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# International and transnational conditions of penalization of illegal export of cultural property from the territory of a legitimate state

## 1. Introductory remarks

The experiences of the Second World War and the approval by the international community of the rules of cooperation resulting from the adoption of the United Nations Charter,<sup>1</sup> the announcement of the Universal Declaration of Human Rights,<sup>2</sup> and the development of the Geneva Conventions<sup>3</sup> created new conditions for the development of legal protection of cultural property.

In this context, the creation of UNESCO in 1946<sup>4</sup> was of key importance, as, since the 1950s, it has sought to coordinate various aspects of legal protection of cultural property, and more broadly of the world's cultural heritage,<sup>5</sup> through cooperation between states. In this regard, UNESCO also supports legislative initiatives undertaken by other organizations, primarily the European Union and the Council of Europe, but also those with lesser visibility, such as UNIDROIT.<sup>6</sup>

The intergovernmental agreements which intended to preserve the integrity of national cultural heritage and to restrict the possibilities of export of cultural property outside the territory of an authorized country were among the first focuses of UNESCO activities. The result of this cooperation was the adoption in 1970 of the Convention on measures aimed at the prohibition and prevention of the illegal transportation,

<sup>1</sup> UN Charter; 1 UNTS VXi.

<sup>2</sup> Text in: E.J. Osmańczyk, *Encyklopedia ONZ i stosunków międzynarodowych*, Warszawa 1986, pp. 117–118.

<sup>3</sup> In particular, the Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949, *Journal of Laws* of 1956, No. 38, item 171, Annex.

<sup>4</sup> <https://en.unesco.org/about-us/introducing-unesco> (accessed: 14.04.2021).

<sup>5</sup> The concept of "world cultural heritage" was formulated in art. 1 of the Convention on the Protection of the World Cultural and Natural Heritage, adopted by the UNESCO General Conference in Paris on 16 November 1972, *Journal of Laws* of 1976, No. 32, item 190.

<sup>6</sup> <https://www.unidroit.org/statute> (accessed: 14.04.2021).

exportation, and transfer of cultural property.<sup>7</sup> The Convention recognizes as illegal import, export, and transfer of ownership of cultural property any action taken in this respect in breach of its provisions (art. 3 of the 1970 Convention). It is worth recalling that this group of illegal activities includes, *inter alia*, the forced transfer to another state of ownership of cultural property and its export in conditions of a lack of sovereignty (art. 11 of the Convention), which innovatively also signalled the problem of restitution of cultural property for newly created states – as a result of the abolition of colonial dependencies.<sup>8</sup>

When assessing the significance of the 1970 Convention in terms of the degree to which it obliges the implementation of protective measures in the internal systems of states in order to counteract the acquisition of cultural property illegally removed from the territory of another state, it is wrong to limit domestic activities only to transactions carried out by museums and similar institutions (art. 7 letter a) of the 1970 Convention), as this solution excludes the practical use of the control mechanisms proposed in the Convention for transactions between private persons. The prohibition of the importation of stolen goods into the territory of a state was also narrowly defined, as the Convention covered only cultural property stolen from a museum or from a religious or secular historic public building, or from another similar institution (art. 7 letter b) of the 1970 Convention). Considering the *ratio legis* of the Convention, the provisions contained in art. 8, which postulate that the unlawful behaviour indicated in the Convention be subject to penalties (criminal or administrative) imposed by state parties, should be considered as correct. Therefore, the issue of sanctions was resolved on the basis of the “minimum rule” used at the level of international cooperation, which leaves state parties complete freedom as to the choice of their type and level of sanctions.

The problem of the return of cultural property lost from the territory of a state as a result of the commission of a prohibited act, raised in the UNESCO Convention of 1970, returned in the international forum with the adoption in 1995 of the UNIDROIT Convention on the theft or illegal export of cultural objects.<sup>9</sup> Because it also applies to transactions made by private persons, it can be said that it complements the limitations of the 1970 Convention. In the Preamble to the UNIDROIT Convention, it is emphasized that one of the aims of the Convention is “(...) to facilitate the restitution and

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<sup>7</sup> Convention concerning the Measures to Prohibit and Prevent the Illegal Importation, Export and Transfer of Ownership of Cultural Property, signed in Paris on 17 November 1970, *Journal of Laws* of 1974, No. 20, item 106.

<sup>8</sup> The establishment by UNESCO of the Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation proves the importance attached to the problem (Resolution 20/C4/7.6/5 adopted during the 20<sup>th</sup> Session of the UNESCO General Conference on 24 October – 28 November 1978). For more on this topic, see: A. Chechi, “Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects” [in:] *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, eds. S. Borelli, F. Lenzi, Leiden 2012, p. 352.

<sup>9</sup> UNIDROIT Convention on Stolen or Illegal Export of Cultural Objects, adopted in Rome on 24 June 1995.

return of cultural property and to provide remedial measures, such as compensation, needed to restore their possession and return" (recital 4). Among the possibilities of recovering lost cultural property, art. 5 of the Convention provides for the possibility of conducting a dispute before a competent court or other authority of the petitioned state in the territory of which the illegally exported property is located, in order to obtain an order to return such property to the petitioning state (para. 1). The solutions proposed in the Convention are mainly of a formal and legal nature; in particular they define the type, scope, and conditions of the parties' participation in activities that should be undertaken by participants in the dispute. The convention in general does not contain substantive regulations; however, justifying the need for their preparation, the Preamble generally mentions the dangers of illegal trade in cultural property, robbery of archaeological excavations, and finally the illegal export of cultural property. Against this background, art. 3 para. 2, which directly relates to the concept of "theft", requires that the obtaining of cultural goods as a result of illegal archaeological excavations be included within its scope, when the law of the country of origin of the cultural goods prohibits such behaviour.

On the other hand, the Convention on offenses related to cultural property, prepared by the Council of Europe in 2017,<sup>10</sup> is of a different character. This is because its main goal is to prevent and combat illegal trade in and destruction of cultural goods, also in cooperation with other international organizations, especially those whose activities include combating terrorism and organized crime. The spectrum of problems included in the 2017 Convention is wide, but the substantive criminal law regulations – Chapter II (articles 3–9) is devoted to these – are of key importance. Because of the scope of the regulations of a substantive criminal nature, the 2017 Convention is unique in this respect, as it does not use the "minimum rule" in the definition of penalized behaviour and the imposition of sanctions on it.

The Nicosia Convention criminalizes acts that directly threaten cultural property, such as theft, unlawful excavation, illegal acquisition, and behaviour consisting in forging documents, destroying, or damaging cultural property, if committed intentionally. All of the above-mentioned acts are, to a greater or lesser extent, related to the problem of exporting cultural property from the territory of a state; however, there is no doubt that this problem becomes particularly current in conjunction with the act of illegal trade in cultural property, including, in particular, its import, export, and placing on the market.

It follows from the justification attached to the Convention that the unification of the basic provisions of substantive criminal law in the field of the protection of cultural property strengthens the national systems of criminal law protection by establishing common standards. Because of the lack of universal models, legal loopholes or defective regulations existing in individual internal systems limit the possibilities of prosecuting and combating crimes against cultural property. In this context, in connection

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<sup>10</sup> Council of Europe Convention on Offences relating to Cultural Property, done in Nicosia on 19 May 2017.

with the transnational nature of the crime of illegal export of an item of cultural property from the territory of an affected state and resulting from the obligation to return the illegally exported property to the affected state, problems can be seen, such as different limitation periods for prosecuting crimes in individual countries, different rules for protecting buyers in good faith, and differences in the type and effectiveness of legal measures at the disposal of customs and border protection units of countries not belonging to the European Union. As a result, the perpetrators' knowledge of defective or incomplete regulations defining the legal conditions for the importation and removal of cultural property from the territories of individual countries contributes to the impunity that perpetrators enjoy with regard to this type of crime.

In European Union law relating to the issue of the search for and recovery of cultural property lost as a result of committing a crime, the following instruments are crucial: the Council regulation on the export of cultural goods<sup>11</sup> and the Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State.<sup>12</sup> The need to introduce this type of legal instruments was directly related to the creation of a common market in the area of the then European Economic Community.<sup>13</sup> It was rightly assumed that the free movement of goods would favour various illegal activities, especially their illegal movement.<sup>14</sup>

Against this background, the jurisprudence of the Court of Justice of the European Union (CJEU) also plays an important role. Its intervention may turn out to be necessary, for example, in the event of doubts about the application of restrictions allowed by art. 36 TFEU<sup>15</sup> to the application of the principle of free movement of goods due to the "protection of national cultural goods of artistic, historical or archaeological value" (recital 2 of the preamble to the 2014 Directive). The need to take into account the position of the CJEU may also arise in the event of controversy when assessing the definitions of cultural goods adopted by individual nation states, for the creation of which they have been granted competence in art. 36 TFEU (recital 3 of the 2014 Directive Preamble).

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<sup>11</sup> Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39, 10.02.2009, p. 1.

<sup>12</sup> Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, amending Regulation EU No 1024/2012, OJ L 159, 28.05.2014, p. 1.

<sup>13</sup> It is worth recalling that the above-mentioned legal instruments do not correspond to those that were originally adopted with the creation of the common market; the original basis was Council Directive 93/7/EEC of 15.03.1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74, 27.03.1993, p. 74) and Council Regulation (EEC) No 3911/92 of 9.12.1992 on the export of cultural goods.

<sup>14</sup> For more on this topic, see: A. Mattera, "La libre circulation des œuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique", *Revue du Marché Commun de l'Union Européenne* 1993, no. 2.

<sup>15</sup> Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.

The Regulation of 2008 recognizes the requirement to present a permit issued by the relevant Member State as a measure guaranteeing a uniform level of protection to cultural goods in the event of an intention to export them outside the territory of the European Union. The effectiveness of such a measure was connected, firstly, with the need to clearly define it and, secondly, to define implementation procedures (recital 4 of the Preamble). At the same time, it was stipulated that the legal systems of the Member States must provide for sanctions for violating the rules for the export of cultural goods outside their territory. In this case, the Regulation, based on the aforementioned "minimum rule", similarly to the aforementioned acts of international law, does not contain any suggestions as to the choice of the criminal or administrative nature of sanctions, their type, and amount. However, it requires, unlike the aforementioned legal acts, that sanctions should be established taking into account such quantifiers as effectiveness, proportionality, and severity (art. 9).

Violation of the rules set out in the Regulation of 2008 makes the export of a cultural object from the territory of the authorized state unlawful, and the adopted solution is important as it directly affects the substantive scope of application of the Directive on the return of cultural objects unlawfully removed from the territory of a Member State. This state of affairs clearly results from art. 2 point 2 letters a) and b) of the Directive, which recognizes the following as "unlawful removal" of a cultural object from the territory of a Member State:

- the removal of a cultural object from the territory of a Member State in breach of its provisions on the protection of national cultural goods or in breach of the Regulation on the export of cultural goods (letter a);
- failure to return a national treasure before the end of the period of lawful temporary removal or any breach of another condition for such temporary removal (letter b).

## **2. A model approach to the criminalization of the act of illegal export of national cultural property from the territory of a Member State based on the law of the European Union**

In European Union law, the basis for considering the penalisation of behaviour consisting in illegal export of a national cultural good outside the territory of a Member State, as already noted, is the Council Regulation on the export of cultural goods and the Directive of the European Parliament and of the Council on the return of cultural goods unlawfully removed from territory of a Member State. It follows from the above-mentioned definition of "unlawful removal of a cultural good from the territory of a Member State" contained in the Regulation that the export of a cultural object from the territory of a Member State may be considered illegal, not only if the illegality already existed at the time of exportation, but also when, after the goods have been legally removed, the conditions for the legality of exportation are violated. The latter

situation mainly concerns the temporary export of a cultural object and arises when the time limit set for the return of the cultural object to the territory of the Member State from which it was withdrawn is exceeded. The Regulation points out that in the event of exceeding the deadline for return, the Regulation does not make the illegal export of a national cultural object conditional on the distinction of the type of person responsible for its return. The export of a national cultural good will be illegal, irrespective of whether it was carried out by a private person or by a person professionally involved in the protection of, display of or trade in cultural goods. However, the scope of art. 2 point 2 letter b will not apply to cases where the exported object legally belongs to the person who exports it or who agrees to its export, and only after leaving the territory of the Member State, will it be classified as a cultural object which requires an export certificate to be legally exported. This situation corresponds to the principle of *lex retro non agit*.

In art. 2 point 2 of the Regulation, both in the paragraph marked with letter a) and in the paragraph marked with letter b), no reference is made to the future, so the possible return of the cultural object is irrelevant for the recognition of its removal as illegal, and, thus, does not affect the determination of the legal liability of the perpetrator due to illegal removal. It is also irrelevant for the initiation of the procedure whether the fact of illegal export was discovered by the customs authorities or other officials in connection with the crossing of a state border, or whether a notification of illegal export of cultural property was submitted by conservation supervisory authorities to the competent authorities.

When defining the illegality of removing an item of national cultural property from the territory of a member state, the illegality is not linked to necessary damage of national heritage resources. It is enough, therefore, that the national cultural good is removed from the territory of the state without the appropriate permit. With regard to art. 2 of the Regulation, it does not follow that the fact that an export license could have been issued in relation to a given good is relevant for the designation of illegal exportation. As a result, it is illegal to export a cultural object even if there were no obstacles to issuing a license for its export outside the territory of a member state, and the exporting party merely disregarded the obligation to obtain an export certificate.<sup>16</sup>

It should also be noted that the structure of an act consisting in illegal removal of a national cultural good outside the territory of a Member State, in the version resulting from the Regulation, is closely related to the regulation adopted in a given Member State on granting a permit for the export of a national cultural good outside its territory. This issue is significant because the rules and procedure for obtaining certificates authorizing the export of cultural goods are determined by administrative law; as a result, if illegal export in the domestic system is considered a crime, then

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<sup>16</sup> J. de Ceuster, "Les règles communautaires en matière de restitution de biens culturels ayant quitté illicitement le territoire d'un Etat member", *Revue du Marché commun de l'Union Européenne* 1993, no. 2, p. 55.

determining the features of the act in the form of illegal export will be related to the violation of the regulation determined by administrative law.

The definition of the term “cultural good” is also important for the penalisation of behaviour consisting in illegal removal of a cultural object from the territory of a member state. A synthetic definition of a national cultural good based on commonly recognized quantifiers, e.g., artistic, scientific, historical, archaeological, or ethnographic value, is not adopted in the Regulation. In the discussed case, the aggregate definition type was used – the definition of “cultural good” has been reduced to the specification of the categories of objects that have been granted protection.

With regard to art. 1 of the Regulation, it follows that, for the purposes of the Regulation, the term “cultural object” includes the categories of objects specified in Annex I to the Regulation. In addition to listing the categories of items for which freedom of movement has been restricted, the Annex considers two types of limits: age and economic value. This solution is practical because, since it is up to the Member States to consider an object as a cultural object, the quantifiers used in the cooperation between the Member States must be based on objective, unambiguous features that do not require additional interpretation. From a practical point of view, the adopted solution is conducive to the efficiency of border and customs services, while the efficiency of the above-mentioned units guarantees protection to the Member States against the undesirable phenomenon of smuggling.

When considering the model approach to penalizing the act of illegal removal of a cultural good from the territory of a Member State, it is also necessary to take into account the Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State. This need is already clear from the title of the Directive, which clearly indicates that the *sine qua non* condition for initiating restitution procedure is the unlawful removal of a cultural object from the territory of a Member State. In order to guarantee the coherence of the system, the Directive, when defining the phrase “illegal removal from the territory of a Member State”, refers to the above-mentioned Council Regulation of 2008 (art. 2 (2) of the Directive). Therefore, it does not modify the conditions adopted in the Regulation that determine the illegal removal of a cultural object from the territory of a Member State.

It should be emphasized, however, that the Directive differs from the Regulation in that it defines the concept of “cultural property”. According to art. 2 of the Directive, “cultural property” means an object “which, before or after its unlawful removal from the territory of a member state, has been classified or defined by a Member State, on the basis of national legislation or administrative procedures, as a national cultural object of artistic, historical or archaeological value within the meaning of art. 36 TFEU”.<sup>17</sup>

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<sup>17</sup> The current regulation concerning the definition of the term “cultural object” does not repeat the solution adopted in the former Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. The 1993 Directive, like the Directive currently in force, in its art. 1 gave Member States the right to define cultural objects, but in order for an object belonging to the national cultural heritage to fall within the scope of the 1993

For an unambiguous linguistic interpretation, also in relation to art. 2 of the Directive, it is worth emphasizing once again that the object removal from the territory of the state cannot be considered illegal if it was legal at the time of export, and only after its removal was the object classified as a “cultural good”.

*De lege lata*, therefore, the only condition for applying the solutions adopted in the Directive is that a property should be recognized by a Member State as “belonging to the national artistic, historical or archaeological heritage”. It should be noted that the concept of delineating the boundaries of the restitution proceedings developed in European Union law differs from both the system adopted in the UNIDROIT Convention and the UNESCO Convention of 1970, in which the boundaries of restitution proceedings are determined by the list of selected categories of cultural goods attached to them, along with an indication of thresholds of age limit and economic value.

While expressing appreciation for the system adopted in the 2008 Directive as an advantage, it should be pointed out that in the adopted system the Member State sovereignly decides not only about the scope of the national heritage, but also may seek to restore the content of its national heritage. In this context, it is necessary to recall the problems with the return of goods illegally removed from the territory of a Member State during the period of validity of the Directive of 1993, which, as already mentioned, used a different mechanism. This is because there were cases in which cultural goods were prohibited for export in the interest of the state, but they were below the threshold limits set out in “Annex A” to the 1993 Directive, which made it difficult to launch the procedure for their return provided for therein.

This problem was raised in particular by the Italian doctrine, which, approving the current solution, judges it to be lawful in the light of art. 36 TFEU, which recognizes and justifies the differentiation of national systems for the protection of national heritage.<sup>18</sup> It is true that when assessing the conditions of illegality, the rules set out in the Regulation of 1993 are still used, but in the event of applying for the return of a cultural good that does not meet the limits adopted in Annex I, the rule to solve this problem is contained in recital 8 of the Preamble to the Directive from 2008:

(...) This Directive should therefore cover collections of historical, paleontological, ethnographic or numismatic interest or of scientific value, whether they form part of public collections, other collections, or whether they are individual objects and whether they come from legal or illegal excavations, provided that they are classified or defined as national treasures. In addition, cultural objects classified or defined as national cultural goods should be

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Directive, it also had to be listed in Annex A, the list of objects that can be returned under it. The third recital states that the purpose of the list was to limit the scope of restitution proceedings. The list was also intended to facilitate cooperation in the recovery of cultural objects. For more on this topic, see: A. Gerecka-Żołyńska, “Restytucja dóbr kultury a wolny rynek sztuki”, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1996, no. 2, pp. 50–51.

<sup>18</sup> For more on this topic, see: L. Pasquali, “Art. 74. Esportazione di beni culturali dal territorio dell’Unione Europea” [in:] *Codice dei beni culturali e del paesaggio*, eds. G. Famiglietti, N. Pignatelli, Nel Diritto Editore 2015, p. 464.



eligible for return under this Directive regardless of whether they belong to certain categories or meet thresholds related to their age or their financial value.

Bearing in mind the above-mentioned recital of the Preamble of the Directive of 2008 and looking for additional regulations in it significant for the assessment of the illegal removal of a cultural object from the territory of a Member State, it must be ultimately said that its unquestionable merit is the mutual recognition between Member States of national regulations concerning the export of cultural goods from their territory.

### **3. Illegal export of a cultural good from the territory of a Member State from a national legal perspective**

The Council Regulation on the export of cultural goods leaves the Member States the freedom to regulate several important issues, among which, from the criminal law point of view, the need to define the conditions of an offender's legal liability is in the foreground. The regulation indicates that the path of establishing the perpetrator's liability may be administrative or criminal, and each of these paths has both advantages and disadvantages.

In the administrative mode, the course of the proceedings is very efficient and the penalties imposed are usually high. The punishment imposed is of a financial nature; it is painful, but it has no possibility of fulfilling educational functions, and it is not modified in the course of executive proceedings. The adjudicating body also does not have the possibility of ordering additional measures, e.g., regarding compensation for damage; moreover, imposing an administrative penalty usually does not limit the social functioning of the perpetrator.

In the criminal responsibility mode, the course of the proceedings is longer, but the court has the option to choose a penalty, from the least painful (a fine) to the most severe, which is imprisonment. Apart from choosing the type of penalty, it also defines its severity within the limits indicated in the act, and may decide on the application of additional measures, which strengthens the individual prevention aim of the penalty. Moreover, conviction results in consequences directly related to the social functioning of the perpetrator, not only in the form of deprivation of liberty, but also, for example, deprivation of the possibility to practice a profession or forfeiture of property. On the other hand, the procedure of criminal liability makes it possible to apply to the perpetrator institutions that mitigate the penalty, such as waiving the penalty, imposing a lighter penalty due to the procedural agreements of the perpetrator with procedural authorities, or a conditional suspension of execution in the case of a sentence of imprisonment. Bonus treatment of the offender also takes place in executive proceedings, in which, due to the obligation to update the objectives of the execution of the sentence, a further modification of the penalty, e.g., remission of a fine, conditional

early release from serving a sentence of imprisonment, or shortening the period of expunging the sentence, is possible.<sup>19</sup>

In Poland, illegal export of cultural goods from the territory of the state is classified as a crime under art. 109 of the Act on the protection and preservation of monuments<sup>20</sup>. Imprisonment, ranging from three months to five years, is imposed on a person who, without permission, takes a cultural object abroad or, having taken it abroad, does not bring it back to the territory of Poland within the period of validity of the permission given to do so, or who, in the event of a decision to refuse another permit or leaving such an application unprocessed, does not bring the exported cultural object back to Poland within sixty days from the date when the decision became final or from the date the applicant received information that the application had been left unprocessed (art. 109 para. 1).

In the event that the perpetrator has acted unintentionally, the penal sanction is mitigated by the possibility of imposing milder penalties: restriction of liberty, fines or imprisonment, but on a lower scale – up to 2 years (art. 109 para. 2).

Moreover, the court may adjudge a payment in excess of three times the minimum remuneration for a social purpose related to the care of historical monuments and forfeiture of cultural property, even if it is not the property of the offender (art. 109 paras. 3 and 4).

The court's decision on the adjudication of an excess or forfeiture is optional in nature; so the grounds for taking such a decision are directly related to the assessment of a specific case. The legislator has not shown such an understanding in every national system. In the legislation of countries where the illegal export of cultural goods is one of the most frequently committed offenses, in order to deter future perpetrators, a solution is adopted in which forfeiture is imposed obligatorily, but with the exception of cases where the cultural object does not belong to a person or persons associated with the offense of illegal exportation.<sup>21</sup>

The issue of imposing a forfeiture as one of the sanctions attributed to the crime of illegal export of a cultural good from the territory of a state is also topical under the law of the European Union, particularly with regard to the possibility of imposing a forfeiture in a situation where the court is deprived of the conditions to decide the case on its *merits*.

In the law of the European Union, the possibility of forfeiture in a situation where the court does not adjudicate on the *merits* of a case is provided for in the Directive of the European Parliament and of the Council on the securing and confiscation of instrumentalities and proceeds of crime in the European Union.<sup>22</sup> The directive imposes an

<sup>19</sup> V. Manes, "La tutela penale" [in:] *Il diritto dei beni culturali*, eds. C. Barbati, M. Cammelli, G. Sciuolo, Bologna 2003, p. 219.

<sup>20</sup> Act of 23 July 2003 on the protection and preservation of monuments, consolidated text: *Journal of Laws* of 2021, item 710.

<sup>21</sup> L. Pasquali, "Art. 74 Esportazione di beni culturali...", p. 465.

<sup>22</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3.04.2014 on the securing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.04.2014, p. 39.

obligation on the Member States to introduce legal regulations into national systems that allow for the forfeiture of tools involved in and benefits derived from a crime, also when the court does not decide on the *merits* of a case, because there is an obstacle that prevents the issuance of a conviction despite the fact that the evidence collected in the case justifies it. However, the directive limits the decision on forfeiture under such conditions to situations where, firstly, the tools involved in and benefits obtained as a result of committing the crime were already secured in the course of the proceedings, and secondly, where they come from serious organized crime. From the point of view of the criminal law protection of cultural goods, the suggested solution may be relevant when the activities of an organized criminal group include illegal export of cultural goods and other crimes against cultural goods, such as theft of and illegal trade in works of art, especially fencing.

In Polish criminal law, the conditions of forfeiture without conviction of the perpetrator are specified in art. 45a paras. 1 and 2 of the Act of 6 June 1997 – Criminal Code (consolidated text: *Journal of Laws* of 2020, item 1444). Article 45a para. 1 of the Criminal Code indicates substantive legal circumstances, the occurrence of which leads to giving up conviction or to the inadmissibility of the conviction, but leaves open the possibility of forfeiture.<sup>23</sup> In art. 45a para. 2 of the Criminal Code, in turn, the circumstances of a procedural nature, which make it impossible to continue criminal proceedings, have been enumerated accordingly, with the reservation, however, that in this situation forfeiture may be ordered only when the evidence collected in the case indicates that if the perpetrator was convicted, forfeiture would be ordered.<sup>24</sup>

Commentary unanimously emphasizes that art. 45a of the Criminal Code, both in terms of material and procedural conditions, permits forfeiture not only of items derived directly from the commission of the crime, but also items that were used to commit the crime, or items prohibited from being manufactured, possessed, traded, transmitted, or transported (so-called prohibited items)<sup>25</sup>. Therefore, the regulation provided for in art. 45a of the Criminal Code can also be applied in the case of the crime of illegal export of a cultural good penalized in art. 109 of the Act on the protection and preservation of monuments.

Analysing the content of art. 45a paras. 1 and 2 of the Criminal Code, it may be stated that such a possibility may be realistically used when a circumstance excluding conviction of the perpetrator appears, i.e., expiration of the statute of limitations for the offence (art. 17 para. 1 point 6 of the Act of 6 June 1997 – Code of Criminal

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<sup>23</sup> The material and legal circumstances include: the insignificant social harmfulness of the act, conditional discontinuance of criminal proceedings, the existence of a circumstance excluding the punishment of the perpetrator of the act, or the commission by the perpetrator of a prohibited act in a state of insanity (due to a mental illness, mental retardation, or other disturbance of mental functions, the perpetrator could not, at the time of the act, recognize its meaning or control his or her conduct).

<sup>24</sup> The circumstances excluding the possibility of conducting criminal proceedings include: death of the accused, failure to detect the perpetrator, failure to apprehend the accused, and lack of participation of the accused in the proceedings due to mental illness or serious somatic disease.

<sup>25</sup> V. Konarska-Wrzosek [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer Polska, Warszawa 2020, LexOmega, thesis to art. 45a.

Procedure<sup>26</sup> in connection with art. 101 of the Criminal Code), or when in the course of the proceedings the accused dies (art. 17 para. 1 point 5 of the Code of Criminal Procedure), or the proceedings have to be suspended because of a serious somatic disease which prevents the accused from participating in criminal proceedings (art. 22 of the Code of Criminal Procedure).

On the other hand, one should definitely oppose the adoption of this solution in the event of discontinuance of criminal proceedings due to the insignificant social harmfulness of an act, as this would be a decision in contradiction with the accepted legal assessment.<sup>27</sup>

From the point of view of the level of severity of punishment, in addition to the possibility of imposing a forfeiture in the case of the commission of an offence of illegal export of a cultural good from the territory of the state, the possibility of imposing a measure in the form of a ban on practicing a profession or carrying out an activity should be recognized as equally severe if the perpetrator of illegal export was a person professionally engaged in the sale or exhibition for sale of cultural goods.<sup>28</sup>

The *ratio legis* in this case is conducive to disciplining the activities of brokers who trade in cultural goods, and above all, it serves to maintain the integrity of the national cultural heritage. As regards criminal law protection, the cross-border elements of prohibited acts make the tightness of the system dependent on cooperation between states.

#### 4. Conclusions

The above considerations convincingly suggest that the contemporary rational legislator, in order to develop optimal legal protection, cannot be limited only to taking into account the models functioning within the national legal order. As regards criminal law protection, the cross-border elements of prohibited acts make the tightness

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<sup>26</sup> Consolidated text: *Journal of Laws* of 2021, item 534.

<sup>27</sup> In the context of the present discussion, it should be recalled that, in the Polish legal system, the possibility of imposing a forfeiture for the benefit of the State Treasury of cultural property illegally exported from the territory of Poland may also occur outside the criminal process. Such a solution, in the case of the return of cultural property illegally exported from the territory of Poland under art. 30 of the Customs Law, is provided for by the Act of 25 May 2017 on the restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591) in art. 9 paras. 2–5, which implements into the system of Polish law the 2014 Directive on the return of cultural property unlawfully removed from the territory of a Member State. The purpose of the proceedings conducted under this procedure is to protect the state's interest in the form of recovery and preservation of any lost cultural property, which is not directly related to the determination of criminal liability of the perpetrator of illegal export; moreover, the perpetrator of illegal export may still remain unknown. For more on this topic, see: I. Gredka-Ligarska, "Uregulowanie własności narodowego dobra kultury zwróconego na terytorium Polski w ustawie o restytucji narodowych dóbr kultury", *Państwo i Prawo* 2019, no. 8, pp. 103–121.

<sup>28</sup> C. Barbati, M. Cammelli, L. Casini, G. Piperata, G. Sciuillo, *Diritto del patrimonio culturale*, Bologna 2017, pp. 187–188.

of the system dependent on cooperation between states. The most effective form of cooperation is the common definition of the subject of protection, measures for its implementation, and sanctions resulting from violation of standards adopted in an international agreement or in other instruments undertaken at the level of transnational cooperation, such as, e.g., common positions, recommendations, and area programs.

In theoretical terms, the current problems of penalizing the act of illegal removal of a piece of cultural property from the territory of the state directly affect the methodology of research in this subject. In the current *status quo*, among research methods, comparative research is gaining importance, although in this case comparative legal studies may be limited to the analysis of specific solutions, without the need to thoroughly examine foreign legal orders.

Taking into account the functions assigned to comparative legal studies,<sup>29</sup> it can be stated that in the research area outlined in this way, a unification function comes to the fore among the functions of comparative studies. However, this should not be reduced to checking the differences between unified regulations in order to develop common regulations, but its aim should also be to ensure optimal protection of cultural goods against illegal removal from the territory of a state, which contributes to increasing the security of trade in cultural goods and makes it possible to maintain the integrity of a national cultural heritage. In addition, in order to achieve a satisfactory level of protection of cultural property in terms of the indicated threats, comparative research should be multilateral and conducted in a planned manner. As regards the comparison of the regulations adopted in the legal systems of the European Union Member States, research is facilitated by the fact that these systems prefer the model of criminal liability *vis-à-vis* perpetrators of prohibited acts against cultural property. This corresponds to a general tendency to introduce more rigorous systems of conduct in relation to perpetrators of this type of prohibited acts, especially by stricter penalties and distinguishing among the basic types of crimes, types qualified via the specific object of protection, which is cultural goods.

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<sup>29</sup> The functions of comparative legal studies are to identify sets of activities performed in accordance with the chosen comparative methods in order to achieve set goals. For more on this topic, see: R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, p. 198.

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## Summary

**Anna Gerecka-Żołyńska**

### **International and transnational conditions of penalization of illegal export of cultural property from the territory of a legitimate state**

This article discusses the issue of international and supranational conditions of criminalization of illegal export of a cultural object from the territory of an authorized state. The text is divided into four parts. The first is introductory in nature, indicating the acts of international law that have been developed in order to prohibit the illegal export of cultural goods abroad and to combat the functioning of the illegal art market. In particular, on the one hand, it is pointed out that it was necessary to introduce mechanisms into internal control systems to prevent illegal export of cultural goods. On the other hand, the importance of national protection measures adopted in order to counteract the acquisition of cultural goods illegally removed from the territory of another state is emphasized. Attention is paid to the crime of theft, falsification of documents, fencing, and illegal trade in cultural goods, especially their import, export, and marketing, related to the crime of illegal export of cultural goods. The instruments are indicated that have been adopted within the framework of cooperation between EU Member States in order to counteract the illegal export of cultural goods.

Detailed comments on counteracting the illegal export of cultural goods from the territory of the authorized state between the EU Member States are discussed in the second part of the article under the title: A model approach to penalizing the act of illegal export of national cultural goods from the territory of a Member State on the basis of European Union law.

The third part of the article covers the analysis of the problem of illegal export of a cultural object from the territory of a Member State from the perspective of national law. The discussion focuses primarily on the conditions for determining the individual legal liability of the perpetra-

tor of the illegal export of a cultural object and the type and amount of the penalty imposed as a result of such behavior.

The article ends with a fourth part, in which final conclusions are formulated. The key factor is the statement that the contemporary rational legislator, in order to work out optimal legal protection, cannot be limited only to taking into account the patterns functioning within the national legal order. In this context, the significance of the unification function of law increases. This allows the introduction of uniform standards of protection, thanks to which the protection of cultural goods against illegal export beyond the borders of the authorized state is strengthened on an international and supranational scale.

**Keywords:** cultural goods, illicit trafficking in works of art, ban on the export of cultural goods abroad, control mechanisms for the export of cultural goods across borders

## Streszczenie

*Anna Gerecka-Żołyńska*

### Międzynarodowe i ponadnarodowe uwarunkowania penalizacji nielegalnego wywozu dobra kultury z terytorium państwa uprawnionego

W artykule omówiono międzynarodowe i ponadnarodowe uwarunkowania penalizacji nielegalnego wywozu dobra kultury z terytorium państwa uprawnionego. Tekst został podzielony na cztery części. W pierwszej, o charakterze wprowadzającym, wskazano akty prawa międzynarodowego, które zostały opracowane w celu ograniczenia nielegalnego wywozu dóbr kultury za granicę i ograniczenia funkcjonowania nielegalnego rynku dzieł sztuki. Z jednej strony wskazano na konieczność wprowadzania do systemów wewnętrznych mechanizmów kontrolnych uniemożliwiających nielegalny wywóz dóbr kultury poza granice państwa. Z drugiej podkreślono znaczenie krajowych środków ochronnych przyjmowanych w celu przeciwdziałania nabywaniu dóbr kultury nielegalnie wywiezionych z terytorium innego państwa. Zwrócono uwagę na związane z przestępstwem nielegalnego wywozu dobra kultury za granicę przestępstwa kradzieży, fałszowania dokumentów, paserstwa, nielegalnego handlu dobrami kultury, w tym zwłaszcza ich importu, eksportu oraz wprowadzania do obrotu. Wskazano instrumenty, jakie w celu przeciwdziałania nielegalnemu wywozowi dóbr kultury z terytorium państwa zostały przyjęte w ramach współpracy między państwami członkowskimi UE.

Szczegółowe uwagi dotyczące przeciwdziałania nielegalnemu wywozowi dóbr kultury z terytorium państwa uprawnionego między państwami członkowskim UE zostały omówione w punkcie drugim publikacji.

W punkcie trzecim problem nielegalnego wywozu dobra kultury z terytorium państwa członkowskiego poddano analizie z perspektywy prawa krajowego. Skoncentrowano się przede wszystkim na warunkach ustalenia indywidualnej odpowiedzialności prawnej sprawcy nielegalnego wywozu dobra kultury oraz rodzaju i wysokości kary wymierzanej w rezultacie takiego zachowania.

Punkt czwarty zawiera wnioski. Za kluczowe należy uznać stwierdzenie, że współczesny racjonalny prawodawca w celu wypracowania optymalnej ochrony prawnej nie może ograniczać się tylko do uwzględniania wzorców funkcjonujących w ramach krajowego porządku prawnego.

W tym kontekście wzrasta znaczenie funkcji unifikacyjnej prawa, która pozwala wprowadzić jednolite standardy ochrony, dzięki czemu w skali międzynarodowej i ponadnarodowej dochodzi do wzmocnienia ochrony dóbr kultury przed ich nielegalnym wywozem poza granice państwa uprawnionego.

**Słowa kluczowe:** dobra kultury, nielegalny handel dziełami sztuki, zakaz wywozu dóbr kultury za granicę, mechanizmy kontrolne wywozu dóbr kultury za granicę