challenges lie in

the allocation of public funds, intellectual property rights, and the potential for misuse in the selection process. Concerns also arise regarding the ownership and management of artworks once they are acquired by the government, particularly regarding the protection of artists' moral rights and the enforcement of fair compensation for public display. Additionally, the broader legal implications surrounding the public funding of art must be addressed to ensure transparency and minimize potential misuse of public resources. Establishing a Public Art Bank without clarifying its unique role, risks duplicating efforts and creating inefficiencies within Korea's public art ecosystem.

Art Services Registration System (2026)

This new initiative mandates the registration of art-related businesses. These industries include art galleries, art auctions, art consulting, art leasing and sales, art appraisal, and art exhibitions, as defined in Article 2(5) of the Act. Among its key measures, the Act implements a notification system for art service providers. While the system is intended as a simple registration process ("notification not requiring acceptance"), Article 18 of the Act suggests it may require administrative approval upon review. Specifically, Article 18(3) states that local governments must examine the notifications submitted by art service providers, confirm compliance with the Act, and issue a registration certificate. This raises concerns that the notification system could function as a de facto licensing requirement, requiring both formal and substantive reviews before taking effect. Further scrutiny arises from Article 18(4), which specifies disqualifications for art service providers. Individuals or organizations falling under specific categories—such as minors, bankrupt individuals without reinstatement, those convicted of certain crimes, or entities with recently suspended operations—are barred from registering. These restrictions effectively serve as criteria for disqualification from operating within the art service industry. While the registration system could lead to greater accountability, legal concerns include the administrative burden on smaller businesses, which may struggle to meet the registration requirements due to resource constraints. Furthermore, questions arise about data privacy and the legal responsibilities of registered entities to ensure the accuracy and legitimacy of the information provided. Overregulation may also stifle market innovation by imposing rigid frameworks on dynamic art-related businesses. From a legal perspective, there must be careful consideration of the costs and benefits of this mandatory registration to avoid unintended consequences that could disproportionately impact smaller market participants.

Artists' Resale Royalty Right (2027)

As part of efforts to align with international norms, South Korea is introducing a resale royalty

scheme that ensures artists benefit from secondary market transactions. While this provision is designed to address long-standing concerns about fair compensation for artists, particularly in the context of high-value resales, legal issues surrounding its

implementation are multifaceted. The scheme's enforcement, particularly in the context of international transactions and private sales, poses a challenge for local authorities. The Art Promotion Act of Korea introduces resale royalty rights for artists (Article 24), allowing them to claim compensation from sellers when their artworks are resold. This measure aims to ensure that artists benefit from the appreciation of their works in secondary and tertiary art markets. However, the implementation of this right has sparked significant debate. Critics argue that resale royalties may influence price formation, particularly in the primary market. Buyers may factor in the future obligation to pay resale royalties, potentially suppressing demand or discouraging purchases. Furthermore, the enforcement of these royalties might concentrate disproportionately on high-value transactions involving a small number of artworks, limiting the broader impact on the art market and rendering the policy less effective. The ambiguity has led to differing views on whether the payment obligation should rest solely with the seller or be distributed among other stakeholders through contractual agreements. The lack of clear guidelines on joint or shared liability complicates the enforceability of this provision and creates uncertainty for market participants. The legal framework must ensure that the royalty is enforceable across borders, and that it does not create barriers for smaller galleries or dealers who may lack the financial resources to comply with such regulations. Additionally, there is concern that the introduction of resale royalties could inadvertently inflate the prices of artworks, limiting access to art for collectors and investors and potentially distorting the art market.

III. The Art Appraisal System: A Persistent Problem

South Korea's art appraisal system remains a contentious aspect of its art market. Despite being a critical component of the industry—affecting transactions, taxation, and legal disputes—it has been criticized for its lack of uniformity and accountability.

Key Cases Highlighting Systemic Flaws

The Lee Ufan Forgery Controversy

The reemergence of forgery allegations surrounding works attributed to the renowned artist Lee Ufan has spotlighted inconsistencies in South Korea's art appraisal system. Two leading appraisal institutions arrived at conflicting conclusions over the authenticity of multimillion-dollar artworks, raising questions about the legal standards and protocols governing the art appraisal process. The lack of a unified framework exacerbates uncertainties, undermining public trust in the art market.

Chun Kyung Ja's "Beautiful Woman" Case

The late Chun Kyung Ja's "Beautiful Woman" (미인도) remains a landmark case in South Korea's art forgery history. Despite professional appraisers authenticating the painting as genuine, Chun's personal denial of authorship created legal and ethical dilemmas. This case underscores the tension between an artist's testimony and the evidence-based conclusions of art appraisal institutions, exposing potential gaps in how disputes of this

nature are adjudicated under current laws.

Rising Demand for Art Appraisal

Growing initiatives such as the acceptance of artworks in lieu of taxes and the use of art as collateral for loans have heightened the importance of accurate and reliable art appraisal. These developments necessitate a robust legal framework to standardize appraisal practices and address disputes effectively. The current lack of regulatory oversight risks creating a volatile environment, where appraisers, collectors, and financial institutions are left vulnerable to legal and financial risks.

IV. Legal Challenges and Opportunities in South Korea's Art Appraisal System

Standardization and Regulation

One of the primary challenges in South Korea's art appraisal industry is the lack of a standardized certification system, which undermines transparency and consistency across the market. To address these concerns, the Ministry of Culture, Sports and Tourism (MCST) has introduced reforms such as a standardized appraisal template, which aims to unify legal standards and foster greater market confidence. Key milestones in this process include the establishment of the Art Appraisal Task Force Team in 2006, the drafting of the Act on the Distribution and Appraisal of Artworks in 2016, and the legislative announcement of the Art Promotion Act in 2023. One of the key proposals is the creation of a National Appraisal Institution to provide state-backed credibility for appraisals. While this initiative has the potential to increase trust and standardization, concerns about "excessive government intervention," limited market demand, and the underdevelopment of professional appraisers complicate the successful rollout of such reforms. The legal framework must carefully balance government involvement with the need for industry flexibility and professional autonomy.

Dispute Resolution Mechanisms

Another pressing challenge in South Korea's art market is the lack of specialized mechanisms to resolve disputes, particularly those concerning the authenticity of artworks. The prevalence of counterfeit artworks exacerbates this issue, further complicated by inconsistent appraisal results, which may vary between different institutions or even within the same organization. Establishing dedicated legal forums or arbitration panels could provide a more streamlined and efficient dispute resolution process. This would reduce the reliance on lengthy court proceedings, improving the efficiency of the art market and offering stakeholders a more transparent and accessible platform for resolving issues. Such mechanisms would also enhance the credibility of the appraisal system by ensuring that disputes are handled professionally and impartially.

Liability and Accountability

The limited legal accountability of art appraisal institutions and individual appraisers is another critical concern. Currently, there are few mechanisms in place to hold appraisers accountable for errors or misconduct. The Art Promotion Act aims to address this by defining "art appraisal services" as a formal business requiring registration by 2026. This provision ensures that only registered entities will be authorized to conduct appraisals, thereby establishing clear legal obligations for practitioners. However, the introduction of liability frameworks that hold appraisers accountable for mistakes or ethical violations is necessary to enhance the professionalism and reliability of the industry. By instituting such frameworks, the legal system can help foster public trust in the appraisal process, ensuring that art valuations are credible and accurate.

V. Legislative and Policy Responses

The Art Promotion Act seeks to address these challenges through comprehensive reforms to the appraisal system, including mandatory registration for art appraisers, the introduction of standardized appraisal certificates, and the implementation of enhanced professional accountability measures.

Mandatory Registration for Appraisers

The Art Promotion Act mandates formal registration for art appraisers, aiming to enhance oversight and standardization. However, this requirement presents legal challenges, including increased compliance costs for independent appraisers and small practices, potentially restricting entry into the profession. To avoid arbitrary
exclusion, the legal framework must establish transparent and fair registration criteria while ensuring due process for applicants. Effective implementation hinges on balancing regulatory control with equitable access to the profession. Standardized Appraisal Certificates
Standardized appraisal certificates are intended to reduce inconsistencies in artwork valuation. While this reform promotes uniformity, it raises legal concerns about enforceability, particularly in disputes over valuation accuracy during resale or litigation. Clear guidelines for appraisers on valuation scope and accuracy, along with mechanisms for verification and challenges, are essential. Additionally, templates must allow flexibility to account for the unique attributes of individual artworks to ensure legal and practical effectiveness.

Enhanced Professional Accountability

Under the Art Promotion Act, art appraisers will be subject to stricter ethical guidelines and periodic assessments to maintain their qualifications. These measures are designed to elevate industry standards and ensure that appraisers uphold professional integrity. However, enforcing these guidelines presents several legal challenges. The definition of "professional misconduct" and ethical breaches must be clear and precise to prevent inconsistent application of the rules. Additionally, the Act should include transparent

procedures for monitoring appraisers, handling disciplinary actions, and conducting qualification assessments. Without these mechanisms, the risk of legal disputes over discrimination or procedural irregularities could undermine the credibility of the profession and the efficacy of the appraisal system.

VI. Global Comparisons

International models, such as the Uniform Standards of Professional Appraisal Practice (USPAP) in the United States and France's Commissaires-Priseurs Judiciaires, offer valuable benchmarks for South Korea. These frameworks emphasize rigorous training, licensure, and clear legal recourse, ensuring higher levels of trust and reliability.

Rigorous Training and Licensure

International models such as USPAP and France's Commissaires-Priseurs Judiciaires underscore the importance of formal training and licensure for appraisers, ensuring professional competence through continuous education and standardized practices. Adopting such frameworks in South Korea necessitates comprehensive licensure systems with clear educational and professional criteria. Legislative amendments would be required to govern the issuance, renewal, and revocation of licenses, balancing rigorous standards with fair accessibility for new entrants to the profession.

Clear Legal Recourse Mechanisms

Effective dispute resolution mechanisms are central to both USPAP and the French model, offering clear legal recourse for grievances and professional misconduct. South Korea could benefit from regulatory bodies empowered to investigate complaints, mediate disputes, and enforce sanctions. Critical legal considerations include the scope of regulatory authority, procedural fairness, and judicial review, all of which must be designed to ensure transparency, impartiality, and accessibility.

Standardization and Trust

Standardized appraisal practices are foundational to fostering trust in the art market. USPAP's detailed guidelines and the French model's legal integration of standards offer valuable precedents. South Korea should implement standardized practices tailored to its unique market dynamics, such as private sales and digital art. Legislative reforms must define clear compliance criteria and establish robust monitoring and enforcement mechanisms to ensure consistency and reliability.

VII. Critical Challenges

While the proposed reforms are promising, several challenges remain. Balancing Accessibility and Professionalization

Mandatory registration and stricter oversight are crucial for professionalizing the art appraisal sector, yet they pose significant challenges for smaller galleries and independent appraisers. The associated costs of compliance, such as registration fees and administrative

burdens, may disproportionately impact less-resourced market participants. This could lead to the exclusion of independent appraisers and smaller institutions, raising legal concerns under competition law regarding equitable access to the art market. The potential for monopolization or concentration of power within larger institutions could stifle competition, undermine diversity, and prevent emerging professionals from entering the market.

To address these concerns, legislators should consider the introduction of tiered regulatory frameworks that offer different compliance levels based on the size and capacity of institutions. Additionally, phased compliance periods and subsidized programs could help mitigate the financial burden for smaller players and ensure inclusive market participation. These measures would allow the art appraisal system to advance its professional standards without unfairly limiting access to the profession, thereby fostering a more equitable and competitive market.

Authenticity and Market Dynamics

The growing demand for authenticity certificates in the art market has introduced procedural complexities, including increased costs and administrative burdens. Despite these efforts, the circulation of forged works remains a significant issue, underscoring the gaps in the current legal framework. These gaps pose serious risks to market integrity, as forged works can be sold to unsuspecting buyers, resulting in financial loss and damage to public trust in the system.

To address these challenges, the legal framework must introduce stronger penalties for selling forged works and enhanced liability for fraudulent appraisals. Such measures would act as a deterrent for those engaging in fraudulent activities and provide legal recourse for victims of malpractice. Furthermore, the establishment of a centralized, publicly accessible registry for authenticity certificates would improve the traceability of artworks, making it easier to verify their provenance and authenticity. This registry would help build confidence in the art market, reduce the circulation of forged works, and streamline the resolution of disputes. Legal provisions must also be introduced to clarify the standards for authenticity and the processes for certification to ensure consistency and enforceability.

Technological Integration

South Korea's appraisal system has yet to integrate blockchain and other digital tools,, which can improve transparency, traceability, and accountability. Blockchain offers immutable records of provenance, addressing key gaps in the current framework. However, adoption requires legal provisions ensuring the admissibility of blockchain records, data privacy protection, and interoperability standards. Pilot programs and collaborations with global technology leaders can aid implementation while addressing regulatory challenges. Legal considerations must also include intellectual property rights and copyright implications, especially as blockchain intersects with digital and NFT art markets.

VIII. Opportunities for Innovation

The convergence of legislative reform and technological advancement provides a unique opportunity for South Korea to position itself as a global leader in art law and market regulation.

Key recommendations include:

Developing a National Appraisal Registry

A centralized digital appraisal registry could enhance transparency and reduce disputes over authenticity in the art market. By requiring registered appraisers to upload appraisal certificates to a secure, government-administered platform, the registry would enable real-time verification and traceability. Legally, the system demands robust data protection regulations, intellectual property safeguards, and liability provisions for fraudulent records. Compliance with international cybersecurity standards is critical to safeguarding sensitive data and maintaining public trust.

Promoting Public-Private Partnerships

Public-private partnerships (PPPs) can foster innovation in the art appraisal sector by leveraging resources from nonprofit organizations, academic institutions, and tech companies. Academic institutions could offer training programs, while tech firms could develop blockchain-based provenance solutions. Legally, PPPs require transparent contracting, accountability measures, and adherence to procurement laws to prevent conflicts of interest. Incentives such as tax benefits or research grants could further encourage private-sector collaboration, advancing the government's cultural policy goals while ensuring inclusivity.

IX. Conclusion

The "Art Promotion Act" and its associated appraisal reforms represent a pivotal moment for South Korea's art market. However, the success of these measures depends on their ability to balance regulatory rigor with market accessibility, cultural authenticity, and international competitiveness. By addressing existing gaps and embracing innovation, South Korea can set a new standard for art law and policy in the 21st century.

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