

## INTERNATIONAL ARTS LAW UPDATE

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### UNLAWFUL TRAFFIC IN CULTURAL HERITAGE AND UNESCO

[139] The 15th of November 2000 was the 30th anniversary of the adoption by the 16th General Conference of UNESCO of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*. UNESCO celebrated this occasion with a seminar assessing the current situation regarding illicit traffic in cultural heritage and the means being used to fight it.<sup>2</sup>

Over the years, the 1970 Convention has often been denigrated as ineffective, too bureaucratic and simply of little importance. As late as 1994 two significant commentators were saying that it was 'dépassée dans son esprit et sa teneur' (outdated in its spirit and its terms).<sup>3</sup> Although there have been relatively few examples of recovery of illicitly trafficked material under the Convention procedures, it has had a great moral influence. This has been particularly the case as regards the ethical practices of museums in which the Convention is often portrayed as setting the appropriate standard of conduct. In addition to that, the stage has now been reached where the Convention can have a more direct practical effect.

In each five year period since 1970 the number of accessions has never been less than eight.<sup>4</sup>

1970–1975	1976–1980	1981–1985	1986–1990	1991–1995	1996–2000
<b>24</b>	<b>20</b>	<b>11</b>	<b>13</b>	<b>15</b>	<b>8</b>

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<sup>2</sup> P J O'Keefe, 'Conference Report: 30th Anniversary of UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, France (November 15, 2000)' (2001) 10 *International Journal of Cultural Property* (forthcoming).

<sup>3</sup> Q Byrne-Sutton and M-A Renold, 'Role et contenu d'une nouvelle réglementation Suisse en matière de circulation des biens culturels' in Q Byrne-Sutton, F Mariéthoz and M-A Renold (eds), *La réglementation Suisse de l'importation et de l'exportation des biens culturels* (1994) 15, 36.

<sup>4</sup> Table reproduced from P J O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (2000) 9.

[140] The problem has been that the great majority of these States are the so-called source countries and only four — Australia, Canada, France and the United States of America — are 'art market' States. That position seems set to change dramatically. On 14 March 2001 the British Government announced that the United Kingdom will ratify the Convention. As London is one of the major world art markets, this could provide a much greater role for the Convention. The same is true of Switzerland, probably the most significant State through which flows the trade in cultural heritage. Switzerland is well on the way to introducing the necessary legislation for implementation of the Convention. Belgium has announced that it has begun the procedure towards ratification. Sweden has also announced it will ratify the Convention and Japan is actively considering the same step. The 1970 Convention could just now be said to be coming into its maturity.

UNESCO has also taken steps to supplement the Convention. It initiated and supported the development of the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*, which was adopted by States in 1995 and came into force on 1 July 1998.<sup>5</sup> More recently, the 30<sup>th</sup> General Conference of UNESCO in November 1999 endorsed an International Code of Ethics for Dealers in Cultural Property. Work began on the Code in 1987 following a request by the 5<sup>th</sup> session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation. The Code was officially launched during the 30<sup>th</sup> anniversary celebrations for the 1970 Convention. To publicise the Code, UNESCO produced a folder illustrated by Paul Klee's 'The Niesen' stolen from the Museum of Fine Arts in Berne in 1976. It contains a copy of the code of ethics in French and English together with an explanatory document in both languages. Copies can be obtained from the Cultural Heritage Division of UNESCO or electronically on <[www.unesco.org/culture/legalprotection/committee](http://www.unesco.org/culture/legalprotection/committee)>.

Codes of ethics adopted by many organisations were studied during the preparation of the UNESCO Code. Particular attention was paid to the *Code of Practice for the Control of International Trading in Works of Art* which was adopted by a number of

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<sup>5</sup> The drafting history and an analysis of the UNIDROIT Convention can be found in L V Prott, *Commentary on the UNIDROIT Convention* (1997).

British organisations in 1984<sup>6</sup> and taken over (with appropriate adjustments) by the *Confédération internationale des Négoçiants en Oeuvres d'Art* to become binding on that organisation's constituent bodies. The Rules of the International Association of Dealers in Ancient Art, which contain a Code of Ethics and Practice as Art 12, were also significant.

In Art 1 the Code commences with a general statement similar to that made in the British/CINOA Code and reminiscent of Art 3 of the 1970 Convention. The term 'professional trader' is used in order to cover situations where a person may be trading in cultural property as a professional but yet not be regarded as a dealer under the relevant law. Such persons are not to import, export or transfer the ownership of cultural property if they have reasonable cause to believe that it has been stolen, illegally alienated, clandestinely excavated or illegally exported. The qualifier 'reasonable cause' is used to prevent any notion of an absolute duty on the part of the trader. Nevertheless, it is to be read as requiring traders to investigate the provenance of the material they handle. It is not sufficient to trade in material without questions and consider that the clause only comes into effect when somehow evidence of the illegality is fortuitously acquired. To satisfy the 'reasonable cause' requirement, traders must actively examine the background of the objects they are offered and question the person concerned. They must pay attention to any circumstances likely to arouse suspicions, such as a demand for a large payment in cash or too low a price asked for a valuable object. That having been said, if there are no suspicious circumstances and questions are answered satisfactorily, traders can proceed with the transaction having no reasonable cause to believe there is any illegality.

[141] Of the four categories of suspect goods, only those illegally alienated may need explanation. These are items of the cultural heritage over which a State has a right of pre-emption or requires that any transfer be subject to specified conditions or only to certain transferees.

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<sup>6</sup> Christie's; Sotheby's; Society of London Art Dealers; British Antique Dealer's Association; Society of Fine Art Auctioneers; Incorporated Society of Valuers and Auctioneers; Antiquarian Booksellers' Association; Royal Institution of Chartered Surveyors; Fine Art Trade Guild; British Association of Removers; Antiquities Dealers' Association.

Under Art 2 a trader who sells on his or her own behalf is regarded as guaranteeing title to the buyer; contrariwise if he or she is only acting as agent for the seller and makes this known to the buyer. This provision is designed to make clear whether the buyer or the seller has the onus of checking provenance and increases the incentive for the trader or buyer to check the title diligently.

Broadly speaking, Arts 3 and 4 require a trader not to take part in any transaction concerning objects which he or she has reasonable cause to believe were unlawfully excavated or exported. If the trader is in possession of the object, all legally permissible steps to return it are to be taken. Under Art 5, the trader should not assist the illicit transfer or export of an object by offering specialist services such as exhibition, attribution, appraisal; nor will he or she advise the person offering the item where these services may be obtained. Such services are often very significant in increasing the value of an object, particularly one that does not have an acceptable provenance. Denial of them by traders should have a significant affect on the illicit trade.

In a recent article Souren Melikian describes the destruction wrought by traders breaking up manuscripts from the Middle East so that individual illustrations can be sold to collectors interested only in their value as art.<sup>7</sup> But this is only one example of a practice whereby traders look to increase their profits by dismembering heritage items so that the individual pieces can be sold at higher overall prices to a number of collectors. Traders adhering to the UNESCO Code of Ethics undertake not to engage in such practices.

Certain items of cultural heritage were created as a unit and meant to be kept together. An obvious example of this are architectural features attached to a structure such as fireplaces, architraves, panelling. Once again adherents to the Code undertake to the best of their ability to keep such things together.

The UNESCO Code of Ethics for Dealers in Cultural Property is purely voluntary. It could be adopted by traders on an individual basis or by an association. The Code

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<sup>7</sup> S Melikian, 'Illusion and Delusion' [March 2001] *Art & Auction* 94.

does specify that violations will be rigorously investigated by a body to be nominated by participating dealers. This suggests that there will be an association involved. In its supporting literature, UNESCO suggests that dealers who adopt the code will be recognisable — presumably by self identification or use of a logo UNESCO has introduced — and that it will follow closely the practice of dealers who use the Code. UNESCO considers that the public will be entitled to expect that dealers adopting the Code have been diligent in ascertaining the origin of the goods they deal in and will be able to give assurances of their good provenance.

### EUROPEAN LANDSCAPE CONVENTION

This Convention originated in the Council of Europe's Congress of Local and Regional Authorities (CLRAE). In 1994 CLRAE had established an ad hoc drafting group composed of members of its Chamber of Local Authorities and Chamber of Regions. A preliminary draft convention was produced in 1997. The Committee of [142] Ministers set up a select committee of experts to prepare a European landscape convention on the basis of the CLRAE draft. This was opened for signature on 20 October 2000<sup>8</sup> and will come into force following 10 ratifications. As at 28 April 2001, there were 21 signatures but no ratifications.

Monuments — the built remains of past civilizations — were the first subject of historic preservation. Other buildings then came to be protected from destruction for various reasons. Later again, it was realised that, to preserve the value of protected monuments and buildings, their surroundings also had to be included by the creation of a buffer zone. The next step was to see value in groups of buildings that, perhaps, had no particular significance individually. Finally the move was made to protect buildings together with their associated land where the two were integrated. At the same time as this progression in protective regimes was being made, a system of national parks came into being. Park development and historic preservation came together in the concept of landscapes which was the topic of the 1962 UNESCO *Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites*, in 1992, was introduced into the guidelines for the *Convention*

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<sup>8</sup> European Treaty Series No 176; text available at <[www.nature.coe.int](http://www.nature.coe.int)>.

*concerning the Protection of the World Cultural and Natural Heritage* 1972. All these developments concerned features of cultural and natural heritage which were considered special in some way. The *European Landscape Convention* departs from this approach. In the words of one person involved in its preparation:

The future Convention should cover both outstanding and ordinary landscapes. This is because all landscapes help determine the quality of Europe's living environments. Landscape protection measures should not be confined to outstanding sites and landscapes.<sup>9</sup>

Following on this objective, 'landscape' for the purposes of this Convention is very broadly defined as an area 'perceived by people, whose character is the result of the action and interaction of natural and/or human factors' (Art 1). Its scope is specifically stated to extend to 'landscapes that might be considered outstanding as well as everyday or degraded landscapes' (Art 2). To a large extent, the *European Landscape Convention* is not an instrument for the protection of the cultural and natural heritage *per se*, but one to further certain social and environmental goals by improving the quality of life of Europe's inhabitants. Protection of the cultural and natural heritage will likely occur as a byproduct of this larger objective.

There is little in the Convention establishing specific duties and responsibilities on the part of Member States. Rather it sets out a general framework within which States undertake to adopt policies and implement procedures seen as desirable for effective landscape protection, management and planning. The two significant operative articles are 5 and 6. Under 5(a) States party are 'to recognize landscapes in law' and 6(E) requires them to 'introduce instruments aimed at protecting, managing and/or planning the landscape'. At the moment only a handful of Member States of the Council of Europe have any legislation concerning landscapes: Czech Republic, Denmark, France, Germany, Norway, Slovak Republic, Switzerland. The problem will be to implement legal measures protecting, managing and planning landscapes without running foul of the human rights enjoyed by European inhabitants particularly under the *European Convention on Human Rights*. Neither that Convention nor the

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<sup>9</sup> R Priore, 'Le projet de Convention européenne du paysage' in G Hajós (ed), *Denkmal — Ensemble — Kulturlandschaft am Beispiel Wachau* (1999) 33, English summary at 38.

*European Landscape Convention* gives any guidance on how this may be done. For example, the former Convention protects a person's 'home' and Art 1 of the First Protocol to that Convention states that every 'natural or legal person is entitled to the peaceful enjoyment of his possessions'.<sup>10</sup> Application of these principles is complex even in the context of landscapes regarded as having special importance. It will be much more [143] difficult in respect of those with no particular importance.<sup>11</sup> Consider the example of a person whose home and surroundings does not measure up to the standards of tidiness demanded by his or her neighbours or the local authority. It should be noted that the Explanatory Memorandum to the *European Landscape Convention* states that 'there may be areas whose landscapes are severely damaged and need entirely reshaping'.<sup>12</sup>

Article 5(d) is also significant in that here States are required to integrate landscape considerations into all its other activities. Presumably, integration of 'landscape' means that attention has to be given to its protection, management and planning when assessing these activities. The requirement is extremely broad. For example, under the *European Convention on the Protection of the Archaeological Heritage (Revised)* 1992, archaeology is to be integrated into the planning process. The *European Landscape Convention* goes much further. Not only are planning policies to consider landscapes but also cultural, environmental, agricultural, social and economic policies as well as 'any other policies with possible direct or indirect impact on landscape'.

There are a number of articles designed to increase the knowledge and appreciation of both the public and officials. For example, Art 6 sets out undertakings for States in respect of such aspects as awareness raising; training and education; identification and assessment. These are very general and are to be found in many instruments of a similar nature. Articles 7 and 8 deal respectively with the consideration of landscape in formulating international policies and co-operation in the provision of mutual assistance and exchange of information. The topic of transfrontier landscapes is treated in Art 9, but only in a rudimentary fashion. This is potentially a very important issue in the European context but the article goes no further than requiring State to

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<sup>10</sup> Both of these are subject to qualifications allowing the State to act against the home or property in certain circumstances.

<sup>11</sup> P J O'Keefe, 'Legislation and Cultural Landscapes' in G Hajós (ed), above n 9, 39.

encourage co-operation on dealing with such landscapes at the local and regional level and, wherever necessary, the preparation and implementation of joint programs. Provision is made for a Council of Europe Landscape Award which may be conferred on local and regional authorities where their protective, managerial and planning policies in relation to landscape 'have proved lastingly effective and can thus serve as an example to other territorial authorities in Europe'. Non-governmental organisations may also have the award conferred on them where they have made a 'remarkable contribution' to the same end (Art 11).

It may be that the drafters of this Convention, in their desire to protect, manage and plan landscapes, have produced an instrument which seeks to go too far; one that, because the obligations are so broad and diffuse, will have little influence. Only time and experience will tell. Implementation of the Convention is to be monitored by a committee of experts set up by the Committee of Ministers. But this will only occur after the Convention has come into force.

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<sup>12</sup> Electronic version, 14.