

PHILOSOPHIES, POLITICS, LAW AND THE 1970 UNESCO CONVENTION

Lyndel V. PROTTE

Summary: I. Introduction: Changes in public attitudes. II. Philosophies. III. Politics. IV. Laws – national and international. V. A new analysis. VI. The New Age in the Protection of Cultural Objects – Retrospect and Prospects. VII. Conclusion.

Those of us concerned with the problems of protecting the movable cultural heritage are well aware of the complexity of illicit traffic. Among the factors driving this trade are the habit of collecting, the money to be made by trading in this material, the poverty in many “art-rich” countries which induces local people to search for and sell (at often vastly underrated prices), the profit motive of middlemen and a host of collaborators (restorers, conservators, shady art historians and the like), profit-takers, corrupt officials, ambitious museum directors, collectors (whether for show or for love) and so on. We also know that it is the intense demand for beautiful and historically interesting items coming from wealthy countries which is a root cause of the problem.

UNESCO, archaeologists, ICOM, INTERPOL and many others have been trying to combat this phenomenon for more than half a century. Yet we are told that the situation in many countries with a wealth of significant archaeological site is getting worse, not better. Recently criminologists have been working on this issue of attitudes in the collecting or “art market” States, and are producing much more sophisticated analyses of how the illicit trade works and how it can be countered.

What I want to look at first is why it is so difficult to engender a more responsible attitude by traders and collectors in these States and then set out the analysis of the criminologists.

I. INTRODUCTION: CHANGES IN PUBLIC ATTITUDES

Attitudes and law, international and national, in dealing with the illicit trade have evolved dramatically in the last half century. Though progress is sometimes held to be slow it is worth considering the changes that have occurred during this period.

In 1973 two American commentators, discussing a provision in the original Secretariat draft of the 1970 Convention¹ which would have required States Parties to impose criminal sanctions “on those in charge of public or private institutions, in particular, museums, who knowingly add to their collections illicitly imported cultural property without having ascertained its origin”, saw this as establishing “a new category of international delinquent, the light-fingered curator,... to stand alongside the pirate and the planner of aggressive wars, subject to universal criminal jurisdiction”.² Compare these attitudes with those in the 21st century. Marion True, Curator of Antiquities for the Getty Museum, charged with criminal conspiracy by the Italian authorities, stated in 2008 “Everything bought or accepted as a gift was vetted by in-house lawyers, senior staff and by the board of trustees before approval” and she has criticised senior Getty figures for failing to step forward to defend her.³ The return of cultural objects by the Getty, Boston, and Metropolitan museums amounts to an admission that the objects were wrongfully acquired. One would hardly have imagined such a response in the 1960s.

There has also been a considerable development from the attitudes of the governments in the holding States in the 1960s and 70s. We have some information about the views of governments from UNESCO documents. Some of the art trade States made comments on the original Secretariat draft of the Convention. One that I recall is that it would be likely that no country which had “a liberal legal system” would be able to adopt the Convention (Germany).⁴ Another thought that it was inconsistent with the Florence Agreement on the Importation of Educational, Scientific and Cultural

¹ Preliminary Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property UNESDOC. SHC/MD/3, Annex Article 7(i).

² Abramson and Huttler, “Illicit Movement of Cultural Property”, *5 Law and Policy in International Business*, 1973, 933 at 952.

³ *The Art Newspaper* January 2011, <http://theartnewspaper.com/articles/Marion+True%27s+defence+lawyer+speaks+out/21758> interview with Marion True and her lawyer.

⁴ Unesdoc CLT/CH/CS.51/2 Annex II p.4 para.10.

Materials 1950 and had little practical interest in the Convention (Norway).⁵ A few years after the adoption of the 1970 Convention, UNESCO circulated a questionnaire to its Member States about their intention to participate in the Convention or the reasons why they did not intend to do so. A country whose dealers were very active in the international art trade, replied that it saw no advantage for it to become party to the Convention – the question of mutual support for preserving cultural heritage without the destruction and damage wreaked on it by illicit traffic was apparently not even an issue to be considered. The general tendency in the replies of the non-ratifying States over the years until 2000 was the reluctance to change their own national legislation to fulfil the obligations imposed by the Convention. Yet almost all of them have now undertaken that task, onerous as it might have been.

This century again shows a dramatic change, for example, the Museums and Galleries Commission in the United Kingdom adopted in 2000 “Restitution and Repatriation: Guidelines for Good Practice” which point out the importance of giving “careful thought to decisions that can affect the communities to which they are accountable, and the individuals and communities whose heritage they hold”. It sets out in detail the steps that must be followed in processing requests for return and the need to respect the sensitivities of all parties.⁶ Some anthropologists and archaeologists in holding countries have been instrumental in changing attitudes in their countries and institutions. And all the major art trading States are now parties to the 1970 Convention. There is, of course, a question as to how seriously they are implementing the Convention which I will look at in a moment.

Attitudes among dealers remain resistant to any increased control of illicit traffic. For example, at the 16th session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Heritage to its Countries of Origin or Its Restitution in Case of Illicit Appropriation, held in Paris in 2010, the Secretary-General of the *Syndicat national des antiquaires* (SNA), stated that the SNA was not in favour of the 1995 UNIDROIT Convention “because it created legal uncertainty for the owner of the object, did not impose any import controls and provided for conditional compensation”. The representative of the *Syndicat national des maisons de ventes volontaires* (SYMEV) had little enthusiasm for the 1995 Convention, which he considered “created an unfavourable legal situation in the market and that seizures of objects undermined the art market and the image of the country that harboured them”.

⁵ UNESDOC SHC/MD/5 Annex I p. 18.

⁶ See also Policy Statement on Repatriation of Cultural Property, September 2006, <http://www.museumassociation.org/publications/12913> accessed 4 June 2011.

The representative of the International Federation of Dealer Associations (CINOA), established 75 years ago, referred to its code of ethics while seeking to address the issue of “reversing the burden of proof” in the possession of cultural property.⁷ All three statements as reported show little understanding of the way the Convention works.

Why is it that attitudes are changing so slowly? What can we do to persuade collectors, private and public, individuals and museums, to stop “this awful business” as one desperate archaeologist described it.⁸

II. PHILOSOPHIES

Many attitudes are unconsciously perpetuated from thinkers who were at the height of their influence centuries ago. It is generally accepted that the United States and the United Kingdom are the two biggest art markets. The justification for collecting goes back to certain philosophers whose ideas, though more recent analyses depart from or refine them, have so permeated the culture of their citizens that they have become the unthinking basis of most of their citizens’ views.

Take, for example, the work of John Locke (1632-1704) an English philosopher who spent, however, some years in the Netherlands because his ideas against royal dictatorship had made his continued presence in England dangerous. In 1688 the “glorious revolution” exiled the Stuart king and set up a new royal dynasty in the United Kingdom, where politics was henceforth based on Locke’s ideas of a partnership of strong government and liberty of the citizen.⁹ This was a crucial point in English history and the gradual loosening of restrictive legislation and the upholding of citizen rights by the courts changed the constitutional structure of the Kingdom and became deeply embedded in English culture. Indeed, it is at the roots of the development of human rights. The liberty of the citizen to manage his own affairs as he wished with minimal intervention of the government became the hallmark of English politics.

⁷ UNESCO document CLT-2010/CONF.203/COM.16/6 Final report of the sixteenth session: Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation pp. 6 & 7.

⁸ Alder, C.M. and Polk, K., “Stopping this Awful Business”: The Illicit Traffic in Antiquities Examined as a Criminal Market’ *Art, Antiquity and Law*, 11(1), 2202, 35-55.

⁹ Two treatises on Government, 1st publ 1690 Book II, available as an ebook on Gutenberg website.

Another very influential English philosopher was John Stuart Mill (1806-1873). In his widely read book *On Liberty*, first published in 1859,¹⁰ he made the following statements.

[M]en should be free to act upon their opinions - to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril.¹¹

The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.¹²

As it is useful that while mankind are [*sic*] imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others... It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.¹³

One can see these passages as a plea for cultural diversity. They certainly seek to legitimise individual tastes, habits and views. Indeed his theory that “individuality should assert itself” justifies all manner of choices and behaviours. It is easy to see that in the eighteenth and nineteenth centuries such a philosophy not only renders art collecting permissible, but indeed lauds it. The distance from other countries and knowledge of their cultures, the apparent abandonment of many significant archaeological sites at those times, would seem to justify the belief that the collector was not “molesting others in what concerns them” and was not making himself “a nuisance to other people” or doing “injury to others”. Early travellers who gathered interesting pieces from abandoned sites did not perceive the importance of archaeological sites to local communities, nor did they know anything about the significance of stratigraphy. These attitudes have persisted to the present day, despite the wave of information achieved this century on the damage done to knowledge of prior civilisations by the uncontrolled taking of items

¹⁰ Available as an ebook on Gutenberg website.

¹¹ 103.

¹² 104.

¹³ 105.

from such sites, the damage to cultural history of us all and the profound loss of cultural roots and pride by communities where the created works of their artists and ancestors have been taken away.

While the importance of the “individuality” promoted by Mill remains a bedrock item in English-speaking cultures, the caution about not damaging the culture of others has not been updated in the field of cultural collecting by understanding the real damage caused to communities and to humanity in general. What is more, many other factors rely on what seem to be unchallengeable fundamental ideas to rationalise continued collecting despite all the current information on the “injury to others”. These philosophies have deeply influenced politics.

III. POLITICS

Trade has been a major feature of European culture since mediaeval times. It was given the credit for raising the standard of living and indeed, much more. A Professor of Law at Sydney University in the late nineteenth century wrote of trade as “the herald of culture”. The renowned Belgian jurist Charles de Visscher, who wrote pioneering pieces on the art trade during the 1930s, at a time when efforts were being made to draft an international convention on the subject, noted that the free movement of movables was linked to national policy because of its effect on economic prosperity and that therefore nations favoured a minimum of barriers to trade within their national legal systems.¹⁴

In the United States, lawyers traditionally analyse law in terms of policy and are active in formulating policies that they think should be adopted by the law. Indeed, they are not reluctant to criticise or mock the policies of others. Article 7 (h) of the Secretariat draft of the 1970 convention¹⁵ would have required parties to the convention “to impose disciplinary or penal sanctions on those in charge of public or private institutions, in particular, museums, who knowingly add to their collections illicitly imported cultural property without having ascertained its origin.” As mentioned above two United States commentators wrote that “a new category of international

¹⁴ De Visscher, C. “Protection internationale des Objets d’Art et des Monuments historiques”, *Revue de Droit international et de Législation comparée* 32, 1935, 48.

¹⁵ The first draft (Unesdoc SHC/MD/3 Annex), prepared by for experts from different regions, was circulated in 1969 for comments by Member States. Those comments were then taken into account in the 1970 Secretariat draft (Unesdoc SHC/MD/5 Annex) and presented to the negotiating conference of Committee of Member States in 1970. It was amended there to produce the current text of the 1970 convention.

delinquent, the light-fingered curator, was to stand alongside the pirate and the planner of aggressive wars, subject to universal criminal jurisdiction”.¹⁶ The panel of the American Society of International Law on the International Movement of Art Treasures remarked that “the probable effect of this provision would be to discourage U.S. Museum acquisition of cultural material... from countries that had ineffective internal policing and that were known to grant certificates reluctantly”.

There are other internal politics. For example, the United States commented that “although a number of countries have adopted regulations of varying character in regard to the import, export, and transfer of certain cultural properties, for the United States to adopt legislation of the scope envisioned by the Preliminary Draft Convention would mean the introduction of *entirely new governmental controls of private activity*”. This view reflects firstly the philosophy of the liberty of a citizen to do what he or she wishes to with their property. It also pointed out the problems of federalism by the proposal of “*new responsibilities for the federal government in relation to the States*” (emphases added).¹⁷ In many federations the control of property is a function of an internal administration which is only one of many (internal state, province, canton or other) within the federal State. The first challenges a fundamental philosophy, the second would mean changes in administration and the law which in many federations would be legally and politically difficult. In 1983¹⁸ Switzerland also declared that its federal structure created “obstacles of a psychological, political and practical nature” to creating a constitutional basis for the necessary implementing legislation and that “consequently any initiative by the Federal government would have little chance of success”.¹⁹

There is another dimension to the conflict between national and international politics. National politicians, at least in democratic countries, are very susceptible to the views of their citizens – they do not want to lose their seat in Parliament! However there are variations in the degree of activity of their different constituencies and their acceptance of lobbying. In modern European economies the most active antiquities traders are powerful: they are rich, they are influential and they are very vocal. Recently the coin collectors in the United States had as many as four legal suits running against the federal administration there. If they cannot win a case in court, they may

¹⁶ Abramson, H.D. & Huttler, S. B., “The Legal Response to the Illicit Movement of Cultural Property”, *Law and Policy in International Business*, 1973, 932, 952

¹⁷ Unesdoc SHC/MD/5 p.21

¹⁸ Unesdoc 116 EX/CR/CLT p. 6, para 14.

¹⁹ 20C/84, (Reports of Member States) Report of Switzerland, p.42

well try to change the law, or to hinder the adoption of one which they do not like. Their influence in the United States resulted in two rejections of the bill which would have enabled the ratification of the 1970 Convention. A third version, much weakened, was also bitterly fought. The law was finally only passed after 12 years of the Administration's efforts. The United States was particularly concerned about the effect of this opposition on its foreign relations. But ultimately a national legislative body pays attention to its local constituency: the effect of this intransigence on its international reputation is not a major concern of legislators in most countries. Indeed, often a politician will speak in an international body in a way which is unhelpful or even damaging to his or her country in that body, but will be lauded when reported at home. Until we reach the time (which may still be a very long way off) when national representatives in international bodies are also elected, insufficient efforts to co-operate at the international level will continue. The European Parliament in Strasburg appears to be the only body to have reached that level of sophistication.

IV. LAWS – NATIONAL AND INTERNATIONAL

As we have seen, de Visscher illustrated the link between policy and national laws. An illustration of that view was the refusal in the French court to recognize the ownership of a Spanish convent over a precious bowl inalienable by Spanish law sold to a "good faith" purchaser in France.²⁰ This despite the fact that France had its own rules of inalienability.

More recent developments have led to strong urgings to make exceptions for cultural objects of great significance. In 1982 an Italian court decided that it should recognize the title of Ecuador to certain gold works of art which had been smuggled out of that country because Italy had similar laws and should therefore apply the Ecuadorian law as a matter of comity.²¹ But there is still a great many States who continue to apply rules of maximum encouragement to the circulation of goods or "return to the stream of commerce" rather than trying to stop the illegal transit of important antiquities and art objects. Systems of law which maintain a presumption of "good faith", even in circumstances which indicate that it would have been difficult to avoid some suspicion of malfeasance, exemplify this attitude.

²⁰ *Duc de Frias vs. Pichon* 1886 Clunet 593.

²¹ *Republic of Ecuador vs. Danusso*, Civil and Criminal District Court of Turin, First Civil Section, 4410/79, 18 *Revista di diritto Internazionale privato e processuale*, shortened version 1982, 625; Court of Appeal of Turin, Second Civil Section, 593/82.

A Dutch scholar, Hugo Grotius (1583–1645) was the founder of international law and a major figure in philosophy, political theory and law, who first set out the principles for relations between States. (Though other systems have existed, the dominance of Europe in the following centuries ensured that this became the general system for all States). However he could not have imagined the giant steps taken to make this system work in its present complexity. The major development in the twentieth century was the establishment of a continuous, permanent discussion body (the United Nations) open to every State, which has brought to the fore many issues previously ignored or suppressed. It has also had to deal with unprecedented economic growth, enormously increased contact and trade between distant States, decolonisation, globalisation, control of violence, a deeply compromised environment and, not least, the distribution and protection of cultural objects and claims for their return.

The Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property 1970 was the first successful attempt to have some international law on the subject. There were previous attempts, for example provisions in the *Treaty of Sèvres* (Articles 420-422 and Annex) between the Principal Allied and Associated Powers (the victors in the First World War) and Turkey in 1920, but it was never ratified and was superseded by the Treaty of Lausanne 1923 which did not include these provisions. Then there was a long process in the 1930s of preparing and drafting by the *Office international des Musées* (predecessor of ICOM) in an attempt to regulate these matters, but the final draft in 1938 was still objected to by the Netherlands, Sweden, the United States and the United Kingdom so that the outbreak of war in 1939 stopped all further negotiations. The adoption of the 1970 Convention, 50 years after the first efforts to bring some order into the international art trade, was the first international convention on the topic to be adopted.

After all this time, why is it still so difficult to reduce the demand for antiquities which causes so much damage? Putting together accepted philosophies which may now be outdated by developments, politics which continue to popularise them and laws which incorporate or prefer such embedded beliefs make public attitudes difficult to change. There are additional factors: museums which previously overtly, and now much more discreetly, encourage acquisitions of antiquities and other art objects, even where the provenance is dubious; dealers who jealously guard their lists of clients, so that it is difficult to contact private collectors and enlighten them to the damage being done by clandestine excavation; the dedication to profit which simply overrides ethical principles for many; the “convenience” for private collec-

tors of not having to check provenance. All this shows why the complexity of trafficking in culture has made the 1970 Convention UNESCO's most controversial one.

To summarise: philosophy provides the ideas, politics popularise them and law embeds them in the national culture.

V. A NEW ANALYSIS²²

Criminologists who have made a special study of the problem of illicit traffic generally believe that control of illicit markets has tended to focus on restriction of supply, which countless illustrations (alcohol, drugs, arms, antiquities) demonstrate will not work as long as demand remains high. The traffic in illicit cultural heritage material functions as a market, where demand (most often from wealthy market countries) drives supply (located most often, but not always, in poorer, less developed countries). The traffic is illicit because, especially in supply environments, the removal of antiquities nearly always violates criminal laws. The illicit traffic in antiquities is different from many other illicit markets (e.g., drugs) because it is *de facto* legal in most market environments, and operates openly, often in the most elegant of venues. The major problem in market countries such as the United Kingdom and the United States is "that illicit trading in antiquities subsists in the global and local trade relations which are part of the most basic architecture of formal and informal markets that continue to function in relatively plain view, and therefore have become normalised to the point that their organized ties to underlying wrongdoing or immorality have become effectively invisible".²³ In the case of antiquities, it is likely to be more productive to use "punishment and persuasion", where the greater emphasis is placed on persuasion aimed at reducing demand in the market environments. To summarise: there are, in fact, few punishments which have been developed to fit this illicit traffic in the demand nations, and, if the use of "persuasion"

²² The following part of this paper was originally presented to a Workshop of the Institute of Advanced Studies of the University of Western Australia, "Illicit Traffic of Cultural Objects: law, ethics and the realities", 4-5 August 2011. The paper entitled "The 1970 UNESCO and 1995 UNIDROIT Conventions: Where are we now?" will be published by Ashcroft 2013 in a collection of the papers presented to that meeting.

²³ Mackenzie, S. "The market as criminal and criminals in the market: Reducing Opportunities for Organized Crime in the International Antiquities Market", Chapter in Manacorda, S. and Chappell, D. (eds), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, New York, Springer, 2011, pp. 69-86.

is to be attempted, it needs a regulatory body to develop such policies and supervise their implementation.²⁴

In the context of international co-operation, many States will not apply criminal sanctions to those trading in cultural objects which prove to have been improperly removed from another country. Where an object has passed through several hands before it has been seized in the importing country, it is often very difficult to prove that the possessor knew of the illegality and had the intention to commit the illegal act. In many States the standard of proof is much higher for a criminal offence than for a civil or administrative wrong, and therefore the return of the object concerned is much more likely to happen if a civil suit, rather than a criminal suit, is undertaken. These difficulties for Canada, a State which has actively implemented the provisions of the 1970 Convention, in the case of seizure and return of Bolivian textiles, have been clearly set out.²⁵ It would be wise to consider this experience before undertaking any project to formulate internationally binding criminal standards. On the other hand it may well be that “market end criminalisation” should be one element in a range of market reduction measures which can usefully engage with the problematic culture and activities of the antiquities market.²⁶

Where theft is clearly proven, most countries already have provisions in their national law which enable the imposition of fines and imprisonment. An example is the prison sentences given to a well-known New York dealer by a court in the United States and to an English dealer by a court in the

²⁴ This summary is based on the following works: Alder, C. *et al.*, “Perspectives on the organization and control of the illicit traffic in antiquities in South East Asia” in Manacorda, S. (ed) *Organized Crime in Art and Antiquities*, Milan, ISPAC, 2009, 119-144; Alder and Polk, “A victimology approach to the study of the illicit traffic in antiquities,” in Hagemann, O. *et al.* (eds) *Victimology, Victim Assistance and Criminal Justice*, Hochschule Niederrhein, Mönchengladbach, 2009, 99-110; Grabosky, P. “The System of Corporate Crime Control,” in Pontell, H. and Shichor, D. (eds), *Contemporary Issues in Crime and Criminal Justice*, Prentice-Hall, Upper Saddle River, New Jersey, 2000, 137-154; Green, P., and Mackenzie, S., *Criminalising the Market in Illicit Antiquities: An Evaluation of the Dealing in Cultural Objects (Offences) Act 2003*, Research Report, London, Westminster University, 2007, published in condensed form in Mackenzie, S. and Green, P. (eds) *Criminology and Archaeology: Studies in Looted Antiquities*, Oxford: Hart, 2009.

²⁵ *R. vs. Yorke* [1993] 3 S.C.R. 647 discussed in detail by Paterson, “Bolivian Textiles in Canada”, *International Journal of Cultural Property*, 1993, 359 and “Criminal Proceedings in the Market” in “Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited”, *special issue, University of British Columbia Law Review*, 1995, 241 at 251; also Walden, “Canada’s Cultural Property Export and Import Act: the Experience of Protecting Cultural Property” in the same publication, 203.

²⁶ Mackenzie, S. Chapter cited note 23, 70.

United Kingdom for their conspiracy to illegally acquire, export and sell important Egyptian antiquities.²⁷

The return of the object is usually the principal concern of the State of origin and this is in itself a considerable deterrent to the illicit trade because the loss of the object, the loss of profit, and the cost of expenses in obtaining the object, directly affect the importer and make the business of selling foreign, insufficiently provenanced, cultural objects far less attractive in general. Forfeiture of the object may be imposed in either civil or criminal proceedings where the law has been broken. Indeed, one expert considers that forfeiture is the crucial action: burdening the proceedings for forfeiture with the high standard of proof required by criminal rather than civil proceedings may well make forfeiture more difficult.²⁸ If the proposal to strengthen penal measures is pursued, it would seem crucial to get the advice of specialists in this field to make sure the best means are used to deter the illicit trade. Indeed, focussing on the criminalization of illicit traffic “lacks the holistic and lateral-thinking approaches that characterise the leading edge of contemporary tools of market governance”.²⁹

Like most students of the illicit trade in cultural objects, I came to the subject from a general concern with cultural heritage and am very aware of the complexity of illicit traffic which combines issues of crime (theft, illegal excavation, illegal export etc), extreme poverty in some groups in culturally rich countries, issues of governance (government and trade corruption, insufficient security etc.) and government support for the market activities of their dealers. However in general criminology, where there has been some very relevant work done on control of markets, there is a rich vein of research which could generate a new program of action combining a number of different techniques: criminal law and regulation of market demand using new approaches, anti-corruption measures, and renewed efforts to improve the lot of the extremely impoverished while dissuading the looting of sites.³⁰

²⁷ *United States vs. Schultz* 33 F.2d 393 (2d Cir 2003); and *R. vs. Tokeley-Parry*, 1999, Criminal Law Reports (U.K.) 578.

²⁸ O’Keefe, P.J. “The Use of Criminal Offences in UNESCO Countries: Australia, Canada and the U.S.A.”, 2001, 6 *Art Antiquity and Law* 19-35 at 34.

²⁹ Mackenzie, S. “Illicit Deals in Cultural Objects as Crimes of the Powerful”, 56 *Crime, Law and Social Change* Special Edition on “The Prism of Art Crime”, ed. B. B. Proulx, No. 2, 2011, 133-153, 136.

³⁰ The following paragraphs are closely based, indeed, adopted or paraphrased from the work of Simon Mackenzie who has assembled insights from general penology and applied them to the specific problems of the illicit trade in antiquities. See his two key contributions cited at notes 23 and 24.

Recent analyses³¹ show that the antiquities market is best understood as a grey market.³² Illegitimate objects pass through the “legitimate” trade and therefore any regulatory attention paid to such objects will directly affect the business of the trade generally, rather than support “legitimate” dealers by eliminating their “illegitimate” peers. Simon Mackenzie comments that.

*...although there are some dealers who are more pure in their legitimate intent than others, our interviews found that even these apparently well-intentioned dealers could not always be sure they were not dealing in some looted objects.*³³

*The model of the antiquities market is a grey market. The reality is that flows of licit and illicit objects are intermixed and therefore that, rather than being a market characterised by a “clean” public trade and a “dirty” private or “underground” trade, the supposedly clean public trade in antiquities is tainted “grey” by the circulation therein of illicit antiquities.*³⁴

1. *Crimes of the powerful*

Mackenzie’s research with dealers at the market end of the global chain of supply of cultural objects suggests that the analytical framework associated with the concept of ‘crimes of the powerful’ can be useful in helping us to understand the role of dealers in driving the market, and in focussing our attention on the difficulties of engaging with the illicit trade through a conventional criminal justice approach. By harnessing recent studies of power, neutralisation and regulation it becomes possible to understand how dealers have power to navigate the legal obstacles they have been presented with. Mackenzie was able to research the role the dealers’ lobby played in the negotiation of the United Kingdom *Dealing in Cultural Objects (Offences) Act 2003* (s. 1(i)) which created a new criminal offence where a person

dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.

“Tainted” means illegally excavated or dismembered. The intended effect was to criminalise, and hence deter, the knowing possession of or trade

³¹ Polk, K. “The Antiquities Trade Viewed as a Criminal Market” *Hong Kong Lawyer*, September, 2000, 82; Bowman Proulx, “Transnational Crimes Against Culture: Looting at Archaeological Sites and the ‘Grey’ Market in Antiquities” 24 *Journal of Contemporary Criminal Justice*, 2008, 225-242.

³² Mackenzie, S. Chapter cited note 23.

³³ *Ibidem*, 71 and 72 note 1.

³⁴ *Ibidem*, 72.

in antiquities looted in the United Kingdom or abroad. Research focusing on business procedures and the world views of dealers came to the following findings:

- Despite most respondents being aware of the 2003 Act, only a very small number of the trade respondents thought that they had noticed any change in trade routines which could be seen as a productive response to the Act.
- Only a very small proportion of trade respondents said that the Act would result in them changing their own business routines, and in many of these cases the change planned was only formal rather than substantive.
- It was acknowledged that where changes to business routines did ensue, they were likely to be purely cosmetic.
- There was a general feeling that the antiquities market was ‘under fire’ from regulators, journalists, and public opinion. Dealers, (some) museums, collectors and officials such as the UK’s Department for Culture, Media and Sport, all tend to work on the assumption that the market is composed of ‘legitimate’ and ‘illegitimate’ dealers and that therefore if the ‘bad apples’ can be excised the ‘legitimate’ market can function without hindrance and will not be in danger of contravening any national criminal laws. This is wrong.³⁵

2. “Neutralization” by the powerful

For the 2003 Act to be successful in sanitising the market it must require that dealers not accept offers of goods which are clearly illicit but also that they take serious steps to investigate the provenance of the objects they routinely purchase from sources they might historically have assumed to be “trustworthy”. At present there is an assumption that open market dealing equates to lawful dealing in objects which are not tainted. In light of the evidence from sellers on the open market as to the lack of investigation into object provenance, this faith in the open market is misplaced.

The deference paid to the cultural field in general and to the cultural objects trade in particular is indicative of symbolic power that plays a central part in maintaining social boundaries between the affluent who appreciate high culture and those who do not. The active task of the dealer is to sustain the popularly held image of the routines of the industry as high

³⁵ *Ibidem*, 71.

culture rather than, for example, crime. This renders the trade less visible for the regulators and creates power in its operators. The high-end dealers tend to be eloquent, persuasive and emotional in their pleas for their trade to be considered as essential to the preservation of the world's cultural heritage. Impression-management is most powerful when its mechanisms are least perceived, though contemporary processes of negotiation of image in the market for cultural objects often occur against a background of implied defamation litigation which operates to suppress critical expressions before they receive wide airing.

Dealers in cultural objects are active in deliberately framing the debate in a way that leads to consideration of certain issues rather than others, such as object preservation and neo-liberal freedoms to engage with private property, rather than global cultural harm, outdated imperialist attitudes and the unglamorous dirty business of handling stolen goods.³⁶

The context of public and official cognition already sympathetic to the art and antiquities trade benefits the traders through a regulatory reluctance on the part of government. Their resistance to the moral imperatives underlying the drive to regulation is often to be discerned as connected to a neutralising discourse which provides a raft of rationalisations, justifications and excuses. Techniques of neutralisation have become in recent years a core analytical tool for researchers into white-collar crime.

Dealers take much advantage of the moral distance that accompanies geographical distance from the sites where harm is located. They also use the timeline... to argue against causality in the link between their acts of trade and the harms caused – the objects are out of the ground already so why not trade them? Indeed, given that these rare and fragile items are now at loose in the world, dealers tend to argue that it is a moral prerogative for them to collect and care for them; or at least to play a role in securing their transfer to a private collector or museum who will. The highly profitable nature of such transfers is not generally mentioned in this process of constructively moralising about the benefits of trade. Another suggestion which tends to be dismissed by dealers is that the market nature of the movement of illicit antiquities refutes the alleged lack of cause-and-effect relationship between the market and its sources of supply. They focus on the fact that by the time an object reaches them, the harm has already happened and cannot be undone, rather than seeing their act of purchase as encouraging future looting in a cyclical market-oriented manner... The myth of the “chance finds” is always available to supplant a picture of looting with an image of accidental discoveries during routine agricultural work...

³⁶ Mackenzie, article cited note 24 , 143-144.

Mackenzie draws a parallel with other acts which have been described as “philanthropic power crimes” such as arms smugglers who think they are supporting democratic revolution in countries torn by civil war and person smugglers who see their roles in terms of moving clients to where they want to go and, in the process, alleviating global problems such as unemployment and overpopulation.³⁷ Trading in stolen cultural objects is constructed by market participants as taking place somewhere on a continuum from beneficial to justifiable to excusable, but which are constructed as criminal by external observers.

A good example of neutralisation is the interpretive guidelines issued by the United Kingdom Department for Culture Media and Sport (DCMS) to the 2003 *Act*. They state:

*The burden of proving knowledge or belief that an object is tainted rests with the prosecution and such proof must be beyond all reasonable doubt. This means that a failure by the accused to carry out adequate checks on the problems of an object will not constitute knowledge or belief.*³⁸

The culture of “don’t ask, don’t tell” has been well known to all commentators on the art and antiquities market. The international standard has been set by the provisions of the 1995 UNIDROIT Convention. It makes crystal clear the standard of diligence required if an acquirer is found to have a stolen or clandestinely excavated object in his or her possession:

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.

Article 4(4)

Mackenzie comments that not asking questions as to provenance is now enshrined in the 2003 Act and the associated DCMS guidelines as a rational strategy for a dealer who wants to buy antiquities but does not want to risk being prosecuted for the criminal offence of dealing in tainted cultural ob-

³⁷ Ruggiero, V. “It’s the Economy, Stupid! Classifying Power Crimes”, 35 *International Journal of the Sociology of Law*, 2007, 163-772.

³⁸ Italics added. Department for Culture Media and Sport, 2004. *Dealing in Tainted Cultural Objects - Guidance on the Dealing in Cultural Objects (Offences) Act 2003* (DCMS Cultural Property Unit Publication PP639, London, 2004, 8.

jects. In my view the inclusion of dealers in government committees and their consultation in the setting of the Guidelines has succeeded in emasculating the legislation.

3. *Risk shifting*³⁹

Another tactic is risk-shifting rather than risk management – exemplified by the credit default swaps of “toxic debt” by the banks which created the recent global financial crisis. Mackenzie sees a parallel with the antiquities trade where artefacts with no, or dubious, provenance are bought and sold in a “pass the parcel” fashion producing a highly profitable transaction chain which participants enjoy as long as the music does not stop. There is little attempt in the antiquities trade to manage risk by, for example, practising due diligence. Indeed where a dealer considers the risk of purchase to be too great and declines to buy, he will normally not report it to the police and thus insulates himself from risk but does not contribute to an overall system of management of objects which are clearly suspect. Mackenzie mentions regulatory bodies in other market segments which “oversee, inspect, make information demands of, steer, cajole, sometimes threaten, and otherwise take an active part in controlling businesses in their regulatory sphere. They are comprised of experts in the field, given legal duties and powers to exercise market governance, and are intended to be closer to the markets they control than the police, who have proven to be too inexpert and too far removed from white-collar settings to exercise any useful level of preventive control over illicit or criminal activity at high levels”⁴⁰ in the market.

4. *The need to educate regulators*⁴¹

There also needs to be clarity over the insistence of dealers influencing the interpretation of legislation in relation to the British legislation and the activities of the US Cultural Property Advisory Committee set up to put into practice US law implementing the 1970 Convention. It is particularly important to educate bureaucrats to understand the problematic character of the grey market and for them not to keep pandering to the rich and famous dealers who manipulate the interpretation of the law. Unfortunately the rich and famous have influence on all national governments – they can

³⁹ Article cited note 24, 147-148.

⁴⁰ *Ibidem*, 149.

⁴¹ Comments by Prott.

contribute to political funds, they are noisy and have influence in the press, and they have votes. Clearly governments give them more attention than they will give to those outside the country who have no influence or votes within their jurisdiction.

Mackenzie goes on to look at what kinds of regulation can be applied in such situations and locates a model where the most severe penalty is criminal and the lowest is self-regulatory measures (such as dealers' codes) calling on moral principles. In the case of the illicit trade in antiquities however, there is missing a middle level, such as requiring licences for sellers backed by the sanction of revocation of the licence for misfeasance, quite a severe sanction for a dealer. Such a sanction for a dealer who has failed to exercise due diligence would avoid the current problem of reaching the high standard of proof required for a criminal conviction.

5. *The art and antiquities trade as a vulnerable sector*

Mackenzie has also applied the findings of other criminologists to the vulnerability of certain sectors to organized crime, that is, a market sector which attracts activities of criminal cartels primarily interested in other forms of crime, but which may take advantage of a particular sector to further their interests. There are certain high-risk products and markets and the art and antiquities market is clearly one of them. The interface between illegitimate and legitimate in the art and antiquities market is paramount in allowing crime to profit in the market. Space does not allow me to give any further details here but I strongly recommend a study of Mackenzie's work in this respect⁴². And I would like to see a committee of criminologists developing the "Market Reduction Approach" (MRA) for the market in cultural objects.

6. *The market reduction approach*

The importance of "changing the market" and suggestions of how to do it were discussed by Patrick O'Keefe in his 1997 report for UNESCO.⁴³ Though this did not become a primary activity in UNESCO (mainly because of the very limited resources of funds and staff at that time), it has

⁴² Comment of author, there is the analysis by Mackenzie Chapter cited note 23, 74-80.

⁴³ O'Keefe, P. *Trade in Antiquities: Reducing Destruction and Theft*, UNESCO/Archetype, Paris/London, 1997, 61-85.

now been taken up seriously by criminologists who had already worked on MRA in other fields.

Dealers mention a new class of buyer – the art-for-status rather than the art-for-collection purchaser. There may be an opportunity to engage with the modern face of the antiquities trade through public education campaigns geared towards the uncommitted buyer who might be persuaded to turn his attentions to other less problematic luxury goods as the antiquities market becomes increasingly tarred with the looting brush, as is now increasingly the trend.⁴⁴ MRA recommends general initiatives to reduce demand together with law enforcement measures aimed at key points in the chain of supply. Such measures might apply to the international market in illicit wildlife, weapons and ammunition, human and body parts, and cultural heritage. In all these markets the MRA seeks to reduce demand because reducing dealing in stolen goods will reduce motivation to steal. It depends on

- instilling an appreciation among thieves that transporting, storing, and selling stolen goods has become at least as risky as it is to steal goods in the first place;
- making buying, dealing and consuming stolen goods appreciably more risky for all those involved.⁴⁵

7. *Issues of governance in source countries*⁴⁶

Another big problem is of course corruption in the source countries. Many citizens and others operating in the countries of Asia, Africa and elsewhere regard bribes as a normal part of doing business. Nonetheless I think projects should be developed to assist in good governance in vulnerable countries and anti-bribe legislation for individuals in art market countries. Corruption will always be with us, and even in stable democratic governments there are prosecutions for improper enrichment and a network of supervising bodies such as Crime and Misconduct Committees which have enough work to show that corruption can tempt individuals whatever the political system is: the trick is to minimise it by careful supervision and punishment.

⁴⁴ *Ibidem.*, 80.

⁴⁵ Sutton, M. *et al.*, *Tackling Theft with the Market Reduction Approach*, Crime Reduction Research Series Paper 8, Home Office, London, 2001, vii. Further comments in this paper are the author's own.

⁴⁶ This and all following text by Prott.

Other issues of governance affect the art and antiquities trade. Poor taxation administration leads to limited budgets which affect the cultural sector. Badly paid Museum curators are easily tempted to steal from their own museums.

VI. THE NEW AGE IN THE PROTECTION OF CULTURAL OBJECTS – RETROSPECT AND PROSPECTS

Between 1907 and 1939 the first efforts for legal control of the movement of cultural objects was undertaken mainly by the European States. They had three main concerns: to protect cultural heritage (museums, libraries, and other collections) in time of conflict, dealt with in the Hague Convention IV respecting the Laws and Customs of War on Land 1907, the rights of foreign archaeological teams to dig in archaeologically rich countries and to retain some of their finds, rules developed in the treaty of Sèvres 1920 which never, however, came into effect and finally the repatriation of classified inalienable cultural objects in State collections.

Looking back on these first minimal rules we can see the cardinal significance of the 1970 Convention. While strenuous efforts were made to develop a more complete set of rules the drafts of 1933, 1935, 1938 and 1939, all failed. By 1969 there was a dramatic change in the composition of the international community. States which were formally colonised or subject to mandates had different concerns, such as the return of important cultural objects which had been taken from them and control over their important archaeological sites. For them the coming of the 1970 convention was a watershed. It created the first international standards on cultural heritage. It was also a landmark for UNESCO: up until then the culture division was part of the Social and Human Sciences Sector but the work in developing this significant legal instrument led to the establishment of an independent Culture Sector as is currently the case. Though none of the pressing problems described by the developing States were finally resolved in 1970, a whole new dynamic began.

This can be illustrated by the development of new approaches by countries such as the Netherlands, the United Kingdom, and the United States. The development of rules on the management of cultural heritage is the result of passion (to save objects of emotional significance) and reason (to develop dispassionately rules to regulate potential and actual conflicts). The Netherlands in 1933 raised objections to the draft Convention developed by the Office international des Musées (OIM), particularly on the failure

to distinguish public and private property and in 1939, despite numerous concessions to meet their views, it decided not to take part in a diplomatic conference for its adoption. In 1969 it made no comment on the draft Convention. The Netherlands had, however, during the 1960s fostered co-operation between Dutch and Indonesian institutions: in the 1970s it agreed on repatriation of Indonesian Museum objects, funding up to 60% for “mutual heritage” (no longer named “colonial heritage”). In 1978 the Statue of Prjanaparanmia (13th century) was returned to its country of origin in accordance with a bilateral agreement between the Netherlands and Indonesia. Although it signed the 1995 UNIDROIT Convention, it has not ratified it. It has, however, adopted some of its provisions in its national legislation (longer limitation periods and an exception to the Dutch Civil Code in respect of cultural heritage items with regard to the rules on the protection of good faith purchasers). In 2009 it ratified the 1970 UNESCO Convention.

The United Kingdom had also raised objections to the 1933 OIM draft because it made no distinction made between objects removed from Museum collections and those taken from archaeological excavations; nor was there a distinction between publicly and privately owned property. In 1936, despite concessions made in the new text, it declined to take part in a diplomatic conference for its adoption. In 1939 it stated that it did not recognise inalienability in its legal system and again refused to take part in a conference designed for adoption of the draft convention. In 1969 it made no comments on proposed Convention. In 1970 61 UNESCO Member States, including the Netherlands and the United States, participated in the Special Negotiating Committee which finally adopted a text, but the United Kingdom was not present. In 1983 a UNESCO Committee of Experts, requested to make an evaluation the Convention, considered the views of UNESCO Member States party to the Convention and non-party States asked for their views on the Convention, which had come into force in 1972.

The UK saw difficulties with the import provisions and favoured (and later promoted) a “Code of Ethics” for Dealers and Auction Houses instead of a Convention. In 2000 a British House of Commons Report on “Cultural Property: Return and Illicit Trade” recommended accession to UNIDROIT Convention; a Ministerial Advisory Panel on Illicit Trade later that year advised acceptance of the 1970 Convention but not UNIDROIT “in present circumstances”. In 2002 the United Kingdom became party to the 1970 Convention and in 2003 it legislated the Dealing in Cultural Objects (Offences) Act 2003 designed to deal with illicit imports. (Two recent studies suggest that it has had little impact on dealers’ transactions.) In 2006 the UK Museums Association adopted Guidelines for Museums on requests for return.

The United States commented in the first round of comments on a possible convention in 1932 that “Objects do not disappear from public collections in this country and there is no serious exportation of objects of artistic or historic value from private ownership in the United States”. Of the 1933 OIM draft it saw “No benefit in international legislation which requires domestic courts to enforce the law of other States”. In 1936, despite concessions, it would not take part in a diplomatic conference for its adoption. As to the 1939 draft, its legal system did not recognise inalienability and despite further concessions it was not prepared to attend a diplomatic conference on the draft. In 1969 it commented on the first draft that it would require “the introduction of entirely new governmental controls of private activity” and would “enforce foreign laws that could lead to the elimination of all significant international movement of art objects of cultural importance”; and it would not accept “penal sanctions for violation of foreign laws”. It did take part in the Special Negotiating Committee in 1970 but it submitted an alternative draft for the Convention. Consequently substantial changes were made resulting in the current articles 7 and 9. The Leader of the delegation “deeply appreciated the spirit of compromise”. After 12 years negotiations with objectors in the United States, implementing legislation was finally passed in Congress (a third bill, with diminished impact compared to the two earlier bills presented to the legislators). In 1983 it accepted the Convention with a broad reservation and seven declarations. Between 1987-2013 it negotiated agreements with 16 States claiming emergency measures under article 9.

This history shows that attitudes do evolve, but slowly. The three States who were most reluctant to join in this international effort have gradually been brought to join in a common effort to deal with the illegal trade, although their initial reactions were quite negative.

In the 42 years of that development Mexico has played a significant role. Its negotiators were instrumental in changing international law through the 1970 convention (as shown by James Nafziger elsewhere in this publication). The Mexican delegation again worked hard to prevent a breakdown between States with opposing opinions by helping to craft a suitable compromise in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. Mexico is at present deeply engaged in ensuring better implementation of the rules of those two key Conventions now that, in the 21st century, the 1970 Convention has ratifications from the States most affected by the transfer of cultural objects and the 1995 Convention continues to gather support. Most regrettably Mexico, despite its pioneering work on the international

law of cultural heritage, has not yet become party to the 1995 UNIDROIT Convention although ten other Latin American countries have.

1. *The complexities of international heritage law*

International law and policy on cultural heritage is complex, using rules from criminal law, civil law, national legislations and policies, international treaties, insights from anthropology, archaeology, history, museology and the sociology of cultures as well as discussions within the United Nations General Assembly. To cover this broad range of material UNESCO works with ICCROM, ICOM, Interpol, UNIDROIT, UNODC, WCO (full titles below),⁴⁷ the UN Security Council and a number of specialised national criminal police units dealing with heritage crime such as the Italian and the French. Proposals have been made by several scholars⁴⁸ that cultural heritage objects should now be the subject of special rules and no longer have the normal rules of property law applied to them automatically⁴⁹ since many aspects of such objects, such as their significance to communal identity, emotive qualities, uniqueness, irreplaceability by substitution and, in many cases, their spiritual significance, make the application of the existing law on movables, appropriate to purely commercial objects, distort their appropriate handling.⁵⁰

⁴⁷ International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), International Council of Museums (ICOM), International Criminal Police Organisation (Interpol) International Institute for the Unification of Private Law (UNIDROIT), United Nations Office on Drugs and Crime (UNODC), World Customs Organization (WCO).

⁴⁸ Crewdson, R. "Cultural Property – a Fourth Estate?", 18 *Law Society's Gazette* 126, 1984; Chatelain, J. Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC (Commission of the European Communities, Doc. X11/57/76-E (1976); Rodotà, S. "The Civil Law Aspects of the International Protection of Cultural Property" in Council of Europe, *International Legal Protection of Cultural Property* (1984) 99; "Explanatory Memorandum" in Council of Europe, *The Art Trade*, 1988, 1.

⁴⁹ Camarcho, V. F. *El Tráfico ilícito internacional de bienes culturales* (Beramar, Madrid, 1993, 381-414, has written persuasively that the *Lex originis* should be applied rather than the general rule of *Lex rei sitae* as is generally the case.

⁵⁰ This change is now occurring in national legislation. The Netherlands legislation implementing the 1970 Convention (cited n. 52 below) changes some of the rules generally applied to movables in its Civil Code. The New York Arts and Cultural Affairs Law makes special provision for works of art consigned by artists, overriding contrary provisions in New York's Uniform Commercial Code, Chevrokas, L.W. & Brodie, S.E. "Art Lenders Undertake New Precautions in Light of Amendment to NYACAL'S Consignment Provisions", in Herrick, Feinstein, 13 *Art and Advocacy*, 2012, 2.

Changes to national law have proved to be essential to deal with this problem since one of the chief difficulties in this area of law has been the conflicting rules adopted by different jurisdictions. This has plagued the question of time limitations for lawsuits to recover cultural objects; the protection of “good faith” purchasers with different conditions and within different time frames; a reluctance to enforce foreign public laws, such as those concerning export, and a failure to recognise that cultural objects have important factors distinguishing them from the normal goods in commerce. Changes to these views have been inspired by some of the organs mentioned above. In 1975 the Institut de Droit international⁵¹ pronounced that it was no longer appropriate to have a blanket prohibition on enforcing foreign public laws (this means that foreign export laws should not be ignored in other jurisdictions). New conditions, such as increased access to antiquities through the widespread use of metal detectors and rapid sale of cultural objects over wide geographical areas through the Internet, has also been influential. These developments have also persuaded policymakers to find new regulations to rein in illegal excavations and untraceable sales.

2. *Improving the law*

The dynamic created by the adoption of the two conventions and the widespread ratification of the 1970 convention have reinforced the interest of many States in reaching better arrangements for the protection of cultural heritage. There are a number of steps which need to be taken over the next two decades to improve the law:

1. A major effort should be made to increase the number of States Parties to both conventions but most particularly to the UNIDROIT Convention of 1995.

2. States should respond to UNESCO’s request for reports on the implementation of the 1970 convention – an obligation required by Article 17 of The Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution of UNESCO.

3. States should study and use subsidiary aids provided by UNESCO and UNIDROIT such as the UNESCO International Code of Ethics for Dealers in Cultural Property, the Model Provisions on State Ownership of

⁵¹ Lalive, P. “L’application du droit public étranger”, Institut de Droit international, session of Wiesbaden, 1975; Carter, P.B., “Transfers *inter vivos* of Movable Property”, British Year Book of International Law (1981) 31, 329-334.

Undiscovered Cultural Objects jointly recommended by both organizations as well as other basic information and guidance available on the UNESCO website.

4. States should revise their legislation regularly to ensure the best possible protection of their heritage. They should compare their legislation with that of other countries in the UNESCO legislative database http://portal.unesco.org/culture/en/ev.php-URL_ID=33928&URL_DO=DO_TOPIC&URL_SECTION=201.html.

3. *Improving the prevention of clandestine excavations*

The trade in antiquities discovered by clandestine excavation continues to be one of the major challenges. What can be done?

1. Archaeologically rich countries should ensure that they claim ownership of all unexcavated antiquities. This allows lawsuits for the return of such an object and permits other States to seize and return stolen objects (e.g. The National Stolen Property Act of the United States).

2. States should seek co-operation from foreign customs services. In recent years art trade States have been cooperative in returning such objects. For example, the United Kingdom has returned container loads of objects to China which have been seized either by their police or customs officers; The Immigration and Customs Enforcement unit (ICE) of the United States has made numerous returns (for example its list of seized cultural heritage objects for 2012 included 4,000 objects returned to Peru, and other returns to Guatemala, Mexico, France and Brazil; France has returned objects to Madagascar and other countries and the Netherlands seized statues from Cambodia at the customs border. Such “co-operation” also means action on the part of States of origin. They need to:

(i) notify foreign customs services of suspicious networks or operators (customs frequently make seizures not by searching suitcases, but through long established procedures employed after “tip-offs” for drugs, money, arms, people smuggling etc.);

(ii) act promptly if informed of a seizure. Many States have a relatively short period for which they can hold such an object (e.g. 12 weeks in the Netherlands,⁵² 60 days in Australia).⁵³

3. Some States require an object to be inventoried as a condition for its return. Object specific designation cannot be used for undiscovered antiquities, but some other States (such as Australia and Canada) use a system of categories e.g. a particular area, age or style. The United States has also used such designations of objects in their agreements such as objects from Sipan in Peru. Source States should nominate all other searched or known sites and those suspected to be such significant areas.

4. States should nominate areas found to be the subject of looting.

5. Where there are likely to be unauthorised diggers using metal detectors, the States concerned should follow the rules adopted by Israel making their use of this equipment illegal⁵⁴ and deeming any person found on an archaeological site with such equipment as breaking the law.⁵⁵

6. States should publicise their rules. Every tourist should be handed a brochure and every exhibition, especially exhibitions in other countries, should publicise the damage done by unauthorised excavation to the national heritage.

7. Finally, the most difficult of all tasks: ameliorating the conditions of those impoverished citizens for whom antiquity hunting provides an important element of income, using State action to provide alternative resources for improving the life of their families.

VII. CONCLUSION

While there has clearly been an evolution of attitudes over the last century, there is still much to be done to ensure support for the protection of cultural heritage from the blights of theft, clandestine excavation and smuggling. Taking a long view it can be seen that there have been advances. But

⁵² Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act 2009, s.10(1)).

⁵³ Protection of Movable Cultural Heritage Act 1986, s 35.

⁵⁴ Antiquities Law 5738 – 1978, s. 9.

⁵⁵ Section 38 of Israeli Antiquities Law cited: “If a person is found on an antiquities site with digging implements in his possession or nearby with which it must be supposed digging has recently been done on the site or is found with a metal detector in his possession or nearby he shall, unless he proves otherwise, be presumed to have intended to discover antiquities”.

it is realistic to see a long trail still ahead. When public attitudes in different countries are so opposed, progress will only be made step by step and through compromises. Direct confrontation will not succeed and will probably slow down the process.

It is of course ultimately possible to force the text of a convention through an international assembly if the numbers allow it. But the resentment caused by such a move may make it impossible to get adoption by all groups and may indeed slow down the progress hoped for. I have spent many years in UNESCO patiently explaining the provisions of the two Conventions of possible universal ratification (the 1970 UNESCO and 1995 UNIDROIT Conventions),⁵⁶ to help overcome powerful (but often mistaken) understandings of the Conventions. At this time we have serious analyses which should lead the way to more persuasive steps. We should now make an earnest effort, along the lines of the studies we currently have of the factors which are keeping wrongful acquisitions protected in the art market, to set in place a more effective way of diminishing demand in the countries of acquisition and to use more productive and much less damaging ways of exchanging cultures.

⁵⁶ On the complementarity of these two conventions see Unescdoc CLT-2005/Conf/803/2 Paris, (16 June 2005).