



## **The role of the museum in the fight against illicit trafficking in cultural property**

### **Abstract – Master thesis**

Valentine Molineau\*

Considering the vulnerability of the museum to illicit trafficking in cultural property (due to its possible status as a victim of theft) and its potential responsibility in the persistence of illicit trafficking (due to its activity of enriching the collections and its consequent quality of art market operator), the museum is doubly affected by the problems of illicit trafficking. It therefore seems relevant to determine to what extent the museum's plural positioning with regard to the illicit trafficking of cultural objects conditions its action, obligations and initiatives against this scourge.

Trafficking in cultural property distinguishes two types of illicit acts: (i) the outright theft of cultural property from its owner (whether an individual, a gallery, a museum or a State) and its subsequent transport across borders to States where it may be easily traded and integrated into the legitimate market, as well as (ii) the illegal export of cultural property. While it is inherently difficult to measure the scale of this traffic<sup>1</sup>, the damage it causes is considerable and requires an international response. It should be noted that the success of such cooperation necessarily relies on the search for a balance between the different interests of the source countries and the market countries. The aim is therefore to examine the tools available to museums, and to evaluate the responses formulated by the latter to address the challenges of the fight against illicit trafficking in cultural property.

The undertaken reflection consists, firstly, in studying the international legal framework and the ethical principles surrounding the practice of museums to prevent and counter the illicit trafficking of cultural property (I) and, secondly, in assessing the extent to which the

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<sup>1</sup> LENZNER (N. R.), “The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention”, *University of Pennsylvania Journal of International Business Law*, vol. 15, no. 3, Fall 1994, p. 469-508.

museum is able to act as a driving force in the fight against the illicit trafficking of cultural property (II).

## **I. International legal framework and ethical principles surrounding the practice of museums in the fight against illicit trafficking of cultural property**

The role of the museum in the fight against illicit trafficking of cultural property is plural, while the organisation of this mission calls for legal, but also ethical arguments. The fight against illicit trafficking of cultural property as carried out by the museum entity is part of a legal framework necessarily raised at an international level, due to the transboundary nature of the traffic (A), and of an ethical framework largely shaped and matured by its own subjects, museums and museum professionals, hence the interest of an international network of museums and museum professionals, i.e. the International Council of Museums (hereafter "ICOM") (B). These two frameworks of rules, although proceeding from a fundamentally distinct elaboration, respond to each other opportunely.

### ***A. International legal framework***

The fight against the illicit trafficking of cultural property as led by the museums relies, on the one hand, on the efforts of the individual governments of the States in which the museums are established, to ratify and implement the relevant legislative instruments and, on the other hand, on the efforts and capacity of the museums and their staff to observe and comply with the codes of ethics and other non-binding standards developed and established in this field<sup>2</sup>.

The cross-border nature of illicit trafficking of cultural property requires coordinated action and the establishment of mechanisms at the international level. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (hereinafter the "**1970 UNESCO Convention**") and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects adopted in Rome on 24 June 1995 (hereinafter the "**1995 UNIDROIT Convention**") constitute the two essential and complementary pillars of international cooperation in favor of the fight against illicit traffic in cultural property.

It is therefore interesting to assess how these two international legislative tools legally apprehend the museum entity and to what extent their respective provisions reach and impact the practice of museums, beyond the mere data of ratification, acceptance, or accession of these instruments by their respective State of establishment. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention have respectively and mutually induced positive developments in museum practice. The 1995 UNIDROIT Convention was drawn up to reinforce the provisions of the 1970 UNESCO Convention. The complementarity of these

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<sup>2</sup> KIRBY (C. L.), "Stolen Cultural Property: Available Museum Responses to an International Dilemma", *Dickinson Law Review*, vol. 104, no. 4, 1999-2000, p. 729-748.

two legislative instruments and the synergy of actions of these two organisations in the fight against illicit trafficking of cultural property have a significant impact on the attitude and practice of museums.

### ***B. Ethical principles***

Illicit trafficking is developing alongside a legal market for cultural objects. As such, the most effective way to combat trafficking in cultural objects is to hold all participants in the art market accountable. In view of its role in the circulation of cultural property and its insertion in the art market, the question arises as to how much the museum is involved in the illicit trafficking of cultural property. The link between the art market and the initial illicit removal was admitted early on by the museum community, as evidenced by the original wording of Article 3.2 of the code of professional ethics published by ICOM in 1987: “(...) *museums must be aware of the links between the market and the initial, and often destructive, removal of an object from the commercial market and recognise that it is unethical for a museum to support, directly or indirectly, such trafficking*”<sup>3</sup>. As a key player in the chain of circulation of cultural objects, the museum must necessarily seize and take part in the fight against this scourge. The recognition of the museum's participation (either direct or indirect) in the illicit trafficking of cultural property, through its essential activity of enriching collections, is the necessary prerequisite for the museum to effectively take up the fight against this scourge. This awareness has conditioned the evolution of the museum's position with regard to the illicit trafficking of cultural property and contributed to the establishment of a true museum intelligence and deontology. The ethical principles surrounding the practice of museums to prevent and counter the illicit trafficking of cultural property are the result of a gradual and significant evolution in the behaviour of museums.

The ethical framework that governs museum practices, notably the ICOM code of ethics for museums (hereafter the “**ICOM Code of Ethics**”) is the result of a horizontal elaboration, as it is made up of a corpus of rules of conduct established by the subjects to whom they are addressed, namely the museum professionals. As per, but to a lesser extent, the *lex mercatoria* governing the contractual relations between merchants, who were then governed by their own customs<sup>4</sup>, this gives these rules an unparalleled force of application and

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<sup>3</sup> « *les musées doivent être conscients des liens qui existent entre le marché et l'enlèvement initial et souvent destructeur d'un objet à destination du marché commercial et reconnaître qu'il est contraire à la déontologie qu'un musée apporte son appui, directement ou indirectement à un tel trafic* » (article 3.2, *ICOM Code of Ethics*, 1987).

<sup>4</sup> According to the international law dictionary, "the *Lex Mercatoria* is made up of specific professional rules without reference to a specific law (...) it is based on widely recognised and respected customs and principles, on customs observed between traders, on standard contracts and on principles enshrined in arbitration awards rendered in international trade" (« *la Lex mercatoria est constituée de règles professionnelles propres sans référence à un droit déterminé (...) elle s'appuie sur des usages et des principes largement reconnus et respectés, sur des usages observés entre commerçants, sur des contrats-types et des principes consacrés par les sentences arbitrales rendues en matière de commerce international* ») (Glossaire international. *Définition de Lex Mercatoria* [en ligne], <https://www.glossaire-international.com/pages/tous-les-termes/lex-mercatoria.html>, [page consultée le 14/08/2021]). This parallel is interesting in this case in order to question "the links between ethics and usages" (DUROY (S.), GOFFAUX (G.), JARRASSÉ (D.), « Regards

legitimacy. Thus, the articulation of museum ethics, as codified by ICOM, with international legislative instruments in the fight against illicit trafficking of cultural property reinforces the applicability and observance of these principles and standards by their respective subjects, while contributing to homogenise the moralisation exercised on museums as operators in the art market. It also allows us to question the relationship between law and ethics and to assess the extent to which the museum is inclined to raise its ethical standards in order to counter illicit trafficking of cultural property more effectively<sup>5</sup>, independently or in parallel with the ratification of binding instruments by his State of establishment. The coexistence of ethical principles and legal standards “*provides a set of rules that complement one another and aim to create a complete, if not homogeneous, regulation*”<sup>6</sup>.

## **II. The museum, force of proposal in the fight against illicit trafficking of cultural property**

Museums play a major role in the fight against the illicit trafficking of cultural property. Thus, in support of established ethical principles, but also beyond the sole national and international legislative framework applicable to it as per its State of establishment, the museum must be a force for proposal and effectively address the issue of illicit trafficking in cultural property. Although there are disparities among museums in the way they understand and organise the fight against this traffic, there is nevertheless a multiplication of notable and relevant museum initiatives, confirming the museum's capacity to act as an “*ad hoc*” force of proposal in the fight against the illicit trafficking of cultural property. The growing introspection and questioning of the legitimacy and coherence of museum collections contribute to the fight against illicit trafficking of cultural property (A), while the museum must promote the processes of return and restitution of stolen or illicitly exported cultural objects, in order to strengthen its credibility and to curb impunity for these acts (B).

### ***A. The increasing introspection of museums regarding the legitimacy of their collections***

Efforts to adjust the collection management policy to the challenges of the fight against illicit trafficking of cultural property, including the continuous work of provenance research, but also the mission of education and awareness-raising of the harms of traffic among the public that the museum entity is likely to exercise, contribute to the fight against illicit trafficking in cultural property. Collections management policy, some aspects of which are developed through museum self-regulation, is an essential component of the fight against illicit trafficking of cultural property, while rethinking the ownership of museum collections and

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croisés sur les enjeux éthiques du patrimoine culturel », *Juris art etc.*, Juris éditions, Dalloz, 2015, n°28, p.18-22).

<sup>5</sup> WEISS (L.J.), “The Role of Museums in Sustaining the Illicit Trade in Cultural Property”, *Cardozo Arts & Entertainment Law Journal*, vol. 25, no. 2, 2007, p. 837-876.

<sup>6</sup> FRIGO (M.), “Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property”, *International Journal of Cultural Property*, vol.16, no. 1, 2009, p. 49-66.

exploring its alternatives is likely to have an impact, in the long run, on the operational schemes of trafficking actors.

***B. Returns and restitutions, an integral part of the fight against illicit trafficking***

The museum appears to be an appropriate institution to facilitate and promote the processes of return and restitution of stolen or illegally exported cultural objects. The issues of return and restitution are also increasingly perceived as being “*indissociable from that of illicit trafficking*”<sup>7</sup>.

The mission of protecting cultural heritage, which is incumbent on the museum institution, and which undoubtedly includes the fight against illicit trafficking of cultural property, is part of a broader reflection on the shaping of tomorrow's museum landscape, which goes hand in hand with a growing questioning of the "universal museum": a museum community where the return and restitution of stolen or illicitly exported cultural objects may be seen as a means of regulating the art market, and where the full ownership of museum collections is rethought in favour of long-lasting and organised museum cooperation.

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<sup>7</sup> SAVOY (B.), SARR (F.). (2018). *Rapport sur la restitution du patrimoine culturel africain. Vers une nouvelle éthique relationnelle*, N°2018-26. URL : [http://restitutionreport2018.com/sarr\\_savoy\\_fr.pdf](http://restitutionreport2018.com/sarr_savoy_fr.pdf).