



# Culture, Conservation and Crime: Regulating Ivory Markets for Antiques and Crafts



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## ABSTRACT

Elephant population numbers are seriously declining due to poaching activity to provide illegal ivory for crafted items, sculpture and jewellery. Despite seemingly robust legislation controlling legal ivory sales (including export permit requirements for UK sales abroad) and the fact that synthetic ivory can now be created to the same diagnostic standards as genuine ivory, selling at a fraction of the cost, the demand for the 'real thing' continues to rise in craft and antique markets with very few prosecutions in the UK. Moreover, there is evidence to suggest that "ghost ivory" (post 1947 worked ivory being sold as pre-1947 worked ivory) is being sold by traders to the unsuspecting and uneducated buyer. Two key illegal sub-markets are identified and a socio-legal and economic analysis of the regulatory options available is presented.

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## 1. Introduction

Ivory has been used as an artistic and cultural medium for millennia to create objects from the exotic and exquisite Chinese puzzle balls, Byzantine pyxis and Japanese Netsuke to household items such as knife handles, piano keys and billiards balls but ivory has a dark history and the killing of elephants for their ivory is not a modern day phenomenon. The Greeks and Romans had hunted the North African elephant to extinction more than two millennia ago with their use of the animals for warfare, ornament and as exotic entertainment to be slain by gladiators in the Roman arenas (Alchin, 2015) (also see Walker, 2009). The Chinese elephant had met the same fate by 600 BCE (Li et al., 2012) and so it is not without due cause that modern day conservationists fear for the fate of the wild elephant population with recently reported figures from WWF stating that wild elephant numbers have declined from 1.3 million in 1979 to 600,000 in 1989 to an estimated 400,000 today ([www.panda.org](http://www.panda.org), 2015).

Ivory substantially features in the wildlife monitoring network TRAFFIC's estimate of the illegal trade in wildlife products. This trade is considered to be worth around one-third of the legal trade of \$22.8 billion, which would equate to a value of between \$7.6 and \$8.3 billion a year (TRAFFIC, 2015). The largest consumers of the illegal trade being China, the US and EU and the most lucrative specimens being traded are elephant ivory, rhino horn and tiger bones as well as birds and reptiles (Lawson and Vines, 2014) (also see National Crime Agency, 2014).

The conservationists' warnings of wildlife population decreases to the point of near extinction has led to 181 countries ratifying the Convention on the Trade in Endangered Species (CITES). Hailed as "the Magna Carta for Wildlife" (Layne, 1973), CITES subject wildlife imports to mandatory licensing and incorporates a banned list of prohibited species set out in its Appendix I and a "controlled list" list of species (Appendix II). The Convention was established to be implemented through Member Countries' national laws with each Member Country being tasked with reporting data back to a biennial CITES conference.

The UK, a founder member of the Convention, first legislated to give effect to CITES with the enactment of The Endangered Species (Import & Export) Act 1976. This initial statute has been substantially amended and is now largely superseded by European Regulations. The Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES) make provision for enforcement of the European Regulations and this is an evolving instrument and frames the legal regulations with which UK sellers of ivory must comply (Council Regulation EC No. 338/97 art. 4.1 and 4.2). While COTES regulates trade offences once the species has entered the UK, the Customs and Excise Management Act, 1979 ("CEMA") covers the illegal import and export of CITES species (Magistrates' Court Sentencing Guidelines, 2002). The current regulations state that for ivory to be legally exported or imported from or into the EU, an export and import permit is required from the designated (CITES) Management authorities of the export and import countries. These permits act as proof that the ivory was legally acquired and that the trade should not be detrimental to the survival of the species (CEMA, 1979).

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This study serves to assess the regulatory context and options available to curb the activity in illegal ivory markets ranging from permissive to more prohibitive options. The paper is organized in the following manner. The next section considers the role and legal status of ivory within the antique trade. In Section 3 some UK cases are then briefly examined to illustrate the limited efficacy of the current legal position in the UK in bringing about a substantial number of prosecutions for illegal ivory trading. The following section helps account for this limited success by establishing the range and complexity of the illegal sub-markets in ivory. Section 5 evaluates the range and applicability of various regulatory policy instruments ultimately seeking to help secure elephant populations in the face of an escalating recent onslaught of poaching activity. The final section offers summary and concluding remarks.

## 2. Ivory and the Antiques Trade

Within the EU, ivory can only be legally sold under certain conditions. It is generally forbidden to use Annex A-listed ivory for commercial purposes (Council Regulation (EC) No 338/97). However, sale of Annex A listed ivory is permitted if the intended use is non-commercial in nature and in addition to this exemption there is an antique derogation that means “worked” ivory specimens acquired before 1 June 1947 do not require a certificate. The regulations state that specimens will be considered as worked if they are significantly altered from their raw state for jewellery, adornment, art, utility, or musical instruments, and need no further carving, crafting or manufacture to effect their purpose. In addition to this, as of the 9th May 2013 to claim the derogation the item must also be worked across the whole surface. As an example, an antique carved netsuke of Shishi, the Chinese guardian lion created from a piece of tusk to depict Shishi in great detail will be able to claim the derogation, whereas a 19th century Anglo-Indian ivory dinner gong, like the one sold by Morphets Auction House in Harrogate, in November 2011 would no longer fall within the derogation.

Most antiques, enjoy this “worked item” derogation exemption from the CITES regulations, however, dealers and auctioneers need to be very clear about the law when they take in for sale or sell an ivory item as the timing of the working is vital. The CITES guidance (European Commission, 2015) gives the following example: an ivory billiards ball made in 1900. As it was significantly altered from its original state (a raw tusk) to make the ball many years before the cut-off date of June 1947, it can therefore be legally sold within the EU without the need for a CITES certificate. The billiards ball would still come within the derogation if it had been re-carved, for example to make a walking stick handle, before June 1947. However, if the re-carving had been done after that date, it would be outside the derogation and need a CITES certificate from the department of Animal Health’s Wildlife Licensing and Registration Service (The Antiques Trade Gazette, 2013). In May 2013, significant changes were introduced following new guidance from the European Commission on the interpretation of the “worked item” derogation and since then the “worked item” derogation does not apply to the import or export of items outside the EU. Anything sent by a UK antiques dealer to a buyer outside the EU will require an export permit (CEMA, 1979). Dealers have reported their confusion at the regulations as to the “worked item” derogation and leading UK solicitor, Andrew Banks of law firm Stone King who advises members of the antiques trade on CITES requirements has criticised DEFRA on its “wholesale failure” to make the trade properly aware of changes to the CITES regulations (Arkell, 2015).

In addition to COTES, ancillary legislation exists in the UK which, while not directly relevant to the illegal wildlife trade, is linked to it. The Proceeds of Crime Act, 2002 and the Serious Crime Act, 2015 address offences which have been shown to facilitate the illegal wildlife trade, such as money-laundering.

Despite the seemingly robust legislation and regulations controlling the sale of ivory and the fact that synthetic ivory can now be created to the same diagnostic standards as genuine ivory (Sims et al., 2011) and selling at a fraction of the cost, the demand for the “real thing” continues

to rise. Moreover, there is evidence to suggest that sellers are using this to their advantage by passing off real (illegal) ivory as synthetic and indeed vice versa when they come to sell it (Sims et al., 2011).

As a consequence of these various rules, constraints and uncertainties the attainable sale prices for ivory objects have become unstable. In particular, the U.S. federal ban introduced in February 2014 has had an unsurprising detrimental impact on the prices of, in particular, high end ivory artefacts. The inability of dealers to take items to the U.S. to sell has unquestionably resulted in a drop in prices and a decline in the economies of specialist dealers (Macquisten, 2015). In addition to this, there can be little doubt that the fear of a total ban on the sale of ivory is also taking its toll on the legal trade in antique ivory items (Macquisten, 2015). Buyers are also understandably nervous about purchasing an object which may become illegal to re-sale. The current U.K. regulations have been accused of being anything but clear (Arkell, 2015) and this is perhaps best illustrated by the recent case against international auction house Christies. On the 23 May 2016, Christies were fined £3250 for offering for sale an “unworked” ivory object, an un-carved tusk mounted on silver dating to 1880. The item was due to be offered at Christie’s South Kensington sale on April 28, 2015 but following a tip-off to the Wildlife Crime Unit of the Metropolitan Police, the item was seized (Actman, 2016). In court, Christies’ representatives apologised for what they called an “isolated incident”. Contrary to some national press reports, this was not an issue of CITES licenses. The guidelines for the sale of “worked” items was revised by the CITES management authorities in December 2012, making an item such as the one offered for sale by Christies no longer subject to the ‘worked item’ derogation. The fact that the changes to the regulations were poorly advertised carried no weight with the court stating that, “Christie’s professionals should know what they are doing and should be beyond reproach” (Capon, 2016).

## 3. UK Cases

It is an interesting fact that despite the calls for the sale of antique ivory to be outlawed, there have been only seventeen successful prosecutions<sup>1</sup> against members of the antiques trade for the sale of illegal ivory under Regulation 8 COTES in the last twenty four years (TRAFFIC, 2015). However, this may not give a full picture of COTES offences particularly if viewed in light of the Elephant Trade Information System (ETIS) data. These figures show the UK to be playing an increasing role in the illegal ivory trade both at import and re-export but also as a transit country with reported seizures by the U.K. to ETIS between 2010 and 2014 to be 154 (averaging 30.8 seizures per year) with total seizures in the preceding five years being only seventy five (amounting to an average of 15 seizures per year).<sup>2</sup>

The antiques trade in the UK is disparate and diverse and includes the leviathans of the auction world such as Christie’s, Bonham’s and Sotheby’s, through high end dealers specialising in specific artefacts to general auction houses and dealers with a non-specific stock (of which ivory may be a part) to finally, the opposite end of the trade, ‘car booters’ and house clearance companies, with generally little knowledge of what they are selling. Educating and regulating this diverse population is challenging and while trade associations do exist, the vast majority of the trade do not belong to one.

COTES offences are notifiable to the Home Office however, statistical analysis of those offences under CITES is not possible as CITES offences have not been allocated a specific code and are, therefore, recorded under the general Home Office code “999/99 Other crime or record only entry not catered for elsewhere” (Environmental Audit Committee, 2012). In addition, as CITES offences are tried either in the Magistrates Court or the Crown Court (i.e. lower courts) they are not formally ‘reported’ and so do not appear on legal databases.

<sup>1</sup> See Appendix 1.

<sup>2</sup> ETIS, managed by TRAFFIC, tracks illegal trade in ivory and other elephant products (<https://cites.org/eng/prog/etis/index.php>).

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