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Alesia Koush

# Fight Against the Illegal Antiquities' Traffic in the EU : Bridging the Legislative Gaps

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## **About the author**

Alesia Koush holds a Bachelor in Humanities from the Minsk State Linguistic University, Minsk, Belarus, as well as a diploma in History and the Protection of Artistic Heritage from the University of Florence, Italy. She obtained a Master's degree in European Political and Administrative Studies from the College of Europe, Bruges, Belgium, where she graduated in 2011. She is currently pursuing a Master's degree in History of Art at the University of Florence, Italy.

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This article is based on the research conducted for the Master's thesis of the same title under the supervision of Professor Dr. Dr. Jörg Monar. It is dedicated to Daniel Entin and the Nicholas Roerich Museum in New York in the name of Nicholas Roerich, father of cultural heritage protection legislation.

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## **Abstract**

The illegal antiquities' traffic is a form of transnational organized crime and its roots often lead to drugs' and arms' trafficking and terrorism. Serious gaps of the existing legislative instruments, such as non-retroactivity, incomplete definitions, non-punitive character and burden of proof, as well as strongly-felt trade interests are the reasons for the persistence of the problem. The necessity to resolve it, putting an end to the dispersion and destruction of the world cultural heritage and to the criminal activity which stands behind it, has been the key motivation of this research.

The aim of this paper was to analyze the weaknesses of the existing international, European and national legislation and, on the basis of those, to construe a comprehensive EU legal response. The results were twofold. First, the grounds on which the EU should apply the UN Convention against Transnational Organized Crime to the illegal antiquities' traffic were made evident. Secondly, the key elements to be incorporated by a new EU legally-binding instrument were demonstrated and justified. The importance of the EU solution was underlined as exemplifying for the international dimension.

## Introduction

The fight against the illegal antiquities' traffic has so far had little success<sup>1</sup>: the existing international, European and national legislation have been unable to stop dealing in illicit archaeological artifacts looted from source countries all over the world. However, the damage caused to the common cultural heritage of humankind is irreparable: it destroys the archaeological context of the sites, and often the objects themselves, which end up in private hands never to be seen by wide public, nor studied by archaeologists. Furthermore, the illegal antiquities' traffic presents a form of transnational organized crime and is closely connected to drugs' and arms' trafficking and terrorism.

The present paper has aimed, firstly, at revealing the weaknesses of the existing international, European and national legislative instruments and, secondly, at proposing a potential EU-level legal solution. The analysis of the legislation demonstrated several common features, such as non-retroactivity problem, insufficient coverage of definitions, lack of criminal law elements. However, the biggest obstacle represents the burden of proof problem which emerged as a true cornerstone of legislative effectiveness on all the levels. Moreover, the case-study of the UK demonstrated that a strong pressure is exercised by trade stake-holders on the market regulation policy-making, lowering substantially the reach of legislation.

The EU is at the heart of the solution. Its pivotal location in the world, rich economic resources and wealth of collectors stimulate the insatiability of demand. The need to break the vicious circle of the illegal antiquities' trade is the basis of the proposed EU solution. First, it should consist of the application of the UN Convention against Transnational

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<sup>1</sup> Chauncey D. Steele, 'The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts', *Suffolk Transnational Law Review*, Summer 2000, para. 668; Stefano Manacorda & Duncan Chappell, 'Introduction. From Cairo to Vienna and Beyond: Contemporary Perspectives on the Dialogue About Protecting Cultural Artefacts from Plunder', in Stefano Manacorda & Duncan Chappell (eds.), *Crime in the Art and Antiquities' World. Illegal Trafficking in Cultural Property*, New York – Dordrecht – Heidelberg – London, Springer, 2011.

Organized Crime to the illegal antiquities' traffic and, secondly, in the adoption of a new Directive that would repair the existing legislative gaps. The grounds for applying the UNTOC are presented and the recommendations for a new EU legislative instrument are outlined and justified. The EU-level solution is important for its potential to become a model internationally.

### **1. Illegal antiquities' traffic: an overview**

The phenomenon of the illegal antiquities' traffic is global in nature and involves three types of countries: source, transit and market countries<sup>2</sup>. The chain of supply- starts with common thieves and tomb robbers in source countries (Italy, Greece, Cyprus, Iraq, Afghanistan, Egypt, etc.) who often destroy the archaeological context and damage the objects themselves while excavating<sup>3</sup>. For relatively small amounts of money<sup>4</sup>, they sell the objects to professional dealers and middlemen who transport the goods towards final destinations<sup>5</sup>. To smuggle them, dealers make use of a variety of mechanisms: counterfeiting export certificates; bribing a competent certificate issuing authority; securing the transport of the stolen goods by "*knowing someone who knows someone*"<sup>6</sup> in the customs service; or by making use of big "diplomatic bags"<sup>7</sup>. In all of these cases, the objects arrive on the market with a high criminal record (violation of domestic export legislation, theft, fraud,

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<sup>2</sup> Kenneth Polk, 'Whither Criminology in the Study of the Traffic in Illicit Antiquities?', in Simon Mackenzie & Penny Green (eds.), *Criminology and Archaeology. Studies in Looted Antiquities*, Oxford and Portland, Oregon, 2009, p. 14.

<sup>3</sup> Simon Mackenzie & Penny Green, 'Introduction: A Context for the Engagement of Criminology and Archaeology', in Simon Mackenzie & Penny Green (eds.), *op. cit.*, p. 1.

<sup>4</sup> As compared to the final market prices for the artefacts, the tomb robbers receive not more than 1% of the total value, in N. Brodie, J. Doole, P. Watson, *Stealing History: the illicit trade in cultural material*, commissioned by ICOM UK and Museums Association, Cambridge, The McDonald Institute for Archaeological Research, 2000, p. 13.

<sup>5</sup> Chauncey D. Steele, *op. cit.*, para. 680.

<sup>6</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities. An Evaluation of the Dealing in Cultural Objects (Offences) Act 2003 in England and Wales*, The Scottish Centre for Crime and Justice Research, 2009, p. 15, retrieved 5 March 2011, <http://www.sccjr.ac.uk/pubs/Criminalising-the-Market-in-Illicit-Antiquities-an-Evaluation-of-the-Dealing-in-Cultural-Objects-Offences-Act-2003/32>.

<sup>7</sup> Neil Brodie, Jenny Doole & Peter Watson, *op. cit.*, p. 17.

counterfeiting, corruption, etc.)<sup>8</sup>. According to some estimates, 80-90% of antiquities on sale are of illicit origin<sup>9</sup>.

In market countries (France, Belgium, the UK, the Netherlands, the USA, etc.), the demand is driven by dealers, auction houses, collectors, museums and galleries. Interest in archaeological objects is dependent on its prestige and aesthetic value as collectors strive to possess precious pieces<sup>10</sup>. The overall financial value of the illegal antiquities' traffic is hard to be evaluated due to its invisible and seamless character<sup>11</sup>. In fact, only 30-40% of antique dealings take place through auction houses where the pieces are published in catalogues<sup>12</sup>; the rest occurs through private transactions<sup>13</sup>. On the whole, the total financial value of the antiquities' market ranks third after drug and arms trafficking<sup>14</sup> and amounts to up to \$6 billion yearly<sup>15</sup>. Finally, the links between the antiquities trade and drug and arms trafficking<sup>16</sup> and the financing of war machines and terror organizations have been reported<sup>17</sup>, which puts antiquities trafficking on the level of a serious transnational organized crime. Multi-billion antiquities revenues are used by Taliban, Al-Qaeda and Hezbollah<sup>18</sup>, to say nothing of more 'common' drug smugglers dealing also in antiquities<sup>19</sup>. In Afghanistan, there are entire zones controlled by Taliban where antiquities are excavated and subsequently sold on the market at prices ranging from €20-25.000 to 200-300.000.<sup>20</sup> The money goes to finance their war machine. Mohammed Atta, who flew his planes into the

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<sup>8</sup> Alesia Koush, 'The illegal antiquities' traffic as a form of transnational organized crime', Bruges, College of Europe, April 2011, p. 6.

<sup>9</sup> Peter Watson, *Sotheby's: The Inside Story*, Random House, 1997, cited in Chauncey D. Steele, *op. cit.*, footnote 6.

<sup>10</sup> Alesia Koush, *op. cit.*, p. 3.

<sup>11</sup> Duncan Chappell & Kenneth Polk, 'Unraveling the "Cordata": Just How Organized Is the International Traffic in Cultural Objects?', in Stefano Manacorda & Duncan Chappell (eds.), *Crime in the Art and Antiquities' World. Illegal Trafficking in Cultural Property*, *op. cit.*, p. 104.

<sup>12</sup> Peter Watson, *loc. cit.*

<sup>13</sup> Alesia Koush, *op. cit.*, p. 4.

<sup>14</sup> Lisa J. Borodkin, 'The Economics of Antiquities looting and a Proposed Legal Alternative', *Columbia Law Review*, no. 2, 1995, p. 377-418.

<sup>15</sup> *Ibid.*, p. 377.

<sup>16</sup> Neil Brodie, Jenny Doole & Peter Watson, *op. cit.*, p. 16.

<sup>17</sup> Documentary 'Spotlight: Blood antiques', LinkTV, <http://www.linktv.org/programs/blood-antiques>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Neil Brodie, Jenny Doole & Peter Watson, *loc. cit.*

<sup>20</sup> Documentary 'Spotlight: Blood antiques'.

Twin Towers in 2001, was trying to sell Afghan antiquities in order “to buy a plane” just several months before the tragedy.<sup>21</sup> The externally chic antiquities’ market has blood-marked roots and effective action should be initiated to stop this criminal activity.

## **2. Legislative basis: international, EU and national levels**

### **2.1 International legislation**

In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>22</sup> was signed and until now it remains the most comprehensive international instrument in the field. The 1970 Convention provides a framework for legal action against the illicit traffic of cultural property. It provides definitions for the key categories, such as ‘cultural property’<sup>23</sup>, ‘cultural heritage’<sup>24</sup>, and ‘illicit’<sup>25</sup>, and it contains provisions for the establishment of national services for the protection of cultural heritage, formation of laws, construction of lists of national cultural property, and supervision of archaeological excavations (Article 5). It also highlights guidelines for the introduction of export certificate systems (Article 6), import prohibitions (Article 7), penalties or administrative sanctions for infringements (Article 8) and promotes protection of cultural heritage by educational means (Article 10).

However, it possesses serious gaps. First of all, it is not retroactive and applies only to the movements of cultural property after the date of its entry into force (1972).<sup>26</sup> Second, it only provides a reference point for countries, leaving a very large margin of appreciation

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<sup>21</sup> Documentary ‘Spotlight: Blood antiques’, with the reference to “Kunst als Terrorfinanzierung?”, *Der Spiegel*, 18 July 2005, retrieved 13 April 2011, <http://www.spiegel.de/spiegel/print/d-41106138.html>.

<sup>22</sup> The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property has been signed by more than 120 states, [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>23</sup> Art. 1 of the 1970 UNESCO Convention.

<sup>24</sup> Art. 4b of the 1970 UNESCO Convention.

<sup>25</sup> Art. 3 of the 1970 UNESCO Convention.

<sup>26</sup> Open-ended Intergovernmental Expert Group Meeting against Trafficking in Cultural Property, United Nations Office on Drugs and Crime, Vienna, 24-26 November 2009, <http://www.unodc.org/unodc/en/treaties/intergovernmental-meeting-on-trafficking-in-cultural-property.html>.



in terms of transposition into national legislation and implementation, which leads to a range of domestic laws and regulations that do not always live up to the levels of protection of the Convention.<sup>27</sup> Thus, Article 10a stipulates that “as appropriate for each country”, antiquities dealers, subject to penal and administrative sanctions, should maintain detailed registers of their items, but the wording itself, “as appropriate for each country”, weakens the effect of this obligation, and many state-parties do not impose this rule at all<sup>28</sup>.

Another important gap concerns import prohibitions. Article 7.a obliges member-states “to prevent museums and similar institutions” from acquiring illegally exported cultural property. However, it does not make export certificates<sup>29</sup> obligatory, which renders the provision vague and symbolic. Moreover, the provision tackles only “museums and similar institutions”, leaving aside private buyers that constitute a very big proportion of the antiquities’ market.

Furthermore, the Convention’s scope is limited to the thefts from registered public collections and museums. Private collections are out of reach, to say nothing of the unregistered cultural heritage. In fact, Article 3, which declares illicit any conduct contrary to the provisions of the Convention, combined with Article 1 in which cultural property is defined as the property “specifically designated by each State as being of importance for archaeology, prehistory, art or science”<sup>30</sup>, have provoked a lot of controversy among experts. They nevertheless have been generally interpreted as limiting the scope of Convention only to the registered cultural property, reducing the effectiveness and applicability of the Convention on illicit trafficking.<sup>31</sup> Finally, the Convention operates only on an

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<sup>27</sup> Simon Mackenzie, ‘Protection against trafficking in cultural property’, background paper for the Meeting of the expert group on protection against trafficking in cultural property, UN Office on Drugs and Crime, Vienna, 24-26 November 2009, p. 8, [www.unodc.org/documents/organized-crime/V0987314.pdf](http://www.unodc.org/documents/organized-crime/V0987314.pdf).

<sup>28</sup> Open-ended Intergovernmental Expert Group Meeting against Trafficking in Cultural Property.

<sup>29</sup> Simon Mackenzie, *loc. cit.*

<sup>30</sup> Art. 1 of the 1970 UNESCO Convention.

<sup>31</sup> Simon Mackenzie, *op. cit.*, p. 9.

intergovernmental basis (Article 9), and private individuals have no possibility of making a request of return of their cultural property.

Thus, the above analysis of the key points of the 1970 Convention demonstrates that it is more “a diplomatic rather than legal instrument”<sup>32</sup>. It does remain an important international law instrument that leaves a lot of room for bilateral and multilateral agreements (Article 9)<sup>33</sup>.

To provide remedies for the weaknesses of the 1970 Convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>34</sup> was adopted in 1995. It was aimed at establishing a legal order for the restitution of stolen cultural objects<sup>35</sup> and for the return of illicitly exported cultural objects<sup>36</sup>. Designed by a private law institution, it put under its jurisdiction private persons and legal entities as well.<sup>37</sup>

On the level of definitions, the coverage was extended to unregistered artifacts since ‘stolen’ were considered the objects “unlawfully excavated or lawfully excavated but unlawfully retained, when consistent with the law of the State where the excavation took place”<sup>38</sup>. This in itself is a big step forward.

Aiming at the restitution problem, the 1995 Convention had to resolve the issue of the legal title of ownership. In accordance with common law practice, it favored the true owner of an object over a good-faith purchaser (Chapter II), provided for the return of any stolen cultural property, and made use of the civil law system allowing a good-faith purchaser to claim compensation from an original owner (Chapter III)<sup>39</sup>. However, compensation is due only when a purchaser “neither knew nor ought reasonably to have

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<sup>32</sup> Neil Brodie, Jenny Doole & Peter Watson, *op. cit.*, p. 36.

<sup>33</sup> Simon Mackenzie, *op. cit.*, pp. 8-9.

<sup>34</sup> The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is available at <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>; see Annex 1.

<sup>35</sup> Chapter II (Arts. 3-4) of the 1995 UNIDROIT Convention.

<sup>36</sup> Chapter III (Arts. 5-7) of the 1995 UNIDROIT Convention.

<sup>37</sup> Arts. 3-7 of the 1995 UNIDROIT Convention.

<sup>38</sup> Art. 3(2) of the 1995 UNIDROIT Convention.

<sup>39</sup> Neil Brodie, Jenny Doole & Peter Watson, *op. cit.*, p. 40; Chauncey D. Steele, *op. cit.*, para. 692-693.

known that the object was stolen and can prove that it exercised due diligence when acquiring the object”<sup>40</sup>. This provision reverses the burden of proof for compensation claims, although the concept of due diligence acquires certain specificity in the context of the antiquities’ market, 80-90% of which is illegal. The biggest archive of stolen art is the Art Loss Register<sup>41</sup>, and a buyer is supposed to contact it before making a purchase. The Register will confirm that an object is not on their list and this procedure means that a buyer exercised due diligence<sup>42</sup>. “*But there is no digger who would ever put his object on record with the Art Loss Register!*”<sup>43</sup>, an ex-dealer says. Thus, inserted into the real-life context of the illegal antiquities’ market the provision on due diligence becomes quite useless, and dealers can sell freshly dug up artifacts with no fear of being punished.

Furthermore, compensation and reverse of the burden of proof are to be applied only to the “stolen cultural property” and not to the illegally exported cultural property (Chapter III). In the latter case, restitution is conditioned by the State proving that the removal of a particular cultural object “significantly impairs”<sup>44</sup> its interest, which is almost inapplicable to the unregistered archaeological heritage involved in trafficking.

Thus, just as the 1970 Convention possesses elements of administrative law (export certificates, institution of national agencies, etc.), the 1995 Convention belongs rather to private and commercial law (with its focus on the restitution and on the compensation of the bona-fide purchaser), and in both only an accessory function is allocated to the criminal law<sup>45</sup>. The lack of punitive mechanisms and practical enforcement renders them helpless in the fight against the illegal trafficking in antiquities.

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<sup>40</sup> Art. 4(1) of the 1995 UNIDROIT Convention.

<sup>41</sup> Art Loss Register, London, New York, Paris, Cologne, Amsterdam, <https://www.artloss.com/content/home>.

<sup>42</sup> Michel van Rijn, former antiquities’ dealer, in Documentary ‘Thieves of Baghdad’, [http://www.youtube.com/watch?v=X4Q\\_0p1L\\_YU](http://www.youtube.com/watch?v=X4Q_0p1L_YU).

<sup>43</sup> *Ibid.*

<sup>44</sup> Art. 5(3) of the 1995 UNIDROIT Convention.

<sup>45</sup> Stefano Manacorda, *op. cit.*, p. 41.

It is also necessary to be aware of the existence of a number of legislative texts adopted by the Council of Europe, such as the 1985 European Convention on Offences relating to Cultural Property<sup>46</sup>, the European Convention on the Protection of the Archaeological Heritage of 1969<sup>47</sup>, subsequently revised in 1992<sup>48</sup> and others. Their effectiveness, however, remains close to zero due to a very limited number of contracting parties and ratifications.

## 2.2 The EU

First of all, not all the EU states ratified the 1970 and 1995 Conventions<sup>49</sup>. The EU legislation itself consists of two legal documents: the amended Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State<sup>50</sup> and the Council Regulation (EC) N. 116/2009 on the export of cultural goods<sup>51</sup>. These documents, created for the needs of internal market and free movement of goods<sup>52</sup>, do not contain the ‘fighting’ arm of criminal law.

The purpose of the Council Directive 93/7/EEC was “to reconcile the fundamental principle of the free movement of goods with the protection of national treasures”<sup>53</sup>. It provides for the obligation of member-states to return cultural objects unlawfully removed from the territory of another member-state (Article 2). However, it applies only to cultural

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<sup>46</sup> European Convention on Offences relating to Cultural Property, Delphi, 1985, <http://conventions.coe.int/treaty/en/treaties/html/119.htm>; see Annex 1.

<sup>47</sup> European Convention on the Protection of the Archaeological Heritage, 1969, <http://conventions.coe.int/treaty/en/treaties/html/066.htm>.

<sup>48</sup> European Convention on the Protection of the Archaeological Heritage (revised), 1992, <http://conventions.coe.int/treaty/en/treaties/html/143.htm>; see Annex 1.

<sup>49</sup> See Annex I.

<sup>50</sup> Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, amended by the Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 and by the Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0038:EN:HTML>.

<sup>51</sup> Council Regulation (EC) N. 116/2009 of 18 December 2008 on the export of cultural goods (codified version, repealing the Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009R0116:EN:NOT>.

<sup>52</sup> Interview with Dr. Angela Casanovas y Sesé, European Commission, DG Enterprise and Industry, Internal Market and Enforcement, Brussels, 28 March 2011.

<sup>53</sup> ‘Single market for goods – return of cultural goods’, European Commission, DG Enterprise and Industry, retrieved 23 April 2011, [http://ec.europa.eu/enterprise/policies/single-market-goods/regulated-sectors/cultural-goods/index\\_en.htm#h2-2](http://ec.europa.eu/enterprise/policies/single-market-goods/regulated-sectors/cultural-goods/index_en.htm#h2-2).

objects “classified as national treasures possessing artistic, historic or archaeological value”<sup>54</sup>, which means that it is of no use for the problem of looted archaeological heritage not present in the inventories of museums. , The burden of proof remains a very hard task for source countries that virtually need to prove that an object in question had belonged to the State before its illegal excavation and was exported after 15 March 1993.

The Council Regulation (EC) N. 116/2009 on the export of cultural goods is also aimed at reconciling internal market needs with the need “to ensure that exports of cultural goods are subject to uniform controls at the Community's external borders”<sup>55</sup>. The Regulation lays out for the introduction of an export certificate that should be presented at the customs control (Articles 2 and 4). It does not exercise any influence on illegal traffic inside the EU, therefore it is of limited use for the protection of EU source countries such as Italy, Greece or Cyprus. Oftentimes archaeological artefacts, illegally exported from these source countries, acquire a new legal status in another EU market state (in this case, a transit point) and, are then exported outside the EU<sup>56</sup>.

As far as monitoring the implementation of these instruments, the issue of the illegal traffic in cultural property is on the agenda of four Directorates-General of the European Commission: DG Education and Culture, DG Taxation and Customs Union, DG Enterprise and Industry and DG Home. The DG Taxation and Customs Union works on the prevention of export of cultural goods from the EU member-states, and its advisory Committee for the Exportation and Return of Cultural Goods manages problems related to the EU regulations on export and return of cultural goods<sup>57</sup>. In the meantime, the DG Enterprise and Industry and its subdivision, Single Market for Goods – Return of Cultural Goods, follows the dossiers of the two EU legal instruments, Directive 93/7/EEC and the Regulation (EC) N

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<sup>54</sup> Art. 1.1 of the amended Council Directive 93/7/EEC.

<sup>55</sup> Preamble (3) of the Council Regulation (EC) No 116/2009.

<sup>56</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 4.

<sup>57</sup> *Open Method of Coordination – “Prevention of Theft and Illicit traffic” Subgroup*, Final report, European Commission, DG Education and Culture, 14 May 2010, p. 6, [http://ec.europa.eu/culture/our-policy-development/doc1575\\_en.htm](http://ec.europa.eu/culture/our-policy-development/doc1575_en.htm).

116/2009, as they concentrate on securing free movement of cultural goods within the internal market<sup>58</sup>.

A bit more on the preventive side is the DG Education and Culture; its Sub-Working Group on the Prevention of Theft and Illicit Trafficking of Cultural Goods carries assessment studies and reports on transposition and implementation of the international and EU legislation in member-states and on appropriate application of due diligence when dealing with cultural heritage<sup>59</sup>. However, in spite of the doubtless importance of these studies, the powers of the Sub-Group are limited by the working basis on which it operates - the Open Method of Coordination (OMC) leads neither to new binding legal instruments, nor to the obligation to modify national laws<sup>60</sup>.

Finally, the DG Home Affairs and its Unit A2 Fight against Organized Crime does not work specifically on the problem of the illicit antiquities' traffic<sup>61</sup>. However, following the conclusions of the EU JHA Council of 27-28 November 2008<sup>62</sup>, in which the need for strengthening prevention and fight against the illicit trafficking in cultural goods was highlighted, the DG Home was assigned with a public procurement to launch a study on the illicit trafficking in cultural goods.<sup>63</sup> The results of this study will be analyzed together with the reports of DG Enterprise, DG Culture, DG Taxation, and new legislation will be proposed.<sup>64</sup> It will be up to the EU to take a step forward in the previously-never-won fight against the illegal antiquities' traffic.

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<sup>58</sup> 'Single market for goods – return of cultural goods', European Commission, DG Enterprise and Industry, *cit.*

<sup>59</sup> Working Group on Museum Activities, DG Education and Culture, European Commission, [http://ec.europa.eu/culture/our-policy-development/doc1575\\_en.htm](http://ec.europa.eu/culture/our-policy-development/doc1575_en.htm).

<sup>60</sup> 'Open Method of Coordination', <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/openmethodofcoordination.htm>

<sup>61</sup> Interview with Grzegorz Gajewski, European Commission, DG Home, Unit A2 – Fight Against Organized Crime, Brussels, 28 March 2011.

<sup>62</sup> Document CRIMORG 166 ENFOPOL 14224/2/08, [http://www.eu2008.fr/webdav/site/PFUE/shared/import/1127\\_JAI/Conclusions/JHA\\_Council\\_conclusions\\_illicit\\_trafficking\\_in\\_cultural\\_goods\\_EN.pdf](http://www.eu2008.fr/webdav/site/PFUE/shared/import/1127_JAI/Conclusions/JHA_Council_conclusions_illicit_trafficking_in_cultural_goods_EN.pdf).

<sup>63</sup> *Call for tender 'Study on preventing and fighting illicit trafficking in cultural goods'*, European Commission, DG Home Affairs, [http://ec.europa.eu/home-affairs/tenders/2010/tender\\_037714\\_en.htm](http://ec.europa.eu/home-affairs/tenders/2010/tender_037714_en.htm).

<sup>64</sup> Interview with Dr. Angela Casasnovas y Sesé.

### 2.3 National legislation in source and market countries.

Source countries exercise strict regimes of protection of their cultural heritage which nationalize and prohibit the unauthorized export of all the cultural property: discovered and undiscovered, registered and unregistered, and above ground and underground (state-vesting legislation)<sup>65</sup>. However, their efforts are often unilateral since not all the market countries signed and/or ratified the 1970 and 1995 Conventions and, in case of the 1970 Convention, the transposition into national law might not have occurred<sup>66</sup>.

For this research, two case-studies of EU market countries were selected, Belgium and the United Kingdom. There are a number of reasons for this choice. First of all, Belgium and the UK are very active destination points for the arts and antiquities' trade, both on the EU level and in the international dimension<sup>67</sup>. Second, they are very 'convenient' places in terms of weak risks of legal prosecution. In Belgium there no laws governing purchasing policies of antique dealers, and they are not obliged to prove the legal origin of the objects they sell<sup>68</sup>. Existing legislation in the UK is designed in such a way so as to make it almost impossible to prove the illicit character of the dealings<sup>69</sup>. In spite of this substantial difference in their legislative basis, the case-studies represent a typical situation in a market country with the activity of antiquities' dealers almost immune from jurisdiction due to the burden of proof problem. Finally, the conclusions of the selected case-studies can be successfully applied to other market countries in the EU and in the world.

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<sup>65</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 2.

<sup>66</sup> See Annex 1.

<sup>67</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, p. 2, p. 21; Documentary 'Spotlight: Blood antiques'.

<sup>68</sup> Documentary 'Spotlight: Blood antiques'.

<sup>69</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, p. 20.

## 2.4 Case study: Belgium

The Belgian antiquities' market, with the Brussels Zavel/Sablon at its heart, is known as a real “linchpin for stolen art”<sup>70</sup>, since an antique dealer “is not obliged to prove that he has come by the piece through legal channels”, and “pieces that have only recently been dug up can be sold here without any problem.”<sup>71</sup>

In fact, relatively more control is exercised in Belgium over museums, libraries and archives (museums' practices are governed by federal and regional laws, international codes of ethics of museums, ICOM Statute (transposed into national law), good museum practices and even the principles of the 1995 UNIDROIT Convention, even if it has not been ratified by the country)<sup>72, 73</sup> and rather strict sanctions can be applied in cases of a serious breach of the established rules<sup>74</sup>. On the contrary, the situation is completely different in respect to private collectors, auction houses and dealers. There is no national legislation governing the acquisition of pieces by actors falling under these categories, they are not controlled by any national authority, there are no obligations to request documentation upon acquisition, no penal or administrative sanctions are imposed, and no awareness has been ever registered about the due diligence provisions of the 1995 UNIDROIT Convention.<sup>75</sup>

According to inspector Axel Poels, Head of the Belgian Federal Police Squad on Works of Art and Antiquities, it is almost impossible to persecute anyone in Belgium, even though the police is aware of the illegal origin of many objects<sup>76</sup>. The primary reason for this is the burden of proof. In fact, the chain of the antiquities' market presents a number of

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<sup>70</sup> Inspector Axel Poels, Head of the Belgian Federal Police Squad for Works of Art and Antiquities, in Documentary ‘Spotlight: Blood antiques’.

<sup>71</sup> Documentary ‘Spotlight: Blood antiques’.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Implementation of Due Diligence report, op. cit.*

<sup>74</sup> *Ibid.*, pp. 32-46.

<sup>75</sup> *Ibid.*

<sup>76</sup> Documentary ‘Spotlight: Blood Antiques’.



criminal and civil law offences<sup>77</sup>, but the police has to prove that each specific object is stolen and the documents, if any, are counterfeited, which is an almost impossible task.

In 2009, Belgium ratified the 1970 Convention, which has not changed substantially the situation<sup>78</sup>. The Convention is to be transposed into national law, which has not yet taken place. However, even when it occurs, it will remain difficult to enforce since, first, it deals mostly with registered objects and, second, due to its non-retroactivity: the police will have to verify if this or that collector had really possessed this or that piece before 2009 (year of ratification).<sup>79</sup> Thus, the act of ratification was seen rather as symbolic and not having any actual influence on the market<sup>80</sup>.

Thus, due to the absence of national legislation on the antiquities market regulation and to the impossibility to enforce effectively civil and criminal law provisions, the illegal antiquities traffic is given practically absolute freedom in Belgium.

## 2.5 Case study: the UK

The UK is an important market for illegal antiquities, both as a transit stage and as an ‘end point’ in the chain of supply.<sup>81</sup> The UK ratified the 1970 UNESCO Convention in 2002, and in 2003, it passed the transposing Dealing in Cultural Objects (Offences) Act<sup>82</sup> that provided for penal and administrative sanctions in case of acquiring a tainted object.<sup>83</sup> However, according to some criminological studies, the Act was “purely cosmetic”<sup>84</sup> in nature and “ineffective in achieving substantial effect on the trade”<sup>85</sup>. To understand the reasons for this assessment, it is necessary to look more closely at key provisions of the Act

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<sup>77</sup> See Chapter I.

<sup>78</sup> Documentary ‘Spotlight: Blood antiques’.

<sup>79</sup> Arthur Brand, Dutch journalist and art connoisseur, in Documentary ‘Spotlight: Blood antiques’.

<sup>80</sup> *Ibid.*

<sup>81</sup> Norman Palmer & Colin Renfrew, ‘Ministerial Advisory Panel on Illicit Trade’, Department for Culture, Media and Sport, London, December 2000, cited in Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 2.

<sup>82</sup> Dealing in Cultural Objects (Offences) Act, 2003, <http://www.legislation.gov.uk/ukpga/2003/27/contents>.

<sup>83</sup> Art. 1 of the Dealing in Cultural Objects (Offences) Act.

<sup>84</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 9.

<sup>85</sup> *Ibid.*

and the way they are formulated as well as to pay attention to the stake-holders that participated in its negotiation and stipulation.

Article 1 of the Act states that “a person is guilty of an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted”. The “knowing and believing” condition nullifies the reach of the whole text: it is practically impossible to prove that a dealer either knew or believed at the moment of acquisition that the object was tainted<sup>86</sup>. As a result, according to a London police officer, the number of convictions and arrests related to the antiquities’ crime fell from 34% in 2003 to 5% in 2005<sup>87</sup>.

Furthermore, the definition of “tainted” includes only the objects illegally excavated (Article 2), but does not cover illegally exported cultural objects, thereby excluding a very considerable proportion of artifacts. Indeed, during the negotiation of the Act, the prohibition on dealing with illegally exported objects was considered “a daily need” by the police, but it was not followed by the panel.<sup>88</sup>

The 2003 Act is not retroactive in character and this aggravates even further the problem of the burden of proof. British law is generally not retroactive, but the non-retroactivity of the 2003 Act is rendered even more conviction-unfriendly: the prosecution has to prove not only that the dealing in a tainted object occurred after 30 December 2003, but the theft itself as well<sup>89</sup>.

Moreover, it is important to underline that during the stipulation of the Act, the major trade stake-holders played a decisive role<sup>90</sup>. Even though the objective was to achieve the most appropriate consensus for all, the question of “what the dealers would acquiesce to

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, p. 21.

<sup>88</sup> *Ibid.*, p. 15.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, p. 28-29.

became the measure of how tight the legislation would become”<sup>91</sup>. As a result, the instrument is hardly enforceable and therefore “toothless”<sup>92</sup>. Its lack of actual power is obvious to the market, and little has changed in the majority of art dealers’ practices.<sup>93</sup> This example can lead to a logical conclusion that in other market countries where the antiquities trade involves very high revenues, trade stake-holders must be rather influential in policy-making and in the market-regulation attempts, if any occur at all.

Thus, the two case-studies demonstrate several common features such as the non-retroactivity of legislative instruments and low levels of enforceability. The most important common denominator remains the burden of proof problem. As has already been demonstrated before, the burden of proof presents a serious obstacle for the EU law as well: it remains up to the prosecution to prove the fact that an object belongs to the state that is making a request. However, the centre of attention of this research has been on the antiquities market where the overwhelming majority of objects come from illicit excavations and that are not registered in public collections or museums, which renders the burden of proof a difficult task. In this context, it is important to demonstrate a case-study where these problems have been successfully overcome and, paradoxically, on the British soil. The reference is made to the UN Security Council Resolution 1483<sup>94</sup> and, especially, to the 2003 Iraq (UN Sanctions) Order (SI 1519)<sup>95</sup> transposing the Resolution.

The UN Resolution prohibits the trade and transfer of suspicious Iraqi cultural property.<sup>96</sup> In the context of military activities in Iraq and the overall knowledge of looting of the Baghdad Museum, it is presupposed that anyone dealing in antiquities should have a reasonable suspicion on the legitimacy of objects from the zone.

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, p. 30.

<sup>93</sup> *Ibid.*, p. 17.

<sup>94</sup> The UN Security Council Resolution 1483, 2003, [http://www.un.org/Docs/sc/unsc\\_resolutions03.html](http://www.un.org/Docs/sc/unsc_resolutions03.html).

<sup>95</sup> The Iraq (UN Sanctions) Order (SI 1519), 2003, <http://www.legislation.gov.uk/uksi/2003/1519/made>.

<sup>96</sup> Art. 7 of the UN Security Council Resolution 1483.

The 2003 Iraq (UN Sanctions) Order (SI 1519) goes even further, introducing for the first time in the history of the fight against the illicit antiquities traffic, the reverse of the traditional burden of proof:

Any person who deals in any item of illegally removed Iraqi cultural property shall be guilty of an offence under this Order, unless he proves that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property<sup>97</sup>.

Moreover, the “illegally removed Iraqi cultural property” definition applies to all the property removed from Iraq since the 6<sup>th</sup> of August 1990<sup>98</sup>, i.e. it is retroactive. The effect on the trade was immediate: publications of Iraqi objects in auction houses fell dramatically, and many of the Iraqi antiquities’ dealers moved to a more illicit activity-friendly Belgium.<sup>99</sup> It demonstrates once again the central character of the burden of proof problem and that the effective regulation of the illicit antiquities market can only be achieved through a common effort both at the source and at the destination points.

### **3. Role of the EU in the illicit antiquities’ fight: from the UNTOC to a new legal instrument**

The analysis of the EU legislation demonstrated its inconsistency: created for the needs of the internal market, it does not address the criminal nature of illicit traffic and its connections to drug and arms trafficking and terrorism. The national level approach is also unsatisfactory in market countries that either exercise a laissez-faire approach<sup>100</sup>, or make only superficial steps towards regulation. International legal instruments, even if containing weaknesses, have not been signed or ratified by all the EU member-states.

The necessity of an adequate EU response is evident. This section highlights that, first of all, the EU should follow the conclusions of the UN Office on Drugs and Crime and

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<sup>97</sup> Art. 8 (3) of the Iraq (UN Sanctions) Order (SI 1519).

<sup>98</sup> Art. 8 (4) of the Iraq (UN Sanctions) Order (SI 1519).

<sup>99</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 19-20.

<sup>100</sup> Interview with Prof. Hans Nilsson, Council of the European Union, Head of the Legal Service, Bruges, 2 April 2011.

apply the UN Convention against Transnational Organized Crime to the illicit antiquities' traffic<sup>101</sup>. Second, an EU-level legislative instrument is deemed absolutely necessary and its key points will be outlined and justified. The role of Europol will also be underlined.

### **3.1 Application of the UN Convention against Transnational Organized Crime to the illegal antiquities' traffic**

The international traffic in illicit antiquities is a form of transnational organized crime<sup>102</sup>. Therefore, the UNTOC should be applied to it, as was recommended by the UN Office on Drugs and Crime in 2009<sup>103</sup>. The grounds for this will now be examined.

The illegal antiquities traffic involves more than three persons organized to dig up, smuggle and sell the objects with the aim of obtaining financial contribution, while the billion-value revenues are used to finance other criminal activities.<sup>104</sup> All this perfectly fits into the definitions of the UNTOC, according to which 'transnational organized crime' is a crime committed in more than one state, with a substantial part of preparation taking place in another state, involving an organized criminal group and having substantial effects in more than one state.<sup>105</sup> And an 'organized criminal group' is a group of three or more persons acting in concert with the aim of committing serious crimes<sup>106</sup> in order to obtain financial benefit.<sup>107</sup>

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<sup>101</sup> United Nations Office on Drugs and Crime, 'The United Nations Convention against Transnational Organized Crime: a vehicle for effective law enforcement and international cooperation to combat trafficking in cultural property?', presentation made at the Open-ended Intergovernmental Group Meeting against Trafficking in Cultural Property of the UN Office on Drugs and Crime, Vienna, 24-26 November 2009, <http://www.unodc.org/unodc/en/treaties/intergovernmental-meeting-on-trafficking-in-cultural-property.html>.

<sup>102</sup> Simon Mackenzie & Penny Green, *Criminalising the Market in Illicit Antiquities*, *op. cit.*, p. 2.

<sup>103</sup> United Nations Office on Drugs and Crime, *op. cit.*

<sup>104</sup> European Commission, DG Home and DG Justice, *Call for tender 'Study on preventing and fighting illicit trafficking in cultural goods in the EU'*, Brussels, 2009, p. 8, [http://ec.europa.eu/culture/our-policy-development/doc1575\\_en.htm](http://ec.europa.eu/culture/our-policy-development/doc1575_en.htm); Documentary 'Spotlight: Blood Antiques'.

<sup>105</sup> Art. 3 (2) of the UNTOC.

<sup>106</sup> The Convention applies not only to the offences specifically designated in it, but also to other "serious crimes constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty" (Art. 2 (2) of the UNTOC).

<sup>107</sup> Art. 2 (a) of the UNTOC.

Thus, there are several offences on the basis of which the Convention can be applied to the illicit antiquities' traffic.<sup>108</sup> Article 5 provides for the criminalization of participation in an organized criminal group and, consequently, the activity of the illicit antiquities' traffic participants should be criminalized<sup>109</sup>. Article 6 lays out the criminalization of laundering of proceeds of crime and, in our case, the antiquities on the market shall be considered as proceeds of crime. Moreover, acquiring something on the antiquities market one has to be minimally aware of the risks of illegal provenance of the objects, and buyers should exercise minimal due diligence. Otherwise, "the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime"<sup>110</sup> is considered an offence under the Convention and this provision can be applied to both dealers and private collectors.

The Convention provides also for the confiscation and seizure of the proceeds of crime (Article 12) and for the international cooperation for purposes of confiscation (Article 13), and Article 8 criminalizes corruption in the public sector. These provisions could also be used against the illegal antiquities' trafficking.

However, even though the Convention contains a clause on a possible shifting of the burden of proof – Article 12.7 states that "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime", the difficulty of proof remains a serious obstacle.

The UNTOC was ratified by almost all the EU member-states (with the exception of the Czech Republic) and approved by the European Union as a whole (2004)<sup>111</sup>. I consider it the first and minimal step on the way to regulating the antiquities market in the EU. Thus,

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<sup>108</sup> United Nations Office on Drugs and Crime, *op.cit.*, p. 11.

<sup>109</sup> *Ibid*, p. 12.

<sup>110</sup> Art. 6.1(b), (i) of the UNTOC.

<sup>111</sup> The UNTOC, Status of ratification and the list of States-Parties, retrieved 30 April 2011, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en).

“states should criminalize activities related to trafficking in cultural property... and consider making the trafficking in cultural property a serious crime in accordance with their national legislation and article 2 of the Organized Crime Convention, especially when organized criminal groups are involved.”<sup>112</sup>

### 3.2 Recommendations for a new EU-level legally-binding document

From a legal perspective, the EU has the basis for harmonisation in the field of illegal antiquities’ traffic: Article 83 (1) of the Consolidated Version of the Treaty on the Functioning of the European Union provides that directives may be adopted in areas of particularly serious crimes with a cross-border dimension.<sup>113</sup> It is supported by Article 81 (1), which stipulates that the Union shall develop judicial cooperation in civil matters having cross-border implications by means of approximation of laws and regulations in civil matters.<sup>114</sup>

Now, on the basis of the previous analyses, the most essential aspects to be taken into consideration for a new EU legally-binding instrument will be highlighted and justified.

- a) The definition of the illegally obtained cultural property should include both stolen and illegally exported cultural property. Important legal precedent of such an inclusive treatment is the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>115</sup> which requires countries “to sight export documentation before allowing import”<sup>116</sup>. This will be an opportunity to tie the legal import of the antiquities into the EU with legal exports from overseas<sup>117</sup>.
- b) The reverse burden of proof should be adopted. The example of the Iraq (UN Sanctions) Order (SI 1519) should be taken as an example: *any person who deals in any item of illegally removed cultural property of any country in the world shall be guilty of an offence, unless he proves that he did not know and had no reason to suppose that the*

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<sup>112</sup> *Recommendations of the expert group on protection against trafficking in cultural property*, Commission on Crime Prevention and Criminal Justice, Nineteenth session, Vienna, 17-21 May 2010, retrieved 29 March 2011, <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/19.html>.

<sup>113</sup> Art. 83 (1) of the TFEU, <http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>.

<sup>114</sup> Art. 81 (1) of the TFEU.

<sup>115</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973, <http://www.cites.org/eng/disc/what.shtml>.

<sup>116</sup> Simon Mackenzie & Penny Green, *loc.cit.*

<sup>117</sup> *Ibid.*

*item in question was illegally removed cultural property*<sup>118</sup>. The reverse burden of proof would simply imply purchasing legitimate cultural goods from reliable sellers. If this leads to a decrease in the number of dealers, this should not deter the EU from legislating but rather be considered evidence of the illegal nature of the majority of antiquities on the market.

- c) The respective provisions of the UNTOC should be incorporated into the new law. The legal precedent of this kind is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>119</sup> which was incorporated into the EU legislation by means of the 2002 Framework Decision on Combating trafficking in human beings<sup>120</sup>, Council Directive 2004/81<sup>121</sup> and the EU Directive 2011/36/EU on fighting trafficking in human beings<sup>122</sup>.
- d) In terms of restitution of stolen and return of illegally removed cultural property, the relevant provisions of the UNIDROIT Convention (“the possessor of a cultural object which has been stolen shall return it”<sup>123</sup> and the title of a bona-fide purchaser to compensation<sup>124</sup>) and of the EU Directive 93/7/EEC (cultural objects “unlawfully removed from the territory of a Member State shall be returned”) should be made use of. The import of illegally exported goods to the EU should thus be controlled.
- e) The retroactivity problem should also be addressed. The Iraq (UN Sanctions) Order can be taken as an example as it is retroactive and is to be applied to all the cultural property

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<sup>118</sup> Author’s interpretation and wording of Art. 8 (3) of the Iraq (UN Sanctions) Order (SI 1519), 2003.

<sup>119</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 2000, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en#EndDec).

<sup>120</sup> Framework Decision on Combating trafficking in human beings, 2002, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett).

<sup>121</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0081:EN:HTML>.

<sup>122</sup> EU Directive 2011/36/EU on fighting trafficking in human beings, 2011, <http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=18J5N7mDGqlNX9FQ16cj4HSC1LWFxTvmxf7wDYvBh6GWZpyGq5qql-1989779177?id=77172b8d-5d04-4cf0-b276-49f733ab93c8>.

<sup>123</sup> Art. 3(1) of the 1995 UNIDROIT Convention.

<sup>124</sup> Art. 4(1) of the 1995 UNIDROIT Convention.



removed from Iraq after the 6th of August 1990. Thus, a precise date of entry into force of the new EU legislation should be determined.. This will have a preventive effect and reduce the purchases of illegal material.

f) The role of Europol should be enhanced. Up to 2007, Europol had a Cultural Property Crime Expert in its Property Crime Group under Serious Crime Department SC4<sup>125</sup> that was carrying out projects on the fight against cultural crimes, such as development of an EU-wide model for a database on stolen cultural property and the preparation of a manual on cultural property crime in the EU<sup>126</sup>. Both of them were terminated when this role ceased to exist in 2007<sup>127</sup>. If a new legislative instrument is adopted, it will be essential to have a strategic EU law-enforcement unit that would coordinate, monitor and assist the implementation of a new law<sup>128</sup>. Having in Europol the mandate to deal with “illicit trafficking in cultural goods, including antiquities and works of art”<sup>129</sup>, it should become the European point of reference in relation to this type of crime and carry out such tasks as the creation of databases, practical assistance in police cooperation between member-states, raising social awareness-, and sending the message that collecting illicit material is a crime. <sup>130</sup>

Thus, a comprehensive new EU instrument would overcome the weaknesses of previous legislation. However, there should be “a clear set of prioritizing” coming from the Council of the European Union and from the European Parliament<sup>131</sup>, and it is important not to let trade interests override the necessity of combating the criminal phenomenon, as it

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<sup>125</sup> Telephone interview with Werner Gowitzki, Project Manager, ex-head of the Property Crime Group, Europol, 19 April 2011; Minutes of the 6<sup>th</sup> International Symposium on Works of Art, Antiques and Cultural Property, Interpol, Lyon, 21-23 June 2005, <http://www.interpol.int/Public/WorkOfArt/Conferences/>

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Open Method of Coordination – “Prevention of Theft and Illicit traffic” Subgroup, op. cit., p. 6.*

<sup>129</sup> Annex of the Council Decision of 6 April 2009 establishing the European Police Office (OJ L 121/47 of 15.05.2009), <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:121:SOM:en:HTML>.

<sup>130</sup> Telephone interview with Werner Gowitzki.

<sup>131</sup> *Ibid.*

happened with the 2003 UK Act. In other words, the presence of political will is of crucial importance for the aim of regulation to be achieved.

## **Conclusion**

The present research has aimed at investigating the legislative basis of the fight against illicit trade in cultural property. An analysis has been carried out of the international, European and national legislation, proving the existence of significant gaps: incomplete definitions, vagueness of crucially important provisions, burden of proof problem, non-retroactivity, and the lack of a punitive element. The research also demonstrated that the above problems can lead to practical unenforceability of the law and the almost complete immunity of illicit dealings from jurisdiction.

The research concentrated particular attention on the EU dimension, where the problem of the illegal traffic in cultural goods is addressed mainly from the internal market perspective and its criminal nature is given little attention. An adequate EU response should consist in the implementation of the UN Convention against Transnational Organized Crime to the illegal antiquities traffic and, ultimately, in the adoption of a new legally-binding instrument. Concrete recommendations were proposed.

An effective EU-level response to the illegal antiquities traffic will have a spillover effect. both on the lower level of changing the practices in the member-states, and on the upper level in providing an example for the international community. To put it with the words of the ex-head of the Property Crime Group of Europol Werner Gowitzke, “cultural values are important on the long-term basis, and we should protect our heritage”<sup>132</sup>.

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<sup>132</sup> *Ibid.*

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## ANNEX I: EU Member-States and international legislation

EU Member/ Status, 05/2011	UNESCO, 1970 <sup>1</sup>		UNIDROIT, 1995 <sup>2</sup>		ECOCP, 1985 <sup>3</sup>		ECPAH, 1992 <sup>4</sup>	
	Accepted	Ratified	Signed	Ratified	Signed	Ratified	Signed	Ratified
Austria	—	—	—	—	—	—	—	—
Belgium		31/03/2009	—	—	—	—	30/01/2002	08/10/2010
Bulgaria		15/09/1971	—	—	—	—	16/01/1992	02/06/1993
Cyprus		19/10/1979	—	02/03/2004	25/10/1985	—	08/04/1998	26/04/2000
Czech Republic	26/03/1993*	—	—	—	—	—	17/12/1998	22/03/2000
Denmark		26/03/2003	—	01/02/2011	—	—	16/01/1992	16/11/2005
Estonia		27/10/1995	—	—	—	—	03/05/1996	15/11/1996
Finland		14/06/1999	01/12/1995	14/06/1999	—	—	15/09/1994	15/09/1994
France		07/01/1997	24/06/1995	—	—	—	16/01/1992	10/07/1995
Germany		30/11/2007	—	—	—	—	16/01/1992	22/01/2003
Greece		05/06/1981	—	19/07/2007	23/6/1985	—	16/01/1992	10/07/2006
Hungary		23/10/1978	24/06/1995	08/05/1998	—	—	16/01/1992	09/02/1993
Ireland	—	—	—	—	—	—	16/01/1992	18/03/1997
Italy		02/10/1978	24/06/1995	11/10/1999	30/7/1985	—	16/01/1992	—
Latvia	—	—	—	—	—	—	28/02/2003	29/07/2003
Lithuania		27/07/1998	24/06/1995	04/04/1997	—	—	26/01/1998	07/12/1999
Luxembourg	—	—	—	—	—	—	16/01/1992	—
Malta	—	—	—	—	—	—	16/01/1992	24/11/1994
Netherlands	17/07/2009	—	28/06/1996	—	—	—	16/01/1992	11/06/2007
Poland		31/01/1974	—	—	—	—	16/01/1992	30/01/1996
Portugal		09/12/1985	23/04/1996	19/07/2002	23/6/1985	—	16/01/1992	05/08/1998
Romania	06/12/1993	—	27/06/1996	21/01/1998	—	—	22/07/1996	20/11/1997
Slovakia	31/03/1993*	—	—	16/06/2003	—	—	30/06/1993	31/10/2000
Slovenia	05/11/1992*	—	—	08/04/2004	—	—	15/11/1996	07/05/1999
Spain		10/01/1986	—	21/05/2002	—	—	16/01/1992	31/03/2011
Sweden		13/01/2003	—	—	—	—	16/01/1992	11/10/1995
United Kingdom	01/08/2002	—	—	—	—	—	16/01/1992	19/09/2000

\*) - Notification of succession

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2. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Rome, 1995, <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.
3. ECOCP European Convention on Offences relating to Cultural Property. CETS No.: 119, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=119&CM=7&DF=02/05/2011&CL=ENG>.
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