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in the fight against the illicit trafficking of cultural property”

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THE LEGAL AND ILLEGAL TRADE IN CULTURAL PROPERTY TO AND  
THROUGHOUT EUROPE: FACTS, FINDINGS AND LEGAL ANALYSIS

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**THE LEGAL AND ILLEGAL TRADE IN CULTURAL PROPERTY TO AND  
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## I. Introduction

At UNESCO's request, the University of Geneva Art- Law Centre has performed the present review of *The legal and illegal trade in cultural property to and throughout Europe: Facts Findings and legal Analysis*. It is meant to be used as a background document for the project *Engaging the European Union in the fight against illicit trafficking in cultural property*.

We start by reviewing the licit and illicit dimensions of the trade in cultural property (II), before assessing the present legal regime in Europe (III) and discussing the challenges faced and possible answers (IV).

The present report should be considered as work in progress and the authors would greatly appreciate receiving any comment relating to its contents from the participants to the project.

## II. The Licit and Illicit Dimensions of the International Trade in Cultural Property

The international market for art and cultural property is an ever increasing one. Buyers are willing to purchase works of art and antiquities in galleries, antique shops and at auction.<sup>1</sup> According to the TEFAF Art Market Report 2017, in 2016 the art market generated about US\$45 billion of global sales, up 1.7 percent compared to 2015.<sup>2</sup>

Europe is the largest art market in the world in terms of sales made through auctions, private sales and dealers, and in terms of recorded cross border trade of artworks. Europe is thus the largest global exporter of artworks, totalling US\$14.59 billion, and the second largest in terms of imports after the United States, with US\$11.5 billion of art and antique imports into and between European countries.<sup>3</sup> Over half of this was into the United Kingdom (with \$6.275 billion in value). The next largest trading country is Switzerland with 6% of global trade. France counts 5%, whereas Germany counts 3%. Trade with Italy represents 1.5% of global trade, and Austria, Belgium, Spain and The Netherlands each roughly 0.5%.<sup>4</sup>

Paradoxically, it is this worldwide interest that generates risks and threats for the integrity of cultural property. Indeed, the increasing demand for works of art and antiquities not only results in the development of a healthy art market with an international dimension. It is also the cause of the illicit trafficking in cultural materials resulting from the theft from museums, private collections, and religious buildings, and the irremediable looting and destruction of archaeological sites or the pillage from buildings and monuments.

Theft is universally recognized as an offence to be subject to criminal sanction. It can be defined as the act in which property belonging to another is taken without that person's consent. Being a generic term, theft comprises any intentional and fraudulent taking of property, regardless of whether the taking occurred with violence or threat of violence (robbery) or with trespass (burglary) or not. The notion of theft applies to the taking of property belonging to private persons, be they natural or legal persons (such as collectors or private galleries), as well as to States or State-controlled institutions (such as public museums or archives). In the same vein, objects can be stolen by individuals as well as by States.

The illicit removal of cultural property relates to two similar phenomena. First, it refers to the unauthorized and unscientific looting of archaeological sites by clandestine excavators. Many art-rich countries provide laws that require archaeological excavations to be authorized through an

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<sup>1</sup> Deloitte, *Art & Finance Report 2016*, 16, available at: <https://www2.deloitte.com/lu/en/pages/art-finance/articles/art-finance-report.html>.

<sup>2</sup> Pownall A.J.R., *TEFAF Art Market Report 2017*, 2017, p. 12.

<sup>3</sup> *Ibid.*, pp. 72-73.

<sup>4</sup> *Ibid.*, p. 75.

administrative process. As part of the same problem, this offense addresses the situation whereby a cultural object has been excavated by duly authorised personnel in compliance with existing legislation, but it has not been delivered by them to the competent body. Second, the illicit removal refers to the forced dismemberment of cultural property (such as statues, frescoes and friezes) from monuments, buildings or sites. With respect to the first case, it should be mentioned that the legislation of many States establishes that ownership of archaeological objects is vested *ipso iure* in the State, regardless of whether such objects have been previously possessed, documented or inventoried by State officials. The fact that most national laws (patrimony laws) establish the principle of the State's ownership in such clear terms entails that the person removing an archaeological object without permission can be prosecuted as a thief, and that the property found by a chance finder can be forfeited to the State if the finder fails to comply with his/her obligation to declare the find to the competent State authorities. Therefore, the State whose patrimony has been impoverished due to theft is treated similarly to a dispossessed individual collector. The primary function of these laws is to deter the clandestine excavation of archaeological sites by making looted antiquities unsaleable and to punish the looters.<sup>5</sup>

Illicit exportation refers to the smuggling of cultural property in breach of the legislation of the exporting country. Many States have adopted laws prohibiting or restricting the export of cultural property. These laws either prohibit the exportation of items that have been designated as belonging to the inalienable cultural heritage of the State, or allow the (definitive or temporary) exportation of other objects provided that the exporter obtains an authorization by the competent national authorities in accordance with the law of the State from which the cultural property is being exported. Export controls not only apply to artefacts inscribed in the patrimony of the State, but also to objects that are in private ownership. There may be the case that the legitimate owner of a cultural object decides to secretly smuggle it out of the country in order to reap the profit that he/she could not obtain on the national art market. Although legally owned by someone other than the State, certain items can be subject to normative restrictions on movement. If an artefact is legally sold to another person and transferred from the country of origin without appropriate permission, the export is deemed illicit. Generally speaking, these export regulations do not affect the ownership title of cultural property as their purpose is simply to avoid the restriction in their movement.

These offenses are often combined. In effect, stolen or illegally removed objects are commonly exported abroad. In addition, the three infractions described above are often associated to other illicit conducts. These include the falsification or the tampering with documents in order to deceive and induce customs agents or other officials to believe that cultural property has a licit provenance and that can legitimately be exported. Moreover, the illicit trade can result from cybercrime offences, ie offences 'committed by means of a computer system or network'.<sup>6</sup> This is the case of art objects which have been stolen or illicitly excavated and then put on sale online.

### **A. The Transnational Dimension of the Illicit Trade in Cultural Property**

Many disputed cases point to the transnational nature of the illicit trafficking in cultural objects. The convictions of Giacomo Medici,<sup>7</sup> Frederick Schultz and Jonathan Tokeley-Parry,<sup>8</sup> and Subhash

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<sup>5</sup> Ulph J. and Smith I., *The Illicit Trade in Art and Antiquities*, Oxford: Hart, 2012, 86.

<sup>6</sup> INTERPOL, Office of Legal Affairs, *Countering Illicit Trade in Goods: A Guide for Policy-Makers*, Legal Handbook Series, 10.

<sup>7</sup> Giacomo Medici was arrested in 1997, found guilty of dealing in stolen goods in 2004, and sentenced to 10 years in jail. His appeal was rejected in December 2011. Isman F. and Harris G., 'Smuggler's Final Appeal Fails', *The Art Newspaper*, No. 233, March 2012. For a full account of this case see Watson P. and Todeschini C., *The Medici Conspiracy*, New York: Public Affairs, 2006.

<sup>8</sup> Within a larger criminal network, UK-based restorer Jonathan Tokeley-Parry disguised Egyptian antiquities as touristic souvenirs to facilitate their transport, and he forged documentation from a non-existent collection to facilitate their sale by US-based Frederick Schultz, one of New York's most prominent art dealers. For a full account see Ulph and Smith, *supra* n. 5, 93-95.

Kapoor<sup>9</sup> demonstrate that the trafficking in antiquities stretches from local bands of thieves to auction houses and other art trade enterprises in Europe, the United States and Asia. The most common structure of the transnational illicit antiquities trade is that of a market supply chain or network of local small-scale looters, intermediaries (who work as smugglers, handlers or connectors) and buyers that works as follows: bandits loot artefacts; objects are often cut into smaller pieces to facilitate transport, marketability and profit; the pieces are exported to States where title laundering occurs, where false documents are prepared, or where the objects remain hidden away in storage sites until they are deemed to be ripe for sale; finally, the pieces are shipped out to Europe or elsewhere to dealers or other intermediaries, who sell them on the global art market to collectors, auctioneers and museums. Corrupt officials, restorers and other experts might assist the trade. This *modus operandi* is possible because of the art's market opacity. Moreover, convincing evidence also demonstrates that cultural assets are looted on 'commission': dealers or collectors choose artefacts to be looted in art-rich countries, directly or through intermediaries; bandits loot artefacts as per instructions; then the objects follow the usual route.<sup>10</sup>

Three points must be stressed about the transnational nature of the illicit trade in cultural property:

1. First, thieves and smugglers are well aware of the differences, gaps or weaknesses in the law of the different countries, and seek to exploit them in order to increase profits, confound law enforcement efforts and hence lower their chances of being caught. This is demonstrated by the fact that misappropriated artefacts are frequently moved to countries where they can be concealed from police, customs and border officers, where tainted titles can be laundered in ways that pre-empt restitution claims, and where they can be sold legally, either to individuals, institutional collectors or art trade companies. For example, thieves and smugglers tend to send wrongfully taken objects to civil law countries where the protection of good faith purchasers and the security of commercial transactions are favoured over the interests of dispossessed owners. The principle underlying these preferences is captured by the French expression '*en fait de meubles, la possession vaut titre*'. In States such as France and Switzerland the rules on the protection of *bona fide* purchasers establish that once the possessor has satisfied the good faith requirement and the statutory time-period has expired, the possessor acquires good title, while the original owner loses the right to recover. The fact that the seller – possibly the thief – did not have such a title is immaterial. Conversely, common law jurisdictions follow the *nemo dat quod non habet* principle (no one can transfer title on stolen property). Accordingly, the mere fact that a person acquires a stolen object in good faith does not extinguish the title of the true owner, and gives the purchaser neither a valid title, nor the right to receive compensation. Thus, common law jurisdictions maintain the title of stolen property in the original owner. This means that the purchaser of cultural property, whether in good faith or not, is vulnerable to a restitution claim by the true owner at any time.<sup>11</sup>

2. In addition, wrongfully taken cultural property normally moves from 'source nations' towards 'market nations'.<sup>12</sup> Although many States may fall into both groups, these two categories accurately reflect the current dynamics of the international trade in art. Source nations are rich in cultural materials and focus on the protection and on the integrity of the national patrimony. It is for these reasons that source nations adopt measures to stem the removal of cultural materials (such as export regulations) and to obtain restitution. By contrast, market nations are the home of affluent collectors

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<sup>9</sup> Kapoor was arrested in Germany in 2011 and extradited to India in 2012, where he awaits trial for overseeing a global smuggling ring to move antiquities from India, Pakistan and Afghanistan to market countries, particularly the United States. US authorities uncovered nearly US\$100 million worth of antiquities at his Manhattan gallery. Seiff S., 'How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back', *ABA Journal*, 1 July 2014.

<sup>10</sup> Conklin J.E., *Art Crime*, Westport: Praeger, 1994, 11-12; and Hardy S.A., 'Is Looting-To-Order "Just a Myth"? Open-Source Analysis of Theft-To-Order of Cultural Property', *Cogent Social Sciences*, 2015, 1.

<sup>11</sup> Mackenzie S., 'The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market', in Manacorda S. and Chappell D. (eds.), *Crimes in the Art and Antiquities World*, Springer, 2011, 69-85, 69.

<sup>12</sup> This distinction is borrowed from Merryman J.H., 'Two Ways of Thinking about Cultural Property' (1986) *American Journal of International Law* 831-853.

and museums, and of art trade companies that can invest huge amounts of money in purchasing foreign cultural property. Market nations acknowledge the problems provoked by the illicit trade. They also agree with source nations on the overall goal of preserving the physical integrity of cultural property. Nevertheless, market nations sustain the importance of free trade as the only means for the flourishing of the exchange of artworks and of the international market, on the one hand, and tend to oppose restitution claims, on the other. A third category comprises ‘transit nations’, that is, States where objects coming from neighbouring source nations are then exported towards market nations. For instance, various cases of high-level smuggling show the role played by Switzerland or Hong Kong as transit portals. In these States various mechanisms are employed so that artworks can be shipped onward with both legal export documents and a provenance that can be used for purposes of sale to buyers. The well-known example is provided by archaeological objects from the classical world which have appeared on the European market with seemingly perfectly legal export papers from Switzerland and with the additional information that they come from the ‘private collection of a Swiss gentleman’.<sup>13</sup>

3. There is empirical and criminological evidence that the illicit trade in cultural property is a complex criminal conduct, most frequently having a transnational dimension, one that requires a certain degree of organization by perpetrators. This does not mean that all groups have a mafia-like organization, with a hierarchical and stable internal structure. Offences related to cultural property are often performed by criminals operating within changing and fluid networks. As explained above, these networks connect looters to buyers. As part of the same problem, it must be pointed out that criminals follow the logic of business. As a result, they do not focus on one area only – say narcotics – but tend to diversify their illicit activities into areas of high profit and little risk of detection or confiscation of profits. This explains the involvement of drugs or arms traffickers in the illicit trade in cultural property. Because this area of activity is characterized by less effective regulations and law enforcement, it can provide an important support for other types of criminal transactions. Looted antiquities are not just a commodity to be sold, they also serve other functions. In connection with narcotics transactions, for instance, they may serve either as initial collateral or as payment.<sup>14</sup> For instance, in countries such as Turkey, Syria and Iraq, looted antiquities have been found together with weapons – or are traded for weapons. Fighters need arms, and antiquities can be an easier way to buy them.<sup>15</sup>

In addition, there is abundant evidence that terrorist groups are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.<sup>16</sup> A notorious example relates to the antiquities from Afghanistan. Mohammed Atta, the mastermind of the 9/11 attacks, attempted to sell antiquities to a German professor at the University of Göttingen, who eventually declined the offer.<sup>17</sup> In addition, there is evidence that cultural objects looted by ISIS in Iraq and Syria have been put on sale by auction houses in Europe. One of the most prominent cases concerns cultural relics looted from the ancient Syrian city of Palmyra and smuggled to Europe.<sup>18</sup>

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<sup>13</sup> Manacorda S. and Chappell D., ‘Introduction’, in Manacorda S. and Chappell D. (eds.), *Crime in the Art and Antiquities World. Illegal Trafficking in Cultural Property*, New York: Springer, 2011, 1-15, 6.

<sup>14</sup> Shelley L.I., *Dirty Entanglements. Corruption, Crime, and Terrorism*, Cambridge: Cambridge University Press, 2014, 262.

<sup>15</sup> Baker A. and Anjar M., ‘Syria’s Looted Past: How Ancient Artifacts Are Being Traded for Guns’, *Time*, 12 September 2012.

<sup>16</sup> United Nations Security Council, Resolution 2199 (2199), para. 16.

<sup>17</sup> Shelley, supra n. 14, 31.

<sup>18</sup> See, for example, Agerholm H., ‘Stolen Artifacts from Palmyra and Yemen Seized in Geneva’, *The Independent*, 4 December 2016.

## B. The Illicit Trade: The Causes

Many are the causes of today's international illicit traffic of cultural objects. One can point to the opening of frontiers, the rapid expansion of low-cost travel and the blossoming of the international art market. As said, the increasing demand for cultural artefacts has resulted in the development of a wealthy art market with an international dimension. Part of the problem is also that art is seen by many as a commodity or as an alternative to traditional investments.<sup>19</sup> At fairs, auction houses and galleries an influx of new riches coming from the world of finance has streamed in not only because artefacts are fashionable and pretty, but also because they happen to be a profitable investment. Indeed, today the art market resembles a 'stock exchange' where artworks are bought and sold either in the hope of earning a direct profit or making an advantageous investment.<sup>20</sup>

The multiplication of conflicts is a further cause of the theft and illicit exportation of cultural materials and the looting of sites and monuments. Criminal activity thrives in chaos, and the theft of antiquities for a rapacious international black market is no exception. For instance, the Arab Spring uprisings of 2011 and the ensuing civil wars served as the catalyst for the systematic theft of antiquities either by the impoverished local population or organized criminal syndicates. The museums, archaeological sites, and monuments making up the unique national heritage of Syria and Iraq have been heavily pillaged since the outbreak of the war.<sup>21</sup> One must add that organized criminal groups are increasingly involved in all aspects of trafficking in cultural objects and related offences. In particular, several reports reveal that trafficking in antiquities has become one of the sources of funding of the 'Islamic State of Iraq and Syria' (ISIS) along with oil and kidnapping.

In addition, the deficiencies of national regulations must be considered. The inadequacy of the legal responses deployed by States against the exploitation of their heritage and the illicit trafficking can be explained by the following reasons. The first is that export regulations are often difficult to enforce because of their excessive breadth and stringency. Second, the criminal measures put in place in various States provide for light penalties and, hence, little deterrence. Third, compliance with the domestic rules in force is inadequately compensated. Consider the problem of chance finds. A large proportion of excavated materials are found during the course of normal agricultural and building activities. Anecdotal evidence suggests that the lack of a satisfactory system of reward and the disruptions caused to the economic activities of the finders in the wake of the archaeological assessment usually lead them to destroy or to dispose of such objects on the black market rather than run the risk of being caught with them. Fourth, the legal and regulatory measures put in place by States rarely control and discipline effectively the demand side of the market.

In relation to the last issue, it should be noted that various cases demonstrate that dealers, auctioneers, museums curators and individual buyers – be they experienced or dilettanti – have often traded in stolen, illegally excavated or illegally exported items – either knowingly or unwittingly. This means that art business firms can betray their own professed culture-sensitive goals by engaging in illicit or unethical conduct. In effect, in a number of instances auction houses have been accused of obscuring the true origin of art objects through their confidentiality clauses, thereby favouring thieves and the criminal organizations that resort to art trade for laundering the proceeds of their illicit activities. In addition, businesses have often been implicated in cases over stolen or looted objects.<sup>22</sup> This also

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<sup>19</sup> Signer R. and Baumann D., 'Art Market Back on Growth Track', Credit Suisse, News and Expertise, 12 May 2011.

<sup>20</sup> Ulph and Smith, *supra* n. 5, 14.

<sup>21</sup> Noce V. and Stapley-Brown V., 'Cheikhmous Ali: The Syrian Archaeologist Who Doesn't Take Sides', *The Art Newspaper*, 10 February 2016.

<sup>22</sup> See eg the case of rare gold bracelets stolen in Romania and then sold in European auction houses (Lazăr A., 'Illicit Trafficking in Cultural Goods in South East Europe: "Fiat Lux"', in Desmarais F. (ed.), *Countering Illicit Traffic in Cultural Goods. The Global Challenge of Protecting the World's Heritage*, ICOM International Observatory on Illicit Traffic in Cultural Goods, 2015, pp. 107-120, 108-109, 115. See also Laetitia Nicolazzi, Alessandro Chechi, Marc-André Renold, "Case Hopi Masks – Hopi Tribe v. Néret-Minet and Estimations & Ventes aux Enchères," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva; and Ece Velioglu, Anne Laure Bandle, Marc-André Renold, "Case Khmer Statue – Cambodia and Sotheby's and the United States," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

means that the global legitimate market runs in tandem with a black market – which is driven by greedy thieves, looters and middlemen hastening to meet the demand – and that in the international art market licit and illicit antiquities are mixed.<sup>23</sup>

Various strategies are employed by looters and smugglers to disguise the illicit means by which artefacts have been obtained.<sup>24</sup> It is difficult to identify looted works of art and cultural property because they are often introduced directly into the legal art market via galleries and auction houses. Furthermore, pieces of art with a dubious provenance can obtain a (natural) safe provenance and increased prominence thanks to repeated sales by galleries or exhibitions in museums. Therefore, the correct provenance is hard to verify and suspicious facts about the trade of looted works of art and cultural goods often come to light as a result of the context or by accident.<sup>25</sup> Therefore, the complicity of art traders that provide faulty provenance and documentation for looted antiquities and the absence of dedicated regulation and law enforcement means are central to laundering strategies.

One might add that advancements in technology allow illegal digging at an increasingly accelerated pace, also in regions that used to be unreachable,<sup>26</sup> and the sale of wrongfully taken cultural property through internet sales platforms like eBay and social media.

### **C. The Illicit Trade: The Scale of the Problem**

A number of studies have reported that the illicit trade in cultural property would be the third most common form of international criminality after arms and drugs trafficking, providing billions of dollars of revenue. For instance, Frank Wehinger estimated that the global illegal market has a value between US\$6 and US\$8 billion per year.<sup>27</sup>

In reality, it is problematic to provide an assessment of the global extent of the illicit trade in cultural property.<sup>28</sup> Indeed, complete and reliable statistics that might help to estimate the true dimension and scope of the illicit trafficking or the monetary value of the black market in cultural property do not exist. The reasons are not hard to find.

First, few countries have the motivation or the manpower to compile periodic statistics of cultural property stolen from museums, galleries, places of worship and private homes, or looted from archaeological sites. This is demonstrated by the fact that INTERPOL receives annually information on cultural property theft from less than half of all States Parties to it.<sup>29</sup>

Another reason is that many crimes remain undetected – this is the case of never-before-seen antiquities excavated by clandestine diggers – or unreported to authorities. Museum curators do not report thefts because they do not want to draw the attention of thieves to the vulnerability of their holdings or because they do not want to scare off donors; collectors conceal their losses out of fear of alerting either potential thieves to the value of their possession or tax authorities in the case the possession of the stolen artworks (or the funds used to buy them) had not been previously declared; museum curators and collectors may decide not to report the theft of (unprovenanced) objects acquired

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<sup>23</sup> See also Wehinger F., *Illegale Märkte. Stand der sozialwissenschaftlichen Forschung*, MPIfG Working Paper, 11/6, October 2011, pp. 49-53.

<sup>24</sup> Passas N. and Proulx B., 'Overview of Crimes and Antiquities', in Manacorda S. and Chappell D. (eds.), *Crime in the Art and Antiquities World. Illegal Trafficking in Cultural Property*, New York: Springer, 2011, 51-67, 58-59.

<sup>25</sup> Salm C., 'The European Added Value of EU Legislative Action on Cross-Border Restitution Claims of Looted Works of Art and Cultural Goods', November 2017, p. 6.

<sup>26</sup> Passas and Proulx, supra n. 24, 59.

<sup>27</sup> See, for example, Wehinger, supra n. 23, p. 50.

<sup>28</sup> See Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Leicester: Institute of Art and Law, 2005, 10-16.

<sup>29</sup> INTERPOL, 'Frequently Asked Questions', available at: <https://www.interpol.int/Crime-areas/Works-of-art/Frequently-asked-questions>.

in dubious circumstances for fear of attracting the attention of the police or of the governments of the country from which the artefacts were allegedly smuggled.<sup>30</sup>

More generally, it is not possible to provide a reliable estimate of the precise nature and magnitude of the illicit trade in cultural property because it is fuelled by clandestine activities which, by nature, are secretive.<sup>31</sup> In this sense, INTERPOL made it clear that it does not '[...] possess any figures [...] to claim that trafficking in cultural property is the third or fourth most common form of trafficking' and that 'it is very difficult to gain an exact idea of how many items of cultural property are stolen throughout the world and it is unlikely that there will ever be any accurate statistics'.<sup>32</sup>

### III. The Legal System Regulating Cultural Property in Europe

The problem of the illicit trade in cultural property was addressed at the international level only in the second half of the twentieth century. In what follows, the most relevant features of the instruments adopted by UNESCO, the Council of Europe and the European Union will be briefly considered.

#### A. UNESCO and UNIDROIT

UNESCO has been a major actor in the fight against illicit trafficking of cultural property for many years. At the level of normative action, UNESCO has elaborated different instruments including the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 ('1970 Convention'). It has also been instrumental in the elaboration of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 ('1995 Convention').<sup>33</sup>

The 1970 Convention was designed to target the 'illicit import, export and transfer of ownership of cultural property' that is 'specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science',<sup>34</sup> and to reinforce the solidarity between States that suffer from illicit export of cultural heritage and importing States. The 1970 Convention formulates basic principles for the protection of cultural objects, including regulations for measures to combat illegal trafficking, protect a country's own cultural heritage and unlawfully imported cultural objects of other signatory States, prevent their illegal export, ensure that such property be returned upon request from the country of origin.

However, this treaty is not self-executing. This means that its provisions do not apply directly to auction houses or other market operators and that States Parties are required to pass the necessary implementing legislation. Indeed, States are requested to: set up specific services for the protection of cultural property;<sup>35</sup> introduce certification system;<sup>36</sup> establish rules in conformity with the ethical principles set forth in the Convention;<sup>37</sup> impose penalties;<sup>38</sup> and control trade in cultural objects.<sup>39</sup>

The 1995 Convention, which was adopted to fill the gaps left by the 1970 Convention, strives for 'the restitution of stolen cultural objects' and 'the return of cultural objects removed from the territory of a

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<sup>30</sup> Conklin, *supra* n. 10, 4.

<sup>31</sup> Gerstenblith P., 'The Public Interest in the Restitution of Cultural Objects' (2000-2001) *Connecticut Journal of International Law* 197-246.

<sup>32</sup> See at: <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Trafficking-in-illicit-goods-and-counterfeiting>.

<sup>33</sup> This treaty was adopted by the International Institute for the Unification of Private Law (UNIDROIT) in 1995 at the request of UNESCO.

<sup>34</sup> Articles 1 and 2.

<sup>35</sup> Article 5.

<sup>36</sup> Article 6.

<sup>37</sup> Article 6(e).

<sup>38</sup> Article 8.

<sup>39</sup> Article 10(a).

Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage'. In effect, the 1995 Convention focuses on private transactions related to movable cultural heritage and its provisions are self-executing.

Article 3 of the 1995 Convention provides that the owner of a stolen or illegally exported cultural object can make a claim for restitution from the new owner. This provision can apply to claims against art traders if they cannot prove that they checked the background of an item properly before selling it. In addition, although the 1995 Convention focuses on private transactions, it is nevertheless of importance for items stolen from museums or pillaged from archaeological sites. Many countries have enacted legislation stating that any cultural relics that are undiscovered or have been illicitly excavated are owned by the State. The UNIDROIT Convention recognizes such laws by considering that 'a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place'.<sup>40</sup> Therefore, States Parties can reclaim their illegally excavated and exported cultural heritage items in the same way as private persons if their law is consistent with the 1995 Convention.

Moreover, this treaty contains criteria to assess the circumstances of the acquisition and hence to decide whether the possessor of a stolen or illegally exported cultural object is entitled to payment of fair and reasonable compensation.<sup>41</sup> Regarding the restitution of stolen objects, Article 4(4) states: '*In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances*'. Similarly, as regards the return of illegally exported cultural objects, Article 6(2) provides: '*In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State*'. All in all, these provisions are meant to not only discourage market operators from participating in the illicit art market, but also to encourage purchasers to question the origin of items more intensely.<sup>42</sup> Indeed, the criteria for good faith assessment are useful for both art trade professionals – to exercise properly the required due diligence and avoid dealing in objects having an uncertain or nefarious past – and for law-enforcement agents – to assess the good faith of the actors involved in disputes concerning the recovery of stolen or illegally exported cultural objects. An effective international system of laws against illicit art trafficking covering claims for restitution from States and private persons alike is crucial in order to protect heritage sites and to prevent further pillaging and art theft. Unscrupulous art traders must be discouraged from participating in draining the cultural heritage of other countries for their own profits.

## **B. Council of Europe**

The Council of Europe has adopted a number of conventions on the protection of various aspects of cultural heritage. However, for the purposes of the present study, the most relevant is the new Convention on Offences relating to Cultural Property. Adopted in May 2017, it is a criminal law convention to prevent and combat the intentional destruction of, damage to, and trafficking in cultural property by strengthening criminal justice responses while facilitating co-operation on an international level. As such, this is the first international treaty with a focus on the prevention and criminalisation of illicit activities relating to cultural heritage. Moreover, when it is in force, this new treaty will serve to better protect and aid the responsible actors in the art trade who are abiding by the law.

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<sup>40</sup> Article 3(2).

<sup>41</sup> See Articles 4(1) and 6(1).

<sup>42</sup> Brodie N., Doole J. and Watson P., *Stealing History: The Illicit Trade in Cultural Material*, Cambridge: The McDonald Institute for Archaeological Research, 2000, 40.

### **C. EU Law**

The establishment of the Internal Market by the Treaty on European Union prompted the adoption of specific measures on the protection of cultural property. The reason is that the Internal Market required the abolition of the internal frontiers within the EU, which would have undermined the power of Member States to prevent the illicit movement of cultural objects through the application of border controls. As a result, two specific measures were enacted Regulation 3911/92 on the Export of Cultural Goods (repealed and replaced by Regulation 116/2009 of 12 December 2008) and Directive 93/7 on the Return of Cultural Objects Illegally Exported from the Territory of a Member State (repealed and replaced by Directive 2014/60/EU of 15 May 2014). These measures were not aimed at harmonizing national laws, they merely aimed at fostering Member States' reciprocal recognition of domestic provisions designed to fight the illicit trade in antiquities.

On the one hand, Regulation 116/2009 aims to prevent the exportation outside of the EU of works of art that have been unlawfully removed from the Member State of origin through the exploitation of the more relaxed rules of other Member States. It sets up a procedure according to which the antiquities defined as national treasures within the meaning of Article 36 TFEU and belonging to one of the categories listed in the Annex can be exported to third countries only if accompanied by an export certificate issued by the Member State of origin.<sup>43</sup>

There is a notable difference in the quantity of export licenses issued by Member States under these provisions. Whereas each year Italy issues around 9,000 export licenses, and the United Kingdom and France issue around 8,000 and 3,000 licenses respectively, other Member States issue far fewer. For example, Germany issues approximately 1,200 licenses while Poland normally issues a mere 70 per year; in addition, several Member States (e.g. Bulgaria or Greece) have been known not to issue a single export license in a particular year. The different number of issued export licenses stems from a variety of factors, but a primary driver of this variation lies in the different 'quantities' of cultural objects and strength of national art markets (the United Kingdom being one of the largest in the EU).<sup>44</sup>

On the other hand, Directive 2014/60 sets up a system under which the judicial authorities of the Member State where a cultural object has been unlawfully imported must order its return to the requesting Member State, provided the requested object is defined by the requesting Member State as "national treasure" within the meaning of Article 36 TFEU. In comparison to Directive 93/7, Directive 2014/60 innovates in two notable respects: the definition of cultural property (financial or historical thresholds have been cancelled) and of time limits (the time limits set out in Articles 5(3) and 8(1) have been extended). As such, the new text strengthens the protection of national treasures of EU Member States. Ultimately, the objective of Directive 2014/60 is to achieve a better compromise between the principle of the free movement of cultural goods and the need to provide better protection for cultural heritage.

## **IV. Challenges in the Fight against Illegal Trade**

The present section aims at pinpointing the major problems that has to be taken into account when considering the efficacy of the norms enacted to fight against the illicit trafficking in cultural property.

### **A. Divergences in National Legislations**

The first problem relates to the fact that EU Member States have different substantive laws regulating the protection and the circulation (exportation / importation) of cultural heritage items. This is due to the fact that EU Member States have espoused different approaches to these issues. This is reflected by

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<sup>43</sup> Articles 2 and 4.

<sup>44</sup> Peters R., 'The Protection of Cultural Property in EU Law : Status Quo and Future Perspectives', in Desmarais F. (ed.), *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, ICOM International Observatory on Illicit Traffic in Cultural Goods, 2015, pp 143.

the definitions of ‘source nations’ and ‘market nations’ described above. This difference is reflected by the anti-seizure legislation enacted by a number of Member States. These national laws – which grant immunity from seizure to items temporary on loan from abroad – seem incompatible with the obligations deriving from the legal instruments deployed to curb illicit trade in cultural objects. In other words, a statutory guarantee of immunity for loaned artefacts can clash with obligations requiring States to return wrongfully taken objects set out in international and EU instruments, such as Directive 2014/60. Furthermore, there is little international harmonization of the regulation concerning the (due diligence) obligations of the persons and companies active in the art trade. As a result, the norms adopted (if any) to protect the market from the criminals seeking to launder the proceeds of crime or to finance illegal activities differ from State to State. For example, in France, auction houses and art dealers fall within the regulated sector, whilst in the UK they only become regulated entities if they accept cash payments at or above 10.000 euros for a single or series of linked transactions. In Switzerland, the cash limit is higher, 100.000 CHF and above.

Another reason is that most rules are not self-executing. This means that Member States are required to pass the necessary implementing legislation. This is particularly the case of the 1970 Convention. It is for this reason that UNESCO adopted the ‘Operational Guidelines for the Implementation of the 1970 Convention’.<sup>45</sup> Not only do they aim to ‘strengthen and facilitate the implementation of the Convention’, but also ‘to identify ways and means to further the achievement of the goals of the Convention’. As far as EU legislation is concerned, the situation is more complex. As well known, under EU law, regulations have general application and are directly applicable in all Member States. Therefore, Regulation 116/2009 is immediately enforceable as law in all Member States without the need to be transposed into national law. This is not the case for EU directives, for which the enactment of national implementing legislation is always necessary.

Two sets of measures have been adopted in order to counter this regulatory fragmentation:

1. First, it is worth mentioning the instruments that have been adopted in order to ensure the seizure and eventually the restitution of cultural objects looted and illegally exported from Iraq and Syria. With resolutions 2199 (2015), 2253 (2015) and 2347 (2017), among others, the United Nations Security Council condemned the destruction of cultural heritage committed by ISIS and other groups in Iraq and Syria and acknowledged that these terrorist groups are ‘*generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items [...], which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks*’.<sup>46</sup> More importantly, the Security Council adopted legal measures to counter the illicit trafficking of antiquities removed from these States: ‘*The Security Council [...], [a]cting under Chapter VII of the Charter of the United Nations, [...] [r]eaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property [...] illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, [...] thereby allowing for their eventual safe return to the Iraqi and Syrian people [...]*’.<sup>47</sup> In sum, Resolution 2199 (2015) aims to place economic and diplomatic sanctions on the countries and individuals that enable ISIS and other terrorist groups to profit from the illicit trade in antiquities. At the EU level, the following legal instruments have been adopted to contain terrorism funding and the looting of cultural sites. Regulation 1210/2003<sup>48</sup> prohibits the import, export and dealing in Iraqi cultural property, if the items form an integral part of either the public collections listed in the inventories of Iraqi institutions, or there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been

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<sup>45</sup> Adopted by consensus on 18 May 2015 by the Meeting of the States Parties to the 1970 Convention (UNESCO Doc. C70/15/3.MSP/11).

<sup>46</sup> Para. 16.

<sup>47</sup> Para. 17.

<sup>48</sup> Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, repealing Regulation (EC) No 2465/96, OJ L 169 of 8 July 2003.

removed in breach of Iraq's laws and regulations.<sup>49</sup> Regulation 1332/2013<sup>50</sup> contains measures to prohibit the trade in objects constituting Syrian cultural heritage and to facilitate their safe return to their legitimate owners. In particular, it prohibits the import, export and transfer of Syrian cultural property, where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law.<sup>51</sup> These regulations also contain a clause whereby Member States are required to lay down the rules on effective, proportionate and dissuasive penalties applicable to infringements of the prohibitions set out therein and to take all measures necessary to ensure that such penalties are implemented.

2. In addition, EU institutions are working on the adoption of a new Regulation on the importation of cultural objects. Proposed in July 2017 by the EU Commission, the new regulation would contain rules to stop imports in the Union of cultural goods illicitly exported from their country of origin. In particular, it would provide for a new licensing system for the import of cultural goods which are known to be most at risk, such as archaeological objects, parts of monuments and ancient manuscripts.<sup>52</sup>

## **B. The Illicit Trade in Cultural Property and Other Related Crimes**

### **1. Organized Crime**

The illicit trade in cultural property has attracted the attention of international organized criminal syndicates. This is demonstrated, for instance, by the results of 'Operation Pandora'.<sup>53</sup> Launched by Spain and Cyprus in November 2016, this police operation involved authorities from 18 European countries. Relating to an illegal trafficking ring in cultural property, coming mainly from conflict zones, Operation Pandora led to the arrest of 75 individuals and the seizure of more than 3.000 cultural objects.<sup>54</sup> This operation demonstrates that organized crime networks not only comprise thieves and bandits, but also corrupt officials and professionals of the art market who facilitate the laundering of the objects. Another case relates to the theft of two paintings from the Van Gogh Museum in Amsterdam. Stolen in 2002, the works were found in September 2016 near Naples in a house owned by a drug boss of Camorra. Investigators said that they got a tip that the Camorra might have the Van Gogh paintings while looking into the syndicate's cocaine trafficking operations.<sup>55</sup> This case demonstrates that the illicit trafficking in cultural objects can intersect with other types of illicit trade because organised criminal groups are normally involved in a diversified 'portfolio' of illicit activities. In this case, the Camorra, awash in illegal revenues from drug trafficking, designer-goods counterfeiting and toxic waste dealings, turned to cultural property to launder their profits and make even more money in the process.<sup>56</sup> Of course other intersections are possible. This is the case of the

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<sup>49</sup> Article 3. This prohibition does not apply under two circumstances: if the possessor of the object can prove that it was exported from Iraq prior to 6 August 1990 or, if that the object is officially being returned to Iraqi institutions in accordance with Paragraph 7 of UN Security Council Resolution 1483 (2003).

<sup>50</sup> Council Regulation (EU) No. 1332/2013 of 13 December 2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 335/3 of 14 December 2013.

<sup>51</sup> Article 11(c). This prohibition does not apply if it is demonstrated that the objects at stake were exported from Syria prior to 9 May 2011 or that they will be returned to their legitimate owners in Syria.

<sup>52</sup> See at: [https://ec.europa.eu/taxation\\_customs/business/customs-controls/cultural-goods\\_en](https://ec.europa.eu/taxation_customs/business/customs-controls/cultural-goods_en). See also Peters, supra n. 44, pp 146-147.

<sup>53</sup> See also the cases mentioned supra at n. 7, n. 8 and n. 9.

<sup>54</sup> Eggs N., "'Operation Pandora": Police in Spain and Cyprus Lead Major Bust of Antiquities Traffickers', *The Art Newspaper*, 24 January 2017.

<sup>55</sup> D'Emilio F., 'Van Gogh Paintings Stolen in 2002 Found in Italian Farmhouse', *AP International News*, 30 September 2016.

<sup>56</sup> McGivern H., 'Italian Mafia Trading Weapons for Libyan Artefacts Plundered by Isil?', *The Art Newspaper*, 17 October 2016.

trafficking in artefacts made with parts or derivatives of illicitly traded endangered species of wild fauna and flora, such as ivory and rare timber.<sup>57</sup>

On the other hand, as already noted, several reports reveal that illicit trade in antiquities has become one of the sources of funding, along with oil and kidnapping, of terrorist groups such as ISIS, Al-Nusrah Front and other entities associated with Al-Qaida. Various gruesome propaganda videos document ISIS's destruction of cultural property in Iraq and Syria.<sup>58</sup> However, experts say that temples and other buildings are destroyed before the camera in order to conceal the evidence of what has been looted. Indeed, militants have been quietly selling off antiquities. Archaeologist Michael Danti stated that the clandestine excavation and smuggling of antiquities started as opportunistic theft by some but then turned into an organized transnational business that is helping fund terrorist activities.<sup>59</sup> Not only ISIS grants licenses for digging at historic sites, it has also established a department for antiquities.

## 2. Corruption and Money Laundering

The lucrative nature of the illicit trafficking in cultural property explains the correlation of this illicit trade with other 'supporting' criminal conducts.<sup>60</sup> These include corruption and money laundering.

The illicit cross-border trade described above can only function because of large and pervasive corruption. Corruption can be resorted to at different phases of the supply chain. Bribes can be offered, for example, to surveillance personnel to turn a blind eye to the looting, or to customs officials to permit the exportation of looted relics. Corruption is by no means limited to public officials. Increasing attention is being devoted to corruption practices in the private sector. For example, an employee of an auction house can be bribed to allow the sale of objects with a dubious provenance.

Money laundering involves disguising the fact that assets have been derived directly or indirectly from crime. As far as cultural property is concerned, money laundering refers either to the very act of buying art objects with criminally earned money (purchasing valuable assets helps to convert such 'dirty' cash into an asset that gains value and can be sold later), or to cleaning the tainted money through an art deal<sup>61</sup> whereby an artwork is bought by an accomplice of the seller with money provided by the seller (fictitious auction). In the case, for example, of an archaeological object clandestinely excavated in a source country and then illegally exported and sold to a collector in a market country, all those who have been knowingly involved in dealing with that relic or with the proceeds of the sale are vulnerable to prosecution for money laundering, and they may be stripped of the benefits which they have received by way of confiscation. In the same vein, profits made from drugs trafficking by an international criminal group may be used to buy and subsequently sale works of art. The proceeds of sale will appear to be derived from a legitimate activity. These profits, which originally stemmed from crime, may be used to support further criminal activity.<sup>62</sup> In sum, the acquisition of art by criminals is not a threat to art itself, the problem arises when art is bought with criminally earned money. The absence of any reliable figures makes it practically impossible to gauge

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<sup>57</sup> For other examples see Yates D., 'Displacement, Deforestation, and Drugs: Antiquities Trafficking and the Narcotics Support Economies of Guatemala', Kila J.D. and Barcells M. (eds.), *Cultural Property Crime*, Leiden: Brill, 2015, 23-36.

<sup>58</sup> 'Isis Destroys Tetracylon Monument in Palmyra', *The Guardian*, 20 January 2017.

<sup>59</sup> Fisk R., 'Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – And Then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting', *The Independent*, 3 September 2015; and D'Arcy D., 'Isil Holds Heritage to Ransom to Fund Fighters, US Expert Warns', *The Art Newspaper*, 2 July 2015.

<sup>60</sup> INTERPOL, Office of Legal Affairs, *supra* n. 6, 72-74.

<sup>61</sup> Van Duyne P.C., Louwe L. and Soudijn M., 'Money, Art, and Laundering: Coming to Grips with the Risks', in Kila J.D. and Barcells M. (eds.), *Cultural Property Crime*, Leiden: Brill, 2015, 79-95, 80.

<sup>62</sup> Ulph and Smith, *supra* n. 5, 63, 101. On the susceptibility of the art market to money laundering see also Bowman B.A., 'Transnational Crimes against Culture. Looting at Archaeological Sites and "Grey" Market in Antiquities' (2008) *Journal of Contemporary Criminal Justice* 24, 225-242; and De Sanctis F.M., *Money Laundering through Art. A Criminal Justice Perspective*, Dordrecht/London: Springer, 2013.

the extent to which money laundering may exist in the art market. With that said, the few high profile cases—which have come to light in recent years—demonstrate that the art market, like other financial markets, is at risk of abuse.

Concerned by the significant and evolving challenges money laundering and terrorist financing and their connection with the illicit trade in cultural property, recent months have witnessed the adoption of a series of initiatives at international, European and national levels. In 2015, at a conference in Geneva organized by the University of Geneva's Art-Law Centre and the Geneva-based Art Law Foundation, representatives from the art market, the Geneva free port, law enforcement and customs, as well as lawyers and academics discussed whether the existing legal and regulatory framework is effective to prevent that the art market be abused by criminals. Following this discussion, the Responsible Art Market Initiative (RAM) was launched in January 2017. This non-profit industry initiative was established to support art market businesses providing them with a practical and ethical compass to navigate the increasingly complex and fragmented legal framework within which they are required to operate. It aims to do this by: (i) raising awareness of the risks; (ii) consolidating and sharing existing industry best practices; and (iii) providing practical guidelines and tools that can be easily understood and implemented.<sup>63</sup>

### C. Free ports

Free ports are tax-free warehouses where goods can be held for a period of time before their import, export or transit. Owners pay no import taxes or duties until the stored goods reach their final destination. The 'free' aspect of free ports therefore refers to the suspension of customs duties and taxes. Moreover, due to generally favorable national legislations and lack of controls, it is not easy to find out what is actually being stored in the free ports around the world and who the owners are.

Art collectors and dealers have embraced free ports enthusiastically over the last 20 years, their use growing with a thriving art market and the rising number of wealthy individuals. Today, there are several tens of free ports in the world and in Europe (more than forty into the EU and over ten in Switzerland). The Geneva free port is one of the largest with more than 550,000 square feet of warehousing. According to Geneva authorities, 40 percent of the free port is dedicated to storing art and antiquities.<sup>64</sup> As a consequence, many priceless works can be stored in high-security warehouses for decades at a time, stashed away from the public eye. According to a specialist art journal, in 2013 the Geneva free port held around 1.2 million artefacts.<sup>65</sup> Moreover, the 2016 leak of the Panama Papers revealed just some ways these zones are used to conceal ownership of high-value objects.<sup>66</sup> Therefore free ports attract not only legitimate businesses but also criminals. Indeed, various recent cases demonstrate that free ports have been used by art dealers to store wrongfully removed artworks for resale when things have cooled down, even many years later.<sup>67</sup>

In 2016, Swiss legislation was amended as part of a broad anti-money laundering strategy. The new legislation enhances transparency. Free port managers must now receive information on the identity of the tenants of free port warehouses and a declaration (an inventory) of all cultural objects (which are regarded as 'sensitive goods') held in warehouses, their value, their certificate of origin and the identity of the person entitled to dispose of them.<sup>68</sup>

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<sup>63</sup> See at : <http://responsibleartmarket.org/artfully-done/>.

<sup>64</sup> "Free Ports and Risks of Illicit Trafficking of Cultural Property", ICPRCP/16/20.COM/12, July 2016, para. 12, 18.

<sup>65</sup> *Connaissances des Arts*, 16 January 2013, <https://www.connaissancedesarts.com/marche-de-lart/dans-le-secret-des-ports-francs-11136/>.

<sup>66</sup> Pownall, *supra* n. 2, p. 133.

<sup>67</sup> For some examples concerning the Geneva Free Port see "Free Ports and Risks of Illicit Trafficking of Cultural Property", ICPRCP/16/20.COM/12, July 2016, para. 9.

<sup>68</sup> Art. 182.2 of the Federal Customs Ordinance (RS 631.01) and its Appendix 2.

#### D. Sales on Internet

Although illicitly removed cultural objects are commonly sold through newspaper adverts, flea markets, antique shops and auction houses, they are also sold through online platforms. Indeed, countless artefacts are sold on the internet market, for instance on eBay or on the web sites of auction houses. According to the 2017 Hiscox Report, the value of the online market was US\$3.75 billion in 2016, and it is estimated to grow up to US\$ 9,14 billion in 2021.<sup>69</sup>

It is extremely difficult to control the online market because normally the items put on sale carry no documentation on provenance or find spot. In addition, the number of users is enormous, just as the volume of sales. For instance, eBay counts more than 162 million users and more than 800 million objects on sale. Another feature of the internet market that must be taken into account is that web platforms like eBay offer large quantities of small, low-priced items, whereas auction houses sell fewer objects for higher prices. This indicates that artefacts that previously would not be worth looting are now become profitable.<sup>70</sup> Moreover, the online market is deleterious because: (i) sales may occur very rapidly; (ii) buyers and sellers may remain anonymous; (iii) law-enforcement agencies are often unable to intervene because the seller, the buyer and the objects concerned are not located in the same jurisdiction; (iv) the low prices of many of the objects being sold are not enough to warrant serious attention from police forces. Therefore, when compared to the traditional physical market, the Internet market can be seen as a vehicle through which smugglers and bad faith possessors profit from the trafficking in stolen or looted artefacts. Various examples testify to this. The Nebuchadnezzar Larsa bricks were looted around 2003 in Iraq and started appearing for sale on eBay and other Internet sites in about 2005.<sup>71</sup> Another example related to Halaf terracotta figurines. Dating back to Neolithic times in Syria, these artefacts appear on eBay but also on the Emergency Red List of Syrian Cultural Objects at Risk of the International Council of Museums (ICOM).<sup>72</sup> Nevertheless, between November 2015 and February 2016, seven sellers based in the United Kingdom and elsewhere sold 60 figurines for the total sum of £6.099.<sup>73</sup>

UNESCO has joined forces with INTERPOL and ICOM to fight the internet-based illicit trafficking in cultural property. These three organizations jointly developed a set of 'Basic Actions concerning Cultural Objects being offered for Sale over the Internet'. These Basic Actions encourage Internet sales platforms to post disclaimers advising prospective buyers to check and request a verification of the licit provenance of the object. Cooperation between internet sales platforms and national and international police forces and judicial authorities is also urged. In particular, national authorities are encouraged to establish specific agreements with the main Internet platforms and to deploy measures – investigation, seizure, prosecution, and restitution – when criminal activity occurs.

Furthermore, it is worth noting that a number of States have concluded agreements with eBay in order to fight against the illicit trafficking of cultural property. In France, eBay has built an interface that the Central Office on the Fight against the Illicit Trafficking of Cultural Property (OCBC) can use to search for stolen goods and artefacts which would be put up for sale online. Moreover, eBay regularly transfers data to the OCBC for deeper verifications. Agreements have also been concluded by eBay with Germany, Austria and Switzerland. In these countries, the sale of a cultural good is possible via the Internet platform if the seller could prove that the object is authentic and exported legally. In Italy, the Carabinieri-Cultural Heritage Protection Office collaborates with eBay in the sense that the latter gives access to the identities of online traders to the former.<sup>74</sup>

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<sup>69</sup> Hiscox, *The Online Art Trade Report 2017*, 6, available at: <https://www.hiscox.co.uk/online-art-trade-report/>.

<sup>70</sup> Brodie N., 'The Internet Market in Antiquities', in Desmarais F. (ed.), *Countering Illicit Traffic in Cultural Goods. The Global Challenge of Protecting the World's Heritage*, ICOM International Observatory on Illicit Traffic in Cultural Goods, 2015, pp. 11-20, p. 12.

<sup>71</sup> *Ibid.*, p. 17.

<sup>72</sup> See at <http://icom.museum/resources/red-lists-database/red-list/syria/>.

<sup>73</sup> Brodie N., 'eBaywatch (1)', available at: <http://www.marketmassdestruction.com/ebaywatch-1/>.

<sup>74</sup> Planche E., 'Fighting against Illicit Trafficking of Cultural Goods on the Internet: UNESCO and Its Partners' Response', *CITES World – Official Newsletter of the Parties*, Issue No. 19, available at: <https://cites.org/eng/news/world/19/5.php>.

## **E. Accountability of Art Market Professionals**

In a number of States art market enterprises and professionals are required to comply with the standards set out in national laws and codes of ethics with respect to the different questions that are likely to arise when dealing with works of art. For instance, they are required to report suspicious offers, to take effective precautions against the entry of illicit antiquities into the market, and other due diligence duties. For instance, persons and companies active in the art trade may be required to check the provenance of the objects brought to them against the ICOM Red Lists or databases such as the Art Loss Register, establish the identity of the supplier or seller during initial contact; obtain a written declaration on the right to dispose of the cultural property from the supplier or seller. As an example, Article 7 of the Auction Law of Poly Auction provides that ‘goods or property rights prohibited for sale by laws or administrative rules and regulations shall not be made objects of auction’.<sup>75</sup>

The question of differing national laws has been dealt with already. Here we would like to focus on the role of codes of ethics. These soft law sources could be a useful source of standards of conduct for art market operators. However, these codes seem not to be numerous, are often vague or ambiguous, and are often neither adhered to nor enforced.<sup>76</sup> As a result, examples of dishonest and unethical conduct abound, while the best-informed buyers regularly and persistently ignore professional ethics. Moreover, compliance with these rules by auctioneers varies from State to State. This is most probably due to the presence or absence of external controls. For instance, in the United States there does not appear to be an appointed responsible monitoring body, whereas in Germany inspection and oversight is ensured, though to differing degrees, by State authorities.<sup>77</sup>

An example related to the market for Egyptian antiquities demonstrates that self-regulation might not work given that, where and that as long as there is profit in looting and in smuggling, there will always be somebody willing to run the risk of being caught. Within a larger criminal network, UK-based restorer Jonathan Tokeley-Parry disguised Egyptian artefacts as touristic souvenirs and forged documentation from the non-existent Thomas Alcock collection to facilitate their sale by US-based art dealer Frederick Schultz. When Tokeley-Parry was convicted of dishonest handling of antiquities and Schultz was convicted of conspiring to receive, possess and sell stolen property, it was alleged that the viability of the worldwide art market would be threatened. Yet sales of Egyptian antiquities at auction in the UK increased after Tokeley-Parry’s conviction. By the same token, the US market for Egyptian relics increased greatly since the Arab Spring. This means that the evidence of massive looting in Egypt, the predominant lack of secure collecting histories, and the instructive lessons of simultaneous repatriations of illicit antiquities from the US to Egypt, did not persuade art traders that extra care should be used in dealing in Egyptian antiquities.

## **F. Tools to combat trafficking**

The EU Commission cooperates closely with a number of organisations to strengthen the regulatory environment. These organisations include, in particular, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the International Criminal Police Organisation (INTERPOL), the International Council of Museums (ICOM), the World Customs Organisation (WCO), the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Office for Drugs and Crime (UNODC) and the Council of Europe.

From this cooperation, initiatives to combat trafficking in cultural goods have successfully been established and developed. Also private initiatives to combat trafficking in cultural goods were

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<sup>75</sup> See at: [http://en.polypm.com.cn/english/index\\_en.php](http://en.polypm.com.cn/english/index_en.php).

<sup>76</sup> Gerstenblith P., ‘Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past’ (2007/2008) *Chicago Journal of International Law* 169-195, 192.

<sup>77</sup> Brodie, *supra* n. 70, 17-18.

launched. Without the aim of being exhaustive, we list hereinafter a number of those tools which have been set up recently:

- ICOM Red Lists;
- Electronic information exchange platform Archeo;
- INTERPOL database of Stolen Works of Art;
- Art Loss Register;
- Psyche;
- EU CULTNET;

We hope that the above elements can be useful to UNESCO in its never-ending crusade against the illicit trafficking of cultural property and the entire team of the Art-Law Centre remains at UNESCO's disposal for any future academic or practical research in the field.

Geneva, February 27, 2018

For the Art-Law Centre  
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