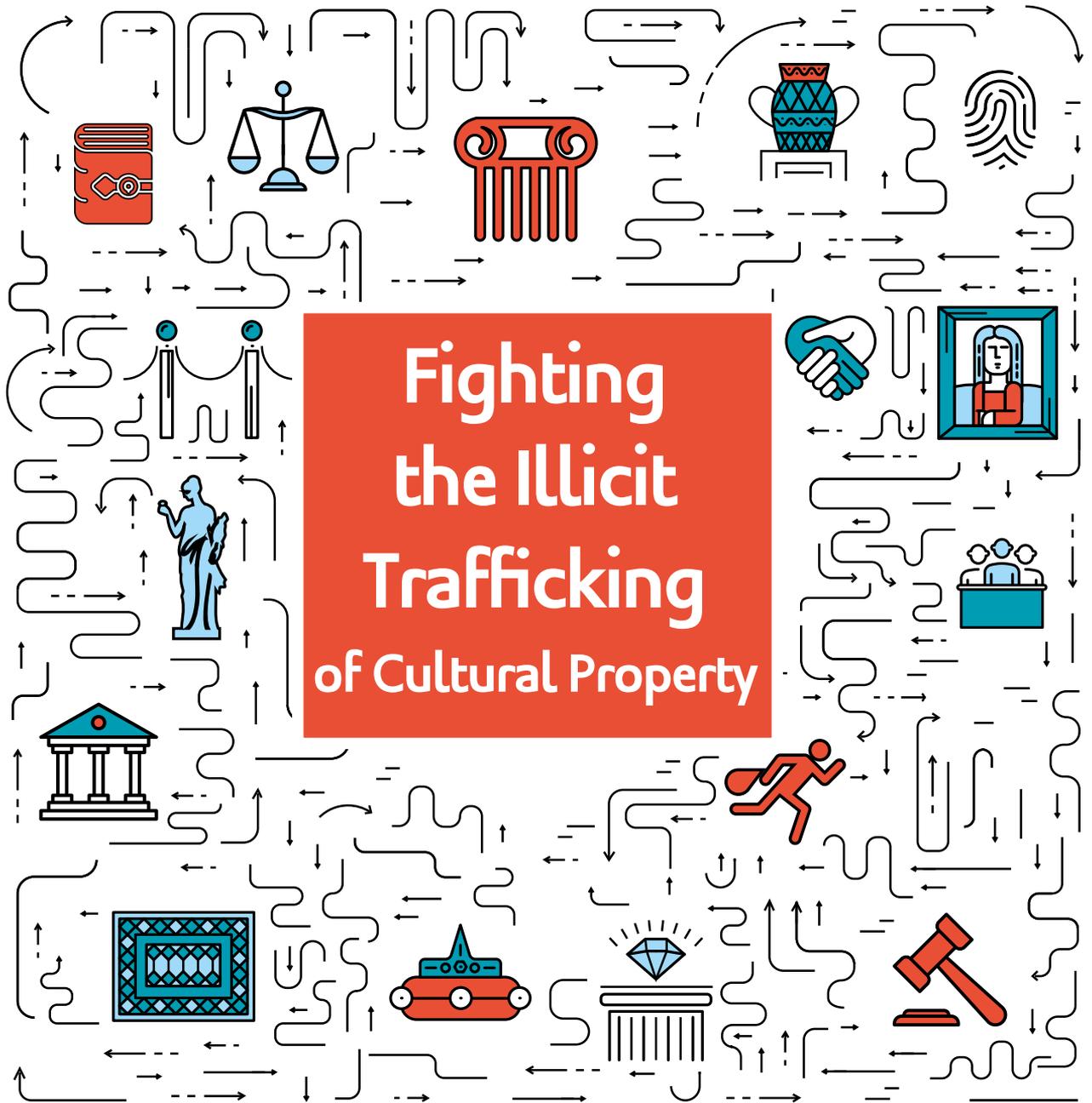




United Nations
Educational, Scientific and
Cultural Organization



Convention for the fight
against the illicit trafficking
of cultural property



**A TOOLKIT FOR EUROPEAN JUDICIARY
AND LAW ENFORCEMENT**

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Fighting the Illicit Trafficking of Cultural Property

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Foreword by the European Union

Trafficking in cultural goods can take different forms, ranging from theft from cultural heritage institutions or private collections, through looting of archaeological sites to the displacement of artefacts due to war. But the result is always the impoverishment of the countries of origin of these treasures, and irreparable damage to the common cultural heritage of humankind. This trade is also often linked to organized crime, money laundering and terrorism.

The illicit trade in cultural goods is international in nature and requires an international response. International cooperation is therefore the most efficient means of protecting the world's cultural property.

The EU and UNESCO share the same priorities and the same desire to strengthen the global response to the looting and smuggling of cultural heritage treasures. This training manual, published during the European Year of Cultural Heritage 2018, is the proof that by joining forces we become more effective.

Michel MAGNIER

Director for Culture and Creativity
DG Education and Culture at
the European Commission

Foreword by UNESCO

UNESCO, by virtue of its mandate, implements activities directed at preserving peace, protecting cultural heritage, contributing to sustainable development and strengthening international security through the development of international standard-setting instruments. One such pioneering instrument, soon to be celebrating its 50th anniversary, is the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was the first international treaty in the fight against the illicit trafficking of cultural property. With 137 States Parties and a widely recognized action in the fight against the illicit trafficking of cultural property, its scope is now universal.

Although illicit trafficking of cultural goods is not a new phenomenon, the levels it has reached in recent years, especially in areas affected by armed conflicts and natural disasters, is a very serious cause for concern for the international community. Indeed, cultural heritage is increasingly targeted during conflicts. Its destruction, theft, looting or smuggling stems from a desire to reduce to ashes the collective memory and dismember the identity of peoples. Moreover, the illicit trafficking of cultural property contributes significantly to the funding of terrorism, organized crime and money laundering. It should be recalled that the United Nations Security Council formally recognized in 2017 (Resolution 2347) that threats to cultural heritage are a major security issue and that the international community has a direct responsibility to protect it.

In this regard, UNESCO would like to thank the European Union for its invaluable and long-term cooperation and acknowledge the work and efforts made by all relevant professionals, especially judicial representatives and law enforcement agencies. Given the scale of the damage faced by the international community in relation to the illicit trafficking of cultural property, only a strong and continued cooperation will enable the police and judicial authorities to overcome this global threat. Bridges need to be built between the two, in close cooperation with member states, the IGOs and NGOs involved in this field and the other stakeholders, such as the art market.

In light of this, the present manual offers a practical and comprehensive toolkit for all professionals. It outlines the international legal instruments and existing tools in order to enhance best practices and to improve European and international cooperation. By doing this, and by working together to attain security objectives and the safeguarding of heritage, we will preserve a common and irreplaceable legacy.

Lazare ELOUNDOU ASSOMO

Director, Culture and Emergencies
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List of acronyms

AML	Anti-money laundering
ANF	Al-Nusra Front
CFT	Counter-terrorist financing
CNRS	French National Centre for Scientific Research
CoE	Council of Europe
EIO	European Investigation Order
EU	European Union
FATF	Financial Action Task Force
ICC	International Criminal Court
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICOM	International Council of Museums
ICPRP	Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.
IMI	Internal Market Information System
INTERPOL	International Criminal Police Organization
ISIL	Islamic State of Iraq and the Levant
MLA	Mutual legal assistance
MRA	Market reduction approach
NCB	National Central Bureau
NGO	Non-governmental organization
OCBC	French Central Office for the Fight against Illicit Trafficking in Cultural Goods
OSCE	Organization for Security and Cooperation in Europe
SNDJ	French National Judicial Customs Service
UCAP	UNIDROIT Convention Academic Project
UNCAC	United Nations Convention against Corruption 2003
UNESCO	United Nations Education, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTOC	United Nations Transnational Organized Crime Convention 2000
WCO	World Customs Organization

1. Introduction



1.1. The purpose of this toolkit

Preventing the illicit trafficking of cultural objects is a fundamental necessity for the protection of cultural heritage. Fighting this crime requires specific knowledge and experience of international legal tools, including their practical implementation. Most importantly, in order to cooperate efficiently on this matter, all actors involved in mitigating the illicit trafficking of cultural property must be well-prepared. Any loss of time only serves to favour the smugglers while undermining cultural heritage, science and hope.

This manual aims to provide the basic reference documents, together with practical tools developed by the relevant international or regional governmental or non-governmental organizations (NGOs), organs and mechanisms, including:

- United Nations Security Council (UNSC)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- International Institute for the Unification of Private Law (UNIDROIT)
- International Criminal Police Organization (INTERPOL)
- United Nations Office on Drugs and Crime (UNODC)
- World Customs Organization (WCO)
- International Council of Museums (ICOM)
- European Union (EU)
 - Eurojust
 - Europol

The protection of cultural property is an undertaking that is generally associated with cultural heritage professionals such as archaeologists, art historians, anthropologists and museum professionals. However, when this protection becomes a legal obligation and contrary actions are criminalized, the responsibility to ensure the application of the law rests with the law enforcement agencies and the judiciary. In this regard, this manual also aims to provide fundamental information on the principal actors in this fight: the police, gendarmerie, customs, prosecutors and judges.

The examples and exercises included in this study offer practical steps to complement the theoretical information provided in the legal texts, and to initiate interaction during training.

For practical reasons, in order to limit the number of pages of the study, the legal tools addressed in the manual are not annexed. However, the websites of all online sources or online versions of the sources used in this study are available in the footnotes. Before carrying out the exercises, please make sure you read the legal texts referred to in the relevant chapters.

1.2. The importance of protecting cultural heritage through the prevention of illicit trafficking



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Awareness-raising and information aimed at improving the state of the world is found on every corner and on all matters, from protecting wildlife to fighting extremism, preventing certain diseases, ending child abuse, defending human rights, ensuring equality in education and encouraging healthy eating.

With so many causes competing for our attention, what is it that makes cultural objects so important that their protection should be considered a cornerstone for a better future? Cultural property is composed of inanimate objects. However, the creators of those objects were real people who, through their artefacts, transmitted their artistic soul, wisdom, culture and knowledge. Our capacity to learn from the findings of people who lived much earlier than us has, for example, made it possible for us to engage in democratic practices today, or to develop a vaccine against malaria.

Cultural property contributes to the world and to

all of our lives, not only through the fundamental scientific information it transmits, but also because of its historic value and fragility – something that unites people in spite of their differences.

It is natural to share the most human feelings when protecting a life or keeping youngsters away from drugs or saving the life of an animal. Safeguarding anything related to a living organism unites us in a compassionate desire to help and protect something that we consider precious. Cultural heritage elicits the very same feelings, as it represents our common humanity above all political, religious and sectarian divisions. For that reason, the actions undertaken by ISIL in Syria and Iraq against cultural heritage shocked the entire world.

The importance attributed to the sustainability of cultural property and the protection of cultural heritage is not a recent phenomenon. Hugo Grotius, in his masterpiece *On the Law of War and Peace*, cites the famous historian Polybius (c. 203 BC – 120 BC), who refers to the unnecessary destruction of objects such as porticos, temples, statues and all other elegant works and monuments of art, even during wartime, as ‘brutal rage’ and ‘madness to destroy things.’¹

1 H. Grotius and S. C. Neff, 2012, *On the Law of War and Peace*, Cambridge, Cambridge University Press, p. 327.

As one of the most famous lawyers and prosecutors in Western history, Marcus Tullius Cicero was also concerned with the looting of cultural objects. He made his name by prosecuting Gaius Verres for looting Sicily. In his lectures on the Verres case, *Verrines*, Cicero refers to three categories as far as property is concerned: *res sacra* (sacred), *res publicae* (public) and *res privatea* (private), and Verres was found guilty of all of them.²

These concerns have not been limited to Europe. In his magnum opus *Al-Muqaddima*, Ibn-I Haldun (1332–1406), one of the forerunners of modern historiography, sociology and economics, expresses his disappointment towards people who carry out illicit excavations, as they expose themselves to the risk of punishment. The reference to the word ‘punishment’ in the manuscript leads us to infer that, even if due to different reasons, illicit excavations were already criminalized a very long time ago.

2 I. Lindsay, 2014, *The History of Loot and Stolen Art from Antiquity until the Present Day*, London, Unicorn Press, p. 49.

2. The international and regional legal framework for preventing the illicit trafficking of cultural property



2.1. Background

Up until the nineteenth century, the legal tools relating to cultural property were limited to bilateral or multilateral agreements. As mentioned in the introduction, cultural property-related arguments began to emerge as early as the Roman period, with Cicero's classification of the nature of property *de facto* designating cultural property as it is understood today.

Article CXIV of the Peace Treaty of Westphalia, 1648, includes provisions on the return of looted artefacts, including the archival records, at the end of the Thirty Years War. Within the scope of this agreement, **Sweden returned 133 Bohemian archival documents by the end of eighteenth century.**³ The Treaty of Westphalia is thus considered a crucial milestone among the many international legal regulations that have influenced the rules on the return of cultural property.

During the **Napoleonic Wars, several cultural objects were removed from their country of origin** and following Waterloo, during the negotiations for the **Convention of Paris** in 1815, the allies declined France's attempt to include a clause for the retention of confiscated property.⁴ **An order was subsequently issued for the return to its country of origin** of both confiscated property and property acquired through a treaty.

It is not surprising to observe that the first international regulations on cultural property emerged in relation to the laws of war. This is because in addition to civilians, cultural property suffers the heaviest damage in the event of war, unrest or armed conflict.

Another important tool that is considered one of the founding documents for the laws of war is the **Lieber Code**, which was created based on the understanding that even war must have standards to protect human life. This Code was penned in 1863 during the American Civil War and it is therefore considered a national legal instrument. It is, however, also regarded as the ancestor of the Brussels Declaration of 1874, which is the reference document for the 1899 Hague Convention.⁵

The First Hague Conference was organized in 1899 to review and revitalize the Declaration on the Laws of War, which was drafted but not ratified at the **1874 Conference of Brussels**. The Hague Convention of 1899 makes direct reference to and prohibits the unnecessary destruction of edifices devoted to religion, art, science and education. The most relevant article to the illegal appropriation of cultural property is Article 56 and it reads as follows:

3 R. Peters, 2011, Complementary and alternative mechanisms beyond restitution: An interest-oriented approach to resolving international cultural heritage disputes. Ph.D. thesis, European University Institute, Department of Law, p. 31.

4 C. Bassoni, 1983, *Jurisdictional Issues in the International Movement of Cultural Property*, Vol. 10, No. 2, Syracuse, New York, Syracuse University College of Law, p. 288.

5 Lindsay, *op. cit.*, p. 19.

Article 56

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.⁶

Furthermore, Article 47 of the Convention formally prohibits pillage. The very same provisions are included in the Second Hague Convention (1907) with only very small changes in the wording.

Case: Venus of Cyrene



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In 1913, Italian military forces in Libya discovered a headless statue of Venus in an ancient site called Cyrene. Allegedly for safekeeping reasons, the Italian authorities sent the statue to Italy. In 1989, the Libyan Government made a claim for the return of the artefact. The Italian authorities agreed that this artefact belonged to Libya and the negotiations between the two governments resulted in a joint communiqué, which was followed by an agreement signed in 2000 concerning the return of the Venus of Cyrene to Libya.

Following the issuance of a ministerial decree to implement the joint communiqué and the agreement of 2000, an Italian NGO, Italia Nostra, applied to the Regional Administrative Tribunal of Lazio for the cancellation of the ministerial decree. The NGO argued that the decree was in contradiction with Italy's domestic legislation, as cultural objects are inalienable according to the relevant law of Italy and when the artefact was found, the place of discovery was Italian soil.

It is worth noting that when Italy declared war against the Ottoman Empire in 1911, Tripolitana and Cyrenica belonged to the Ottoman territory. However, it was only in 1923 (eight years after the transportation of the Venus to Italy) that the Allies acknowledged Italian sovereignty over Libya with the Peace Treaty of Lausanne. This means that Italy took the artefact from Libya during wartime occupation. At the time of the events, Italy was a Party to the Second Hague Convention with respect to the Laws and Customs of War on Land of 29 July 1899, whose Article 56 prohibits seizure of works of art. Italy was therefore bound by Article 56 of that Convention which was also re-stated in the 1907 Hague Convention.

Given all these elements, the Regional Administrative Tribunal of Lazio decided that the statue should be returned to Libya. The reasons were twofold: first, because the joint communiqué and agreement of 2000 between Libya and Italy prevail over domestic legislation due to their international character; and second, because of the existing customary law in relation to the return and restitution of works of art. The NGO appealed the judgment before the Italian Supreme Court, which upheld the decision of the Regional Administrative Tribunal of Lazio.

6 Alexander Pearce Higgins, 1909, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War. Texts of Conventions with Commentaries*. Cambridge, Cambridge University Press. [This article was directly transferred from the Brussels Draft Declaration of 1874, Article 8.]

The return of the statue took place in 2008 and this action was considered as the beginning of a new era between Italy and Libya; it remains a good example both of international cooperation and the implementation of the 1899 Hague Convention.^{7,8}

In 1919, two important treaties, the Treaty of Versailles and the Treaty of Saint-Germain-en-Laye, addressed the subject of the return and restitution of cultural property. It was the first time that a treaty included tailor-made provisions on the reparation of specific artefacts and provided the grounds for claims for the restitution of works of art, archives, historical souvenirs, etc.⁹

The first international convention devoted entirely to the protection of cultural property was the **Washington Pact of 1935**, also known as the Roerich Pact or the Pan-American Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. **It is a regional convention concluded between the Americas**¹⁰ designed to protect some forms of cultural property both during war and peacetime, but it does not cover all forms of cultural artefacts comprehensively.

The Treaty on the Protection of Movable Property of Historic Value of 1935 is the first multilateral treaty between the Americas that enables the application of foreign legislation regarding the return and restitution of cultural property.¹¹ The most important feature of this treaty could be considered the restriction on importing cultural property. According to Article 2 and Article 3 of the Treaty, if an object is not accompanied with an export certificate issued by the country of origin, the object shall be confiscated, its import not authorized, and the artefact returned to the country of origin. Furthermore, the State Party that is also the country of origin of the artefact attempted to be imported will have the right to claim the return of the object. Despite the Treaty being limited to artefacts dating to pre-Colombian and colonial times and only applying in the Americas, the norms it has introduced in the field of cultural property law have their place in the international and regional regulative documents today.

Restitution of looted artefacts-related provisions were also included in the treaties that were signed at the end of World War II. With the **Convention on the Settlement of Matters Arising out of the War and the Occupation**, adopted in 1952, Germany undertook to establish an agency to search for, recover and restitute cultural property in addition to other property such as jewellery and antique furniture taken from the occupied territories during World War II.¹²

7 This case note is kindly corrected and consolidated by Dr Alessandro Chechi. A. Chechi, 2008, The return of cultural objects removed in times of colonial domination and international law: The case of the Venus of Cyrene, *Italian Yearbook of International Law*, pp. 159–81.

8 A. Chechi, A. L. Bandle and M.-A. Renold, 2012, *Case Venus of Cyrene – Italy and Libya*. Art-Law Centre, University of Geneva, ArThemis. Available at <https://plone.unige.ch/art-adr/cases-affaires/venus-of-cyrene-2013-italy-and-libya/case-note-2013-venus-of-cyrene-2013-italy-and-libya> (Accessed 13 May 2018.)

9 Treaty of Peace with Germany (Treaty of Versailles). Article 245–247. Available at: <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf> (Accessed 13 May 2018.)

10 UNESCO, 1984, *The Protection of Movable Cultural Property I. Compendium of Legislative Texts*. Available at: <http://unesdoc.unesco.org/images/0006/000603/060309eo.pdf> (Accessed 12 May 2018.)

11 M. Wantuch-Thole, 2015, *Cultural Property in Cross-Border Litigation: Turning Rights into Claims*. Berlin, W. De Gruyter, p. 178.

12 Federal Republic of Germany, 1959, *Convention on the Settlement of Matters Arising out of the War and the Occupation*, Treaty Series No.13, Chapter V, Article 1. Available at: <http://treaties.fco.gov.uk> (Accessed 22 May 2018.)

2.2. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999

The 1954 Hague Convention is the first international instrument on the protection of cultural heritage that is open to ratification by any State, as it is not limited to a specific region or continent. As briefly mentioned in the previous sections of this manual, the very first provisions relating to the protection of cultural property – including preventing looting and misappropriation – appeared in war-related documents such as peace treaties or laws of war-related instruments. The pre-1954 Hague Convention phase could be considered as a period of ‘accumulation’ during which, through the development of the previous documents, the wording of the Convention started to emerge. It is clear that philosophy, through its expression of the need to protect cultural property, was the core motivation for this development, and this is reflected in the preamble of the Convention: **‘being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’**.

The 1954 Hague Convention was also the first international treaty with a comprehensive definition of cultural property under three classes: (i) movable or immovable property of great importance to the cultural heritage; (ii) buildings whose main and effective purpose is to preserve or exhibit movable cultural property; and (iii) centres containing monuments.

The implementation of the 1954 Hague Convention and its two Protocols started during peacetime, through the taking of appropriate measures for the protection of cultural property in the event of armed conflict.¹³

The 1954 Hague Convention and its two Protocols prohibit:

- targeting and attacking cultural property unless it becomes a military objective;
- exposing cultural property to damage by using it for military purposes;¹⁴
- launching an attack that may be expected to cause incidental damage to cultural property;

¹³ Article 3, Article 7(2), Article 7(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (1954 Hague Convention), available at: http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html and Article 5, Article 30(3)(a) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (1999 Second Protocol), available at: http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html (Accessed 23 May 2018).

¹⁴ Article 4 (1) of the 1954 Hague Convention.

- making cultural property the object of reprisals, and the misuse of the distinctive emblem.¹⁵

However, the Convention also includes provisions that recognize **'imperative military necessity'**,¹⁶ which denotes that there exist no alternative means to achieve the same military advantage. In this regard, the aforementioned prohibitions are not absolute and could be waived in view of imperative military necessity.¹⁷

For the purposes of this manual, the most important provision to recall is **Article 4(3) of the 1954 Hague Convention** which **prohibits theft, pillage and misappropriation of cultural property**. As far as this article is concerned, 'imperative military necessity' is not considered as a valid defence, as stealing cultural property can hardly be justified as a military necessity.

Article 4 (3)

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

According to Article 4(3), while the military forces themselves must avoid engaging in any kind of misappropriation and vandalism, the parties to a conflict, during hostilities, must also prohibit and prevent such acts by other actors, which may include any local criminal formations or organized crime groups.

2.2.1. Belligerent occupation

International law imposes certain duties on the occupying power, considering it as the custodian of the territory during the temporary displacement of the governing authority of the sovereign. This is not an 'in law/de jure' acknowledgement or acceptance of the transfer of the sovereign title to the occupying power but an **'in practice/de facto' designation aimed at ensuring that the laws of armed conflict are applied in the territory**.

The occupying power also has several duties and obligations in the event of armed conflict relating to the protection of cultural property.

In this regard, Articles 1–5 of the First Protocol require the High Contracting Parties to:

- Prevent the export of cultural property from a territory occupied by a High Contracting Party.¹⁸

15 Please refer to the text of the Basic Texts of the Convention and its two Protocols (1954 and 1999) at: <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf> (Accessed 23 May 2018) and R. O'Keefe, C. Péron, T. Musayev and G. Ferrari, 2016, *UNESCO Military Manual for the Protection of Cultural Property*, available at: <http://unesdoc.unesco.org/images/0024/002466/246633e.pdf> (Accessed 23 May 2018.)

16 R. O'Keefe, C. Péron, T. Musayev and G. Ferrari, 2016, op. cit.

17 Article 4 (2) of the 1954 Hague Convention.

18 Paragraph 1, Section I of the First Protocol

- Seize cultural property either directly or indirectly imported into its territory if it is exported from an occupied territory. Seizure shall be carried out automatically if it is detected by the authorities of the importing High Contracting Party. If the High Contracting Party fails to detect it at the time of entering the country, the seizure shall take effect upon request of the authorities of the territory from which the cultural property was exported.¹⁹
- Return the property to the authorities of the territory previously occupied at the end of hostilities.²⁰
- Pay a compensation to the purchaser in good faith of the cultural property that has to be returned to the previously occupied territory, if a High Contracting Party fails to fulfil its obligation to prevent the export of the cultural property in the territory it occupied, and the illegally exported property was bought in good faith.²¹
- At the end of the hostilities, return cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, to the competent authorities of the territory from which it came.²²

🔍 Case: Iraq and Kuwait

During the First Gulf War, the National Museum of Kuwait was invaded and several artefacts were taken to Iraq. The Kuwaiti authorities notified UNESCO of the removal from their territory of a vast number of cultural objects and requested UNESCO to assist in their recovery. On 2 March 1991, the UNSC adopted Resolution 686 (1991),²³ which demanded that Iraq 'immediately begin to return all Kuwaiti property seized by Iraq; the return to be completed in the shortest possible period'. Cultural objects from Kuwait National Museum and Dar-Al-Athar-Islammiyya were returned to Kuwait by the Iraqi authorities between 14 September and 20 October 1991. It is worth noting that during the war both Iraq and Kuwait were High Contracting Parties to the 1954 Hague Convention as well as to its First Protocol.²⁴

In 1998, Iraq was obliged by the UNSC to pay nearly US\$19 million to a Kuwaiti collector for the pillaging of his collection by occupying Iraqi forces.

19 Paragraph 2, Section I of the First Protocol

20 Paragraph 3, Section I of the First Protocol

21 Paragraph 4, Section I of the First Protocol

22 Paragraph 5, Section II of the First Protocol

23 Resolution 686 (1991). Available at: <http://unscr.com/en/resolutions/doc/686>. Accessed (Accessed 15 May 2018.)

24 Despite retrieving several looted artefacts, Kuwait notes that it has not recovered its national archives. This topic was addressed in the reports of the UN Secretary-General pursuant to paragraph 14 of UNSC Resolution 1284. The thirty-fourth report states that no significant progress has been made to return the national archives of Kuwait. However, it is understood from the following paragraphs of the report that both countries established commissions to search for the elements of the national archives of Kuwait with a view to achieving their return. *UN Security Council - Thirty-fourth Report of the Secretary-General Pursuant to Paragraph 14 of Resolution 1284 (1999)*. Available at: <http://www.refworld.org/docid/50f52e2e2.html> (Accessed 15 May 2018.)

✓ Please remember:

‘Customary International Law: International law comes from both treaty law and rules of what is known as customary international law. Treaties are written conventions in which States formally establish certain rules. Customary international law, on the other hand, is not written but derives from “a general practice accepted as law”. To prove that a certain rule is customary, one has to show that it is reflected in state practice and that the international community believes that such practice is required as a matter of law.’²⁵ Thus, even a State that is not a party to the 1954 Hague Convention or to either of its Protocols, is still bound by the same rules that are customary law.

Following the criminal acts committed against cultural property during several conflicts that took place after the adoption of the 1954 Hague Convention, the Convention was discussed with a view to strengthening the protection of cultural property in the event of armed conflict. Following the discussions, the Second Protocol to the Hague Convention was adopted in 1999 and entered into force in 2004.

The Second Protocol introduced the term ‘enhanced protection’ and identified sanctions to be applied for serious violations of the Convention, including the application of individual criminal responsibility.²⁶

Article 9 of the Second Protocol addresses the question concerning the illicit trafficking of cultural property and excavations in an occupied territory by providing that an occupying Party shall prevent and prohibit the illicit export, other removal or transfer of ownership of cultural property. Furthermore, any archaeological excavation shall also be prohibited, unless it is strictly required to safeguard or preserve the cultural property. As with prior provisions considered, this article not only prohibits the members of the occupying power from engaging in such excavations, but it also mandates them to monitor the territory in relation to the aforementioned actions and to prevent such activity by any other actors.

2.2.2. Serious violations

Chapter IV of the Second Protocol to the 1954 Hague Convention entitled ‘**Serious violations**’ lists various actions as war crimes. In addition to (i) attacking a cultural property under enhanced protection or protected by the Convention; (ii) using of cultural property under enhanced protection for military purposes; and (iii) extensive destruction or appropriation of cultural property protected also under the Convention, it also considers **(iv) theft, pillage or misappropriation of cultural property** protected under the Convention a crime through violation of the Convention or the Second Protocol.

📄 ARTICLE 15, paragraph 1

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

25 ICRC, 2010, *Customary International Humanitarian Law*. Available at: <https://www.icrc.org/en/document/customary-international-humanitarian-law-0> (Accessed 16 May 2018.)

26 For more information, please refer to: J. Hladik, 2004, The control system under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its Second Protocol, *Yearbook of International Humanitarian Law*, Vol. 4, The Hague, T. M. C. Asser Press, pp. 419–31.

(...)

e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

(...)

According to Article 16 of the Second Protocol which regulates '**Jurisdiction**', each Party must introduce measures to establish its jurisdiction over the serious violations listed in Article 15. Specifically, paragraph 1 (c) of Article 16 is based on universal jurisdiction and it is only applicable to the offences set forth in Article 15 sub-paragraphs (a) to (c). The same specific reference can be observed in Article 17, which concerns **prosecution**, as well as in Article 18, which regulates **extradition**. Even if theft, pillage and misappropriation of cultural property are not among the referred offences for the application of universal jurisdiction or extradition, **the thin line between 'appropriation' mentioned in Article 15(1)(c) and 'misappropriation' in Article 15(1)(e) must be well defined by the prosecuting State.**

The offence of 'illicit export of a cultural property' is considered in the last article of Chapter IV of the Protocol, which defines the 'measures regarding other violations'. According to **Article 21**, each State Party shall adopt such legislative, administrative or disciplinary measures **to suppress the illicit export, other removal or transfer of ownership of cultural property from** occupied territory.²⁷

The **appropriate penalty** is decided by national lawmakers, but it should be noted that the only appropriate penalty for war crimes, including the ones committed against cultural property, is **imprisonment**. Financial sanctions cannot be the only means of punishment but may be considered as an addition to the prison sentence.²⁸

The Parties are obliged to assist each other in investigations or criminal or extradition proceedings in relation to the offences mentioned in Article 15. This article designates **theft, pillage or misappropriation** of, or acts of vandalism directed against, cultural property protected under the Convention **as a war crime**, and the Parties shall afford the greatest measure of mutual legal assistance (MLA) for crimes relating to this matter.

As far as illicit trafficking is concerned, the UNESCO 1970 and the UNIDROIT 1995 Conventions are the most comprehensive sources of law at the international level. However, the 1954 Hague Convention and its two Protocols also include provisions relating to the prevention of illicit export, import, return and restitution. **Moreover, theft, misappropriation and illicit export of cultural property are considered war crimes in accordance with the Second Protocol.** In this regard, it is vital for law enforcement professionals as well as prosecutors and judges to be well informed about these tools in addition to the domestically implemented legislation. The consequences of a prosecution on the grounds of national implementing legislation of the UNESCO 1970 Convention and a prosecution on the grounds of the 1954

27 For further reading on the implementation of Chapter, 4 please refer to: R. O'Keefe, 2002, *National Implementation of the Penal Provisions of Chapter 4 of the Second Protocol of 26 March 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Available at: <http://unesdoc.unesco.org/images/0015/001586/158681E.pdf> (Retrieved May 18, 2018.)

28 For detailed information please refer to: UNESCO, 2017, *The Penal Protection of Cultural Property: The Fight Against Impunity in the Framework of the 1954 Hague Convention and its 1999 Second Protocol, Paris, UNESCO*. Available at: <http://unesdoc.unesco.org/images/0026/002600/260071e.pdf> (Retrieved May 18, 2018.)

Hague Convention and its two Protocols would be entirely different, given that the latter relies on the laws of war and international criminal law, as well as international humanitarian law.²⁹ Thus, **the source of law must be well-identified or complemented by all relevant tools to ensure a holistic response to such illegal actions.**

🔗 Case: The ICC Prosecutor Vs. Ahmad Al Faqi Al Mahdi³⁰

- The situation in Mali was referred to the court by the Government of Mali on 13 July 2012. After conducting a preliminary examination of the situation, the Prosecutor of the International Criminal Court (ICC), Ms Fatou Bensouda, opened an investigation into the alleged crimes committed on the territory of Mali since January 2012.
- As a result of the investigation by the Prosecutor, the Pre-trial Chamber I issued an arrest warrant for Ahmad Al Faqi Al Mahdi, who was accused, pursuant to article 25(3)(a) (perpetration and co-perpetration); article 25(3)(b) (soliciting, inducing); article 25(3) (c) (aiding, abetting or otherwise assisting); and article 25(3) (d) (contributing in any other way) of the ICC Rome Statute, of the commission of a war crime alleged by the Prosecutor with regard to intentionally directing attacks against religious and historical buildings.
- Upon his arrest by the authorities in Niger and surrender to the ICC, and following the first appearance and confirmation of charges, the trial took place in August 2016. At the trial's opening, Mr Al Mahdi pleaded guilty to the war crime of destruction of historical and religious monuments. Accordingly, the prosecution showcased its evidence and presented witnesses.
- In September 2016, Trial Chamber VIII unanimously found Mr Al Mahdi guilty, as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012. The Chamber sentenced Mr Al Mahdi to nine years' imprisonment.
- In August 2017, Trial Chamber VIII of the ICC issued a 'Reparations Order' in the Al Mahdi case, concluding that he is liable for €2.7 million in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city.³¹

29 For detailed information please refer to: UNESCO, 2017, op. cit.

30 Cour Pénale Internationale/International Criminal Court. SITUATION IN THE REPUBLIC OF MALI IN THE CASE OF THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI. Available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF (Accessed 9 November 2018.)

31 ICC, 2017, Al Mahdi case: ICC Trial Chamber VIII issues reparations order. Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1329> (Accessed 9 November 2018.)

2.3. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The increase in thefts from museums and looting of archaeological sites by the early 1960s, as well as the increasing interest in art by importing countries, exposed the need for an international legal tool that could be applicable in times of peace to address the problem of fraudulently exported and imported cultural objects.

In April 1970 at its sixteenth Session, the UNESCO General Conference adopted the Convention which is based on three main pillars: prevention, return and restitution, and international cooperation.

Contrary to the 1995 UNIDROIT Convention, the 1970 Convention³² is not a self-executing tool, and therefore the effective implementation of the 1970 Convention depends on its incorporation into national legislation and the establishment of operational mechanisms.

In some States, once an international convention is ratified, a national legislation is enacted, which serves as an endorsement by the authoritative organ of that State (usually the parliament) of the convention in question. This declarative and approving legislation often causes confusion. Undoubtedly, such legislation is fundamental for a State and the importance of this law of approval is beyond question. However, in addition to such legislation, **the content of the 1970 UNESCO Convention must also be incorporated into the relevant national legislation for the Convention to be effectively enforceable.**

The fight against illicit trafficking is generally associated with return and restitution cases. Although return cases have a certain impact on mitigating this crime, the most powerful and effective techniques remain the preventive measures as set forth in the 1970 Convention.

The 1970 UNESCO Convention provides a very broad and widely acknowledged definition of cultural and even natural property, which includes several items from specimens of fauna, archaeological items, stamps, furniture, musical instruments, paintings and many other type of cultural objects.³³ There are certain categories of cultural property also set forth in the Convention, and the States Parties undertake to recognize the cultural property falling under those categories as part of the cultural heritage of each State.³⁴

32 Available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> (Accessed 8 May 2018.)

33 Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

34 Ibid., Article 4

✓ **Please remember:**

National legislation should include a clear definition of cultural property as well as provisions on state ownership. The absence of clear provisions at the national level may weaken both domestic and international attempts to prevent illicit trafficking and could result in a loss of rights in the event of a claim to return a cultural property.

According to the Convention, States Parties undertake to put a stop to the illicit import, export and transfer of ownership of cultural property and to cooperate with one another.³⁵ In practice, this obligation may take three different forms based on the role of a country in the international circulation of cultural property (taking into account the fact that the **positions of countries are interchangeable**):

- Source country: increase the security level around the archaeological sites and museums, train all relevant national actors, strengthen efforts to inventory museum or any other collection artefacts, raise awareness at the local and/or national level, increase export controls, etc.
- Transit country: increase customs controls, train relevant law enforcement authorities, update national legislation to include provisions that foresee the challenges of a 'transit' situation, etc.
- Destination country: increase import controls, adopt trade-regulating legislation relating to cultural heritage, monitor the market, cooperate on return and restitution.

Article 3 of the 1970 UNESCO Convention declares that **import, export or transfer of ownership of cultural property effected contrary to the provisions of the Convention are illicit**.³⁶ There are various opinions on how to implement this article. However, given the modus operandi of traffickers – exporting illegally but finding a way to import legally – criminalizing the import when the export cannot be proven legal may provide a functional solution to implementation.



While this model provides a satisfactory way of implementing Article 3, according to which export, import and transfer of ownership are illicit when carried out contrary to the provisions of the Convention, **there is no action of export that does not end in an action of import: the latter inevitably results from the former**. If the first action (i.e. the export) is illegal, it results that the following and linked activity (i.e. the import) in the territories of another State Party to the Convention cannot be considered as an act that is in compliance with the Convention.

However, when national laws or customs do not foresee an import prohibition on illegally exported cultural artefacts, it is the traffickers who benefit from the resulting legal vacuum. Such **laundered artefacts, generally accompanied with fake provenance histories, also serve to undermine States in their efforts to keep the market clean**.

35 Article 2 of the 1970 UNESCO Convention

36 As this article is one of the most discussed among specialized scholars, participants with an interest in the legal and theoretical background may wish to consult: P. J. O'Keefe, 2000, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, Leicester, Institute of Art and Law, pp. 41–44.

The Convention requires all States Parties to set up one or more national services for the protection of cultural heritage to contribute to:

- drafting legislation on the prevention of the illicit import, export and transfer of ownership of cultural property;
- establishing and updating the national inventory of protected cultural heritage;
- promoting the development of museums, archives, etc.;
- arranging the supervision of the archaeological excavations and protecting the archaeological sites;
- raising awareness through educational measures;
- ensuring that publicity is given to the stolen or disappeared cultural property.³⁷

Another preventive measure – the export certificate – is also foreseen in the Convention.

Put simply, it calls upon States Parties to put in place an export certificate which must accompany the cultural property designated by the national regulation when leaving the country of origin.³⁸ Furthermore, **it requires a prohibition on the export of protected cultural property that is not accompanied by an export certificate, and that this prohibition be publicized as broadly as possible.**

The national regulations on export vary from one country to another. For example, the EU member states are bound by the Council Regulation (EC) No 116/2009 and its implementing Regulation EC 1081/2012, which leads to the issuance of export certificates under specific conditions.

Example: EU export certificate

The EU adopted Council Regulation (EC) No 116/2009 as a basic tool to regulate the export of cultural goods from EU member states to third parties. The implementing regulation 1081/2012 for this was adopted in 2012, and provided a model export licence to be issued by the EU member states. This regulation foresees three types of export licences:

STANDARD LICENCE

Each export subject to Council Regulation (EC) No 116/2009

SPECIFIC OPEN LICENCE

Repeated temporary export of a specific cultural good by a particular person or organization

GENERAL OPEN LICENCE

Temporary export of cultural goods that are part of the permanent collection of a museum or other institutions

Article 3(2) of Council Regulation (EC) No 116/2009 mandates the Commission with publishing a list of the authorities and any amendment to that list in the 'C' series of the Official Journal of the EU. This list is available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528139851504&uri=CELEX:52018XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528139851504&uri=CELEX:52018XC0224(01)).

In order to ensure a practical and easy implementation of the Regulation, another list which identifies the customs offices empowered to handle formalities for the exportation of cultural goods was created in accordance with Article 5(2) of the said Regulation. It is available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528139851504&uri=CELEX:52018XC0222\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528139851504&uri=CELEX:52018XC0222(01)).

37 Article 5 of the 1970 UNESCO Convention

38 Article 6 of the 1970 UNESCO Convention

However, in some source countries the notion of ‘export certificate’ may refer to a different context, as the export of cultural property from their respective territories is completely prohibited by any means. In such countries, sending artefacts abroad temporarily for an exhibition or for any other scientific reason, is not an act of ‘export’ but one of ‘temporarily taking abroad’. They do not consider the official documents issued for the purposes of the exhibition as an ‘export certificate’.

 **Please remember:**

Relevant national legislation should foresee export restrictions and the issuance of export certificates or temporary permission documents to control the flow of cultural property crossing borders.

The States Parties are obliged to keep museum collections clean by taking the necessary measures to prevent museums and similar institutions from acquiring cultural property that has been illegally exported from another State.³⁹ Considering that, as in any other type of trafficking, the illicit flow of cultural artefacts is also based on a supply and demand chain, this provision of the Convention, if fully implemented, could drastically curtail the demand side of the equation. This decrease in demand would doubtlessly lead to a concrete and measurable decrease in supply.

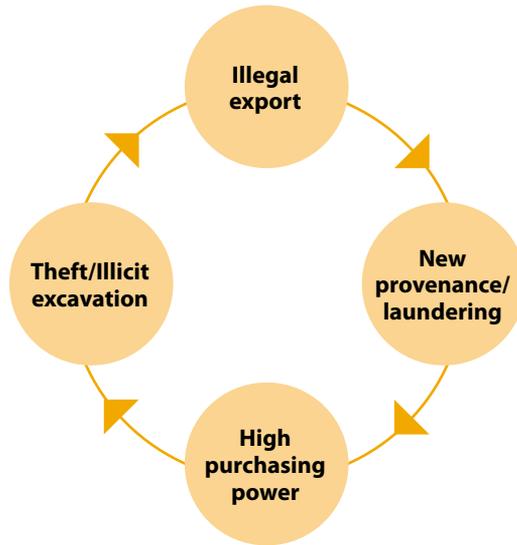
The **Market Reduction Approach (MRA)** method was presented by criminologists as an effective response to illicit activity, to be applied to the antiquities market. The main principle of MRA is the deterrent ‘**risk projection**’ method, which increases the risk not only for the thief but for anyone involved in the transaction, such as the **facilitators and individuals transporting, storing, selling or buying stolen goods**.⁴⁰

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects introduces a due diligence principle and the ICOM Code of Ethics for Museums⁴¹ requires the buying institution/person to take all necessary measures to ensure that the artefact has reached them lawfully.

39 Article 7 (a) of the 1970 UNESCO Convention.

40 S. Mackenzie, The market as criminal and criminals in the market: Reducing opportunities for organised crime in the international antiquities market, in: S. Manacorda and D. Chappell (eds), 2011, *Crime in the Art and Antiquities World*, Springer Science + Business Media, pp. 80–81. Available at: <https://traffickingculture.org/app/uploads/2012/07/2011-Springer-OC-antiquities-chapter.pdf> (Accessed 3 August 2018.)

41 Available at: <https://icom.museum/en/activities/standards-guidelines/code-of-ethics>



The diagram above does not represent the money flow between the actors but aims to represent the link between the above-mentioned steps and how they reinforce one another. The theft/illicit excavations are encouraged by the intermediary who also organizes the illegal export step. In some cases, there may be two intermediaries, with the first one gathering the cultural property from the thief or illicit excavator and the second intermediary being higher in the hierarchy with direct access to the laundering/marketing controllers. The illegal income that the supplier generates is not comparable to the final price paid by the buyer. However, even a small amount is enough to motivate certain people who do not require capital to run this business, and the ‘adventurously appealing’ nature of such ‘treasure hunting’ may be another motivating factor.⁴²

Article 7(b) is one of the most controversial provisions of the Convention. Put simply, **this article regulates the return and restitution procedures of cultural property**. However, it limits its own scope to artefacts whose existence was known and indeed recorded prior to their theft. **The products of clandestine excavations that cannot be recorded seem to have been overlooked** during the drafting of this article.⁴³ In this regard, it is not incorrect to argue that the return and restitution-related provisions of the 1970 Convention are not as clear as its provisions on preventive measures. However, the UNIDROIT Convention brings a response to this loophole and UNESCO and UNIDROIT drafted the Model Provisions on State Ownership of Undiscovered Cultural Objects, which aim to assist States in drafting a consistent legislation.

This being said, the declaration made in **Article 3**, the categories set out in **Article 4** (especially subparagraph (b) – cultural heritage found within the national territory), and other articles that refer to illegal export such as **Article 13**, can all be considered as efforts to strengthen its effectiveness **if remedy is**

42 For further reading on this part, several online articles are available from the Trafficking Culture website, in the ‘List of Academic Publications’ menu. Available at: <http://traffickingculture.org/publications> (Accessed 22 May 2018.)

43 O’Keefe, 2000, op. cit., pp. 57–66, for further reading.

sought within the text of this Convention. However, a more satisfactory solution to address this shortcoming and clarify the ambiguity is provided by the 1995 UNIDROIT Convention.

🔍 Case: France, Egypt and eight Egyptian artefacts

On 20 January 2010, French customs agents searched a British resident passenger in the Paris Gare du Nord. During this search, twelve archaeological objects were discovered. French customs contacted experts in the Louvre Museum, who identified eight of these artefacts as authentic and originating in Egypt. All eight Egyptian artefacts date back to the first millennium BC and the export of such property is prohibited in Egypt.

This action was identified as an offence of illegal movement of property deemed contraband and importation of prohibited goods, as set out in the relevant articles of the French Customs Code.

The public prosecutor was officially informed about the offence and a judicial inquiry was opened and entrusted to the French National Judicial Customs Service (SNDJ). The SNDJ's investigation resulted in the identification and dismantlement of an organized network which was used to transfer Egyptian artefacts to the United Kingdom, transiting France. The offender was sentenced to pay a customs fine and the confiscated objects were seized.

Once the artefacts were seized, they became the property of the French State. The customs authorities informed the Ministry of European and Foreign Affairs and a note verbale was sent to the Egyptian authorities. In March 2017, the Egyptian authorities sent a formal letter informing their French counterparts that these artefacts belonged to Egypt's cultural heritage and requesting the return of the artefacts to Egypt in accordance with the 1970 UNESCO Convention.

France handed over the artefacts to Egypt in October 2017.⁴⁴

Article 7 (b)(ii) of the 1970 UNESCO Convention foresees a **'just compensation'** for the **'bona fide purchaser'** but it does not describe any criteria for one to be considered in good faith. In other words, according to this article the person who holds an illegally exported artefact does not need to prove his/her good faith.⁴⁵

💬 Exercise:

George is a collector in country X and country Y gets in touch with him, requesting the return of an artefact that was stolen from one of its museums 40 years ago. George declines the request and the respective authorities of country Y file a civil complaint in country X. George is adamant that he bought it in good faith but cannot provide any documentation on the background of this acquisition. He explains that he bought it in country W nearly 40 years ago but he does not have anything to prove this claim. Country Y on the other hand, has an old photo of the artefact as well as a police report on the theft incident. At the time of theft, country Y also asked INTERPOL to circulate the information to all Members in order to give publicity to the theft incident.

- Imagine you are the legal representative of country Y. What arguments would you use to convince the judge?
- Imagine you are the judge of the case. What sources of law would you refer to when adjudicating this case?

Please focus on the return and compensation issues and note that the 1995 UNIDROIT Convention is not applicable, as country Y is not a Contracting Party. Also note that the civil code of country X acknowledges acquisitive prescription

⁴⁴ Restitution aux autorités égyptiennes de huit pièces archéologiques saisies par la douane française en janvier 2010. Available at: <http://www.douane.gouv.fr/Portals/0/fichiers/douane/espace-presse/2017-10-DP-remise-antiquites.pdf> (Accessed 2 May 2018).

⁴⁵ O'Keefe, 2000, op. cit., pp. 41-44.

and it requires possession in good faith and with just title for ten years. It is stipulated in the civil code that 'A person cannot claim good faith unless he/she has shown due care'. The criteria of due care are not identified in the laws and regulations.

The Convention also requires States Parties to **adopt penal or administrative sanctions** for violations of an export prohibition or for an import of a cultural property that is stolen from a museum or similar institution.⁴⁶ Several countries have extended these sanctions by adding **dissuasive measures** to illegal excavations, the import of any artefact prohibited from export from the country of origin, illegal trade, unnotified cultural property, etc. These are also foreseen in the Council of Europe Convention on the Offences Relating to Cultural Property, adopted in 2017, as well as in the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, which was adopted by the UN General Assembly in 2014.

The 1970 UNESCO Convention also invites States to help protect the cultural heritage of States whose **cultural heritage is in jeopardy**. The United States uses this article as a basis for its own model of implementing the 1970 Convention. It is common to see bilateral agreements between States Parties to the Convention with the aim of improving their implementation and increasing the visibility of this legal tool. However, the USA and Switzerland apply a different model, which requires **a bilateral agreement to prohibit the import of certain artefacts** originating in the country with which the agreement is signed.⁴⁷

Article 10 focuses on **restricting the movement of cultural property illegally removed** from any State Party to the Convention **by education, information and vigilance**. Furthermore, according to Article 10, States Parties **oblige art dealers to keep records** on the artefacts they sell, including information on the origin, by applying penal or administrative sanctions for failure to do so. States Parties also undertake to publicize by educational means the impact of clandestine excavations, theft and illicit export of cultural heritage, in order to raise public awareness of this situation.



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In 2014, UNESCO and the Uruguay National Commission of UNESCO organized a poster contest to raise awareness on the fight against illicit trafficking in the South American region. Several posters were received from Argentina, Brazil, Chile, Paraguay and Uruguay. Such awareness-raising campaigns are generally organized by culture-related organizations. However, such initiatives can also form a part of the communication strategy of the law enforcement authorities.

46 Article 8 of the 1970 UNESCO Convention.

47 Examples of these bilateral agreements and more detailed information on this model can be found for the USA at: <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (Accessed 24 May 2018.) For Switzerland at: Federal Office of Culture FOC. Available at: <https://www.bak.admin.ch/bak/en/home/cultural-heritage/transfer-of-cultural-property/bilateral-agreements.html> (Accessed 24 May 2018.)

In the spirit of the 1899 and 1907 Hague Conventions, as well as the 1954 Hague Convention and its two Protocols, Article 11 of the 1970 UNESCO Convention prohibits the export and transfer of ownership of cultural property under compulsion arising **directly or indirectly from the occupation of a territory by a foreign power**.

The States Parties to the 1970 Convention thus undertake to prevent the transfer of ownership of cultural property likely to promote illicit export; to ensure that their competent services cooperate to return the cultural property; to admit actions for the return of the lost or stolen cultural property on behalf of the rightful owner; and **to recognize the right of a State Party to declare certain cultural property as inalienable**.⁴⁸

Article 13

The States Parties to this Convention also undertake, consistent with the laws of each State:

- (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

In accordance with this, **States Parties to the Convention are encouraged to establish State ownership for the cultural property that the national authorities deem appropriate**. This declaration of State ownership should also include undiscovered cultural property that is at potential risk of illicit excavations.

48 Article 13 of the 1970 UNESCO Convention.

✓ Please remember:

The clarity of the definition of State ownership in national legislation is crucial for a State to claim ownership and return of its illicitly excavated, or in any case illegally exported, cultural property.

The Italian legislation considers all archaeological findings property of the State. In Greece, findings of archaeological excavations or research, regardless of date, belong to the State. In China, movable cultural relics remaining underground, in inland waters or territorial seas within the boundary of China are owned by the State.

UNESCO and UNIDROIT developed *Model Provisions on State Ownership of Undiscovered Cultural Objects*. These model provisions can be used by States to ensure that the law regarding cultural heritage provides a satisfactory and clear identification of State ownership on undiscovered objects. They are available at: <https://www.unidroit.org/instruments/cultural-property/model-provisions>

🔗 Case: Peru Vs. Johnson

The *Government of Peru vs. Johnson* case underlines the importance of a clear establishment of State Ownership on undiscovered cultural property. In 1987, the Government of Peru filed a civil suit against collector Benjamin Bishop Johnson, who was in possession of Peruvian artefacts that were illegally excavated at the Moche site of Sipan and exported from Peru illegally. Peru's claim was based on 1929 and 1985 legislations that establish State ownership on undocumented Peruvian antiquities. However, the court decided that Peruvian legislation permits private ownership and only sets export restrictions, and thus rejected the case.⁴⁹

💬 Exercise:

George moves with his art collection from country Y to country Z. Country Z's legislation only requires the declaration of artefacts at customs when entering the country and does not foresee an import restriction. After a while, George decides to sell his collection to a State-owned museum in the town in which he resides. The museum gathers a group of experts for the examination of the artefacts and the group believes that some of the objects may have a dubious origin. The experts' view is that the origins of the artefacts are country W and country Q. They inform the central authority in the Ministry of Culture of country Z about the result of their examination. The central authority in turn informs the local police and the prosecutor in the town in which George resides and where the museum is located. It also requests an order to keep the artefacts in the museum while it gets in touch with the authorities of countries W and Q to verify the findings of the museum experts. The prosecutor opens an investigation and orders the seizure of the artefacts on the basis of a legislation which has nothing to do with the protection of cultural property but with dealing in stolen property (please remember that country Z does not have any import restrictions and George declared the artefacts upon entering the country). The central authority subsequently transmits the official information to country W and country Q and requests their confirmation. Both countries confirm that these artefacts belong to them, and according to both of their national legislations, these types of objects are state property and may not be exported. As the scientific evidence provided by countries W and Q confirm their origin, and such artefacts are protected by law and are inalienable by their national legislations, the criminal court of country Z decides on the confiscation of the artefacts in accordance with dealing in stolen property law. Country W and country Q send rogatory letters, requesting the return of the artefacts. The court agrees to the request and the artefacts are sent back to country W and country Q.

Please match the actions mentioned above with the provisions of Article 13.⁵⁰

What would the result have been if the experts had simply declined to buy the artefacts rather than alerting the central authority?

What would the result have been if the prosecutor had only considered the law protecting cultural property?

49 J. H. Merryman, 1992, Limits on state recovery of stolen artifacts: Peru v Johnson, *International Journal of Cultural Property*, Vol. 1, No. 1.

50 <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/>

Despite not being of retroactive nature, the 1970 UNESCO Convention does not restrict the restitution of cultural property removed for any reason from its territory of origin. **Article 15 of the Convention states that nothing in the Convention prevents States Parties from concluding special agreements for the return of the above-described cultural property.** In other words, it means that States can decide to go beyond the Convention if they want.

🔗 Case: Human remains

In 1838, following the execution of King Badu Bonsu II, his head was sent from Ghana to the Netherlands. It was transported to Leiden University and subsequently forgotten in the collections of the University's Medical Centre until being rediscovered during research in 2002. In 2008, during an official visit, the President of Ghana informed the President of the Netherlands and the Queen about the situation and requested the return of the head to Ghana. In 2009, an agreement was signed between the two governments on the restitution of the head. It was returned to the Ahanta tribe in Ghana, and a traditional Ahanta ceremony was held in honour of the late king at the Netherlands Ministry of Foreign Affairs.⁵¹

Several examples on the return of artefacts/human remains prior to the entry into force of the Convention exist, such as the restitution of: 17 Tasmanian human remains from the UK to Tasmania (2007), the Great Zimbabwe Bird from Germany to Zimbabwe (2004), the Axum Obelisk from Italy to Ethiopia (2005), the remains of Sarah Baartman from France to South Africa (2002), the Maori head from Switzerland to New Zealand (2011), and the Venus of Cyrene from Italy to Libya (2008).⁵²

2.3.1. How is the 1970 UNESCO Convention governed?

The Convention is governed by its statutory organs, namely **'the Meeting of States Parties** to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property' and **'the Subsidiary Committee** of the Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property'.

The Meeting of States Parties has been held on an ordinary basis once every two years since 2012. It provides strategic orientations for the implementation of the Convention and takes all measures it deems necessary for the promotion of the objectives of the Convention.⁵³

In 2012, the Meeting of States Parties decided to establish the Subsidiary Committee as a monitoring body on the implementation of the Convention. The Committee is composed of 18 members, elected for 4 years in accordance with the geographical equal distribution principle. The mandate of the Committee is as follows:

- 51 S. M. Tuyisabe, A. Chechi, M.-A. Renold, 2017, *Tête du roi Badu Bonsu II – Ghana et Pays-Bas*, Art-Law Centre, University of Geneva, ArThemis. Available at: <https://plone.unige.ch/art-adr/cases-affaires/tete-du-roi-badu-bonsu-ii-2013-ghana-et-pays-bas> (in French) (Accessed 29 May 2018.)
- 52 For further details of these cases, see: ArThemis: Art-Law Centre, University of Geneva. Available at: <https://plone.unige.ch/art-adr> (Accessed 29 May 2018.)
- 53 UNESCO, 2017, *Meeting of States Parties to the 1970 Convention*, Paris, UNESCO. Available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/meeting-of-states-parties> (Accessed 1 June 2018.)

- To promote the objectives of the Convention.
- To review the national reports submitted to the General Conference by the States Parties to the Convention.
- To share good practices, prepare and submit to the Meeting of States Parties' recommendations and guidelines that can help in implementing the Convention.
- To identify difficult situations resulting from the implementation of the Convention, including topics regarding the protection and return of cultural property.
- To establish and maintain coordination with the 'Return and Restitution Committee'⁵⁴ in connection with capacity-building measures to combat the illicit trafficking of cultural property.
- To inform the Meeting of States Parties of the activities that have been implemented.

2.3.2. Operational Guidelines of the 1970 UNESCO Convention

The purpose of the Operational Guidelines⁵⁵ is to strengthen the implementation of the Convention. Given that the 1970 Convention was adopted nearly 50 years ago, developments in the past years have brought new challenges as well as new remedies in the fight against illicit trafficking. In order to ensure an effective fight, these developments should influence the national implementation behaviours of the Convention. The guidelines also aim to minimize disputes arising from the interpretation of the Convention and provide a common international standard, although not binding.

It is important that the guidelines be taken into consideration during the drafting or revision of national legislation on cultural heritage protection. The parts relating to due diligence, return and restitution of cultural property, online sales and auctions, import and export prohibition are the main features of the Operational Guidelines.

Moreover, the Operational Guidelines can also be considered as a manifesto that addresses challenges and proposes remedies. In accordance with the text, States are expected to:

- set criteria for **due diligence** in order to decide on good faith with reference to Article 4.4 of the UNIDROIT Convention;⁵⁶
- ensure that the **products of clandestine excavations** are considered within the scope of the Convention;⁵⁷

54 Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

55 Please see the full text of the Operational Guidelines of the 1970 UNESCO Convention: UNESCO, 1970, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, UNESCO. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/OPERATIONAL_GUIDELINES_EN_FINAL_FINAL.pdf (Accessed 29 May 2018.)

56 Ibid, Paragraph 94

57 Ibid, Paragraph 96

- **pose import restrictions** for any cultural artefact that is illegally exported from another country and return the object to the country of origin when detected;⁵⁸
- consider **scientific examinations as evidence** when a State requests the return of its illegally exported cultural object, especially in instances where it is not possible to produce retroactive evidence;⁵⁹
- acknowledge that the **1970 Convention does not legitimize any illegal transaction that took place prior to its entry into force**;⁶⁰
- give **special attention to the sales of auction houses** to ensure that the cultural property offered for sale has been legally imported, as documented by a legally issued export certificate, to inform the State of origin of the properties of any doubts in this regard, and to put in place the appropriate interim measures;⁶¹
- **monitor the online sales of cultural property** and even create a network among the public to supervise the online market and notify the State authorities when an object of dubious origin appears.⁶²

The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP)⁶³

In addition to the 1970 UNESCO Convention and its statutory organs, UNESCO has another remarkable mechanism: The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP).

States, Parties or not to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, may apply to ICPRCP.⁶⁴

This Committee is composed of 22 member states and is responsible for:

1. Seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the member states concerned;⁶⁵
2. Promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin;
3. Encouraging the necessary research and studies for the establishment of coherent programmes for the constitution of representative collections in countries whose cultural heritage has been dispersed;
4. Fostering a public information campaign on the real nature, scale and scope of the problem of the restitution or return of cultural property to its countries of origin;

58 Ibid, Paragraph 63

59 Ibid, Paragraph 91

60 Ibid, Paragraph 102

61 Ibid, Paragraph 71

62 Ibid, Paragraph 69

63 For more information on the ICPRCP, please see: <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/> (Accessed 18 September 2018.)

64 For more information on how to submit a case to ICPRCP, please see: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/5_Procedure_case_19_ICPRCP_en.pdf (Accessed 18 September 2018.)

65 For more information on return and restitution cases resolved under the aegis of the ICPRCP, please see: <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/> (Accessed 18 September 2018.)

5. Guiding the planning and implementation of UNESCO's programme of activities with regard to the restitution or return of cultural property to its countries of origin;
 6. Encouraging the establishment or reinforcement of museums or other institutions for the conservation of cultural property and the training of the necessary scientific and technical personnel;
 7. Promoting exchanges of cultural property in accordance with the Recommendation on the International Exchange of Cultural Property;
 8. Reporting on its activities to the General Conference of UNESCO at each of its ordinary sessions.
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2.4. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The content of the 1970 UNESCO Convention could be considered as a mosaic with references to various fields including but not limited to private law, criminal law, preventive measures, diplomacy and international cooperation. In order to ensure an effective response, all types of measures must be developed and applied in accordance with the specific needs in a given situation. In this regard, the 1995 UNIDROIT Convention is a piece of mosaic to be used when private law applies regarding the return and restitution of a cultural object.

In the 1980s, at the request of its Member States, UNESCO gathered a committee of experts to evaluate the implementation and use of the 1970 UNESCO Convention. Since the problems identified by the expert group were related to the field of private law, UNESCO contacted UNIDROIT and the Hague Conference on Private International Law. As a result of the discussions between these two bodies, it was decided that UNIDROIT should undertake the work.⁶⁶

The purpose of the 1995 UNIDROIT Convention is to supplement the provisions of the 1970 UNESCO Convention by formulating uniform legal rules on the return and restitution of cultural objects with a view to mitigating the illicit trafficking in cultural objects. It does so by attempting to change the behaviours of the actors in the market, including the buyers.⁶⁷ This approach can most clearly be observed in Article 3(1) of the Convention, according to which the possessor of a stolen cultural object must return it.

Since the 1995 UNIDROIT Convention was drafted to remedy the shortcomings of the UNESCO Convention, it may be helpful to consider these limitations with the remedies offered by the 1995 UNIDROIT Convention.

66 L. Prott, 2009, The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten years on, *Uniform Law Review*, Vol. 14, No. 1–2, pp. 215–37. Available at: <https://www.unidroit.org/english/conventions/1995culturalproperty/articles/s70-prott-2009-e.pdf> (Accessed 1 June 2018.)

67 UNIDROIT, 2014, *The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - an Overview*. Available at: <https://www.unidroit.org/overviewcp/english> (Accessed 1 June 2018.)

Problem: As the 1970 Convention contains certain provisions that are open to interpretation, this leads to various ways of implementation at the national level.

Remedy: The provisions of 1995 UNIDROIT Convention are written in a very clear way and the Convention is a self-implementing tool which combines the main principles of civil and common law systems. As it does not require transposition into national legislation, the Convention serves as one harmonized document.

Problem: As far as archaeological objects obtained by clandestine excavations are concerned, States Parties implement the 1970 Convention in different ways. For example, some States Parties regulate only the return and restitution of registered artefacts, while the implementing legislation of some other States Parties also regulates the return of unregistered cultural property, mostly obtained by clandestine excavations. This variety in application helps criminals to legitimize the artefacts that they deal in.

Remedy: Article 3(2) of the 1995 UNIDROIT Convention clearly establishes that all cultural objects that have been unlawfully excavated or lawfully excavated but unlawfully retained are stolen, as long as it is consistent with the law of the State where the excavation took place. If the illegal export of an object from its territory significantly impairs its preservation and the context,⁶⁸ the integrity of the object, or the preservation of the scientific or historical data, Article 5(3) requires the competent authority of the State where it is held to order the return of said artefact.

Problem: It is not wrong to argue that the differing national private law systems do not simplify the implementation of the 1970 UNESCO Convention at the national level. For example, a good faith purchaser is protected in the civil law system, whereas the common law system does not grant such recognition and protection.⁶⁹ The 1970 UNESCO Convention only refers to national laws and does not foresee any criteria for proving good faith – the burden is on the claimant.

Remedy: The 1995 UNIDROIT Convention blends the principles of common and civil law systems concerning the protection of good faith purchasers or the issue of 'title'. To remedy this conflict, the Convention 23 years ago introduced the now much-used concept of 'due diligence'.⁷⁰

Article 3

(1) The possessor of a cultural object which has been stolen shall return it.

(...)

68 Context includes all surrounding elements of the place of discovery of an artefact, including the other artefacts found together with the one in question, the type of soil, the nutrition remains available, the seeds or animal remains. All elements must be evaluated together to get the whole and most detailed picture. For most archaeologists, context is everything. This is why illicit excavations matter and how scientific data is lost.

69 *Nemo dat quod non habet*: no one can give what he has not got. The basic rule that a person who does not own property, such as a thief, cannot transfer it on to another except with the true owner's authority.

70 Please see the section 'Due diligence' for more information.

Article 4

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation **provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.**

(...)

(4) **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.

All types of trafficking are based on a supply and demand chain. Whereas the 1970 UNESCO Convention does not put any responsibility on the holder of the artefact, the 1995 UNIDROIT Convention in turn does address the 'demand' side of this equation. Without violating the rights of a person who may be entitled to compensation, the UNIDROIT Convention obliges the individual to prove that he/she has shown all possible efforts at the time of acquisition to ensure that the artefact in question was not of illicit origin. It would therefore not be wrong to consider that the 1995 UNIDROIT Convention served to redress the balance between the responsibilities of the holder and the claimant.

Problem: According to Article 7(b)(ii) of the 1970 UNESCO Convention, only a State Party can claim the return of an artefact and this must be carried out through a set of 'diplomatic channels'. However, a reliance on diplomatic channels means that an individual who has lost his/her cultural property would need to convince the authorities to endorse his/her case and ask for the return of the object. Considering that art works constitute a growing individual investment revenue, such belongings are therefore at greater risk if the individual depends on their governmental authorities to ask for its return.

Remedy: Article 3 of the 1995 UNIDROIT Convention, which regulates the restitution claims of stolen artefacts, does not refer to 'Contracting States' of the Convention but to a 'claimant'. This understanding enables individuals themselves to follow the procedures to claim their stolen cultural objects without any need to convince the governmental authorities. Article 5, which is the core provision on the return of illegally exported cultural objects, does not provide the same right to individuals, because an act of 'illegal export' can be taken exclusively against a State. A cultural object can be stolen from a person, but it can only be exported from a State. Thus, Article 5 only concerns the 'Contracting States'.

Problem: The time limitations for international claims set out in civil or property laws vary from one country to another. This situation again leads to unharmonized applications.

Remedy: With a view to establishing a standard on this matter, the 1995 UNIDROIT Convention set time limitations. The purpose of these limitations is also to ensure the security of transactions, which can otherwise be called into question at any time, even in the remote future.⁷¹ According to Article 3 of the Convention, a claim for restitution must be made within three years' time from the moment the claimant discovers the location of the cultural object and in any case within a period of fifty years from the moment of theft.⁷² However, for artefacts

71 L. Prott, 2009, op. cit.

72 Article 3(3) of the 1995 UNIDROIT Convention

that belong to archaeological sites and public collections, the only time limitation that applies is the three years from the moment when the claimant discovers the location of the cultural object.⁷³ The same periods of three and fifty years are also foreseen in Article 5(5) concerning illegally exported cultural artefacts.

As with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention is not retroactive. Its Article 10 stipulates that the 1995 UNIDROIT Convention applies to matters that took place after its entry into force in both States concerned. In this regard, country P will not be able to make a claim for the return of an illegally exported cultural property to country R if the artefact has been exported prior to the entry into force of the Convention in both States.

The principles of the 1995 UNIDROIT Convention provide insight into all actors in the field by defining the solutions to problems from a different dimension concerning the return and restitution of cultural property.

The influence of the 1995 UNIDROIT Convention is clearly observable in the national legislation of some States and even in regional regulations, such as in the Federal Act on the International Transfer of Cultural Property (CPTA) of Switzerland, the new Article 3(87) of the Dutch Civil Code, and the European legal framework in this field.⁷⁴

At the regional level the recasting Directive 2014/60/EU has incorporated the exact elements of the 1995 UNIDROIT Convention.⁷⁵

Exercise

Step 1: Claude is from country A and he filed a civil complaint against Michael, who is a resident of country B, for the restitution of a painting that was stolen from his home in 2000. Claude has photos of the painting from when it was hanging on his wall as well as the documents relating to the police investigation that took place right after the theft incident. Michael says that he bought the painting from an art fair and that he can provide a receipt dated 2003. Michael wants to keep the artefact and if the judge decides on its restitution, he wants to be compensated. Considering that both countries A and B became parties to the 1995 UNIDROIT Convention in 1998, Claude develops his complaint on the grounds of this Convention.

- a) Which article(s) of the Convention should Claude refer to in support of his claims?
- b) Which article(s) of the Convention should Michael refer to in order to convince the judge to his right to a compensation?
- c) Michael claims that he has owned the painting for 15 years now and that the statute of limitation has expired for this motion. What are the grounds for Michael's claim?
- d) Considering Michael's compensation claim, what type of questions should the judge ask and why?
- e) Considering the claim on time limitation, what questions need to be asked by the judge and what criteria should be applied to determine at what period of time Claude learned that the painting was in Michael's possession?

⁷³ Article 3(5) of the 1995 UNIDROIT Convention

⁷⁴ S. Delepierre and M. Schneider, 2015, Ratification and implementation of international conventions to fight illicit trafficking in cultural property, in: F. Desmarais (ed.), *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, Paris, ICOM, p. 130.

⁷⁵ *Ibid.*, p. 134.

Step 2: All relevant documents are provided by both parties and the judge is not of the opinion that due diligence has been exercised by Michael. Can he/she decide that Michael is not entitled to compensation, despite the Civil Code of country B stipulating: 'If an individual possesses in good faith a movable object of another individual for three consecutive years, he/she becomes the owner of the object'?

Please explain the grounds for your answer.

2.5. Annex 11 to the Nairobi Convention – World Customs Organization (WCO)

The Customs Cooperation Council (now known as the World Customs Organization) in 1974 entrusted its Permanent Technical Committee with the preparation of a draft multilateral convention on mutual administrative assistance to suppress customs offences. The work resulted in the adoption of the Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences in 1977. The Nairobi Convention comprises 11 annexes and entered into force in 1980.

Annex 11 (Assistance in action against the smuggling of works of art, antiques and other cultural property) of the Convention is dedicated to preventing and repressing the fraudulent exportation of works of art, antiquities and other cultural property. It is built upon the Resolution of 16 June 1976, which acknowledged the importance of the 1970 UNESCO Convention and invited the Council Members to develop mutual administrative assistance to combat the smuggling of works of art and antiquities.⁷⁶

Annex XI refers to the 1970 UNESCO Convention and is also applicable to financial operations undertaken in connection with the smuggling of the goods concerned. The assistance defined in this annex covers the exchange of information by customs administrations on their own initiative; assistance on surveillance requests; enquiries on request on behalf of another Contracting Party; action by customs officials of a Contracting Party in the territory of another Contracting Party (appearances before courts or tribunals, participation in investigations); and pooling of information concerning both persons and smuggling methods, at the Council's General Secretariat to be shared with INTERPOL and UNESCO, where appropriate.⁷⁷

76 World Customs Organization, 1999, International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, (Nairobi, 9 June 1977), commentary p. 52. Available at: <http://www.wcoomd.org/~media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/nairobi/naieng1.pdf?la=en> (Accessed 3 June 2018).

77 World Customs Organization, 1999, op. cit., Appendix 1, p. 75.

2.6. United Nations Convention against Transnational Organized Crime (UNTOC)

Trafficking in cultural property is an organized crime with different dimensions such as finding, obtaining, transporting and selling (in some cases more than once), exporting, importing and even conserving or restoring the artefacts.⁷⁸ Owing to successful investigations such as those into Giacomo Medici,⁷⁹ Frederick Shultz and Jonathan Tokeley-Parry,⁸⁰ and Subhash Kapoor,⁸¹ it is known that trafficking in artefacts starts with local gangs of thieves stealing from auction houses or other art trading organizations in Europe, the United States and Asia.⁸²

There is evidence that leads us to establish the link between trafficking in cultural property and other types of transnational organized crime such as the drug trade, arms smuggling, violence, corruption and money laundering.⁸³ These links led States to recognize the need to extend the application of the UN Convention against Transnational Organized Crime (UNTOC) to crimes relating to the trafficking of cultural property. The UNTOC does not have a specific provision on cultural objects, but the last paragraph of the preamble of General Assembly Resolution 55/25, by which the UNTOC was adopted, reads as follows:

General Assembly Resolution 55/25

'...strongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an **effective** tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes ...'

In a study on the use of the UNTOC for protection against trafficking in cultural property, the **United Nations Office on Drugs and Crime (UNODC) underlines the organized character of this crime:** 'This traffic has links to organized crime, as it relies on the modus operandi used by organized criminal groups; the strong demand for illicit objects is highly lucrative for those participating in the trade; its complex nature often requires the involvement of many actors, legal entities and third parties, who tend to operate

78 N. Brodie, 2017, The role of conservators in facilitating the theft and trafficking of cultural objects: The case of a seized Libyan statue, *Libyan Studies*, Vol. 48, pp. 117–23.

79 N. Brodie, 2015, *Giacomo Medici*. Available at: <https://traffickingculture.org/encyclopedia/case-studies/giacomo-medici/> (Accessed 16 September 2018.)

80 A. Chechi, A. L. Bandle, M.-A. Renold, 2012, *Case Egyptian Archaeological Objects – United States v. Frederick Schultz*, *Art-Law Centre, University of Geneva*. Available at: <https://plone.unige.ch/art-adr/cases-affaires/egyptian-archaeological-objects-2013-us-v-schultz> (Accessed 21 June 2018.)

81 J. Felch, 2013, *Guilty Plea: Kapoor's Gallery Manager Cops to Six Criminal Counts*. Available at: <https://chasingaphrodite.com/2013/12/05/guilty-plea-kapoors-gallery-manager-cops-to-six-criminal-counts/>

82 M.-A. Renold, 2018, *The Legal and Illegal Trade in Cultural Property to and throughout Europe: Facts, Findings, Legal Analysis*, Study for the Capacity Building Conference on Engaging the European Art Market in the Fight Against the Illicit Trafficking of Cultural Property, Joint European Commission-UNESCO Project, pp. 4-5. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/630X300/Study_Prof_Renold_EN_02.pdf (Accessed June 6 2018.)

83 N. Brodie, J. Doole and P. Watson, 2000, *Stealing History: The Illicit Trade in Cultural Material*, Cambridge, McDonald Institute for Archaeological Research, p. 16.

in a structured and organized way; and the use of modern and sophisticated technologies. There is also evidence that transnational trafficking in antiquities is linked to other illicit activities in which organized criminal groups are involved, including drugs and arms smuggling, violence, corruption and money-laundering.⁸⁴

The UNTOC:⁸⁵

- applies to serious crimes (at least four years of deprivation of liberty), where the offence is transnational in nature (committed in more than one State) and involves an organized criminal group (Article 2 and 3);
- has provisions on the criminalization of laundering the proceeds of crimes;
- requires States Parties to:
 - criminalize the offences that penalize the intentional transfer of ownership or concealment of origin of such property (Article 6)
 - establish measures to enable the confiscation of such proceeds of crime and to identify and trace property which may qualify as such proceeds (Article 12)
 - respond to requests for confiscation by other States Parties (Article 16)
 - extradite suspected offenders (Article 16)
 - engage in the widest measures of mutual legal assistance (Article 18)
 - consider conducting joint operations and other measures of law enforcement cooperation (Article 27)
 - develop specialized training for law enforcement officials (Article 29).

Participating in an organized criminal group, laundering the proceeds of crime, corruption and obstruction of justice are offences that are defined in the UNTOC and also related to trafficking in cultural property.

According to the UNTOC's definition, an 'organized criminal group' involves at least three people.⁸⁶

On several occasions, law enforcement officials, as well as prosecutors, have voiced the difficulties in establishing ties between the seized individuals and the organized groups. This is mostly because being caught with an undocumented or stolen cultural property within the borders of a country is not a serious crime and most of the investigation methods are not applicable. **It appears that States are more vigilant in criminalizing acts of theft, illicit excavation, illegal trade or illicit export as serious crimes.** However, trafficking in cultural property is a crime that may start in a desolate field in the most remote area and continue in the fanciest room of a hotel where an auction takes place. Trafficking can even involve a scientific process including conservation or restoration, or the object could be given on loan to a well-known public collection/museum for many years in order to establish a new and seemingly clean history.

84 'Use of the United Nations Convention Against Transnational Organized Crime for Protection Against Trafficking in Cultural Property', Fifth Session of Conference of the Parties to the UNTOC. Available at: <http://undocs.org/CTOC/COP/2010/12> (Accessed 6 June 2018.)

85 'Protection Against Trafficking in Cultural Property'. UNODC Meeting of the Expert Group on Protection Against Trafficking in Cultural Property, Vienna, 24–26 November 2009. Available at: <http://www.unodc.org/documents/organized-crime/V0987314.pdf> (Accessed 6 June 2018.)

86 Since the Convention must be transposed in the national legislation of all States, the number of people designated in the national law may be different from that of the Convention

The laundering of cultural property falls within the scope of Article 6 of the UNTOC. As this provision concerns the criminalization of the intentional transfer of ownership or concealment of origin of the proceeds of a crime, it covers any actions aimed at hiding the true origin of an illegally exported, imported or traded cultural property. This includes **falsifying the provenance information; defragmenting the cultural property** or **changing its physical appearance so as to hide it**; transferring the object from one country to other; fictitious sales; and storing the artefact in a place for a long period and falsifying financial records to hide the money earned from dealing in cultural property.

When investigating or prosecuting cultural property-related crimes it may therefore also be useful to consider other sources of law, such as the criminal code, in addition to the law on the protection of cultural property.

A person or a group undertaking any of the actions listed above would also violate the criminal code, as they constitute '**laundering the proceeds of a crime**'. In this regard, it is important to analyse the crime from two angles: the object of the crime and the law related to that object on the one hand, on the other the action itself in a broader sense, regardless of the object subjected to the crime.

Corruption among public officials in the countries of origin, transit and destination facilitates the work of traffickers. In fact, even by 'merely' facilitating an organized crime, these individuals may be considered members of an organized criminal group. However, there is no requirement that this specific offence must be committed in an organized way. In accordance with Article 8 of the UNTOC, States Parties are expected to criminalize any act of active or passive bribery. During an investigation, it is worth scrutinizing these public officials if there is suspicion that an individual or group are obstructing prevention efforts, not taking action that they reasonably should take, preventing or decelerating the investigation, etc. In such a case, prosecuting the offenders by giving effect to Article 8 of the UNTOC would bring the corrupt officials to justice.⁸⁷

The corruption of investigators or prosecutors or manipulation of the evidence represent a huge challenge for justice. In accordance with Article 23 of the UNTOC, States Parties are required to criminalize the 'obstruction of justice' through the use of inducements, threats or force to interfere with witnesses and officials whose role is to provide accurate evidence or testimony.

87 'Use of the United Nations Convention Against Transnational Organized Crime for Protection Against Trafficking in Cultural Property', Fifth Session of Conference of the Parties to the UNTOC, Available at <http://undocs.org/CTOC/COP/2010/12> (Accessed 6 June 2018.)

**EFFECTIVE
CRIMINALIZATION**

- Jurisdiction
- Liability of legal persons
- Prosecution, adjudication and sanctions
- Cooperation with law enforcement authorities
- Seizure and confiscation of cultural property

**FACILITATING EFFECTIVE
INVESTIGATION**

- Special investigation techniques
- Establishment of specialized multidisciplinary investigation units
- Joint investigation teams

**INTERNATIONAL COOPERATION
IN CRIMINAL MATTERS**

- International investigations
- Extradition
- Mutual legal assistance (even in cases of suspicion)
- Confiscation and recovery

Exercise

1) Which crimes related to cultural property are considered serious crimes (at least four years of deprivation of liberty), as defined in the UNTOC?

Illegal excavation	(Yes/No)
Theft of cultural property	(Yes/No)
Illegal export (by hiding or misdeclaration)	(Yes/No)
Illegal import (by hiding or misdeclaration)	(Yes/No)
Damaging cultural property	(Yes/No)
Producing fake export certificates/provenance documents	(Yes/No)
Others?	(Please list)

- 2) What are the main challenges encountered in investigating and prosecuting organized crime in relation to cultural property?
- 3) When investigating a case of transnational nature, which channels would you use to inform the authorities of the other State?
- 4) In addition to requesting the confiscation and return of the cultural property illegally exported from your country, what else should you focus on in a legal assistance request?

2.7. International guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property

The diversity of national legislations leads to loopholes and complexities in the implementation of international conventions. An action in relation to cultural property may be a crime in country X but not in country Y. This situation may create problems if MLA is required; meanwhile, the traffickers benefit from such discrepancies to continue their illegal business.

Examples:

In Spain, exporting cultural objects that are declared national property is absolutely prohibited and smuggling cultural property of a value higher than €50,000 is punishable. The legislation foresees deprivation of freedom of one to five years and negligence is considered a sufficient form of mens rea for such an offence with a maximum penalty of three years, imprisonment.⁸⁸

In the United Kingdom, the Dealing in Cultural Object (Offences) Act 2003 includes sanctions ranging from fines to seven years' imprisonment if found guilty of dishonestly dealing in tainted cultural property with the knowledge and belief that the object is tainted.

According to the Cultural Property Transfer Act in Switzerland (2005), sanctions vary from up to one year's imprisonment to CHF 100,000 for individuals who intentionally import, deal, distribute, procure or export cultural property.

In Egypt, private ownership is not permitted and the law imposes sanctions of imprisonment with hard labour for the possession or trade in antiquities. Even accidentally defacing an antiquity is sanctioned with imprisonment.⁸⁹

In Greece, persons who export or attempt to export cultural property in violation of the law may be sentenced to imprisonment of up to ten years. If the artefact was obtained illegally, this is considered an aggravating condition and the imprisonment sentence increases accordingly.⁹⁰

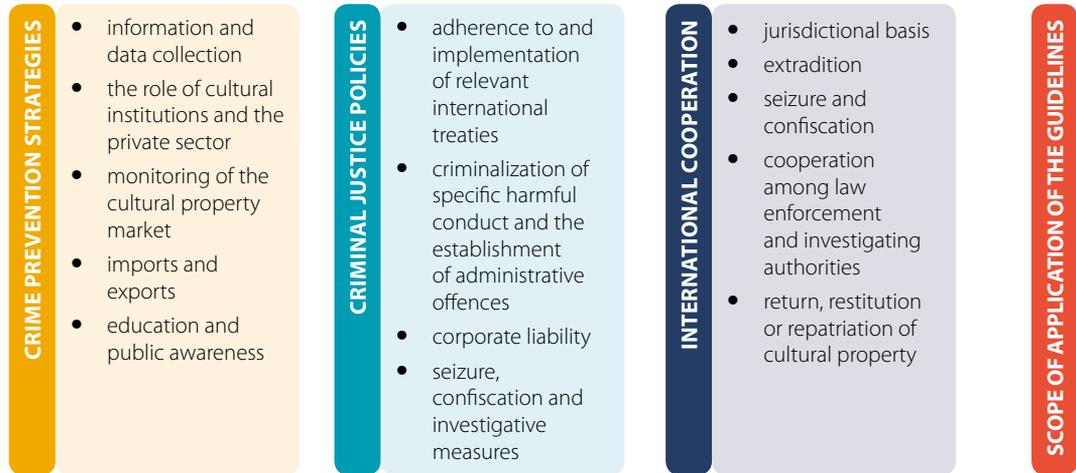
The growing volume of illicit trafficking of cultural property, not limited to but greatly exacerbated by crisis situations in countries like Syria, Iraq, Libya, Yemen, Afghanistan and Mali, requires a swift criminal response. In order to ensure a harmonized application of criminal preventive measures and justice responses, UNODC was mandated with the creation of a set of guiding principles. The International Guidelines, which were adopted in 2014 by the UN General Assembly are the result of these efforts.

88 S. Manacorda, 2015, *From National to International Responses Against Trafficking in Cultural Property*, Doha, Thirteenth United Nations Congress on Crime Prevention and Criminal Justice. Available at: https://www.academia.edu/11874075/_From_National_to_International_Responses_Against_Trafficking_in_Cultural_Property_Thirteenth_United_Nations_Congress_on_Crime_Prevention_and_Criminal_Justice_Doha_Qatar_-_15-16_April_2015 (Accessed 7 June 2018.)

89 UNESCO, 2014, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Final Report*, p. 30. Available at: <http://unesdoc.unesco.org/images/0022/002269/226931E.pdf> (Accessed 7 June 2018.)

90 UNODC, 2016, *Practical Assistance Tool to assist in the implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences*, p. 48. Available at: http://www.unodc.org/res/cld/bibliography/2016/practical_assistance_tool_to_assist_in_the_implementation_of_the_international_guidelines_for_crime_prevention_html/Cultural_Property_practical_assistance_tool.pdf (Accessed 7 June 2018.)

The guidelines are composed of four chapters:



UNODC also developed a practical tool to assist in the implementation of the International Guidelines both at the legal and practical level.⁹¹

2.8. Council of Europe Convention on Offences relating to Cultural Property

The most recent development in international efforts to deal specifically with the criminalization of the illicit trafficking of cultural property and harmonize the various different national criminal legislations is the Council of Europe Convention on Offences relating to Cultural Property.⁹² The Convention was adopted on 3 May 2017 and is open for signature by the member states and non-member states that have participated in its elaboration and for accession by other non-member states since 19 May 2017.

As can be observed by looking at the keystones of the 1970 UNESCO Convention and its Operational Guidelines, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property (2014) and several recommendations adopted by expert meetings of organizations such as UNESCO, UNIDROIT, UNODC, INTERPOL and ICOM, this Council of Europe Convention includes similar preventive measures. These measures highlight the necessity of inventories; consulting databases; introducing import and export control procedures; establishing a national service dedicated

⁹¹ Available at: http://www.unodc.org/res/cld/bibliography/2016/practical_assistance_tool_to_assist_in_the_implementation_of_the_international_guidelines_for_crime_prevention_html/Cultural_Property_practical_assistance_tool.pdf (Accessed 4 June 2018.)

⁹² CoE, 2017, *The Council of Europe Convention on Offences relating to Cultural Property*, Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680710435> (Accessed 8 June 2018.)

to cultural heritage; and organizing awareness-raising campaigns. The Convention also urges States to ensure **that museums whose acquisition policy is under state control do not buy any stolen, illegally excavated or illegally exported cultural property and to encourage private museums and collections to comply with the ethical rules.** The requirement of the establishment of policies at the domestic level regarding online sales and internet service providers is also noteworthy.

The Convention calls upon States to criminalize illicit excavations, the import, export, placing on the market and acquisition of stolen, illegally excavated or illegally exported cultural property, the falsification of documents, the destruction and damage and the aiding and attempting of any of these criminal acts. It requests States Parties to ensure that the offence of theft and other forms of unlawful appropriation as set out in their domestic criminal law apply to movable cultural property.

Designing criminal law provisions of ‘**aiding and abetting**’ and the ‘**falsification of documents**’, for cultural property-related crimes, **placing on the market and acquisition of stolen, illegally excavated or illegally exported cultural property** may be considered as the most innovative points of this Convention. Furthermore, this international treaty requires States **to criminalize the import of stolen, illegally excavated or illegally exported cultural property from another State.** The Convention also deals with the issue of transit by requesting States to criminalize the export of illegally imported cultural property. However, the reference to ‘...when committed intentionally’ in Articles 4, 5, 6 and 10 may lead to an additional **hurdle of having to obtain evidence of mens rea to prove an intention, which adds difficulty in view of this concept’s abstract nature.** In this regard, investigators, while practising under the implementing law of this Convention, may wish to keep this problem in mind and structure their investigations with a view to revealing the ‘intention’ of the offender.

The initiation of proceedings ‘is designed to enable the public authorities to prosecute criminal offences referred to in this Convention ex officio, without a victim having to file a complaint.’⁹³ When the authorities therefore detect an act violating the provisions of the implementing law of this Convention, the prosecuting action should be taken systematically. This applies to any offence required to be criminalized by the domestic legislation. In this regard, as is the case for the 1970 UNESCO Convention and the UNTOC, the primary source for law enforcement action at the domestic level is the implementing national legislation of this treaty.

The principles that should govern international cooperation concerning a cultural heritage-related crime is also set forth in this Convention. For example, **States are obliged to cooperate to the widest extent possible** with regard to the investigations and/or proceeds of crime, which includes seizure and confiscation. The legal basis for MLA referred to in this Convention is the European Convention on Mutual Assistance in Criminal Matters (1959),⁹⁴ the Convention on the Transfer of Sentenced Persons (1983),⁹⁵ the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

93 COE, 2017, *Explanatory Report to the Council of Europe Convention on Offences relating to Cultural Property*. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680710437> (Accessed 7 June 2018.)

94 Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016800656ce> (Accessed 7 June 2018.)

95 Available at: <https://rm.coe.int/1680079529> (Accessed 7 June 2018.)

(1990)⁹⁶ and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (2005),⁹⁷ as well as the UNTOC.⁹⁸ The explanatory report on the Convention further explains the phrase ‘cooperate with each other to the largest extent possible’, in reference to Article 5 of the European Convention on Mutual Legal Assistance. The European Council Convention encourages States to consider if the dual criminality requirement is satisfied when the rogatory letter for search or seizure of property covers one of the offences falling within the scope of the Convention, even if the applicable sanction for that crime is an administrative one.

The European Council Convention also invites States to consider the Convention as the legal basis for judicial cooperation, including extradition cases in the absence of a bilateral agreement or treaty relationship.

Exercise 1

- 1) List the actions that must be criminalized in accordance with the Council of Europe (CoE) Convention.
- 2) List the actions that are criminalized in your country's domestic legislation.
- 3) Compare the two lists and identify the actions that are not criminalized in your domestic legislation but are listed in the CoE Convention.

Exercise 2

Please read the Convention carefully and imagine it is fully implemented in your domestic legislation.

Nicholas shares a post on Facebook where he put on sale some archaeological artefacts that are definitely prohibited to sell or even keep without permission as archaeological objects in country A are state property and keeping them is a crime. Nicholas' post attracts the interest of Delia, who is a resident of Country B, and she sends Nicholas a message asking for the price. Delia is not well-informed about the legislation in force concerning cultural property, but she also asks about the legal status of the artefacts in her message. Nicholas replies to her in writing, states the price and assures Delia that there is no legal problem at all. Delia buys the artefacts. Nicholas delivers them to her and during the shipment, the delivery is intercepted by a customs officer. An investigation starts, and as trade includes both the seller and the buyer, the prosecutor of country A claims that both Nicholas and Delia are liable to punishment. The investigation reveals that Nicholas has a criminal record that proves that he was aware of the law and the object's legal status, despite telling Delia that there was no legal problem.

- a) In this context, please list the crimes Nicholas and Delia have committed, referring to the relevant article of the Convention (the article that requires criminalization of the offence you identify in the example).

Tip: you may also wish to remember the aiding and abetting-related provision of the Convention.

- b) Please identify the mens rea and actus reus for the offence(s) mentioned in the above text.

96 Available at: <https://rm.coe.int/168007bd23> (Accessed 7 June 2018.)

97 Available at: <https://rm.coe.int/168008371f> (Accessed 7 June 2018.)

98 Available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (Accessed 7 June 2018.)

2.9. United Nations Security Council resolutions

2.9.1. UN Security Council Resolution 1483 (2003)

On 6 August 1990, the Security Council adopted Resolution 661⁹⁹ under Chapter VII of the UN Charter to implement international sanctions on Iraq. The Council decided to block the import of all commodities originating in Iraq or Kuwait, any activities that would promote the export of products originating in Iraq or Kuwait and the availability of funds or any other economic resources, as well as trade in military equipment or weapons.

The sanctions applied by the UN Security Council with Resolution 661 were lifted by the UNSC Resolution 1483 in 2003, excluding the arms embargo and the prohibition on import of cultural property originating in Iraq that was exported illegally from Iraq after 6 August 1990.¹⁰⁰

UN Security Council Resolutions are binding when they are adopted under Chapter VII of the UN Charter, in accordance with Article 25 of the Charter.

Paragraph 7 of UNSC Resolution 1483 (2003) obliges member states to:

take all appropriate measures to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Library, and other locations in Iraq, since the adoption of resolution 661 (1990) of August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect **to which reasonable suspicion exists that they have been illegally removed**, and calls upon the United Nations Educational, Scientific and Cultural Organization, Interpol, and other international organizations as appropriate, to assist in the implementation of this paragraph.

The EU implemented UNSC Resolution 1483 (2003) by Council Regulation No. 1210/2003.¹⁰¹ It is important to bear in mind that as EU Regulations are binding and self-executing, none of the EU member states require a domestic law to implement it. Article 3 of this Regulation reads as follows:

99 UNSC Resolution 661 (1990). Available at: <http://unscr.com/en/resolutions/661> (Accessed 8 June 2018.)

100 UNSC Resolution 1483 (2003). Available at: <http://unscr.com/en/resolutions/1483> (Accessed 8 June 2018.)

101 Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 is available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R1210&from=EN>

Article 3

1. The following shall be prohibited: (a) the import of or the introduction into the territory of the community of, (b) the export of or removal from the territory of the community of, and (c) the dealing in Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq, in particular, if: (i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries' conservation collection, or the inventories of Iraqi religious institutions, or (ii) there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq's laws and regulations.
2. These prohibitions shall not apply if it is shown that either: (a) the cultural items were exported from Iraq prior to 6 August 1990; or (b) the cultural items are being returned to Iraqi institutions in accordance with the objective of safe return as set out in paragraph 7 of UNSC Resolution 1483 (2003).

In order to ensure that the artefact was not exported after 6 August 1990, **the second paragraph of Article 3 of Regulation 1210/2003 requires proof of the date of export; the holder of the artefact is also obliged to produce the relevant documentation.** In this regard, the burden cannot be considered to rest solely on the law enforcement authorities or the prosecutor, since they are given the responsibility of enforcing the Regulation with 'reasonable suspicion' (paragraph 1 sub-paragraph (ii)). **The burden of proof could therefore instead be considered more to lie with the holder/possessor, who must show that the artefact was exported before 6 August 1990.**

Case: EC Regulation 1210/2003

In 2016, a criminal police office in the state of Schleswig-Holstein in Germany seized a clay cuneiform tablet originating in Iraq that was offered in an online auction in violation of the ban on trade in Iraqi cultural property in the EU.¹⁰² The vendor voluntarily gave up any property claim¹⁰³ and the artefact was returned to Iraqi authorities on the occasion of presenting the German version of the ICOM Red List for Iraqi cultural heritage.

✓ Please remember:

Iraqi legislation has prohibited unauthorized excavations¹⁰⁴ and the export of cultural property¹⁰⁵ since at least 1936. The date of 6 August 1990 is a reference to UNSC Resolution 661, which enacted sanctions on Iraq.

102 EC, 2003, Council Regulation (EC) No 1210/2003. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:169:0006:0023:En:PDF> (Accessed 9 June 2018.)

103 UNESCO, 2016, *Illicit Trafficking of Cultural Property: Germany returns seized object to Iraq*. Available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/other-cases-of-return-or-restitution-of-cultural-objects/germany-to-iraq> (Accessed 9 June 2018.)

104 Article 40 of the Iraqi Antiquities and Heritage Law No. 55 of 2002. Available at: <https://en.unesco.org/cultnatlaws/list> (Accessed 9 November 2018)

105 *Ibid.*, Article 41.

Example: Emergency protection

The US enacted the Emergency Protection for Iraqi Cultural Antiquities Act in 2004, which prohibits the import of Iraqi archaeological and ethnological material illegally removed from the Iraq National Museum, the National Library of Iraq and other locations in Iraq since the adoption of UN Security Council Resolution 661 of 1990.¹⁰⁶

This act was followed by an emergency import restriction on any archaeological and ethnological materials from Iraq¹⁰⁷ which maintains restrictions that have been in effect continuously since 6 August 1990.¹⁰⁸

Case: Hobby Lobby¹⁰⁹

- The US Customs Regulations require the shipment of goods valued at \$2,500 or greater arriving at the US ports be granted 'entry' or 'clearance' by Customs prior to the goods being allowed to enter the commerce of the US. This clearance may be obtained through the use of a customs broker.
- The form, which is filed by the importer as part of the formal entry process, requires a truthful declaration of goods including the country of origin, description and value.
- In compliance with UN Security Council Resolution 661, the importation of goods from Iraq is prohibited. Following the adoption of UNSC Resolution 1483 (2003), which lifted the general ban while retaining more limited restrictions including a ban on the import of Iraqi cultural property, the US enacted a specific law prohibiting the import of Iraqi cultural property that was exported from Iraq after 1990.
- Between 3 and 5 January 2011, five FedEx shipments sent from the United Arab Emirates (UAE) to Oklahoma City were detained on their arrival in Memphis by US Customs and Border Protection, National Targeting Center officers.
- The shipment contained 223 cuneiform tablets and approximately 300 clay bullae.¹¹⁰ All of them were falsely labelled as 'tile samples' from Turkey. The value of the shipments was also mis-declared, as was the content and the country of origin. The packages were shipped to Hobby Lobby Stores, Inc., a widely known crafts trader based in Oklahoma, USA.
- The investigation revealed that, as stipulated in the facts filed with the court, Hobby Lobby began collecting manuscripts, archaeological artefacts and other types of cultural property in 2008. The collection was started when the president of the company and an employee travelled to the UAE to examine several archaeological objects including a large number of cuneiform tablets.¹¹¹
- The company contacted an expert on cultural property law in October 2010 and the expert warned the company that the group of artefacts that Hobby Lobby was interested in acquiring carried a high risk, as they were likely

106 United States Congress, 2004, H.R. 1047, Miscellaneous Trade and Technical Corrections Act of 2004 - TITLE III: Iraqi Cultural Antiquities. Available at: <https://eca.state.gov/files/bureau/iq2004hr1047.pdf> (Accessed 9 June 2018.)

107 Department of Homeland Security, Bureau of Customs and Border Protection, Department of the Treasury, 19 CFR Part 12 [CBP Dec. 08-17] RIN 1505-AB91: Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq. Available at: <https://eca.state.gov/files/bureau/iq2008dlfrn.pdf> (Accessed 10 June 2018.)

108 United States Department of State, Bureau of Educational and Cultural Affairs, Bilateral Agreements: Iraq. Available at: <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/iraq> (Accessed 10 June 2018.)

109 Department of Justice US Attorney's Office, Eastern District of New York. 2017, press release, 5 July, Available at: <https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported> and <https://www.justice.gov/usao-edny/press-release/file/978096/download> (Accessed 10 June 2018.)

110 Bullae: seal impressions

111 Cuneiform is an ancient system of writing on clay tablets that was first developed by the ancient Sumerians of Mesopotamia c. 3500–3000 BCE. Mesopotamia: The region between the Tigris and Euphrates rivers, which can be broadly defined to include the area that is now eastern Syria, south-eastern Turkey, and most of Iraq.

looted from archaeological sites in Iraq. Furthermore, the expert advised the company to verify that the country of origin of the artefacts was properly declared at the time of importation into the US for any artefacts originating in Iraq. The expert informed Hobby Lobby that an improper declaration of origin of cultural property may lead to seizure of the artefacts.

- Despite all these warnings, Hobby Lobby proceeded to purchase more than 5,500 artefacts composed of cuneiform tablets and bricks, clay bullae and cylinder seals for an amount of \$1.6 million. According to the results of the investigation, including an examination of the documents provided by Hobby Lobby itself, the US Eastern District of New York Attorney's Office considered the purchase suspicious due to several reasons, such as the fact that Hobby Lobby received conflicting information on the storing history of the artefacts, that Hobby Lobby representatives had not met or contacted the dealer who was stated as the owner of the artefacts, and that they did not even make payment to the supposed owner but instead to seven different personal bank accounts of five other individuals.
- With the consent of the company, the packages were shipped to three different addresses at Hobby Lobby's headquarters in Oklahoma. The first three shipments arrived at the same time without any required documentation and with false shipping labels. After seven packages arrived in this manner and were received by Hobby Lobby and its affiliates, the US Customs and Border Protection (CBP) intercepted five shipments. No further shipments were received until September 2011 when 1,000 clay bullae were shipped by an Israeli dealer and again falsely declared as if the country of origin was Israel.
- As a consequence, on 5 July 2017, the US filed a civil complaint to forfeit thousands of cuneiform tablets and clay bullae, in accordance with its domestic law implementing UNSC Resolution 1483 (2003). A stipulation of settlement was also filed by the government. The company consented to the forfeiture of the artefacts and an additional \$3 million fine, thereby resolving the civil action. Furthermore, Hobby Lobby agreed on adopting internal policies and procedures regulating its importation and purchase procedures of cultural property.¹¹² The company also agreed on training its personnel, hiring qualified external customs counsel and brokers, as well as submitting reports to the government every three months on any cultural property acquisitions for an eighteen-month period.¹¹³

2.9.2. UN Security Council Resolution 2199 (2015)

UN Security Council Resolution 2199 (2015), adopted under Chapter VII of the UN Charter, condemns the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and ANF.¹¹⁴ It furthermore acknowledges that ISIL, ANF and other individuals, groups, undertakings and entities associated with Al-Qaida, 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 in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.¹¹⁵

112 In accordance with the agreement, on 17 January 2018, a new forfeiture was carried out for 245 cylinder seals originating in Iraq. For detailed information on the case please refer to: L. Albertson, 2018, Hobby Lobby turns over more artefacts to federal prosecutors in New York, *ARCA website*, 20 January. Available at: <http://art-crime.blogspot.com/2018/01/hobby-lobby-turns-over-more-artifacts.html>. (Accessed 11 June 2018.)

113 This case note was kindly checked and consolidated by United States Homeland Security Agent J.P. Labbat

114 UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199, para 15.

115 UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199, para 16.

In its paragraph 17, the Resolution reaffirms the decision articulated in paragraph 7 of UNSC Resolution 1483 (2003) and obliges all UN member states to take appropriate measures to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare, scientific and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people.¹¹⁶

✓ Please remember:

Why 6 August 1990 and 15 March 2011?

Through its resolutions, the UN Security Council imposes economic sanctions on States or individuals. In the normative framework of the UNSC, cultural property is technically an economical asset when it is considered in the context of financing terrorism. As mentioned above, the economic sanctions on Iraq were initiated with UN Security Council Resolution 661 adopted on 6 August 1990. This Resolution did not have a specific paragraph on cultural property but it de facto covered cultural property as it refers to all economical assets. This date of the first Resolution, which initiates and also legitimizes the economic embargo by the UN Security Council, thus provides the legal dates for decisions or actions concerning any economical asset.

The date 15 March 2011 set forth concerning Syria is based on the widely accepted starting date of the crisis in the country.

Please note that exporting cultural property from both countries has been prohibited by national regulations from much earlier dates.

For example, Syria declared national ownership on all cultural property found within its territory in 1947 and again in 1949. The export of national artefacts is only possible for restoration and exhibition reasons which must be permitted by the governmental authorities in advance. Antiquities taken out of Syria are thus stolen property according to Syrian law.¹¹⁷

The same applies to Iraq since 1936, as stated in UNSC Resolution 1483 (2003).

In this regard, please remember that even if a Syrian or Iraqi artefact does not fall within the scope of the resolution, this does not necessarily indicate that the artefact was exported legally.

In relation to safeguarding cultural heritage, paragraph 17 of the UNSC Resolution 2199 (2015) establishes in 2015 a common responsibility for all member states to fight against the destruction and looting of Iraqi and Syrian cultural property and to ensure the safe return of illegally exported cultural artefacts from those countries. **Both in paragraph 7 of UNSC Resolution 1483 (2003) and in paragraph 17 of the UNSC Resolution 2199 (2015), the use of the word 'decides' goes beyond expressing an intent or tendency, and instead expresses mandatory measures that are imposed on UN member states.**¹¹⁸

116 UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199, para 17.

117 E. Thompson, 2015, Restrict imports of antiquities from Syria to cut down on looting, *The New York Times*, 21 January. Available at: <https://www.nytimes.com/roomfordebate/2014/10/08/protecting-syrias-heritage/restrict-imports-of-antiquities-from-syria-to-cut-down-on-looting> (Accessed 11 June 2018.)

118 V. Negri., 2015, *Legal Study on the Protection of Cultural Heritage through the Resolutions of the Security Council of the United Nations*. Paris, UNESCO, p. 6. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf (Accessed 11 June 2018.)

This international ban on transnational trade in cultural objects originating in Iraq and Syria imposes new obligations on all UN member states. The Security Council used its normative power by imposing the obligations enumerated in paragraph 17 of the resolution. The situation in Iraq and Syria falls within the scope of the 1954 Hague Convention and the 1970 UNESCO Convention. However, the application of international conventions is limited to their States Parties¹¹⁹ unless their provisions are considered to constitute an obligation under customary law. Thus, the adoption of the resolution prohibiting the trade in Iraqi and Syrian cultural property established a new authoritative norm for member states. Additionally, once a resolution is adopted under Chapter VII, it becomes immediately effective in international legality, whereas international Conventions require the consent and action of States to take effect.¹²⁰

As UNSC Resolutions 2199 (2015) and 2253 (2015) engender an obligation for States to prosecute the crimes that fall within their scope in domestic courts due to their erga omnes nature, this could be considered as a development in the criminalization of the illicit trade in cultural property.¹²¹

EU regulation No 36/2012 concerning restrictive measures in view of the situation in Syria was amended on 13 December 2013 by Regulation 1332/2013. Article 11 (c) was inserted in the latter, which is similar to Article 3 of the EU Regulation on Iraq No 1210/2003. EU Regulation 1332/2013 prohibits the import, export and transfer of Syrian cultural goods, where there are grounds to suspect that they have been removed without the consent of their legitimate owner or in breach of Syrian or international law. Categories of goods to which these Regulations apply have been listed in annexes to the Regulations, both of which correspond to Annex I of Council Regulation (EC) No 116/2009 on the export of cultural goods.¹²²

The prohibition described above applies unless it is ‘demonstrated’ that the artefact was exported from Syria prior to 9 May 2011, or that the goods are being safely returned to their legitimate owners. As is the case for the EU measures on Iraq, the law enforcement authorities may act without requiring a domestic implementing legislation as the regulation is self-executing. The use of the word ‘demonstration’ in a passive way does not clearly refer to the holder/possessor of an artefact. However, if the holder/possessor cannot provide any document and the investigative authority cannot find any evidence which indicates a legal export from Syria before 9 May 2011, the prohibition applies. Thus, in a way the Regulation also puts the burden on the possessor/holder of a Syria-originating artefact if he/she claims that Article 11 (c) does not apply.

For the implementation of UNSC Resolution 2199 (2015), some countries such as Switzerland and the United States either amended their national laws or adopted new legislation¹²³ for prohibiting the import, export and transfer of Syrian cultural goods.

119 A. F. Vrdoljak, 2016, The criminalisation of the Illicit trade in cultural property, *Cultural Property Reader*, p. 1. Available at: http://works.bepress.com/ana_filipa_vrdoljak/36 (Accessed 12 June 2018.)

120 Negri, op. cit., p.6

121 Negri, op. cit., p. 1.

122 EU, 2013, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of Council Regulation (EC) No 116/2009 Of 18 December 2008 on the Export of Cultural Goods 1 January 2011*. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52015DC0144> (Accessed 12 June 2018.)

123 Le portail du Gouvernement suisse, 2012, Ordonnance instituant des mesures à l'encontre de la Syrie. Art. 9a - Interdictions concernant les biens culturels. Available at: <https://www.admin.ch/opc/fr/classified-compilation/20121374/index.html#a9a> (only in French, German and Italian) and United States Congress, 2016, H.R.1493 - Protect and Preserve International Cultural Property Act. Available at: <https://www.congress.gov/bill/114th-congress/house-bill/1493> (Accessed 12 June 2018.)

2.9.3. UN Security Council Resolution 2253 (2015)

Following the adoption of UNSC Resolution 2199 in February 2015, the Council adopted, under Chapter VII of the UN Charter, UNSC Resolution 2253 in December 2015 to strengthen the Al-Qaida sanctions regime and focus on ISIL.

Paragraph 2 of UNSC Resolution 2253 (2015) refers to sanctions such as asset freezes, travel bans and the arms embargo and obliges UN member states to also take these measures with respect to ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities.

According to paragraph 12 of the Resolution, those responsible for committing, organizing or supporting terrorist acts must be held accountable. It reminds member states of their obligation to afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings **relating to the financing or support of terrorist acts**, including assistance in obtaining evidence in their possession necessary for the proceedings. The same paragraph calls upon member states:

- to provide full coordination in investigations or proceedings involving ISIL, Al-Qaida and associated individuals, groups, undertakings and entities;
- to find and bring to justice, extradite or prosecute any person who supports, facilitates, participates or attempts to participate in the direct or indirect financing of activities conducted by ISIL, Al-Qaida and associated individuals, groups, undertakings and entities.

One of the key elements of UNSC Resolution 2253 (2015) can be considered to be Paragraph 14. This paragraph **'encourages' member states to submit listing requests of individuals and entities supporting ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities and it 'directs' the Committee** (the Sanctions Monitoring Committee linked to the Security Council) to immediately consider designations of individuals and entities engaged in financing, supporting, facilitating acts or activities, including in oil and antiquities trade-related activities with ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities.

Please remember:

In cases related to Iraqi or Syrian cultural property, the law enforcement authorities must remember to check the ISIL (Da'esh) and Al-Qaida Sanctions List and compare the names, in order to comply with the obligations set forth in the resolution.

In Paragraph 15, the Council expresses its concern on the lack of implementation of UNSC Resolution 2199 (2015), and therefore calls upon the member states to report on the Committee interdictions in oil and antiquities as well as on the outcome of the proceedings brought against individuals and entities.

Financial Action Task Force (FATF):

'The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the proliferation of weapons of mass destruction. The FATF Recommendations are recognized as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard'.¹²⁴ The FATF, in its report on the financing of ISIL, states that ISIL makes money from antiquities in two ways, both by selling looted artefacts and by taxing traffickers moving items through ISIL-held territory.¹²⁵

On a separate note, the FATF Guidance on Recommendation 5 on Criminalizing Terrorist Financing provides all key points for States to ensure that all sources for terrorism financing are criminalized in the broadest extent possible in their domestic legislation. This can be found at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf>

2.9.4. UN Security Council Resolution 2347 (2017)

UNSC Resolution 2347 (2017)¹²⁶ is the first resolution adopted by the UN Security Council on **safeguarding cultural heritage in armed conflict**. Despite the existence of several international legal tools, the importance of the adaptation of previous tools in this resolution lies in its global impact.

UNSC Resolution 2347 (2017) has four dimensions:

- to mainstream all international efforts by various organizations by adapting all of the tools that are related to terrorist financing, armed conflict and organized crime to the context of cultural heritage;
- to identify offences relating to tangible cultural heritage during armed conflict with a view to encouraging the UN member states to criminalize such actions;
- to encourage the UN member states to propose listings of ISIL, Al-Qaida and associated individuals, groups, undertakings and entities involved in the illicit trade in cultural property in compliance with UN Security Council Resolutions 1267 (1999), 1989 (2011) and 2253 (2015);
- to encourage member states to adopt preventive measures to be taken during peacetime to ensure the highest level of protection in the event of an armed conflict.

It is worth noting that, in its preamble, the **Resolution acknowledges the involvement of organized crime groups by stressing their possible links with terrorist organizations**. Crimes such as money laundering, bribery and corruption are also mentioned, as they may be linked to cultural property-related crimes.¹²⁷ The Security Council's concern regarding the potential for new information and communications technologies, and particularly the internet, to facilitate terrorist acts is also expressed in the preamble¹²⁸

124 FATF, 2015, *FATF Report: Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)*. Available at: www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html (Accessed 13 June 2018.)

125 Ibid.

126 Available at: <http://undocs.org/S/RES/2347> (2017) (Accessed 15 June 2018.)

127 UN Security Council Resolution 2347, preamble para 9.

128 Ibid, preamble para 17.

in order to attract the attention of States to the fact that online sales of cultural artefacts taking place under their jurisdiction may be contributing to the funding of terrorist acts.

The scope of UNSC Resolution 2347 (2017) includes the unlawful destruction of cultural property including religious sites and artefacts, and the looting and smuggling of cultural property in the context of armed conflicts, particularly by terrorist organizations.¹²⁹ It underlines that, pursuant to international law, directing unlawful attacks under certain circumstances may constitute a war crime.¹³⁰

Paragraph 8 requests member states to take appropriate measures to counter illicit trafficking of cultural property originating in countries in situations of armed conflict. It also highlights the possible link between terrorist groups and cross-border trade in cultural property in the event of an armed conflict. This paragraph does not have the same gravity as paragraph 7 of UNSC Resolution 1483 (2003) or paragraph 17 of UNSC Resolution 2199 (2015), due to the lack of the word 'decides' and its replacement with 'requests'. In the context of UNSC Resolutions 1483 (2003) and 2199 (2015), it is not surprising that the Council preferred to use stronger language considering that these two resolutions deal with critical situations which required immediate action, whereas UNSC Resolution 2347 (2017) provides the general stance of the UNSC in such situations. In connection with terrorist financing, paragraph 8 reminds States that no funds, other financial assets or economic resources shall be made available directly or indirectly by their nationals to groups, entities or undertakings associated with ISIL or Al-Qaida in accordance with relevant resolutions.

Please remember:

Apart from its abstract global importance to all humanity, cultural heritage may also be used as an asset to finance terrorism. Thus, although domestic codes that aim to suppress the financing of terrorism do not explicitly refer to cultural heritage, they may also apply to cases relating to the illegal trade in cultural property. It is therefore important for specialized law enforcement units or judiciary personnel to keep themselves up to date about the broader legislation in their country in relation to terrorist financing.

Paragraph 9 of UNSC Resolution 2347 (2017) urges member states to introduce effective measures in accordance with their obligations and commitments under international law. It encourages them to consider designating as serious crimes activities related to the illegal trafficking in cultural property that may benefit organized crime groups, including terrorists or terrorist groups, in accordance with the UNTOC. This application of the UNTOC is not a new approach, but it is the first time that a UN Security Council Resolution refers to trafficking benefitting organized crime groups in relation to cultural property. Taking into account the fact that all organized crime groups trafficking in cultural property may not have links to terrorist organizations, this paragraph also empowers the national authorities to designate organized crime groups in addition to terrorist organizations.

¹²⁹ UN Security Council Resolution 2347, para 1.

¹³⁰ *Ibid.*, para 4.

The preventive measures laid out in paragraphs 16 to 20, including measures addressed in this part of UNSC Resolution 2347 (2017), are aimed at harmonizing the preventive steps referred to in different legal texts. The creation of digitized and accessible inventories and databases for stolen goods; the contribution to other existing databases, such as the UNESCO and INTERPOL databases; the establishment of standards for museums and the art market, such as provenance certifications and due diligence; the sharing of lists of cultural sites under terrorist control; the development of education and awareness-raising activities; and the creation of educational programmes on the protection of cultural heritage are among the preventive measures set forth in UNSC Resolution 2347 (2017).

2.10. The European Union legislative framework on the import, export and return of cultural property

The Treaty on the Functioning of the European Union in its Article 36 defines cultural property by using the phrase ‘national treasures’, referring to properties that possess artistic, historic or archaeological value. The same article also acknowledges the rights of member states to prohibit or restrict imports and exports of national treasures. States in this regard may decide to keep important objects that form part of their heritage.¹³¹

Following the creation of the European Single Market on 1 January 1993 and the abolition of internal borders, EU member states faced problems in preventing their ‘national treasures’ from leaving the EU through another member state. In order to remedy this situation, the EU developed two pieces of legislation to prevent the illicit trade in cultural property:¹³² **Council Regulation (EC) No 116/2009¹³³ on the export of cultural goods and the European Parliament and the Council Directive 2014/60/EU, which is a recast of the Directive 93/7/EEC¹³⁴ on the Return of Cultural Objects Unlawfully Removed from the Territory of a member state.** In order to complete the full package of protection, the European Commission also proposed a regulation on the Import of Cultural Goods into the EU, which currently awaits adoption by the European Parliament and Commission.

131 M. Cornu, 2018, *Fighting Illicit Trafficking in Cultural Objects, Searching for Provenance and Exercising Due Diligence in the European Union, Study for the Capacity Building Conference on Engaging the European Art Market in the Fight Against the Illicit Trafficking of Cultural Property, European Commission-UNESCO*, p. 3. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/630X300/Study_Prof_Cornu_EN_01.pdf (Accessed 3 June 2018.)

132 European Commission, Taxation and Customs Union, 2017, *Import of Cultural Goods into the EU*. Available at: https://ec.europa.eu/taxation_customs/business/customs-controls/cultural-goods_en (Accessed 4 June 2018.)

133 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0116&from=EN>

134 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0007> (Accessed 4 June 2018.)

✓ Please remember:

An EU Regulation is a legal act of the EU which is entirely binding and directly applicable. As it does not need to be transposed into national legislation, it is immediately enforceable. The purpose of this type of legal action is to have a uniform application on the matter.¹³⁵

An EU Directive, in contrast, cannot be directly enforced unless it is transposed into national legislation. Nevertheless, the EU member states have an obligation to incorporate a Directive into their national legislation before a given deadline.

2.10.1. Council Regulation (EC) No 116/2009 on the export of cultural goods

Council Regulation (EC) No 116/2009 requires the issuance of export certificates for national cultural property to be exported outside the EU. There are three different kinds of export licenses that could be issued: standard, specific open and general open.¹³⁶

Fifteen categories of national cultural property are listed in Annex 1 of the Regulation. **An export licence is needed if the object the individual wants to export falls into one of the listed categories.** It is worth noting that the types of objects are assigned an age and financial threshold to be covered by the Regulation.

According to the Regulation, **an export licence shall be issued by the authority of the member state in whose territory the cultural object in question was lawfully and definitely located on 1 January 1993** (enforcement date of the European Single Market).

135 R. Peters, 2015, The protection of cultural property in EU law: Status quo and future perspectives, in: F. Desmarais (ed.), op. cit., pp. 141–43.

136 Please refer to graphic on pg. 29.

CASE 1:**Mr Green**

Mr Green is in country S and country S is an EU member state. The artefact is not only located in but also originating from country S. It is an archaeological

artefact. Mr Green wants to export it to a third country in order to sell it.

- Mr Green must apply for an export certificate
- He can easily find the list of relevant authorities empowered to issue an export certificate online: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC0716\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC0716(02))
- At the customs while leaving country S, he must present his export licence together with the export declaration. However, he should make sure that the customs office that he applies to is competent to accept that declaration. He can check the list of customs offices empowered to handle formalities for the exportation of cultural goods at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC0613\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC0613(02))

CASE 2:**Mr Violet**

Mr Violet is in country S and country S is an EU member state. He wants to export to a third country (outside the EU) a painting with a value of €89,000. He applied to the competent authority in country S.

**Ms Orange**

Ms Orange is responsible for the export permits of cultural goods in country S. In accordance with Council Regulation (EC) No 116/2009 she asks him the following questions:

Ms Orange: Since when have you had this painting?

Mr Violet: Since 1997.

Ms Orange: Where did you buy it?

Mr Violet: I bought it from an art gallery located in this city.

Ms Orange: Do you have any documentation on the ownership history?

Mr Violet: Yes, and it says here that prior to my ownership it belonged to an anonymous collector in country U (EU Country).

**Mr Red**

Ms Orange: Mr Red I found your contact information from the EU List of authorities empowered to issue export licences for cultural goods. I have a request for an export certificate, but the inadequate provenance information concerned me a bit. According to the data provided to me, the applicant bought it in 1997 and prior to that it was in a private collection in your country. Would you mind verifying this? I have sent it to you via the Internal Market Information (IMI) System already.

Mr Red: Ms Orange, thank you for your vigilance, as indeed after consulting our database of stolen artefacts, I see that this painting is recorded here. It was stolen in 1995.

 Exercise

- 1) Please match the actions and steps mentioned both in Case 1 and Case 2 with the relevant article of Council Regulation (EC) No 116/2009.
- 2) An individual who has a manuscript in his/her possession and wishes to travel to a third country is stopped by the customs authorities of an EU member state and they request documentation. The individual claims that the manuscript is a family inheritance and there is no documentation as it was never traded. You have a strong feeling that there may be something dubious about this manuscript and you remember an ICOM Red List disseminated by the WCO, which included a similar manuscript. However, you are not an expert and the individual is putting you under pressure as he/she will miss the train. What do you do? Apart from Council Regulation (EC) No 116/2009, what would be the legal basis at the national level for your next steps?

2.10.2. European Parliament and Council Directive 2014/60/EU

In March 1993, the EU adopted Directive 93/7/EEC¹³⁷ on the return of cultural objects unlawfully removed from the territory of a member state. The need for a legal tool on this topic is again related to the creation of the European Single Market. To prevent the abolition of customs duties from benefitting traffickers, the EU established Directive 93/7 to counter or at least mitigate illegal export within the single market. The Directive had some shortcomings in its implementation, including its limited scope with the categories or types of artefacts mentioned in its annex, as well as the financial and age thresholds, which further restricted its scope.¹³⁸

In order **to remedy the deficiencies of Directive 93/7/EU, on 15 May 2014 the European Parliament and the Council adopted a recast text which became Directive 2014/60/EU**. The significant features of the Directive 2014/60/EU¹³⁹ are:

- It covers all cultural property which has been unlawfully removed after 1993.
- It covers any object, as long as it is considered as national cultural property by one of the member states and there are no monetary thresholds included in the text.
- The member states shall cooperate on matters such as providing information on the artefact requested to be returned, notifying each other if they find a cultural object which may belong to another member state, prevent any action that would evade the return procedure and ensure the physical preservation of the artefact. They are also requested to act as an intermediary between the possessor and/or holder and the requesting member state with regard to the object's return. This coordination among member states is established through the Internal Market Information System (IMI).¹⁴⁰
- A requesting member state shall provide all possible information to the requested member state and the latter must immediately inform the former on the actions taken or on any other developments.
- A member state shall initiate the return proceedings for an unlawfully removed cultural object within three years after becoming aware of the location of the object and of the identity of its possessor or

137 Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0007:en:HTML>

138 Peters, 2015, op. cit., p. 145

139 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0060&from=fr>

140 See also Chapter 4 (g.)

holder. There is a 30-year time limit overall, which starts at the moment of the unlawful removal of the object. This time limit, however, does not apply to cultural objects forming a part of public collections and objects belonging to religious institutions. For such objects, the limitation period is inspired by the 1995 UNIDROIT Convention and is 75 years or more.

- A competent court shall order the return of the cultural object in question if it is found to have been unlawfully removed from the national territory of a member state.
- The directive endorses the due diligence principle of the 1995 UNIDROIT Convention. This is the most significant modification and it strengthens the alliance between the EU and international law.¹⁴¹ The previous Directive (93/7) included a provision on awarding the possessor with a compensation. The burden of proof to claim good faith varied from one national legislation to another, which led to the problem of disparity in the practical implementation of the former directive.¹⁴² The Directive 2014/60/EU shifts the burden of proof to the possessor claiming compensation if a court decides on the return of the cultural property in question. As stated in Article 4(4) and Article 6(2) of the 1995 UNIDROIT Convention, a person must prove that they have exercised due diligence in order to be eligible for compensation.
- The EU member states must submit their reports every five years (starting from December 2015)¹⁴³ on the implementation of the Directive, which is followed by the Commission presenting a report to the European Parliament to monitor the effectiveness of the Directive.¹⁴⁴

2.10.3. Proposal for a regulation of the European Parliament and of the Council on the import of cultural goods COM/2017/375

In 2017, the European Commission announced the preparation of a new regulation against the illicit trade in cultural goods. This initiative was introduced by Germany, Italy and France to urge the Commission to submit to the Council and the Parliament a draft EU regulation on prohibiting the importation of illegally exported cultural goods to the EU. Its basis is the 2015 European Agenda on Security and the 2016 Action Plan to strengthen the fight against the financing of terrorism.

Given that the failure in halting the illegal import of cultural property into the EU encourages organized crime, terrorist financing, money laundering and tax evasion, the Commission decided that the standard customs controls applied at EU borders should be strengthened in order to better address the particularities of cultural artefacts.¹⁴⁵

141 M. Cornu, 2015, Recasting restitution: Interactions between EU and international law. *Uniform Law Review*, Vol. 20, No. 4, p. 644.

142 Ibid.

143 Please see the Corrigendum to Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member state and amending Regulation (EU) No 1024/2012. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2015_147_R_0010 (Accessed 17 September 2018.)

144 Available online at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32014L0060>

145 European Parliament, 2018, *Briefing: Regulating Imports of Cultural Goods*. Available at: [http://www.europarl.europa.eu/RegData/studes/BRIE/2018/614697/EPRS_BRI\(2018\)614697_EN.pdf](http://www.europarl.europa.eu/RegData/studes/BRIE/2018/614697/EPRS_BRI(2018)614697_EN.pdf) (Accessed 5 June 2018.)

Despite some EU member states (such as Austria, Greece, Germany, France, Spain, Italy and the Netherlands) having introduced provisions to restrict the import of cultural artefacts into their territories, these national efforts provide different degrees of protection and are not harmonized.¹⁴⁶

In order to overcome this situation, **a proposal for a regulation of the European Parliament and of the Council on the import of cultural goods was prepared. The expected changes that the proposal would bring about are as follows:**

- A common definition of cultural goods in the context of imports;
- Import licences and documents that prove the licit export of cultural property;
- Simplifying the work of EU customs and authorities;
- Providing legal certainty to trade operators and buyers;
- Empowering customs authorities to seize and temporarily retain goods when the licit provenance of goods in question cannot be demonstrated;
- Strengthening the cooperation among EU customs authorities.¹⁴⁷

146 European Commission, 2017, *Staff Working Document: Proposal for a Regulation of the European Parliament and of the Council on the Import of Cultural Goods*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017SC0263> (Accessed 9 November 2018)

147 European Parliament, 2018, op. cit.

3. Illicit trafficking of cultural property as an organized crime



3.1. Sources



🔍 Case: Theft – behaviour

The Verona Museum Robbery¹⁴⁸

- On 19 November 2015, three masked thieves entered the Verona Civic Museum of Castelvecchio.
- They entered the museum deliberately just before closing time, as the alarms are normally activated afterwards.
- They tied up the museum cashier and took the guard's car keys to escape.
- One of the three thieves, who was armed, stayed with the cashier, pointing his gun at her.
- The other two thieves, one of whom was also armed, started to collect the paintings that they had taken from the wall.
- They stayed in the museum for 80 minutes and took 17 paintings with them.
- The van belonging to the museum guard was found abandoned in Brescia.

¹⁴⁸ L. Albertson, 2016, *Was the Verona Museum Theft Commissioned? Possibly*. Available at: <http://art-crime.blogspot.com/search?q=verona> (Accessed 14 June 2018.)

- The investigation revealed that:
 - The guard was involved.
 - The brother of the guard and his Moldovan girlfriend were the point of connection between the Italian and Moldovan criminals.
- Owing to the dedicated work of the Italian Carabinieri, and the Moldovan and Ukrainian authorities, the artefacts were eventually found in a forest in Ukraine.

3.1.1. Illicit excavations: different groups, different motivations and behaviours

The reasons that individuals get involved in illicit excavations vary from one region to another. In some countries and provinces, people engage in illegal excavations on archaeological sites for saleable cultural objects due to **extreme poverty**.¹⁴⁹ According to the local people who profit from the cultural artefacts that they dig up illegally, they see these as presents from their ancestors that allow them to survive.¹⁵⁰ Another motivation for illegal excavators is being **forced to do so by criminal groups and being punished if they come out with nothing**. Research in Cambodia revealed that the Khmer Rouge distributed metal detectors to local people in villages and expected them to find artefacts so that the organization could generate an income.¹⁵¹

Treasure hunters¹⁵² are another category of illicit excavators and are generally influenced by legends and local stories about ancient hidden treasures. They share videos and photos of each other's findings and are mostly not aware of the fact that they are committing a crime, or at most they consider their action to be a petty, 'innocent crime' that they can easily get away with. Money can be an incentive for most of them, but the main motive is adrenalin and the appeal of adventure. They are the most likely group to get swindled and over time they may evolve into serious criminals.

In addition to the above-mentioned groups, there are individuals who consider illicit excavations as their way of making a living. This group is composed of members who knowingly commit a crime – even an organized one. Research¹⁵³ carried out into this group revealed that:

149 D. Yates and N. Brodie, 2012, *Trafficking Culture – Subsistence Digging*. Available at: <https://traffickingculture.org/encyclopedia/terminology/subsistence-digging> (Accessed 14 June 2018.)

150 D. Matsuda, 1998, The ethics of archaeology, subsistence digging, and artifact looting in Latin America: Point muted counterpoint, *International Journal of Cultural Property*, Vol. 7, No. 1, pp. 87–97.

151 K. Miura, 2016, Destruction and plunder of Cambodian cultural heritage and their consequences, in: B. Hauser-Schäublin and L. V. Prott (eds), *Cultural Property and Contested Ownership: The Trafficking of Artefacts and the Quest for Restitution*, London, Routledge. For further information, see also: T. Davis and S. Mackenzie, 2015, *Crime and conflict: Temple looting in Cambodia*, in: J.D. Kila and M. Balcells (eds), *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends*, Leiden, Boston, Brill, pp. 292–306.

152 In some countries, treasure hunting is legal providing that some administrative responsibilities are undertaken, such as getting a licence or informing the authorities about the finding, etc. A group acting in accordance with the national legislation of the country concerned is not the group referred to here. Within the scope of this manual, the term 'treasure hunters' is limited to the people or groups acting illegally.

153 A. S. Tulay, 2007, *Soygun-Hırsızlık Kaçakçılık Olayları ve Bir Müze Soygunu: Eski Eser Yağması*. Arkeoloji ve Sanat Yayınları, İstanbul, p. 72.

- They use trucks, cranes, ladles and bulldozers, both for digging and also transporting the heavy objects they find.¹⁵⁴
- They act when the guard is away or manage to distract them. (They may split into 2-3 groups before the main group steals into the archaeological site, while the others make sounds to attract the guard towards their location.)
- They convince the guard to participate in or aid their actions.
- In the less protected and remote areas, they pretend to be officials from governmental organizations or a scientific excavation team.
- They may have been provided with photos of artefacts or auction catalogues by the local intermediary in order to find similar objects in exchange for money.
- They are generally from the area where they conduct the illegal excavation. If they are not from the area, they pretend to be camping or hunting when asked.
- They may use metal detectors or other underground monitoring systems.¹⁵⁵
- Their communication strategy while interacting or convincing other locals or family members is based on underestimating the value of the cultural heritage: 'Come on, it is only a piece of stone', etc.
- They are generally not the ones responsible for storing or marketing and instead mostly work for one specific person, who may have a small business in a nearby town or city.

The production of fakes and the looting and plunder of authentic artefacts increases in turbulent times. A Syrian smuggler admits that, due to high demand, 'About 50% of what I get is fake'.¹⁵⁶ Since fake objects are not 'cultural property', it may be confusing that this is considered as illegal trafficking of cultural objects. However, given the findings of several investigations, fake and authentic objects are generally interconnected in the trade and it is likely that authentic cultural objects will be found together with fakes.

154 C. Luke and C. Roosevelt, 2006, Looting Lydia: The destruction of an archaeological landscape in western Turkey, in: N. Brodie, M. Kersel, C. Luke and K. Walker Tubb (eds), *Archaeology, Cultural Heritage, and the Antiquities Trade*, Gainesville FL, University Press of Florida, pp. 173–87.

155 'In 2010, illegal metal detector-users entered a registered archaeological site in Noyon, France and excavated coins, antique fibulas, strapping copper and shrapnel fragments from the First World War. Following this incident, the Ministry of Culture and Communication asked for a report from the Conseil national de la recherche archéologique (CNRA), on the impact of metal detector use in France. The CNRA has made a series of proposals to strengthen the legal framework on the use of metal detectors, particularly the training of metal detector users, supervising the use of such devices, raising awareness among "amateur archaeologists", involving regional authorities, registering metal detectors, criminalization of unauthorized use and implementation of legislation'. From: UNESCO, 2016, *Treasure Hunters' and Cultural Trafficking – Regulation on Metal Detectors and Underground Monitoring Systems. UNESCO Report to the 20th Session of the ICPRCP, Provisional Agenda Item 6. Paris, UNESCO*. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/FINAL_2_Treasure_Hunting_ENG_01.pdf (Accessed 17 June 2018.)

156 F. Van Tets, 2013, The art of civil war. *Foreign Policy*. Available at: <https://foreignpolicy.com/2013/05/08/the-art-of-civil-war> (Accessed 18 June 2018.)

🔗 Case: Producing fakes – behaviour

Ely Sakhai¹⁵⁷

- In May 2000, the same Gauguin painting, Vase de Fleurs (Lilas), appeared in the spring catalogues of both Christie's and Sotheby's in New York.
- A well-known Gauguin expert examined the paintings and concluded that the one offered by Christie's was a fake.
- Christie's communicated this information to the art gallery in Tokyo that had offered this painting to be auctioned in the US.
- In the meantime, Ely Sakhai, who was the owner of the original painting, auctioned it at Sotheby's for \$310,000.
- The investigation of the FBI initiated for the fake painting revealed the following:
 - Sakhai first started to show up at well-known auction houses in the late 80s.
 - He gave the impression of wealth through his clothing and jewellery.
 - He showed an interest in the art of well-known impressionist and post-impressionist artists but not in 'masterpieces' or top quality works, instead preferring lesser known and cheaper pieces.
 - Having bought a painting from a public auction (with witnesses able to testify to this), he would order a fake of the very same painting.
 - In view of the rising demand from companies in Tokyo, where his wife is from, he sent the fakes to his customers there with the certificate of authenticity he had received with the original painting. He knew that an original without a certificate would not lose in value, as experts can easily confirm its authenticity.
 - Auction houses that worked with often him got phone calls from Asia telling them that the piece offered on sale belonged to their collection. But since the ones he offered in New York and London were authentic, the auction house professionals could not find a problem with the ones they put on sale.

Fakes and illicit excavations also go in hand in hand with a decrease in the resources of the provider.

🔗 Case: Illicit excavations and fakes

Goddess statuettes¹⁵⁸

Şevket Çetinkaya was a resident in a village called Hacilar in the Burdur province in Turkey. In 1956, while working in his field, he saw a mole come out of a hole with something attached to it – a necklace made of sea shells. Şevket started to enlarge the hole and found a statuette, together with some ceramic fragments. He brought his findings to a teacher in the village and the teacher told him that what he had found might be valuable and encouraged him to contact archaeologists who were excavating a few kilometres away. The archaeologists, who were undertaking a lawful and scientific excavation at the site, were Seton Lloyd and James Mellaart from the British Institute. After seeing the goddess statuette that Şevket had found they were extremely excited, as these were the first findings proving Neolithic settlement in Anatolia. After obtaining the relevant permissions, James Mellaart started to excavate and Şevket became the guard of the excavation site. During the excavation season, Mellaart dug up artefacts and, as was eventually revealed, Şevket continued to do so illegally out of season. Şevket started to illegally trade in the artefacts he collected

157 Clive Thompson, 2004, How to make a fake. *New York Magazine*. Available at: <http://nymag.com/nymetro/arts/features/9179> (Accessed 18 June 2018).

158 Özgen Acar, 2012, Çakma Tarihin Perde Arkası, *Aktüel Arkeoloji Dergisi*, Vol. 29, pp. 58–71.

from his illicit excavations. The demand was high, as buyers from Europe and the US were in a race to procure a newly discovered figure for their collections. One day, after Şevket made another profitable sale, the buyer put the statuettes he bought in the bath tub. Suddenly, the artefact turned into mud and the buyer realized that he was a victim of fraud. The previous buyers heard the news and discovered through analyses on their statuettes that most of them were also fake. Even the most convincing ones, artistically speaking, had traces of petrol gas as a chemical component, as Şevket and his wife had kiln-dried the ceramics in a petrol gas oven.

3.2. Transportation and trade

After **'the source'** illegally finds or produces the objects, he/she may deliver them to the first middle men who are responsible for the region. This first intermediary may be a resident in the region and often visits the villages or towns to direct his/her sources. This person may be a small business owner, which enables him/her to be in direct contact with foreigners, visitors or tourists.¹⁵⁹ It can also work the other way around, with these individuals being recruited by **'visitors'** coming from abroad to make contracts and/or establish contacts. In time, this person may develop a substantial knowledge of archaeology or the arts even without an educational background.¹⁶⁰ There are subsequently two possibilities for the intermediary:

(i) they may sell the objects themselves in a clandestine way to a person unknown to them;¹⁶¹

or

(ii) they may inform someone above them in the hierarchy – the second intermediary – about the finding for the artefact to be transferred to him/her.¹⁶²

These possibilities may also include the first intermediary keeping some relatively small artefacts for himself/herself, to be sold directly, and passing on to the second intermediary the bigger object or the ones less easy to smuggle. The first intermediary may have his/her own group, not necessarily exclusively composed of willing members. They may have a reputation for violence, which puts pressure on local people to participate in the illegal excavation. On the other hand, they may take the opposite approach, appearing pleasant and trying to offer solutions for the economic needs of the potential thief/looter/digger. They may also be a relative of previously known or suspected traffickers.¹⁶³

The second intermediary, who handles the international transport of the objects, probably has a more hostile profile, in order to discourage the first intermediary from attempting to contact the receiver directly.

159 This comment does not accuse people who are in the above-mentioned business but their position gives the traffickers the possibility of using their business areas for their illegal activities.

160 T. Davis and S. Mackenzie., 2015, *Crime and conflict: Temple looting in Cambodia*, in: J. D. Kila and M. Balcells (eds), *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends*. Brill, Leiden|Boston, pp. 292–306. Available at: <https://traffickingculture.org/app/uploads/2015/06/2015-Crime-and-conflict-in-Kila-and-Balcells.unlocked.pdf>

161 A. Ahmad, 2017, *Jihad & Co.: Black Markets and Islamist Power*, Oxford, Oxford University Press, p.182.

162 S. Mackenzie and T. Davis, 2014, *Temple looting in Cambodia: Anatomy of a statue trafficking network*, *British Journal of Criminology*, Vol. 54, p.729. Available at: <https://traffickingculture.org/app/uploads/2014/12/2014-BJC-Temple-Looting-in-Cambodia-print.pdf>

163 Ibid

The criminals occupying this position may also be involved in other types of trafficking, such as drugs or weaponry, depending on the context. Since they may attempt to bribe governmental authorities, this part of the organization may also involve corrupt officials.¹⁶⁴

The receiver is the one who enjoys the highest profit margin on the transactions. He/she is the hub of all illegal flow of cultural objects and fakes coming from various countries. The receiver may be located in a neighbouring country to the source country, if logistically this facilitates transportation by land. Transportation differs from one situation to another, with air or sea sometimes serving as the primary means.¹⁶⁵

🔗 Case: Cambodia temple looting¹⁶⁶ – transportation and trade

- The first intermediary, defining himself as a ‘broker’, drives around the region in the morning picking up willing participants for that day’s looting. In some cases, if there are no volunteers, he orders the villagers to take part and due to his violent reputation, they tend to comply.
 - The first intermediary, who began statue looting during the civil war in Cambodia, is an illiterate individual who was a looter himself before establishing his own group of diggers.
- The first intermediary transports the stolen goods to the second intermediary. The individuals are brothers and their roles function as a single person. While one of them serves as the ‘money man’, the other is the ‘delivery man’.
- They meet in a Cambodian town that is close to the Thai border.
 - The resources of the second intermediary are not limited to the stolen goods provided by his brother. The town serves as a hub where all first intermediaries arrive to deliver their objects to the second intermediary.
 - The second intermediary is determined to protect his monopoly and will kill if necessary; he has already killed the uncle of a first intermediary who attempted to bypass him and directly approach the ‘dealer’.
- The second intermediary transports the artefacts to the receiver who is on the Thai side of the border.
- The receiver considers himself to be the premier counterfeiter in Thailand. He makes copies of some of the artefacts and delivers both the fakes and the originals to a dealer in Bangkok.
 - The dealer himself also asks the receiver to produce fakes.
- The dealer markets the artefacts all around the world. The researchers of the case nicknamed him ‘Janus’, in reference to the Roman God, with one face looking into the illicit past of the artefact and one looking into its public future, where its dark past is concealed.

164 Davis and Mackenzie, 2015, op. cit., p. 297

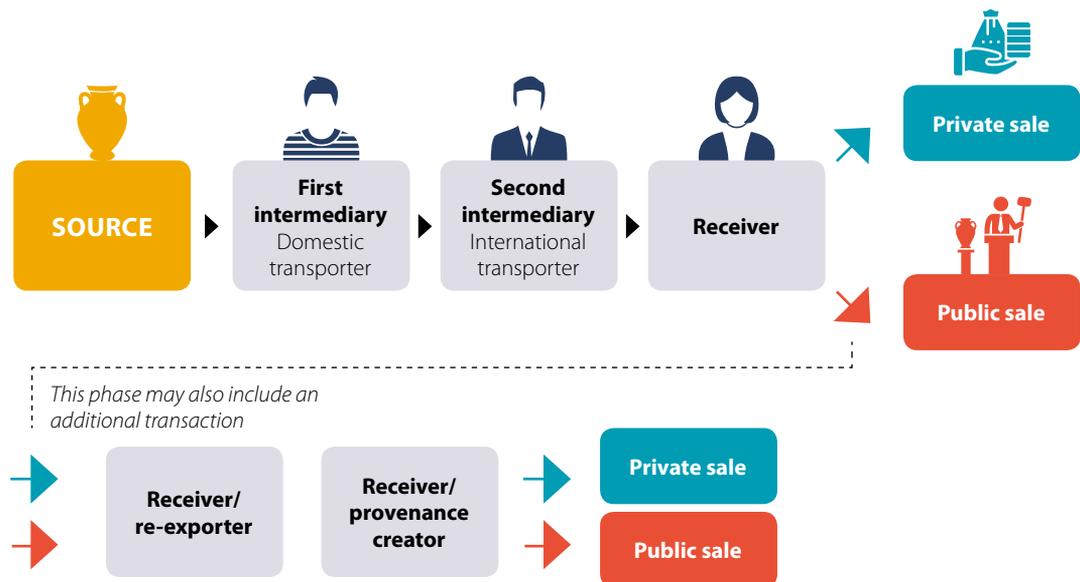
165 Turkish National Police, Ministry of Interior, 2013, *Turkish Report of Anti-Smuggling and Organized Crime*. Available at: <http://www.kom.pol.tr/SiteAssets/Sayfalar/Raporlar/2013eng.pdf> (Accessed 20 June 2018.)

166 Mackenzie and Davis, 2014, op. cit., pp.722–40

Exercise

- 1) Compare the organization of criminal groups dealing in illegal trafficking of cultural property with that of the organization and conduct of criminal groups dealing in other types of trafficking.
- 2) Compare the Cambodian network case with the cases of illegal trafficking of cultural property where you have been involved in the investigation or judicial process.

A POSSIBLE SCENARIO FOR THE ILLICIT FLOW OF CULTURAL PROPERTY



3.2.1. Transit and destination

Illicit trafficking routes can change for historical, cultural, economic and social reasons. For example, Lebanon, Pakistan and Turkey are source countries that suffer from the looting of archaeological sites but are also transit countries at the same time.¹⁶⁷ As transit countries may also be source countries, it is highly probable that artefacts passing through transit countries are mixed with the cultural property originating in those transit countries. For example, Bulgaria is a source country and it was reported that icons stolen from its churches appeared on the market in Greece as well as in North America and Western

167 Research study conducted by Dr Samuel Andrew Hardy in 2016: *Illicit Trafficking, Provenance Research and Due Diligence: The State of the Art*, Paris, UNESCO. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Hardy_2016_UNESCO_antiquities_trafficking_review_materia.pdf (Accessed 20 June 2018.)

Europe.¹⁶⁸ As a result of a joint operation undertaken by Bulgaria, Turkey and France (Operation PEKOM),¹⁶⁹ 5,600 pieces were seized in 11 towns in Bulgaria. It is reported that the artefacts principally originated in ancient sites in Bulgaria and Turkey and were to be transferred through Serbia to final destinations in France, Germany and the UK.¹⁷⁰ In this example, Bulgaria is a source as well as a transit country for Turkish objects; Turkey is a source country; Serbia is a transit country for both Bulgarian and Turkish artefacts; whereas Germany, France and the UK are destination countries. It is worth noting that **the roles of countries are interchangeable depending on the circumstances of any given trafficking case.**

3.3. Some relevant concepts

3.3.1. Due diligence/Due care¹⁷¹

In this context, due diligence represents all the steps that must be taken by a buyer to ensure that the cultural property he/she wishes to buy has the necessary legal documentation. If due diligence is considered a prerequisite by legal authorities for granting the ‘good-faith’ qualification in the case of a claim, people will be more careful to avoid dealing with a cultural object of dubious origin. **This is in fact the spirit of the UNIDROIT 1995 Convention, which aims to change the behaviours of all actors involved, in particular the buyer.** The concept was furthermore articulated in the international law on cultural property by the UNIDROIT 1995 Convention.

Two questions are important in this regard:

- 1) How is due diligence exercised?
- 2) How can it be determined whether due diligence has been exercised?

In fact, the first question is strongly connected to the second, since the criteria for exercising due diligence would be used by a judge in his/her questions to the claimant of the ‘good-faith’ title in order to reach a just decision.

¹⁶⁸ Ibid., p.7

¹⁶⁹ Bulgaria recovers over 5,000 antiquities in joint anti-smuggling op with Turkey, France. *Daily Sabah, Europe*. Available at: <https://www.dailysabah.com/europe/2017/05/26/bulgaria-recovers-over-5000-antiquities-in-joint-anti-smuggling-op-with-turkey-france> (Accessed 20 June 2018.)

¹⁷⁰ For more information on the operation, see: Bulgaria, Turkey and France arrest 22 for trafficking ancient antiques into Western Europe, *OCCRP*. Available at: <https://www.occrp.org/en/daily/6513-bulgaria-turkey-and-france-arrest-22-for-trafficking-ancient-antiques-into-western-europe> (Accessed 20 June 2018.)

¹⁷¹ This chapter is drafted in the light of the studies prepared by Professor Marie Cornu and Professor Marc-André Renaud for Phase 1 of the 2018 UNESCO-EU project on the fight against illicit trafficking: ‘Engaging the European Art Market in the fight against the illicit trafficking of cultural property’.

In Article 4(4) of the 1995 UNIDROIT Convention (then taken in Article 10 of the Directive 2014/60/EU), a number of elements are listed in order to inform the potential buyer of the steps to take before buying and to help the judge to determine whether due diligence has been exercised or not at the time of acquisition. **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 that they could have reasonably obtained, and whether they consulted accessible agencies or took any other step that a reasonable person would have taken in the given circumstances** are listed as indicators in the 1995 UNIDROIT Convention.

i) The circumstances of acquisition: the circumstances of the acquisition are an important indicator for a judge to determine if due diligence has been exercised. If the sale was carried out in a concealed manner in an unusual place, or the transaction of money was effected with an effort to eliminate traceability, the lack of documentation on the acquisition or money transaction establishes dubious circumstances that should alert a reasonable person as to the nature of the object's origin.

ii) The existence of documentation: provenance documents, if they exist, add value both for the buyer and the seller, as such documentation supports the claim of authenticity and also serves as a legal guarantee for both actors in case a third party should raise questions around the legality of the artefact. In addition to such provenance documentation, a proper export certificate issued by the respective authorities of the country of origin would be beneficial for the same reason. The lack of such documentation therefore raises suspicions on the legality of the object. In this regard, anyone buying an artefact that does not come with the documentation to prove its legal origin and export is knowingly taking the risk of purchasing illegally handled goods.

iii) The origin of the artefact: it is widely known that most states, if not all, have export prohibitions on certain objects. Some states prohibit the export of specific types of cultural property and apply monetary or age thresholds. Others, such as Greece, Turkey, Egypt, Peru, Syria and Iraq, apply export prohibitions in a more conservative way and prohibit the export of any archaeological artefact. As a matter of fact, it is acknowledged that cultural property is subject to private legislation at the national level. If a person is offered an oil lamp that was exported from Greece without any documentation, such an offer should sound warning bells to the possible buyer and if the buyer still chooses to buy it, it would be difficult to argue that due diligence was exercised by this person. Moreover, the situation of a country (e.g. armed conflict or natural disaster) is taken into account as an additional indicator. A person buying an artefact of Syrian or Iraqi origin without any valid, official documentation – even without considering the UNSC decisions – cannot be considered to be exercising due diligence. In fact, this might even serve to increase suspicion about his/her good faith, as the looting of cultural heritage in Syria and Iraq is an internationally known reality.

iv) The level of competence/capacity of the possessor of an artefact: if the possessor of an artefact is involved in the art world as an antiquity expert, scholar or other related profession, it follows that in view of their professional profile, they would be expected to know of the necessary precautionary measures compared to buyers who do not have such a background.

v) The efforts to obtain information: a person is expected to show an effort to acquire some information on the legality of the artefact that he/she wants to buy. Such an effort may be performed in various ways.

For example, the person may consult databases such as the INTERPOL Database of Stolen Works of Art to verify that the artefact in question is not a stolen one or the UNESCO National Cultural Heritage Law Database to find out about the export procedures or prohibitions of the country of origin. Consulting experts in cultural heritage law or contacting the authorities of the country of origin are among the other ways of gathering information. The absence of any of these efforts would make it difficult for one to claim good faith.

In 2011, ICOM created the ICOM International Observatory on Illicit Traffic in Cultural Goods,¹⁷² in order to acquire and provide information on the issue of illicit trafficking of cultural objects. Within this project a glossary, good practices and case studies were also developed and shared publicly through the website of the Observatory. One of the significant contributions of this platform is the chapter on due diligence/good practices.¹⁷³ The Observatory provides a non-comprehensive **checklist to establish the basis of a due diligence exercise** which can also help the authorities generate the relevant questions in their determination of whether due diligence has been carried out.

3.3.2. What is provenance?

Provenance information is the information on the artefact, including the place of discovery or the earliest known history. Provenance information must be supported with documentation and is the main means of identifying artefacts in legal circulation.

3.3.3. Fake provenance documents

In order to hide the illegal or suspicious history of cultural objects, the production of fake documents is a common practice of traffickers. Three forms of falsified provenance information exist:

- producing physical documents, such as false export certificates or customs documents;
- creating an ownership history which dates back to times prior to scientific excavations or before export bans were criminalized by the national law of the country of origin;
- misinforming customs authorities on the origin or content of the artefacts when entering a country.

172 ICOM International Observatory on Illicit Traffic in Cultural Goods. Available at: <https://www.obs-traffic.museum> (Accessed 3 June 2018.)

173 Available at: <https://www.obs-traffic.museum/due-diligence-good-faith>

Case: Dancing Shiva

In 2005, New York-based art dealer Subhash Kapoor went to Chennai in southern India and met with Sanjivi Asokan, the leader of a local theft gang. Kapoor commissioned Asokan to steal idols dating back to the Chola Dynasty Period.¹⁷⁴ In 2006, the gang took statues from Ariyalur province, including one called the 'Dancing Shiva', which was subsequently delivered to New York. In 2008, the National Gallery of Australia bought the statue from Kapoor for AUS\$5.6 million. The theft was discovered by the villagers and reported to the Tamil Nadu Police. Police arrested seven locals, including Asokan. It was revealed during the investigation that the thieves had been instructed by Kapoor. Kapoor was arrested in Germany in 2011 after India's Central Bureau of Investigation applied to INTERPOL for a Red Notice for his arrest within five days. Upon his extradition to India in 2012, he was put on trial for violating the Indian criminal code as well as the legislation on the protection of cultural property through looting and trafficking of Indian art. The FBI raided Kapoor's storage depot in New York and seized several artefacts worth more than \$100 million in total.¹⁷⁵ Kapoor's business partner Aaron Freedman admitted that the artefact had been stolen from an Indian temple and that he had created forged documents to produce a fake history of ownership to facilitate its sale.¹⁷⁶

3.3.4. Fake export certificates/Falsified customs declarations

In several countries, export prohibitions or restrictions are foreseen in national legislations. The export procedures of EU member states are regulated by Council Regulation (EC) No 116/2009 and 1081/2012. The latter proposed model export certificates for the use of its member states. A similar initiative was also undertaken by UNESCO and the WCO with a view to harmonizing the components of an export document to facilitate the work of customs. The tool is entitled the UNESCO-WCO Model Export Certificate for Cultural Objects. Despite these efforts to simplify and unify the content of export certificates, there are still several different types of export certificates in circulation.

Forgers of course benefit from this diversity for their illegal activities. ICOM and UNESCO published a scam alert on its webpage¹⁷⁷ in order to warn the general public about some fraudulent websites that imitate the ICOM institutional website. In return for a fee, these fraudulent websites offer certificates of authenticity and permission to export and import items of cultural heritage purportedly issued by ICOM and UNESCO.

174 Chola was a Tamil dynasty that ruled primarily in southern India until the thirteenth century.

175 M. Frith, E. Velioglu Yildizci and M.-A. Renold, 2015, *Case Dancing Shiva Statue – India and National Gallery of Australia*. Available at: https://plone.unige.ch/art-adr/cases-affaires/dancing-shiva-statue-2013-india-and-national-gallery-of-australia/case-note-dancing-shiva-statue-2013-india-and-national-gallery-of-australia/at_download/file. ArThemis: Art-Law Centre, University of Geneva. (Accessed 21 June 2018.)

176 J. Felch, 2014, Unprecedented: Australia's National Gallery sues Kapoor over \$5 Million stolen Shiva. *Chasing Aphrodite website*. Available at: <http://chasingaphrodite.com/2014/02/11/unprecedented-australias-national-gallery-sues-kapoor-over-5-million-stolen-shiva> (Accessed 21 June 2018.)

177 Images of false UNESCO and ICOM certificates are available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/scam-alert/gallerie-de-photos-exemples-de-faux-certificats-de-unesco-et-de-licom/> (Accessed 10 September 2018.)

 **Please remember:**

Neither ICOM nor UNESCO nor any other international or intergovernmental organization has the right, authority or mandate to permit an export or issue an authenticity document. By consequence, all these offers – generally involving Cameroon – are fraudulent.

Another important area of concern for customs authorities is that of falsified customs declarations.

 **Case – Marble statue from Libya**

On 1 November 2013, the UK customs authorities seized a marble statue from the premises of a shipping and storage company that had a sister organization specializing in the movement of art and antiques.¹⁷⁸ The customs declaration for the statue described the artefact as a ‘marble stone piece for home decoration’ manufactured in Turkey and the declared value was \$100,000. The customs authorities sent the piece of ‘decoration’ to the British Museum for an expert opinion. The British Museum concluded that the piece was an original funerary statue of a goddess from Cyrene, Libya, and estimated the market value of the statue to be £2 million. The false documents led to a ruling by Westminster Magistrates’ Court that the statue should be forfeited, based on the Customs and Excise Management Act 1979, which holds that an object can be forfeited if a misdeclaration is made knowingly or recklessly.¹⁷⁹ By the same decision, the statue was declared to be the property of Libya.¹⁸⁰

Falsified provenance documents are on the rise. It was recently reported that an attempt was made to import a mosaic of Syrian origin into the US with a falsified document claiming its origin to be Turkey.¹⁸¹ In order to reassure the customs authorities, traffickers may also provide a letter from the ‘factory’ or ‘manufacturer’ of these artefacts, which falsely declares that they have been produced recently.

3.3.5. Online sales

In 2006, UNESCO, INTERPOL and ICOM issued a joint statement on the online marketing of cultural property entitled **‘Basic Actions concerning Cultural Objects being offered for Sale over the Internet’**.¹⁸² The statement is confined to seven basic actions, with a view to suppressing the sale of illicitly traded antiquities. The statement encourages internet sale platforms to post a disclaimer which alerts potential buyers to verify the legality of the provenance of any artefacts of interest and invites them to make enquiries about dubious offerings with the national authorities of the country of origin. It underlines the importance of an **ongoing information exchange between the law enforcement authorities and the**

178 N. Brodie, 2017, The role of conservators in facilitating the theft and trafficking of cultural objects: The case of a seized Libyan statue, *Libyan Studies*, Vol. 48, pp. 117–23.

179 J. Ulph, 2015, UK customs seizure of looted Libyan statue, *Institute of Art & Law website*. Available at: <https://ial.uk.com/uk-customs-seizure-of-looted-libyan-statue> (Accessed 22 June 2018.)

180 Ibid. Copy of the decision available at: <https://www.ial.uk.com/wp-content/uploads/2015/10/2015.Politics.Return.Libyan.statue.pdf> (Accessed 22 June 2018.)

181 R. St. Hilaire, 2018, Importer restored ancient mosaic. FBI seized It. Now U.S. attorney seeks forfeiture. *Red Arch: Cultural Heritage Law & Policy Research website*. Available at: <http://culturalheritagelawyer.blogspot.com/2018/06/importer-restored-ancient-mosaic-fbi.html> (Accessed 23 June 2018.)

182 INTERPOL, UNESCO and ICOM, n.d., *Basic Actions concerning Cultural Objects being offered for Sale over the Internet*. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/basic-actions-cultural-objects-for-sale_en.pdf (Accessed 22 June 2018.)

internet platforms; monitoring of sales by a central authority; international police cooperation; keeping records of the checks conducted on the sale of cultural objects, including information on the vendors; and establishing legal measures to immediately seize the object and return it to its lawful owners.

According to the United Nations Conference on Trade and Development (UNCTAD),¹⁸³ there are three types of e-commerce models:

- Business-to-business (B2B)
- Business-to-consumer (B2C)
- Consumer-to-consumer (C2C)

Among the above, two types of e-commerce modalities are applicable to the online sales of cultural objects:

- B2C: companies selling directly to the public (internet dealers) and companies offering material for online auctions (internet auctions).¹⁸⁴
- C2C: customers interact with one another. An individual sells an artefact, and an interested individual submits a bid to buy it. The internet platform providers generally charge a flat fee or commission on the sale. Such online platforms are considered to be intermediaries. Their liability on the products offered depends on the national legislation and whether they own, possess or hold the artefact offered for sale. Craigslist and eBay are examples of this model.

The rapid growth of e-commerce has also translated into an increase in online sales of illicitly exported or stolen cultural objects.¹⁸⁵ This claim is supported by the fact that most of the objects offered for sale on the internet do not have authentic documentation. An artefact that lacks provenance should serve as a red flag for the authorities responsible for monitoring the online sales, as such artefacts may have been obtained from illegal excavations and offered for sale in violation of the relevant national legislation.¹⁸⁶

For the C2C model, two types of violation exist:

- Selling the artefact: even if the seller does not provide shipment outside the country where the object originated and is located at the time of the sale, it may be prohibited by the law of the country to trade in cultural property without a specific licence.
- Shipping the artefact out of the country: according to UNESCO research, 91% of the states who participated in the survey have an export prohibition or restriction¹⁸⁷ in force. However, the rapid nature

183 UNCTAD, 2015, *Information Economy Report 2015*, United Nations, p. 3. Available at: https://unctad.org/en/PublicationsLibrary/ier2015_en.pdf (Accessed 27 September 2018.)

184 N. Brodie, 2015, *The internet market in antiquities*, in: France Desmarais (ed.), op. cit., p. 11.

185 UNESCO - Fourth Session of the Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 26–28 September 2016, Item 10 on Online Sales of Cultural Objects. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/4SC_10_OnlineSales_Final_en.pdf (Accessed 22 June 2018.)

186 Ibid.

187 UNESCO, 2014, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector. Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, UNESCO, p. 29. Available at: <http://unesdoc.unesco.org/images/0022/002269/226931E.pdf> (Accessed 22 June 2018.)

of e-commerce may result in the object being sold before the authorities have the time to investigate its sale, despite the national legislation of the country (where the object is located at the time of sale) including an export restriction. C2C websites set time limits to complete the sale: for example, on eBay, the seller is requested to send the object within 7 days once the payment is cleared. Such a timeframe would hardly be sufficient to grant an export permission.

The problem is not limited to C2C types of e-commerce. The B2C, such as the websites of auction houses, should also be monitored for any stolen or illegally exported objects. In 2016, the Egyptian authorities recognized that some artefacts on the e-catalogue of a French auction house, Millon, originated in Sakkara. The Egyptian authorities sent several memoranda to the auction house concerning the return of the artefacts. Following an expert examination, the objects were confirmed to be among the ones that had been declared stolen and the artefacts were eventually returned to Egypt.¹⁸⁸

While it is possible to provide more successful examples of the return of cultural property detected in online sales, it is also worth noting that the internet is a sphere that enables vendors to disappear quickly and easily. In addition to the policies of internet auctions, dealers or internet platform providers, there should be provisions in national legislations that foresee the online sales as well as special agreements between the governmental bodies and companies involved.

In the periodic reports on the implementation of the 1970 Convention, some countries provide their own examples of good practice in relation to the measures they take regarding the online sale of cultural property.

Examples:

- Estonia has an agreement between the National Heritage Board and a popular C2C internet platform, www.osta.ee, according to which the platform must disclose to the National Heritage Board on request all relevant information on the goods for sale as well as details on the buyers and sellers.
- In France, the specialized police force for cultural property uses an interface provided by eBay which enables a search for stolen goods and artefacts.
- Germany reached an agreement with eBay in 2008 that prohibits the sale of cultural objects on the online platform, unless they are accompanied by valid documentation showing legal export from its country of origin.
- Poland, in order to identify the illicitly excavated relics offered in online sales, concluded an agreement with one of the largest internet auction sites in the country.
- Switzerland is one of the first countries to have signed a memorandum with eBay. This agreement limits the sale of cultural property on eBay to objects that have proof of legality issued by the Swiss or relevant countries' competent authority.¹⁸⁹

188 A. Masyria, 2016, Egyptian Embassy in Paris retrieves stolen artefact, *allAfrica* website. Available at: <https://allafrica.com/stories/201606301179.html> (Accessed 23 June 2018.)

189 Switzerland, just like the USA, implements the 1970 UNESCO Convention through bilateral agreements. This prohibition on the sale of cultural objects without documentation on eBay applies in particular to cultural objects originating in countries with which Switzerland has an agreement. For more information on the bilateral agreements that Switzerland has with other States, see: Confédération suisse - Federal Office of Culture, 2018, *Bilateral Agreements*. Available at: <https://www.bak.admin.ch/bak/en/home/cultural-heritage/transfer-of-cultural-property/bilateral-agreements.html> (Accessed 24 May 2018.)

The lack of facts and figures on the role of the internet regarding the illegal trade in cultural property prompted the Dutch Ministry of Education, Culture and Science to commission a research project into the trade of cultural goods on the internet. The research was conducted by criminologists and the results were published in the 2011 report: *The Art of the Internet: A Study of Illegal Online Trading in Cultural Goods*, where the researchers concluded the following:

- Trade on the internet is on the rise and this includes trade in art and antiquities.
- While prices are not always listed in the adverts, most of the goods in this category are in the lower price range.
- The general public, as well as the internet platform providers/advertisement sites' lack of knowledge on the relevant legislation, leads to the internet being used for illegal sales of cultural objects.
- The lack of expertise and capacity within monitoring, investigation and enforcement agencies is a major handicap for an effective fight against illegal practices in internet sales of cultural goods.
- The industry itself has not sufficiently developed its ability to keep itself clean.¹⁹⁰

It is also important to note that the existence of national regulations on this matter is crucial, and that such initiatives must be followed by a monitoring of online sales.

🔍 Case: Operation Athena and Pandora II

The first global customs-police operation, Operation Athena, was organized by the WCO in close cooperation with INTERPOL. In parallel, the Spanish Guardia Civil and Europol coordinated a Europe-focused action, codenamed Operation Pandora II. Both operations took place between October and early December 2017, and resulted in the seizure of 41,000 pieces of cultural property and the arrest of 53 people. In addition to the remarkable number of seizures by the Argentinean Federal Police, the Brazilian customs, the French customs and the Greek police, the investigation of the Spanish Guardia Civil highlighted the role of the internet as a facilitator in the trafficking of cultural property.

In a single investigation in Spain, the Guardia Civil seized more than 2,000 cultural objects composed of coins, ceramic, metal and stone archaeological objects, historical weapons and ivories. The investigation started with the monitoring of various internet pages dedicated to the sale and purchase of objects of historical value.

The use of social media sites for illegal trading in cultural objects is also a known practice. In order to mitigate this problem, vigilant monitoring as a preventive measure is crucial, since the social media companies responsible can act quickly to close down such pages.¹⁹¹ An individual who shares posts to sell cultural property from his/her social media account may be liable to sanctions for violating the prohibition on illegally trading in cultural goods. In 2015, a journalist identified five pages on Facebook that showed some objects of Syrian and Iraqi origin. The information on the page included the contact information of the seller. The authenticity of the artefacts is a separate question, but so as not to permit any suspicious activities, Facebook took down the pages quickly. In some cases, the investigation process may require the seller to believe that everything is going well, in order to enable the law enforcement authorities to

190 T. van Ham, 2011, *The Art of the Internet: A Study of Illegal Online Trading of Cultural Goods*. The Hague, Eleven International Publishing.

191 L. Daftari, 2015, Facebook purges pages offering priceless ISIS plunder for sale, *Fox News*, 11 June. Available at: <http://www.foxnews.com/world/2015/06/11/facebook-purges-pages-offering-priceless-isis-plunder-for-sale.html> (Accessed 24 June 2018).

achieve their targeted results. The law enforcement authorities may need to access the personal data of an account holder for the sake of an operation. Facebook does not provide this sort of information for international level requests unless a Mutual Legal Assistance Treaty (MLAT) or a rogatory letter is provided.¹⁹² However, the MLAT procedures may be considered too slow to investigate the rapid space that is the internet. In such urgent situations, the **Law Enforcement Online Requests**¹⁹³ may be another option. eBay has a similar system, the **Law Enforcement eRequest System**,¹⁹⁴ which was developed to enable law enforcement professionals in need of records for investigations related to specific sales on eBay to obtain the necessary data as quickly as possible.

3.3.6. Dark Web

Recent investigations and academic research have revealed the use of the Dark Web for illicit trafficking of cultural objects, including by terrorist groups. The sophisticated nature of cybercrime has prompted national authorities to take stronger measures to mitigate such crimes. In taking such measures, cultural property crimes must also be included in the monitoring work of the investigative authorities. Monitoring and intervention of the illicit trade in antiquities on the Deep Web and Dark Web¹⁹⁵ would help prevent these illegal actions moving to such ‘untraceable areas’. It is worth noting that preventive measures require long-term vision. In this regard, taking all the measures that have already been discussed in relation to the protection of cultural property is only one part of that approach. In addition, it is also crucial to systematically consider cultural property whenever a new type of crime or criminal field emerges that could involve or benefit the illegal trade of cultural property. **The connection between money laundering, tax fraud and the illegal trade in cultural property has long been acknowledged. To this end, any money laundering, terrorist financing and tax fraud-related measures set forth by the authorities must be with the capacity to involve and foresee cultural property trafficking.** Cultural property may not be a weapon to kill or bomb targets, but it certainly has the potential to sustain such actions if allowed to fall into the wrong hands.¹⁹⁶

192 Information for law enforcement authorities. Facebook. Available at: <https://en-gb.facebook.com/safety/groups/law/guidelines> (Accessed 24 June 2018.)

193 Please see: Request secure access to the law enforcement online request system, Facebook. Available at: <https://en-gb.facebook.com/records/login> (Accessed 24 June 2018.)

194 Information for law enforcement authorities. eBay. Available at: https://pages.ebay.com/securitycenter/law_enforcement.html and https://le.corp.ebay.com/leportal_communitieslogin (Accessed 16 September 2018.)

195 According to Bright Planet, the difference between the Deep and the Dark Web is as follows: ‘The Deep Web is anything that a search engine cannot find. The Dark Web is classified as a small portion of the Deep Web that has been intentionally hidden and is inaccessible through standard web browsers’. <https://brightplanet.com/2014/03/clearing-confusion-deep-web-vs-dark-web/> (Accessed 16 September 2018.)

196 For further information, see: K. Paul, 2018, Ancient artifacts vs. digital artifacts: New tools for unmasking the sale of illicit antiquities on the Dark Web, *Arts*, Vol. 7, No. 2, p. 12. Available at <http://www.mdpi.com/2076-0752/7/2/12/htm> (Accessed 25 June 2018.)

4. Practical measures and tools



4.1. UNESCO tools

As part of its mandate, the UNESCO Secretariat has provided several practical tools to support states in the fight against the illicit trafficking of cultural property. These initiatives include the following:¹⁹⁷

4.1.1. Awareness-raising campaigns: films, video clips and publications

UNESCO undertakes several awareness-raising activities, which include training events, visual media and publications. The films, video clips and publications are available on the UNESCO webpage.¹⁹⁸ These materials are used by the national authorities to raise awareness and also for training purposes.

Example: 'Heritage is Identity, Don't Steal It!'



©UNESCO

The awareness-raising video clips are primarily targeted at tourists. The objective of the campaign is to warn tourists when they purchase a cultural object to verify where it comes from and ensure that they have the necessary authorization to export the object out of the country.

These clips are available for dissemination by government authorities, the internet, social media, travel hubs (airports, ports, train stations, etc.), hotels, tourist offices and cultural sites.¹⁹⁹

4.1.2. Mediation and conciliation rules on conflicts related to cultural property

Within the framework of strategies designed and implemented to facilitate the work of the ICPRCP, and to enhance the process of restitution of cultural objects, particularly in the context of dispute resolution linked to the return or restitution of cultural property, UNESCO's General Conference adopted at its 33rd session a resolution that explicitly articulates the mediatory and conciliatory functions of the ICPRCP.

197 UNESCO, 2015, *Information Kit on the 1970 UNESCO Convention*, Paris, UNESCO, p.5. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Infokit_en_final_May_2017.pdf (Accessed 25 June 2018.) Only the tools that are more related to law enforcement and judiciary work are explained further, for information on all of the tools please refer to the information kit.

198 UNESCO, n.d., *Illicit Trafficking of Cultural Property*, Paris, UNESCO. Available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/videos> (Accessed 26 June 2018.)

199 <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/videos/heritage-is-identity-dont-steal-it/>

According to the Rules of Procedure for Mediation and Conciliation, **mediation** means a process whereby, with the prior consent of the parties concerned, **an outside party intervenes to bring them together** and to assist them in reaching an amicable solution to their dispute with respect to the restitution or return of cultural property.

Conciliation means a process whereby, subject to their prior consent, the parties concerned **submit their dispute with respect to restitution or return of cultural property to a constituted organ for investigation and for efforts to effect an amicable settlement of their dispute**. Chosen mediators and conciliators should preferably be independent experts.²⁰⁰

4.1.3. Actions concerning Cultural Objects being offered for Sale over the Internet

Basic Actions concerning Cultural Objects being offered for Sale over the Internet was drafted by UNESCO in close collaboration with INTERPOL and ICOM, in order to provide advice to States on how to overcome difficulties faced by authorities in countering the increasing illicit sales of cultural objects over the internet.²⁰¹

4.1.4. A Code of Ethics for Dealers in Cultural Property

This tool acknowledges the key role played by trade members in cultural property and provides a framework by setting out a number of rules to combat illegal trade in this area.

The code requires dealers:

- Not to import, export or transfer ownership of a cultural property where there is reasonable cause to believe that it has been illegally obtained and handled;
- To guarantee the buyer the title to the goods;
- Not to assist in any further transaction with an object when he/she has reasonable cause to believe that an object has an illegal history;
- To take all legally permissible steps to cooperate in the return of an object in their possession to its country of origin, if it has been illegally obtained or illegally exported;
- Not to promote the illegal export or transfer of cultural property;
- Not to divide the cultural property into fragments in order to sell each part separately;
- To keep cultural objects together which were originally produced/meant to be kept together.²⁰²

200 For further information, please see: UNESCO, 2010, Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Paris, UNESCO. Available at: <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf> (Accessed 26 June 2018.)

201 For further information, please refer to the chapter 'Online sales', and also to: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/basic-actions-cultural-objects-for-sale_en.pdf

202 UNESCO, 1999, *International Code of Ethics for Dealers in Cultural Property*, Paris, UNESCO. Available at: <http://unesdoc.unesco.org/images/0012/001213/121320M.pdf> (Accessed 26 June 2018.)

4.1.5. Model export certificate

The Model Export Certificate for Cultural Objects²⁰³ was jointly prepared by UNESCO and the WCO. It aims to facilitate the work of customs officials by providing a standard approach, and fulfils the requirements of identifying and tracing cultural objects without being overly burdensome.²⁰⁴

4.1.6. Database of National Cultural Heritage Laws:

A painting could be included in the definitions and covered by the law concerning the protection of cultural property of country X, but this may not be the case in country Y, where pictorial art has never been a central element of its culture. Another example of the differences in domestic legislations may arise with the export restrictions: whereas country Y enforces more conservative restrictions, country X may have a more liberal legislation. In this regard, it would not be wrong to argue that these various types of legislations limit the ability of the authorities of other states to reach a definite opinion without the use of international cooperation channels. **If a law enforcement or investigative authority finds itself in such a situation, especially when the need for information is urgent, the UNESCO Database of National Cultural Heritage Laws²⁰⁵ would be the most relevant and helpful source.**

 **Paragraph 38 of the Operational Guidelines of the UNESCO 1970 Convention states:**

The UNESCO database should be the first point of call for a customs service supervising imports because it will provide them with the legislation on the definition of what is a controlled export, what is an illegal export, and what needs to be discussed with the authorities of the country of export. It is therefore important to also have the legislation in an accessible language. National heritage services should be encouraged to publicize their protected cultural property nationally as well as to other States Parties so as to facilitate cooperation.

203 UNESCO, 2005, *Model Export Certificate for Cultural Objects*, Paris, UNESCO. Available at: <http://unesdoc.unesco.org/images/0013/001396/139620E.pdf> (Accessed 26 June 2018.)

204 Please refer to the chapter 'Fake export certificates/Falsified customs declarations'. See also: UNESCO, 2005, op. cit. Available at: <http://www.unesco.org/new/en/culture/themes/illlicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate> (Accessed 26 June 2018.)

205 <https://en.unesco.org/cultnatlaws/list>

How to search the database.

1. Enter the webpage <https://en.unesco.org/cultnatlaws/list>

2. Choose the category on which you want to conduct a search.

You can search using the following criteria:

Field/Subcategory: if you choose the 'Armed Conflict' subcategory and click 'apply', you will access all legislation related to armed conflict registered in the database. You may choose several categories at once.

Keyword: If you need to list all legislation related to 'fossils' you may wish to use the keyword search option.

Type of document: If, for instance, you need to view an agreement instead of a law, you can choose the 'agreement' option under the normative instruments title.

Themes: If you need to obtain information on any of the themes assigned to the database such as compensation, import, export, licence, etc., you may use the themes parameter to access all legal documents that are relevant to the theme you select.

Regions: If you need to obtain a regional overview, you can select the region you are interested in and all submitted legislations of the countries located in that region will be listed.

Country: If you need information on the law of a specific country, you may use the 'country' option.

Year: this parameter may be useful for limiting the search.

All options allow for several simultaneous selections. You may download the pdf files for your records.

[List of National Cultural Heritage Laws](#)

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Document's title
Is equal to

Document type
- Any -

One or several categories
Armed Conflict
Cultural Diversity
Cultural Immovable Heritage
Cultural Movable Heritage - Cultural Property
Intangible Cultural Heritage
Natural Heritage
Underwater Cultural Heritage

One or several keywords
Choose some options

One or several normative instruments
Choose some options

One or several themes
Choose some options

One or several regions
Africa
Arab States
Asia and the Pacific
Europe and North America
Latin America and the Caribbean

One or several countries
Choose some options

Year
- Year

Sort by
Year Asc
Title Desc

Source: www.unesco.org

4.1.7. Model Provisions on State Ownership of Undiscovered Cultural Objects

A claim for ownership should have a legal justification. In the context of the return and restitution of undiscovered cultural objects such as unearthed archaeological artefacts, the existence of clear provisions in the relevant national legislation regarding state ownership is of the utmost importance.

In this regard, in accordance with a decision by the ICPRCP, an Expert Committee was set up by UNESCO and UNIDROIT in 2011 and drafted *Model Provisions on State Ownership of Undiscovered Cultural Objects*. **These provisions can either supplement or replace the relevant existing provisions to strengthen enforcement or to fill a gap. The text was prepared as simply as possible in order to avoid any ambiguity or different interpretations.**

The drafting of clear provisions aims to reduce the time and effort needed to develop comprehensive interpretations of the law of the state bringing an action for the return of an object that falls within the scope of these provisions.²⁰⁶

206 UNESCO-UNIDROIT, 2011, *Model Provisions on State Ownership of Undiscovered Cultural Objects*. Available at: <https://www.unidroit.org/instruments/cultural-property/model-provisions> (Accessed 13 July 2018.)

4.2. UNIDROIT Convention Academic Project (UCAP)

UCAP was established to promote 'a favourable legal environment for restitution and return of stolen or illegally exported cultural objects'.

UCAP aims to:

- Disseminate information on the 1995 UNIDROIT Convention and the 2011 UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects;
- Assist scholars, students, lawyers, judges, other governmental officials, art collectors, dealers, auction house and museum professionals by providing information on the 1995 UNIDROIT Convention;
- Promote and link pertinent (inter)national research made by entities and Universities holding courses in the field of cultural heritage law, in particular on the 1995 UNIDROIT Convention;
- Assess the significance, the distinctive features and operational aspects of the 1995 Convention and its interaction with other regional and international instruments, with a view also to assessing their legal impact;
- Identify best practices in the art market.

This project has also interactive features, available at: <https://1995unidroitcap.org/>



Source: UNIDROIT

4.3. INTERPOL tools

4.3.1. Database for stolen works of art

Illicit trafficking in cultural property is a transnational crime. Fighting this crime therefore requires international cooperation, which can be facilitated by easily accessible data. INTERPOL has a database which aims to provide an efficient exchange of information by centralizing the data available. It is accessible to law enforcement agencies and other authorized users.²⁰⁷

In the case of theft, the photo(s) and descriptive information regarding the stolen objects must be shared with the INTERPOL National Central Bureau (NCB) as soon as possible. In turn, police forces must transmit their information to the INTERPOL HQ to be uploaded onto the database, following a two-level revision process.²⁰⁸

The INTERPOL database may be useful for governmental officials in the following situations:

- An authority locates an artefact from its country in another country. They may check the database with the appropriate category for the object they are investigating, while also selecting their country in the 'country of the event' parameter. If the artefact concerned is registered in the database, the INTERPOL NCB should be informed in order to enable them to contact their counterparts in the country where the artefact is located. The NCB of the country that is requesting assistance should provide all available information to the NCB of the requested state.
- The authority that monitors the circulation of cultural objects in its country finds a suspicious item. In such a case, they may conduct a search on the database to see if the object has been recorded. If their suspicions are confirmed, the NCB of the country where the object is located may get in touch with the NCB of the object's country of origin. The latter may request all necessary information from the former to take further action.
- During investigations conducted by law enforcement agencies, a law enforcement authority may take advantage of the database during investigation processes. However, a lack of result from the database does not mean that the object has not been stolen. To this end, INTERPOL provides the following warning on interpreting the results of the database:²⁰⁹

207 <https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art>

208 In 2013, INTERPOL and the Italian Carabinieri Command launched a project called PSYCHE (Protection System for Cultural Heritage) to innovate the database with financial support from the European Commission. The new version of the database, online since 11 June 2018, allows for faster dissemination of information on stolen works of art worldwide granting all member countries the ability to directly insert, modify and delete data into INTERPOL's database.

209 <https://www.interpol.int/Crime-areas/Works-of-art/Database>

Database

PLEASE NOTE

The database contains only those objects that have been officially reported as stolen by member countries.

An object may have been stolen, but is not included in the database for one of the following reasons:

- *It has not yet been reported as stolen to the police;*
- *The theft report has not yet been received at INTERPOL through official channels;*
- *The object has not yet been entered into the database;*
- *Searches for the object are being carried out at national level only;*
- *The object has been looted from an archaeological site and is not known to the police.*

We therefore encourage users to interpret database results with caution as an object may have been stolen, even if it does not appear in the INTERPOL database.

Source: INTERPOL

4.3.2. Posters



© Works of Art Unit, INTERPOL

INTERPOL publishes a poster every June and December highlighting the most wanted works of art.²¹⁰ The posters are distributed through **all INTERPOL NCBs to all law enforcement agencies worldwide**, as well as to all other international partner organizations (UNESCO, WCO, ICOM, UNIDROIT, ICCROM, UNODC and OSCE).

INTERPOL also issues special posters. The example below shows artefacts stolen from Iraq (the Mosul Museum) and Syria (the Raqqa Museum and Palmyra) to raise awareness of these thefts and to facilitate the recovery of the objects.

²¹⁰ <https://www.interpol.int/Crime-areas/Works-of-art/Posters>



© Works of Art Unit, INTERPOL

An essential step for national authorities is to disseminate the posters as widely as possible to all law enforcement agencies (including customs authorities), but also to cultural heritage institutions and private professionals in the art market. The posters are available online and can be shared electronically.

4.3.3. Purple Notice

INTERPOL notices are international requests for cooperation or alerts allowing the police in member states to share critical crime-related information. They are published by INTERPOL's General Secretariat at the request of the National Central Bureaus (NCBs) and authorized entities, and can be published in any of the organization's official languages: Arabic, English, French and Spanish. **The most important notice to tackle the illicit traffic of cultural property is the 'Purple Notice' that is issued to seek or provide information on the modus operandi, objects, devices and concealment methods used by criminals.** Processing this information requires authorization at the national level from judicial authorities.

4.4. ARCHEO – World Customs Organization

The WCO manages a real-time communication tool, ARCHEO, for the information exchange and strengthening of cooperation among customs administrations, other enforcement agencies, relevant national authorities and academic experts. ARCHEO is an internet-based Customs Enforcement Network (CEN) application that is only accessible to a closed user group. The information sent via ARCHEO is encrypted and secured. **The platform aims to enable the exchange of experience, provide training materials, manuals, guides for identification, other background information related to customs enforcement, and to share and inquire into seizure-related information.**²¹¹

211 Further information on ARCHEO, an electronic information exchange platform managed by the World Customs Organization, is available at: http://www.wcoomd.org/~media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/cultural-heritage/archo_brochure_en.pdf (Accessed 27 June 2018).

ARCHEO brings together professionals and experts from the field of protection of cultural heritage in order to assist the work of customs through facilitating the identification of suspected items, in order to strengthen enforcement in this area.²¹²

Case: Operation Pandora²¹³

Operation Pandora took place in October and November 2016 and had a joint action week from 17 to 23 November 2016, during which several police officers were deployed on the spot to assist the national authorities with inspections and searches.

The following EU member states participated in Operation Pandora: Austria, Belgium, Bulgaria, Croatia, Cyprus, Germany, Greece, Italy, Malta, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom. The non-EU countries involved were Bosnia and Herzegovina, Serbia and Switzerland.

Europol coordinated and directed the entire operation, which was supported by INTERPOL, WCO and UNESCO. In addition, the agency supported the concerted action from its 24/7 operational coordination centre in The Hague by providing operational and analytical support and facilitating the exchange of information.

A total of 48,588 persons, 29,340 vehicles and 50 ships were checked, and these controls led to the arrest of 75 people and the opening of 92 new investigations. In total, 3,561 works of art and cultural goods were seized, almost half of them artefacts, several of which were of great cultural importance in the archaeological world. The Spanish Guardia Civil seized more than 500 archaeological objects in Murcia: 19 had been stolen from the Museum of Archaeology in Murcia in 2014.²¹⁴

The WCO supported the joint action by facilitating communication, cooperation and assistance between the law enforcement authorities and customs administrations concerned through the **ARCHEO communications platform**.

Customs agents are generally the actors who must be the most vigilant and swift, as they are on the frontline of border security. In this regard, the ability to learn quickly whether the object in question is protected by law or not, or to obtain information on the export regime of the country of departure or related information may have a positive impact on the effectiveness of the enforcement.

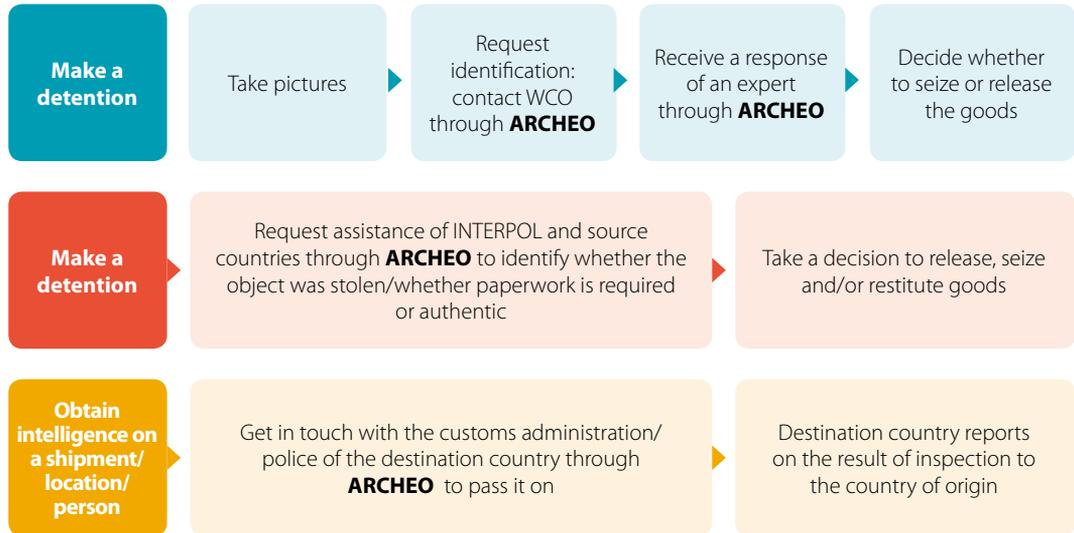
All tools can be found under the 'library' section of ARCHEO in relation to trafficking in cultural property, including the texts of international conventions, INTERPOL posters and ICOM Red Lists. This is another feature of ARCHEO that accelerates the process of gathering information, as it makes available all the tools at the same digital location.

212 WCO, n.d., *Trafficking of Cultural Property*. Available at: <http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/trafficking-of-cultural-objects.aspx>. (Accessed 27 June 2018.)

213 Europol, 2017, 3561 artefacts seized in Operation Pandora, *Europol* website. Available at: <https://www.europol.europa.eu/newsroom/news/3561-artefacts-seized-in-operation-pandora> (Accessed 27 June 2018.)

214 WCO, 2017, Operation Pandora: 3,561 artefacts seized and 75 people arrested, *World Customs Organization* website. Available at: <http://www.wcoomd.org/en/media/newsroom/2017/january/operation-pandora.aspx> (Accessed 27 June 2018.)

Please see below some operational scenarios concerning the use of ARCHEO:²¹⁵



Source: WCO

4.5. Red Lists – International Council of Museums (ICOM)



© International council of museums (ICOM)

The Red Lists of ICOM aim to identify categories of endangered archaeological objects or other types of cultural property that are at risk of pillage, looting, theft or clandestine excavation. The ICOM Red Lists are not ‘wanted posters’ but are composed of images of the objects that are secured in a museum or in a cultural institution. The purpose of these lists is to enable law enforcement and cultural heritage/museums professionals and collectors to be alerted when they encounter similar artefacts

²¹⁵ These schematized and practical scenarios are developed and kindly shared by the WCO. For more information on ARCHEO, please contact the ARCHEO team: archoe@wcoomd.org

to the ones presented in the list. In other words, the Red Lists provide prototypes to facilitate the work of all actors when it comes to the identification of objects, identifying the provenance of artefacts and, even more importantly, on their legal status (protected by their national legislation).

ICOM has published 17 Red Lists which can be downloaded individually from the Red Lists-ICOM²¹⁶ webpage. ICOM also offers a publicly accessible database for Red Lists²¹⁷ that enables searches by key word, material, type, region or country, and period.

🔍 Case: France-Iraq – the use of ICOM Red Lists

In October 2012, investigators from the French Central Office for the Fight against Illicit Trafficking in Cultural Goods (OCBC) identified two cones and some cuneiform tablets. According to a statement from the OCBC, the police officers identified the objects with the help of the ICOM Red List of Iraq. This initial identification led to a seizure and the images of the artefacts were displayed by a scholar from the Department of Sumerian antiquities at the French National Centre for Scientific Research (CNRS). The examination by the expert also confirmed that the artefacts were authentic and of Iraqi origin. The French authorities returned the seized objects to Iraq at the end of 2012.²¹⁸ The use of an ICOM Red List in this incident once again underlines the importance of having the capacity to take immediate action. This case is also significant in terms of the synergies at the international level: the artefacts could be returned by virtue of a ban imposed by UNSC Resolution 1483 (2003) and endorsed by the EU (Reg 1210/2003), and practically implemented by French authorities benefitting from a tool developed by ICOM.

4.6. SHERLOC-UNODC

The SHERLOC (Sharing Electronic Resources and Laws on Crime) knowledge management portal (www.sherloc.unodc.org) is an initiative developed by UNODC to facilitate the dissemination of information regarding the implementation of the UNTOC and its three Protocols.

SHERLOC contains five databases, namely: **case law, legislation, bibliography, strategies and treaties**. All resources hosted on SHERLOC cover a wide range of topics in the following 15 different types of crime: **participation in an organized criminal group, corruption, counterfeiting, drug trafficking, money-laundering, obstruction of justice, cybercrime, piracy and maritime crimes, smuggling of migrants, trafficking in persons, trafficking in cultural property, wildlife (including forest and fisheries) crimes, falsified medical products, trafficking in firearms and terrorism**. This wide scope allows users to discern the existing links between different forms of organized crime, including trafficking in cultural property.

216 Available at: <https://icom.museum/en/activities/heritage-protection/red-lists/> (Accessed 3 September 2018.)

217 Available at: <https://icom.museum/en/resources/red-lists/> (Accessed 3 September 2018.)

218 ICOM, 2008, *Red List of Afghanistan Antiquities at Risk*. ICOM. Available at: <http://icom.museum/programmes/fighting-illicit-traffic/red-list> (Accessed 28 June 2018.) There are several other case studies reflecting the use of ICOM Red Lists. For a detailed case please refer to: St. J. Simpson, 2015, Back to Kabul: Case studies of successful collaboration between the National Museum of Afghanistan, the British Museum, the UK Border Force and others in the return of stolen antiquities to Afghanistan, in: France Desmarais (ed.), op. cit., pp. 181–96.

The databases are searchable by country/region, relevant UNTOC article(s) and relevance to specific types of crime. Furthermore, resources can also be filtered by additional keywords and cross-cutting issue(s). Cross-cutting issues include special procedures and measures that facilitate international cooperation in the effective prosecution and adjudication of transnational organized crime, such as extradition, MLA, joint investigations or special investigative techniques but also broader issues such as crime prevention and the protection of victims and witnesses.

The portal enables users to learn from the practices in other states and regions, different legal and political systems, and jurisprudence and legislative frameworks.²¹⁹

4.7. The Internal Market Information System (IMI) – European Union

The Internal Market Information System (IMI) is a secure multilingual online tool developed to facilitate administrative cooperation among the EU member states through a quick and easy exchange of information.

The IMI is regulated by (EU) Regulation No. 1024/2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').²²⁰ The system is available online and does not require the installation of a software programme. **The multilingual, encrypted and secured features of the system allow for a continuous and effective exchange of information.** The requesting authority is able to track the status of their request. Surveys have shown that more than half of the IMI requests are concluded within two weeks. This toolkit for public authorities required to work together aims to simplify the workflow and accelerate the speed of administrative procedures.

The IMI is available in all EU languages. The user needing to join the IMI has to apply to the National IMI Coordinator.²²¹ Once the application is approved, the user can submit their request by selecting from pre-translated questions. After reviewing the question, the receiver(s) may choose an answer from earlier-translated questions and answers, data fields, or proposals on actions to be taken.²²²

219 The information on SHERLOC is kindly shared by UNODC.

220 EUR-Lex, 2008, Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation). *EUR-Lex* website. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R1024> (Accessed 28 June 2018.)

221 The contact lists of IMI coordinators are available at: http://ec.europa.eu/internal_market/imi-net/contact/index_en.htm. (Accessed 28 June 2018.)

222 O. Jakubowski, 2016, The Internal Market Information System (IMI) on the return of cultural objects – Its principles, application, and evaluation of its effectiveness for the protection of cultural heritage, *Santander Art and Culture Law Review*, Vol. 2, No. 12. Available at: http://heuright.eu/wp-content/uploads/2016/01/olgierd_jakubowski_imi-study2016_heuright.pdf (Accessed 28 June 2018.) See the animated video on IMI for the basics of the system: http://ec.europa.eu/internal_market/imi-net/index_en.htm (Accessed 28 June 2018.)

The IMI is used for seven legal areas, which are: services, professional qualifications, posting of workers, SOLVIT, Euro-cash transportation, cross-border healthcare and e-Commerce.

4.7.1. The use of the IMI System in accordance with Directive 2014/60/EU

Directive 2014/60/EU²²³ refers to the use of the IMI in the recitals of the text as well as in Articles 5 and 7. The preamble introduces the idea of the utilization of the system for the implementation of this Directive. The key points of the preamble of the Directive include the adaptation of the protection of personal data-related provisions of the IMI Regulation to the cases falling under the Directive, the creation of a customized IMI module and the formation of an expert group to work on the module.

Article 5 and Article 7 of the Directive aim to strengthen cooperation and promote consultation among the competent authorities of the member states. The actions that may be undertaken through the use of the IMI in accordance with Articles 5 and 7 are:

- Search for a specified cultural object that has been unlawfully removed, as well as the identity of its possessor.
- Notify the discovery of a cultural object.
- Enable the verification of a cultural object.
- Act as an intermediary with regard to the object's return.²²⁴
- Exchange information between the requested and requesting member states on the proceedings that have been initiated with the aim of securing the return of the object in question.

The IMI functionalities for users of the '**Return of Cultural Objects**' legal area will include '**one-to-one**' and '**one-to-many**' communication modules, as well as '**repositories**' in which an authority can store information that can be made accessible to a defined group of users. For example, one EU member state needs to create a notification that a cultural object has been unlawfully removed. The proper module will be '**one-to-many communication**', whereas '**one-to-one communication**' would be useful when requesting to seek an unlawfully removed cultural object and the identity of its possessor/holder.

223 See section 2.10.2. 'European Parliament and Council Directive 2014/60/EU'.

224 European Commission, 2014, *Legislation on the return of cultural goods – Directive 2014/60/EU*. Available at: <http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/return-cultural-goods> (Accessed 30 June 2018.)

5. Mutual legal assistance and special investigative techniques



5.1. Mutual legal assistance (MLA)

Organized crime constitutes a serious peril for all states. With a view to avoiding detection in a country, criminals often extend their operations to the territories of other countries. International assistance is a key element in the fight against any type of crime, and falls into two categories: administrative assistance and mutual legal assistance.

5.1.1. Administrative/Informal assistance

'An administrative or informal approach should be the first step in any evidential request of complexity in any event, even where it is always the intention to issue a formal letter of request.²²⁵ By beginning on a police-to-police, or prosecutor-to-prosecutor basis, the requesting state will have the opportunity of discussing the form and the requirements of the letter with the requested state before the letter is finalized; that will better ensure that it addresses all matters that the requested state needs and that avenues of enquiry are narrowed down as much as possible in advance of the formal request. It will also help the authorities in both states to build networks and contacts.²²⁶

The International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (Nairobi Convention) is one of the tools of the WCO. The Contracting Parties of the Convention are required to afford each other mutual assistance with a view to preventing, investigating and repressing customs offences. The customs administration of a Contracting Party may request mutual assistance in the course of any investigation or in connection with any judicial or administrative proceedings being undertaken by the requesting Contracting Party. Annex XI of the Nairobi Convention²²⁷ identifies the proper criteria for mutual administrative assistance for an action against the smuggling of works of art, antiques and other cultural property. The administrative assistance methods listed in Annex XI of the Convention are:

- Exchange of information by customs administrations on their own initiative;
- Assistance, on request, relating to surveillance;
- Enquiries, on request, on behalf of another Contracting Party;
- Action by customs officials of a Contracting Party in the territory of another Contracting Party.

Before sending a letter of request for formal MLA, it is better to ensure that 'administrative/informal' channels such as police-police or prosecutor-prosecutor cooperation are exhausted. The liaison officers may be a useful channel to transmit such administrative requests. Organizing bilateral or

225 Please note that the use of the word 'informal' does not describe the evidence or information itself; instead it refers to the way in which the request is made, so as to avoid the delays that are often encountered in cases of formal MLA procedures.

226 Council of Europe, 2013, *Mutual Legal Assistance Manual*. Available at: <https://rm.coe.int/mutual-legal-assistance-manual-eng/1680782927>

227 Please also see Chapter 2 (2.5)

regional trainings or seminars where counterparts can meet each other to establish contacts for future cooperations may also be a good investment for administrative assistance. Additionally, international or regional organizations such as INTERPOL, WCO, UNODC, Europol and Eurojust may assist states in identifying contacts in the other country concerned. The use of communication platforms such as ARCHEO²²⁸ can also be very useful in such cases.

5.1.2. Letter of request (rogatory letter)

Rogatory letters are used to make mutual assistance requests for seizure or confiscation; gathering evidence; execution of the imprisonment, fine, confiscation or forfeiture decisions given by foreign courts; detection and observance of earnings, properties, tools or others with the purpose of gathering information and evidence; hearing the victim, plaintiff, participants and witnesses; and examination or interrogation of the suspect or the offender.²²⁹

A rogatory letter may include the following information: the name/title of the requesting authority; a brief synopsis of the case, which should include information on the parties and the nature of the claim (any information that would better help a foreign court to understand all issues involved); the type of case and whether it is criminal or civil; an identification of the required assistance; detailed information of the individuals if the request concerns compelling evidence, examination, interrogation etc.; the list of questions to be asked if a written interrogatory is concerned; the list of required evidence to be produced; and the location of the object whose seizure or confiscation is requested.

There are several international or regional conventions addressing MLA that could be applied to cultural property-related crimes:

- the UN Transnational Organised Crime Convention 2000 (UNTOC);
- the UN Convention against Corruption 2003 (UNCAC);
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005;
- the Council of Europe Criminal Law Convention on Corruption 1999;
- the European Convention on Mutual Assistance in Criminal Matters 1959.

The EU also has an MLA Convention (2000) that covers criminal offences as well as administrative breaches. In order to avoid possible delays, this Convention enables the communications to be made directly to the judicial authorities instead of having to pass through central bodies first. The Convention allows EU member states to send mutual assistance requests to hand over to the competent authorities of a requesting state

228 Please also see Chapter 4 (4.4)

229 Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, Chapter II. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030> (Accessed 30 June 2018.)

objects that have been stolen with a view to ensuring their return to their rightful owners.²³⁰ Provisions on requesting several special investigation techniques as well as the creation of joint investigation teams are also set forth in the Convention.

✓ Please remember:

The Council of Europe in its *Manual for Mutual Legal Assistance*²³¹ and the UNODC in its *Manual on Mutual Legal Assistance and Extradition*²³² offer checklists for the requesting Party to make sure that the (rogatory) letter of request is complete.

The European Union Convention on Mutual Assistance and Cooperation between Customs Administrations (1998) also permits cross-border cooperation for cases relating to the illicit trafficking in cultural goods. In accordance with the Convention, the customs administrations of the EU member states shall provide each other with the necessary assistance in terms of staff and organizational support. While combatting specific crimes referred to in this Convention, with the approval of the requested authority, officers of the applicant authority may engage in activities in the territory of the requested state.

There are several judicial and law enforcement networks with the mandate of strengthening international or regional cooperation that the authorities may consult when in need of assistance. These include INTERPOL, WCO, the Online Directories of Competent National Authorities (by UNDOC), Eurojust, Europol and the European Judicial Network.

Example:

Police officers in country D get in touch with officers in country E for the withdrawal of an object from sale by an auction house located in country E as the experts in country D have identified it as stolen. The authorities of country D provide all necessary information to their counterparts in country E. Country E gets in touch with the auction house, which agrees to temporarily withdraw the object from the sale, until more information can be provided on its origin. In such cases, where the auction house agrees to temporarily withdraw the artefact without requiring a legal order, the time granted to the requesting authority is limited to a few days. If a state seeks administrative assistance under such circumstances, it must produce the evidence as soon as possible. If country E prohibits the import of illegally exported cultural goods and the law enables the law enforcement authorities to seize those goods imported in breach of the national legislation, the law enforcement authorities of country E will be in a position to conduct the seizure in line with its own domestic regulation. Even if it is possible to do this without a formal MLA request by country D, requesting the return of the object may require a rogatory letter, unless the situation allows for the use of diplomatic channels.

However, in a different scenario where importing a cultural object is legally permitted in country E and the auction house is not under obligation to cooperate, despite the effectiveness of administrative assistance channels, it is likely that a letter of request (rogatory letter) would be crucial for the law enforcement authorities of country E to take action and cooperate with country D.

If both countries are EU member states, then in addition to INTERPOL and EUROPOL channels, the communication and subsequent actions may be conducted through the IMI System in accordance with the implementing/corresponding domestic provision of Article 7 of the Directive 2014/60/EU.

230 Article 8 of the EU MLA Convention.

231 Available at <https://rm.coe.int/mutual-legal-assistance-manual-eng/1680782927> (Accessed 18 July 2018.)

232 Available at https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf (Accessed 18 July 2018.)

5.2. Special investigative techniques

Special investigative techniques can be defined as techniques for systematically gathering information without alerting the target person, applied by law enforcement officials for the purpose of detecting and investigating crimes and suspects.

These techniques are important tools in the suppression of transnational crime and it is important to acknowledge that they require legislative safeguards and transparent regulation.²³³

Article 20 of the UNTOC and Article 50 of the UNCAC are two of the international tools encouraging states to apply special investigative techniques, as appropriate. On this legal basis, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences encourages states to consider the use of special investigative techniques as follows:

International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014)

Guideline 31. States may consider, in the investigation of the above-mentioned offences, especially if related to organized crime, allowing for the appropriate use by their competent authorities of controlled delivery and other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within their territory, and allowing for the admissibility in court of evidence derived therefrom.

These techniques could be very useful to law enforcement authorities investigating organized crime cases of illicit trafficking of cultural property, and the techniques that have provided successful results in other types of crimes may also be applied to cultural property-related crimes.

The main problem in the fight against illicit trafficking of cultural property is the low level of interest in determining and identifying the actors involved. **Most of the time the principal focus is on the artefact itself and its return to its country of origin. There are several cases of returned cultural property that have not been followed by any legal proceedings.** Country X calls country Y and informs it that it has seized an artefact probably originating in its country and asks for confirmation. Country Y confirms the origin and provides excerpts from its legislation that prove the state ownership of the cultural property as well as the export prohibition. Country X returns the artefact to country Y with the consent of the person who holds the artefact. Every case is not serious enough to justify a deepening of the investigation, but all cases do deserve an investigation. The creativity of the traffickers has been revealed in several cases. For example, traffickers have used the method of exporting a huge sarcophagus, declaring it as a 'mould' for toy production, or covering original artefacts with plaster to disguise them as souvenirs. They create a social space in their host countries in a very planned manner, acting as respectable collectors while using their hometown contacts to order thefts in order to exchange originals with fakes in their collections. There are several other methods that cannot be described in an open source document.

233 D. Halvarsson, 2015, The suspect and mutual legal assistance: A legal analysis of the rights of the individual in the suppression of transnational organised crime. Unpublished master's thesis, Uppsala, Sweden, University of Uppsala, p. 32. Available at: http://heuright.eu/wp-content/uploads/2016/01/olgierd_jakubowski_jimi-study2016_heuright.pdf (Accessed 30 June 2018.)

An investigation is thus essential to ensure the effective enforcement of the law to reveal the criminal organization that is hidden behind the object. In this regard, undercover and controlled delivery operations have yielded successful results and contributed to the efficacy of investigations. The use of special investigative techniques when dealing with trafficking of cultural property is also important for discovering, tracing and recovering cultural objects, as well as identifying and prosecuting the offenders.

Technical surveillance: this is a helpful tool for the investigating authority but its highly intrusive nature requires stringent protection against misuse. The interception of telecommunications, the use of listening devices and the deployment of tracking devices all fall within the definition of electronic surveillance.

Physical surveillance and observation: this technique is not considered as intrusive as the technical surveillance methods. It implies locating a target, observing, following and even recording them. Depending on the case, it may extend to the use of special kinds of computer activity and also bank account monitoring.

Undercover operations: such operations are useful when 'it is difficult to gain access by conventional means to those engaged in organized criminality'.²³⁴ Evidence obtained from an 'insider' is too direct and concrete to be denied, so this technique is also significant at the prosecutorial level.

Controlled delivery: this technique works by allowing the detected deliveries to go forward and meet their recipients under the control and surveillance of law enforcement authorities. This technique has been proven efficient in identifying and prosecuting principals, organizers and financiers.

Special investigative techniques for the purposes of suppressing illicit trafficking in cultural property may be used in the context of cooperation at the international level. However, it is obvious that the **use of special investigative techniques is strictly connected to human rights issues and the misuse of these techniques may result in serious violations of the rights of individuals.** The delicate and sensitive nature of actions such as surveillance, telephone tapping, tracing of computer communications or hot pursuit, etc. may require high-level vigilance on the part of cooperating countries.

234 Council of Europe, 2013, op. cit.

✓ Please remember:

- Some of the special investigative techniques enforced in the requesting country may not be legal in the requested country. This would lead to a refusal of the MLA request for the use of the requested investigation technique. To avoid this, please remember to contact the relevant authorities, whether through the contacts provided on accessible directories or through requesting the assistance of organizations responsible for international cooperation on criminal matters.
- The 2018 Eurojust report *Current Situation in Judicial Cooperation in New Psychoactive Substance and (Pre)Precursor Cases* acknowledges the challenges arising from the various legal regulations that change from one state to another. Different sources of regulations may affect the possible application of coercive measures. The main challenge is the low level of punishment, as it disables the use of special investigative techniques.²³⁵

5.2.1. The European Union Convention on Mutual Legal Assistance (2000)

This Convention does not have a specific provision on the illicit trafficking of cultural property, but the preamble states: ‘The High Contracting Parties to this Convention, member states of the European Union (...) recognizing that the provisions of those Conventions remain applicable for all matters not covered by this Convention, (...) have agreed on the following provisions:’. In addition to several MLA methods set forth in the Convention, including the temporary transfer of persons held in custody for the purpose of investigation, hearing by videoconference, hearing of witnesses and experts by telephone conference, **the return of stolen objects to their rightful owners**, it also enables its Parties to cooperate in applying techniques through the framework of MLA, controlled deliveries (for extraditable crimes), joint investigation teams, covert investigations, and the interception of telecommunications.

5.2.2. The European Union Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II)

The Convention enables the use of special investigation techniques such as: hot pursuit; cross-border surveillance (even in the absence of a prior authorization due to an urgent situation); requests for enquires, surveillance or information; controlled delivery (for extraditable crimes); covert investigations and gathering joint special investigation teams. **All of the above techniques apply to cultural property, as ‘cultural goods’ are listed in Article 19 of the Convention’s related offences.**²³⁶ If trafficking in cultural property is not an extraditable crime in the countries concerned, then the option of controlled delivery may be an exception to this generalization.

235 Eurojust, 2018, *Current Situation in Judicial Cooperation in New Psychoactive Substance and (Pre)Precursor Cases: An Analysis Report*. Available at: [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Current%20situation%20in%20judicial%20cooperation%20in%20new%20psychoactive%20substance%20and%20\(pre\)precursor%20cases%20\(April%202018\)/2018-04_Analysis-report-judicial-cooperation-psychoactive-precursor-cases_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Current%20situation%20in%20judicial%20cooperation%20in%20new%20psychoactive%20substance%20and%20(pre)precursor%20cases%20(April%202018)/2018-04_Analysis-report-judicial-cooperation-psychoactive-precursor-cases_EN.pdf) (Accessed 30 June 2018.)

236 The Convention can be found at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0123\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0123(01)&from=EN)

5.2.3. The European Investigation Order

'A European Investigation Order (EIO) is a **judicial decision which has been issued or validated by a judicial authority of a Member State** ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.²³⁷

Directive 2014/41/EU on the European Investigation Order (EIO) in criminal matters **enables member states, through the issuance of an EIO, to request the execution of several special techniques, such as the interception of communication, information on a bank account and other financial accounts or operations, and controlled deliverables and covert investigations, as an alternative means to traditional MLA channels.** Annex D of Directive 2014/41/EU lists the crimes for which an EIO may be issued.²³⁸ The creation of this list, which includes 32 offences, is a novel development to reinforce the mutual recognition principle. One of these identified offences for the application of an investigative order is the 'illicit trafficking in cultural goods, including antiques and works of art'.

5.2.4. The European Arrest Warrant

Based on the principle of **mutual recognition of judicial decisions, an EU country may request another EU country to arrest a person and surrender him/her for prosecution or to execute a custodial sentence or detention order issued in the first country.** The mechanism is based on direct contact between judicial authorities. This alternative to traditional extradition, which applies for 32 categories of offences listed in the adopting framework decision, has the benefit of not requiring verification on whether the act is a criminal offence in both countries. **The only requirement is that it be punishable by a maximum period of at least 3 years of imprisonment in the issuing country. The illicit trafficking in cultural goods, including antiques and works of art, is included in the catalogue of offences.** Thus, this document provides a strong tool for the judiciary to ensure that offenders of this crime can be brought to justice, even if they are located in another EU country.

🔍 Case: Operation Demetra

In 2014, the Italian Carabinieri Command Centre for the Protection of Cultural Heritage initiated an investigation codenamed operation Demetra. The investigation revealed that in the Caltanissetta district of Sicily, which is rich in ancient Greek and Roman sites, local members of an organized crime group obtained several cultural artefacts through illegal excavations. The artefacts were then taken out of Italy with fake provenance documents. The key facilitators who were playing the coordinating supply chain role and providing technical support were identified in Barcelona and London. Before the action day, the Italian Carabinieri seized 3,000 archaeological artefacts, 1,200 fake objects and 1,500 tools such as metal detectors that were used for the illicit excavations. The prosecutor of the Republic of

237 European Investigation Order, Article 1

238 An infographic on the EIO is available at: <http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/European%20Investigation%20Order/2018-European-Investigation-Order.pdf> (Accessed 1 August 2018.)

Caltanissetta issued an EIO to conduct searches abroad, where numerous archaeological objects and important documentation for further investigations were found. The investigations in Germany against two Munich-based auction houses are reported to be still ongoing. European Arrest Warrants were also issued, and on the basis of these warrants 23 suspects have been detained. As a result of the operation, 25,000 archaeological items were seized, worth a total of €40 million.²³⁹ Europol and Eurojust played an essential role in the operation, as they coordinated the execution of the arrests and searches in the four member states on the action day of the operation. The applicability of the European Investigation Order and Arrest Warrants to the cultural goods-related cases undoubtedly assisted the Italian authorities greatly in achieving this result.²⁴⁰

If the offender is located outside the EU, the bilateral agreements between states, the European Convention on Extradition (1957),²⁴¹ the UNTOC or the UNCAC can provide the legal basis for an extradition request.

The International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014)

Guideline 36. States should consider making the crimes against cultural property enumerated in guideline 16 extraditable offences. In the context of extradition procedures, States should also consider adopting and applying, where possible, provisional measures to preserve the cultural property related to the alleged offence for the purpose of restitution.

5.2.5. Joint Investigation Teams (JITs)

Joint Investigation Teams are an international cooperation tool, which includes at least two states and requires an agreement between the competent authorities of the states concerned. These authorities include both judicial and law enforcement professionals. **There must be a specific purpose or need to conduct a criminal investigation and the agreement must be established for a limited time. Being an alternative to traditional channels of MLA, JITs enable a direct gathering and exchange of information.** Another added value is the liberty of seconded members of the JITs to be present and take part in investigative measures carried out outside their state's jurisdiction. For these reasons, JITs constitute a very efficient and effective cooperation tool that facilitates the coordination of investigations and prosecutions conducted in parallel across several states.

239 Europol, 2018, Hard blow against illegal trafficking of cultural goods. *Europol* website. Available at: <https://www.europol.europa.eu/newsroom/news/hard-blow-against-illegal-trafficking-of-cultural-goods> (Accessed 1 August 2018.)

240 For detailed profiles of the arrests, please see: L. Albertson, 2018, More details on Operation Demetra. *ARCA* website, 6 July. Available at: <http://art-crime.blogspot.com/2018/07/more-details-on-operation-demetra.html> (Accessed 1 August 2018.)

241 Please remember that non-members of the Council of Europe can ratify CoE Conventions. Israel, the Republic of Korea and South Africa are the non-members of the Council of Europe who have ratified this Convention.

 Exercise

Please see below the special investigation techniques identified by the Council of the European Union:²⁴²

1. Interception, recording and transcription of telecommunications
2. Interception and recording of other forms of communications
3. Interception, recording and tracing of communications in the area of computer crime
4. Tracing of telecommunications
5. Observation
6. Observation and surveillance by video camera
7. Infiltration
8. Infiltration by an undercover agent of the requested state
9. Infiltration by an undercover agent of the requesting state in the territory of the requested state
10. Infiltration by an informer of the requested state
11. Handling of informers
12. Cross-border observation
13. Cross-border hot pursuit
14. Cross-border tracking
15. Controlled delivery
16. Pseudo purchases

Imagine you are involved in an investigation on an illicit excavation case in your country.²⁴³ You have identified three individuals physically undertaking the digging. In your domestic legislation, illicit excavation is a crime punishable with imprisonment of up to four years. However, you know that the illicit excavators are obtaining these artefacts for monetary profit. As they are damaging and even destroying scientific data through the illicit excavations, you must act immediately to stop them; on the other hand, you need to discover the intermediary and criminal group that these illicit diggers work for.

What would you do with a view to dismantling the network but also securing the cultural property? Which of the above-mentioned techniques are applicable to your case, at the domestic level?

Your steps have been successful and after identifying the intermediaries in your territory you have managed to obtain the name of a gallery owner in another country. Both your country and the country where the suspect is located are:

- (i) parties to the UNTOC
- (ii) EU member states

Please list the actions that you will take separately in view of UNTOC membership and EU membership. Do you need assistance? If so, what would you request from your counterpart in the other country? What would be the channels that you would use to reach your contact? Would you start with an administrative assistance request or directly with an MLA letter of request (rogatory letter)? If you have to draft an MLA request, what are the sources that you can use to ensure the effectiveness of your letter, whether immediately or at a later stage?

242 H. G. Nilsson, 2005, *Special Investigation Techniques and Developments in Mutual Legal Assistance: The Crossroads Between Police Cooperation and Judicial Cooperation*, Resource Material Series No. 65, pp. 41–42. Available at: https://www.unafei.or.jp/publications/pdf/RS_No65/No65_07VE_Nilsson2.pdf (Accessed 15 June 2018.)

243 Please do not limit yourself to your current role. If the exercise requires you to reply in the capacity of a law enforcement officer, please do so. If the question requires an answer from a prosecutor or a judge, even if you are not either, please act as if you are from the judiciary. Make sure that you read the legal tools addressed in each chapter before the exercise. This will allow you to learn about these tools from another angle.

Case: Verona Museum²⁴⁴– Operation Gemini²⁴⁵

On 19 November 2015, three masked and armed thieves entered the Verona Civic Museum of Castelvechio and left with 17 paintings. The Italian Carabinieri Command Centre for the Protection of Cultural Heritage, the Central Operations Service of the State Police, and the Mobile Squad of the State Police of Verona, under the coordination of the Prosecution Office of Verona, undertook the following investigative techniques: interrogation of the witness, analysing the surveillance camera footage and interception of communication. The interception of communication was the main tool used to identify the suspects.

All camera footage was tapped from the Verona museum to the city of Brescia, almost 75 km away, where the car was abandoned. All calls made at the time of the theft between these two points were listed and checked individually, and thousands of phone numbers were checked as the thieves changed their phone cards every week.²⁴⁶

The investigation showed that the guard, his brother and the brother's girlfriend were involved. In the meantime, INTERPOL immediately registered the paintings on the Stolen Works of Art Data, sent an alert through the ARCHEO Network (of the WCO) as well as a special alert to all INTERPOL member countries, and published a special poster of the stolen paintings.

After a few weeks, the gang was caught and five suspects were arrested in Moldova and seven in Italy. The paintings, however, remained in the possession of the last two criminals who had managed to flee to Ukraine. All the information that had been gathered by Italian and Moldovan authorities was shared with the Ukrainian authorities. INTERPOL established and maintained constant contact between the Ukrainian and Italian police authorities and the investigation was also aided by the liaison police officer of Italy to Ukraine. The Ukrainian police eventually found the paintings buried in a forest.

An MLA letter was sent to the Ukraine for their return. In order to accelerate the process and avoid any further delay, following a request for support, the Italian National Member²⁴⁷ of Eurojust initiated a case. Since Ukraine is not an EU member state, the help of the contact point for Eurojust in the Ukraine was requested to speed up the execution of the MLA request sent by the Italian authorities.

The paintings were returned to Italy by the Ukrainian authorities on the basis of the MLA letter of request.²⁴⁸ In December 2016, the Verona Tribunal sentenced the criminals to between one year and eight months' to ten years and eight months' imprisonment.²⁴⁹

244 Please refer to Chapter 3 'Illicit trafficking of cultural property as an organized crime' for the background to the case.

245 Please see the short video on the operation at: <https://www.youtube.com/watch?v=iwLqXQTjTwk> (Accessed 2 August 2018.)

246 D. Elia, 2016, Verona-Kiev, one way, *Osservatorio Balcani e Caucaso – Transeuropa* website. Available at: <https://web.archive.org/web/20161115231221/http://www.balcanicaucaso.org/eng/Areas/Ukraine/Verona-Kiev-one-way-175540> (Accessed 3 August 2018.)

247 Eurojust is composed of 28 national members, one from each EU member state. National members are appointed by the states and are judges, prosecutors or police officers of equivalent competence. These national members form the Eurojust College. Eurojust has a network of contacts worldwide and it aims to strengthen the coordination of international investigations as well as prosecutions in the EU member states. It does so most notably through its efforts to improve the cooperation between competent authorities through facilitating the conduct of international mutual legal assistance and the implementation of extradition requests.

248 Eurojust, 2016, Seventeen stolen masterpieces recovered with support of Eurojust. *Eurojust* website, press release. Available at: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2016/2016-05-13.aspx> (Accessed 3 August 2018.)

249 For more detailed information on the Verona Tribunal ruling, please see: ARCA, 2016, Sentencing: Museum theft at the Museo Civico di Castelvechio, *ARCA* website, 7 December. Available at: <http://art-crime.blogspot.com/2016/12/november-19-2015-museum-theft-museo.html> (Accessed 1 August 2018.)

6. Interagency cooperation

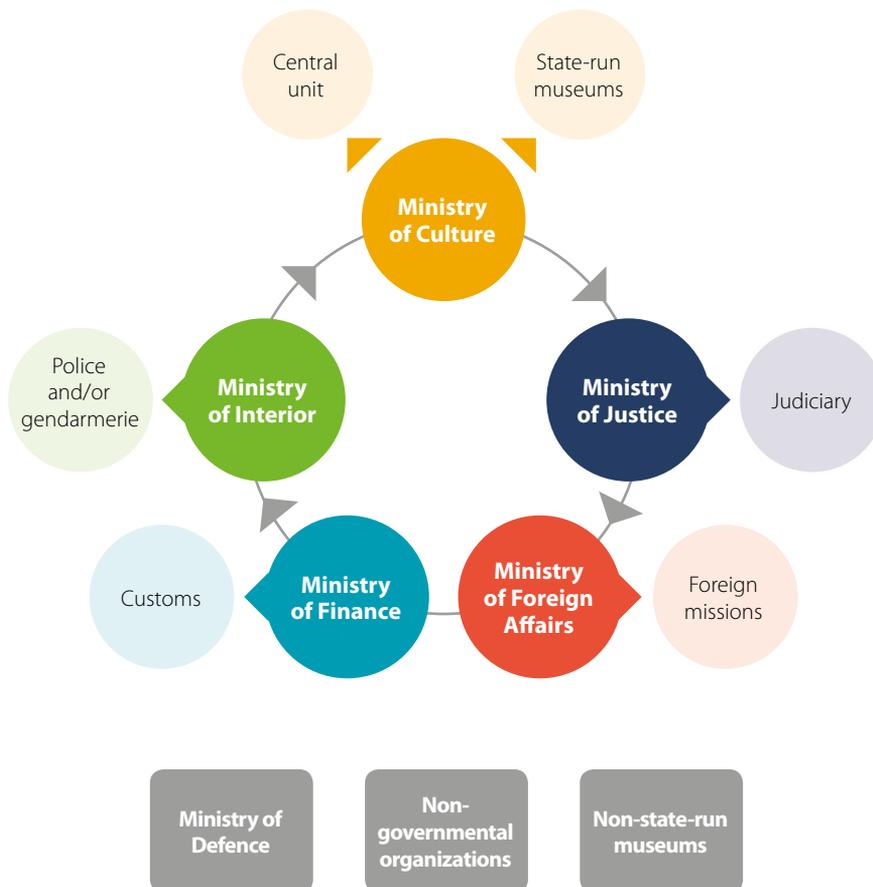


6.1. Main stakeholders

'Cooperation', 'synergies', 'increasing capacities' and 'raising awareness' are reference terms concerning the fight against illicit trafficking of cultural property. The importance of these terms is self-explanatory and referring to these actions is relevant, but most important of all is to turn these recommendations into concrete actions.

The organized character of the crime of illicit trafficking of cultural property has been addressed by this study on a number of occasions. In fact, the key to an effective fight against this crime is already hidden in the definition: 'organization'.

As all states do not share the same governmental structure, it is not possible to propose a single model for interagency cooperation. However, the national reports of the States Parties to the 1970 UNESCO Convention and the 1954 Hague Convention give a good idea of the main actors involved in the fight against illicit trafficking. These include: central government institutions in charge of culture, law enforcement, justice administration, foreign affairs, finance and defence.



6.2. Areas and types of cooperation

6.2.1. Training activities

It is crucial that cooperation for professional trainings takes an interagency approach. All stakeholders involved in the fight against illicit trafficking inevitably have their own mandate and responsibilities.

The professionals working for the relevant Ministries would be more helpful to each other if they could anticipate the needs of the other. These needs or requirements are unlikely to be compiled in list form, as they may not be easily identifiable. Instead, understanding each other's approach would develop the mutual ability to anticipate needs on a case-by-case basis.

One way to achieve this could be by including a component related to illicit trafficking in cultural property in the mandatory training curricula of customs, police, gendarmerie, judges, prosecutors, culture heritage professionals, diplomats and military personnel. Since the mandatory training modules of the ministries are normally broad in scope, this method could be limited to providing just the essential information. This would be a good way to provide the basics and to attract the attention of the participants. This part of the training might include general information, such as international and national legislation, examples from case studies around the world to provide a global view, and the basic situations where suspicions should be raised.

More specific trainings can be provided depending on the specific needs of the institution. For example, the identification of cultural property could be a supporting module to the method mentioned above. Given the diversity of the cultural heritage field, it is not realistic to expect law enforcement professionals to become experts on the identification of cultural goods. However, some fundamental information could be provided to enable these professionals to recognize certain red flags. Using a study on the modus operandi of traffickers in their country, some simple indicators could be listed to help the law enforcement professionals know what to look out for.²⁵⁰

In addition to raising suspicions, it is also important for law enforcement agencies to have basic knowledge on how to handle an actual cultural object. The conditions in which the object in question should be stored even temporarily, measuring an artefact and taking photos from the right angles are among the skills in which law enforcement officers should be trained. **For instance, humidity, light and body oil can lead to irreparable damage to certain objects such as manuscripts, or a painting may suffer from dry and over-heated areas.** Training the law enforcement officials on how to handle these objects serves to protect them and ensure the optimum circumstances for when an expert is consulted.

250 M. van Hesse, 2018, Cultural goods: Insight from the Netherlands on the value of collaboration, *WCO News Magazine*, June, No. 86, p. 62. Available at: https://mag.wcoomd.org/uploads/2018/06/WCO_News_86-1.pdf (Accessed 3 August 2018.) Please note that another interesting article on Serbia's efforts to protect cultural heritage is also available in the same issue of *WCO News Magazine*, p. 37.

In addition to studying the national and international legal framework, training for judges and prosecutors may include various case studies. Knowledge of past cases enables prosecutors to develop a broader perspective on what to look out for. For example, if an investigating authority is well-informed on cross-cutting crimes related to the illicit trafficking in cultural property, such as money laundering, then efforts will also be made to gather evidence related to this other crime.

The cultural heritage professionals responsible for the fight against illicit trafficking in ministries of culture would also need to be trained by the law enforcement authorities and the judiciary. **In addition to the needs identified at the national level, a common action plan would also be of utmost importance to these professionals.** The information shared should include under which circumstances they should be alerted when individuals bring objects to state museums, the provinces that have the highest number of illicit excavations, and where the legal loopholes lie in the law in force if its enforcement is among the responsibilities of the ministry of culture.

The training of diplomats is also crucial for two reasons. Firstly, research has demonstrated the use of the diplomatic bag for transferring cultural property whose export is prohibited. It is thus important to raise awareness amongst diplomats to prevent this misuse of the diplomatic bag. Secondly, diplomats can take immediate action to request the return of an artefact originating in their home country but detected in the country in which they are posted.

Organizing periodic trainings may require sustainable human resources as well as a dedicated budget. Giving members of different agencies the opportunity to get know each other would certainly have a positive impact on the effectiveness and efficiency of their work. Taking advantage of technology is also a means of ensuring a relatively permanent source of information for newcomers in the relevant units of the involved agencies. In this regard, another model for interagency cooperation on training could be the creation of a basic online platform with educational videos, taking an interdisciplinary approach. This model has been used by the US Department of Justice in its online training for prosecuting cultural property cases.²⁵¹

In accordance with the 1954 Hague Convention, civil-military cooperation for the protection of cultural property, including the prevention of looting, must be ensured. Countries such as Albania, Austria, Belgium, Bosnia-Herzegovina, Canada, Estonia, Finland, France, Greece, Latvia, Poland, Slovenia and Switzerland have fully or partially implemented Article 7 (2) and provide trainings that are also assisted by civil authorities.²⁵² Such trainings may cover how to prepare adequate inventories, how to arrange for the protection of cultural property in situ, how to identify cultural property, etc.

251 INTERPOL, 2017, *Creating a National Cultural Heritage Unit*, Lyon, France, INTERPOL, p. 18. Available at: https://www.interpol.int/content/download/34601/453595/version/6/file/007-41_WOA%20Brochure-web_LR.pdf (Accessed 4 August 2018.) For more information on the online programme on prosecuting cultural property crimes, please see: United States Attorneys Bulletin March 2016, available at: <https://www.justice.gov/usao/file/834826/download> (Accessed 4 August 2018.)

252 UNESCO, 2017, *Consideration of National Reports on the Implementation of the 1999 Second Protocol, UNESCO C54/17/12. COM/5-INF. Annex 1*, Paris, UNESCO, p. 20. Available at: <http://unesdoc.unesco.org/images/0026/002603/260324E.pdf> (Accessed 5 August 2018.)

Examples:

In Belgium, military commanders are advised on the protection of cultural heritage by legal experts before and during armed conflicts. The civil-military cooperation for the protection of cultural heritage is organized by CIMIC (civil-military cooperation) advisers and officers.

The Austrian Federal Monuments Authority provides the Ministry of Defence and Sports with a list of cultural property to be submitted to the operational headquarters. The respective operational headquarters may request further details, especially with regard to cooperation in the recording of cultural property.²⁵³

6.2.2. Identification of cultural objects

Appointing contact points within the law enforcement units who receive more advanced training to enable them to identify and recognize cultural property may also encourage interagency cooperation. In the Netherlands, special training programmes and a system of permanent education have been developed for customs in close cooperation with the cultural heritage agency, as well as a system of risk analysis with designated actors for control and specific pilot actions during fairs and auctions.²⁵⁴

Example: Indicators

The main indicator for customs authorities is the export regime of the country from which the artefact originates. ARCHEO and IMI may provide the quickest exchange of such information and the UNESCO National Heritage Law Database could also be consulted. In addition to these databases, the Antiquities Coalition, a non-profit organization leading a global campaign against the looting and trafficking of cultural property, compiled a checklist of indicators for potential buyers. However, some of the elements in the list could be also useful for the law enforcement experts to identify potentially illegal objects.²⁵⁵

- Does the artefact have dirt on it? Dirt such as soil particles on an object should be a major red flag as this probably indicates direct removal from the ground, which suggests looting.
- Was it originally an immovable property? Anything that suggests that the object has been broken from its attachment, such as a statue with a broken foot or leg, or a fresco that has obviously been detached, should be another major warning sign.

253 UNESCO, 2009, *Directive for the Military Protection of Cultural Property and the Military Safeguarding of Cultural Heritage*, Paris, UNESCO, p. 16. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Directives-Austria-en_20111220.pdf (Accessed 5 August 2018.)

254 UNESCO, 2015, *Report by the Netherlands on the Application of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, UNESCO, p. 3. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/REPORT_Netherlands.pdf (Accessed 4 August 2018.)

255 Please see the original infographic, available at: <https://theantiquitiescoalition.org/wp-content/uploads/2015/09/Checklist-infographic.png> (Accessed 4 August 2018.) The points are adapted from the list referred to above but changes have been made as the targeted benefactors are different.

- Are there small numbers imprinted on the bottom or edge of the artefact? When archaeologists find an object, they provide it with an initial inventory number and register the place of discovery and all other relevant information in a registry. The same happens in museums, where an 'inventory number' is given and marked on the object itself. This practice is not only conducted for archaeological objects but for all museum objects. Sometimes, when it is not possible to mark the object directly, stickers or tags may be used. The existence of these indicates that the object you are examining is most probably stolen.
- Is the country that the passenger is coming from, or the country where the artefact originates from in a vulnerable situation? Please remember that vulnerabilities are not limited to armed conflict situations and can occur due to economic crises. Any crisis, whether economic/political or natural, could lead to an increase in the illegal export of cultural objects.
- Does the cultural object have an export certificate? Cultural objects exported legally should have an export certificate or a document issued by governmental authorities that serves the same purpose. A receipt or a similar document that proves the trade does not mean that the object has been exported legally.
- Have you seen a similar object on the ICOM Red Lists? The lists provide prototype of objects that are at high risk of theft or looting. Any artefact that looks like one of the posts on the red lists is possibly a stolen object.

The above bullet points can be extended or modified, depending on the experience of each country.

Cultural institutions may also carry out identification of cultural property when they are called and asked for help by the law enforcement agencies or judiciary. In addition to the experts deployed by governmental cultural organizations for the identification and reporting, in some cases the expertise of non-state-run museums/collections should be also helpful for the authorities.

6.2.3. Modalities

The composition of National Committees on International Humanitarian Law represents another example of interagency cooperation. These committees were created to ensure a more effective implementation of international humanitarian law. The protection of cultural property in the event of armed conflict is one of the items on the agenda of these committees. The boards of the committees include representatives of governmental organizations responsible for the protection of cultural heritage, as well as representatives of the ministry of defence, foreign affairs, justice, education, health and many others.²⁵⁶

In terms of preventing illicit trafficking of cultural property during times of peace, several countries such as Bulgaria, Denmark, Estonia, the Netherlands and Romania have special agreements to ensure interagency cooperation.

256 A table containing the name, address, legal basis, membership and mandate of each national committee and other national bodies on international criminal law is available at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law> (Accessed 6 August 2018.)

Examples:

In the Netherlands, there is a covenant between the Ministry of Finance and the Ministry of Education, Culture and Science. This tool addresses the exchange of information, planning activities, financial resources and control procedures. For example, cultural goods officers working in Dutch customs liaise between the customs and the Cultural Heritage Inspectorate. If a customs officer discovers something suspicious in a shipment, they may consult the cultural goods officer. If the suspicions are confirmed, then photos and descriptions of the object(s) in question are submitted to the Cultural Heritage Inspectorate along with information surrounding the circumstances of the shipment. The Inspectorate can then assess the information and in some cases, it may apply for the services of museums or universities. The cooperation extends to customs controls, the development of a risk analysis system and the issuance of export licences.²⁵⁷

In Romania, the Ministry of Culture, the General Directorate of Customs, the police and the border police have signed protocols of cooperation in order to fight the illicit trafficking of cultural goods in a coordinated manner. Additional protocols of cooperation have been concluded among relevant institutions at the provincial level. Such a local cooperation model may include religious cults and museums. In accordance with the cooperation protocol, cultural goods captured by the customs officers are handed over to the border police or to the relevant county police for further arrangements, such as ensuring the examination of the objects by experts.²⁵⁸

Interagency cooperation in Czechia is carried out using the 'Integrated System of Movable Cultural Heritage Protection'. This system brings together administrative, strategic, legislative and financial tools. It is conducted by the Ministry of Culture and it enables the direct involvement of museums and galleries in order to provide immediate assistance to the specialized units of the police and customs authorities. The cooperation with other relevant bodies is coordinated by the ISO Programme Advisory Board. Representatives of all stakeholders, including those of the Roman Catholic Church, attend the meetings of the Advisory Board and are generally involved in the work on an ongoing ad hoc basis. The Ministry of Culture cooperates with the Trade Inspection Board, the police and the National Heritage Management Institute to oversee the compliance of auction sales with the trade and export legislation.²⁵⁹

As the mandates of governmental stakeholders are clearly defined by laws and regulations, and as each agency understands and complies with its role, establishing a protocol for enhanced cooperation can only be beneficial. Such initiatives may assist in measuring improvement and address loopholes when they are identified as the result of a case. Most importantly, cooperation is very commonly impacted by the absence or retirement of staff. The sustainability of cooperation and efficiency of the work of agencies is sometimes heavily dependent on individuals. Having a mutually or multilaterally (depending on the number of the stakeholders involved) accepted understanding of the roles and channels available to conduct the work may reinforce cooperation and ensure its improvement.

257 van Hesse, 2018, op. cit., p. 63

258 UNESCO, 2015, *Report by Romania on the Implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, UNESCO, p. 4. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/ROMANIA_REPORT.pdf (Accessed 6 August 2018.)

259 UNESCO, 2015, *Report by the Czech Republic on the Implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, UNESCO, p. 2–3. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/REPORT_CZECH_REP.pdf (Accessed 6 August 2018.)

 Exercise

- a) Imagine you are tasked by your national authorities to draft a protocol including the responsibilities and tasks of all governmental agencies in relation to preventing illicit trafficking of cultural property. Please list the contents of such a protocol. Who should be involved? What should it contain? Which topics should be tackled?

1.....

2.....

3.....

4.....

5.....

- b) I am a () customs officer () police officer () prosecutor () judge and in my view, it would be beneficial if trainers from other agencies could provide content on the following topics in order to better assist my institution's work:

1 (topic)...../(agency)

2 (topic)...../(agency)

3 (topic)...../(agency)

4 (topic)...../(agency)

5 (topic)...../(agency)

6.2.4. Cooperation with NGOs

State-run institutions should become familiar with each other's ways of working and increase the level of cooperation to the highest extent possible. Such a cooperation model will function optimally when it gets support from NGOs. For example, a governmental institution may be too overloaded to organize a training programme or an awareness-raising event – in such a case, an NGO may be invited to the project as the co-organizer. In addition to their joint contribution to the organization and funding of such an event, staff members would also have the possibility to share experiences.

In this regard, compiling a list of NGOs and involving them where possible in events such as training and awareness-raising activities, or even undertaking joint projects, may help governmental institutions to be more productive in fulfilling their mandate.

About the author

Biography

Zeynep Boz works as an Expert at the Combatting Illicit Trafficking of Cultural Property Unit of the Ministry of Culture and Tourism of Turkey. After graduating from the Department of Prehistory at Ankara University, she started her professional career in 2007 as an associate expert in the Ministry. She gained her expert title upon defending her expertise thesis on the UNIDROIT 1995 Convention and Bilateral Agreements in 2010. She was invited to join the UNESCO 1970 Convention Secretariat in 2014. In 2015, she was appointed as the focal point of UNESCO to the UN Security Council for the implementation of the paragraphs 15-17 of the UNSC Resolution 2199. She returned to the Ministry of Culture and Tourism of Turkey in early 2017. Her responsibilities include the implementation of the UNESCO 1970 Convention, organizing training and awareness-raising programmes, contributing to the planning of Turkey's policies on preventing illicit trafficking at the international level as well as dealing with restitution cases. She holds three Ministerial awards and several certificates of achievement related to the fight against illicit trafficking as well as a diploma of Art, Law and Ethics (Institute of Art and Law, London, UK).

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Fighting the Illicit Trafficking of Cultural Property

A TOOLKIT FOR EUROPEAN JUDICIARY AND LAW ENFORCEMENT

UNESCO and the European Union have cooperated in preparing this publication dedicated to the fight against the illicit trafficking of cultural property, an endemic phenomenon that involves organized criminal activity and contributes to the financing of terrorism.

In this context, an international response and increased cooperation among professionals, including European judicial and law enforcement officers, are required more than ever.

This toolkit aims to enable them to acquire and strengthen their knowledge of the legal framework, and offers a set of practical tools to combat illicit trafficking. The kit is designed as a 'self-help' training tool – the hands-on exercises throughout the five chapters ensure an interactive experience for individuals or groups.

With numerous case studies to enable a concrete understanding of international principles, this handbook aims to provide a range of answers to support practitioners fighting against the illegal trafficking of cultural property.



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