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PUNISHMENT IN CASES OF OFFENCES AGAINST CULTURAL HERITAGE. MODEL REMARKS AGAINST THE BACKGROUND OF UNESCO AND THE COUNCIL OF EUROPE CONVENTIONS

Abstract

Among the issues raised internationally that relate to the protection of cultural heritage, increasing attention is being paid to the individual responsibility of perpetrators of crimes against cultural property. The aim to harmonise the level of criminal law protection of cultural property in national legal systems is seen as one of the most important factors that could reduce crime in this area. Legislative initiatives undertaken by countries in order to strengthen the criminal law protection of cultural property focus primarily on two groups of problems: the development of a catalogue of offences against cultural property and the determination of the type and amount of sanctions with which these offences should be threatened.

In the search for an optimal pattern of penalisation, the article identifies the norms of international law influencing the scope of penalisation of behaviours violating the principles of protection of cultural property in the national legal orders and analyses the legislative achievements so far obtained within the framework of international cooperation at the universal and regional (European) level. The considerations were concentrated around three key issues, which were considered to be: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set

out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against cultural property under legal protection. The last part of the article consists of the final conclusions formulated after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law protection of cultural heritage indicated above.

KEYWORDS

international protection of cultural heritage, individual criminal responsibility, UNESCO, Council of Europe, European Union, cultural property, criminal sanctions, administrative sanctions, imprisonment, confiscation of property

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międzynarodowa ochrona dziedzictwa kulturowego, indywidualna odpowiedzialność karna, UNESCO, Rada Europy, Unia Europejska, dobra kultury, sankcje karne, sankcje administracyjne, pozbawienie wolności, konfiskata mienia

1. HIGHLIGHTING THE PROBLEM

In the field of international law, the question of undertaking formalised cooperation for the protection of cultural property became particularly important in the second half of the 20th century with the establishment of international organisations that included the protection of cultural heritage among their basic statutory objectives.[1] In this context, from a global perspective, it is worth mentioning the establishment of UNESCO in 1946, and from a regional (e.g., European) perspective, the establishment of the Council of Europe in 1949.[2]

[1] Bart Zwegers, *Cultural Heritage in Transition A Multi-Level Perspective on World Heritage in Germany and the United Kingdom, 1970–202*, Springer 2022, 3 <https://doi.org/10.1007/978-3-030-93772-0>; see more Alberto Martorell, *The role of cultural heritage in the global society* in Bogusław Szmygin (ed), *Heritage in transformation: cultural heritage protection in XXI century – problems, challenges, predictions*, Lublin 2016, 151–152.

[2] Attempts to regulate the few issues of protection of cultural property related to humanitarian law were made as early as the beginning of the 20th century. The peace conferences organised at that time in The Hague resulted in the adoption of several conventions regulating the conduct of armed conflicts. Of particular importance, from the point of view of the protection of cultural property, were those adopted in 1907: Convention IV on the Laws and Customs of War and Convention IX on Bombardment by Naval Armed Forces in Time of War. Another example of the beginnings of international cooperation for the protection of cultural property is the Treaty

De lege lata, attention is drawn to the disproportion between the adopted rules of cooperation based on civil law instruments and those based on criminal law elements. The former have a comprehensive character, and among them, the remedies in the form of return or restitution of cultural property occupy a key position, while criminal law protection is regulated in a marginal and fragmentary way.[3] The low level of recommendations for criminal law protection is the result of the use of the concept of minimum intervention in international treaties for the protection of cultural property.[4] This concept leaves States Parties free to choose the acts challenged and the sanctions threatened, which may be criminal or administrative. The freedom of choice of sanctions indicates that it is of primary importance to achieve the stated objective of ensuring effective protection of cultural heritage. Determining the means by which this objective is achieved holds lesser importance. The advantage of using the concept of minimum intervention is the flexibility to implement the solutions adopted in the international agreement into the national order.

The arguments in favour of strengthening criminal law protection include, on the one hand, the increase in the level of threat and variety of attacks on cultural property and, on the other hand, the increase in the real possibility of apprehending the perpetrator of a criminal offence using measures provided for in the criminal procedure. Against this background, the inclusion of the perpetrators of this type of crime committed in the context of an armed conflict under the jurisdiction of the International Criminal Court[5] is also of particular importance.

A mode of responsibility based on the norms of criminal law is linked to the need for national criminal law systems to develop a catalogue of offences against cultural objects, which may include specific behaviour not yet criminalised. The constituent elements of the offences in these cases are co-determined, inter alia,

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for the Protection of Artistic and Scientific Institutions and Historical Monuments, adopted on 15 April 1935 by the majority of American states (Brazil, Chile, Dominican Republic, Guatemala, Colombia, Cuba, Mexico, El Salvador, USA, Venezuela), referred to as the Roerich Treaty after its creator. For a more extensive discussion, see Roger O' Keefe, *The Protection of Cultural Property in Armed Conflict,* Cambridge 2006, 22–27; Anna Przyborowska-Klimczak, *Rozwój ochrony dziedzictwa kulturalnego w prawie międzynarodowym na przełomie XX i XXI wieku*, Lublin 2011, 43–71.

[3] See also Wojciech Kowalski, *Restytucja dzieł sztuki w prawie międzynarodowym*, Katowice 1989, 22–24; Kamil Zeidler, *Restitution of cultural property*, *Hard Case. Theory of Argumentation. Philosophy of Law*, Gdańsk-Warszawa 2016, 26–29.

[4] Stefano Manacorda, 'Criminal Law Protection of Cultural Heritage: An International Perspective' in Stefano Manacorda, Duncan Chappell (eds), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer 2011, 18.

[5] Rome Statute of the International Criminal Court done at Rome on 17 July 1998 <https://www.icc-cpi.int>.

by the rules of legal protection of cultural property adopted in the national legal order, insofar as they prescribe the manner of dealing with these exceptional objects. As a result, violations of these rules lead to criminal liability.

This solution is peculiar in the sense that if the questioned behaviour concerned objects other than cultural assets, it could remain unpunished. Under the Polish Act on the protection and care of monuments,[6] for example, we may point to the act of destroying a monument, which is classified as a criminal offence (Article 108(1–2)). Criminal liability in this case is incurred by anyone who destroys a monument, even if the destruction is carried out by the owner of the monument. Criminal liability in the case of destruction of things that are not monuments is enforced on the basis of Article 288 (1) of the Polish Criminal Code[7] and applies only to behaviour involving destruction of another person's property. An important element in shaping effective criminal law protection is also the selection of appropriate penalties and criminal measures to be imposed for offences against cultural property, taking into account the relevant rules of individual and general prevention. The purpose is not only to prevent impunity for acts that threaten cultural heritage, but it is also fundamental that they are in accordance with the standards of due process and the norms guaranteed by international human rights law.

2. RESEARCH METHODOLOGY

The article analyses the key treaties for the protection of cultural heritage developed by UNESCO and the Council of Europe in order to indicate the norms of international law influencing the level of penalisation of behaviour violating the principles of protection of cultural property in the national legal orders.[8] The considerations carried out focus on three issues: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against legally protected cultural property.

The final conclusions are drawn after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law

[6] Act of 23 July 2003 on the protection and care of historical monuments (Consolidated text, Official Journal 2022, 840).

[7] Act of 6 June 1997 Criminal Code (Consolidated text, Official Journal 2023, 17).

[8] Scott Veitch, *Moral Conflict and Legal Reasoning*, Oxford, Portland Oregon 2002, 205–206.

protection of cultural heritage indicated above. The considerations are carried out primarily using the dogmatic legal method.

3. THE CONCEPT OF JUST PUNISHMENT IN CRIMINAL LAW DOCTRINE

Punitive repression, which corresponds to the moral principle that wrong deeds should be punished, has for centuries acted as a regulator of human relations.[9] In social terms, a punishment that arouses universal approval, resulting from the need for revenge, which is one of the elements of the social sense of justice, is considered just.[10]

In the science of criminal law, the discussion on just punishment has been held for years, both on the grounds of its adjudication in the *civil law* system, as well as in the *common law* system.[11] It is nowadays unanimously accepted that punishment should take into account both retributive and preventive objectives. The essence of punishment should not be reduced to a mere problem of retribution.[12] In the process of imposing a particular punishment, its severity is of paramount importance, which depends on the gravity of the act, the degree of guilt and the consideration of the various circumstances of the offence, classified as mitigating or aggravating. In this context, it is worth recalling the Italian Constitutional Court's ruling No 313 of 4 July 1990, from which it follows that punishment has an obligatory repressive character and is deeply linked to the need for social defence and the general prevention of crime. The retributive and repressive functions of punishment should set the minimum conditions without which punishment would lose its meaning. However, the Court has stipulated that, while reintegration, deterrence and social defence are values with a constitutional basis, the impairment of civil rights on their basis can only occur for a corrective purpose, explicitly defined in the Italian Constitution in the context of punishment.[13]

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[9] Kazimierz Buchała, Andrzej Zoll, *Polskie prawo karne*, Warszawa 19955, 13.

[10] Bogusław Janiszewski, 1999, 'Sprawiedliwość kary. Rozważania w świetle prawnych podstaw jej wymiaru' in Andrzej J Szwarc (ed), *Rozważania o prawie karnym. Księga jubileuszowa z okazji 70. urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, 152–153; Paweł Petasz, *Sens, istota i cele kary kryminalnej*, Gdańskie Studia Prawnicze, 2005, Vol XIV, 1129.

[11] The discussion covers not only the notion of fair punishment but also the principles of due process, without which it is objectively impossible to achieve fair punishment. Kevin J Heller, Markus D Dubber, 'Introduction' in Kevin J Heller, Markus D Dubber (eds) *The handbook of comparative criminal law*, Stanford University Press 2011, 2–3.

[12] Jarosław Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, 22.

[13] M. C. Carta, *Detention conditions and treatment of prisoners in the case-law of the Court of Justice of the European Union and of the European Court of Human* Rights in Anna Gerecka-

This view is also reflected in the democratic legal systems of other countries that respect human rights, in particular the standards for deprivation of liberty set out in the International Covenant on Civil and Political Rights (Articles 9 and 10)[14] and, at the European level, in the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 3, 5, 7).[15] It is emphasised in the doctrine that the concept of just punishment is linked to the principle of proportionality by assuming that it is measured in accordance with the (negative) value of the act.[16] From a practical point of view, for the concept of just punishment, not only the type and seriousness of the offence for which it is imposed is of significance, but also the comparison of the given punishment with penalties currently imposed for similar offences.[17]

Among the comments on the concept of 'just punishment', one cannot overlook the concept of 'restorative justice', which has been gaining increasing recognition in recent decades, despite the partly critical assessment of the doctrine.[18] Restorative justice reduces the importance of the criminal response, giving priority to providing compensation to the victims of the crime for their losses.[19] In the case of crimes against cultural goods due to their unique and irreplaceable scientific, cultural, historical, and archaeological value, the obligation to compensate for the damage caused by the crime, even if it constitutes a significant financial burden for the perpetrator, leaves a deficiency from the point of view of satisfying the victim. As a result, the victim will expect justice not only by compensating the harm caused by the crime, but also by imposing a severe punishment on the perpetrator.[20] In this context, under the norms of international criminal law, the jurisdiction of the International Criminal Court is of particular interest. In the structure of the proceedings before this Court, the compensation procedure, in

-Żołyńska (ed), *International legal sources of implementation of the humanitarian principle in the of imprisonment*, Poznań 2021, 61–62.

[14] International Covenant on Civil and Political Rights adopted on 19 December 1966 in New York <https://www.ohchr.org>.

[15] Council of Europe Convention of the Protection of Human Rights and Fundamental Freedoms, Roma 4 November 1950, Council of Europe Treaty Series – No 005 <https://www.coe.int/en/web/conventions>.

[16] Marian Cieślak, *Polskie prawo karne*, Warszawa 1999, 129.

[17] Janiszewski (n 10) 153.

[18] Wojciech Zalewski, *O pojmowaniu sprawiedliwości w prawie karnym*, Gdańskie Studia Prawnicze, 2005, Vol XIV, 1114–1115.

[19] Ilaria Bottigliero, *Redress for victims of crimes under international law*, Springer Dortrecht 2004, 2–3.

[20] Vladimír Pelc, *Criminal Penalties Affecting Property* in Jiří Jelinek, Jozef Záhora (eds), *Sanctions under criminal law*, Wolter Kluwers Budapest 2019, 97.

which the issue of reparation for the losses suffered by the victims of war crimes is decided, constitutes one of the stages of the execution proceedings.[21]

Given, in turn, that the Rome Statute recognises as a war crime the deliberate targeting of buildings dedicated to religious, educational, artistic, scientific or charitable purposes, historical monuments, hospitals and places where the sick and wounded are gathered, provided that they are not military objectives (Article 8(2)(b)(IX) and Article 2 (e)(iv)), compensation may be awarded to a specific group of victims whose loss results from the destruction of a cultural asset. This solution has already been practically used in the *Ahmadi Al Mahdi* enforcement proceedings.[22]

Combining the issues of just and severe punishment against the background of the possibility of punishment in cases of crimes against cultural property, attention must also be paid to the problem of organised crime. For years, there have been suggestions in the science of international criminal law to specify the correlation between the protection of cultural property and the regulation of organised crime. This issue was particularly emphasised after the adoption of the United Nations Convention against Transnational Organised Crime in Palermo.[23]

Those in favour of extending the catalogue of offences relating to participation in an organised criminal group, as defined in the 2000 Convention, to include the offence of trafficking in works of art and archaeological artefacts, justified their position above all by the need for a global toughening of penalties for the perpetrators of this type of offence. At the time, they called for an interpretative extension of the provisions of the Palermo Convention in national legal orders by including offences against cultural property. In particular, with reference to the definition of serious crime in Article 2(b) of the 2000 Convention, it was suggested to States Parties that, for offences of trafficking in works of art and archaeological artefacts committed in conjunction with participation in an organised group, the threshold for a minimum term of imprisonment should be set at four years.[24]

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[21] More: Anna Gerecka-Żołyńska, 'Procesowe oczekiwania ofiar w postępowaniu przed Międzynarodowym Trybunałem Karnym na tle zasady rzetelnego postępowania sądowego' in *Hominum causa omne ius constitutum sit. Księga jubileuszowa Profesora Piotra Hofmańskiego*, Paweł Czarnecki and others (eds), Wolters Kluwer 2024, 539–546.

[22] International Criminal Court judgment of 27 August 2016, No ICC-01/12-01/15 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF>.

[23] The United Nations Convention of 15 November 2000 against Transnational Organized Crime, adopted by General Assembly resolution 55/25 (UNTOC, Palermo Convention) <https://www.unodc.org/unodc/en>.

[24] Manacorda (n 4) 22.

The issue of strengthening the protection of cultural heritage against the threats posed by trafficking, with reference to the solutions adopted in the Palermo Convention, was also signalled at international forums during this period, inter alia, in the 'Protection against trafficking in cultural property' resolutions promulgated by the Economic and Social Council in 2004[25] and 2008,[26] as well as in several subsequent Security Council resolutions.[27]

Within the framework of cooperation between European states, the question of distinguishing offences against cultural goods committed as part of the activities of an organised group as a specific category of offence was resolved with the adoption of the Council of Europe Convention on Offences Relating to Cultural Property.[28] At that time, it was decided that offences relating to cultural property committed by organised criminal groups or with the intention of financing terrorist operations would generally be classified as terrorist offences. At the same time, the existing international and national counter-terrorism instruments were considered sufficient, also with regard to the prosecution of this type of crime.[29]

In a similar way, this problem has been addressed in European Union law, as confirmed, for example, by the Regulation on the entry and import of cultural objects into the European Union from non-member countries adopted in 2019.[30] In justifying the adoption of the aforementioned legal instrument, it was linked to the objectives pursued by the Directive on combating terrorism, adopted in 2017.[31]

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[25] (ECOSOC) Resolution 2004/34, adopted during the 47th plenary meeting on 21 July 2004, 'Protection against trafficking in cultural property', <https://ecosoc.un.org/default/files/documents/2023/resolution-2004-34pdf>.

[26] (ECOSOC) Resolution 2008/23, adopted during the 42th plenary meeting on 24 July 2008, 'Protection against trafficking in cultural property', <https://ecosoc.un.org/ecosoc/docs/2008/resolution%202008-23.pdf>.

[27] Resolution 2199 of 12 February 2015 of the UN Security Council, particularly paragraphs 15, 16 and 17; Resolution 2253 of 17 December 2015 of the UN Security Council, in particular paragraphs 14 and 15; Resolution 2322 of 12 December 2016 of the UN Security Council, in particular paragraph 12; Resolution 2347 of 24 March 2017 of the UN Security Council <https://documents.un.org./doc/unoc>.

[28] Council of Europe Convention on Offences Relating to Cultural Property adopted on 19 May 2017 in Nicosia, Council of Europe Treaty Series – No 221.

[29] Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property <https://rm.coe.int/1680a55237>.

[30] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the entry and import of cultural goods (Official Journal. EU.L.2019.151.1).

[31] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (Official Journal.EU. L 88, 31 March 2017).

4. THE SCOPE OF CRIMINAL LAW PROTECTION OF CULTURAL PROPERTY IN THE UNESCO AND COUNCIL OF EUROPE DOCUMENTS

Adopted by the Council of Europe in 2017, the Nicosia Convention is an act of international law comprehensively setting out the substantive and formal conditions for the criminal law protection of cultural property. In general terms, the document also formulates model comments on the sanctions that should be imposed on behaviour that violates the principles of this protection. The Convention takes into account the significant solutions developed so far in the field of the protection of cultural property in the international forum, both at the global and regional (European) cooperation level.

Prior to the adoption of the Nicosia Convention, the issue of the criminal law protection of cultural objects was signalled primarily by the UNESCO Conventions of 1954 on the Protection of Cultural Property in the Time of Armed Conflict[32] and 1970 on Measures to Prohibit and Prevent the Illicit Import, Export and Transfer of Ownership of Cultural Property.[33] In terms of global commitments in this context, mention should also be made of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[34] With regard to initiatives developed by the Council of Europe, it is worth recalling the Convention on Crimes against Cultural Property drawn up in 1985, although its practical significance is negligible as it has not been ratified by any State.[35]

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[32] Council of Europe Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with its implementing Regulations and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed at Hague on 14 May 1954; Second Protocol, drawn up at Hague on 26 March 1999, to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention – Legal Affairs – <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention>).

[33] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; adopted by the General Conference at its 16th session, Paris, 14 November 1970 (UNESCO Digital Library – <https://unesdoc.unesco.org/ark:/48223/pf0000133378>).

[34] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995 (1995 Convention - UNIDROIT – <https://www.unidroit.org/instruments/cultural-property/1995-convention/>).

[35] Council of Europe Convention on Crimes against Cultural Property (known as the 'Delphi Convention') was opened for signature to Council of Europe Member States on 23 June 1985. It has not entered into force because only six states have signed it and none have ratified it, Council of Europe Treaty Series – No 119.

Among the above-mentioned acts of international law, the Second Protocol appended in 1999 to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict[36] is of particular importance from the point of view of the criminal law protection of cultural property. This document, in Article 15(a–e), identified five cases classified as grave breaches of this Protocol, among which three: (a) making a cultural property subject to enhanced protection the object of attack, (b) using a cultural property subject to enhanced protection or its immediate surroundings in support of military action, and (c) extensive destruction or appropriation of a protected cultural property, were considered to be acts that threaten the security of cultural property to such a degree that their perpetrator should be held criminally responsible.

Against the conduct defined in Article 15(a–c) of the Second Protocol, there was thus no provision for non-criminal sanctions, which constituted an innovative solution. Hitherto, respecting the concept of 'sovereignty' and applying the concept of conventional minimalism, the decision on the choice of the type of legal responsibility of the offender was left to the State, equally assessing the level of protection built on criminal and administrative sanctions. Thus, State Parties to the Second Protocol were obliged to incorporate into their national systems the relevant crimes, the prosecution of which should take into account the principles of international law. Among the instruments of international cooperation in this context, the need for legal assistance, the introduction of universal jurisdiction, the preservation of extradition regulations and the recognition of the principle of *aut dedere aut iudicare* in cases where extradition is not possible[37] were pointed out in particular.

The horizontal approach to the criminal law protection of cultural heritage facilitates the strengthening of the response of the judiciary of individual states in prosecuting crimes against cultural property, expands the possibilities of international cooperation and eliminates gaps in the existing protection system resulting from the diversity of national regulations. Against this background, attention is first drawn to the need to harmonise the statute of limitations for criminal prosecution and the rules of prosecution as well as to equalise the level of legal liability in the case of unlawful actions aimed at marketing illegally obtained cultural property. The implementation of this demand would deprive the perpetrators of illegal activities of the possibility to evade the resulting consequences, by choosing as the place of the crime countries with a lenient catalogue of penalties and

[36] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999 <https://www.ihl-databases.icrc.org/assets/590-IHL-95-EN.pdf>.

[37] Manacorda (n 4) 29; O' Keefe (n 2), 2006, 274.

low effectiveness of law enforcement agencies (*forum shopping*). This idea was included in the 2017 Council of Europe Convention, extending it to other types of criminal acts.

The Nicosia Convention lists the acts endangering cultural property which should be criminalised in the national legal order.[38] The issue of sanctions regulated by Article 14 of the Convention generally coincides with the content of Article 9 of the Council of the European Union Regulation laying down the rules for the export of cultural objects from the territory of a Member State.[39] Both the Convention and the Regulation give the sanctions three basic functions: prevention, effectiveness and proportionality. On the other hand, Article 14 of the Nicosia Convention innovatively suggests that offences against cultural property should be punishable by a custodial sentence high enough to warrant extradition. The European Convention on Extradition[40] identifies offences punishable by a maximum term of imprisonment of at least one year or more as grounds for extradition (Article 2(1)).

5. MONETARY PENALTIES UNDER THE NICOSIA CONVENTION AS DETERRENT ELEMENTS

Article 14 of the Nicosia Convention lists monetary penalties in addition to the penalty of imprisonment. At the same time, it stipulates that imprisonment should not be imposed for excavating on land or under water to find and remove cultural objects without having the authorisation required by the law of the State in which the excavation took place (Articles 14(1) and 4(1a)) and for the importation of movable cultural objects, which is prohibited under the law of the State concerned, if the cultural objects were obtained from excavations carried out without the authorisation required by the law of that State (Articles 14(1) and 5(1b)).

Imprisonment should also not be imposed for exporting protected cultural property in violation of the law of a State if the perpetrator knew that it had been stolen, extracted or exported in violation of the law of another State (Articles

[38] Theft and other forms of unlawful appropriation (Article 3), Unlawful excavation and removal (Article 4), Illegal importation (Article 5), Illegal exportation (Article 6), Acquisition (Article 7), Placing on the market (Article 8), Falsification of documents (Article 9), Destruction and damage (Article 10).

[39] Regulation 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal. EU.L.2009.39.1).

[40] Council of Europe Convention on Extradition Paris, 13 December 1957, Council of Europe Treaty Series – No 024.

14(1) and 5(1c)). The proposed solution should be assessed positively, even though it partially breaks the criminal law model for the protection of cultural heritage, shaped by the 2017 Convention. The recommendation to adopt a monetary penalty as a reaction to the above-mentioned unlawful behaviour makes it possible to establish the responsibility of the perpetrator not only through criminal liability, but also through administrative liability. Responsibility based on the elements of administrative law in the discussed scope may be the preferred option due to the fact that issues related to the search for monuments and their export abroad are regulated by administrative law. In this context, such issues of the national cultural heritage protection system as the way of cataloguing monuments, the definition of conditions for excavations and the rules for issuing export certificates can be pointed out, among others. On the other hand, it must be stated that the suggestion to subject the illegal search for cultural property and its illegal export from the territory of the State to a punishment other than imprisonment does not exclude the possibility of criminalising such behaviour. In such a case, the criminal sanction may, as recommended by the Convention, be of an economic nature (fine) or otherwise partially restrict the freedom and rights of the perpetrator (e.g., restriction of liberty, prohibition to exercise a profession, prohibition to engage in a certain type of activity). Although it follows from Article 14(2) of the Nicosia Convention that, in the case of offences against cultural property, sanctions prohibiting or restricting professional activities should be imposed on legal persons, in systems where it is not possible to attribute criminal liability to legal persons, the measures listed in Article 14(2) of the Nicosia Convention should be applied to natural persons responsible for offences against cultural property if the commission of the offences was in connection with their professional activities.

Given that the profit motive is one of the leading motives for offences against cultural property, national legal systems should include among the consequences of such offences measures allowing for the seizure and confiscation of any instrument used in the commission of the offence and the seizure and confiscation of proceeds or property derived from the commission of the offence. Such a solution is introduced in Article 14(3) of the Nicosia Convention.

In contrast, the Nicosia Convention report[41] states that the way in which measures relating to the seizure and confiscation of the proceeds of crime are defined corresponds to the concepts adopted in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,[42] and the Council of

[41] Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property <https://rm.coe.int/1680a55237>.

[42] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in Strasbourg on 8 November 1990, Council of Europe Treaty Series – No 141.

Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,[43] which identify confiscation of the proceeds of crime as one of the most effective instruments to combat crime. In this view, confiscation is not only intended to prevent the unjust enrichment of the perpetrator, but also has a deterrent function due to the coercive nature of taking the proceeds and property obtained through the commission of a crime.

The criminal law nature of asset confiscation is, therefore, important to ensure that this measure can be realistically enforced, and not only within the national system. Asset confiscation is one of the measures included in cooperation agreements in criminal matters between States, which allows it to be enforced even when the property is located outside the territory of the State in which the criminal proceedings take place. Confirmation of cooperation in criminal matters between EU Member States in this dimension, for example, is provided by Regulation (EU) 1018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.[44] When implementing the criminal measure of confiscation of property obtained through the commission of a criminal offence, questions of assessing the good faith of the purchaser of an illegally obtained object are irrelevant.[45] The resulting conflict between the unauthorised transferor, the legitimate victim and the bona fide purchaser in terms of reparation shall be resolved on the basis of civil law and, if necessary, on the basis of the rules contained in the aforementioned international treaties, when the scope of the transaction goes beyond the borders of a single State.

6. CONCLUSIONS

The type, level and effectiveness of punishment are important factors with which crime against cultural goods can be reduced. However, the introduction of strict rules of criminal responsibility into national legal systems will not decrease the level of crime if it is not backed up by effective law enforcement and judicial action. The deterrent function of punishment can be fully realised if the potential offender is convinced not only of the severity of the punishment, but also of the

[43] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on 16 May 2005, Council of Europe Treaty Series – No 198.

[44] Regulation (EU) 1018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders (Official Journal UE. L. 2018.303.1).

[45] Agnieszka Plata, *Spór o zbiory Muzeum Brytyjskiego*, Gdańsk 2024, 112–116.

impossibility of avoiding it. The first step towards the attribution of criminal responsibility in a fair criminal trial is, therefore, the apprehension of the offender. In countries where law enforcement agencies have a high level of operational efficiency, this usually happens quickly. Among other things, international cooperation is important to achieve this goal, not only in the case of cross-border crimes, but also when the perpetrator of a crime seeks refuge in another country to avoid criminal responsibility.

Against this background, it must be stated that the Nicosia Convention is a tool of international law that facilitates States Parties to delimit the scope of the penal protection of cultural heritage in their national legal systems and sets out rules for cooperation in the prosecution of such offences. The document has also been prepared for the benefit of States not belonging to the Council of Europe, which promotes the global unification of the model of criminal law protection of cultural property. It is, therefore, rightly pointed out that the ratification of the Convention by as many countries as possible will reduce the phenomenon of *forum shopping* primarily by levelling the level of criminal sanctions.

It is worth emphasising that the assumption adopted in the Convention that the offences listed therein are to be punishable by imprisonment, with the minimum lower limits of imprisonment unequivocally defined, is an innovative solution, as none of the previously adopted acts of international law on the protection of cultural property contained such regulations. Defining the lower limit of imprisonment at a level that allows the extradition of the perpetrator is an important element in strengthening the criminal law protection of cultural heritage at the level of international cooperation. Such is also the case with the recommendation that perpetrators be ordered to confiscate property and proceeds of crimes against cultural property.

The particular value of cultural heritage means that professionals responsible for its preservation should, in the event of a breach of their duties, be deprived of the possibility of continuing to exercise their profession or trade. The imposition of this type of sanction closes off an avenue of income and forces a change in previous professional activity, which in a broad assessment, can be perceived as equally distressing as the imposition of a custodial sentence.

On the other hand, the Nicosia Convention, in order to preserve the coherence of national legal systems for the protection of cultural heritage, does not deprive States Parties of the possibility of enhancing the role of administrative sanctions in this system, which, unlike criminal sanctions, are more flexible and of a more generalised nature. From the point of view of international cooperation, however,

their feasibility is relatively limited by the lack of comprehensive cooperation instruments beyond the few regulations adopted by the Member States of the European Union.

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