The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction[[1]](#footnote-1)♦

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Abstract

*In 2017, the Council of Europe opened for signature the first ever international treaty aimed at policing cultural property. As more attention has been paid to the damage done by the theft, looting, and illicit trafficking of cultural objects, the Council of Europe has met this challenge with an ambitious convention, which aims to fill gaps in the current criminal laws. These gaps have too often been exploited by individuals in the illicit antiquities trade. The author had an opportunity to present his analysis of a draft version of the Council of Europe’s Convention at a meeting held in Lucca, Italy in 2017. The meeting of that group of experts revealed a document that had the benefit of grand ambitions and tough talk on the policing of illicit antiquities. Yet, pessimism was expressed by many experts that the convention would accomplish the goals which it set out to achieve. The essay that follows is an expansion of the remarks given at that meeting. It argues that the cultural property trade badly needs to be properly regulated. This includes not simply seizure and forfeiture of objects, but also the prosecution of persistent bad actors. The Nicosia Convention opens up new possibilities for prosecution at all levels of the illicit trade. Although the convention is the first of its kind, it has been met with surprisingly little attention in the cultural heritage law academy. This essay introduces the main reforms offered by the convention and argues that it points the way forward for future policing of the illicit trade in cultural property.*

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Introduction

In 2017, the Council of Europe opened for signature the Nicosia Convention on offences relating to cultural property.[[3]](#footnote-3) Referred to as the “Blood Antiquities Convention” by its drafters, the convention aims to police the illicit trafficking of cultural objects. The work of the convention marks an exciting moment in the evolution of international cultural heritage law.[[4]](#footnote-4) It offers a chance for the Council of Europe to move forward, as a leader, in erecting a cohesive international policing strategy for reducing the illicit trade in cultural objects.[[5]](#footnote-5) Cultural property conventions have attempted to regulate activity during armed conflict,[[6]](#footnote-6) sought to prevent illicit movement through public law,[[7]](#footnote-7) worked to set aside World Heritage sites of universal cultural value,[[8]](#footnote-8) attempted to harmonize private international law,[[9]](#footnote-9) and have even sought to regulate underwater cultural heritage.[[10]](#footnote-10) Yet, apart from an earlier Council of Europe initiative in 1985,[[11]](#footnote-11) there has been no international effort devoted to creating a complementary criminal law framework that applies to illicit cultural objects. The new Blood Antiquities Convention carries forward the lessons of those conventions to the area of criminal law, seeking to provide consistent criminal offenses targeting various segments of the illicit trade. The result is a convention which offers the possibility for a more cooperative regulatory network, which offers a multidisciplinary, international solution to a problem that requires a cohesive regulatory response.

Other conventions have only mentioned the possibility of using criminal regulation indirectly. For example, Article 2 of the 1970 UNESCO Convention urges States Parties to put “a stop to current practices” that allow the illicit movement of cultural property.[[12]](#footnote-12) As a result, the use of criminal law to change behaviors that incentivize looting and illegal export has been underutilized. This has been the case in domestic legal systems, but even more so in policing the transnational criminal networks, which move illicit cultural objects to collectors and markets.[[13]](#footnote-13)

The scale of the trade in stolen and looted art is a dark number, as so much of the art trade is conducted anonymously.[[14]](#footnote-14) Efforts have been made to compare the black market in art and antiquities to other illicit markets,[[15]](#footnote-15) but those efforts are only rough estimates. We know that illicit art travels the world in shipping containers, slips anonymously through freeports, is stowed in airplane luggage, and is looted from ancient sites.[[16]](#footnote-16) The illicit trade in art and antiquities risks closing off entire disciplines of human learning.[[17]](#footnote-17) This crime has touched every ancient culture and site of note, from the ancient Inca civilization in Peru,[[18]](#footnote-18) to rock art in the American Southwest,[[19]](#footnote-19) to ancient Greek civilizations in the Mediterranean,[[20]](#footnote-20) and to the temples of Southeast Asia.[[21]](#footnote-21) No nation is immune to the damage done by looters, no matter how large or small its economy.[[22]](#footnote-22) Further, no major collecting museum has been able to successfully acquire material without risking buying stolen,[[23]](#footnote-23) fake,[[24]](#footnote-24) or looted material.[[25]](#footnote-25) This problem requires a robust international effort, one that has been slow to fully embrace the tools of policing.

The new convention has an opportunity to shift the conversation. Given that the Council of Europe now has forty-seven Member States, including both Russia and Turkey, the impact of this new convention could be considerable.[[26]](#footnote-26) These Member States include art-acquiring nations,[[27]](#footnote-27) transit nations where art frequently travels,[[28]](#footnote-28) and nations of origin.[[29]](#footnote-29) The convention even allows for the possibility that any non-council state may sign on to the convention.[[30]](#footnote-30) Given the novel approach to the criminal activity involving cultural property, the Nicosia Convention firmly moves States Parties to the convention to the lead of the international community in the race to erect effective criminal laws aimed at stemming the illicit trade in cultural property. It does this by using criminal regulation at all the stages of the trade in cultural objects, including looters, traffickers, and end-of-the-chain art sellers and buyers. This encompassing approach will lead to more effective policing of the illicit trade in cultural objects and will serve to protect and aid the good actors in the art trade, who are abiding by the law but have been suffering due to the unfair competition provided by illicit traffickers.

1. The Antiquities Trade Presents Unique Regulatory Challenges

Chapter II of the convention sets out guidance for States Parties in crafting these substantive criminal law provisions. The European Committee on Crime Problems undertook a comprehensive review of current national legislation related to cultural property and found a number of gaps.[[31]](#footnote-31) The convention encourages States Parties to introduce new criminal offenses or highlight offenses that already exist and can apply to the actions taken by actors in the illicit trade. Articles 3 through 9 of the convention criminalize different stages of the trafficking of illicit cultural property, which works like this: first, objects are illegally excavated. After removal, these objects are transported abroad.[[32]](#footnote-32) This transnational movement occurs because looters, thieves, and smugglers can exploit differences between legal systems to exploit gaps or weaknesses in the law.[[33]](#footnote-33) This both increases the prices they can fetch for their illicit material and also diminishes the probability of being apprehended.[[34]](#footnote-34) Illicit cultural objects are taken to nations where they can easily be concealed from customs and border agents, where title can be laundered for these objects.[[35]](#footnote-35)

To show how effective the potential solutions offered by the convention are, we should first consider why the antiquities trade has been a difficult illicit trade to regulate. The antiquities trade has characteristics that make it uniquely difficult to police.

To start, many individuals involved in the trade are social elites with high status.[[36]](#footnote-36) As a consequence, it has been classified by criminologist Simon Mackenzie as a crime of the powerful.[[37]](#footnote-37) This means that unlike the trade in illegal narcotics, endangered wildlife, or other counterfeit objects, the illicit trade in culture has been fueled by wealthy individuals. Their wealth and social status have allowed them to avoid the scrutiny of prosecutors, thus creating an under-regulated marketplace.[[38]](#footnote-38)

Another obstacle has been a lack of awareness and a failure to accurately document how vast the problem of illicit cultural property really is.[[39]](#footnote-39) Raising awareness of a criminal activity is one of the best measures to spur police and prosecutors to direct their efforts at a problem.[[40]](#footnote-40) The illicit art trade combines two main classes of objects: stolen artworks and recently excavated (i.e., “looted”) antiquities.[[41]](#footnote-41) So, how large is the volume of this material? The answer to that question will only be, at best, a rough estimate. Sandro Calvani, a former director of the United Nations Interregional Crime and Justice Research Institute, argues the trade in illicit art has reached “epidemic proportions”; yet, he also notes the difficulty policymakers have in precisely quantifying these crimes, as “every year, the Interpol General Secretariat asks all member countries for statistics on theft of works of art.” However, only sixty out of 187 member countries, on average, provide statistics.[[42]](#footnote-42) Moreover, individual nations do not keep track of those statistics in a uniform way.[[43]](#footnote-43) Some estimates of the size of the trade in illicit cultural property put it on par with other major criminal markets like drugs and arms.[[44]](#footnote-44) When works of art are sold, they are often sold from anonymous sellers to anonymous buyers.[[45]](#footnote-45) Even when auction houses act as the intermediary, they closely guard the identity of buyers and sellers.[[46]](#footnote-46) A cogent policy solution requires sound data, and this data has been difficult to acquire.

Furthermore, the scale of looted antiquities presents other problems, as estimating the kind of object taken from fresh looter’s pits, for example, will invariably be difficult.[[47]](#footnote-47) Without records and the skilled expertise of an archaeologist to record scientific and contextual information, a tremendous amount of raw information and knowledge is lost, not to mention the amount of material which is damaged and cast aside because it may not be salable.[[48]](#footnote-48) We can, however, estimate the kinds of objects that may have been taken from a looted archaeological site via qualitative studies. The work of reporters and other investigators has given a glimpse at how the antiquities trade operates. Peter Watson described the ways in which illicit material was smuggled out of Italy, through Switzerland, and was then sold at Sotheby’s in London.[[49]](#footnote-49) Roger Atwood tracked the work of looters of pre-Columbian civilizations in the Americas.[[50]](#footnote-50) Jason Felch and Ralph Frammolino conducted investigative reporting into the acquisition of antiquities at the Getty, which helped show how much illegally exported and looted materials made their way into that museum.[[51]](#footnote-51) Archaeologists have also used auction house catalogues to show how little information is provided to the public when antiquities are sold.[[52]](#footnote-52) How to raise the attention and notice of prosecutors, without discernible methods for collecting data and revealing its scope, remains a difficult and vexing question for cultural heritage advocates. With little to compare the vague numbers to and little solid data supporting the numbers, those who want to encourage decision makers to take more direct and tangible efforts have little in the way of real data to support their cause. Often, the best data is the illicit object itself, which may explain the law’s object-centered approach.

1. Seizure and Forfeiture of Cultural Property Are the Dominant Regulatory Responses in the United States

Though there have been notable seizures, returns, and forfeiture of illicit material,[[53]](#footnote-53) there have been few successful prosecutions of the individuals who drive the demand for illicit antiquities. Despite major scandals at some of America’s most prestigious cultural institutions, including the Metropolitan Museum of Art in New York,[[54]](#footnote-54) the Getty,[[55]](#footnote-55) the Museum of Fine Arts in Boston,[[56]](#footnote-56) and others,[[57]](#footnote-57) few convictions have been secured by the police and prosecutors.[[58]](#footnote-58) Further, none of the individuals at, or major donors of, these respected institutions have even been subject to prosecution by U.S. prosecutors.

Instead, federal prosecutors rely on seizure and forfeiture. Seizures are one of the most common tools used by customs agents to stop shipments of illicit cultural material.[[59]](#footnote-59) Likewise, civil forfeiture offers prosecutors a number of advantages.[[60]](#footnote-60) For starters, the burden of proof is much lower for the government to prove that the property has been connected to illegal activity.[[61]](#footnote-61) Plus, there is no need to show that the current possessor knew the illicitness of the object in question.[[62]](#footnote-62) Also, when the federal prosecutors bring a civil forfeiture action, the statute of limitation of five years starts to run from the time of the illicit import, not from the date of the looting or theft. This all raises the chances of successfully regaining the object for the nation of origin. Cost also matters.[[63]](#footnote-63) The country of origin has a tremendous benefit in seeing the United States bear nearly all the expenses for this litigation. When a nation of origin does not recover illegally trafficked cultural objects through a prosecution in its own courts, civil suits abroad present significant costs and a risk of losing the dispute.

However, this trend of relying on civil forfeiture and seizure has drawbacks. For one, contrast civil forfeiture with criminal forfeiture. Criminal asset forfeiture allows the government to seize property after a criminal conviction.[[64]](#footnote-64) It serves a function as a sentencing tool.[[65]](#footnote-65) For example, if a defendant robs a bank and uses that money to purchase a house, the house would be considered proceeds of that crime and could be forfeited if the robber was convicted of robbing the bank.[[66]](#footnote-66) Civil forfeitures, though, are *in personam* actions brought against an individual convicted of a crime, and thus they carry the procedural and constitutional protections of any other criminal trial.[[67]](#footnote-67) These safeguards include the high burden of proof on prosecutors, right to counsel, and other well-established rights.[[68]](#footnote-68)

The ease of civil forfeiture cases offers prosecutors a disincentive to bring criminal prosecutions. Criminal cases are hard to win, because a government prosecutor must establish criminal intent and knowledge. In cases involving undocumented antiquities, establishing beyond a reasonable doubt that someone knew that an object had a tainted past is extremely difficult.[[69]](#footnote-69) Dealers know this, often practicing what is called optical due diligence. This involves doing the bare minimum of research on an object and intentionally not taking the extra step to truly determine whether a work of art is illicit or not.[[70]](#footnote-70) Although the doctrine of conscious avoidance may be useful to counter the problem of actors intentionally avoiding understanding the nature of their acquisitions—i.e., practicing optical due diligence—the paucity of prosecutions remain.[[71]](#footnote-71) These cases are only accomplishing part of the goal. Authorities need to hold the individuals up to the scrutiny of the criminal justice system. Most of the work has already been done. The seizure or forfeiture of a cultural object relies on a U.S. Attorney showing that a criminal statute has been violated.[[72]](#footnote-72) Prosecutors just need to go the next step and hold the individuals accountable as well.

When actors in the illicit trade suffer a seizure or forfeiture of their wares, they can simply continue doing business, free from the specific[[73]](#footnote-73) or general deterrence[[74]](#footnote-74) upon which much of our criminal justice system rests. They move on relatively unscathed, able to continue dealing in other objects. In many cases, prosecutors ask the possessor to refrain from fighting the forfeiture in exchange for an agreement not to prosecute. Not fighting the forfeiture also means the possessor will not invite unwanted scrutiny into business records. If civil forfeiture does continue to push out criminal prosecution in the United States, losing one shipment will likely be explained away as the cost of doing business. With the prices of antiquities on the international market at such high levels, these costs can be absorbed easily. These civil forfeitures do not offer significant disincentives for these actors.

One recent example of unhelpful use of civil forfeiture can be seen in the intervention by U.S. prosecutors in Missouri over a dispute between the St. Louis Art Museum and Egypt.[[75]](#footnote-75) The object forfeited was a 3,200-year-old mask of the Ka-Nefer-Nefer. The mask was excavated in 1952 by an archaeologist, and it was registered as property of the Egyptian government. Assistant U.S. Attorneys alleged, in their civil forfeiture complaint, that the mask was likely stolen from an Egyptian antiquities inventory between 1966 and 1973.[[76]](#footnote-76) The St. Louis Art Museum purchased the mask in 1998.[[77]](#footnote-77) The Egyptian government asked for the return of the mask in 2006, a request which the St. Louis Art Museum repeatedly refused.[[78]](#footnote-78) In 2011, assistant U.S. Attorneys for the Eastern District of Missouri attempted to intervene on Egypt’s behalf and threatened to bring a forfeiture suit if the Museum did not return the mask to Egypt. The complaint asked for the forfeiture of the mask under the legal theory that it was stolen and thus could not have been lawfully exported from Egypt. Professor Stephen Urice has criticized this legal theory, arguing that this kind of broad language would allow any unprovenanced object to be subject of criminal prosecution under the National Stolen Property Act,[[79]](#footnote-79) and it would make it possible to effectively empty American museums of any unprovenanced antiquity.[[80]](#footnote-80) In response, the St. Louis Museum filed a declaratory judgment suit in federal court in Missouri,[[81]](#footnote-81) asserting that any forfeiture claim by the government would be barred by the statute of limitations.[[82]](#footnote-82) The ultimate result in the case was a resounding victory for the St. Louis Art Museum. The government’s initial forfeiture complaint was dismissed after the Museum filed a motion to dismiss.[[83]](#footnote-83) Later, the government filed a motion to seek more time to amend the initial complaint, and after appealing the denial of that motion to the 8th Circuit, the government’s forfeiture attempt was denied, largely on the basis of repeated missed deadlines.[[84]](#footnote-84)

Prosecutors could perhaps have reached a more tenable forfeiture claim by digging more thoroughly into the history of the mask, or even targeting the individuals who sold the mask to the museum.[[85]](#footnote-85) But the forfeiture action itself, even if it had been successful for the government, would have done little to interrupt the operation of the network that removed this mask from Egypt. Prosecutors should take more care to distinguish between regulating the trade and reducing criminal activity versus using civil forfeiture to secure an end-run around the usual private law mechanisms, which original owners have available to secure property.[[86]](#footnote-86) Museums do not want to have to build collections with material that may be questioned and undermine their public missions. So, when the art trade, in its disparate factions, can point to unjust prosecutions, unjust returns, and over-reach on the part of law enforcement, it reinforces their feeling that a penal framework is unjust. This makes it impossible for penal sanctions to apply and have much impact. This makes the penal sanctions that do exist not only ineffective, but also a recruitment tool for individuals to commit criminal disobedience by actively challenging and undermining the existing legal framework. When prosecutors are only concerned with the recovery of objects—reaping the praise of those in the cultural heritage community–we risk perpetuating the endless cycle of looting, theft, shaming, and return.[[87]](#footnote-87)

1. Comparing Recent Investigations in the United States and Europe

Much of the doctrinal development of cultural property law has focused on limiting the movement of illicit cultural property, largely through the 1970 UNESCO Convention, and the import restrictions, export restrictions, and bilateral agreements that that Convention encourages States Parties to create.[[88]](#footnote-88) Though there have been successes,[[89]](#footnote-89) this initiative has failed in its larger purpose.[[90]](#footnote-90) Looting still happens at an alarming rate, because the 1970 Convention focuses only on the movement of objects. It does this by urging States Parties to erect a cooperative international framework that creates an object registry for extant collections and obligates States Parties to respect the export restrictions of other States Parties.[[91]](#footnote-91) The rationale was to increase the number of checks on the movement of this material. The UNESCO Convention, though, does not offer specific requirements for what this mutual enforcement should look like. One of the most prominent art markets, the United States, has implemented only a couple of the Convention’s articles, and has done so in a way which puts the burden on nations of origin to request import restrictions via renewable five-year restrictions.[[92]](#footnote-92)

The United States must be accounted for in any discussion of the illicit trade in cultural property, because so much of the illicit trade in cultural property ends up in the hands of dealers, collectors, and museums here.[[93]](#footnote-93) The policing strategy in the United States has been uneven. The federal agencies that have the jurisdiction and capability to mount long-term investigations into this trade have sought most often to secure the return of objects only, in a policy of seizing illicit material and sending it back to the nation of origin. In the United States, federal efforts to reduce the international trade in looted artworks have seen the restitution of a considerable amount of looted and stolen ancient art.[[94]](#footnote-94) But these efforts have been unable to effect lasting impact on the art trade. Merely repatriating an object does little to deter more theft and looting.[[95]](#footnote-95) In the relatively insular world of art, prosecution impacts the actions of museum curators, art dealers, and collectors. As Mackenzie argues, “despite sustained calls from observers and experts to encourage buyers to ask for clear details of provenance, that process of information transfer still suffers gravely at the hands of the historical preference of the antiquities trade for privacy and confidentiality.”[[96]](#footnote-96)

As an example of this dynamic in action, consider a series of raids conducted by U.S. federal agents. In 2008, federal agents executed search warrants at four art museums in Southern California: The Los Angeles County Museum of Art (LACMA), the Bowers Museum, The Pacific Asia Museum, and the Mingei International Museum. In addition, three collectors and dealers were raided as well: Robert Olson; Jonathan and Cari Markell; owners of the Silk Roads Gallery in Los Angeles; as well as collector Barry MacLean, a trustee of the Art Institute of Chicago.[[97]](#footnote-97)

The searches were the fruits of an extensive investigation which began in 2003. The investigation was timely and initially led to speculation it would lead to serious legal consequences for the museums, collectors, and dealers involved. The National Park Service, via its agent, was able to gather evidence that would allegedly allow the government to show that Olson and the Markells were engaging in activities that enabled buyers to avoid paying taxes by allowing buyers to receive fraudulent appraisals of purchases, which would then be donated to museums. Despite these allegations, the federal criminal charges went nowhere, due in part to the untimely death of Roxanna Brown, the expert in Southeast Asian antiquities who initially was a cooperating witness in the investigation, but was later arrested by federal authorities; she died soon after her arrest.[[98]](#footnote-98) Neil Brodie, an archaeologist who has studied the damage done by the trade in antiquities, argues the case shows the “broader area of criminality” which can be fueled by the “fact that unprovenanced antiquities have no verifiable evidence of previous ownership.”[[99]](#footnote-99) The five-year federal investigation involving multiple agencies, undercover agents, and cooperating witnesses ended abruptly with no prosecutions.[[100]](#footnote-100) Perhaps the biggest reason is the inability of the federal government to effectively regulate the illicit trade in cultural property.[[101]](#footnote-101)

1. Prosecutions Can Have a Tremendous Deterrent Impact in this Area

Even a few well-targeted prosecutions of prominent dealers, auction house actors, collectors, or other individuals involved in the trade could have a tremendous deterrent impact. But, until now, prosecutions have not been adopted in a systemic way across the various stages of the illicit trade. The Nicosia Convention encourages more prosecution by urging States Parties to ensure criminal offenses apply at multiple important sectors of the antiquities trade, including clandestine excavation, theft, unauthorized import, unauthorized export, transferring, putting on the market, acquiring, fabricating histories, or even making preparatory steps to attempt these activities.

Unfortunately, even though illicit cultural objects are found, the investigations usually end without prosecution. Investigative authorities should be praised when they successfully discover and seize illicit works of art and antiquities. The primary evidence that could be used against the buyers has often been returned to the nation of origin. In the United States, these objects, when returned, are not available to defendants who have a constitutional right to view the prosecution’s evidence in a criminal proceeding. At the market end of this illicit trafficking in the United States, Homeland Security Investigations (HSI) is responsible for regulating the importation of cultural objects. In a 2018 press release, which announced the return of a 1493 copy of a letter by Christopher Columbus describing his findings in the New World, there are no mentions of prosecutions. Instead, a staggering amount of material has merely been seized and returned to its nation of origin, with “11,000 artifacts” returned to “over 30 countries since 2007.”[[102]](#footnote-102) It may be that insufficient investigative resources prevents the prosecution of individuals involved in looting and trafficking all of this illicit material into the United States. However, it seems an insufficient response if so many objects are being seized and ICE investigators are not able to hand cases over to prosecuting U.S. Attorneys. Merely seizing objects allows dealers of illicit material to continue doing business in this manner.

The situation is much different in Europe, with long-term investigations which target entire looting networks, producing not only the seizure of illicit cultural material, but also arrests of the looters and handlers of this material. In 2017, Europol and law enforcement officials in eighteen countries announced the fruits of an investigation titled “Operation Pandora” which took place in October and November of 2016.[[103]](#footnote-103) The Operation, led by police from Spain and Cyprus, resulted in the seizure of a staggering amount of ancient material, including 3,561 works of art. This included 500 archaeological objects found in Murcia, Spain, some of which included nineteen objects stolen in 2014 from the Archaeological Museum in Murcia. In addition, 400 coins were seized, seventy-five individuals were arrested, and an estimated ninety-two new investigations were initiated. The aim of the Operation was to “dismantle criminal networks involved in cultural theft and exploitation and identify potential links to other criminal activities. Pandora led to two more large investigations, codenamed ATHENA and PANDORA II.[[104]](#footnote-104) Those investigations, which took place from October to December in 2017, allowed the seizure of over 41,000 illicit cultural objects, the arrest of fifty-three individuals, and the creation of 200 more investigations.

Another massive investigation was announced in 2018: police in Spain, Germany, the United Kingdom, and Italy announced arrests in the culmination a four-year investigation named Operation Demeter.[[105]](#footnote-105) At the center of Operation Demeter were objects likely looted from archaeological sites in Sicily, and the investigation recovered an astounding 25,000 objects including coins, statues, and pottery fragments. One of the individuals arrested in London was Thomas William Veres, a man of Hungarian origin. Veres has repeatedly been involved in trafficking illicit material from Sicily to other parts of Europe and abroad. Police told reporters that: “The London art merchant Thomas William Veres commanded a transnational criminal holding that was able to traffic considerable quantities of Sicilian archaeological artifacts . . . .”[[106]](#footnote-106) Veres is an alleged handler of illicit material and is subject to criminal prosecution. Yet a wealthy American antiquities collector, Michael Steinhardt, who has been connected to Veres in the past, has been able to avoid serious consequences.

Steinhardt is a prominent antiquities collector in the United States who illustrates how the illicit antiquities market in the United States fits the description of a crime committed by powerful individuals. In 1999, Steinhardt lost a lengthy court battle when the Second Circuit held that false statements on a customs form were sufficiently material to forfeit an ancient gold platter under the customs laws of the United States.[[107]](#footnote-107) The story of this crime began in 1980, when a fourth-century B.C.E. gold phiale (a type of gold bowl which likely originated in Sicily) was sold to a collector and coin dealer, who in turn sold that work on to Veres. At the time, Veres was an art dealer who operated in Zurich, Switzerland. In 1991, Veres helped transport the phiale to Switzerland where it was sold to Steinhardt for $1.2 million.[[108]](#footnote-108) Veres and another art dealer, Robert Haber, revealed how little faith they had in the licitness of the gold plate when in the purchase agreement with Steinhardt they agreed that: “If the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser.”[[109]](#footnote-109) Haber was working as a middle man between Veres and his client, Steinhardt. Haber had sold Steinhardt “20 to 30 objects” in the past with a value of between $4 and $6 million total.[[110]](#footnote-110) In December of 1991, Haber flew to Switzerland to collect the phiale from Veres.[[111]](#footnote-111) When he returned to New York, Haber’s customs agent, Jet Air, crafted customs forms declaring falsely that the work’s country of origin was Switzerland and that it was only valued at $250,000.[[112]](#footnote-112)

The phiale was displayed in Steinhardt’s Manhattan residence until 1995 when Italy requested assistance from the U.S. government under a Mutual Legal Assistance Treaty (MLAT).[[113]](#footnote-113) A federal magistrate in New York issued a warrant to seize the work from Steinhart’s apartment, and U.S. Attorneys initiated a civil forfeiture action against the phiale, with Italy and Steinhardt both intervening in the dispute.

The district court granted summary judgment for the government on two grounds.[[114]](#footnote-114) First, Steinhardt’s importation documentation was false,[[115]](#footnote-115) and second, the document did not allow the Customs Officers to examine the object properly “in order to raise a red flag.”[[116]](#footnote-116) The customs declaration failed to properly disclose the nation of origin, Italy, and failed to accurately reflect the purchase price of $1.2 million.[[117]](#footnote-117) The antiquity was also considered stolen by the district court. While the case was upheld on appeal only on the grounds of misstatements on the customs declaration,[[118]](#footnote-118) the case set important precedent moving forward for how law enforcement in the United States has responded to requests by nations of origin. The phiale was returned to Sicily in 2000, but no prosecutions ensued in the United States. The individuals involved have persisted in trafficking looted material. Veres has seemingly continued to play an important role as an interface in the illicit trade in art. In the Steinhardt phiale forfeiture and the alleged wrongdoing outlined in Operation Demeter, Veres was an important Janus figure who looked back at the illicit trail of the material to looting, and also looked at the path that art can take into the private collections and museums.[[119]](#footnote-119) The approach of merely seizing or forfeiting and returning looted and stolen artworks does not do enough to effectively police this trade. Effective prosecution of key actors must take place, but too often it does not.

The Steinhardt case illustrates the doctrinal development of international cultural heritage law and how it has long struggled to find a foothold into allowing for the basic regulation of looted material[[120]](#footnote-120); first fighting for the rights of nations of origin to seek the return of this material when it has been illegally exported,[[121]](#footnote-121) then later developing the legal mechanisms by which actors in this trade can be prosecuted.

The potential utility of prosecutions in the cultural property arena can be seen in the prosecution of the high-profile antiquities dealer Frederick Shultz. There are a number of theoretical models and critiques of the deterrent impact of increased criminal sanctions or other increased penalties. Deterrence theory in criminal law is very simple. Individuals avoid committing certain acts for fear of punishment. The current system of object-focused policing of cultural property in the United States allows unscrupulous dealers to evade prosecution. The purchase or sale of a potentially looted object is a present potential benefit, while the risk of a forfeiture or seizure is a “long-distance danger.”[[122]](#footnote-122) Two criminologists, Williams and Hawkins, have argued that criminal deterrence brings a broader set of costs to the risk and reward calculus in rational deterrence theory. They argued that social censure, costs to careers, and self-imposed feelings like guilt or depression should be factored into the costs of perceived deterrence.[[123]](#footnote-123) Those primary and secondary deterrent impacts can be seen in the prosecution of Frederick Schultz.

One longstanding aspect of the illicit art trade is how much criticism and controversy develop. When repatriation occurs, museums and collectors respond by loudly claiming nations of origin are trying to empty the world’s museums. Criminologists also generally agree that the certainty, severity, and celerity (or swiftness) of criminal punishment impacts deterrence. So given what we know about deterrence and perceived costs, the reforms presented by the Convention allow for more effective regulation of the illicit art trade.

Under United States law, it is a crime to deal in property valued at $5,000 or more that has been “stolen, unlawfully converted or taken, knowing the same to be stolen.”[[124]](#footnote-124) Schultz was a prominent antiquities dealer in New York, and a former president of the National Association of Dealers in Ancient, Oriental, and Primitive Art. [[125]](#footnote-125) In 1983 Egypt enacted Law 117, which declared all unauthorized trade in antiquities a crime.[[126]](#footnote-126) Schultz was convicted of conspiring to sell antiquities that were looted from Egypt and illegally removed to England, where they were restored and given a false provenance by Jonathan Tokeley-Parry in England.[[127]](#footnote-127)

Federal prosecutors alleged that Tokeley-Parry removed objects from Egypt with financing from Schultz. Correspondence between the two cited by prosecutors included the following exchange from Tokeley-Parry to Schultz: “Any news of the big cheque? We now need it urgently; the boys have just returned from the hills above Minea, which is bandit country . . . and we are offered a large hoard . . . . We shall need the money to put down.”[[128]](#footnote-128) In another letter Tokeley-Parry told Schultz:

The piece is lost to us because, simply, we didn’t have any money there to put down a deposit and secure it (that is, physically take it away from the farmer.) I’m immensely depressed about this, as the piece would have solved all our problems . . . . We managed, however, with considerable skill, to keep our customer who, it seems, is sitting on a temple. We have told him that we need another important piece, and he has agreed to actively dig for one.[[129]](#footnote-129)

Not only that, but Tokeley-Parry provided Schultz with fake documents to create false provenances, suggesting that the objects being illegally exported were a part of an English family collection dating to the 1920s, which would have predated Egyptian Law 117.

In upholding Schultz’s conviction, district court Judge Jed Rakoff noted: “If an American conspired to steal the Liberty Bell and sell it to a foreign collector of artifacts, there is no question he could be prosecuted . . . The same is true when . . . a United States resident conspires to steal Egypt’s antiquities.”[[130]](#footnote-130) At trial, Tokeley-Parry was the U.S. government’s star witness, having previously been convicted in England.[[131]](#footnote-131) This assistance led to Schultz’s conviction, sentencing Schultz to thirty-three months in prison and a $50,000 fine.

The Second Circuit upheld the conspiracy conviction, affirming earlier precedents which recognized the ownership of objects by a foreign government under a valid patrimony law.[[132]](#footnote-132) Schultz’s conviction was an important precedent, as after the ruling there can be no doubt that ignoring or dismissing the patrimony laws of other nations will be a viable defense.[[133]](#footnote-133) And knowledge of the scope and enforcement history of these laws must be researched by every responsible dealer in this material.[[134]](#footnote-134) As a result, in order to interface effectively with law enforcement in the United States, countries of origin have a massive incentive to ensure their patrimony laws will be recognized by courts in the United States.[[135]](#footnote-135) A similar incentive which exists to document the antiquities which are known in national and private collections exists so that when a document appears undocumented it will be by default considered to have been looted illegally after this patrimony law has been enacted.[[136]](#footnote-136) The reaction to the Schultz prosecution was dramatic.[[137]](#footnote-137) Though some in the market criticized the prosecution of Schultz on the grounds it would effectively eliminate the trade in cultural objects, the prosecution revealed a number of unpleasant details about the mundane operation of the black market in antiquities.[[138]](#footnote-138) It served to change the conversation about the policies erected in nations of origin, and served to alter the behavior of a number of dealers.[[139]](#footnote-139) But few similar prosecutions have emerged.

In the United States, as is the case in other jurisdictions, the issue of intent has been a difficult one, which has often hindered prosecutions. The National Stolen Property Act has a knowledge or scienter requirement requiring guilty defendants to know that the cultural object he or she possessed was stolen.[[140]](#footnote-140) The Archaeological Resources Protection Act, however, simply requires that a criminal defendant know he or she received an archaeological resource, irrespective of its provenance.[[141]](#footnote-141) The law does not require knowing the object was illicit.[[142]](#footnote-142) For example if prosecutors in the United States were to use state theft laws, there might be an increased viability of prosecutions for dealing in illicit archaeological artifacts.[[143]](#footnote-143)

The general trend in American criminal law scholarship points out the overbroad scope of criminal law in the United States, leading to over incarceration and prison overcrowding.[[144]](#footnote-144) Yet the illicit trade in art and antiquities defies these broader trends.[[145]](#footnote-145) There needs to be more prosecutions of bad actors in the cultural property trade. The Nicosia Convention offers potential solutions that can lead to better criminal policy moving forward.

1. The Nicosia Convention

The new Convention stands alone as the first international treaty to deal exclusively with the criminal aspects of the illicit trade in cultural property. The Convention’s text sets out regulatory minimums for the prosecution and punishment of what it defines as cultural property crime, including theft, unauthorized excavation, illegal import, and illegal dealing in cultural material. The Council itself has characterized the new Convention as a gap-filling initiative. In the past, these gaps have allowed determined actors in the art and antiquities trade to avoid regulation and detection.[[146]](#footnote-146) For instance, national laws protecting good faith purchases allow offenders to transport objects to various jurisdictions, which have said good faith protections, in order to launder the object’s title. For example, a bad actor may take a transaction from the black market and launder it through a “grey-market” transaction, ultimately attempting to cleanse the title of a once-illicit object by conducting a series of transactions that give it distance from any black-market ties.[[147]](#footnote-147)

The Council pointed to a couple of pressing concerns that drove the need for the Convention. The first concern it looked at was the increasing connections of both organized crime and terrorist organizations to the illicit trade in cultural property.[[148]](#footnote-148) The Convention seeks to target all levels of the trade, from the thieves and looters all the way through the dealers and handlers of objects. In particular, the Convention hopes to target the real drivers of demand for illicit objects: the wealthy individuals who acquire this material. The second concern that the Council emphasized was the increasing role of technology. The illicit trade does not just take place in apartments, shops, showrooms, freeports, or auction houses.[[149]](#footnote-149) Combating the trade requires thinking about the social media, auction sites, and even the dark web.[[150]](#footnote-150)

This Convention aims to meet these challenges by focusing exclusively on criminal law. Prior to the plenary negotiations, a smaller drafting group put together an initial proposed text.[[151]](#footnote-151) Senior officials from European justice ministries and experts from the Art Law Centre at the University of Geneva were tasked with putting together a draft.[[152]](#footnote-152) After a process of several rounds of negotiations, the Member States of the Council of Europe came together to discuss and debate the draft text.[[153]](#footnote-153) All Member States sent representatives to these negotiations, along with Observer States, Mexico and Japan, as well as representatives from UNESCO, UNIDROIT, INTERPOL, the UNODC, and the OSCE.[[154]](#footnote-154)

1. The Convention’s Purpose and Potential Impact

The preamble establishes a bold goal: to protect cultural property and prevent and combat cultural property crime.[[155]](#footnote-155) It first points out that offenses related to cultural property are growing and that these crimes are destroying the world’s cultural heritage. Material that is unlawfully excavated, illicitly exported, and illicitly imported is “increasingly being sold in many different ways,” including the typical venues of antique dealers, auction houses, and the Internet. It notes that international action stands as a key component of stemming this tide of persistent violations of national and international norms on protecting material cultural heritage. The Convention also makes note that the text aims to provide substantive criminal law provisions, which are directed at addressing the actors that have helped spur cultural property crime: organized criminal groups and terrorist organizations.[[156]](#footnote-156) The preamble reflects the growing consensus about the illicit trade in cultural objects.[[157]](#footnote-157) This multi-billion dollar illicit network entangles collectors,[[158]](#footnote-158) museums,[[159]](#footnote-159) *clandestini*, and *tombaroli*.[[160]](#footnote-160) These groups offer a double-edged sword to cultural heritage observers. On one side, they offer an opportunity to raise the profile of this area of law. Yet, on the other, these groups increasingly do damage at a larger and more destructive pace. For example, the illicit trade in cultural property has been used as a source of financing for terrorist groups, which has drawn the notice of the UN Security Council.[[161]](#footnote-161)

A threshold issue for any convention targeting cultural property is what kinds of objects are subject to the proposed regulation. The objective of the Nicosia Convention was to target art with high monetary value, antiquities in private collections, undisturbed archaeological resources, and objects held in public collections.[[162]](#footnote-162) The Convention extended its definition of cultural property to apply not just to the protected property of a State Party, but also all cultural property designated under other relevant national instruments.[[163]](#footnote-163) In addition, the preamble to the Convention lists a number of allied international instruments that it hopes to complement. Those include the UNESCO 1970 Convention, which it echoes in important ways. The emphasis on international cooperation, prevention, and awareness-raising in particular, are all important considerations.[[164]](#footnote-164) Moreover, the discussion of due diligence connects it directly with the 1995 UNIDROIT Convention.[[165]](#footnote-165)

Both UNESCO and the Council of Europe share basic assumptions about the role of cultural heritage and how to protect it. UNESCO does this through the World Heritage Convention of 1972, which provides that cultural heritage of States Parties with “outstanding universal value” may be classified as a World Heritage site. In much the same way, the European Cultural Convention of 1954 states that all objects of “European cultural value” placed under the control of a European State form an integral part of the common cultural heritage of Europe.[[166]](#footnote-166)

In the event that no more nations sign on and ratify the Convention, which seems unlikely given ten nations have already signed on at the time of writing, the Convention will still have an impact on the future of policing cultural property. The drafters of the Convention were careful to emphasize how the Convention compliments other treaties and other Intergovernmental Organizations (IGOs). The complementary relationship between the Council of Europe and other IGOs means that even when a Council of Europe initiative receives lackluster initial support, its ideas can gain traction in the future. One notable example involves the development of underwater cultural heritage law.[[167]](#footnote-167) The Parliamentary Assembly of the Council of Europe adopted a recommendation on underwater cultural heritage in 1978, aiming to prompt the Council of Ministers to draft a convention.[[168]](#footnote-168) Though the Council of Europe never promulgated a convention, the recommendation was used by the International Law Association and UNESCO to draft the 2001 UNESCO Underwater Cultural Heritage Convention. The draft European Convention on the Protection of the Underwater Cultural Heritage was presented to the Council of Ministers of the Council of Europe in 1985, but it was never adopted as a text. Janet Blake, though, notes it marked a “significant text for the development of international legal texts in this field and contains many very useful provisions.”[[169]](#footnote-169) Yet another example involves the connections between the UNESCO World Heritage Convention of 1972 and a 1985 Council of Europe Convention for the Protection of the Architectural Heritage of 1985.[[170]](#footnote-170) As Kerstin Odendahl notes “the Council of Europe Convention supplements” the UNESCO World Heritage Convention “and fills the gaps left over by the latter.”[[171]](#footnote-171) Even if there remain only a handful of nations that sign on to this Convention, its text will still be used as a starting point for future developments in this area. The foundation of those efforts will be an emphasis on policing all levels of the illicit trade.

1. Substantive Criminal Law in the Convention

The Convention urges states to erect criminal offenses for certain frequent behaviors which involve cultural property. This includes theft, unlawful excavation, illegal import, illegal export, dealing in cultural objects with illicit history, falsification of documents and permits, and the destruction or damage of cultural property. These offenses require intent, meaning in some cases an offender must have known of the unlawful history of an object, or importantly, failed to establish the appropriate level of due diligence. These offenses must be committed intentionally, and the difficulty of establishing intent is a long-standing obstacle for effective regulation in this area. The Convention leaves to domestic law of States party to determine the interpretation of intent in the Convention. Though the obligation to craft these criminal offenses requires states to ensure that their domestic laws can be applied in the relevant criminal procedures, many of the offenses provided for in the Convention will already be accounted for in existing domestic law.

The individual Articles in Chapter II move orderly, mimicking the likely route that illicit cultural objects travel from state of origin through to the art market, museums, or private collections. The Chapter begins with Article 3, which requires States Parties to ensure that the offense of theft and unlawful appropriation will apply to movable cultural property.[[172]](#footnote-172) This should apply to theft of movable objects like a canvas, but also to objects that should be attached to a building such as a statue, fresco, mosaic, or a frieze. The Convention establishes this requirement to all relevant objects, whether they be in a private collection or are State-controlled. Most Member States likely have a criminal provision dealing with this kind of action already.

Article 4 concerns itself with the difficult problem of unlawful excavation and removal, commonly referred to as looting.[[173]](#footnote-173) Most countries already require archaeological excavations to be undertaken with permission. Removing antiquities, human remains, and the associated context when done by expert archaeologists reveals a great deal of information about our past, and looters destroy the possibility of uncovering this information.[[174]](#footnote-174) This information is a priceless and irreplaceable piece of humanity’s shared cultural heritage. The entire discipline of archaeology reflects this truth, as archaeologists consider a de-contextualized object to be utterly worthless.[[175]](#footnote-175) Article 4, Paragraph 1 b) covers situations where an individual removes and retains a cultural object recovered during an unauthorized excavation. Paragraph 1 c) covers the situation where an object has been excavated in compliance with required authorizations but has been retained illegally. For example, this applies if an antiquity is not given over to the relevant authorities or if material is taken from an antiquity storeroom. Paragraph 2 of Article 4 grants a State a great deal of flexibility by allowing a State to refrain from providing criminal sanctions for unauthorized excavations, so long as the non-criminal sanctions are effective.

Articles 5 and 6 continue the path of illicit traffic and require States Parties to ensure that importing movable cultural property is criminalized. Article 5 works in coordination with the domestic law, assuming domestic law prohibits the importation of cultural property which has been stolen, clandestinely excavated, or illegally exported.[[176]](#footnote-176) Article 5 carries a knowledge requirement, requiring an offender to know of the unlawful provenance of the cultural object, thus allowing for the possibility of innocent importation. Article 6 applies to illegal exportation and requires States Parties to ensure that exportation of illicit cultural property is criminalized.[[177]](#footnote-177) This applies to cultural property that has been claimed by the State or which might be owned by private individuals. The offense applies when the export has been prohibited by the law of the State which has classified, defined, or designated the conditions of the export. Therefore, the offense is violated if an export takes place without proper permission. Article 6, paragraph 2 requires States Parties to consider enacting these measures to cultural property that has been illegally imported. This would then target the transnational movement of illicit cultural property. In other words, each import and export in any nation could trigger a criminal offense. The sharing of this data is an important step towards reducing the ability of illicit traffickers to use transit states. It allows law enforcement a much better opportunity to thwart an individual who may attempt to export cultural property from a state in which it had already been illegally imported.

Article 7 requires States Parties to ensure the prohibition of acts of acquisition of cultural property that have violated Articles 3, 4, 5, or 6.[[178]](#footnote-178) Acquisition carries many meanings, including a sale, a donation, or even an exchange via an antique shop, auction house, or an online market. This acquisition is only prohibited if the offender knows of the unlawful connection to the cultural object. With this knowledge requirement, the drafters attempted to prevent the prosecution of individuals who unwittingly acquire illicit cultural objects. Nevertheless, buyers and sellers in the antiquities trade have consciously avoided rigorously researching the history of the objects they acquire. In response, Article 7, paragraph 2 instructs States Parties to consider whether to take measures against professionals or experienced collectors who should have known of the illicit history of the objects but failed to exercise due diligence. Certain experienced buyers or sellers of cultural objects should be expected to adhere to higher standards of conduct, as laid out by statutory regimes domestically, by ethical industry guidelines, or other industry norms.

Article 8 requires States Parties to criminalize placing stolen cultural property on the market which violates Articles 3, 4, 5, or 6.[[179]](#footnote-179) It works in coordination with Article 7, criminalizing both the acquisition and selling of this material, while also carrying the requirement that the seller must know of the unlawful history of the object.

Article 9 highlights one of the enduring problems of the illicit art trade: the problem of falsifying and altering documents related to the origin or ownership history of movable cultural objects.[[180]](#footnote-180) The Convention encourages States Parties to criminalize the act of creating these false documents. So, creating fake histories for these illicit objects, as well as acquiring the illicit objects, should be a crime.

Article 10 applies to the intentional destruction of movable and immovable cultural property.[[181]](#footnote-181) In most legal systems this kind of intentional destruction is prohibited by law, but the Article is directed at the kind of intentional destruction which has recently been taking place in Mali, Syria, and Iraq.

Article 11 deals with aiding or abetting the previous crimes.[[182]](#footnote-182) Paragraph 1 requires States Parties to ensure that intentionally aiding or abetting a criminal offense in the Convention also constitutes a criminal offense. Paragraph 2 deals with attempts to commit these crimes, while leaving to domestic legal systems the precise boundaries of what constitutes an attempt, or a preparatory act which should not be a crime.

Article 12 crafts jurisdictional rules for determining which legal system has jurisdiction over the offenses in the Convention.[[183]](#footnote-183) Each party must punish those offenses which occur when they are committed in its own territory. The Convention also requires States Parties to prosecute crimes that take place on vessels or aircraft that are registered in that State. Paragraph 1 d) also offers a useful approach, stemming from the Civil Law concept of nationality, which requires citizens of a Country to comply with its laws even when they are outside its territory. So, if a national of a State Party commits an offense outside his or her State, that State is still able to prosecute that individual.

The Chapter continues by establishing rules for recognizing liability of legal persons for criminal offenses, so the idea of establishing criminal responsibility for museums, companies, or other legal persons for criminal actions performed for their benefit by anyone in a leadership position in one of those organizations. Article 15 provides for circumstances that may aggravate the offenses listed, setting higher levels of punishment when the individual is in a position of trust or a professional in the cultural property field. Article 16 allows States Parties to consider the conviction of an individual in other States. Traditionally, criminal law has been a domestic concern, and the conviction elsewhere of a defendant has not traditionally been taken into account. Article 16 provides for the possibility for courts to take into account final sentences handed down by another party in assessing a sentence.

1. Monitoring and Other Notable Aspects

Chapter III governs the initiation of proceedings in Article 17, Investigations in Article 18, and International cooperation in Article 19.[[184]](#footnote-184) These Articles enable authorities to prosecute criminal offences without requiring victims to file a complaint. They also invite States to take measures to train law enforcement personnel to have access to or receive training in cultural property. Finally, Article 19 sets out the requirement to “co-operate with each other to the largest extent possible” and to erect pathways to facilitate mutual legal assistance.

Chapter IV erects concrete measures to establish inventories which are publicly accessible; introduces import and export procedures is subject to specific certificates; establishes records of transactions; and promotes consultation and information across State boundaries. These measures have a critical function which, if properly implemented and funded, will do a great deal to make the efforts to stem the trade in illicit cultural property more effective. It is my hope that these procedures would, for example, allow for an investigation into whether a work of art, which has traveled through a number of individual States, was properly given an export and import certificate in all of the States through which it traveled. And if not, a proper investigation and penalty regime could be created, which would serve to effectively disincentivize the illicit transfer of cultural objects across State borders.

The Convention in Chapter V provides a follow-up mechanism, which erects a system aimed at ensuring the effective implementation of the Convention by the Parties. This system of follow-ups may take the form of a body composed of representatives of the States Parties to the Convention.[[185]](#footnote-185) The problem of a monitoring body is a difficult one. One of the deficiencies of the Kimberley Process Certification Scheme for Diamonds, which attempts to regulate the diamond trade, is the difficulty of monitoring, reporting accurate data, and obtaining a monitoring body independent of the States Parties.[[186]](#footnote-186) As Mackenzie rightly points out: “Without an independent arbiter, the voting system used to decide action against defaulting countries is not designed to promote enforcement. Small minorities of States can easily prevent action against a state party with which they have some sympathy, or strategic interest.”[[187]](#footnote-187) In fact, the Kimberley Process has come under considerable criticism for allowing the States Parties to simply police themselves,[[188]](#footnote-188) a common criticism of the antiquities trade as well.[[189]](#footnote-189) The consequences of the Kimberly Process’ weakness was so dire that Global Witness, the non-governmental organization which helped establish the Kimberley Process in 2003, was forced to leave and resign its role in 2011 because of the lack of enforcement action by governments and the failure of independent verification of the self-regulation of the industry.[[190]](#footnote-190) Charmain Gooch, who co-founded Global Witness, argued the lack of control exercised over the industry via the Kimberley Process “has turned an international conflict prevention mechanism into a cynical corporate accreditation scheme.”[[191]](#footnote-191) The drafters of the Nicosia Convention left much of the framework for a monitoring process unfinished, assuming perhaps that they will be able to craft a suitable monitoring mechanism when sufficient States have signed on to the Convention and it enters into force. But the optimistic discussion of monitoring should certainly be tempered at this stage.

The final sections lay the groundwork for entry into force and amendments. Chapter VI sets out the relationship of the Convention to other existing international instruments. Chapter VII provides for possible Amendment to the Convention. Chapter VII lays out rules for which nations may sign on to the Convention and provide when it enters into force. The Convention is open for signature by Council of Europe Member States and other non-Member States that have participated in the drafting process, which include the Holy See, Japan, and Mexico. After the Convention enters into force, though, other non-Member States may be invited to accede to the Convention.

Conclusion

The Nicosia Convention sets out one potential course that increased regulation of the trade in cultural property may take. The Convention presents a paradigm that cultural heritage advocates can use to urge policymakers to shift approaches and allocate resources. It also allows for continued doctrinal development, allowing lawmakers and policy makers to refine the criminal offenses that apply to various stages in the transnational criminal network. As criminal offenses are considered, the framework presented by the Nicosia Convention offers a compelling view of how to best regulate the illicit trade in cultural objects. Rather than focusing too much on the objects themselves, as the current policing strategy does, the new initiative takes a holistic approach and considers the trade as a transnational trade with substantial illicit elements. This requires not only a basic approach of seizing and returning art, but also requires law enforcement, prosecutors, and policy makers to look closely at the diverse actors who come together to facilitate the international trade in illicit cultural property. The organized offenses also allow for renewed emphasis on what existing laws can be used to apply to criminal aspects of the trade, and to the extent there are gaps in these laws, they can be remedied. There has not been a great deal of public pressure exerted on governments and dealers to raise the standards for acquiring cultural objects. Though there have been frequent calls by researchers and cultural heritage advocates to encourage buyers of cultural material to ask for more detail and history about an object, the amount of information given when art and antiquities changes hands is shockingly low. Dealers and buyers still prefer confidentiality and concealment.

There are a number of policy proposals that would work in concert with the reforms offered by the Convention. One pioneering effort is being led by Matthew Bogdanos, a Marine Colonel who was instrumental in investigating the antiquities stolen from the Iraqi National Museum during the invasion of Iraq in 2003.[[192]](#footnote-192) The Manhattan District Attorney’s office announced in 2017 that it was creating an antiquities trafficking unit. Manhattan District Attorney Cyrus Vance stated the unit “is committed to stopping the trade of stolen antiquities from historic sites around the world.”[[193]](#footnote-193) The unit will bring together art market analysts, paralegals, and investigators to assist in uncovering information about illicit trafficking networks and will help return illicit cultural property to original owners. The creation of the unit comes after a number of prominent recoveries, with an estimated $150 million in recovered illicit cultural property since 2012 and the recovery of several thousand artifacts. But that seizure strategy needs an investigator and prosecutor willing to bring cases in order to make a meaningful dent in amount of illicit cultural property changing hands. Given New York’s prominent position in the international art market, this new initiative is a welcome sign. As the Convention gains greater awareness, hopefully more pioneering initiatives and doctrinal development will follow as well.

The Council of Europe’s new Convention carries with it the lessons gleaned from previous policy and legal intervention in the illicit trade in cultural objects to offer solutions to the problem of the illicit trade in antiquities—a problem that is diffuse, varied, and requires a cohesive regulatory response. Given the destruction taking place in Mali, Syria, Iraq, and elsewhere, more attention than ever before has been directed at preservation of ancient sites and antiquities. The better part of humanity’s ancient past remains underwater and underground. As development and technology reveal more and more of humanity’s past, ancient sites are routinely looted and pillaged. The group most assumed to be stewards of the artifacts of human history, Museums, offer little help. Museum storehouses are full of undocumented artifacts, and most have yet to document their existing collections. Even worse, many Museums have been complicit in a chain of illicit trafficking of cultural property which has incentivized looted and destroyed ancient sites. How can this past be safeguarded, documented, and preserved for future generations? One necessary approach will be policing the trade in ancient art and antiquities.

The merits of any multilateral Convention will always be dependent on the political will and the resources devoted to its implementation. Given the challenges facing the world’s cultural heritage, both in terms of intentional destruction and the looting of sites to finance illegal activity, the moment is now for a strong Criminal Convention. Its renewed emphasis on regulating exports takes account of the multinational character of the international trade in cultural heritage, its emphasis on information-sharing and collaboration can effectively combat the opaque nature of certain aspects of the art trade, and will serve to work around any deficiencies present in the domestic law of other third party nations. The draft convention comes at a dangerous moment for so much of the world’s cultural heritage, and I am optimistic about its capacity to meet this challenge head-on.

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2. \* Professor, South Texas College of Law Houston. The author wishes to thank his institution for continued research support, especially the librarians. Versions of this paper were presented at a Council of Europe preparatory meeting for the convention at the IMT School in Lucca, Italy in 2017, and at the Southeastern Association of Law Schools Annual Conference in 2018. Special thanks to Seth Davis, Ursula Tracy Doyle, and Jen Kreder who offered helpful advice. [↑](#footnote-ref-2)
3. Council of Europe Convention on Offences relating to Cultural Property, May 19, 2017, C.E.T.S. No. 221, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221 [hereinafter *Nicosia Convention*]. [↑](#footnote-ref-3)
4. *See generally* Alessandro Chechi, The Settlement of International Cultural Heritage Disputes (1st ed. 2014). [↑](#footnote-ref-4)
5. *See generally* Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property (Stefano Manacorda & Duncan Chappell eds., 2011). [↑](#footnote-ref-5)
6. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, https://perma.cc/42NA-5CYE [hereinafter *1954 Hague Convention*]. [↑](#footnote-ref-6)
7. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, https://perma.cc/DT8G-5L7F [hereinafter *1970 UNESCO Convention*]. [↑](#footnote-ref-7)
8. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 1972, 1037 U.N.T.S. 151, https://perma.cc/5KNG-GZ3J [hereinafter *Cultural Heritage Convention*]. [↑](#footnote-ref-8)
9. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457, https://perma.cc/SHL9-BNCY [hereinafter *1995 UNIDROIT Convention*]. [↑](#footnote-ref-9)
10. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 51, https://perma.cc/6HMJ-KP7E [hereinafter *Underwater Cultural Heritage Convention*]. [↑](#footnote-ref-10)
11. European Convention on Offences Relating to Cultural Property, June 23, 1985, 25 I.L.M. 44, https://perma.cc/B2EK-QCXT [hereinafter *Delphi Convention*]. [↑](#footnote-ref-11)
12. *1970 UNESCO Convention*, *supra* note 5. [↑](#footnote-ref-12)
13. As Greg Borgstede states, “there has been increasing attention paid to issues of crime in general and transnational organized crime in particular with respect to cultural property.” Greg Borgstede, *Cultural Property, the Palermo Convention, and Transnational Organized Crime Special Issue: Thinking about Cultural Property: The Legal and Public Policy Legacies of John Henry Merryman*, 21 Int’l J. Cultural Prop. 281, 283 (2014). [↑](#footnote-ref-13)
14. *See, e.g.*, Graham Bowley & William K. Rashbaum, *Has the Art Market Become an Unwitting Partner in Crime?*, N.Y. Times (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/arts/design/has-the-art-market-become-an-unwitting-partner-in-crime.html. [↑](#footnote-ref-14)
15. *See, e.g.*, *Works of Art*, Interpol, https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art (last visited Aug. 29, 2018). [↑](#footnote-ref-15)
16. There are many examples of looting and art theft, but for a few recent examples, see, e.g., Donna Yates & Simon Mackenzie, *Heritage, Crisis, and Community Crime Prevention in Nepal*, 25 Int’l J. Cultural Prop. 203 (2018); Christos Tsirogiannis, *False Closure? Known Unknowns in Repatriated Antiquities Cases*, 23 Int’l J. Cultural Prop. 407 (2016); Vernon Silver, *The Ancient-Art Vigilante Who Holds the Global Market Hostage*, Bloomberg (June 26, 2018, 4:00 AM), https://www.bloomberg.com/news/features/2018-06-26/if-you-steal-it-the-art-vigilante-will-find-you; Tom Mashberg, *Stolen Etruscan Vessel to Be Returned to Italy*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/arts/design/stolen-etruscan-vessel-to-be-returned-to-italy.html [https://perma.cc/E5NC-JNHH]; Tom Mashberg, *Met Museum Turns Over Another Relic With Disputed Past to Prosecutors*, N.Y. Times (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/arts/design/met-museum-relic-lebanon.html; Alan Feuer, *Hobby Lobby Agrees to Forfeit 5,500 Artifacts Smuggled Out of Iraq*, N.Y. Times (July 5, 2017), https://www.nytimes.com/2017/07/05/nyregion/hobby-lobby-artifacts-smuggle-iraq.html. [↑](#footnote-ref-16)
17. *See* Derek Fincham, *The Fundamental Importance of Archaeological Context*, *in* Art and Crime 3 (Noah Charney ed., 2009). [↑](#footnote-ref-17)
18. *See* William Neuman, *Guardians of Peru’s Treasures Stake Out Post Office to Block Smuggling*, N.Y. Times (June 13, 2013), http://www.nytimes.com/2013/06/14/world/americas/guardians-of-perus-treasures-stake-out-post-office-to-block-smuggling.html. [↑](#footnote-ref-18)
19. *See* Felicity Barringer, *As Vandals Take to National Parks, Some Point to Social Media*, N.Y. Times (June 4, 2013), https://www.nytimes.com/2013/06/05/us/as-vandals-take-to-national-parks-some-point-to-social-media.html. [↑](#footnote-ref-19)
20. *See* Ralph Frammolino & Jason Felch, *The Getty’s Troubled Goddess*, L.A. Times (Jan. 3, 2007), http://articles.latimes.com/2007/jan/03/local/me-aphrodite3 [https://perma.cc/W5DB-PNR3]. [↑](#footnote-ref-20)
21. *See* Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54 Brit. J. Criminology 722, 725 (2014). [↑](#footnote-ref-21)
22. As Donna Yates argues,

[t]hus, policy focus must be at the market end of the trafficking chain. Demand causes supply and a reduction in demand for Latin American cultural property will result in a reduction of cultural property theft. Our focus should be discouraging criminality and punishing criminals rather than simple artefact recovery at all costs.

Donna Yates, *Illicit Cultural Property from Latin America: Looting, Trafficking, and Sale*, *in* Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World’s Heritage 33, 42 (France Desmarais ed., 2015). [↑](#footnote-ref-22)
23. The St. Louis Art Museum has been the subject of an unsuccessful civil forfeiture suit by Federal Prosecutors alleging it acquired a figure, the Ka-Nefer-Nefer, that had been stolen from an Egyptian storehouse. Victoria A. Russell, *Don’t Get SLAMmed into Nefer Nefer Land: Complaints in the Civil Forfeiture of Cultural Property*, 4 Pace Intell. Prop. Sports & Ent. L.F. 209 (2014). [↑](#footnote-ref-23)
24. Sanka Knox, *Art Museum Finds It Owns 3 Fakes: Famed “Etruscan” Warrior Statues Proved Forgeries by Scientific Tests*, N.Y. Times, Feb. 14, 1961, at 39. [↑](#footnote-ref-24)
25. *See generally* Catastrophe!: The Looting and Destruction of Iraq’s Past (Geoff Emberling & Katharyn Hanson eds., 2008). [↑](#footnote-ref-25)
26. *47 Member States*, Council of Eur., https://www.coe.int/en/web/portal/47-members-states [https://perma.cc/8GZY-3TW8] (last visited Aug. 29, 2018). [↑](#footnote-ref-26)
27. *See* *The British Art Market 2017*, Brit. Art Mkt. Fed’n 6 (2017), http://tbamf.org.uk/wp-content/uploads/2014/08/The-British-Art-Market-2017.pdf [https://perma.cc/3F23-7J7Y] (“In 2016, the overall value of all sales in the British art and antiques market was just under $12 billion.”). [↑](#footnote-ref-27)
28. An effective transit country would only exert a minimal level of scrutiny on objects entering and leaving and would offer export papers to an object that did leave. *See* Blythe A. Bowman, *Transnational Crimes Against Culture: Looting at Archaeological Sites and the “Grey” Market in Antiquities*, 24 J. Contemp. Crim. Just. 225, 233 (2008). [↑](#footnote-ref-28)
29. For a discussion of the differing perspectives of nations of origin and market nations, see John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 Am. J. Int’l L. 831 (1986). [↑](#footnote-ref-29)
30. *Nicosia Convention*, *supra* note 1, arts. 27, 28. [↑](#footnote-ref-30)
31. *Combating Illicit Trafficking and Destruction of Cultural Property: Council of Europe Adopts New Convention*, Council of Eur.: Eur. Committee on Crime Probs. (May 3, 2017), https://www.coe.int/en/web/cdpc/home/newsroom/-/asset\_publisher/XrE2SMw32DRG/content

/combatting-illicit-trafficking-and-destruction-of-cultural-property-council-of-europe-adopts-new-conventi-1 [https://perma.cc/M6UD-CSKQ]. [↑](#footnote-ref-31)
32. *See generally* Raisa E. Patron, Note, *The Looting of Iraqi Archaeological Sites: Global Implications and Support for an International Approach to Regulating the Antiquities Market*, 40 Geo. Wash. Int’l L. Rev. 465, 474 (2008) (arguing that the looting of sites happens because of market demands for new cultural objects). [↑](#footnote-ref-32)
33. *See, e.g.*, Derek Fincham, *How Adopting the* Lex Originis *Rule Can Impede the Flow of Illicit Cultural Property*, 32 Colum. J. L. & Arts 111 (2008). [↑](#footnote-ref-33)
34. *See* Neil Brodie, *Congenial Bedfellows? The Academy and the Antiquities Trade*, 27 J. Contemp. Crim. Just. 408 (2011). [↑](#footnote-ref-34)
35. Kelly Kill, Note, *The Problem of Auction Houses and Illicit Antiquities: A Call for a Holistic Solution*,51 Tex. Int’l L.J. 337, 344–46 (2016). [↑](#footnote-ref-35)
36. *See, e.g.*, Shelby White, *A Collector’s Odyssey*, 7 Int’l J. Cultural Prop. 170, 170 (1998) (arguing she and her husband’s collecting over the years was aimed at “preserving and expanding knowledge of the past.”). [↑](#footnote-ref-36)
37. *See* Simon Mackenzie, *Illicit Deals in Cultural Objects as Crimes of the Powerful*, 56 J. Crime L. & Soc. Change 133, 136–37 (2011) (analyzing power, neutralization, and regulation; concepts which examined in light of the antiquities trade help us to “begin to understand and remedy the failure of current legal strategies to seriously change the character of the antiquities trade, as we see how dealers have power to navigate the legal obstacles they have been presented with, and may be more usefully controlled by a regulatory approach to the trade as opposed to a narrowly legalistic one.”). [↑](#footnote-ref-37)
38. *See*, *e.g.*, Paul R. Williams & Christin Coster, *Blood Antiquities: Addressing a Culture of Impunity in the Antiquities Market*, 49 Case W. Res. J. Int’l L. 103, 114 (2017) (arguing that a coherent regulatory system is needed for the movement in antiquities to “interrupt both the demand and supply sides in the market for blood antiquities”). [↑](#footnote-ref-38)
39. *See* Clemency Coggins, *Cultural Property and Ownership: Antiquities Symposium: Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 Conn. J. Int’l L. 183, 185 (2001) (arguing that even when international efforts and conventions are ineffective, they contribute to a “growing global awareness of these serious problems.”). [↑](#footnote-ref-39)
40. Raising awareness is a perpetual struggle in the field of cultural heritage law, even with respect to private law and dispute resolution. As Alessandro Chechi argues,

[i]t follows that the proper solution to the problem of the settlement of cultural heritage disputes requires two parallel developments: first, raising awareness among private and public stakeholders about the advantages of resolving cultural heritage-related controversies through non-adversarial mechanisms; secondly, enhancing the functioning of court proceedings by helping adjudicators to become familiar with and take into account the values and priorities underlying the policies of States, international organisations and other stakeholders with respect to cultural heritage in order to overcome the weaknesses of the existing legal regime.

Alessandro Chechi, *Evaluating the Establishment of an International Cultural Heritage Court*, 18 Art Antiquity & L. 31, 56 (2013). [↑](#footnote-ref-40)
41. There are other classes of objects that we can term illicit as well, including forgeries or fakes, but with respect to the scope of this Article, looted and stolen works of art will be the focus. [↑](#footnote-ref-41)
42. Sandro Calvani, *Frequency and Figures of Organised Crime in Art and Antiquities*, *in* Organised Crime in Art and Antiquities 28 (Stefano Manacorda ed., 2008), http://www.academia.edu/887647/Organised\_crimes\_in\_Art\_and\_Antiquities. [↑](#footnote-ref-42)
43. *Cf.* Franklin Feldman & Bonnie Burnham, *An Art Theft Archive: Principles and Realization*, 10 Conn. L. Rev. 702, 703 (1978). [↑](#footnote-ref-43)
44. *See* Mark Durney, *Reevaluating Art Crime’s Famous Figures*, 20 Int’l J. Cultural Prop. 221, 221 (2013). [↑](#footnote-ref-44)
45. *See* William J. Jenack Est. Appraisers and Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 478 (N.Y. 2013) (noting the argument that anonymity in the consignment and bidding process “is a time honored and necessary custom and practice of auction houses to maintain the confidentiality of the seller” by an auction house and other amici curiae in the suit seeking damages for a bidder who refused to pay after winning an auction). [↑](#footnote-ref-45)
46. As Stuart Bennett, a lawyer and former auctioneer with Sotheby’s auction house, noted, the reasons for this anonymity are economic: “Anonymous, untraceable offerings have an aura of mystery, of ancient families fallen upon hard times. Dealer consignments, on the other hand, smack of unsalability and shop-soil.” Stuart Bennett, *Fine Art Auctions and the Law: A Reassessment in the Aftermath of* Cristallina, 16 Colum.-VLA J.L. & Arts 257, 260 (1992). [↑](#footnote-ref-46)
47. Neil Brodie & Jennifer Doole, *Illicit Antiquities*, *in* Trade in Illicit Antiquities: The Destruction of the World’s Archaeological Heritage 3 (Neil Brodie et al. eds., 2001). (arguing the size of the illicit trade in antiquities is difficult to estimate due to the nature of the trade). [↑](#footnote-ref-47)
48. *Cf.* Katharyn Hanson, *Why Does Archaeological Context Matter?*, *in* Catastrophe!: The Looting and Destruction of Iraq’s Past 45 (Geoff Emberling & Katharyn Hanson eds., 2008). [↑](#footnote-ref-48)
49. Peter Watson, Sotheby’s: The Inside Story (1997). [↑](#footnote-ref-49)
50. Roger Atwood, Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World (2004). [↑](#footnote-ref-50)
51. Jason Felch & Ralph Frammolino, Chasing Aphrodite: The Hunt for Looted Antiquities at the World’s Richest Museum (2011). [↑](#footnote-ref-51)
52. *See, e.g.*, Ricardo Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, *in* Trade in Illicit Antiquities: The Destruction of the World’s Archaeological Heritage 145 (2001); David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 Am. J. Archaeology 601 (1993); Donna Yates, *Value and Doubt: The Persuasive Power of “Authenticity” in the Antiquities Market*, 2 PARSE: Platform for Artistic Res. Swed. 71 (2015); Cara Grace Tremain, *Fifty Years of Collecting: The Sale of Ancient Maya Antiquities at Sotheby’s*, 24 Int’l J. Cultural Prop. 187 (2017). [↑](#footnote-ref-52)
53. *See, e.g.*, United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12 Civ. 2600(GBD), 2013 WL 1290515 (S.D.N.Y. Mar. 28, 2013); United States v. Painting Known as “Hannibal,” No. 08 Civ. 1511(RJS), 2010 WL 2102484 (S.D.N.Y. May 18, 2010); United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the “Doble Trinidad”, 597 F. Supp. 2d 618 (E.D. Va. 2009); United States v. One Ancient Egyptian, No. 1:09-cv-23030 (S.D. Fla. Oct. 8, 2009) (on file with author); United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); United States v. Portrait of Wally, A Painting by Egon Schiele, No. 99 Civ. 9940(MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); United States v. An Original Manuscript Dated November 19, 1778, No. 96 Civ. 6221(LAP), 1999 WL 97894 (S.D.N.Y. Feb. 22, 1999) (granting summary judgment). [↑](#footnote-ref-53)
54. Tom Mashberg & Ralph Blumenthal, *The Met to Return Statues to Cambodia*, N.Y. Times (May 3, 2013), http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html. [↑](#footnote-ref-54)
55. Neil Brodie & Blythe Bowman Proulx, *Museum Malpractice as Corporate Crime? The Case of the J. Paul Getty Museum*, 37 J. Crime & Just. 399, 399–421 (2013). [↑](#footnote-ref-55)
56. Geoff Edgers, *MFA Sends ‘Weary Herakles’ Statue Back to Turkey*, Bos. Globe (Sep. 23, 2011), https://www.bostonglobe.com/metro/2011/09/23/museum-fine-arts-returns-looted-weary-herakles-statue-turkey/qsIUqeYCtHF8RbCigpRKZI/story.html. [↑](#footnote-ref-56)
57. *See, e.g.*, Steven Litt, *Turkey’s Inquiry into 22 Treasures at the Cleveland Museum of Art Lacks Hard Proof of Looting*, Cleveland Plain Dealer (May 27, 2012), http://www.cleveland.com/arts/index.ssf/2012/05/turkeys\_inquiry\_into\_22\_treasu.html [https://perma.cc/U86A-P5L7]. [↑](#footnote-ref-57)
58. For a discussion of how the legal system offers advantages and disadvantages via the private and criminal law, see Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 Vand. J. Transnat’l L. 1199 (2005). [↑](#footnote-ref-58)
59. *See* James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States Symposium: Reclamation of Cultural Property on the International Front: Is Home Where the Art Is*, 5 Vill. Sports & Ent. L.J. 19, 20 (1998) (arguing that “[c]ustoms plays a central role in the seizure or forfeiture of cultural property in this country, despite a pitifully small staff and the barest of training programs and directives.”). [↑](#footnote-ref-59)
60. *See generally* Rishi Batra, *Resolving Civil Forfeiture Disputes*, 66 U. Kan. L. Rev. 399, 422 (2017) (“Certainly, one way to make things easier for innocent property owners who may be impacted by civil forfeiture is to abolish the practice altogether . . . . However it is important to remember that civil forfeiture does have several advantages and that we are unlikely to see legislative change soon.”). [↑](#footnote-ref-60)
61. Dick M. Carpenter II et al., Policing For Profit: The Abuse Of Civil Asset Forfeiture 3 (2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf. [↑](#footnote-ref-61)
62. *See generally* Adam R. Cohen, Note, *Asset Forfeiture and Attorneys’ Fees: The Zero-Sum Game*,86 Fordham L. Rev. 163, 178–79 (2017). [↑](#footnote-ref-62)
63. *See* Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 Cardozo J. Conflict Resol. 477, 481 (2012) (discussing the costs of repatriation litigation which “can be more than the disputed cultural property or other subject of the dispute, which is not economically sound.”). [↑](#footnote-ref-63)
64. United States v. Cherry, 330 F.3d 658, 670 n.16 (4th Cir. 2003) (distinguishing civil from criminal forfeiture by noting criminal forfeiture acts *in personam* against a criminal defendant). [↑](#footnote-ref-64)
65. United States v. McGinty, 610 F.3d 1242, 1246 (10th Cir. 2010) (“[C]riminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself.”) (quoting United States v. Hall, 434 F.3d 42, 59 (1st Cir. 2006)). [↑](#footnote-ref-65)
66. This is the example given by the court in United States v. Hoover-Hankerson, 511 F.3d 164, 171 n.4 (D.C. Cir. 2007). [↑](#footnote-ref-66)
67. *See* Stefan D. Cassella, Asset Forfeiture Law in the United States 11 (2d ed. 2012). [↑](#footnote-ref-67)
68. *Id*. [↑](#footnote-ref-68)
69. *See infra* notes 139–142. [↑](#footnote-ref-69)
70. A former curator at the Getty, Arthur Houghton recommended a practice called optical due diligence:

Houghton’s recommendation was not to stop buying looted art, but to devise a strategy that would defuse the legal risks. The Getty should create the appearance that the objects it was acquiring had been carefully vetted, but at the same time avoid “certain knowledge” of where they were actually coming from. He called the approach “optical due diligence.”

Felch & Frammolino, *supra* note 49, at 61. [↑](#footnote-ref-70)
71. *See* Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. Colo. L. Rev. 97, 101 (2017) (arguing “that turning a blind eye to criminality shows one to be just as culpable as acting with knowledge of it.”). [↑](#footnote-ref-71)
72. *See* Cassella, *supra* note 65, at § 2-4 at 33. [↑](#footnote-ref-72)
73. Joshua Dressler, Understanding Criminal Law §2.04[A][1] (7th ed. 2015). [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737, 739 (8th Cir. 2014). [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. Malcolm Gay, *Out of Egypt*, Riverfront Times (Feb. 15, 2006), http://www.riverfronttimes.com/2006-02-15/news/out-of-egypt/1/. [↑](#footnote-ref-77)
78. *Mask of Ka-Nefer-Nefer*, 752 F.3d at 739. [↑](#footnote-ref-78)
79. 18 U.S.C. § 2314 (2013). [↑](#footnote-ref-79)
80. Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. Rev. 123, 159 (2010). [↑](#footnote-ref-80)
81. Complaint for Declaratory Judgment at 5, The Art Museum Subdist. of the Metro. Zoological Park & Museum Dist. of St. Louis v. United States, 4:11CV291 HEA, 2012 WL 1107736, at \*1 (E.D. Mo. Mar. 31, 2012). [↑](#footnote-ref-81)
82. 19 U.S.C. § 1621 (2000). [↑](#footnote-ref-82)
83. United States v. Mask of Ka–Nefer–Nefer, No. 4:11CV504 HEA, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012). [↑](#footnote-ref-83)
84. Jenna Greene, *Feds Pay Up for Failed Forfeiture*, Nat’l L.J. (Oct. 27, 2014), http://www.nationallawjournal.com/id=1202674542951/Feds-Pay-Up-For-Failed-Forfeiture; *see also* United States v. Mask of Ka–Nefer–Nefer, *aff’d*, 752 F.3d 737 (8th Cir. 2014). [↑](#footnote-ref-84)
85. *See* Valentina Pop & Alistair MacDonald, *Belgium Investigates Brothers in Possible Trafficking of Looted Antiquities from Syria*, Wall St. J. (June 23, 2018, 8:29 AM), https://www.wsj.com/articles/belgium-investigates-brothers-in-possible-trafficking-of-looted-antiquities-from-syria-1529755201. [↑](#footnote-ref-85)
86. *See* Cornelius Banta, Jr., Comment, *Finding Common Ground in the Antiquities Trade Debate to Promote Pragmatic Reforms Comments*, 53 Hous. L. Rev. 1113, 1137–47 (2016) (arguing that instead of prosecution, “the United States should place greater importance on civil and private remedies in order to control the antiquities trade.”). [↑](#footnote-ref-86)
87. A recent study of the experience of field archaeologists found that “site looting is an endemic, iterative activity with which the vast majority of field archaeologists have had personal experience. It is so commonplace, in fact, that it is often considered an inevitable part of the field archaeological experience.” Blythe Alison Bowman Balestrieri, *Field Archaeologists as Eyewitnesses to Site Looting*, 7 Arts 1, 6 (2018). [↑](#footnote-ref-87)
88. *See generally* Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, *in* The Routledge Companion to Cultural Property 70 (Jane Anderson & Haidy Geismar eds., 2017). [↑](#footnote-ref-88)
89. David Gill & Christopher Chippindale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 Int’l J. Cultural Prop. 205 (2007). [↑](#footnote-ref-89)
90. Jesse Casana, *Satellite Imagery-Based Analysis of Archaeological Looting in Syria*, 78 Near E. Archaeology 142 (2015). [↑](#footnote-ref-90)
91. *See generally* Patrick J. O’Keefe, Commentary on the 1970 UNESCO Convention (2d ed. 2007). [↑](#footnote-ref-91)
92. *See generally* Gerstenblith, *supra* note 86. [↑](#footnote-ref-92)
93. *See generally* Stacey Falkoff, Note & Comment, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & Pol’y 265 (2007). [↑](#footnote-ref-93)
94. See, e.g., the Department of Justice’s own press releases that seldom show convictions, and instead highlight the return of cultural objects. *See* Press Release, Dep’t of Just., United States Files Civil Action to Forfeit Thousands of Ancient Iraqi Artifacts Imported by Hobby Lobby (July 5, 2017) (https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported [https://perma.cc/5VED-PA46]); Press Release, Dep’t of Just., FBI New York Art Crime Team Has Record Number of Art and Cultural Items Returned in Second Half of 2015, Seeks Public Assistance Locating Other Stolen Items (Dec. 21, 2015) (https://www.justice.gov/interpol-washington/pr/fbi-new-york-art-crime-team-has-record-number-art-and-cultural-items-returned [https://perma.cc/RF7K-6C4W]); Press Release, Dep’t of Just., United States Attorney Files Suit to Forfeit Ancient Italian Sarcophagus Lid (July 2, 2015) (https://www.justice.gov/usao-edny/pr/united-states-attorney-files-suit-forfeit-ancient-italian-sarcophagus-lid [https://perma.cc/8LWZ-J2QU]); Press Release, Dep’t of Just., Arrests Made in Operation Targeting Network Selling Stolen Native American Artifacts (June 10, 2009) (https://www.justice.gov/opa/pr/arrests-made-operation-targeting-network-selling-stolen-native-american-artifacts [https://perma.cc/WQ7K-UNTJ]). [↑](#footnote-ref-94)
95. Derek Fincham, *Two Ways of Policing Cultural Heritage*, *in* Proceedings of the International Conference on “Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice 79 (Stefano Manacorda & Arianna Visconti eds., 2014). [↑](#footnote-ref-95)
96. Simon Mackenzie, *Do We Need a Kimberley Process for the Illicit Antiquities Trade? Some Lessons to Learn from a Comparative Review of Transnational Criminal Markets and Their Regulation*, *in* Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World’s Heritage 160 (France Desmarais ed., 2015). [↑](#footnote-ref-96)
97. Jason Felch & Mike Boehm, *Federal Probe of Stolen Art Goes National*, L.A. Times (Jan. 29, 2008), http://articles.latimes.com/2008/jan/29/local/me-museum29 [https://perma.cc/K2EZ-V8HT]. [↑](#footnote-ref-97)
98. Jason Felch, *Once an Aid in a Federal Probe, Antiquities Scholar Becomes a Key Target*, L.A. Times (Sept. 13, 2008, 12:00AM), http://www.latimes.com/local/la-me-roxanna13-2008sep13-story.html [https://perma.cc/XZ5G-P7F6]. [↑](#footnote-ref-98)
99. Neil Brodie, *The Antiquities Trade: Four Case Studies*, *in* Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime 15, 27 (Duncan Chappell & Saskia Hufnagel eds., 2014). [↑](#footnote-ref-99)
100. Felch & Boehm, *supra* note 95. [↑](#footnote-ref-100)
101. *See, e.g.*, Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 Cardozo Arts & Ent. L.J. 597 (2007). [↑](#footnote-ref-101)
102. *ICE and DOJ Return Christopher Columbus Letter to Spain*, U.S. Immigr. & Customs Enforcement (June 6, 2018), https://www.ice.gov/news/releases/ice-and-doj-return-christopher-columbus-letter-spain. [↑](#footnote-ref-102)
103. Press Release, Europol, 3561 Artefacts Seized in Operation Pandora (Jan. 23, 2017) (https://www.europol.europa.eu/newsroom/news/3561-artefacts-seized-in-operation-pandora [https://perma.cc/8HQF-QU64]); Nathalie Eggs, *‘Operation Pandora’: Police in Spain and Cyprus Lead Major Bust of Antiquities Traffickers*, Art Newspaper (Jan. 24, 2017 6:18 PM), http://theartnewspaper.com/news/operation-pandora-police-in-spain-and-cyprus-lead-major-bust-of-antiquities-traffickers/ [https://perma.cc/Z6S7-XDH7]. [↑](#footnote-ref-103)
104. Press Release, Europol, Over 41000 Artefacts Seized in Global Operation Targeting the Illicit Trafficking of Cultural Goods (Feb. 21, 2018), https://www.europol.europa.eu/newsroom/news/over-41-000-artefacts-seized-in-global-operation-targeting-illicit-trafficking-of-cultural-goods [https://perma.cc/MVT8-HRGX]. [↑](#footnote-ref-104)
105. *Id.* [↑](#footnote-ref-105)
106. *Id.* [↑](#footnote-ref-106)
107. United States v. An Antique Platter of Gold, 184 F.3d 131, 137 (2d Cir. 1999). For a case note of the dispute see Carla J. Shapreau, Case Note, *Second Circuit Holds that False Statements Contained in Customs Forms Warrant Forfeiture of Ancient Gold Phiale - Hotly Contested Foreign Patrimony Issue Not Reached by the Court:* United States v. An Antique Platter of Gold, 9 Int’l J. Cultural Prop. 49 (2000). [↑](#footnote-ref-107)
108. United States v. An Antique Platter of Gold, 991 F.Supp. 222, 225 (S.D.N.Y. 1997). [↑](#footnote-ref-108)
109. *Id.* [↑](#footnote-ref-109)
110. *Id.* [↑](#footnote-ref-110)
111. *Id.* [↑](#footnote-ref-111)
112. *Id.* at 226. [↑](#footnote-ref-112)
113. *Id.* [↑](#footnote-ref-113)
114. *Id.* at 233. [↑](#footnote-ref-114)
115. The importation of goods with “false statements” is prohibited by 18 U.S.C. § 542 (1996). Those objects are subject to forfeiture under 18 U.S.C. § 545 (2006). [↑](#footnote-ref-115)
116. *An Antique Platter of Gold*, 991 F. Supp. at 230. [↑](#footnote-ref-116)
117. The Federal District Court Judge took care to show just how difficult it would have been to smuggle the object from Switzerland:

To acquire the Phiale, Haber took great effort to ensure that the Phiale was not exported directly from Italy. After arriving in Zurich, Haber traveled across the Swiss Alps to Lugano, a town near the Swiss-Italian border that is about a three-hour car drive from Zurich. There, he took possession of the Phiale and received a commercial invoice dating the Phiale as circa 450 B.C. Haber then traveled back to Zurich, rather than to a closer Italian city such as Milan, to fly back to New York.

*Id.* at 232. [↑](#footnote-ref-117)
118. United States v. An Antique Platter of Gold, 184 F.3d 131, 137 (2d Cir. 1999). [↑](#footnote-ref-118)
119. Janus was the “god of door and gate” in Rome. A Janus figure operates as an interface between two worlds, as Janus “looked both ways, and is therefore depicted s a double-headed and bearded man.” John Roberts, The Oxford Dictionary of the Classical World 387 (2017). [↑](#footnote-ref-119)
120. *See* United States v. Hollinshead, 494 F.2d 1154 (9th Cir. 1974); United States v. McClain 593 F.2d 658 (5th Cir. 1979). [↑](#footnote-ref-120)
121. *See* Gov’t of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989). [↑](#footnote-ref-121)
122. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 774 (2010). [↑](#footnote-ref-122)
123. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & Soc’y Rev. 545, 561–66 (1986). [↑](#footnote-ref-123)
124. National Stolen Property Act, 18 U.S.C. 2315 (2013). [↑](#footnote-ref-124)
125. United States v. Schultz, 333 F.3d 393 (2d Cir. 2003); *cf.* Martha Lufkin, Case Note, *Criminal Liability for Recieving State-Claimed Antiquities in the United States: The ‘*Schultz*’ Case*, 8 Art Antiquity & L. 321 (2003). [↑](#footnote-ref-125)
126. Egyptian Law 117, “The Law on the Protection of Antiquities,” provides:

Article 1

An “Antiquity” is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from any such period.

. . . .

Article 6

All antiquities are considered to be public property-except for charitable and religious endowments. . . . It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.

Article 7

As of [1983], it is prohibited to trade in antiquities.

. . . .

Article 8

With the exception of antiquities whose ownership or possession was already established [in 1983] or is established pursuant to [this law’s] provisions, the possession of antiquities shall be prohibited as from [1983].

*Schultz*, 333 F.3d at 400–01. [↑](#footnote-ref-126)
127. *Id.*; *cf.* Lufkin, *supra* note 123. [↑](#footnote-ref-127)
128. Brief for Appellee at 17, United States v. Schultz,333 F.3d 393 (2d Cir. 2003) (No. 02-1357), 2002 WL 32395393 at \*17. [↑](#footnote-ref-128)
129. *Id.* at \*18. [↑](#footnote-ref-129)
130. United States v. Schultz, 178 F. Supp. 2d 445, 448­–49 (S.D.N.Y. 2002). [↑](#footnote-ref-130)
131. R. v. Tokeley-Parry [1999] Crim. L.R. 578 (C.A.). [↑](#footnote-ref-131)
132. *Schultz*, 333 F.3d at 410. [↑](#footnote-ref-132)
133. Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, 14 Art Antiquity & L. 21, 21 (2009) (“Two decisions, one in the United Kingdom and one in the United States, decided just about five years apart, are significant for universalising the principle that vesting laws—laws that vest ownership of antiquities in a nation—create ownership rights that are recognised even when such antiquities are removed from their country of discovery and are traded in foreign nations.”). [↑](#footnote-ref-133)
134. Martha B.G. Lufkin, Case Note, *End of the Era of Denial for Buyers of State-Owned Antiquities:* United States v. Schultz, 11 Int’l J. Cultural Prop. 305, 306 (2002) (“Collectors, dealers and museums may no longer be able to accept antiquities as ‘not stolen’ under U.S. law if they come from countries with patrimony laws unless the objects have clear written provenance.”). [↑](#footnote-ref-134)
135. *See, e.g.*, Marina Papa-Sokal, *Beyond the Nationalist-Internationalist Polarisation in the Protection of Archaeological Heritage: A Response to Professor Merryman*, 14 Art Antiquity & L. 237, 265 (2009) (“Above all, national patrimony laws reduce the marketability of illegally excavated antiquities—at least among ‘respectable’ dealers—by casting doubt on the seller’s title and raising fears of lawsuits by the State of origin.”). [↑](#footnote-ref-135)
136. As Max Anderson notes though, the degree to which objects in museums and galleries are documented varies:

The degree to which an object is documented also varies widely. Awarding each newly obtained artifact a reference number, or accession number, is a normal first step. That number is normally painted on the least obtrusive part of its surface, on top of a reversible (removable) sealant. From that point on the work is typically photographed, measured, and identified, with these details recorded in a museum’s database.

Maxwell L. Anderson, Antiquities: What Everyone Needs to Know 129 (2016). [↑](#footnote-ref-136)
137. Janet Ulph, *The Impact of the Criminal Law and Money Laundering Measures upon the Illicit Trade in Art and Antiquities*, 16 Art Antiquity & L. 39, 44 (2011) (“Schultz’s conviction caused enormous controversy. Dealers were concerned that mere negligence might suffice for a conviction.”). [↑](#footnote-ref-137)
138. *See* Simon Mackenzie, *Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations*, 7 J. Art Antiquity & Law 125 (2002). [↑](#footnote-ref-138)
139. *See generally* Simon R.M. Mackenzie, Going, Going, Gone: Regulating the Market in Illicit Antiquities (2005). [↑](#footnote-ref-139)
140. 18 U.S.C. §§ 2314–15 (2013). *See generally* United States v. Gardner, 171 F.2d 753, 754 (7th Cir. 1948) (holding that knowledge is an essential element of the crime of theft under the NSPA as “there could be no unlawful conspiracy to transport a stolen motor vehicle without knowledge that it was stolen and now unlawful conspiracy to cause to be transported a forged check without knowledge that it was forged.”). [↑](#footnote-ref-140)
141. Archaeological Resources Protection Act, 16 U.S.C. § 470ee(c) (2012) provides:

(c) Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law. [↑](#footnote-ref-141)
142. *See* United States v. Lynch, 233 F.3d 1139, 1145–46 (9th Cir. 2000) (holding that the government must only “prove that a defendant [knows or has reason to know] that he was removing an ‘archaeological resource.’”). [↑](#footnote-ref-142)
143. *See* Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 Notre Dame L. Rev. 1835, 1857 (2009) (citing Cal. Penal Code § 497 (West 1999)). [↑](#footnote-ref-143)
144. *See generally* Keith N. Hylton, *Whom Should We Punish, and How? Rational Incentives and Criminal Justice Reform*, 59 Wm. & Mary L. Rev. 2513, 2572 (2018). [↑](#footnote-ref-144)
145. *See* Kimberly L. Alderman & Chelsey S. Dahm, *National Treasure: A Comparative Analysis of Domestic Laws Criminalizing Illicit Excavation and Exportation of Archaeological Objects*, 65 Mercer L. Rev. 431 (2014). [↑](#footnote-ref-145)
146. *See generally* Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends (Joris D. Kila & Marc Balcells eds., 2014). [↑](#footnote-ref-146)
147. *See, e.g.,* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 294 (7th Cir. 1990) (holding that the efforts by the defendant Peg Goldberg to purchase Byzantine mosaics in Switzerland and sell them in California without conducting due diligence defeated her claims to them: “If Goldberg would have pursued such methods, perhaps she would have discovered in time what she has now discovered too late: the Church has a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it.”). [↑](#footnote-ref-147)
148. Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 Ind. L. Rev. 601, 603 (2012) (“Art crime experts have charged that organized crime has occupied a dominant role in the illicit antiquities trade since the early 1960s.”). [↑](#footnote-ref-148)
149. *See* Katie Paul, *Ancient Artifacts vs. Digital Artifacts: New Tools for Unmasking the Sale of Illicit Antiquities on the Dark Web*, 7 Arts 12 (2018), http://www.mdpi.com/2076-0752/7/2/12/htm (“We are only at the beginning of the effects of this underground trade online and its implications for the smuggling and laundering of artifacts in the real world.”). [↑](#footnote-ref-149)
150. *See, e.g.*, Georgi Kantchev, *Buyer Beware: Looted Antiquities Flood Online Sites Like Amazon, Facebook*, Wall St. J. (Nov. 1, 2017), https://www.wsj.com/articles/the-online-bazaar-for-looted-antiquities-1509466087. [↑](#footnote-ref-150)
151. *Nicosia Convention*, *supra* note 1. [↑](#footnote-ref-151)
152. *Id.* at 2. [↑](#footnote-ref-152)
153. *Id.* at 2–3. [↑](#footnote-ref-153)
154. *Id.* at 2. [↑](#footnote-ref-154)
155. *Id.* at Preamble. [↑](#footnote-ref-155)
156. Borgstede, *supra* note 11, at 281 (“[T]here 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.”). [↑](#footnote-ref-156)
157. Elizabeth Marlowe, *Seizure of Looted Antiquities Illuminates What Museums Want Hidden*, Hyperallergic (Sept. 6, 2018), https://hyperallergic.com/456942/europol-seizure-of-looted-antiquities/ [https://perma.cc/HU7X-DHWN] (“[M]any of those polished marble masterpieces on their spotlit museum pedestals were once merely raw goods on the floor of a crook’s cluttered living room. The alchemy is usually carefully hidden from view; museums do everything they can to keep our attention away from the men behind the curtain.”). [↑](#footnote-ref-157)
158. *See, e.g.*, Matthew Bogdanos, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqi Antiquities*, 31 Fordham Int’l L.J. 725, 727 (2008) (“In March 2006, for example, private collector Shelby White donated $200 million to New York University to establish an ancient studeis institute, prompting one of the university’s professors to resign in protest over what he considered the questionable acquisition practices of the donor.”). [↑](#footnote-ref-158)
159. *See, e.g.*, Mike Boehm, *The Getty’s ‘Victorious Youth’ is subject of a custody fight*, L.A. Times (May 7, 2014), http://www.latimes.com/entertainment/arts/la-et-cm-getty-bronze-20140507-story.html. [↑](#footnote-ref-159)
160. Monica M. Jackson, *Archaeology, Looting and the Luxury Arts in the XXI Century*, 13 Art Antiquity & L. 59, 59 (2008) (“For centuries, tomb raiders known in Italy as clandestini or tombaroli have supplemented their day jobs by plundering tombs and ancient dwellings in night-time raids.”). [↑](#footnote-ref-160)
161. S.C. Res. 2199 (Feb. 12, 2015); S.C. Res. 2253 (Dec. 17, 2015). [↑](#footnote-ref-161)
162. *Nicosia Convention*, *supra* note 1, at art. 2.2.

For the purposes of this Convention the term “cultural property” shall mean:

a. in respect of movable property, any object, situated on land or underwater or removed therefrom, which is, on religious or secular grounds, classified, defined or specifically designated by any Party to this Convention or to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as being of importance for archaeology, prehistory, ethnology, history, literature, art or science, and which belongs to the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

*Id.* [↑](#footnote-ref-162)
163. *Id.* at art. 2.2.b. [↑](#footnote-ref-163)
164. *See, e.g.*, Gerstenblith, *supra* note 86. [↑](#footnote-ref-164)
165. *See generally* Gregory Day, *Explaining the Art Market’s Thefts, Frauds, and Forgeries (and Why the Art Market Does Not Seem to Care)*, 16 Vand. J. Ent. & Tech. L. 457 (2014); Derek Fincham, *Fraud on Our Heritage: Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 Syracuse J. Int’l L. & Comm. 145 (2010); Alexandra Love Levine, Note, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 Brook. J. Int’l L. 751 (2011); Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631 (2000); Mary K. Devereaux, *Battle over a Monet: The Requirement of Due Diligence in the Lawsuit by the Owner Against a Good Faith Purchaser and Possessor*, 9 Loy. Ent. L.J. 57 (1989). [↑](#footnote-ref-165)
166. European Treaty Series No. 19, Dec. 19, 1954, 218 U.N.T.S. 139, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/018. [↑](#footnote-ref-166)
167. For an introduction to the special issues presented by underwater cultural heritage, see generally Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze,”* *in* Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law 301 (Silvia Borelli & Federico Lenzerini eds., 2012); Lydia Barbash-Riley, *Using a Community-Based Strategy to Address the Impacts of Globalization on Underwater Cultural Heritage Management in the Dominican Republic*, 22 Ind. J. Global Legal Stud. 201 (2015); Ole Varmer, *Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf*, Volume 33 Stan. Envt’l L.J. 251 (2014); Derek Fincham, *Transnational Forfeiture of the “Getty” Bronze*, 32 Cardozo Arts & Ent. L.J. 471 (2014); Alexander MacKintosh Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 Pepp. Disp. Resol. L.J. 325 (2008). [↑](#footnote-ref-167)
168. Parliamentry Assembly, Recommendation 848 (1978),Underwater Cultural Heritage, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14882&lang=en. [↑](#footnote-ref-168)
169. Janet Blake, *The Protection of the Underwater Cultural Heritage*, 45 Int’l & Comp. L.Q. 819, 824–25 (1996). [↑](#footnote-ref-169)
170. *See generally* Patrick J. O’Keefe, *The Council of Europe Recommendation on Historic Complexes*, 3 Art Antiquity & L. 389 (1998). [↑](#footnote-ref-170)
171. Kerstin Odendahl, *Securing and Enhancing the Common Cultural Heritage*, *in* The Council of Europe: Its Law and Policies 756 (Stefanie Schmahl & Marten Breuer eds., 2017). [↑](#footnote-ref-171)
172. *Nicosia Convention*, *supra* note 1, at art. 3 (“Theft and other forms of unlawful appropriation . . . Each Party shall ensure that the offence of theft and other forms of unlawful appropriation as set out in their domestic criminal law apply to movable cultural property.”). [↑](#footnote-ref-172)
173. *Id.* at art. 4.

Unlawful excavation and removal

1. Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally:

a. the excavation on land or under water in order to find and remove cultural property without the authorisation required by the law of the State where the excavation took place;

b. the removal and retention of movable cultural property excavated without the authorisation required by the law of the State where the excavation took place;

c. the unlawful retention of movable cultural property excavated in compliance with the authorisation required by the law of the State where the excavation took place.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct described in paragraph 1 of this article.

*Id.* [↑](#footnote-ref-173)
174. *See, e.g.*, Sarah K. Harding, *Value, Obligation and Cultural Heritage*, 31 Ariz. St. L.J. 291, 344 (1999) (“If an object, custom, story or ritual has a living context it should remain in or be returned to that context if we are to accord it the respect which it is due. Heritage that exists outside of its culture, isolated and de-contextualized, may not be appreciated for its intrinsic value.”). [↑](#footnote-ref-174)
175. An archaeologist working at the Gordion site in central Anatolia, located an hour’s drive west of Ankara, described the problems of looting at Gordion:

When artefacts are looted, they become useless data. We don’t know what context they came from; we don’t know how they were used, we can try to guess by whom or when they were made but without knowing in what level, at what site they were found, we can never do more than guess. And so looting artefacts really, truly is robbing us, all of us, of any hope of a deeper understanding of where we came from.

Nina M. Neuhas, *Excavation at Gordian: A Glimpse into the Work of a Modern Day Archaeologist and the Challenges of Illegal Excavations and Looting*, 20 Art Antiquity & L. 77, 80 (2015). [↑](#footnote-ref-175)
176. *Nicosia Convention*, *supra* note 1, at art. 5.

Illegal importation

1. Each Party shall ensure that, when committed intentionally, the importation of movable cultural property, the importation of which is prohibited pursuant to its domestic law on the grounds that it has been:

a. stolen in another State;

b. excavated or retained under circumstances described in Article 4 of this Convention; or

c. exported in violation of the law of the State that has classified, defined or specifically designated such cultural property in accordance with Article 2 of this Convention, constitutes a criminal offence under its domestic law where the offender knew that the cultural property had been stolen, excavated or exported in violation of the law of that other State.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct described in paragraph 1 of the present article.

*Id.* [↑](#footnote-ref-176)
177. *Id.* at art. 6.

Illegal exportation

1. Each Party shall ensure that the exportation of movable cultural property, if the exportation is prohibited or carried out without authorisation pursuant to its domestic law, constitutes a criminal offence under its domestic law, when committed intentionally.

2. Each Party shall consider taking the necessary measures to apply paragraph 1 of the present article also in respect of movable cultural property that had been illegally imported.

*Id.* [↑](#footnote-ref-177)
178. *Id.* at art. 7.

Acquisition

1. Each Party shall ensure that the acquisition of movable cultural property that has been stolen in accordance with Article 3 of this Convention or has been excavated, imported or exported under circumstances described in Articles 4, 5 or 6 of this Convention constitutes a criminal offence under its domestic law where the person knows of such unlawful provenance.

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

*Id.* [↑](#footnote-ref-178)
179. *Id.* at art. 8.

Placing on the market

1. Each Party shall ensure that the placing on the market of movable cultural property that has been stolen in accordance with Article 3 of this Convention or has been excavated, imported or exported under circumstances described in Articles 4, 5 or 6 of this Convention constitutes a criminal offence under its domestic law where the person knows of such unlawful provenance.

2. Each Party shall consider taking the necessary measures to ensure that the conduct described in paragraph 1 of this article constitutes a criminal offence also in the case of a person who should have known of the cultural property’s unlawful provenance if he or she had exercised due care and attention in placing the cultural property on the market.

*Id.* [↑](#footnote-ref-179)
180. *Id.* at art. 9.

Falsification of documents

Each Party shall ensure that the making of false documents and the act of tampering with documents relating to movable cultural property constitute criminal offences under its domestic law, where these actions are intended to present the property as having licit provenance.

*Id.* [↑](#footnote-ref-180)
181. *Id.* at art. 10.

Destruction and damage

1. Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally:

a. the unlawful destruction or damaging of movable or immovable cultural property, regardless of the ownership of such property;

b. the unlawful removal, in whole or in part, of any elements from movable or immovable cultural property, with a view to importing, exporting or placing on the market these elements under the circumstances described in Articles 5, 6 and 8 of this Convention.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of the present article, or to apply it only in specific cases or conditions in cases where the cultural property has been destroyed or damaged by the owner of the cultural property or with the owner’s consent.

*Id.* [↑](#footnote-ref-181)
182. *Id.* at art. 11.

Aiding or abetting and attempt

1. Each Party shall ensure that the intentional aiding or abetting the commission of a criminal offence referred to in this Convention also constitutes a criminal offence under its domestic law.

2. Each Party shall ensure that the intentional attempt to commit any of the criminal offences referred to in this Convention with the exception of those defined in Article 4, paragraph 1, sub-paragraph a and in Article 8 also constitutes a criminal offence under its domestic law.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, the provision of paragraph 1 of the present article in respect of offences defined in Article 4, paragraph 1, sub-paragraph a.

*Id.* [↑](#footnote-ref-182)
183. *Id.* at art. 12.

Jurisdiction

1. Each Party shall take the necessary measures to establish jurisdiction over the criminal offences referred to in this Convention, when the offence is committed:

a. in its territory;

b. on board a ship flying the flag of that Party;

c. on board an aircraft registered under the laws of that Party; or

d. by one of its nationals.

2. Each Party shall take the necessary measures to establish jurisdiction over any criminal offence referred to in this Convention, when the alleged offender is present in its territory and cannot be extradited to another State, solely on the basis of his or her nationality.

3. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, the jurisdiction rules laid down in paragraph 1, sub-paragraph d of the present article.

4. Where more than one Party claims jurisdiction over an alleged offence in accordance with this Convention, the Parties concerned shall, where appropriate, consult each other with a view to determining the most appropriate jurisdiction for prosecution.

5. Without prejudice to the general rules of international law, this Convention shall not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

*Id.* [↑](#footnote-ref-183)
184. *Id.* at ch. III. [↑](#footnote-ref-184)
185. *Id.* at art. 22. [↑](#footnote-ref-185)
186. Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. Pa. J. Int’l Econ. L. 835, 854 (2003). [↑](#footnote-ref-186)
187. Mackenzie, *supra* note 94, at 152. [↑](#footnote-ref-187)
188. Seth A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo,* 29 Suffolk Transnat’l L. Rev. 25, 47 (2005). [↑](#footnote-ref-188)
189. *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 Chi. J. Int’l L. 169 (2007). [↑](#footnote-ref-189)
190. John Eligon, *Global Witness Quits Group on ‘Blood Diamonds’*, N.Y. Times (Dec. 5, 2011), https://www.nytimes.com/2011/12/06/world/africa/global-witness-quits-group-on-blood-diamonds.html. [↑](#footnote-ref-190)
191. Charmian Gooch, *Why We Are Leaving the Kimberley Process - A Message from Global Witness Founding Director Charmian Gooch,* Global Witness (Dec. 3, 2011), https://www.globalwitness.org/en/archive/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch/ [https://perma.cc/99A7-7GDW]. [↑](#footnote-ref-191)
192. Henri Neuendorf, *Art Traffickers Beware: The Manhattan DA Is Deploying a New Unit to Combat NYC’s Antiquities Crime Wave*, Artnet News (Dec. 18, 2017), https://news.artnet.com/art-world/manhattan-antiquities-traficking-unit-1182896. [↑](#footnote-ref-192)
193. *Manhattan District Attorney’s Office Returns Three Ancient Statues to Lebanese Republic*, Manhattan Dist. Attn’y Off. (Dec. 15, 2017), https://www.manhattanda.org/manhattan-district-attorneys-office-returns-three-ancient-statues-lebanese-republic/. [↑](#footnote-ref-193)