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**Meeting of the expert group on protection  
against trafficking in cultural property**

Vienna, 24-26 November 2009


**Protection against trafficking in cultural property\***

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\* Background paper prepared by Simon Mackenzie, UNODC Consultant, to aid discussions of the meeting.

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## I. Introduction

1. In ECOSOC resolution 2004/34 of 21 July 2004, and 2008/23 of 24 July 2008, both entitled “Protection against trafficking in cultural property”, the Economic and Social Council recalled the Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property (the Model Treaty), which was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the General Assembly in its resolution 45/121 of 14 December 1990.
2. In those resolutions, the Council emphasized the importance for Member States of protecting and preserving their cultural heritage in accordance with relevant international instruments such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the United Nations Educational, Scientific and Cultural Organization on 14 November 1970 (UNESCO Convention), the Convention on Stolen or Illegally Exported Cultural Objects, adopted at Rome on 24 June 1995 by the International Institute for the Unification of Private Law (UNIDROIT Convention), and the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at the Hague on 14 May 1954 (the Hague Convention), and the two Protocols thereto of 14 May 1954 and 26 March 1999.
3. Further, in resolution 2008/23, the Council reiterated the significance of cultural property as part of the common heritage of humankind and as unique and important testimony of the culture and identity of peoples and the necessity of protecting it. In reaffirming the need for international cooperation in preventing and combating all aspects of trafficking in cultural property (CP), it noted that such CP is especially transferred through licit markets, such as auctions, including through the Internet, and it expressed concern about the demand for CP, which leads to its loss, destruction, removal, theft and trafficking and it also expressed alarm at the growing involvement of organized criminal groups in all aspects of trafficking in cultural property.
4. In resolutions 2004/34 and 2008/23, the Council requested the Secretary-General to direct the United Nations Office on Drugs and Crime (UNODC), in close cooperation with UNESCO to convene an open-ended intergovernmental expert group meeting to submit relevant recommendations on protection against trafficking in CP to the Commission on Crime Prevention and Criminal Justice. Those recommendations are to include ways of making the Model Treaty more effective. UNODC has convened the expert group meeting from 24-26 Nov 2009 and will report to the 19th session of the Commission.
5. The present background note is intended for use as a discussion paper at this open-ended intergovernmental expert group meeting and to stimulate and support discussion of current and proposed systems for the protection of moveable cultural property against trafficking. It attempts to describe the main challenges to effective protection and entail the most prominent proposals for improving protection against trafficking in CP.
6. There are a range of terms used to refer to items which are at the core of the debate on this illicit trade: cultural heritage, cultural objects, cultural property,

antiquities, artefacts, etc. While acknowledging that various connotations have been read into these terms, they are used interchangeably in this document, with no attempt to privilege one meaning or interpretation over others. For the sake of brevity the tendency is to use an abbreviated form of “Cultural Property” (CP) and “Moveable Cultural Property” (MCP), but this is for convenience only and should not be taken to suggest a preference for seeing antiquities as “property” rather than “heritage”.

## II. Illicit trafficking in antiquities

7. The world has become increasingly aware that the theft and trafficking of CP is a major problem. Most debate has centred on archaeologically important artefacts, which can be very valuable. Much of it is still buried under the ground or otherwise “in situ” as part of a temple or other heritage structure. Items can be illegally removed from temples or gravesites in one country (the “source” country) and trafficked internationally for sale in a “market” country. In the case of underground thefts, the associated destruction of “context” means that through looting, archaeologists lose the capacity to gather knowledge about the past. CP can also be stolen from museums or private collections. Like many illicit markets, source countries for antiquities tend to be developing countries whereas market countries are richer, developed nations. However some major market countries are also the source of local looted antiquities as well as being markets for these and for others which come from overseas.

8. Due to the nature of the problem – clandestine excavation or theft, smuggling in transit, and either private sale or mixing with objects in the legitimate market – it is difficult to arrive at reliable estimates of the size of the illicit market. There is, however, continuing evidence of sometimes widespread looting in source countries,<sup>1</sup> and case studies of specific types of objects have suggested that very high proportions of them have been looted.<sup>2</sup>

9. Provenance (the history of ownership of an object) and provenience (information about the circumstances in which it was excavated) are major contemporary issues for the antiquities market. Where it is known that a substantial amount of looting happens around the world, and there have also been many high profile cases of seizure of looted objects in market countries (often in the hands of major auction houses), one would have thought that great effort would be expended by buyers in order to ensure so far as possible that they are not dealing in illicit objects. This has not been the case, however. Research with high level antiquities dealers has shown them to be more concerned with collecting these prized objects, wherever they may have come from, than with playing a part in protecting archaeological sites in foreign countries.<sup>3</sup>

10. There is no accepted international approach to standards of proof in provenance, such as by way of certificates or object passports. It is difficult for genuine good faith buyers to get information about the provenance of an object, and often impossible to get reliable information about provenience. It is also relatively easy for looters, traffickers and buyers in bad faith to evade detection and punishment. In part this is because international regulation has many loopholes, especially due to differences in national legal regimes.

11. The main characteristics of the transnational crime problem of looted and smuggled cultural property/heritage are:

- (a) A crime problem in poorer “source” countries which provides a source of income for local populations;
- (b) Difficulty in enforcing the relevant laws in source countries due to lack of resources as well as varying levels of corruption;
- (c) A ready market for looted objects in rich market countries providing a demand for the international transportation of looted CP;
- (d) Difficulty in telling illicit objects apart from licit ones once they are mixed together in the chain of supply – compounded by a culture of privacy in the antiquities market (buyers are reluctant to ask too many searching questions about provenance);
- (e) A conflicted law enforcement and policy response to the issue in some market countries, since market and free trade principles tend to weigh against restrictive controls on the cross-border movement of CP;
- (f) An existing trade infrastructure (dealers, collectors, museums) which has a history and developed culture of dealing in CP without necessarily knowing about its provenance or provenience.

### **III. Organized crime and the Convention against Transnational Organized Crime**

12. There is some evidence that transnational trafficking in antiquities is linked to other illicit markets in which organized crime operates. These observed links include ties to drugs and arms smuggling, violence, corruption and money-laundering.<sup>4</sup> Enforcement activity undertaken in line with the UN Convention against Transnational Organized Crime, making use of its provisions related to international cooperation and law enforcement, may be effective in reducing the trafficking problem. The Convention applies to serious crimes (i.e. conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) where the offence is transnational in nature and involves an organized criminal group. It could therefore apply to illicit trafficking in CP when these conditions are met. In particular, the Convention’s provisions on criminalization of laundering the proceeds of crime may prove useful if they are applied to the antiquities trade. Where CP is looted or otherwise stolen in a source State it may be defined as property which is a “proceed of crime”, and the Convention requires States parties to establish criminal offences which penalize the intentional transfer of ownership or concealment of origin of such property (article 6). States are also required to establish measures to enable confiscation of such proceeds of crime, identify and trace property which may qualify as such proceeds (article 12), respond to requests for confiscation by other States parties (article 13), extradite suspected offenders (article 16), even where the transnational character has not yet been completely established,<sup>5</sup> engage in the widest measures of mutual legal assistance (article 18), consider conducting joint investigations (article 19) and other measures of law enforcement cooperation (article 27), and develop specialist training for law enforcement personnel (article 29). Such

provisions seem pertinent to the case of stolen CP and in particular law enforcement agencies in some market countries are already finding domestic legislation relating to the proceeds of crime to be a useful way to intervene in the market. Further development of this approach should be considered.

#### IV. The Hague convention and protocols

13. The 1954 Hague Convention is the only international instrument aimed at protecting cultural heritage in wartime.<sup>6</sup> With its two Protocols it contains a range of provisions which are generally oriented around the prohibition and prevention of theft, pillage, misappropriation (including illicit export), or destruction of CP where territory is occupied during an armed conflict. The First Protocol currently has 100 States parties; the Second Protocol has 55. The Convention itself has 123 States parties, with the most recent ratification being that of the US in March 2009. The provisions of the Convention and its two Protocols are remarkable for being so straightforward when compared to the sometimes complex provisions with regard to restitution and return contained in other international instruments (see below): “if objects are taken out of the territory the situation is quite clear: they must be seized and returned”.<sup>7</sup>

#### V. The UNESCO Convention

14. The UNESCO Convention was adopted at the 16th General Conference of UNESCO in November 1970. It came into force in 1972. For many years it was held back in its international reach by an absence of ratifications or acceptances from market states: the US in 1983 was the first major art importer to accept the Convention. But in recent years there have been a number of very important ratifications and acceptances from market States, and the Convention has matured into a widely supported international instrument. As at autumn 2009 there are 118 States Party to the Convention. As well as the US, among the key importer and transit States who are now party to the Convention are Canada (1978), Australia (1989), France (1997), the UK and Japan (2002), Sweden, Denmark, Switzerland and South Africa (2003), Norway and Germany (2007), Belgium and the Netherlands (2009).

15. The main features of the UNESCO Convention are that it requires States parties:

(a) To oppose the illicit market in CP by any means at their disposal (article 2);

(b) To treat transactions, export or import in contravention of the terms of the Convention as illicit (article 3). In combination with article 6, which requires States parties to introduce an export certificate for CP, and the model export certificate designed by UNESCO and WCO, this provision could establish **a network of import/export controls which would have the capacity to substantially impact the illicit market;**

(c) To establish inventories of protected CP and national services for protection (article 5). The Object ID standard was endorsed by the 30th General

Conference of UNESCO in 1999 and since then has been promulgated as the most effective way to harmonize minimum standards in inventory creation. The lists published by Interpol, the International Council of Museums (ICOM), the International Foundation for Art Research (IFAR) and the Art Loss Register all now rank among the ways States might consider publicising lost objects;

(d) To prevent museums from acquiring illegally exported CP (article 7), however it does not require an export certificate as a condition for acquisition, and does not offer great benefit other than if the importing State Party does not admit claims for the return of stolen property by foreign States;

(e) To prohibit import of CP stolen from the inventory of museums or monuments, and to return it on request;

(f) To participate in international efforts to protect the CP of a State Party where it is in jeopardy from pillage (article 9). The provision is fairly restrictive in that it does not cover the plunder of cultural heritage other than where it is archaeological or ethnological;

(g) To restrict by education, information and vigilance, movement of CP illegally removed from another State Party;

(h) As appropriate for each country to oblige “antique” dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of CP, names and addresses of the supplier, description and price of each item sold, and to inform the purchaser of the CP of any export prohibition (article 10a). The apparent restriction of the requirement to “antique” dealers rather than all traders in CP,<sup>8</sup> and the issue of what is considered “appropriate for each country” cause practical problems.<sup>9</sup>

(i) To educate the public on the value of CP and the problem of the illicit market;

(j) To prevent by all appropriate means transfers of ownership of CP likely to promote illicit import or export; and

(k) To recognize the indefeasible right of each State Party to classify and declare certain CP as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned where it has been exported.

16. It is important to note that the UNESCO Convention does not apply retroactively. While article 7 expressly contains a reference to property “illegally removed from the State after the entry into force of this convention in both States”, however, article 3 leaves it open to a State Party to declare illegal all future imports of CP which have been illegally exported at any time. Some countries, such as Australia in s14 of its Protection of Movable Cultural Heritage Act 1986, have taken this line and are prepared to seize objects being imported which have been illegally exported from any foreign country (not only States parties) at any time.<sup>10</sup>

17. The UNESCO Convention has been adopted in various ways, and with different degrees of vigour, by its States parties. Some have focussed on establishing mechanisms in terms of article 9 to allow bilateral agreements to be drawn up at the request of source countries whose cultural patrimony is in jeopardy. Others have put in place systems to regulate their CP markets which are capable of affording quite



significant protection against illicit imports without the high level of bureaucracy and forward-planning involved in the bilateral approach. While the Convention admits interpretation as a powerful international reference point, and it has certainly increased the levels of protection against the illicit traffic globally, there remains among its States parties a disparate range of – often pre-existing – domestic laws and regulations which, while technically meeting its requirements as variously interpreted, do not always live up to the levels of protection the Convention clearly aspires to in spirit. Besides these substantive questions of implementation, the main formal limitations of the Convention can be summarized:

(a) As it has been generally interpreted (i.e. with the restricted view of the force and effect of article 3) it only protects objects stolen from inventoried public collections;

(b) It does not apply to property stolen from private individuals or privately owned sites. The remedies operate only on a State-to-State basis; private individuals have no access to the Convention's procedures;

(c) Although it makes provision for the recognition of export controls, it only restricts acquisition by museums, not private individuals. Further, there is no mechanism to aid restitution and return of illegally exported CP, as there is for stolen CP;

(d) It does not address in any detail the problems of limitation periods or compensation.

## VI. The UNIDROIT Convention

18. Where the UNESCO Convention of 1970 applies only on a State-to-State basis, the UNIDROIT Convention of 1995 supplements this with a range of provisions applicable to claims for restitution and return by, and against, private individuals, creating a specific mechanism giving an individual dispossessed owner the right to access a foreign court in another State Party to the Convention for the purposes of suing for the return of their cultural object. The UNIDROIT Convention has only 30 States parties, and these are almost exclusively source countries.

19. The UNIDROIT Convention applies non-retroactively to “claims of an international character for: (a) the restitution of stolen cultural objects; [and] (b) ... illegally exported cultural objects” (article 1). The preamble to the Convention refers to the “fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilization”. Although it contains strong provisions on the return of cultural objects, it is not a Convention which sits opposed to legal international trade in antiquities, nor of course to other types of exchange of cultural heritage, such as loans for the purposes of exhibition. Its application is not limited to objects “specifically designated by each State” (article 1, the UNESCO Convention) and is therefore potentially of great value to States with large deposits of underground (or otherwise undiscovered or uncatalogued) cultural heritage.

20. The main features of the UNIDROIT Convention are that it requires:

(a) The possessor of a cultural object that has been stolen to return it (article 3(1)). This reflects the decision that was made on how to resolve the incompatibility of the claims to a stolen object by a dispossessed owner and a bona fide purchaser. Most importantly, where an illegally excavated cultural object is discovered overseas, if it were owned by a private individual in the source country, that individual may use article 3(2) to seek its return. If the State is the owner of undiscovered antiquities in its soil and it can prove that the object in question belongs to it in this way, it can use also article 3(2) just as a private owner could;

(b) An importing State to order the return of a cultural object illegally exported from another Contracting State, provided the illegal export impairs a defined interest of the requesting State (articles 5-7). Unlike the case of stolen cultural objects, which are all subject to the Convention's requirements for restitution and return, illegally exported objects only fall within the scope of the Convention if they meet certain requirements contained in article 5(3) – broadly that removal involves loss or damage to contextual information or heritage structures, or they are of some significant cultural importance for the requesting State;

(c) A claim for restitution to be brought within certain time limits (article 3(3) et seq.) which should be at least 75 years for some claims, and three years when claimant knows the location of the cultural object and the identity of its possessor;

(d) Payment of compensation to be paid to a good faith possessor of a cultural object which is returned (article 4). The compensation to be paid should be “fair and reasonable” and reasonable efforts shall be made to have the person who transferred the object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought. The possessor is entitled to compensation on return of the object only if it “neither knew or ought reasonably to have known that the object was stolen and can prove that it exercised **due diligence** when acquiring the object”. A “due diligence” test should tend to impose a greater burden on purchasers than a “good faith” test.

21. The Convention sets the minimum standards for protection, and allows Member States to enhance the protection. Article 9 includes a provision which provides that in a claim under the Convention, a Contracting State can apply any of its rules which are **more favourable** to the restitution or return of stolen or illegally exported cultural objects than provided for by the Convention. This will be at the discretion of the courts in the State where the claim is made.<sup>11</sup>

## VII. The UN Model Treaty

22. The Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1990, and welcomed by the General Assembly in its resolution 45/121 of 14 December 1990. It has since been supportively referred to in various official statements, including the 1992 Charter of Courmayeur and the 2004 Cairo Declaration on the Protection of Cultural Property.

23. The Model Treaty provides a text which states can use as the basis for establishing bilateral relations<sup>i</sup> in respect of the protection of moveable cultural property (“MCP”). Such bilateral relations are envisaged by article 15 of the UNESCO Convention, but practice shows that the Model Treaty itself remains unused.<sup>12</sup> Now may be an appropriate time to reconsider whether the Model Treaty might also mature into a useful tool, in the same manner the UNESCO Convention has grown in importance since its ratification by several of the key art market countries. As the Model Treaty contains provisions similar to the Convention, it reinforces the strength of the Convention. When the Model Treaty was drafted, only 66 countries had become States parties to the UNESCO Convention – the international landscape is very different now. Further, a UN Member State does not have to be Party to the UNESCO Convention in order to use the Model Treaty as the basis for bilateral agreement with another country or countries; and indeed even countries which are not members of the UN may find use in such a model text, making the Model Treaty potentially of very broad impact.

#### A. Definition of cultural property, and the import-export question

24. Article 1 of the Model Treaty provides a definition of the cultural property to which it applies, which matches the definitions in the UNESCO and UNIDROIT Conventions. As established in the UNESCO Convention, States would be free to adopt different standards of specificity in delineating objects as subject to border control, from broad categories of controlled objects to more specific provisions. Otherwise, there are a few minor differences in the descriptions of the categories of goods included, and one major difference in the overall definition.

25. The major difference is that unlike the UNESCO Convention, the Model Treaty includes items in these categories within its terms only if the property has been “specifically designated by a State Party as being subject to export control by reason of its importance for archaeology, prehistory, history, literature, art or science”. It has been questioned whether this wording, combined with the wording of article 2.1(a), would allow an importing State to impose measures to restrict the import of a less broad category of property than has been designated as subject to export control by the relevant exporting State. Previous negotiations in respect of the UNESCO and UNIDROIT Conventions suggest that market countries are likely to be reluctant to undertake to impose import controls over all categories of CP designated by a source State as being subject to export control – this would likely be seen as equivalent to placing the terms of their import regulations in the hands of any source State with which they formed a bilateral agreement based on the Model Treaty. Such a restricted interpretation here would seem to contravene the spirit of the Model Treaty, which appears clearly to require all illicit MCP exports to be treated as prohibited imports. States uncomfortable with this approach would, however, be able to negotiate different wording and it seems appropriate that **the Model Treaty should enshrine the highest levels of MCP protection to which one might aspire, leaving specific departures from this norm to be argued for and developed on a case by case basis**, rather than seeking to predict the policy

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<sup>i</sup> Or conceivably, with appropriate amendments to the language, multilateral relations.

concerns of classes of possible users of the treaty and thereby produce a universally “attractive” model which offers less than full protection against trafficking.

## **B. Main features**

26. Article 2 sets out the “general principles” of the Model Treaty, and article 3 the “sanctions” required, which can be summarized as requiring a contracting State:

- (a) To prohibit the import and export of MCP which has been stolen in the other State Party;
- (b) To prohibit the import and export of MCP which has been illicitly exported from the other State Party;
- (c) To prohibit acquisition and dealing of MCP in the above two categories;
- (d) To legislate against international conspiracies with respect to MCP;
- (e) To provide information on its stolen MCP to an international database (to be agreed);
- (f) To ensure that a purchaser of stolen MCP listed on that database cannot be considered a Bona Fide Purchaser (BFP) in law;
- (g) To set up a system of export licensing which generates an export certificate;
- (h) To ensure that a purchaser of MCP imported after the entry into force of the treaty without an export certificate cannot be considered a BFP in law;
- (i) To use all the means at its disposal, including fostering public awareness, to combat the illicit market;
- (j) At the request of the other State Party, to recover and return any MCP covered by the above;
- (k) To impose sanctions on persons or institutions:
  - (i) responsible for the illicit import or export of MCP;
  - (ii) that *knowingly acquire or deal in* stolen or illicitly imported MCP (emphasis added);
  - (iii) that enter into international conspiracies with respect to MCP.

27. Article 4 contains certain provisions on “procedures”, including that:

- (a) Requests for recovery and return are to be made through diplomatic channels (as opposed, for example, to through the courts), and the requesting State Party shall furnish, at its expense, the documentation and other evidence, *including the date of export*, necessary to establish its claim (emphasis added);
- (b) The requesting State Party must pay the expenses of return, and pay “fair compensation” to a BFP (and a footnote suggests that States Parties may wish to consider whether these costs should be shared between them);
- (c) The States Parties agree to make available to each other such information as will assist in combating crimes against MCP;

(d) Each State Party shall provide information concerning laws which protect its MCP to an international database (to be agreed).

28. Some of these provisions deserve further comment – several of these comments relate to the highlighted phrases above.

### C. Good faith and sight of an export certificate

29. The provision that a buyer will not be in good faith in the absence of sight of a valid export certificate has **the potential to substantially impact the market in illicit antiquities**. It does, however, raise questions of compatibility with the provisions and principles of the domestic law of the importing country, and practical issues relating to the purchase of objects which have been imported by one person and sold through perhaps several domestic purchasers in the importing country. How is a purchaser at the end of such a chain of supply to know that the object is one imported after the date of the treaty, and therefore one which must be accompanied by an export certificate? The provision also raises issues of fairness in relation to the treatment of a purchaser who is deceived by a fake export certificate. Should such an “innocent” party be deprived of the protection of BFP status? UNESCO and the World Customs Organization have developed **a model export certificate for cultural objects** which if it were to become adopted as a universal standard might reduce opportunities for misrepresentation through introducing a measure of uniformity into the documentary evidence of legitimate export – useful in supporting the export provisions of the UNESCO and UNIDROIT Conventions as well as the Model Treaty.<sup>13</sup>

### D. Transit States

30. The bilateral nature of the treaty as currently drafted leaves some difficulty around the issue of “transit States”. Consider, for example, a hypothetical item of MCP illicitly excavated in Source State X which travels to Market State Z via Transit State Y. If Market Z were to sign a treaty with Transit Y, but not Source X, the object would not be protected by the treaty since it was not “stolen in” Transit Y, would not necessarily be “illicitly exported from” Transit Y, and if arriving with an export certificate from Transit Y would be able to accord a buyer in Market Z protected BFP status. If, however, Market Z had signed the agreement with Source X rather than Transit Y, the object would be protected – but perhaps only technically rather than in practice. For if it arrived with an export licence from Transit Y, how would Customs officers at the border, or potential BFPs, in Market Z be able to tell whether it was a recently looted or illegally exported antiquity rather than one which had been circulating prior to the date of the treaty? It may not therefore be possible to determine (a) whether it was “stolen” (and if so from where), or (b) if or when it was illegally exported. These are not new problems, of course, but **the Model Treaty might consider engaging with them more explicitly**.

## E. Requirement of knowledge

31. The requirement in article 3(b) that sanctions be applied to those who *knowingly* acquire or deal in stolen or illicitly imported MCP raises similar issues to the problems of proof raised in the UK's Dealing in Cultural Objects (Offences) Act 2003. A review of that legislation showed that despite being in force for several years, it had never been used in the prosecution of a dealer in looted antiquities.<sup>14</sup> This was primarily because the prosecution burden of proof was extremely difficult to discharge; that beyond a reasonable doubt it could be shown that a person had dishonestly dealt in a cultural object that was tainted, "knowing or believing" that the object was tainted. **A provision in terms of the wording used in article 4.1 of the UNIDROIT Convention might be expected to yield better results:** that sanctions be applied to those who either knew or *ought reasonably to have known* that the object was stolen or illicitly imported.

## F. Proof of date of export

32. The provision in article 4.1 that a requesting State shall furnish the evidence necessary to establish its claim, including the date of export, is likely to be problematic. **Looted and smuggled antiquities are unlikely to leave a trail of export documentation in their wake.** Illicitly exported CP might exit the country either by way of evasion of the customs border altogether, or through concealment or misdescription at customs, and it is difficult to see in any of these cases that a source State would be able to identify the date of export of CP which is noticed only when it "surfaces" overseas. For well-known objects or structures it may be possible to estimate their date of departure if, for example, they were known to be in the source State at a given date before disappearing, but otherwise this provision may cause difficulties.

## G. Compensation

33. The issue of "fair compensation" in article 4.2 raises similar issues to those discussed above in relation to the "fair and reasonable" compensation required under article 4.1 of the UNIDROIT Convention. The restriction of the circumstances in which a buyer can claim to be a BFP in terms of the Model Treaty mitigate to some extent the difficulties of compensation for source States, but as in other debates we see here again the difficult tension between on the one hand acknowledging the financial difficulties involved in source States paying compensation for return of stolen or illegally exported CP, and on the other hand adopting unduly punitive approaches to those market purchasers who may not qualify for BFP status but who are not indisputably in bad faith either.

## VIII. Practical recommendations on the protection against trafficking in cultural property – General Recommendations

34. In ECOSOC resolution 2008/23 of 24 July 2008, the Council sets out several calls for further practical measures to protect against the illicit traffic, including:

(a) The importance of fostering **international law enforcement cooperation** to combat trafficking in cultural property and, in particular, the need to increase the exchange of information and experiences in order for competent authorities to operate in a more effective manner;

(b) To strengthen and fully implement mechanisms to strengthen international cooperation, including **mutual legal assistance**;

(c) To introduce appropriate legislation, including, in particular, **procedures for the seizure, return or restitution** of cultural property;

(d) To promote education, and launch **awareness-raising campaigns**, involving the media and disseminating information on the theft and pillaging of cultural property;

(e) To map and carry out **inventories** of cultural property;<sup>ii</sup>

(f) To provide adequate **security measures**;

(g) To **develop the capacities and human resources of monitoring institutions** such as the police, customs services and the tourism sector;

(h) To take effective measures **to prevent the transfer of illicitly acquired or illegally obtained cultural property**, especially through auctions, including through the Internet, and to effect its return or restitution to its rightful owners.

Below are some key practical measures explored in more depth.

### A. Inventories and databases

35. It is desirable to achieve as much integration and consolidation of, and access to, information as possible. It would be worth exploring the possibility of establishing an infrastructure which would allow access through **a single online portal** to all national and international databases of stolen or missing objects, national inventories of protected CP, and national laws relevant to the protection of CP. Similar linking of databases seems to be envisaged in Clause 13 of General Assembly Resolution 61/52 on the Return or Restitution of CP to the Countries of Origin.

<sup>ii</sup> And cf. UN General Assembly resolution 61/52 of 2006 which suggests that such inventories might be most useful if held in electronic format.

## B. Law enforcement

36. The UNESCO protection handbook contains the following among its practical recommendations: provide specialized training to police and customs agents, familiarising them with the stolen works of art databases, and establishing a working network among them at the national, regional and international levels; and protect and police archaeological sites. This seems essential, but given the market nature of the movement of illicit antiquities, **a major law enforcement focus should be on controlling demand**. Enforcement initiatives in market countries which seek to impact the acquisition practices of dealers, collectors and museums, seem more viable as a mechanism of impacting the market than source country controls.<sup>15</sup> These might be usefully conducted through a focus on confiscating the proceeds of crime, in terms of the Convention against Transnational Organized Crime. Although various codes of practice exist in the antiquities trade,<sup>16</sup> without serious sanctions for breach these modes of self-regulation are only persuasive – law enforcement oversight and intervention is required. In addition, enhancing international cooperation, including mutual legal assistance, through the provisions of the Convention against Transnational Organized Crime should be further explored to ensure effective law enforcement efforts.

## C. Taxation

37. Currently in many market countries, CP donated to a museum creates a benefit for the donor by way of tax relief. If this **tax relief were only available for objects for which an appropriate provenance could be proved** (perhaps from 1970<sup>iii</sup>), one source of value in relation to the disposal of unprovenanced antiquities would be closed off. It has also been suggested that museum trustees might be required to reimburse the public purse when objects they have bought with taxpayers' money are repatriated after they are discovered to have been illicit.<sup>17</sup> One recommendation is to consider beneficial tax schemes for provenanced antiquities, such as a reduction in the standard rate of sales tax if the name of the seller and buyer are made public.<sup>18</sup>

## D. Educational campaigns

38. **Publicity and educational campaigns remain valuable moral-normative tools** to be used both at the market and the source end of the chain of supply. Discouraging buyers from collecting unprovenanced antiquities by attaching stigma to this type of collecting<sup>19</sup> may prove an effective way to reduce the market through reducing demand as well as educating the public in market countries as to the scale of destruction by means of films, tourist visits to archaeological sites, and other forms of education.<sup>20</sup> Instilling in local source populations an appreciation and concern for their heritage, perhaps combined with income replacement schemes such as have been used in relation to international drugs markets, may reduce the

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<sup>iii</sup> 1970 is increasingly becoming the international norm as a reference point for ethical rules relating to acquisition – see, for example, the 2008 revision to the Association of Art Museum Directors code.



incentive for looting – the touristic attractions of cultural heritage provide an obvious alternative source of revenue if local collectives can share in the financial benefits of establishing local museums.<sup>21</sup>

### **E. Loans and long term leases**

39. The promulgation of models where source countries retain ownership of CP but allow significant artefacts to be displayed in museums and collections around the world would **diffuse some of the supply-and-demand pressures** which currently drive the illicit market, and are regularly recommended as part of the solution.<sup>22</sup>

### **F. Partage**

40. This is a mechanism for ensuring source countries benefit from international archaeological expertise, and receive a share of the artefacts that are discovered. Collectors, museums, or other institutions in market countries sponsor archaeological digs in source countries. The objects found are divided between the sponsor and the source nation in pre-agreed shares. This model has fallen into disuse. Several commentators – tending to be those who are “market-oriented” – have supported the development of new models along these lines,<sup>23</sup> although others have concerns that it would only serve to legitimate a sector of the market, and the illicit trade would continue unabated.

### **G. Systems to encourage reporting of finds by local citizens**

41. The Portable Antiquities Scheme in England and Wales is an example of one such scheme.<sup>24</sup> A nationwide network of Finds Liaison Officers are available to record finds made by members of the public. Very important objects can be acquired for value from the finder by national museums; less important objects are kept by the finder, but the archaeological record benefits as the information about the find is at least recorded. The Scheme has grown exponentially since its inception in 1997: in 2007, 77,606 finds were recorded and the online database now contains records of over 360,000 objects.<sup>25</sup> However, some commentators are wary of the model – although it is publicized as a way to glean information about chance finds that would otherwise be lost, there are suspicions that it might encourage looting.

### **H. Provision of low-cost mechanisms**

42. The financial cost of international civil litigation seeking the return of CP is often exorbitant, and this makes such action unappealing or impossible for developing countries and many private owners.<sup>26</sup> Where the recovery of the CP is incidental to a criminal prosecution it will not involve such expense for the dispossessed private owner or State, but the criminal prosecution mechanism of the importing State will have to bear the cost of the action. It would be productive to consider ways of developing the mechanisms created by the UNESCO Convention, the UNIDROIT Convention, and perhaps the Model Treaty, by way of establishing

avenues of international co-operation which perhaps avoid expensive legal approaches. A **mediation infrastructure provided at low cost to participants** may be one solution: the Model Treaty might provide a basis for such discussions, which can also take advantage of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.<sup>27</sup>

## I. Focus on middle-men and legitimate actors

43. As with many forms of transnational crime, **the interface between licit and illicit** is an important feature of the global trade in looted CP.<sup>28</sup> Increasing regulation of auction houses, as well as other “facilitators” of the trade is necessary. These facilitators include conservators, and those who are called on for their skill in authenticating, valuing or otherwise appraising unprovenanced antiquities.<sup>29</sup> Legitimate actors should be encouraged to report suspicious objects to the police.

## J. Summary of General Recommendations

44. To summarize the recommendations above, the following should be considered:

- i. A **single online portal** should be created for linked access to stolen art databases, national laws, and national inventories of cultural property, to enable buyers in the market to easily perform due diligence searches.
- ii. Greater law enforcement attention should be paid to the market end of the chain of supply, including **specialized training of police officers**, the targeted use of **the provisions regulating organized crime**, and specific measures aimed at **criminalising the illegal appropriation and transfer of cultural property** and rendering this type of activity subject to rigorous and appropriately severe penalties. This should also include a focus on trade facilitators such as auction houses.
- iii. Schemes in market countries which award donors **tax relief when they give cultural property to museums** should be restricted so that relief is not available for unprovenanced antiquities.
- iv. **Public education campaigns** should be conducted in both source and market countries.
- v. The promulgation of models where source countries retain ownership of CP but allow significant artefacts to be **displayed in museums and collections around the world on loan** would diffuse some of the supply-and-demand pressures which currently drive the illicit market.
- vi. **Mediation** should be encouraged, including using the good offices of UNESCO, to provide **low-cost alternatives** to prohibitively expensive international litigation.

## IX. Recommendations relating to existing international conventions

45. The UNESCO handbook on legal and practical measures against the illicit trafficking in cultural property provides a legal checklist for Member States to ensure that their domestic laws are compatible with the conventions.<sup>30</sup> This checklist is included in Annex 2. Below are several recommendations relating to the ratification and implementation of the conventions in general.

- A. All States which have not currently joined the **UNESCO 1970 or UNIDROIT 1995 Conventions** should consider doing so.
- B. In order to give the greatest effect to article 3 of the UNESCO Conventions, States Parties should **criminalize the import of unlawfully exported cultural property** from another State Party.
- C. Following the above recommendation, in order to achieve maximum impact on the illicit market, it is good practice in terms of article 3 to **criminalize all future imports of unlawfully exported cultural property**, even where the unlawful export preceded the date of entry into force of the Convention.
- D. Article 6 of the UNESCO Convention requires States parties to introduce a form of export certificate for cultural property. In order to achieve the benefits of harmonization in this regard, consideration should be given to using **the model export certificate designed by UNESCO and WCO**.
- E. In their domestic implementing legislation, States should consider interpreting article 9 of the UNESCO Convention as applying to **all stolen and illicitly exported cultural property**, not just archaeological or ethnological materials.
- F. In terms of the requirement in article 10(a) of the UNESCO Convention for dealers to keep records, it is good practice for States Parties to support this requirement with **a system of vigorous inspection** of these records by law enforcement agencies. Consideration should be given to **the standardization of the minimum levels of documentary evidence** required of those trading in cultural property.
- G. Where due diligence is considered, such as in respect of compensation in terms of article 4(1) of the UNIDROIT Convention, good practice suggests that **trade experts such as antiquities dealers should be held to a higher standard than general consumers**. They should therefore only be considered bona fide purchasers where they have made investigations into object provenance which accord with the level of suspicion a reasonable expert buyer should have, knowing of the looting problem and the presence of illicit artefacts in the market.
- H. The relevant provisions of **the Convention against Transnational Organized Crime** should be applied to the international market in stolen cultural property.

## X. Recommendations relating to the Model Treaty

46. As requested by ECOSOC resolution 2008/23 of 24 July 2008, and in light of the discussion above, several recommendations can be made with regards to the Model Treaty:

- A. The Treaty should make clear that it requires **all illicit exports of movable cultural property** to be treated by contracting States as illicit imports, and that it does not envisage importing States restricting import of only a subset of movable cultural property illicitly exported from a State with which it has a bilateral agreement.
- B. The wide adoption of **the model export certificate** designed by UNESCO and WCO would aid the detection of illicitly exported movable cultural property and therefore support the terms of the Model Treaty.
- C. The requirement in article 4 for a requesting State **to furnish the date of export of an object** it is reclaiming should be deleted.
- D. The sanction in article 3 for those who “knowingly acquire or deal in” stolen or illicitly exported movable cultural property should instead be applied to those who “either knew or ought reasonably to have known” that the object was stolen or illicitly exported. Even more effective would be a **reverse burden of proof** – that is, a rebuttable presumption that objects without provenance documentation (including an export certificate) are illicit.
- E. The fact that the Model Treaty has been drawn up with bilateral agreements in mind means that it overlooks **the problem of transit states**. Greater consideration requires to be given to the role of transit states in granting export certificates and obscuring the provenance of an object.
- F. In light of the above, it would be productive to explore the promulgation of a modified version of the Model Treaty as **a multilateral instrument**, capable of regulating the flow of objects between a subscribing network of countries, and providing explicitly that (a) no State will import illicitly exported cultural property and (b) no State will give an export licence to cultural property which was not imported into its territory with an appropriate export licence.

## Annex 1

### Other relevant international instruments and initiatives

#### A. The Convention on the Protection of the Underwater Cultural Heritage 2001

Adopted by the General Conference of UNESCO on 2 November 2001, this requires States parties to take measures including in terms of Article 14 to prevent the import, dealing in, or possession of, underwater cultural heritage illicitly exported and/or recovered where recovery was contrary to the Convention.<sup>31</sup> A key aim of this convention was to enable protection of artefacts on the seabed beyond national jurisdictional waters.<sup>32</sup> Perhaps most controversial has been the Convention's ban on commercial exploitation of underwater sites (article 2.7). This discounts the possibility of future collaborations between source countries, archaeologists and commercial salvage firms, such as was the case in the excavation of the Hoi An wreck. Recovered objects were divided between Vietnam and the salvage firm, ensuring the protection of all unique objects and their display in the National History Museum in Hanoi, the provision of a further ten percent of duplicate items to regional Vietnamese museums, and the sale of the other objects on the market on behalf of the salvage firms. This model of "partage" has been quite widely supported as a useful compromise solution,<sup>33</sup> and has the benefit that it generates provenance certificates for the objects which enter the market. The Convention now has 26 States Parties and entered into force on 2 January 2009.

#### B. The Convention for the Safeguarding of the Intangible Cultural Heritage, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions

These were adopted by the General Conference of UNESCO on 17 October 2003 and 20 October 2005 respectively. They are not directly relevant to the prevention of illicit traffic in MCP but they are nonetheless important for such a discussion in that they support an international context of concern for a broad range of protections for all aspects of culture.

#### C. Security Council resolution 1483 of 2003

Adopted on 22 May 2003, this relates to the restitution of the CP of Iraq. All artefacts illegally removed from Iraq since 6 August 1990 are to be returned. Although States are required to prohibit trade in such objects, the principle of non-retroactivity demands that only post-2003 trade can be so prohibited. Objects which illegally left Iraq after 1990 and have been traded prior to 2003 may therefore no longer be traded and should be seized by the State and returned. This leaves the issue of compensation for BFPs to be resolved. Of note is the approach taken by the UK in implementing the resolution by way of its *Iraq (United Nations Sanctions) Order 2003*, s8. This prohibits the import, export or dealing in CP illegally removed from Iraq since 1990, and approaches a position of strict liability by reversing the

conventional burden of proof: the only available defence to prosecution is for the dealer to prove that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi CP. This reversal of the burden of proof is a significant departure from the norm, and appears to have dealt quite effectively with the usual difficulties in persuading the market to undertake due diligence – and the near impossibility of State prosecutors proving knowledge of wrongdoing if looted objects are bought.<sup>34</sup> To the contrary, “if the current holder has to prove that the item does not fall within the scope of the Resolution, it will be almost impossible if the item has no provenance”.<sup>35</sup> It has been suggested that the application of such a reverse burden of proof to the market in antiquities more generally may be an effective way to deter dealing in illicit CP whatever the country of origin.<sup>36</sup> In a market where looting is known to be a widespread problem, perhaps the most sensible legal approach would be “demanding that each object have a documented provenance back to a specified cut-off date and making the rebuttable presumption that objects without such documentation are illicit”.<sup>37</sup> There are Human Rights – and in the US, Constitutional – implications to such an approach, however.

#### **D. The UNESCO Cultural Heritage Laws Database**

Launched in 2005, UN Member States are invited to provide electronic copies of their relevant national legislation for inclusion (<http://www.unesco.org/culture/natlaws/>).

#### **E. The INTERPOL stolen art database**

Recently opened to the public in Autumn 2009, accessible after an application for an online password. The database contains around 34,000 stolen artworks (<http://www.interpol.int/Public/WorkOfArt/Default.asp>).

#### **F. The International Code of Ethics for Dealers in Cultural Property**

Adopted in January 1999 by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, and endorsed by the General Conference of UNESCO on 16 November 1999. Article 1 states that “professional traders in CP will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported”.

#### **G. The International Fund for the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation**

Launched in November 2000. Contributions from Member States have not been forthcoming and the fund remains undeveloped and unused.

## **H. The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage**

Made by the General Conference of UNESCO at its thirty-second session in 2003, this contains a range of statements of principle and suggestions for protection against acts of intentional destruction such as in respect of the Bamiyan Buddhas.

## **I. European instruments: the European Cultural Convention 1954; the European Convention on the Protection of the Archaeological Heritage 1969 and its 1992 revision; the European Convention on Offences Relating to Cultural Property; Council Regulations (EEC) No. 3911/92 and 93/7/EEC**

These various instruments contain provisions concerned with the prohibition of unauthorized excavation, site protection and supervision, inventorying, reporting of discoveries, public education, and the provision of adequate sanctions. The 1992 regulation enforces source nation export controls at the external borders of EU Member States. The 1993 regulation deals with trade in cultural objects unlawfully removed from EU Member States themselves.

## Annex 2

### UNESCO recommendations on protection against trafficking in cultural property

The UNESCO handbook on legal and practical measures against the illicit traffic contains clear recommendations. In terms of the legal measures, as well as joining the international conventions, countries are encouraged to use the following checklist for their domestic laws:<sup>38</sup>

(a) Provide a **clear definition** of cultural property/objects and/or cultural heritage that are covered within the scope of the legislation;

(b) **Establish the State's ownership** of: (i) whatever is deemed appropriate by the national authorities; and (ii) cultural property not yet excavated, or illicitly excavated from the national territory. This provision may help in requesting restitution of these objects domestically or even abroad. For objects licitly excavated, national legislation may either maintain the State's ownership or permit private ownership (as through the law of finds);

(c) **Regulate archaeological excavations** on national territory (administration, permits, finds, storage, ownership...);

(d) **Establish a clear legal regime** applicable specifically to cultural property that provides a legal answer to issues such as: i) what categories of cultural objects can be traded (if any), and whether a preliminary authorization by national authorities (Ministry of Culture etc.) is required; and ii) what categories of cultural objects may leave and/or enter the national territory, as well as the conditions (authorization, purpose, storage conditions, insurance etc.), and the time period (temporary or permanent export or import) under which this may take place;

(e) Subject any export (and possibly import) of certain categories of cultural objects to a certificate, possibly **using the UNESCO-WCO Model Export Certificate for Cultural Objects**;

(f) **Establish a national inventory system** of cultural heritage (in particular public and private cultural property whose loss, destruction and/or export would constitute an impoverishment of the national cultural heritage);

(g) Recommend or ensure more broadly the making of inventories, and **the use of the Object ID standard** (to be distinguished from inventorying), to facilitate prompt circulation of information in case of crime;

(h) **Ensure that antique dealers keep a registry** of all transactions of cultural objects, including name of seller/buyer, date, description of the object, price, provenance, and export (or import if required) certificate. Such records are to be kept for a reasonable period of time and made accessible to national authorities;

(i) **Establish and finance national services/units** focused on the protection of cultural heritage, in particular against illicit trafficking, and increase national institutional capacity building in cultural heritage protection, including **public education campaigns** and sensitization on cultural heritage importance, laws and protection measures;



(j) Elaborate and require **policies for museums and collections** that prevent acquisition of stolen, looted, or illegally exported cultural objects and facilitate returns thereof (see for instance the ICOM Code of Ethics for Museums 2004);

(k) **Impose sanctions** (criminal and/or administrative and/or civil) to deter wrongdoers and to serve justice on violators in a manner compatible with the national/local socio-economic situation; and

(l) Elaborate specific measures for the protection of **underwater cultural heritage**.

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