THE IMPACT OF THE CRIMINAL LAW AND MONEY LAUNDERING MEASURES UPON THE ILLICIT TRADE IN ART AND ANTIQUITIES

Janet Ulph*

Introduction

A cursory glance at the pages of any daily newspaper will reveal that the theft of works of art and antiquities from private museums and collections is a serious problem. It is estimated that the international trade in looted stolen or smuggled cultural property is worth several billion US dollars per year.[1] One needs to look no further than the theft in 2010 of five irreplaceable paintings by Picasso, Matisse, Braque, Modigliani and Léger from the Musée d'Art Moderne in Paris in May 2010.[2] The disappearance of these prized objects is a source of distress, not only because those who visit the museum are now deprived of the pleasure of viewing them, but also because of fears that the objects might be damaged in the process of theft, as where a painting is cut from its frame, or that it may subsequently be stored in poor conditions. A further cause for concern arises when objects of antiquity, which have not yet been discovered and identified, are dug out of the ground or forcibly removed from an ancient monument. In certain respects this is worse, because their removal not only robs a vulnerable country of information about its history but may partially strip the cultural object itself of its identity. Information relating to the depth at which an object is buried (stratification), might well have indicated its age, for example.[3] Furthermore, looters are usually looking for objects which can easily be sold and have no respect for the historical record. Consequently, other artefacts are often damaged or destroyed in the process of excavating particular objects which are seen as attractive and desirable. The result is that the site and the objects which have been taken lose much of their significance.

1 ECOSOC Resolution 2004/34, 'Protection against Trafficking in Cultural Property'.

2 See also the theft of Van Gogh's *Poppy Flowers* by from the Khalil Museum in Cairo, Egypt, on 21 Aug. 2010.

3 Simon Mackenzie and Penny Green, *Criminology and Archaeology* (Hart Publishing, 2009) p. 2.

* Faculty of Law, University of Leicester. I wish to thank the Leverhulme Trust for their generous support of my research in this area by way of a Research Fellowship. This paper grew out of and built upon a presentation, 'Le Commerce International Illégal' at 'Les Règles d'Art', annual colloquium of the Franco-British Lawyers' Society (Association des Juristes Franco-Britanniques), Conseil d'Etat, Paris, 17 Sept. 2010.

The stolen items may well be exported, then sold and resold. The main concern for any owner will be to track down stolen works of art or antiquities and to recover them. This is true regardless of whether the owner is a museum, private collector or a government acting on behalf of the nation. The owner will therefore ordinarily have resort to the civil law in order to obtain their return. But the general criminal law can play a valuable role in deterring not only thieves but also accessories such as those who knowingly purchase a stolen object. The criminal law may have a particular impact on dealers and collectors who lend support to those who steal art and antiquities.[4] These people may well excuse their conduct in different ways. In particular, as regards antiquities, they may well argue that they are saving such objects from destruction, because they are not valued in their home countries.[5] But a criminal conviction will connote wrongdoing and will damage a trader's reputation. It may lead to imprisonment. Although business people in possession of stolen property can factor the risk of paying financial compensation to a previous owner into their profit margins, no insurance will provide protection from being jailed. Those convicted of economic crimes, such as theft, handling stolen goods and money laundering, also face being stripped of the proceeds of their crimes by the State. The total value of the benefits which they have received from their criminal conduct is assessed.[6] The fact that an object has been restored to the victim or transferred to a third party or destroyed is irrelevant to these calculations. A confiscation order can usually be made and this is viewed as a debt owed to the State. Any assets belonging to the offenders can be swept up to satisfy the confiscation order and they may become bankrupt as a result.[7]

The best way of deterring theft and subsequent dealings in stolen objects is to prosecute everyone who is knowingly involved: the thieves, their accomplices, dealers and the ultimate purchasers. Unfortunately, in practice, prosecutions for offences involving art and antiquities are fraught with difficulty. Firstly, in a market which is notoriously secretive and where traditionally questions are not asked, it may not be easy to obtain evidence regarding the extent of the knowledge of the accused. Secondly, art and antiquities are moved from one country to another to escape detection: it may be difficult to pinpoint the precise series of events which have taken place after an object has been removed from its original location. Thirdly, any investigation is likely to be expensive and complicated. Whereas a famous work of art will frequently be easily identifiable, in the case of antiquities the prosecution will need to rely heavily upon experts in identifying the object and determining whether or not it has been stolen. For example, neo-Assyrian gold earrings, estimated to be over 3,000 years old, were

4 Imprisonment has a particular deterrent effect on 'white collar' criminals: Simon Mackenzie, 'Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations' (2002) VII *Art Antiquity and Law* 125 at p. 142.

5 Simon Mackenzie and Penny Green, 'Performative Regulation: a Case Study of How Powerful People Avoid Criminal Labels' (2008) *Brit. J. Criminol*. 138 at p. 144; Simon Mackenzie, 'Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities Market' (2005) 45 *Brit. J. Criminol*. 249 at p. 251. Neil Brodie, 'Consensual Relations? Academic Involvement in the Illegal Trade in Ancient Manuscripts' ch. 3 in Simon Mackenzie and Penny Green, *Criminology and Archaeology: Studies in Looted Antiquities* (Hart Publishing, 2009) at p. 48; Tim McGirk, 'A Year of Looting Dangerously' Sunday Review, *Independent on Sunday*, 24 March 1996, 4.

6 Proceeds of Crime Act 2002, ss. 6 - 10, 76, 79, 80, 84; R v. May [2008] 1 A.C. 1028.

7 In ten months, between April 2007 and February 2008, 4,054 confiscation orders were made for a total of £225.87 million: see Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 L.Q.R. 251.

offered for sale by Christie's in New York. Christie's stated that the previous owner had acquired them in 1969. However, the Director of the National Museum in Baghdad, the late Donny George, was able to identify the earrings as unique and as belonging to the Government of Iraq. These earrings were part of the 'Nimrud treasure' and had disappeared from Iraq at some point after the first Gulf war in 1991. They were withdrawn from the auction and were eventually returned to the authorities in Iraq in 2010.[8]

It has been estimated that, in 1999, the United Kingdom enjoyed 26 per cent of the global market in art and antiques and a 50 per cent share of the European markets. By value, the UK had the largest art market in Europe (at £3,467 million).[9] In 2002, the UK ratified the UNESCO 1970 Convention (the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970).[10] It was hoped that this would send out a clear signal that the United Kingdom, as a major participant in the international market, was determined to curb the trade in stolen, looted or illegally exported works of art and antiquities.

This article will provide an overview of the relevant English criminal legislation, including legislative measures passed following the UK's accession to the UNESCO Convention, such as the Dealing in Cultural Objects (Offences) Act 2003. The scope of individual offences and the extent to which they provide a robust deterrent to the trade in stolen art and antiquities will be analysed. It will be demonstrated that one of the most important steps which any nation can take to combat the illicit trade in art and antiquities is to ensure that their domestic law provides clear rules in relation to ownership of undiscovered antiquities. It will also be contended that, over the next decade, money laundering measures will become one of the most powerful and flexible weapons in tackling this trade both in this country and overseas.

Accessories: Handling Stolen Goods

Policy Issues

A thief of a work of art or antiquity does not usually wish to keep it for his own pleasure. He expects to sell it and will be keen to do so, to get rid of the incriminating evidence. A thief may be encouraged to focus upon certain types of art or antiquity by those who habitually deal in stolen goods because there is a ready market for these objects. Handlers may encourage looters to take small items, which can easily be hidden. For example, large numbers of cylinder seals have been taken from Iraq in recent years. The seals have pictures telling a story on their face and are usually carved out of hematite stone or other materials. They are easy to smuggle because they are small (often the size of a pebble); they fetch high prices in market nations because they are frequently beautiful.

8 '3,000 Year-Old Earrings Returned to Iraq from US' *Daily Telegraph* 22 Aug. 2010.

9 Department for Culture, Media and Sport (DCMS) (2001) 'Creative Industries Mapping Document 2001', citing *Market Tracking International (MTI), 2000: The Art and Internet Report.* See further, House of Commons Culture, Media and Sport Committee, *Sixth Report of Session 2004-05: The Market for Art*, 2005, Part 2.

10 14 Nov. 1970 (1971) 10 I.L.M. 289. The Convention was accepted on 1 Aug. 2002; full accession was achieved on 31 Oct. 2002. See Cmnd. 5500. For detail on the UK implementation of the Convention, see Kevin Chamberlain 'UK Accession to the 1970 UNESCO Convention' (2002) VII *Art Antiquity and Law* 231.

Those people who knowingly receive or purchase stolen objects are dealt with harshly by English law because they help to fuel criminal activity. A maximum sentence of fourteen years' imprisonment can be imposed for handling stolen objects, which is far more substantial than the maximum term of seven years for theft. The definition of 'stolen' goods is widened by section 24 of the Theft Act 1968 to include property obtained in the UK or anywhere in the world.[11] It is further provided that the offence applies in relation to other property, including proceeds of sale, which directly or indirectly represent the 'stolen' property. However, prosecutions for handling stolen art or antiquities are fraught with difficulty. There are two obstacles: it must be shown that the dealer is in possession of a 'stolen' object and that he is dishonest.

Ownership and the Problem of Buried Objects

A dealer can be charged with handling stolen goods only if they have been stolen from someone. This is because the English law of theft states that the object must belong to another.[12] If a dealer is found in possession of a painting which has been taken from a private collection, there will not normally be any difficulty in establishing that it belongs to another. Normally, museums will have photographs and a description of the objects which they have on display. Private collectors may well have taken the same precautions. In contrast, if the object has been abandoned, the owner has given up all of his rights in the object. The object will be ownerless and anyone who discovers it cannot be guilty of theft. But it is rare for an object to be ownerless. For example, if a painting is taken from a museum and is later discarded by the robber as he escapes from the police, it is not abandoned: the painting will still belong to the museum.

Determining ownership is more complex where objects of antiquity have remained buried in the ground undiscovered for hundreds or thousands of years. English law is clear on this issue. If objects are attached to or buried in the ground as part of the soil, it is presumed that they belong to the owner or occupier of the land.[13] From a policy perspective, there is a danger that a rule which favours the landowner might encourage a finder to keep his discoveries secret. But, as a matter of principle, the rule that a finder who goes on to a person's land without his permission and digs up objects from the soil (or detaches objects from a building) does not have a better title than the landowner seems right. The result is that, if a finder retains any items which he has uncovered, he may be prosecuted for theft.

In order to preserve heritage objects for the benefit of the public, an exception to the rule that an antiquity belongs to the landowner or occupier has been made by statute. If the object is viewed as 'treasure', it is presumed to belong to the nation, unless the Government wishes to disclaim all interest in it. The Treasure Act 1996 establishes an elaborate scheme whereby people who discover objects which are 'treasure' are

11 The definition also includes property acquired by blackmail or fraud or by obtaining a wrongful credit: Theft Act 1968, s. 24(4)(5).

12 Theft Act 1968, s. 1(1).

13 *Waverley B.C. v Fletcher* [1995] Q.B. 334, C.A., noted by Norman Palmer in (1996) I *Art Antiquity and Law* 157; *Elwes v Brigg Gas Co* (1886) 33 Ch. D. 562; *South Staffordshire Water Co v Sharman* [1896] 2 Q.B. 44, DC; *Parker v British Airways Board* [1982] Q.B. 1004, C.A. For example, a 2,000-year old bronze Roman helmet was recently found Crosby Garrett near Carlisle and the sale price was, with the agreement of all parties, split between the owner, the finder and the auction house: 'A Record £2m for the Roman Helmet Found in Farm Mud' *The Times*, 8 Oct. 2010.

encouraged to reveal their finds in order to avoid prosecution for an offence of failure to report.[14] They may also be charged with theft. If they make their report, they can expect to receive a financial reward.

Unfortunately, not all countries have domestic legislation which provides clear legal principles relating to ownership of buried objects. Where such legislation exists, vesting ownership in the State, it is often referred to as a 'patrimonial law'. If a source country does not have such laws, but only export controls, accessories are unlikely to be charged with handling stolen goods because it may not be clear to whom the objects belong.

'Knowing or Believing' and Dishonesty

In England, the ingredients relating to the mental element which must be established in order to secure a conviction for handling of stolen objects are spelt out in section 22(1) of the Theft Act 1968. The accused must be dishonest and must intend to take an object which belongs to another, 'knowing or believing' that it was stolen, intending to permanently deprive the person of it. The Theft Act 1968 does not define dishonesty as such but guidance can be found in the decision of the Court of Appeal in *R v. Ghosh.*[15] The test contains two strands. The prosecution must prove that the defendant's conduct would appear dishonest if judged by an objective test according to the standards of reasonable and honest people; if so, it must further be shown that the defendant must have realised that, judged by those standards, what he was doing was dishonest. The burden of proof is consequently a difficult one to discharge. However, it should be noted that the other ingredients relating to the mental element set out in section 22(1) support this high standard of proof. The test for knowledge or belief that an object is stolen is subjective: the fact that the circumstances are so suspicious that a reasonable man would be put on enquiry is not sufficient.[16] Knowledge means a 'true belief' that the goods were stolen.[17] This would be the case where, for example, the thief informed the accused that this was the case. The meaning of 'belief', has proved more difficult. It is something short of knowledge.[18] One useful guideline is that 'belief' indicates the mental acceptance of a fact as true or existing;[19] it is where a person, although not certain that the goods are stolen, accepts that there could be no other reasonable conclusion.[20]

Where a person is caught in the act of taking an object, it may be relatively easy to show that he was dishonest and that he intended to deprive the owner of his property. Although this might not be the case where the person took the painting or other object as some form of political protest, planning to eventually return it, there is a separate statutory offence to cover this situation.[21] Yet it is extremely difficult to establish that a dealer has

14 For details, see Janet Ulph and Ian Smith, ch. 3 in *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Oxford, Hart, forthcoming).
15 [1982] Q.B. 1053, C.A., 1064.
16 *R v. Forsyth* [1997] 2 Cr. App. Rep. 299, C.A.
17 *R v. Saik* [2006] UKHL, [2007] 1 A.C. 18 at [26]. See further, *R v. Montila* [2004] UKHL 50 at [27].
18 *R v. Hall* (1985) 81 1 Cr. App. R. 260, C.A.
19 *R v. Grainge* [1974] 1 W.L.R. 619, C.A.; *R v Adinga* [2003] EWCA Crim. 3201, C.A.
20 *R v. Hall* (1985) 81 1 Cr. App. R. 260, C.A.
21 See the Theft Act 1968, s. 11: it is an offence to remove an object, without lawful authority, which

acted dishonestly. This is because dealers have traditionally operated in a market where no questions were asked.[22] A dealer, when accused of handling stolen cultural objects, will say that he knew nothing. He may admit that he has been negligent in failing to ask about the history of an object. But negligence is not the same as dishonesty.

The Prosecution of Tokeley-Parry

There is one significant case in England where a dealer has been successfully prosecuted for handling a stolen cultural object.[23] The dealer was Jonathan Tokeley-Parry. He was also a restorer and he conceived the idea of smuggling excavated antiquities out of Egypt by covering them in a thin layer of plastic and painting them in gold and other colours so that they looked like tourist souvenirs. An accomplice revealed the details of his operations and, because Tokeley-Parry had kept journals with copious information, it was possible for the prosecution to establish that he had acted dishonestly. The antiquities appeared genuine and were clearly stolen because Egyptian law vested ownership of antiquities in the nation.

Tokeley-Parry had worked with an associate called Schultz, who was a prominent dealer in the United States of America. Schultz had financed some of Tokeley-Parry's activities and purchased Egyptian antiquities from him, including the sculptured head of Amenhotep III. He was charged with conspiracy to receive stolen property in *United States v. Schultz*.[24] The court was provided with convincing evidence that the antiquities were stolen: it was shown that Egyptian law not only vested ownership in the nation but also that this law was properly enforced. Although a prosecution will fail if a dealer does not know or believe that the goods have been stolen, the court was prepared to convict on the basis of inferred knowledge. Schultz's contemporaries, with whom he dealt, were well aware of the Egyptian patrimonial law. Schultz himself was an expert on Egyptian antiquities. The court took the view that, if Schultz chose to consciously avoid asking questions, this equated with knowledge. Schultz's conviction caused enormous controversy. Dealers were concerned that mere negligence might suffice for a conviction. But it is clear from the decision in *Schultz* that this was not a case of negligence: the accused was seen as having been aware that he was acting illegally.

There have been relatively few successful prosecutions of dealers in the United States or in the United Kingdom. There are formidable obstacles in the way. Apart from satisfying the standard of proof required in relation to the dealer's knowledge (which may well be impossible to discharge if the transactions which take place are

---

has been available for public display as part of a collection. See further, Humphrey Wine, 'The Missing Goya: Section 11 of the Theft Act 1968' (2001) VI *Art Antiquity and Law* 301.

22 Simon Mackenzie, 'Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities Market' (2005) 45 *Brit. J. Criminology*. 249. This appears also to be the case in France: see Leila Anglade, 'The Portrait of Pastor Adrianus Tegularius by Franz Hals' (2003) VIII *Art Antiquity and Law* 77 at p. 83. See further, *De Martini v. Williams* 18th Chamber, Tribunal Correctionnel, Nanterre 6 July 2001.

23 *R v. Tokeley-Parry* [1999] Crim. L.R. 578, C.A. See further, 'Antique Dealer Jailed for Handling Stolen Shakespeare First Folio' *The Guardian*, 2 Aug. 2010, where Raymond Scott was sentenced to eight years in prison for handling stolen goods and removing stolen property from Britain to the U.S.A.; and also *R. v. Hakimzadeh* [2009] EWCA Crim 959, noted by Kate Warner (2010) XV *Art Antiquity and Law* 95.

24 333 F.3d 393 (2d Cir. 2003). See Martha Lufkin, 'Criminal liability for receiving state-claimed antiquities in the United States: the "Schultz" case' (2003) VIII *Art Antiquity and Law* 321.

unsupported by written evidence), it must be shown that the antiquities in issue were originally taken from within a particular country's borders and that its laws clearly vest ownership of antiquities in the State. Countries' patrimonial laws vary widely and not all satisfy these requirements. [25]

Dealing in Cultural Objects (Offences) Act 2003

The UK Government ratified to the UNESCO Convention following the publication of a Report by the Illicit Trade Advisory Panel (ITAP) which recommended its adoption.[26] This Convention encourages Contracting States to protect their own cultural property, to foster respect for the cultural heritage of all States amongst its citizens, and to return stolen items which are part of an inventory belonging to a museum or similar institution in other Contracting States. The Convention is not retroactive in its application and no substantial change to English law was necessary before accession. Even so, the Illicit Trade Advisory Panel (ITAP) recommended that specific criminal legislation should be enacted to deal with those who dishonestly imported cultural objects which had been stolen, or illegally excavated or removed from any monument or wreck.[27] This proposal was prompted by the fact that the offence of handling stolen goods does not expressly cover importing stolen goods. The Dealing in Cultural Objects (Offences) Act 2003 gave effect to this recommendation.[28]

The 2003 Act is important in terms of showing the UK Government's commitment to combating the illicit trade in cultural objects. It makes it an offence to deal with cultural objects of historical, architectural or archaeological interest; it therefore does not apply to modern works of art. Evidence is required that the object is 'tainted' in the sense that, after 2003, either the object was excavated and this was illegal in the place where it occurred, or it was removed from a building or structure or monument of historical, architectural or archaeological interest and this removal was illegal in the place where it occurred.

Yet the 2003 Act may have little effect in practice because prosecutors must show not only that the accused knew or believed that the object had been illegally removed or excavated but also that the accused had been dishonest. Dealers and others involved in the market in cultural property were consulted extensively before the draft legislation passed into law.[29] They were particularly concerned to ensure that people could not be prosecuted if they failed to enquire when one might have expected them to do so. The Government has reassured dealers that this new law will have little impact upon

25 See *Peru v. Jackson* 720 F. Supp. 810, 814 (C.D. Cal. 1989), where the domestic law did not provide a sufficiently clear declaration of ownership. Moreover, it was not clear whether the antiquities were from Peru: see Roger Atwood, *Stealing History: Tomb Raiders, Smugglers and the Looting of the Ancient World* (St Martin's Press, 2004) at p. 88.

26 *Illicit Trade in Cultural Objects,* Report of the Ministerial Advisory Panel on Illicit Trade, Department for Culture, Media and Sport, December 2000 (chaired by Professor Norman Palmer). See further, Kevin Chamberlain, 'UK Accession to the 1970 UNESCO Convention' (2002) VII *Art Antiquity and Law* 231.

27 ITAP Report, at [67].

28 The Act is discussed by Richard Harwood in (2003) VIII *Art Antiquity and Law* 347.

29 Simon Mackenzie and Penny Green, 'Performative regulation: a case study of how powerful people avoid criminal labels' (2008) *Brit. J. Criminology* 138.

their trading practices.[30] Both the Dealing in Cultural Objects (Offences) Act 2003 and the general law relating to handling stolen goods will be used only in cases where the evidence is very clear cut; it is unlikely that a failure to ask questions about an object's history will suffice as evidence of dishonesty. Thus, if dealers or purchasers avoid asking questions, they can be fairly confident of avoiding prosecution for an offence under the Theft Act or under the 2003 Act.

MONEY LAUNDERING

The Principal Money Laundering Offences

There have been a number of transactions made in the past between dealers which have involved large sums of cash being exchanged for art or antiquities with no questions asked about the object's history.[31] It would be difficult to bring charges of handling stolen goods without more evidence. However, dealers are far more vulnerable to prosecution for money laundering. Three principal offences have been created by sections 327, 328 and 329 of the Proceeds of Crime Act 2002. Two offences are concerned with dealing with an object which represents the proceeds of crime, such as by concealing it, transferring it or storing it. The third offence, contained in section 328, catches those people who merely act as agents in an arrangement involving the proceeds of crime but who may never have any direct control over the money or objects.[32] If someone were to adopt the same techniques as Tokeley-Parry now, concealing a stolen object by covering it in plastic and paint, he is much more likely to be charged with a money laundering offence.

It is considerably easier to prosecute for a money laundering offence because there is no need to show that the accused was dishonest or that he knew or believed certain facts. Suspicion that the object represented the proceeds of crime is enough. In *R v. Da Silva,*[33] the Court of Appeal ruled that the prosecution did not have to show that there were reasonable grounds for the suspicion.[34] It was held that the prosecution merely had to prove that the defendant assisted another in retaining criminal proceeds thinking that there was a possibility, which was more than fanciful, that the other person had been engaged in or had benefited from criminal conduct.[35]

A successful prosecution for a money laundering offence does not depend upon

30 *Dealing in Tainted Cultural Objects – Guidance on the Dealing in Cultural Objects (Offences) Act 2003* (Department of Culture, Media and Sport, 2004) p. 1.

31 See, for example, *Kurtha v. Marks* [2008] EWHC 336.

32 See the conviction of Anthony Blok in 2009 at Croydon Crown Court for money laundering activities connected with the theft of a painting by a client of *Girls on the Beach* by Sir William Orpen. For details of the principal money laundering offences, see Janet Ulph and Ian Smith, ch. 3 in *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Oxford, Hart, forthcoming).

33 [2007] 1 W.L.R. 303, C.A. See *R v. Aminat Adedoyin Afolabi* [2009] EWCA Crim. 2879, C.A., at [18]; *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; *K Ltd v National Westminster Bank plc* [2007] 1 W.L.R. 311; *R v. Haigh* [2007] EWCA Crim 167, C.A.

34 *Ibid.*, at [16]. See further, *K Ltd v National Westminster Bank plc* [2007] 1 W.L.R. 311; *Squirrell Ltd v. National Westminster Bank plc* [2005] EWHC 664, at [13-15].

35 *Ibid*., at [16], *per* Longmore L.J. A fleeting thought would not be sufficient: *ibid*., at [17].

establishing that an object was stolen. Consequently, the prosecution is not obliged to point to the existence of patrimonial legislation vesting ownership in the State. Nevertheless, the domestic law of the country from where the cultural object originated will be important. This is because it will be necessary to show that a serious offence has been committed (a 'predicate offence'), so that the cultural object can be said to represent the proceeds of a crime. In *R v. Montila,* the House of Lords observed that the intention of both domestic legislation and the main international conventions was to target particular activities: the concealment and dealing in the proceeds of crime.[36] If the object is from a legitimate source, the prosecution would fail: no conviction for money laundering can be secured on the basis of bad intent alone. However, the courts have been remarkably flexible in relation to the evidence which the prosecution must bring forward. In *R v. Anwoir;*[37] the Court of Appeal stated that:

> … there are two ways in which the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a particular kind or kinds and that conduct of that kind or those kinds is unlawful; or (b) by evidence of the circumstances in which the property is handled which is such as to give rise to the irresistible inference that it can only be derived from crime.[38]

There is therefore no requirement imposed upon the prosecution to precisely delineate the offence which generated the property to be laundered. The guidance in *Anwoir* is particularly relevant where a defendant is found in possession of millions of pounds in his luggage and is unable to explain where the money has come from and appears to acknowledge that it may be derived from unlawful activity.[39] But it may be equally relevant where someone is found in possession of a number of artefacts and is unable to explain how he came to be in possession of them and is attempting to secretly import them into this country. There is no doubt that the direction in *Anwoir* makes it easier to prosecute a defendant. It is sufficient to bring forward credible circumstantial evidence relating to the provenance of the object and to leave it to the jury to decide whether this evidence has given rise to an irresistible inference that the accused was laundering ill-gotten gains.[40]

Reporting Suspicious Transactions

There are certain typical stages in the money laundering process. The first stage is 'placement'. If money has been stolen, for example, it may be paid into a bank account. The second stage in the process is 'layering', which refers to the series of dealings designed to hide the money's origins by moving money from one account to another. 'Integration' is the final stage: the money is legitimised by being invested in shares, for example, or used to purchase an item or service. The same process of movement and concealment will be used for stolen objects.[41] A history will be built up as they pass

36 *R v Montila* [2004] 1 W.L.R. 3141, H.L., at [37].
37 [2008] EWCA Crim. 1354, [2009] 1 W.L.R. 980.
38 *Ibid*., at [21].
39 *R v. F* [2008] EWCA Crim. 1868, [2009] Crim. L.R. 45. See further, *R v. Ferrel* [2010] UKPC 20; *R v. Albert Yip* [2010] EWCA Crim. 1381.
40 See *R v. MK, AS* [2009] EWCA Crim. 952, at [12].
41 See I. Snaith, "Art, Antiques and the Fruits of Crime: Laundering, Investigation and Confiscation: Part 1" (1998) III *Art Antiquity and Law* 371 at p. 375.

from one dealer to another by way of purchase or loan.

It is easier to detect money laundering at the earlier stages. Consequently, additional measures exist which are intended to detect money laundering and to support the principal money laundering offences. There are important obligations which are imposed upon a large number of businesses (the 'regulated sector'[42]). These businesses include not only financial institutions, lawyers and accountants, but also dealers in 'high value' goods, such as precious metals, or objects of antiquity or works of art. Dealers in art and antiquities are therefore affected by these money laundering measures if their business involves:

> the trading in goods (including dealing as an auctioneer) whenever a transaction involves the receipt of a payment or payments in cash of at least 15,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked, by a firm or sole trader who by way of business trades in goods.[43]

Dealers and auctioneers in items with a high value will commit an offence if they fail to report suspicious transactions to the Serious Organised Crime Agency when they know, or have reasonable grounds to suspect, that another person is engaged in money laundering.[44] They must report suspicious property and financial transactions as soon as is practicable, where this information has come to them in the course of their business and they can identify the person or the whereabouts of any of the laundered property, or where they believe (or it is reasonable to expect them to believe) that the information will assist in identifying that other person or the whereabouts of any of the laundered property.[45] A negligent dealer or auction house will therefore be at risk of prosecution.

There are various defences available. In relation to international criminal activity, a defence exists if the relevant conduct was known or was believed to have occurred overseas and was legal under local law.[46] The accused can also plead that he had a reasonable excuse for not reporting a transaction or that he has disclosed the matter to the authorities and obtained their consent.[47] However, the Act actively encourages reporting because those who report and obtain consent are protected: they cannot be convicted of a money laundering offence and their clients cannot sue them for breach of confidence.[48] These new measures are intended to deter professionals who might otherwise be tempted to turn a blind eye to the suspicious conduct of their clients.

The Money Laundering Regulations 2007 add to this burden by requiring high value dealers, as well as others in the 'regulated sector' to act with due diligence in transacting,

---

42 Proceeds of Crime Act 2002 ('POCA 2002'), Sch. 9, as substituted by S.I. 2007/3287, with effect from 15 Dec. 2007

43 POCA 2002, Sch. 9, Part 1, (1)(q).

44 POCA 2002, ss. 30, 31, as amended by the Serious Organised Crime and Police Act 2005.

45 POCA 2002, s.330(3A), as amended by the Serious Organised Crime and Police Act 2005, s 104. But they will commit an offence if they 'tip off' their client: See further, POCA, s 333.

46 POCA 2002, s. 330(7A); s. 331(6A); s. 332(7).

47 In relation to defences, see subsections (6) and (7) to POCA 2002, ss. 330, 331, as amended by the Serious Organised Crime and Police Act 2005.

48 POCA 2002, s. 337.

checking the identity of sellers and whether or not they own the object.[49] This is reflected in the CoPat Due Diligence Code for Dealers. The 2007 Regulations attempt to make the scrutiny more efficient by adopting a risk-based strategy, whereby different levels of scrutiny are expected according to the business profile of the customer. If a customer is in a high risk category, such as senior politician, more rigorous checks are required.[50] If there are any suspicious circumstances,[51] they must enquire further before proceeding with a transaction; they cannot take the risk of committing a criminal offence. It is not unusual to read of auction houses withdrawing works once questions are raised. For example, *Children Under a Palm Tree* by Winslow Homer was offered for sale by Sotheby's in 2009.[52] However, the auction house withdrew the painting from sale once evidence emerged that it might have been stolen and dumped in a rubbish skip before being found.

The art world once prided itself on the confidential service which it offered to clients. But secrecy could be used as a cloak for criminality,[53] where stolen art was passed from one dealer to another or where objects were bought with money from other types of illegal activity. Money laundering measures now put pressure on dealers and auctioneers to deal at arm's length with their clients. These measures will gradually erode the intimate relationships between dealers and will assist in combating the illicit trade in art and antiquities.[54] The effect of these measures is to encourage transparency in commercial dealings.

A More Draconian Law?

It might be argued that money laundering measures are not tough enough: a dealer who is in possession of a stolen object should be put in a position where he has to explain himself.[55] This would deter traders from purchasing unprovenanced objects.[56] This is the effect of the application of the Iraq (United Nations) Sanctions Order 2003,[57] which

49 The definition of 'high value' dealers is to be found in the Money Laundering Regulations 2007 (SI 2007/2157), reg. 3(12). It is the same as the one provided in the Proceeds of Crime Act 2002 (set out in the text above). The requirement that dealers and auctioneers should establish identification and verification procedures can also be found in their professional codes of conduct (CoPat Codes).

50 In relation to simplified due diligence, see the Money Laundering Regulations 2007 (SI 2007/2157), Reg. 9; in relation to enhanced due diligence, including politically exposed persons, see *ibid*, Reg. 11(5) and 14(1)(b), Sch. 2.

51 The CoPat Due Diligence Code for Dealers provides the example of where the asking price for an object does not equate to its market value.

52 See 'Sotheby's Halts Auction of their 'Stolen' Painting from Fly Tip' *London Evening Standard* 22 May 2009.

53 *Rachmaninoff v. Sotheby's and Eva Teranyi* [2005] EWHC 258, at [35] *per* Michael Tugendhat J. See N.E. Palmer, 'Keeping the Score: the Rachmaninoff Claim and the Circumspection of Auction Houses" (2005) X *Art Antiquity and Law* 317. See further, *Kurtha v. Marks* [2008] EWHC 336, at [140].

54 For further discussion of the tension between transparency and confidentiality, see N. E. Palmer, 'Adrift on a Sea of Troubles: Cross-Border Art Loans and the Spectre of Ulterior Title' (2005) 38 *Vanderbilt Journal of Transnational Law* 947.

55 P. Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past' (2007) 8(1) *Chicago Journal of International Law* 169, 187.

56 P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention* (2nd edn, Institute of Art and Law, 2007) 17 (discussing the application of the Iraq (United Nations) Sanctions Order 2003).

57 SI 2003/1519, as amended by SI 2004/1498. This Order implemented the United Nations Security Council's Resolution 1483 of 22 May 2003 into UK law.

applies to all those in possession of objects illegally exported from Iraq after 6th August 1990. The Order creates two criminal offences in an attempt to curb the trade in looted antiquities from Iraq. Any British citizen or company may be guilty of an offence if the prosecution can establish two matters. First, it must be shown that the object is one of 'archaeological, historical, cultural, rare scientific or religious importance' and that it has been illegally removed from Iraq after 6th August 1990. Secondly, the prosecution must show that the defendant has either dealt with the object or failed to transfer it to a constable whilst in possession or control of it. However, the burden of proof shifts to the accused to prove what he did and did not know on a balance of probabilities. A prosecution will fail if the defendant can prove that, "he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property."[58]

The problem with putting the burden on the accused to show his state of mind is that Article 6(2) of the Human Rights Act 1998, which incorporates the European Convention on Human Rights 1950, provides that anyone charged with a criminal offence is presumed innocent until proved guilty. If anyone is charged with an offence under this Order, they can argue that the law is incompatible with the Convention. This argument may well fail on the basis that the right to a fair trial set out in Article 6(2) is not an absolute right and some interference with the burden of proof in criminal proceedings is tolerated provided that the interference is kept within reasonable limits.[59] Furthermore, a court has the power to interpret the law in the light of the Convention and to decide that the prosecution must prove all the key ingredients, including bringing forward evidence that the accused knew that he was dealing with an object illegally taken from Iraq. All the accused would need to do is to bring forward some evidence that, on the balance of probabilities, he did not know of the circumstances.[60] Even so, the fact that this legislation is untried and may be subject to appeal may discourage prosecutors from bringing a charge under its provisions. It is much easier to use law with which a prosecutor is familiar, such as the money laundering legislation.

Conclusions

Finding suitable methods to tackle the illicit trade in art and antiquities in an effective manner is challenging. A thriving market in cultural objects provides a public benefit in terms of stimulating interest in both domestic and global culture. It is important to ensure that any measures taken to counter the trade in illicit objects are proportionate and do not simply have the effect of damaging this market.

One relatively simple measure which any source nation can take is to ensure that their domestic law provides clear rules in relation to ownership of undiscovered antiquities. Evidence relating to possession and title is essential in bringing a civil claim in England for the return of an object.[61] This evidence is also often vital in demonstrating that an

58 *Ibid*., Article 8(2),(3).

59 *Salabiaku v. France* (1988) 13 EHRR 379, at [28]. See further *Spector Photo Group NV v. Commissiee Voor Het Bank-, Financie- En Assurantiewezen (CBFA)* [2010] 2 C.M.L.R. 30, E Ct HR.

60 In relation to the court's power to 'read down' a provision in this way, see *R v. Lambert* [2002] 2 A.C. 545, H.L. at [37]. See further, *R v. Keogh* [2007] 3 All E.R. 789, C.A.; *R v. Hansen* [2008] 1 L.R.C. 26.

61 See *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd* [2007] EWCA Civ. 1374 [2009] Q.B. 22, C.A., noted by Patty Gerstenblith, (2009) XIV *Art Antiquity and Law* 21.

offence has been committed for the purposes of the criminal law. If antiquities belong to the State or landowner, for example, they become stolen property once they are excavated and removed without permission. In 2008, the United Nations Economic and Social Council called upon States to assert ownership of cultural property and to publicise that fact with a "view to facilitating the enforcement of property claims in other States."[62]

The criminal law and, in particular, money laundering measures, should become one of the most effective weapons in deterring the illicit trade in art and antiquities. Although the Department of Culture Media and Sport has drawn the attention of dealers and auction houses towards the offence of handling stolen goods and the offences created by the Dealing in Cultural Objects (Offences) Act 2003, far less attention has been given to money laundering measures.[63] Yet, on a domestic level, these measures should be changing the way in which professionals in the United Kingdom, including dealers and auction houses, carry out transactions. They are encouraged to ask questions and to report anything suspicious to the Serious Organised Crime Agency to avoid committing an offence. Inevitably, there is a price to be paid, both in terms of a loss of confidentiality in relationships and in economic terms as professionals are transformed into unpaid detectives.

The illicit trade in art and antiquities normally involves moving objects from one country to another: from a 'source nation' to a 'market nation', to use crude terminology. A concerted international effort is needed to oppose this trade. In 2005, the UN Congress on Crime Prevention and Criminal Justice recognised that organised criminal groups were involved in the trafficking in cultural property and wild flora and fauna, along with trafficking in persons, human organs and drugs.[64] In 2008, the United Nations Economic and Social Council issued Resolution 2008/23 entitled 'Protection Against Trafficking in Cultural Property'. As one would expect, this Resolution referred to past resolutions calling for the return of cultural property to the countries of origin.[65] It considered the leading international conventions on the protection of cultural property of the twentieth century,[66] which revolved around encouraging States to protect their own property, to return stolen items to source nations and to educate their citizens. But this was not all. The Resolution flagged up the convergence between these traditional responses to the illicit trade in cultural property and the approaches taken to tackle serious crime in general, which include this trade.

---

62 Resolution 2008/23 of 24 July 2008. See further, Resolution 2004/34.

63 In the DCMS Cultural Property Unit, *The 1970 UNESCO Convention: Guidance for Dealers and Auctioneers in Cultural Property,* money laundering measures are not even mentioned.

64 The Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005: Report prepared by the Secretariat (UN publication, Sales No E.05. IV.7), at [12]. The Bangkok Declaration was subsequently endorsed by the General Assembly in its resolution 60/177 of 16 Dec. 2005.

65 GA Resolution 58/17 of 3 Dec. 2003 and 61/52 of 4 Dec. 2006. See further, UNODC/CCPCJ/EG.1/2009/CRP/1.

66 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 14 Nov. 1970, U.N. Treaty Series, vol. 823, No. 11806; Convention on Stolen or Illegally Exported Cultural Objects 1995, available at www.unidroit.org; Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UN Treaty Series 3511.

It is here that international initiatives relating to money laundering, corruption, serious crime and terrorism can provide new strategies to combat the illicit trade in cultural property. In Resolution 2008/23, it was suggested that the UN Convention against Transnational Organised Crime 2000 ('TOC')[67] had created a fresh impetus for the exchange of information and technical expertise between law enforcement agencies in different countries. This Convention, which the UK ratified in 2006, aims to combat "money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organised crime and terrorist crimes." TOC is concerned with the criminal law and its processes, including the creation of offences, the exchange of information, assistance and training, extradition, the establishment of financial intelligence units and sanctions such as confiscation of illicit assets. It is one of a series of international conventions dealing with money laundering, drug trafficking, corruption and other serious crime.[68] One notable characteristic of these conventions is seizure of proceeds of crime (which would include cultural property and proceeds of sale); indeed, the Convention against Corruption 2003 goes further in requiring Contracting States to return seized assets to their true owners.

A determination to fight money laundering has brought the international community together. There is increasing emphasis in international instruments[69] upon international co-operation and the exchange of information relating to trafficking in cultural property, laundering the proceeds of crime and other serious crime. In order to effectively deal with new illicit networks of criminals, who frequently use the internet to fulfil their schemes, close co-operation between enforcement authorities is accepted as essential. Money laundering measures can assist further: States can use part of the confiscated proceeds of crime to finance this transfer of information and expertise.[70]

There may eventually be an impact upon the public perception of those people who deal in fakes or looted art and antiquities. They have been portrayed in the past as romantic figures: as adventurers rather than common criminals. This is an old-fashioned view. It has always been recognised that the theft of a cultural object, or its illegal excavation and sale from source nations such as Iraq, deprives ordinary people of information and enjoyment. But apologists have argued that these objects are being saved and preserved by those who care for them. However, once it is accepted that trafficking in cultural property generates huge profits, and that this makes the trade highly attractive to professional criminals who may use these profits to fund other criminal activities, the need to suppress the illicit market in art and antiquities, whilst supporting the legitimate one, must surely become evident to all reasonable people.[71]

---

67 UN Treaty Series 2225, No 39574.

68 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; Civil Law Convention on Corruption 1999; Convention for the Suppression of the Financing of Terrorism 1999; Convention against Corruption 2003, UN Treaty Series 2349, No. 42146.

69 See Resolution 2008/23 and the Salvador Declaration of 2010 on 'Comprehensive Strategies for Global Challenges: the Crime Prevention and Criminal Justice Systems and their Development in a Changing World'.

70 This suggestion was made in the Salvador Declaration of 2010.

71 It is thought that the paintings stolen from the Musée d'Art Moderne in Paris in May 2010 will be traded for drugs and weapons in the criminal underworld: C. Bremner, ' 'Pink Panther' Lopes Off with 85m of Top Art Tucked Under his Arm' *The Times* 21 May 2010.