

FIGHTING AGAINST THE LAUNDERING OF THE PROVENANCE OF ANTIQUITIES AND CULTURAL GOODS ON THE SWISS ART MARKET

PAR ENZO BASTIAN

I. Introduction

In 2022, the global art market was estimated at nearly USD 67.8 billions¹. Given its significance and because of greed, this market attracts a multitude of actors, including criminal and terrorist organizations. These organizations find on this market the means to diversify their activities and launder their income. This opportunity can be explained by the features that underpin this market: opacity, anonymity, discretion, international scope, etc². These are criterias sought out by such organizations because they are seeking loosely regulated sectors to carry out their activities.

On the art market, the illicit trafficking⁴ of antiquities and cultural goods is an essential activity for criminal and terrorist organizations. Evidence of this is that the share attributed to these criminal activities was estimated in 2018 at a value between USD 6-8 billions³. Accordingly, these activities are ranked third behind drugs and arms trafficking. To analyze this phenomenon and understand how it could be possible to improve its prevention, it is necessary to present the concept of illicit trafficking of antiquities and cultural goods, and then to assess how the concerned goods are subsequently laundered (II.). It will then be possible to see what legal responses have been adopted and those that should or could be put in place (III.).

II. The laundering of the provenance of antiquities and cultural goods from illicit trade

For several years, criminal and terrorist organizations have coordinated excavations or committed thefts, looting, and even destruction of historical sites in certain regions of the world in order to recover antiquities and cultural goods⁵. They then aim to resell their discoveries to fund their activities or launder their money⁶. Some of these organizations are even specifically mandated to commit

those acts⁷. To facilitate their trafficking, these organizations target regions rich in cultural heritage and unstable due to internal or external conflicts (Middle East, Latin America, Africa, etc.)⁸.

Goods excavated in these so-called "source" countries are then exported to so called "market" countries to be sold⁹. However, the process of selling these goods requires the involvement of other art market actors. To this end, criminal and terrorist organizations resort to corruption. Experts, officials, or even art dealers are sought out to provide their services (transport, storage, authentication, sale, etc.)¹⁰. The creation of fake documents (export or authenticity certificates, prior sales contracts, etc.) is also a necessary step in creating legitimacy for the items sold¹¹. Goods may also be placed in free-trade zones such as the free ports of Geneva for storage for a few years before being re-released for their sales¹². The combination of these elements allows these objects to have their origins "laundered" and become freely exchangeable on the art market. The provenance of the art work is laundered.

III. Current legal framework and proposal for alterations

To overcome this problem of "laundering of provenance" and illicit trafficking of these goods, several sets of rules have been adopted over the years (UNESCO or UNIDROIT international conventions; European directives; national laws, etc.)¹³. In this system, the main emphasis is on the role of art dealers in detecting abuses and attempts at laundering through due diligence and checks (Art. 15 and 17 CPTA¹⁴ in Switzerland)¹⁵. Failures to fulfill these obligations, even by negligence, are coupled with a threat of criminal charges as per Art. 24 CPTA.

However, another important criminal aspect remains and should not be overlooked: by participating directly or indirectly in these processes, these actors (criminal/terrorist organization, art dealers, transporters, storers, etc.) commit the constituent elements of the offense of money laundering (Art. 305bis CP¹⁶)¹⁷. Indeed, through their behavior, they allow heritage values resulting from crimes to be laundered. This criminal offense should not be overlooked by these actors, since in matters of money laundering, complicity, even to the degree of simple assistance for transport or storage, might be punishable¹⁸.

To limit this phenomenon so destructive for global cultural heritage, better awareness of art market actors is essential. In this sense, although a large part of these actors still seem reluctant to this idea¹⁹, it is crucial to strengthen the communications of suspicions of money laundering carried out by these actors. These communications are the cornerstone of the money laundering prevention system²⁰. They are what allows the criminal prosecution authorities to have sufficient information to fight against money laundering, organized crime, and ultimately allow the dismantling of networks of trafficking in antiquities and cultural goods.

Accordingly, to improve the current situation, the rules against money laundering, especially the obligations under the AMLA²¹, should be fully applicable to art

market actors. A parliamentary motion was recently filed to this effect, but it was dismissed by the Federal Council, who, while admitting the existence of a risk for money laundering in this sector, decided not to intervene²¹.

An alternative solution therefore lies in the self-regulation of the sector. This is beginning to develop, especially with the RAM Initiative (Responsible Art Market) which is raising awareness of risks faced by the art industry and providing practical guidance on establishing and implementing responsible practices to address those risks²². However, such an initiative does not have the same binding force as it does in the financial sector with the SBA rules.

IV. Conclusion

In conclusion, if the art market, represented by its actors, truly wants to fight against illicit trafficking of antiquities and cultural goods, it will have to abandon some of its own traditions. Renouncing anonymity and discretion in order to offer better information to criminal prosecution authorities to fight against these traffics seems a reasonable cost, especially when reminded that other sectors have already given it up, without catastrophic consequences for the industry (e.g. the banking sector).

In this sense, it is worth noting that international cooperation plays and will play an essential role in this field. It is already particularly effective. Indeed, to conclude on a positive note, Operation Pandora VI can be mentioned, which since its launch in 2016, has resulted in 407 arrests and the recovery of nearly 147,050 objects²⁴. After all, there might be a glimmer of hope on the horizon.

Ph.D. Candidate/Graduate Assistant at CEDIDAC

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NOTES ET RÉFÉRENCES

[1] Art Basel/UBS, The Art Market 2022, An Art Basel & UBS Report, prepared by Dr. Clare McAndrew, p. 17.

[2] Roth Monika, Money Laundering and the Art Market, Jusletter 11.1.2016, N 32 ; Kern Martin, Geldwäschereisiken im Kunsthandel, SJZ 117/2021, p. 375 ff., p. 380.

- [3] Wehinger Frank, *Illegale Märkte*, Stand der sozialwissenschaftlichen Forschung, MPIfG Working Paper, 11/6, Max-Planck-Institut für Gesellschaftsforschung Köln, October 2011, p. 50.
- [4] Renold Marc-André, *Projet conjoint UNESCO/Commission européenne « Engager le marché de l'art dans la lutte contre le trafic illicite des biens culturels »*, Étude pour la conférence de renforcement des capacités, 20-21 mars 2018 – « Le commerce légal et illégal de biens culturels et à travers l'Europe : faits, conclusions et analyse juridique, Genève, 27.2.2018, p. 9.
- [5] Ferrari Morgane, *Art et blanchiment d'argent*, ESKA Sécurité Globale, n°7, 3/2013, p. 121 ff., p. 124-125 ; Renold, (n. 4), p. 7 & 14-15 ; Lambert Guillaume, *Blanchiment et marché de l'art, le droit et la pratique*, Paris 2020, p. 44 ff. ; Michel Vincent, *Le trafic illicite des biens culturels dans les pays en conflit : De l'identification des objets : la judiciarisation des affaires*, Patrimoines, revue de l'Institut national du patrimoine, 2020, p. 58 ff., p. 63 ; FATF, *Money Laundering and Terrorist Financing in the Art and Antiquities Market*, February 2023, N 29, 73, 75 ss & p. 54-56, Box 35, 36, 37 & 38.
- [6] Renold, (n. 4), p. 9 & 15 ; Lambert, (n. 5), p. 38 ; Michel (n. 5), p. 61.
- [7] Renold (n. 4), p. 5 and cit. ref.
- [8] Tijhuis AJG (Edgar), *Transnational crime and the interface between legal and illegal actors: the case of the illicit art and antiquities trade*, Thesis University of Leiden, Oisterwijk 2006, p. 133-134 ; Renold, (n. 4), p. 7 ; Lambert, (n. 5), p. 41-42 ; Michel (n. 5), p. 58-61 ; FATF, (n. 5), N 72.
- [9] Renold (n. 4), p. 6 and cit. ref.
- [10] Roth, (n. 2), N 10 ; Renold (n. 4), p. 15 ; Lambert, (n. 5), p. 44.
- [11] Renold (n. 4), p. 4 & 6 ; Lambert, (n. 5), p. 44 ; Michel (n. 5), p. 63 ; FATF, (n. 5), N 30.
- [12] See for instance, a case where in 1995, nearly 3,000 antiques belonging to art dealer Giacomo Medici were found in these warehouses. These goods had been subject to illicit excavation and then smuggled into Switzerland. Medici then fabricated false documents to justify the origin and transaction history of these goods. On this basis, he would then ship them to be sold in the United States [Tijhuis, (n. 8), p. 189-190].
- [13] See Renold (n. 4), p. 10 ff.
- [14] Federal Act on the International Transfer of Cultural Property of 20 June 2003, (Cultural Property Transfer Act, CPTA), SR 444.1.
- [15] Renold (n. 4), p. 18 ; Savanovic Ivana/Eichenberger Lukas, *Know the provenance – Die Tücken der Annahme (potenziell) kontaminierter Kunst aus Sicht des Stiftungsrats*, ius.full 2022, p. 38 ff., p. 42 ff.
- [16] Swiss Criminal Code of 21 December 1937, SR 311.0.
- [17] Renold (n. 4), p. 16 ; Savanovic/Eichenberger (n. 16), p. 46-48.
- [18] Ackermann Jürg-Beat (Hrsg.), *Kommentar Kriminelles Vermögen-Kriminelle Organisationen: Enziehung, Kriminelle Organisation, Finanzierung des Terrorismus, Geldwäscherei*, Band II, 3. Auflage, Zurich/Bâle/Genève 2018, Art. 305bis StGB, N 772-773 ; Kern (n. 2), p. 382.

[19] Lambert, (n. 5), p. 110 ff. See also Renold who points out that self-regulatory codes of ethics are often poorly respected and applied in practice [Renold (n. 4), p. 19].

[20] Lambert, (n. 5), p. 98.

[21] Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (Anti-Money Laundering Act, AMLA), SR 955.0.

[22] Motion Pult CN 22.3104 « *Pas de contournement des sanctions. Pour que le commerce de l'art soit soumis à la loi sur le blanchiment d'argent* » from 10.3.2022 (in french).

[23] Renold (n. 4), p. 16 & 19. See not. Art Market Guidelines on the RAM website, available at: <http://responsibleartmarket.org> (lastly checked on 22.6.2023).

[24] FATF, (n. 5), p. 28-29, Box. 13.