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Regulating the Market in Illicit Antiquities

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For centuries antiquities have been bought and sold, often with little regard to their historic ownership. To some, cultural artefacts are regarded as the property of the state, while to others they belong to those who find them and may therefore be freely traded.

There are cultural “nationalists” who argue that relaxed export laws would result in an increased outflow of their heritage. They have little sympathy for collectors in market nations whom they accuse of having plundered their objects. Cultural “internationalists”, on the other hand, believe that antiquities belong wherever the market distributes them, and oppose retentionist attitudes displayed by some source states, suggesting that strong export controls foster black markets.

Given that there is a thriving trade in antiquities, an unknown proportion of which are stolen, this paper provides a brief analysis of the global systems of supply and demand that govern this trade, and the regulatory challenges that exist in this complex market.

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For the purposes of this analysis, the market in illicit antiquities might usefully be split into three stages: the supply of antiquities emanating from source nations, the demand created by consumers in market nations, and the chain of transportation which links the two. By considering these “divisions of labour”, targeted solutions to the problem may be easier to identify than if the market as a whole is considered. This paper deals only with the supply and demand stages; the transport networks which move illicit goods are discussed in an earlier paper in this series (Mackenzie 2002).

Merryman (1986, p. 832) provides a succinct description of the supply and demand aspects of the antiquities market:

...the world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artefacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.

The chain of supply has many permutations. A simplified chain is depicted in Figure 1. In reality, this chain might have many more links, as the item passes from dealer to dealer often in a series of rapid transactions, resulting in a chain of supply so convoluted it is very difficult for an end-consumer to unravel.

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Regulating Supply

Looting of temples, tombs and other sites of archaeological interest is often carried out by poverty-stricken locals in source countries. Peasant populations in these countries may consider buried artefacts to be their birthright, to do with as they please, perhaps left for them providentially by their ancestors precisely for the purpose of making money. This being the case, criminal penalties that have been imposed by source countries to try to stop looting have had little effect.

In addition to criminal penalties, two other measures have been implemented by many source countries:

- export prohibitions; and
- transferring ownership to the state.

These measures, however, do not usually achieve the desired result. The reasons why are discussed below.

Export Prohibitions

Courts in Western market nations do not routinely enforce source country claims based on the source country's laws prohibiting export. In the absence of a treaty or other special legal provision, a source nation seeking the return of a cultural object that has been legally obtained but illegally exported is limited to using diplomatic or executive channels.

The non-enforceability of export restrictions abroad can be seen as an application of the principle of private international law that courts of one nation will not enforce claims based on the public law (as distinguished from claims based on private rights, like ownership) of another nation. The principle was illustrated in the case of *Attorney-General of New Zealand v Ortiz* [1984] AC 1, affirming (1982) QB 349 in which the UK court denied a remedy in an action by New Zealand to recover an illegally exported Maori carving.

Figure 1: A typical chain of supply from source to destination in the illicit antiquities market



Australia enacted its *Protection of Movable Cultural Heritage Act 1986* in order to control the export of what it classes as the most significant elements of its movable cultural property. The Act classifies controlled objects into categories with different levels of export restriction, based upon a National Cultural Heritage Control List. Indigenous artefacts that are more than 30 years old and were not made for sale fall into Part A of the control list appended to the Act. Such objects may not be exported at all. Evidence gathered informally by local cultural property enthusiasts and other interested observers has suggested, however, that there is substantial non-compliance with the requirements of the Act (Young 1999). Export prohibition appears not to be an effective method to retain cultural property without access to international mechanisms of redress and recovery if the prohibition is breached.

Transferring Ownership to the State

Many source states have passed legislation which, as of a certain date, vests title to them of all cultural property within their boundaries. This vesting includes property in the ground, as yet undiscovered. Market states have traditionally been unwilling to enforce such "universal declarations of ownership" without some form of real action on the part of the source state (such as actual seizure) to back them up.

If a source nation is unaware that a particular item has been taken, the market nations' requirement for specific action in respect of that property cannot be met. Without practical implementation by the source state, its legislation is sometimes seen as being contrary to the inalienable right (of Westerners at least) to own property, and therefore falls within the "public policy" exception to the requirement under international private law for one nation to enforce the private laws of another.

Australia does not operate a system of state ownership; rather, Commonwealth legislation gives the government minister a discretionary power to control access to Indigenous sites, and to place restrictions on the sale of items of Indigenous heritage (the relevant statute is the *Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984*).

This legislative framework is supported by state and territory legislation which in some cases recognises the right of Indigenous people to be considered the proper owners of their heritage and to be responsible for its control and management (see, for example, the preamble to the *Victorian Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*). However, a claim made abroad by an Indigenous body, or the minister, for the return of Indigenous artefacts may fail due to the same

reluctance by market countries to recognise state or group ownership.

The efforts of source nations to protect their cultural heritage legislatively by declaring ownership and barring export do not, therefore, always succeed. As with similar programs in relation to illicit drug-producing peasant populations, socioeconomic support for source populations has been proposed as a solution to curbing the illicit supply of antiquities. Offering financial aid and alternative forms of employment might take the necessity out of the looting. Other inventive solutions have been proposed, such as recruiting looters to work with qualified archaeologists for a reasonable wage, thereby legitimating their trade and eliminating destructive practices. For their part, the looters seem more than satisfied with such a proposition, as is illustrated by the following quote from an Italian tomb-robber—a *tombarolo*:

It makes me sad that our heritage, our Italian history is disappearing like this. I'd like to have an honest job, to spend my nights in bed with my wife...but there's no alternative for me or for my men. We work to put food on the table for our families. I know I'm stealing from the state, but I don't know anyone who does this job who is rich. We are all unemployed, we do what we have to do...the government won't help us. Cigarette smugglers are offered work if they give up smuggling... but for tomb-robbers there's nothing on offer, no incentive for us to stop looting.

I have a lot of experience and know Veii better than any archaeologist. I could work for the Sovrintendenza, I could show them where all the necropoleis are. I love history. If I had studied, I'd be a great archaeologist. (Ruiz 2001)

Regulating Demand

“Collectors are the real looters”, says archaeologist Ricardo Elia (1993), by which he means that, as with all market structures, flames of “production” are fanned by

consumer demand at the end of a chain of supply. Many collectors view themselves as guardians of the past, providing the world with a service in preserving—and often displaying—antiquities. This they do, but it is often at the expense of archaeological context. The reasons for this apparent lack of sympathy with the aim of cultural (as opposed to material) preservation are complex, amounting to a “don't ask, don't tell” culture. As Bator (1983, p. 84, fn. 146) notes:

No dealer or auction house will normally reveal the provenance of an object offered for sale; it is assumed that buyers and the public have no business knowing where and when and for how much the object was acquired. Museums (and, of course, private collectors) will also disclose such information rarely...*Indeed, the tradition is that such information is rarely even sought...too much information may spoil the acquisition of a stunning and desirable treasure.* (emphasis added)

How, then, might consumer decisions about purchasing illicit antiquities be influenced? Two

international legislative instruments have been enacted with that aim:

- the UNESCO (United Nations Economic, Social and Cultural Organisation) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970); and
- the Unidroit (International Institute for the Unification of Private Law) *Convention on Stolen or Illegally Exported Cultural Objects* (1995).

Australia ratified the UNESCO convention in 1989 and is currently considering acceding to the Unidroit convention. The moral significance of the treaties is substantial, but unfortunately their enforcement mechanisms do not go far enough. Their limitations are discussed below.

Illegal Export

National courts do not routinely enforce foreign claims based on laws prohibiting export. The UNESCO and Unidroit treaties aim to remedy this defect in respect of cultural property claims.

State Declarations of Ownership

Despite the current legal difficulties with a country declaring blanket ownership of certain cultural artefacts, there is evidence of a growing willingness, in the United States at least, to recognise source countries' legislation. This seems to be influenced by an increasing awareness by the Western judiciary of the problem of cultural destruction. A trilogy of cases illustrates this developing trend. All three involve criminal prosecutions under the United States' National Stolen Property Act.

The first two, *United States v Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) and *United States v McClain*, 593 F.2d 658 (5th Cir. 1979), involved defendants charged, respectively, with taking a stone stela from a Mayan Temple in Guatemala, and taking beads and pots from Mexico. Guatemala and Mexico have declared ownership of all their indigenous cultural property, discovered and undiscovered. The United States courts, in both these cases, were prepared to treat the removal of the objects from their source countries as theft. The defendants were successfully convicted.

The third case is more recent. In 1983, Egypt passed legislation vesting ownership to the state of antiquities more than 100 years old. In New York, ex-president of the National Association of Dealers in Ancient, Oriental and Primitive Art, Frederick Schultz, was charged with possession of Egyptian artefacts removed from that country after 1983. On 3 January 2002, the federal court held that the prosecution of Mr Schultz could proceed. On 11 June 2002 he was convicted for possession of stolen property, sentenced to 33 months in federal prison and fined US\$50,000 (*United States v Schultz*, 178 F Supp 2d 445 (2002)).

Article 7(a) of the UNESCO convention requires states:

...to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported.

However, *no* similar requirement is in place in relation to individual collectors or dealers who may wish to acquire such property. The convention also provides only for the prevention of acquisition—there is no mechanism for the return of illegally exported property to the source nation.

The Unidroit convention provides for such a return of property in Article 5, but only under certain circumstances. The effect of this provision is that market nations will only be obliged to arrange the return of a very small proportion of illegally exported cultural property.

Property Stolen from the Source State

Market states have exhibited a dislike of universal declarations of ownership by source states. This situation is unfortunately preserved (to an extent, implicitly) by the UNESCO convention. The relevant Article is 7(b)(i), which requires market states to prohibit the import of cultural property stolen from a museum or religious or secular monument of the source state:

...provided that such property is documented as appertaining to the inventory of that institution.

Thus, legislation *per se* is still not enough for source states to claim ownership: cataloguing is necessary. If no inventory exists, a market nation need not order the return of the artefact to its source state. Source states would find it difficult to finance an inventory of all of the cultural property within their territories (much of it undiscovered). Could Australia, for example, compile a register of all Indigenous artefacts within its bounds, as well as all of the other objects which fall into classes whose export it would wish to prevent?

The Unidroit convention goes much further than its UNESCO

Source country

The country from which the antiquity originates.

Market country

The country to which the antiquity has been exported or sold.

counterpart. Article 3(2) seeks to provide a clear statement of principle to remove any doubt surrounding the enforcement abroad of source state universal declarations of ownership. Article 3(1) declares that any stolen property shall be returned, and makes no requirement for steps to be taken beyond the legislative declaration of state ownership. However, Article 4(1) gives the good-faith possessor of such a returnable object the right to compensation from the claimant. Source nations must therefore often *buy back* their stolen heritage from the current possessor overseas.

The Overall Effect of the Conventions

Both conventions may seem, on the surface, to be simply about providing for the return of artefacts to their countries of origin. They do little to address the matter of the initial plundering that takes the artefacts from the ground. Such removal destroys any chance for learning from the archeological context.

There is a deeper logic at work in the two treaties, however. There is an assumption that recovery by source countries will have an effect on consumer choices in market states. A collector or institution will be less willing to buy an unprovenanced antiquity, it is thought, if it is likely that it will be reclaimed. Whether this is still the case if the purchaser is assured of receiving compensation to the tune of the purchase price or, better still (as is debated), to the market value of the object upon its return, is unclear.

Relying as they do on systems of civil recovery involving huge and potentially irrecoverable expenditure by source nations (in the case of UNESCO) or, worse, by individuals (in the case of Unidroit), the financial and

administrative hurdles inherent in the mechanisms contained in these treaties may give even a bad-faith purchaser of obviously looted antiquities more security than he or she deserves.

The conventions try to strike a balance between cultural nationalism and internationalism, while at the same time implementing effective measures to protect the sources of the world's cultural heritage. As with most compromises, in attempting to please everyone, in the end they please very few.

Deterrence Through Criminal Sanctions

Another possible approach to tackling demand is through the criminal law, although this is only just beginning to gain a foothold in legislative thinking in relation to the antiquities market. Would the prospect of severe criminal penalties for possession of unprovenanced antiquities deter collectors from acquiring such goods?

The hypothesis is that actual or possible offenders can be deterred by increasing the risks of offending (namely, the likelihood of prosecution and receiving a severe sanction). Much contemporary criminological thought points to the importance of an individual's bonds to conventional society as being influential in his or her decision-making processes. For this reason, deterrence through criminal punishment is unlikely to work for most individuals who come to the attention of the police. These are street criminals who have little investment in society, little to put at risk, little to lose if caught and convicted (Pollack & Smith 1983). White-collar crime, however, is seen as a highly rational form of criminality in

which the risks and rewards are carefully evaluated by potential offenders. The risks are much more salient for the white-collar criminal due to his or her stake in conformity.

For these reasons, there is seen to be a greater fear of imprisonment by white-collar criminals than by street offenders (Wheeler, Mann & Sarat 1988). For example, the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report in October 1989 on insider trading which argued for the retention of imprisonment as a sanction for that offence, quoting a prominent professional at an insider-trading conference:

Five years in denim to anybody in this audience would seem like the death penalty. (p. 238)

The increased likelihood of publicity that accompanies any “fall from grace” of those in the upper echelons of society is also seen to provide a deterrent effect on white-collar criminals.

A Climate of Compliance

Adherence to the law might best be obtained through a variety of regulatory mechanisms which combine to create a climate of compliance. According to Braithwaite (1993, p. 87):

We have a greater chance of efficient and effective regulation if we have a regulatory culture where regulation reviewers and consumerists actually listen to each other and respect the concerns of the other; we have a lesser chance of cost-effective regulation if these two constituencies see their mission as to destroy the other.

Self-regulation schemes sometimes work better than government regulation because the industry is more committed to them and because they are more flexible than the law. Often, though, they fail. What is needed is a self-regulation scheme with built-in incentives.

Incentives for effective self-regulation come from other players...signalling to the

industry that they will press for an escalation of regulatory intervention...if self-regulation is not implemented with energy and results.

(Braithwaite 1993, p. 93)

The detection, capture, prosecution and imprisonment of criminals is costly and time-consuming, and ultimately this cost is passed on to the taxpayer. It is better on all counts to use methods of persuasion to ensure that people obey the rules. Given what has been said about deterrence as an option for controlling white-collar criminals, appropriate criminal penalties may encourage those in the antiquities trade to seriously consider ways in which they can effectively regulate themselves.

Antiquities Registration

Criminal penalties currently exist in Australia for the possession of stolen goods, however they are not as easily applied in the case of looted antiquities. This is due to the inherent difficulty of proving the circumstances surrounding a clandestine excavation or illicit export of an artefact which was likely buried and unknown until found and stolen.

A solution may be to require all holders of antiquities within Australia to lodge details of such holdings with a public register. Only antiquities with documented archaeological provenance would be registered. Criminal penalties could be attached to the possession of an unregistered antiquity. A public register of holdings would:

- enable the tracing of antiquities through their stages of private and public ownership;
- be useful for the purposes of insurance;
- discourage the purchase of antiquities not listed (on the inference that they were looted); and
- enable museums and historians to track down items which they might care to inspect or borrow for the purposes of scholarship or display.

Such a registration requirement—and the attendant criminal penalties—could not, of course, be

retrospective. All antiquities held at the date of passing of the legislation would be registrable without documentation. Although this may seem arbitrary, it is a starting point.

The register could be held and operated by the antiquities trade itself (for example, by a body formed by interested dealers and collectors) or by a company which could run the register for profit. There are already dealers’ collectives in the market—in Australia the body is the Australian Antique Dealers’ Association—which perform some self-regulatory functions in respect of their members. These associations could perhaps be expanded to accommodate the keeping of a register of holdings. Criminal penalties for possession of non-registered antiquities would of course be instigated through the investigatory functions of Australian police services.

Conclusion

In the field of stolen antiquities, the law seems to be creating problems rather than solving them. Ineffective prohibitions by source states, combined with complex and hugely expensive civil mechanisms for recovery of looted artefacts, all amount to a system of legal governance that is demonstrably failing to stop the plunder. Source populations need socioeconomic support but often their national governments are themselves in financial difficulty. Market nations have the power to intervene at the demand end of the chain of supply. This paper has made one suggestion as to the form such intervention might take (a system of registration). A healthy debate on this and other suggestions cannot begin until market nations (including Australia) recognise their responsibility to protect the sources of antiquities and the knowledge that such sources hold.

The impetus for market nations such as Australia to become involved in tackling the problem

head-on might come from a realisation that tax dollars are lost when import taxes are avoided. Australia does not impose import duty on antiques over 100 years old, or on most original works of art (APEC 2002, chapter 97), but a goods and services tax (GST) is applied to the value of the goods plus the freight/postage and insurance costs.

In addition to antiquities whose import into market nations is concealed, there is also evidence that highly valuable antiquities are sometimes passed off as cheap imitations when passing through customs (see, for example, *United States v. Schultz*). One result of this in the Australian context would be the collection of less GST than should apply given the actual value of the object. Encouraging an open trade in properly excavated and provenanced antiquities would remove part of the impetus for such concealment or misrepresentation during import, thereby increasing taxes or (where applicable) import duty revenues for the market nation.

There is also the issue of reciprocity. Moves by Australia to control its consumption of illicit antiquities might encourage other countries that are part of the market for Australian cultural heritage to implement similar market-control measures.

Relatively mundane and low-level civil law requirements to register holdings, combined with serious criminal penalties for non-compliance, fit well with current criminological thinking on effective regulation. Such measures could create a climate of compliance among collectors and dealers that is both unburdensome to the individual and administratively manageable. Indeed, the many dealers and collectors who deplore the trade in illicit antiquities might welcome a system which provides them with an assurance that what they are buying has not been looted. Pressure applied to one party by others in the market who

have an interest in making sure the party complies is a cost-effective and socially integrative method of control. If all collectors of antiquities required dealers to divulge their sources, then dealers would do just that.

In our increasingly global community, perhaps it is time to look beyond the walls of traditionally defined national sovereign interests and, as with environmental initiatives, give some consideration to common global concerns. At present it is possible to buy antiquities with an ambiguous—or no—provenance from shops in the most exclusive precincts in our cities. Many of these artefacts will have been looted and smuggled. It is time to make unacceptable the purchase of such stolen goods, whether their source is Australia or abroad.

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