

# 1

---

## The Trade in Art and Antiquities

---

JANET ULPH

### I Introduction

#### 1.01 Introduction

Art and antiquities can be beautiful, fascinating and highly valuable. It is unsurprising that those in possession of such objects may find that others covet them. The focus of this text is upon the law relating to cultural objects which have been stolen, looted, or illegally exported, in recent times. These objects may be secretly exported from the original countries in which they were located in order to escape detection. They may be sold on the black market abroad or, where the object is not easily identifiable, offered openly in foreign markets.

London is one of the prime locations in the world where there is a legitimate and healthy trade in works of art and antiquities. Unfortunately, stolen or looted objects may masquerade as legitimate purchases. This text will therefore discuss the dangers posed by the illicit trade in cultural objects, the risk that profits made will be used to further other criminal activities, and the strategies which could be employed to combat this trade. This will include an explanation of how the English criminal law, including money laundering measures, applies to those who deal in cultural objects in a domestic or international setting. As the illicit trade in art and antiquities is one of the most lucrative in the world, the powers of law enforcement agencies to seize these objects will be explained. Trafficking in cultural objects, because it is a global trade, is difficult to suppress; consequently the efforts made by international bodies and governments to combat it must also be considered.

The victims of this illicit trade will be anxious to recover their art and antiquities. This text will detail how they may do so, using private civil proceedings. These actions for recovery are often complex, because there will usually be competing claims between private individuals, or between individuals and governments, which may involve issues such as the application of foreign laws and the enforcement of foreign judgments. An analysis of the obstacles facing any claimant in attempting to recover cultural objects will therefore be provided.

#### 1.02 The Loss of Legal Rights to Claim

Over the centuries, individuals, museums and states have been wrongly deprived of cultural objects. The surrounding circumstances have often involved the abuse of the poor by the rich, or of the defenceless by the powerful. Where works of art or antiquities have been taken a long

time ago, such as the Elgin Marbles, it will be too late to bring a legal claim. The dispossessed individual or state can nevertheless argue that, on moral grounds, the object should be returned. There has been heated debate about objects taken centuries ago.<sup>1</sup> The history behind the loss of each object will vary, and the moral issues will be stronger in some cases than others. For example, paintings and other works which were taken during the Holocaust period and which have ended up as part of a UK national collection, are viewed as a special case.<sup>2</sup>

However, this text will be primarily concerned with the law. The focus is therefore necessarily limited to objects which have been taken in recent years.

### 1.03 The Illicit Trade in Cultural Property

In 2002, the UK Government became a party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (hereafter the UNESCO Convention 1970). All signatory states are encouraged to protect cultural property within their territories against ‘the dangers of theft, clandestine excavation, and illicit export’.

This text reflects the concerns of the Convention, dealing with the three situations which are usually encompassed within the phrase ‘illicit trade in cultural property’. First, the phrase may refer to paintings, statues and other cultural objects which have been stolen or misappropriated from a museum, or other public building, or private collection. Recent examples include the thefts of artefacts from the Egyptian Museum on 28 January 2011 during a period of civil unrest. Secondly, it may allude to the trade in objects of antiquity which have been secretly removed from archaeological sites or monuments. This has been a particular problem in Iraq since the 1990s, due to armed conflict. However, it has also affected many other countries, such as Africa, China, Italy, Central and South America, Turkey, Bulgaria, Iraq, Egypt and England.<sup>3</sup> A report by a House of Commons Select Committee noted: ‘Such objects have an owner and a victim – usually a State or a landowner – but their entry into and passage through the trade is more difficult to trace and quantify’;<sup>4</sup> in other words, these objects are not on any database and their loss may not be detected until years later. Thirdly, the phrase may refer to the export of an object without

<sup>1</sup> See eg JH Merryman, ‘Thinking About the Elgin Marbles’ (1985) 83 *Michigan Law Review* 1881, reproduced in JH Merryman (ed), *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, 2nd edn (The Netherlands, Kluwer International BV, 2009) (hereafter Merryman, *Elgin Marbles*); C Hitchens, *The Parthenon Marbles: the Case for Reunification* (London, Verso Books, 2008); S Waxman, *Loot: The Battle over the Stolen Treasures of the Ancient World* (New York Times Books, 2008); J Greenfield, *The Return of Cultural Treasures*, 3rd edn (Cambridge, CUP, 2007); J Cuno (ed), *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton NJ, Princeton University Press, 2009).

<sup>2</sup> In order to redress historic wrongs which were committed during the Nazi era, the UK Government established a Spoliation Advisory Panel in 2000 to make recommendations in relation to any claim relating to Holocaust items: *Official Report*, 8 May 2000, Vol 349, c 491. The Spoliation Advisory Panel has received only a small number of claims and has generally been successful in resolving them. However, certain museums lacked the statutory powers to de-acquire objects and were consequently unable to comply with any recommendation by the Panel to restore an object to the victim’s family: this problem has been successfully dealt with by the Holocaust (Return of Cultural Objects) Act 2009. See generally, NE Palmer, *Museums and the Holocaust* (Leicester, Institute of Art and Law, 2000); C Woodhead, ‘Moral claims against museums: the emerging concept of moral title to objects of cultural heritage’ (2009) 2 *International Journal of the Inclusive Museum* 1.

<sup>3</sup> UNESCO, Information Kit, *The Fight Against the Illicit Trafficking of Cultural Objects, The 1970 Convention: Past, Present and Future* (2011) CLT/2011/CONF.207/6. See also C Luke and JS Henderson, ‘The Plunder of the Ulu Valley, Honduras, and a Market Analysis for Its Illicit Antiquities’ in Brodie et al, (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (Gainesville, University Press of Florida, 2006) 147, 148.

<sup>4</sup> Culture, Media and Sport Committee, House of Commons Session 1999–2000 7th Report *Culture Property: Return and Illicit Trade* (3 vols) (London 2000) (The Select Committee Report) [8].

permission, in contravention of a country's export regulations. This does not necessarily mean that the object was stolen: the owner of the object may decide to secretly smuggle it out of the country or more brazenly to use forged documents to remove it. This is a particular problem in countries with extensive restrictions on exporting cultural objects, such as Italy.

#### 1.04 Big Business

Thieves and looters are usually motivated by greed. However, this is not always so. There is some evidence that thieves of works of art may steal from museums for their private pleasure: to enjoy the power of possession over an object by viewing it and handling it at will.<sup>5</sup> Even so, these thieves may eventually be tempted to sell the work because of its high value. In contrast, the excavation of antiquities which has taken place at archaeological sites in Iraq and other countries appears to be entirely motivated by a desire for money. An insatiable demand amongst collectors for certain types of antiquities has driven up prices and has led to extensive looting.

The removal of antiquities has become highly organised in recent years. They are taken and swiftly transferred to a chain of middle-men dealers, to be rapidly sold and resold. These transactions have been aided by a market culture where traditionally no questions relating to provenance were usually asked. Any lurking suspicion were suppressed. Corrupt customs officials might be prepared to provide false export documents. Restorers and scholars might unwittingly assist the trade: restorers might agree to clean objects of dirt, thereby eliminating information of where they had been buried; scholars might be persuaded to confirm their authenticity. This process of legitimisation ensured that these objects would realise high prices when sold in international markets.

Looted antiquities are often high-value items, and huge profits can often be made by dealers.<sup>6</sup> These lucrative transactions have brought this trade to the attention of terrorists<sup>7</sup> and international organised crime groups. It is increasingly recognised that professional criminals are involved in the illicit trade of art and antiquities. In the early 1990s, it was observed that only the drug trafficking trade was greater, in relation to the value of the assets transferred.<sup>8</sup> This view was echoed in the Report of the Law Reform Commission of Ireland published in 1997, in which it was observed that:

<sup>5</sup> S Mackenzie, 'Criminal and Victim Profiles in Art Theft: Motive, Opportunity and Repeat Victimization' (2005) X(4) *Art Antiquity and Law* 353, 357. See also, M Durney, 'Understanding the Motivations Behind Art Crime and the Effects of an Institution's Response' (2009) 2(1) *The Journal of Art Crime* 83; J Conklin, *Art Crime* (Westport, CT, Praeger, 1994) 119.

<sup>6</sup> MM Kersel, 'From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities' in Brodie et al (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (Gainesville, University Press of Florida, 2006) 188, 189–94.

<sup>7</sup> Bogdanos comments, in relation to objects stolen from the Iraq National Museum which were found in the possession of insurgents in Iraq, that 'the cosy cabal of academics, dealers, and collectors who turn a blind eye to the illicit side of the trade is, in effect, supporting the insurgents who are killing our troops in Iraq': M Bogdanos, 'Thieves of Baghdad' in PG Stone and J Farchakh Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq* (Woodbridge, The Boydell Press, 2008) 109, 124 (hereafter Stone and Farchakh Bajjaly, *Destruction of Cultural Heritage in Iraq*).

<sup>8</sup> NR Lenzner, 'Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?' (1994) 15 *University of Pennsylvania Journal of International Business Law* 469, 472–73. See also, M Olivier, 'The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property' (1996) 26 *Golden Gate University Law Review* 627. However, any estimate will lack precision and, for example, Podesta estimates that the illicit trade in cultural objects is the *third* most profitable illegal trade in the world, after drug and arms trafficking: JM Podesta (2008) 16 *Cardozo Journal of International and Comparative Law* 457, 461.

It is estimated that art smuggling is second only to drug dealing as the most lucrative crime in the world. In South America alone, it is estimated that between 2 and 10 billion dollars worth of art objects are lost each year through theft and smuggling. In Ireland, conservative figures suggest that more than £2 million of antiques are removed from this jurisdiction each year. The objects tend to re-emerge in markets in wealthy developed countries.<sup>9</sup>

The Select Committee on Culture, Media and Sport, in its 7th Report of 2000, added a note of caution to such speculation, remarking that, as the trade was an underground and secretive activity, it was difficult to provide an accurate estimate of the profits being made.<sup>10</sup> Whilst sources such as the Museums Association and the Metropolitan Police estimated that billions of profits were made each year and that profits had increased over the preceding 10 years, the Antiquities Dealers Association suggested that much lower figures would be more accurate.<sup>11</sup> However, the Select Committee went on to conclude on this issue that:

Although it is hazardous to extrapolate from domestic insurance claims, there have been estimates of the value of collectable items stolen annually within the United Kingdom of £300 million or more.<sup>12</sup> Even assuming that only a small proportion of such collectable items constitutes cultural property likely to enter an international market, that figure indicates the worldwide scale of stolen cultural goods likely to be susceptible to entry into the illicit trade. Readily identifiable cultural goods are often likely to be transferred across international boundaries because of the reduced likelihood of detection and the increased ease of sale.<sup>13</sup>

#### 1.05 The Impact of Laws which Protect Good Faith Purchasers

Illegal excavation of antiquities, or theft of objects from museums, churches and private collections, may occur in many countries around the world. As the trade in these objects is international in scale, international instruments will be considered in Chapter 2. However, this text will be primarily concerned with scrutinising the robustness of English laws. Even so, the impact of the domestic laws of other states should not be overlooked. For example, the laws of some states, such as France and Switzerland, provide generous protection for a good faith purchaser after a relatively short period of time against claims by the owner from whom the art or antiquity was stolen.<sup>14</sup> Any thief or fraudster sending an object abroad may be tempted to divert the goods through one of these countries, arranging a sale to a business partner. Once the purchaser has obtained good title through the generosity of a particular system's laws, the object can be sold with impunity within that country. This is why there are references to the 'illicit' trade in cultural property. The original appropriation

<sup>9</sup> The Law Reform Commission of Ireland, *Report on the Unidroit Convention on Stolen or Illegally Exported Objects* (1997) LRC 55 [1.4].

<sup>10</sup> In order to obtain a better understanding of the size of the problem, the Ministerial Advisory Panel had recommended that art theft should be a reportable offence: Report of the Ministerial Advisory Panel on Illicit Trade, Department for Culture, Media and Sport, December 2000 [74], [91].

<sup>11</sup> The Select Committee Report [9], [11].

<sup>12</sup> The Committee referred to J Butler, 'The Art and Antiques Squad' in KW Tubb (ed), *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues* (London, Archetype Publications, 1995) 226.

<sup>13</sup> The Select Committee Report [12].

<sup>14</sup> See *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, and other examples, discussed in the Report of the Ministerial Advisory Panel on Illicit Trade, Department for Culture, Media and Sport, December 2000, Annex A [14]–[16]. Switzerland has been a popular staging post for illicit material in the past, but has now begun to tighten up its laws: P Gerstenblith, 'Recent Developments in the Legal Protection of Cultural Heritage Antiquities' in Brodie et al (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (Gainesville, University Press of Florida, 2006) 68, 77.

of the item may have been illegal; however, its later transfer may result in the original owner, whether a private individual or a state, being divested of the legal title to it.

## 1.06 Terminology

### Cultural Goods, Cultural Property, Cultural Objects and Cultural Heritage

Terminology can be employed quite loosely in this field. Nevertheless, the precise meaning of a particular phrase will need to be ascertained where it is used in an international instrument, European Directive or domestic legislative measure. For example, the phrase ‘cultural goods’ is used in Regulation 116/2009, set out in an Annex to this text, and this phrase is carefully defined by the Regulation.

The phrase ‘cultural property’ is used in two leading international conventions. For example, Article 1 of the UNESCO Convention 1970 refers to ‘cultural property’ and provides a very wide definition of tangible and portable objects of importance for ‘archaeology, prehistory, history, literature, art or science’. The definition is set out and discussed in Chapter 2.<sup>15</sup> The drafters of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (hereafter, the ‘UNIDROIT Convention’) preferred the phrase ‘cultural objects’ which more closely reflected the domestic laws of countries such as France. It has been suggested that the phrase ‘cultural property’ places emphasis upon the property law aspects of cultural objects, thereby encouraging people to view them as commodities to be bought and sold.<sup>16</sup> The phrase ‘cultural object’ is seen as more neutral and one which clearly acknowledges an item’s cultural value. This rather subtle refinement has not been adopted in this text: it is hoped that the phrase ‘cultural’ will suffice to highlight the special status of these objects to humankind or to groups within a society.<sup>17</sup>

The phrase ‘cultural heritage’ is wide in scope and can refer to land, tangible objects and intangible knowledge which has a message which can be passed from one generation to another. This text focuses upon tangible, portable objects alone. Consequently, any references to cultural heritage will merely be acknowledging the fact that the objects in question have a significance for successive generations.<sup>18</sup>

### Looting

This phrase refers to objects which are illicitly unearthed, or which are forcibly removed from a temple, monument or other culturally significant structure, and taken from their country of origin.<sup>19</sup> Since the Second World War, scientific techniques for recovering information about the past have improved dramatically. Unfortunately, at the same time, looting of archaeological sites has increased exponentially.<sup>20</sup> One may add to this that the rapid expansion in easy travel and communications has unfortunately facilitated the stripping of archaeological sites on an industrial scale.

<sup>15</sup> See 2.14. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (the ‘Hague Convention’) also uses the phrase ‘cultural property’: see 2.04.

<sup>16</sup> See J Blake, ‘On defining the cultural heritage’ (2000) *International and Comparative Law Quarterly* 61, 64, 66.

<sup>17</sup> For a detailed discussion of these concepts, see B Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge, Cambridge University Press, 2005) 14–18.

<sup>18</sup> It may therefore implicitly suggest a need to preserve and protect: LV Prutt and P O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property; (1992) (1) *International Journal of Cultural Property* 307.

<sup>19</sup> S Mackenzie and P Green, *Criminology and Archaeology* (Hart, Oxford, 2009) 1.

<sup>20</sup> P Gerstenblith, ‘The Public Interest in the Restitution of Cultural Objects’ (2001) 16 *Connecticut Journal of International Law* 197.

### Market Nations and Source Nations

Merryman has suggested that the world can be divided into source nations and market nations.<sup>21</sup> In source nations, such as Iraq, China, Egypt, Mexico, Greece and Italy, the supply of desirable cultural objects will often exceed the internal demand. In market nations, such as France, Germany, Japan, Switzerland and the United States, the demand may exceed the supply. The demand for cultural objects in the market nation encourages exports of these things from source nations. This distinction is useful but simplistic, not least because some market nations, such as the UK, could also be viewed as source nations for certain types of cultural objects.

### Patrimonial Laws

A patrimonial claim refers to a claim by a foreign government asserting ownership over property.<sup>22</sup> This type of claim should be sharply distinguished from a personal claim by a foreign sovereign to recover unpaid tax, which may be refused by the English courts on public policy grounds as a penal law. In *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd*,<sup>23</sup> the Court of Appeal accepted that the Iranian Government had title to antiquities which had been illegally excavated. This was therefore a patrimonial claim which was being brought to recover them from the defendant art gallery and, on the facts, it succeeded. The phrase can also be found in the UNESCO Convention, where Article 9 is clearly referring to assets owned by the state when it provides that a Contracting State can call upon other states for assistance when its 'cultural patrimony' is in jeopardy from 'pillaging of archaeological or ethnological materials.'

### Pillage

This phrase can be found in Article 4(3) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (the 'Hague Convention'), which provides that Contracting States must undertake to prevent 'any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property'. It is also referred to in Article 9 of the UNESCO Convention, as discussed above. Arguably 'pillaging' is a loose phrase which connotes intentional or reckless conduct with an international dimension which leads to destruction and perhaps also theft.

### Provenance and Provenience

Provenance is concerned with information about the history of an object and, in particular, the succession of previous owners. It is important for any and every cultural object. If an object is offered for sale accompanied by documents which reveal its entire history, then it is clear (assuming that the documents are genuine) that it is not stolen or a forgery. In contrast, provenience is only relevant as regards objects of antiquity. Provenience is concerned with the location of the object and its stratified context. Stratigraphic analysis aids our

<sup>21</sup> JH Merryman 'Two Ways of Thinking About Cultural Property' (1986) 80 *American Journal of International Law* 831, reproduced in Merryman, *Elgin Marbles*, 82, 83.

<sup>22</sup> *Government of India v Taylor* [1955] AC 491 (HL) 511 (Lord Keith). See also *USA v Inkley* [1989] QB 255 (CA) 265; *Re State of Norway's Application (No 2)* [1990] 1 AC 723 (HL) 807.

<sup>23</sup> *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374; [2009] QB 22 (CA) [134], [149].

understanding of the evolution of human culture. As Gerstenblith has observed, 'Controlled scientific excavation of archaeological sites relies on an understanding of stratigraphy; remains of past cultures are deposited in layers (or strata), and each stratum represents a particular time period.'<sup>24</sup>

### Repatriation, Restitution and Return

'Repatriation' refers to the return of human remains or other property of cultural significance either to its country of origin or to a group of indigenous people. It does not suggest that the state has requested the return of the object. It is often used in situations where an object is returned at the request of a particular group, or where the object is simply purchased and taken back to its country of origin.<sup>25</sup>

The phrase 'restitution' is employed in the international arena in the context of disputes between states. According to UNESCO's *IGC Guidelines for the Use of the Standard Form Concerning Requests for Return or Restitution*, the phrase 'restitution' should be used in cases of 'illicit appropriation'.<sup>26</sup> In other words, the use of the phrase indicates that the objects were taken unlawfully, in contravention of the laws of the source country and the 1970 UNESCO Convention. The phrase 'restitution' might therefore be applied where an object was stolen from a museum: it indicates past wrongdoing.

In contrast, the phrase 'return' is quite neutral. It does not suggest that the object was appropriated in contravention of any law. If a state seeks 'the return' of an object, it may simply be doing so on the basis of cultural co-operation, rather than because the object has been misappropriated in the past. The return of an object may imply an *ex gratia* act by the donor.

This text is concerned with wrongdoing, but focusing upon English domestic law rather than public international law. In English private law, 'restitution' is frequently used to refer to situations where the defendant has been unjustly enriched at another's expense. In order to avoid any confusion, the neutral phrase 'return' will generally be used.

## II Cultural Loss

### 1.07 Introduction

Fraud in commercial dealings is unfortunately all too common. A court will frequently be invited to determine which of two innocent parties should suffer a loss as a consequence of the wrongdoing of another.<sup>27</sup> However, the consequences of theft and fraud involving commonplace items, such as grain, oil, machine parts and consumer durables, are normally purely financial. The position is different where cultural objects are involved. The Select

<sup>24</sup> P Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past' (2007) 8 *Chicago Journal of International Law* 169, 171.

<sup>25</sup> Examples are helpfully provided in the Museum Association's Policy Statement on Repatriation of Cultural Property; this Statement can be found on its web-site. See also MG Simpson, *Making Representations: Museums in the Post-Colonial Era* (Routledge, 1996).

<sup>26</sup> Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UNESCO 1986 (revised 1996).

<sup>27</sup> See J Ulph, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (Oxford, Oxford University Press, 2006) ch 11. In relation to theft, see 5.33–5.51.

Committee suggested that ‘the problem of the illicit trade should be measured not only in monetary terms but also in terms of its impact on cultural heritage and on the legitimate trade in cultural property’.<sup>28</sup>

Measuring the trade in monetary terms is important. Huge profits can be made from the illicit trade in cultural property, which can then be used to subsidise further criminal activity. As international organised criminal syndicates become richer, they become more powerful and more able to influence and even destabilise governments. However, apart from these considerations, there are further losses caused by this trade, which are considered below.

### 1.08 Thefts from Museums: Damage and Destruction

Theft of cultural property has become an increasingly important problem in recent years even in the most politically stable countries, where criminals may take cultural objects from churches, museums and private collections. One example is the theft of five irreplaceable paintings by Picasso, Matisse, Braque, Modigliani and Léger from the Museum of Modern Art in Paris in May 2010.<sup>29</sup> Their value in monetary terms would be impossible to calculate accurately. The public have been deprived of the pleasure of viewing them. However, more importantly, there is always the risk that they will have been damaged in the process of being removed. Paintings may be damaged as they are cut from their frames;<sup>30</sup> objects can be dropped in making a getaway. Until stolen items are recovered, there will be the constant anxiety that they have been damaged, stored in poor conditions, or even destroyed.<sup>31</sup>

### 1.09 Objects Unearthed or Removed from Monuments

Where objects of antiquity are dug out of the ground or forcibly removed from some ancient monument, 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.<sup>32</sup> The impairment of the accumulation of knowledge about particular types of antiquity, such as Cycladic figurines which have been subject to large-scale looting, makes it easier for forgeries to be accepted as genuine and to circulate in the market; conversely, a genuine object, which has been looted, will be all the more difficult to identify as authentic.<sup>33</sup> For example, Dacian people in Transylvania, mysterious contemporaries of the Romans, are believed to have created marvelous bracelets of gold. It is believed that looters took about two dozen of them from the Sarmizegetusa Regia archaeological site in Romania

<sup>28</sup> The Select Committee Report, [12].

<sup>29</sup> See the Report of the Ministerial Advisory Panel on Illicit Trade, Department for Culture, Media and Sport, December 2000 Annex A [29]–[30] for a list of some of the museums which have been burgled in recent years.

<sup>30</sup> It has been reported that a theft of a Van Gogh painting from the Khalil Museum in Cairo, Egypt, on 21 August 2010 involved cutting the painting from its frame. Paintings stolen from the Isabella Stewart Gardner Museum in Boston in 1990 had also been forcefully removed from their frames.

<sup>31</sup> There are suggestions that these paintings have been destroyed: H Samuel, ‘£100m masterpieces stolen from French museum “crushed by rubbish truck”’ *Daily Telegraph* (9 October 2011), discussed in Derek Fincham’s *Illicit Cultural Property* blog.

<sup>32</sup> C Renfrew, *Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology* (London, Duckworth, 2000). See also S Mackenzie and P Green, *Criminology and Archaeology* (Oxford, Hart Publishing, 2009) 2.

<sup>33</sup> P Gerstenblith, ‘Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past’ (2007) 8 *Chicago Journal of International Law* 169, 172.

between 1999 and 2001. Twelve bracelets, which are at least 2,000 years old, have been recovered and are available to the viewing public at the Romanian National History Museum in Bucharest. However, there is a question mark over whether the bracelets could be forgeries. The problem is that the Dacians lacked a written language. Consequently, very little is known about them; the main source of information is drawn from the description of their Roman conquerors, who would not necessarily have been impartial in their observations. It is uncertain whether the bracelets were used as part of a religious ceremony or not.<sup>34</sup> It is precisely in this sort of situation that archaeological objects can reveal so much about the past and where, if an archaeological site is damaged and stripped of key items, an artful forger has scope to create his own version of the past.

Looters are usually looking for objects which can easily be sold, and have no respect for the historical record. Thus, frescoes may be torn off walls and crudely cut up into sections which are easier to transport, without any regard being paid to the integrity of the original ensemble. The sections are likely to be sold individually rather than reassembled. Furthermore, other artefacts are often damaged or destroyed in the process of excavating particular objects which are seen as attractive and desirable. It has been estimated that looters only take 5 to 10 per cent of what could originally be found on any given site, destroying the rest in their search for sellable objects.<sup>35</sup> As a consequence, both the site and the individual object lose much of their significance. Valuable historical data will have been lost for ever. The removal abroad of a substantial number of items may erode a group's sense of identity.<sup>36</sup> The Law Reform Commission of Ireland has lamented the 'lost familiarity' with history that results from the transfer of cultural objects from their country of origin, leading to situations where communities become isolated from their own culture.<sup>37</sup>

### III The Global Market in Art and Antiquities

#### 1.10 A National and International Market

The UK has a prominent international market in cultural property, along with the United States, France, Hong Kong, Switzerland and Thailand. In 1999, the UK enjoyed 26 per cent of the global market and exports accounted for £629 million.<sup>38</sup> There are a number of associated services providers which depend upon the market, such as restorers and export agents. The British Government has therefore been keen to support the licit market in art and antiquities, because it benefits the domestic economy. Moreover, a market which deals in legitimate objects can be said to provide a public benefit in terms of stimulating interest in both domestic and global culture.

<sup>34</sup> T Watson, 'Ancient Transylvanians likely controlled untold riches in gold, suggests a new study of a cache of priceless, snake-shaped bracelets' (2011) January *National Geographic News* 13.

<sup>35</sup> S Melikian, 'A Degree of Destruction Unprecedented in the History of the World – And Yet I Support Collecting' *The Art Newspaper* (London, October 1995, No 52) 27.

<sup>36</sup> G Green, 'Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases' (2007) 44 *Harvard Journal on Legislation* 251, 252.

<sup>37</sup> (1997) LRC 55 [1.12]. See further, P O'Keefe and L Prot, *Law and the Cultural Heritage, Volume 3 – Movement* (London, Butterworths, 1989) 11 [108].

<sup>38</sup> 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 also, House of Commons Culture, Media and Sport Committee, *Sixth Report of Session 2004-05: The Market for Art*, 2005, Part 2.

The share of the global market which a particular country enjoys will vary according to a large number of factors, including its system of regulation and taxation and the state of its economy.<sup>39</sup> For example, there was a shift of the art market from New York to London in 2008, which was generally attributed to the weak rate of exchange of the US dollar. Both Sotheby's and Christie's are multinational organisations, well able to take account of changes in the market in a particular country.<sup>40</sup> However, the projected sale price is always significant: a seller or an auction house may choose one country rather than another in which to sell an object, in order to achieve the best price. Consequently, efforts made to regulate one market to prevent the illicit trade in cultural property need to be matched by a similar effort in all other countries. If this does not occur, sellers in possession of objects which they know or suspect have been stolen by looting or other means are likely to choose to sell these objects in a country which makes little effort to curb this trade and where they can be confident of making a lucrative deal.<sup>41</sup>

The UK Government has become concerned that business will be lost elsewhere due to two EU harmonisation measures. First, since 1999, the rate of value added tax has been raised on works of art imported into the UK from outside the EU from 2.5 per cent to the EU minimum rate of 5 per cent. Secondly, the UK has been forced to introduce a right, given to artists and their heirs, to a proportion of the resale price of their works of art (*droit de suite*). This right applies to all transactions involving art market professionals, such as auction houses and dealers.<sup>42</sup> It is difficult to predict the extent to which the UK share of the market may shrink as a consequence of these measures. However, their existence means that every effort will be made to ensure that any measures taken to counter the illicit trade in cultural property are necessary and proportionate, and do not simply have the effect of damaging the UK's share of the market.

## IV Iraq and the Pattern of Trade

### 1.11 Iraq

The risk of cultural objects being misappropriated and smuggled across borders is a worldwide problem. However, circumstances may arise whereby a country becomes particularly vulnerable to theft, looting and misappropriation. Iraq serves as an example. Prior to the twentieth century, those who dug objects up in Iraq could keep them. A law was introduced in 1922 which forced finders to share their spoils with the Iraq National Museum. The country was stable then and, over the years, the Museum in Baghdad amassed an impres-

<sup>39</sup> It was ever thus: for example, the decline of the art market in the 1680s mirrored the state of the country's economy at that time: I Robertson, 'Art, Religion, History, Money' in Robertson (ed), *Understanding International Art Markets and Management* (London and New York, Routledge, 2005) 37, 40.

<sup>40</sup> D Gledhill, 'Sotheby's brings down the hammer on UK jobs' *The Independent* (14 January 2001).

<sup>41</sup> S Mackenzie and P Green note that it was reported that certain dealers moved to the more congenial environment of Brussels after the enactment of the Dealing in Cultural Objects (Offences) Act 2003: 'Criminalising the Market in Illicit Antiquities: an Evaluation of the Dealing in Cultural Objects (Offences) Act 2003 in England and Wales' in S Mackenzie and P Green (eds), *Criminology and Archaeology: Studies in Looted Antiquities* (Oxford, Hart, 2009) 164.

<sup>42</sup> Artist's Resale Right Regulations 2006, SI 2006/ 346. These regulations were made pursuant to the Resale Right Directive, 2001/84/EC.