

8 International exchange and trade in cultural objects

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Introduction

The legal protection of movable cultural heritage at the international level has been defined by a perennial tug-of-war between forces promoting international exchange and those seeking regulation of the transfer of the cultural objects. Shifts over the last century in how the balance between these twin aims is achieved reflect changes in the composition of Member States of inter-governmental organizations and their corresponding changing priorities. In the early twentieth century, the balance fostered under the League of Nations favoured a cosmopolitan view promoting the circulation and interchange of cultural material to further knowledge and mutual understanding between peoples. The balance sought in the late twentieth century emphasized the importance of states being able to host representative national collections on their own territory. More recently, this position appears to be tempered by moves to make cultural objects exhibited in international exhibitions immune from seizure or suit while on temporary loan. These moves are justified on the grounds reminiscent of those articulated a hundred years before.

The evolving recalibration of these dual priorities is the central focus of this chapter. First, I consider the antecedent efforts of the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s predecessor the International Committee for Intellectual Cooperation and International Museum Office's early initiative to draft a multilateral agreement for the protection and return of cultural objects. Next, I reassess the operation of UNESCO's mandate with specific reference to the negotiations for the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and 1976 Recommendation concerning the International Exchange of Cultural Property. Finally, there is a brief examination of regional and domestic instruments regulating the trade in cultural objects and promoting temporary loans abroad. This focus serves as an entry point for a broader discussion of the significance of international exchange in the legal protection of cultural heritage.

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Early initiatives and the International Committee of International Cooperation

The earliest multilateral efforts to regulate the international trade in cultural objects were instigated under the auspices of the League of Nations' International Committee for Intellectual Cooperation (ICIC). These initiatives can only be understood within the context of the ICIC's ethos: the promotion of peace among nations through the pursuit of intellectual cooperation across borders.² It was in this milieu that the ICIC's executive arm in Paris, the International Institute of Intellectual Cooperation, organized a number of international conferences in the 1930s through its International Museum Office (*Office internationale des musées* (OIM)).³ When summarizing the findings of the 1931 Athens Conference, Jules Destrée noted that there was general agreement that the preservation and protection of masterpieces which 'represent[ed] civilisation's highest power of self-expression' was the concern of the entire international community and should be manifested in the 'idea of international solidarity' and mutual assistance.⁴ He argued that there was a need for the public to appreciate its own cultural heritage but also to be inculcated with the 'spirit of international solidarity' which was best achieved through the international movement for exchange and cooperation between museums and other collecting institutions. He suggested that by necessity this restricted 'the right of national ownership' insofar as it is 'a selfish character'. Accordingly, it was necessary for countries to modify their laws to facilitate these endeavours.⁵ This sentiment was reiterated in the Resolution concerning the Protection of Historical Monuments and Works of Art adopted in 1932 (1932 Resolution) by the League of Nations.⁶ It guided the organization's initiatives in the field of movable heritage until its demise in 1945. The Resolution requested that Member States enact domestic laws permitting the transfer of cultural objects 'of no interest' to their national museums and limiting the scheduling of cultural objects 'to those of the special interest to the artistic or archaeological heritage of the country'.⁷

While the OIM conferences were organized to foster technical preservation and protection of movable and immovable heritage, it became clear that there

2 F. S. Northedge, *International Intellectual Co-operation with the League of Nations: Its Conceptual Basis and Lessons for the Present*, PhD Thesis, University of London, 1953, p.28.

3 Including the Rome Conference of 1930 covering the preservation of paintings and sculptures and the Athens Conference of 1931 covering restoration and preservation of architectural monuments.

4 Anon., 'League of Nations' Intellectual Co-operation Organisation', *Information Bulletin*, Oct–Nov 1932, 165–166.

5 Ibid.

6 Adopted by the ICIC on 23 July 1932, and approved by the Assembly of the League of Nations on 10 October 1932.

7 J. Destrée, Annual Report of the President of the Directors' Committee of the International Museums Office, Note by the Secretary, of the Intellectual Co-operation Organisation, 1 July 1932, ICIC/273, 7; and Recommendation 4, 1932 Resolution.

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was also a 'legal' aspect, 'in the form of international agreements'.⁸ The 1932 Resolution called on states to assist each other in recovering scheduled objects which had been stolen or illicitly exported.⁹ At the behest of the Italian Committee on Intellectual Co-operation, a convention guaranteeing the integrity of national collections was a central recommendation of the Resolution.¹⁰ The draft International Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest which have been Lost, or Stolen or Unlawfully Alienated or Exported (1933 OIM draft) clearly reflected the motivation of states, like Italy, that had passed stringent export control laws, designed to 'make surreptitious traffic in works of art more difficult'.¹¹ Solidarity and mutual aid in the context of this draft was pursued to make such laws more effective.¹² The only trigger for the proposed Convention's operation was the alienation or export of the object contrary to national legislation.¹³ The 1933 OIM draft applied to 'movable or immovable objects of an artistic, historical or scientific character'.¹⁴ However, it did not distinguish between cultural objects contained in museum collections and those from archaeological excavations, as was illustrated by a controversy regarding stelae illicitly exported from Egypt and offered for sale on the European market.¹⁵ The OIM confirmed that the definition of objects covered by the proposed convention included '*fragments de monuments*'.¹⁶ Nevertheless, subsequent drafts of the convention did not cover objects from archaeological excavations.

In response to concerns raised by states to the 1933 draft, the subsequent iteration was 'drastically' altered.¹⁷ The draft International Convention for the Protection of National Historic or Artistic Treasures (1936 OIM draft) tightened its operation and no longer provided unfettered aid to national laws.¹⁸ Drawing inspiration from the Pan-American Union's treaty covering movable heritage adopted during the same period,¹⁹ the definition of cultural objects covered by the 1936 OIM draft was broadened to include 'objects of remarkable palæontological, archæological, historic or artistic

8 Anon. 'International Cooperation in the Sphere of Art', *League of Nations Official Journal*, vol. 13, 1932, 1776–1777.

9 Anon., op. cit., 1776.

10 C. de Visscher, 'International Protection of Works of Art and Historic Monuments', *Documents and State Papers*, 1949, 857.

11 Destrée, op.cit. 7. See De Visscher, op.cit., Appendix B, 865–866.

12 De Visscher, op. cit., 821.

13 1933 OIM Draft, Art.1.

14 1933 OIM Draft, Art.1.

15 J. Capart to S. S. Pacha, Egyptian ambassador to Washington, 10 April 1933, OIM.IV.27.I, pp.172–173.

16 Foundoukidis to Destrée, n.d.: OIM.IV.27.I, p.168, Records of the Office international des musées, UNESCO Archives, Paris.

17 Visscher, op.cit., 859.

18 Visscher, op.cit., Appendix B, 866–868.

19 Pan American Union (PAU) Treaty on the Protection of Movable Property of Historic Value, 15 April 1935, in force 17 July 1936, OASTS No.28.

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interest'.²⁰ With the inclusion of two words: 'national' and 'treasures', in the title and preamble of this draft, there is a subtle, but significant, recalibration of the balance between national and cosmopolitan objectives towards the views championed by the ICIC.²¹ It redefined its purpose as the protection of cultural objects considered by the future State Parties to be of national importance, with the claimant state as the 'sole judge of the nature and value of such objects'.²² Also, it provided that the proposed convention's operation could be extended to objects in private collections, provided they were scheduled as being 'of national concern' and subject to export control.²³ These amendments were retained and extended in the 1939 redraft.

During the inter-war period, the promotion of free trade and equal access to cultural resources was most pronounced in the international regulation of archaeological sites, which reinforced the principles set down by the mandate system.²⁴ The tension created between the solidarity for domestic laws for the protection of national cultural heritage and the promotion of international exchange (and by extension the international art trade) was encapsulated in the complete overhaul of Article 1 in the final OIM draft in 1939. It quarantined its application to scheduled objects only. Iraq had unsuccessfully requested a return to the original wording where the convention's operation was triggered by the lack of export authorization.²⁵ It observed that: '[W]here illegal and secret excavations . . . [are] extremely difficult to control. . . . It follows that stolen objects cannot be always known and therefore not registered by the authority concerned'.²⁶ In response, it was argued that the inclusion of objects removed from clandestine excavations would 'compromise' the proposed convention because such objects, by their nature, could not satisfy the requirement of 'prior possession . . . the indispensable condition of the [restitution] claim'.²⁷

The recommendations contained in the Charter adopted at the International Conference on Excavations (1937 Cairo Charter),²⁸ complemented the obligations of the 1936 OIM draft by emphasizing accessibility to the cultural 'resources' from archaeological sites. The primary recommendation required museums to 'satisfy themselves that nothing in its intrinsic character or the circumstances in which it is offered . . . warrants the belief that the object is

20 1936 OIM Draft Art.1(1).

21 Second preambular recital and Art.1(1), 1936 OIM draft.

22 1936 OIM Draft Art.1(2).

23 1936 OIM Draft Art.17.

24 See A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge: Cambridge University Press, 2006, pp.85–87.

25 Iraqi delegation to Secretary General, League of Nations, 21 May 1936, OIM.IV.27.II, pp.162–163.

26 Ibid.

27 ICIC, Report of the Committee on the Work of its Nineteenth Plenary Session, 9 August 1937, C.327.M.220.1937.XII, p.69.

28 See E. Foundoukidis and OIM, *Final Act of the International Conference on Excavations*, Paris: OIM, 1937; and *Museion*, 1937, vol. 39–40, pp.251–255.

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the result of clandestine excavation or any other illicit operation'.²⁹ If suspicion was aroused, they were to notify the relevant authorities. The government and museum should then assist with the repatriation of the object to its country of origin.³⁰ However, to curb illicit trade and enable museums to fulfil their 'scientific and education mission', states were encouraged to provide legal means of acquiring archaeological materials, with the OIM to facilitate the resolution of any dispute between the country of origin and a collecting institution.³¹ Euripide Foundoukidis, head of the OIM, noted that these recommendations were significant because 'they complete[d] legal clauses that figure[d] in the [1936 OIM draft]'.³² The commentary on the Cairo Charter made it clear that the OIM draft which required cooperation for the return of scheduled cultural objects could not be readily extended to archaeological material.³³ Instead, a 'moral agreement among museums' was the preferred route because 'these institutions display an ever more enlightened spirit of international solidarity and understanding'.³⁴

During the same period, the OIM was also working on international initiatives that augmented the international exchange of cultural objects through international exhibitions and the circulation of casts. The League of Nations adopted the Recommendation regarding International Art Exhibitions which made the OIM the central repository of information concerning all international exhibitions.³⁵ The aim was overtly educative as reflected in its opening words: '[I]nternational art exhibitions are calculated to promote intellectual *rapprochement*, the education of public taste, and the progress of historical and artistic research'.³⁶ While almost exclusively concerned with logistical aspects, it did request that governments take all steps necessary to facilitate the importation and return of loaned objects.³⁷ Also, to better encourage the release on loan, collecting institutions approached to loan objects for an international exhibition could request the loan of 'an equivalent work of art' during the period of the exhibition or another form of compensation.³⁸

The draft International Convention for the Protection of National Collections of Art and History (1939 OIM draft) prepared in the aftermath

29 Recommendation 15, Section III, Cairo Charter.

30 Recommendations 16 and 17, Section III, Cairo Charter.

31 Section II, Recommendation 13(b) and (c); and Section III, Recommendations 18, 21 and 22, Cairo Charter. It also recommends the conclusion of bilateral agreements under the auspices of the OIM: Recommendation 27.

32 The Cairo Charter in Section II covering the system of excavation and international collaboration recalled the 1932 Resolution.

33 Foundoukidis and OIM, op. cit., p.5.

34 Foundoukidis and OIM, op. cit., p.3; and Preamble, Section III, Cairo Charter.

35 Recommendation regarding International Art Exhibitions, adopted at the seventeenth session of the Assembly of the League of Nations, 23 November 1936, CL.207, 1936, XII.

36 Ibid.

37 Para.14, 1936 Recommendation.

38 Para.7, 1936 Recommendation.

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of the Cairo Conference and on eve of the Second World War, saw a further tightening of its application.³⁹ The expansive operation of earlier drafts was wound back because of the lack of uniformity in national legislative schemes or agreement on the notion of public ownership, and a desire not to impede unduly the international art trade.⁴⁰ Charles de Visscher explained that that 'restitution form[ed] the essential and also the most solid basis of the proposed convention'.⁴¹ The types of objects covered by the convention had not been altered from the 1936 draft. Yet, how they attracted its operation was severely circumscribed. Objects in public (and private) collections had to be scheduled by State Parties prior to their illicit removal.⁴² Therefore, the key to restitution was that the claimed object was 'known to that administration and inventorie[d] by' the claimant states.⁴³ Also, the drafting committee accepted that inalienability was not recognized by all states and the convention as drafted would severely undermine the international art trade.⁴⁴ Consequently, the draft required that the act triggering its operation be contrary to the property rights 'under the criminal law of the claimant State'.⁴⁵

The 1939 OIM draft also bolstered the OIM initiative to promote the universal appreciation of all cultures through the regulation of export for exhibition, loan, study or conservation.⁴⁶ The provision gave a 'legitimate owner' whose objects were abroad for an exhibition or repair, the same rights he or she would have in their own state.⁴⁷ This was augmented by the 1939 OIM draft explicitly providing that it would not apply retroactively.⁴⁸ Finally, it reaffirmed the precedence of 'diplomatic channels' as the first avenue for resolving disputes under the instrument.⁴⁹ This position departed from the judicial avenues incorporated in the 1933 OIM draft but accorded with the spirit of the 1937 Cairo Charter.⁵⁰

The OIM draft was never adopted by the League of Nations. De Visscher when reflecting on these inter-war efforts observed that they endeavoured to

39 De Visscher, *op. cit.*, pp.869–871; and C. de Visscher, 'Le projet définitif établi en 1939 en vue de la conférence diplomatique', *Art et archéologie: recueil de législation comparée et de droit international*, 1939, vol. 1 78–79.

40 Visscher, 'Le projet définitif établi en 1939 en vue de la conférence diplomatique' *op. cit.*, 89, 91.

41 C.327.M.220.1937.XII, 69.

42 1939 OIM Draft, Art.1(3).

43 *Ibid.*

44 See De Visscher, *op.cit.*, 'Le projet définitif établi en 1939 en vue de la conférence diplomatique', 89.

45 1939 OIM Draft Art.2(1).

46 1939 OIM Draft Art.2(2).

47 *Ibid.*

48 E. Foundoukidis to U. Aloisi, 15 March 1935, OIM.IV.27.II, pp.104–105 referring to Art.2(3) of the 1939 OIM Draft.

49 1939 OIM Draft Art.4(1).

50 De Visscher, *op.cit.*, 'Le projet définitif établi en 1939 en vue de la conférence diplomatique', 99.

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marry two 'worthy' interests: the drive of a country to preserve cultural objects which represent its national heritage which may result in a 'chauvinistic idea' of export prohibitions which impeded the 'more lofty point of view' of the 'eminently universal educational role of the work of art throughout the world'.⁵¹ It would take more than three decades for the multilateral agreement on the regulation of the trade in cultural objects to be realized in the post-war period – and the balancing it achieves is appreciably different from that of these inter-war OIM initiatives.

Current instruments and UNESCO

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is the specialist United Nations' agency in the field of culture and succeeded the functions of the League of Nations' ICIC. It has a decidedly more global membership than its predecessor.⁵² UNESCO's Constitution provides that it recommend the adoption of international agreements to 'promote the free flow of ideas by word and image' and 'maintain, increase and diffuse knowledge' including by facilitating the conservation and protection of the 'world's inheritance of books, works of art and monuments of history and science' and 'the exchange of publications, objects of artistic and scientific interests and other materials of information'.⁵³ By 1976, Deputy Assistant Director-General, Gérard Bolla noted that UNESCO had already adopted three conventions and six recommendations on culture which had the dual aims of 'identifying, protecting and presenting cultural property of Member States and, at the same time, of facilitating the development of cultural exchange, including the exchange of cultural objects'.⁵⁴ However, a clear distinction can be discerned between how the balance between these aims was achieved prior to the Second World War and following the war. The influx of new Member States into UNESCO and other intergovernmental organizations made a significant impact on propelling this shift.

The shift is encapsulated by the fact that one of UNESCO's first instruments covered the regulation of archaeological sites and objects. The UNESCO General Conference adopted the Recommendation on International Principles applicable to Archaeological Excavations in 1956 (1956 Recommendation).⁵⁵

51 De Visscher, *op.cit.*, 'International Protection of Works of Art and Historic Monuments' 859.

52 Agreement between UNESCO and the International Institute of Intellectual Co-operation dated 19 December 1946.

53 Arts 1 and 2, Constitution of UNESCO, 16 November 1945, in force 4 November 1946, 4 UNTS 275.

54 Draft Recommendation on the International Exchange of Cultural Property, 6 August 1976, 19C/25, Annex II, Report of the Special Committee of Governmental Experts, 2.

55 Resolution 4.32(c), of the ninth session of the General Conference of UNESCO, 5 December 1956.

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The Recommendation clearly borrowed heavily from the Cairo Charter but its points of difference marked the changes which would permeate subsequent post-war initiatives in this field. It reaffirms that museums should ensure that archaeological objects which they may acquire are not the result of any unauthorized excavations, theft or otherwise illicitly removed from the country of origin. Further, if they are suspicious that the relevant authorities be notified and details of acquisitions be published.⁵⁶ It replicates the obligation to facilitate any requests for assistance in respect of restitution of objects clandestinely excavated, stolen or exported illicitly.⁵⁷ However, like the Cairo Charter, the Recommendation also urges '[e]ach Member State [to] consider ceding to, exchanging with, or depositing in foreign museums objects which are not required in the[ir] national museums'.⁵⁸ Furthermore, the fostering of bilateral agreements among Member States now extends to all aspects of the instrument.

These obligations are reiterated in the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import, and Transfer of Ownership of Cultural Property adopted in 1964.⁵⁹ Such Recommendation also urged the adoption of a multilateral instrument to curb the illicit trade in cultural objects but noted the obstacles to its realization, thereby counselling that bilateral and regional multilateral agreements be adopted in the interim.⁶⁰ Indeed, the United States in its reply to the draft Recommendation reaffirmed its continued objection to a multilateral agreement and annexed the views of the Association of Art Museum Directors (AAMD) of the United States and Canada in support.⁶¹ The AAMD noted that North American and European museums had, with the 'aid of knowledgeable and enterprising dealers', displayed works which represented the 'cultural heritage of mankind'. It stated that while its members 'rigorously avoided the purchase of publicized stolen art objects' it was rare that the 'precise provenance of origin of an item' was known. It concluded that museums 'deserved encouragement . . . and not the threat of being impeded in this dedicated purpose'.⁶² By contrast, in a 1962 Study, the International Council of Museums (ICOM) suggested that there was 'no contradiction' between the 'legitimate desire of States to preserve their national cultural heritage in their own territory' and the 'idea of a universal cultural heritage or a steady increase in international exchange in the cultural

56 Para.30, 1956 Recommendation.

57 Para.31, 1956 Recommendation.

58 Para.23(e), 1956 Recommendation.

59 Paras.13 and 16, Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO on 19 November 1964.

60 Means of Prohibiting the Illicit Export, Import and Sale of Cultural Property, Preliminary Report, 15 July 1963, UNESCO/CUA/123, 10.

61 Ibid.

62 Ibid.

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field'.⁶³ However, it was not optimistic that a dedicated convention would be realized in the light of the failure of the OIM drafts, the poor take-up of the 1935 PAU treaty,⁶⁴ and the 1954 Hague Protocol,⁶⁵ and the diversity of national legal schemes covering movable heritage.⁶⁶

Nonetheless, the momentum was for a multilateral agreement.⁶⁷ The campaign for an international instrument enabling the restitution of cultural objects to their country of origin, suspended because of the war, was put back on the international agenda by Mexico and Peru in 1960. This was the same year that the Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the UN General Assembly, which in coming decades would significantly change the constituency of UNESCO and other intergovernmental organizations.⁶⁸ Many of these newly independent states were establishing a national collection and becoming acutely aware of cultural objects removed during colonization and the losses that continued following independence. The adoption of multilateral agreements for the regulation of the international trade in cultural materials and international exchange became integral to redressing this phenomenon. The 1964 Recommendation, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁶⁹ and UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention),⁷⁰ reiterate several concerns that had coloured the inter-war OIM drafts. However, how they are articulated is decidedly different from their predecessors.

As the title of the 1970 Convention suggests, it is designed to facilitate the effectiveness of domestic laws concerning the transfer of cultural objects including export controls. It recognizes the 'indefeasible' right of each State Party to nominate certain cultural property as 'inalienable', and to legislate to prohibit exportation.⁷¹ It also incorporates Iraq's 1936 proposal that cultural objects removed without an export certificate be defined as illicit.⁷² Nonetheless, its transposition into the domestic law of States Parties, particularly

63 Technical and Legal Aspects of the Preparation of International Regulations to Prevent the Illicit Export, Import and Sale of Cultural Property, R. Brichet and ICOM, 14 April 1962, UNESCO/CUA/115.

64 Pan American Union (PAU) Treaty on the Protection of Movable Property of Historic Value, 15 April 1935, in force 17 July 1936, OASTS No.28.

65 Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 358.

66 CUA/115, 10–11.

67 See UNESCO, Report on the Possibility of Drafting a Convention concerning the Illicit Export, Import and Transfer of Ownership of Cultural Property, 22 April 1968, 78EX/9, p.3.

68 GA Res.1514(XV), 14 December 1960.

69 14 November 1970, in force 24 April 1972, 823 UNTS 231.

70 24 June 1995, in force 1 July 1998, (1995) 34 ILM 1322.

71 1970 Convention, Art.13(d).

72 1970 Convention, Arts 3 and 6(b).

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the emphasis on bilateral agreements by countries like the United States and Switzerland, has meant that it is far from the multilateral agreement that had been envisioned by its proponents.⁷³ The recognition of the export control laws of States Parties is even more circumscribed by the 1995 UNIDROIT Convention which articulates the applicable private international rules. The 1995 Convention contains a clear distinction between the legal framework governing the 'restitution' of cultural objects described as 'stolen' (Ch. II) and the 'return' of cultural material which had been 'illicitly exported' (Ch. III). Like the OIM drafts before it, the 1995 Convention requires a State Party to show that an illicitly exported object is of 'significant cultural importance' to it.⁷⁴

An aspect of the Cairo Charter which was incorporated into the 1970 UNESCO Convention is the regulation of the conduct of individuals and organizations involved in the trade in cultural objects. The Convention calls on States Parties to establish 'rules in conformity with the ethical principles set forth in this Convention' for curators, collectors, art and antiquities dealers and to ensure that they adhere to them.⁷⁵ This has been augmented by the ICOM Code of Ethics of Acquisition which was originally adopted by its General Assembly in the same year as the UNESCO Convention.⁷⁶ Also, UNESCO finalized an International Code of Ethics for Dealers in Cultural Property in 1999 which recognizes the role 'the trade has traditionally played in the dissemination of culture' to museums and private collectors and the need to eliminate activities from the profession which foster traffic of 'stolen, illegally alienated, clandestinely excavated and illegally exported' objects.⁷⁷ Dealers who have 'reasonable cause' to believe that an object is illicitly removed or exported should not exhibit, appraise or retain it and must facilitate its return.⁷⁸ These provisions complement the 1995 UNIDROIT Convention. Like the OIM drafts and 1970 Convention before it (Art. 7 (b)(ii)), the 1970 Convention provides that the bona fide purchaser be compensated when a stolen item is returned.⁷⁹ However, this is subject to the possessor having acted with due diligence in the circumstances.⁸⁰

73 See Swiss Federal Act on the International Transfer of Cultural Property of 20 June 2003; and US Convention on Cultural Property Implementation Act, 19 USC 2601.

74 1995 UNIDROIT Convention Art. 5(3).

75 1970 UNESCO Convention, Arts 5(f), 7(a) and 10. See also para. 8, 1964 Recommendation. While some States Parties has enacted laws regulating the activities of museum officials and dealers (e.g. France's Code of Ethics of Auction Houses of 2012) most have a voluntary professional code (e.g. Egypt's Antiquities Protection Law (No. 117 of 1983, amended 2010).

76 ICOM Code of Ethics of Acquisition adopted by the General Assembly in 1970, Code of Professional Ethics for Museums adopted 1984 and revised in 2006.

77 International Code of Ethics for Dealers in Cultural Property, adopted by the 30th session of the General Conference of UNESCO, November 1999.

78 Ibid. Arts 3, 4 and 5.

79 1995 Convention, Art. 4(1).

80 1995 UNIDROIT Convention, Art. 4(4) lists the following circumstances including 'the character of the parties, the price paid, whether the possessor consulted any reasonably

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Countries that host large art markets continued to push for a distinction to be made between cultural objects located in museums and those removed from archaeological sites.⁸¹ However, while these items are treated differently by the 1970 UNESCO Convention,⁸² the treaty explicitly covers archaeological material.⁸³ This is in stark contrast to the inter-war OIM drafts. This fundamental shift is explained by changing circumstances in the intervening period including: the proliferation of newly independent states which irreversibly altered the dynamics within intergovernmental organizations like UNESCO, the growing public recognition in countries like the United States of the impact of illicit antiquities trade on the movable heritage of neighbouring countries, and the finalization of regional multilateral agreements covering archaeological excavations.⁸⁴ Likewise, the 1995 UNIDROIT Convention encompasses items removed from unlawful excavations within provisions covering stolen cultural objects. However, the time limit for claims is different from claims for objects from identified monuments, archaeological sites or public collections.⁸⁵

These developments exemplify the recalibration, since the Second World War, of the balance between the aims of facilitating national laws concerning movable heritage, including export controls, and the promotion of the international exchange of cultural objects to foster appreciation of other cultures. International cooperation is defined by efforts to ensure that national laws regulating the transfer and export of cultural objects on a state's territory are rendered more effective.⁸⁶ The 1964 Recommendation calls on Members States, museums and all relevant institutions to collaborate to facilitate the return of cultural objects which have been illicitly exported.⁸⁷ These sentiments are replicated by the 1970 UNESCO Convention whose explicit purpose acknowledges that illicit transfer, export and import of cultural objects is 'one of the main causes of the impoverishment of the cultural heritage of countries of origin' and 'international cooperation constitutes one of the most efficient means of protecting each country's cultural property against [such] dangers'.⁸⁸ Likewise, the 1995 UNIDROIT Convention which is designed to facilitate the restitution of stolen or return of illicitly export objects to their countries of origin, in its preamble registers that States Parties are 'deeply concerned

accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances'.

81 16C/17, Annex II, para.19.

82 1970 UNESCO Convention, Arts 7(b) and 9.

83 1970 UNESCO Convention, Art.1(c).

84 See 1956 Recommendation.

85 UNIDROIT Convention, Art.3.

86 Third and fourth preambular recitals, 1964 Recommendation.

87 Para. 16, 1964 Recommendation.

88 1970 UNESCO Convention, Art.2.

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by the illicit trade in cultural objects and the irreparable damage frequently caused by it'.⁸⁹

However, UNESCO Member States had also adopted the Declaration of the Principles of International Cultural Cooperation in 1966 (1966 Declaration) which provides a cosmopolitan outlook in this field, reminiscent of the sentiments expressed in the inter-war period.⁹⁰ It recognizes that 'each culture has a dignity and value which must be respected and preserved' and that 'in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind'.⁹¹ Its preamble notes that 'the wide diffusion of culture . . . constitute[s] a sacred duty which all nations must fulfil in a spirit of mutual assistance and concern'. The 1970 UNESCO Convention in its opening preambular recitals references this Declaration and reaffirms that the 'interchange of cultural property among nations . . . enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations'.⁹²

While the *travaux* of the 1970 Convention suggested guarantees for the return of cultural property that had been loaned be included in the treaty, in order to facilitate international exchanges, no such provision appears in the final text.⁹³ By contrast, other contemporaneous multilateral initiatives do promote international exchange of cultural objects. The 1964 Recommendation provides that, to encourage 'legitimate exchange of cultural property', Member States should make items available for sale or exchange of the same type which have been prohibited from transfer or export.⁹⁴ The 1995 UNIDROIT Convention includes a provision which encourages the loan (and return) of cultural objects for international exhibitions.⁹⁵ The issue is treated at length in the Recommendation on the International Exchange of Cultural Property adopted in 1976,⁹⁶ which had its genesis in the aftermath of the 1970 UNESCO Convention. This synergy is captured in its preamble which observes that: '[T]he circulation of cultural property, when regulated by legal, scientific and technical conditions calculated to prevent illicit trading in and damage to such property, is a powerful means of promoting mutual understanding and appreciation among nations'.⁹⁷ And like the 1970 UNESCO Convention, it too opens with words which reflect the ethos of the 1966 Declaration on International Cultural Cooperation. The 1976 Recommendation signals that the 'systematic policy of exchanges among cultural institutions, by which each

89 Second preambular recital, 1995 UNIDROIT Convention.

90 Adopted by the General Conference of UNESCO on 4 November 1966.

91 1966 Declaration, Art.2.

92 First and second preambular recitals, 1970 UNESCO Convention.

93 78EX/9 Annex, 11.

94 Para.9, 1964 Recommendation.

95 1995 UNIDROIT Convention, Art.5(2).

96 Recommendation concerning the International Exchange of Cultural Property adopted by the General Conference of UNESCO on 26 November 1976.

97 Third preambular recital, 1976 Recommendation.

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would part with its surplus items in return for objects that it lacked . . . would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages'.⁹⁸

Yet, like the 1970 UNESCO Convention and 1956 Recommendation, the 1976 Recommendation is distinguishable from its inter-war counterpart, the 1936 Recommendation regarding International Art Exhibitions. Whereas the latter was complemented by the promotion of the circulation of casts and reproductions to facilitate the acquisition of the knowledge and appreciation of other cultures, the late twentieth century instruments are driven by an objective closely aligned with the push to curb the illicit trade in cultural objects, namely, restitution. The *travaux* of the 1970 Convention noted that while the lawful transfer and exchange of cultural objects would not be forbidden, it did recognize the need to control its export and sale 'in the interests of the great cause of international understanding do not lead to the disappearance of the cultural heritage of certain States'.⁹⁹ Indeed, in the post-1945 period, international exchange has been advocated by the same states that championed a multilateral agreement on illicit export, import and transfer of cultural objects.¹⁰⁰ As the 1976 Recommendation notes the circulation of cultural property is 'still largely dependent on the activities of self-seeking parties', which leads to 'speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading'.¹⁰¹ Accordingly, there was a need to foster a licit trade in cultural material to counterbalance to the illicit trade.¹⁰² While this necessarily entailed advocacy for the relaxation of domestic laws, the UNESCO Secretariat rejected calls by some Member States to remove a reaffirmation of obligations curbing illicit traffic.¹⁰³ This reaffirmation is contained in the final text of the Recommendation (para.15) and reiterated by the Universal Declaration on Cultural Diversity adopted by UNESCO in 2001.¹⁰⁴

The international exchange of original objects between museums and the reconstitution of dismembered cultural objects was viewed as vital to the efforts of newly independent states to build up their own museum collections.¹⁰⁵ In the late twentieth century, international exchange did not mean

98 Eighth preambular recital, 1976 Recommendation.

99 Preliminary Report, 8 August 1969, SHC/MD/3, 3.

100 Expert Meeting on the Exchange between Museums of Original Objects, Measures to Facilitate International Exchange of Cultural Property, ICOM, 31 March 1966, UNESCO/IEMO/3, 1, 2 and 7.

101 Third preambular recital, 1976 Recommendation.

102 Ibid.

103 SHC/MD/32, 23. See Japan (para.172) and Singapore (para.172).

104 Universal Declaration on Cultural Diversity, Main Lines of An Action Plan for the Implementation, Para.13, adopted by the General Conference of UNESCO on 2 November 2001.

105 Expert Meeting on the Exchange of Original Objects between Museums and the Reconstitution of Dismembered Works of Art, Final Report, 26 August 1966, UNESCO/SHC/1.

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short-term loans for the purpose of an international exhibition. Instead, the 1976 Recommendation defines it as 'any transfer of ownership, use or custody of cultural property between States or cultural institutions in different countries, whether in the form of a loan, deposit, sale or donation of such property'.¹⁰⁶ The *travaux* of the 1976 Recommendation makes plain that such international exchanges are rare and little heralded. Indeed, the Recommendation calls on Member States and their institutions to publicly circulate information about successful international exchanges to encourage future agreements.¹⁰⁷ Why this resistance and near silence? Countries calling for international exchanges as long-term loans or reconstitution of cultural objects are often motivated by the same objectives which drive restitution claims. Holding states and institutions resist such requests for similar reasons. Indeed, long-term loans are often the result of restitution claims. This is reflected in the mandate of the UNESCO Intergovernmental Committee for Promoting Return or Restitution which encourages international exchanges based on the 1976 Recommendation.¹⁰⁸

Regional and national responses

Regulation of the transfer, export and import of cultural objects through mutual assistance between states has been addressed by almost every region. The relative strength of these initiatives is mirrored by the existence of intergovernmental organizations and the uptake of international agreements like the 1970 UNESCO and 1995 UNIDROIT Conventions by states within the region. Also, where a regional organization has adopted a specialist instrument in the field, Member States' domestic laws are more likely to be harmonized with it, rather than those at the international level.

The Organization of American States' Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations¹⁰⁹ defines its dual purpose as the prevention of illicit export and import of cultural property and 'to promote cooperation among American states for mutual awareness and appreciation of their cultural property'.¹¹⁰ Further, it also provides that objects on loan 'to museums, exhibitions, or scientific institutions that are outside the state to whose cultural heritage they belong shall not be subject to seizure as a result of public or private lawsuits'.¹¹¹

106 Para.1, 1976 Recommendation.

107 Parts II and III, 1976 Recommendation.

108 See Art.4(7), Statute of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, adopted by the General Conference of UNESCO on 28 November 1978.

109 Resolution AG/Res.210(VI-O/76), OASTS No.47.

110 Organization of American States' Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, Art. 1.

111 Ibid. Art. 16.

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The Council of Europe and European Union have adopted their own specialist instruments for the protection and return of movable cultural heritage.¹¹² Following a review of its current legislative scheme covering mutual assistance in respect of export controls and restitution, the European Union established a panel of experts to prepare a toolkit covering good practice guidelines and codes of ethics on due diligence to tackle illicit trafficking in cultural objects, another group to consider means of simplifying the loan of artworks within Europe, and a study on the system of insuring, indemnifying and sharing liability for artworks.¹¹³ Various reports have made recommendations concerning measures covering immunity from seizure or suit.¹¹⁴

The African Union's Charter for African Cultural Renaissance of 2006 makes explicit reference to the 1970 (and 1954 Hague) Convention in its preamble.¹¹⁵ The Charter calls on African states to 'take steps to put an end to the pillage and illicit traffic of African cultural property to ensure that such cultural property is returned to the countries of origin.'¹¹⁶ While the Charter does reference mutual cooperation between African states in the cultural field and the 1966 UNESCO Declaration, it does not list protection and return of cultural objects in the enumerated list. Further, it requires States Parties to organize art exhibitions and establish cultural exchange programmes, but makes no mention of immunity from seizure or suit.¹¹⁷

There is no intergovernmental organization which covers Asia as a whole and this explains the lack of related action in this field. However, under the

112 See Council of Europe: Convention on Offences relating to Cultural Property, ETS No.119 adopted in 23 June 1985, not entered into force; and European Convention on the Protection of the Archaeological Heritage (revised) ETS No.121, adopted 16 January 1992, entered into force 25 May 1995. For the European Union: Reg. no.3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p.1; Reg. no.116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.2.2009, p. 1; and Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.3.1993, p.74 (as amended).

113 See CECOJI-CNRS-UMR 6224, Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union, Final Report October 2011; Conclusions of the Council of European Union on preventing and combating crime against cultural goods, 13 and 14 December 2011; Conclusions of the Council and of the Representatives of the Governments of the Member States meeting within the Council, on the Work Plan for Culture 2011–2014 OJ C 325, 2.12.2010, p.1. See Council Resolution of 24 November 2003, on cooperation between cultural institutions in the field of museums, OJ C 295, 5.12.2003, p.1.

114 See EU, OMC Expert Working Group on the Mobility of Collections, Final Report and Recommendations to the Cultural Affairs Committee on Improving the means of increasing the Mobility of Collections, June 2010, pp.11 and 21; Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards, Helsinki: Finnish Ministry of Education, 2006, p.12; Lending to Europe: Recommendations on Collection Mobility for European Museums, Rotterdam: Netherlands Ministry of Education, Culture and Science, 2005, para.3.3.

115 Adopted by the Heads of State and Government of the African Union on 24 January 2006.

116 Charter for African Cultural Renaissance, Arts 26 and 27.

117 Ibid, Art.31.

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Declaration on Cultural Heritage of 2000,¹¹⁸ the Association of South East Asian Nations (ASEAN) Member States agreed to facilitate regional and national efforts for the protection and restitution of movable heritage (paras. 2 and 10) and 'mutual understanding of the cultures and values systems among the peoples of ASEAN' (Preamble). It too does not explicitly reference international exchange or granting immunity to facilitate temporary loans for exhibitions or study.

In every region, domestic legal regimes for the export of cultural objects provide for export authorization for the purposes of temporary loans for exhibitions, study or restoration.¹¹⁹ Indeed, the relevant provision in the 1995 UNIDROIT Convention reinforces these efforts. Article 5(2) provides that an object temporarily exported for such purposes pursuant to domestic legislation and not returned according to the terms of the permit shall be deemed to be illegally exported.

However, states often do not have import control regimes and if they do they rarely cover objects temporarily imported for the purposes of an exhibition.¹²⁰ Australia had raised the failure of the draft 1976 Recommendation to properly address the issue of cultural objects acquired in the past but which could not be returned to the country of origin 'for loan, restoration, study of authentication etc., without risk of being seized because subsequent laws restrict the movement of that class of objects'.¹²¹ It should be noted that some domestic laws do provide for the temporary import of such objects to encourage exhibitions of cultural materials which may not otherwise be accessible to their people.¹²²

The spectre of possible restitution claims for cultural objects temporarily exported for an exhibition, study or restoration stymieing international exchange has led to demands from some lending states for stronger domestic

118 Adopted by the Foreign Ministers of the ASEAN Member Countries on 25 July 2000.

119 See for example France: Art.L111-7, National Heritage Code (Ordinance No.2004-178); Switzerland: Art.5(2), Federal Act on the International Transfer of Cultural Property (2003); Russian Federation: Art.9, Law No.4804-1 of 1993 on Export and Import of Objects of Cultural Value; Peru: Arts 36-39, Law No.28296 of 2004 General Law of the Cultural Heritage of the Nation; Ecuador: Art.40, Law on Cultural Patrimony No.3501 of 1979 (as amended); Cambodia: Art.57, Law on the Protection of Cultural Heritage of 1996 (in force 2006) NS/RKM/0196/26; China: Art.60, Law of the People's Republic of China on Protection of Cultural Relics (Order No.76 of 2002 and revised 2007); Mali: Art.18, Decree No.299 of 1986 regulating the Prospecting, Marketing and Export of Cultural Property; Egypt: Art.10, Antiquities Protection Law (No.117 of 1983, as amended); and Australia: s.10A, Protection of Movable Cultural Heritage Act 1986 (as amended).

120 See for example Russian Federation: Art.9, Law No.4804-1 of 1993.

121 International Instrument on the Exchange of Original Objects and Specimens among Institutions of Different Countries, 5 March 1976, Doc.SHC/MD/32, 4.

122 See for example, Australia: s. 12, Protection of Movable Cultural Heritage Act 1986 (Cth); Ecuador: Art.57, General Regulation to the Law on Cultural Patrimony Decree No.2733 of 1984, Art.57; and South Africa: Art.32(32), National Heritage Resources Act (No.25 of 1999).

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immunity from seizure and suit protections to be enacted by a borrowing state. Several countries have recently passed laws to make immune objects which are temporarily imported for an exhibition.¹²³ The potential for these laws to circumvent existing international obligations including those related to curbing the illicit trade in cultural objects is acknowledged.¹²⁴ Accordingly, guarantees of immunity under domestic law are often only provided after due diligence concerning title is demonstrated.¹²⁵ Restitution claims for objects on temporary loan have raised public awareness of contestations over title, provenance, and the broader historical and socio-economic context concerning the transfer and exchange of cultural materials, which should not be silenced.

Conclusion

The importance of the international exchange of cultural objects for fostering mutual understanding among people has been recognized since the earliest initiatives for the protection of movable heritage at the international level nearly a century ago. It remains a priority for the international community to this day. However, how it relates to efforts to regulate the transfer and restitution of cultural property has changed over time. As the 1966 Declaration makes clear, the diffusion of culture and its appreciation by other peoples can only occur with an acceptance that each culture forms part of the common heritage of all humanity and must be respected and preserved. For this reason, there has been an increasing acceptance of the importance of mutual assistance among states (and non-state actors) in curbing the illicit trade in cultural objects and stemming the losses it entails. The pursuit of this objective has not dampened with current efforts at the domestic and regional levels to facilitate international exhibitions. Indeed, it is telling that laws for immunity from seizure or suit for objects on temporary loan often require that due diligence has been undertaken in respect of title prior to the provision of such guarantees, in recognition of existing international rights and obligations concerning cultural heritage and human rights law. This present-day balance between encouraging international exchange and ensuring effective controls on the trade in cultural objects reflects an acceptance that these twin aims are not mutually exclusively – but can and must be mutually reinforcing.

123 See for example, Australia: Protection of Objects on Loan Act 2013 (Cth); UK: s.134, Tribunals, Courts, and Enforcement Act 2007 (UK) and Protection of Cultural Objects on Loan (Publication and Provision of Information Regulations); and US: Exemption from Judicial Seizure of Cultural Objects imported for Temporary Exhibition and Display, Pub. L. No.89–259 (S.2273) 79 Stat.985 (1965), 22 USC 2459.

124 See Australian Government, Immunity from Seizure for Cultural Objects on Loan, Discussion Paper, Canberra: AGPO, 2011, p.6; and OMC Expert Working Group, *op.cit.*, p.21.

125 *Ibid.* See for example, Swiss Federal Act on the International Transfer of Cultural Property of 2003, Arts 11 and 12; UK Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008.

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