

INTERNATIONAL ARTS LAW UPDATE

RECENT DEVELOPMENTS

PATRICK J O'KEEFE¹

[347] **Implementing the International Conventions**

There are two major international conventions attempting to combat the unlawful trade in cultural heritage: the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property 1970* (the UNESCO Convention) and the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Property 1995* (the UNIDROIT Convention). The first has 100 and the second 21 States Parties.

Both Conventions are complex documents. In particular the methods States are using to implement the UNESCO Convention lead to a wide range of possibilities when return of an object is being sought. For example, Australia prohibits the import of any object which is regarded as cultural heritage by another State and which has been unlawfully exported. Canada prohibits the import of objects stolen or illegally exported from States with which it has a reciprocal arrangement (membership of the UNESCO Convention satisfies this test) but there is provincial court² authority to the effect that the prohibition only applies to objects unlawfully exported after Canada became party to the Convention. The situation in the United States of America is much more complex. Import of illegally exported cultural heritage objects is only prohibited if the United States has a bilateral agreement to this effect (in addition to the 1970 Convention) with the country requesting return. Japan became party to the 1970 Convention on 9 September 2002. However, its implementing legislation applies only to cultural property which has been 'designated' by another State Party in accordance with art 1 of the UNESCO Convention. Much depends on whether the Japanese authorities interpret this to mean that an object must appear in an inventory as opposed to a broader concept of 'designation' which would recognise as 'designation' categories such as those used in the Australian, Canadian and British

¹ Adjunct Professor, Research School of Asian and Pacific Studies, Australian National University.

² *R v Heller* (1983) 27 Alta L R (2d) 346; Appeal decision (1984) 51 A R 73.

export control systems among others.³ Furthermore, Japan has basically limited its import control to objects stolen from a museum or similar institution under art 7. In the case of objects [348] which are illegally exported, the only control appears to be through administrative measures providing deterrence to their acquisition by museums.⁴

In addition to the above factors, there are various practical matters to be taken into account in seeking return of cultural heritage. Probably foremost is the cost involved. For example, in *Bumper Development Corporation Ltd v Commissioner of Police*,⁵ the Government of India was awarded costs for litigation in London of £303,489.67 plus interest against Bumper, but eventually had to sue in Alberta six years later to recover them. The time of senior officials also has to be factored into these costs. The requesting State has to be aware that usually the State being approached will not have made provision for the funding of searches, of administrative and possible legal proceedings involved in responding to a request. It may be necessary to hire technical experts to advise on a variety of issues including identification of the object. Special storage facilities may have to be provided for safekeeping of the object. Interacting with all of this, there can be difficulties brought about by differences such as legal system, language, culture, race and religion.

UNESCO and the International Council of Museums (ICOM) have realised that national administrators — particularly museum professionals, police and custom officials — need instruction in implementing handling requests for return under the Conventions. Regional workshops have been conducted in many parts of the world in order to advance their understanding. Most recently there have been three in the Asian/Pacific region organised by ICOM led by its Asia Pacific organisation — ICOM-ASPAC. The first was held in Hanoi, Viet Nam, 9–13 April 2001 in partnership with the Viet Nam Ministry of Culture and Information involving all the 10 Southeast Asian countries. The second was held in Suva, Fiji, June 2002 through the UNESCO Apia Office bringing together delegates from all the Pacific Island

³ P J O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (Institute of Art and Law, Leicester, 2000) 36–9.

⁴ A short commentary on the law and a translation of the law itself appears in (2003) 8 *Art Antiquity and Law* 107.

⁵ [1991] 4 All ER 638.

countries. The third was convened in the Cultural Triangle, Sri Lanka, 24–29 August 2003 for South Asian countries. Funding for these workshops came from the Netherlands, UNESCO and Sweden respectively. They were planned and executed by the ICOM Asia Pacific Secretariat and Chairman located at the Australian National University together with ICOM Paris.

Seventeen South and Southeast Asian States sent participants to the Sri Lanka workshop. In addition there were representatives from UNESCO, Interpol, International Customs Union and various ICOM international committees such as those on security, documentation, education and conservation. Proceedings took place mainly at Habarana Lodge with visits to the world heritage sites of Anuradhapura and Polonnaruwa. Participants were welcomed by Amareswar Galla, Chairperson, ICOM-ASPAC and principal organiser of the workshop. From the keynote speech given by Lyndel Prott, Australian National University, participants learnt that only 16 of the 43 States in the Asian/Pacific region are party to the 1970 Convention and only 2 to the UNIDROIT Convention. She stressed that the two Conventions were completely compatible and that UNESCO had requested UNIDROIT to prepare the UNIDROIT Convention as UNESCO did not have a mandate to work in areas of private law. Country reports were made on progress in the protection of cultural heritage in Southeast Asia since the Hanoi Workshop in 2001. Karl Heinz Kind spoke of the work of Interpol in the fight against illicit traffic and Bryan Hanley, ICOM Asia Pacific, of the need for proactive rather than reactive policing. Patrick O’Keefe, Australian National University, presented the participants with a case study based on the events which led to the case *Bumper Development Corporation Ltd v Commissioner of Police* and drew from this a number of questions to be considered during the workshop.

Participants were divided into three working groups dealing respectively with: protection of artifacts, security measures and community involvement; linking museums, police and customs to strengthen cultural heritage protection; documentation and inventorying. The three groups all produced recommendations which will be reproduced with the proceedings of the conference. But the great [349] advantage of this type of workshop is that participants can go back to their countries knowing people in other areas of administration and then proceed to network. In this

way the lessons learnt can be spread among a much wider group. Persons giving the country progress papers all spoke of how this had happened after the Hanoi workshop.

Object ID

The portion of the workshop at Polonnaruwa Museum was devoted to a study of the use of Object ID. This is an international standard establishing the minimum data needed for identification of an object of cultural heritage.

Individual museums have traditionally established their own guidelines for recording information on new acquisitions. Inevitably these have varied over time depending on the ideas of individual administrators; the time available for the work; the skill of the person concerned and the equipment available to do the work. But these records may not contain the information necessary to enable identification of the object if it disappears.

Article 5(b) of the UNESCO Convention does require States Members to establish and maintain 'a national inventory of protected property' which would consist of a 'list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage'. There has been little official comment on this provision but what there is seems to regard the inventory as having the scientific objective of providing information from which judgments can be made on the need for protection of particular objects. This means that these inventories may not contain information necessary for the ready identification of the object for police and customs purposes.

In 1993, the Getty Information Institute initiated a collaborative project with government administrations, museums, dealers, police, customs, the insurance industry and appraisers to find a model system of core data which would facilitate such identification. In July of that year, the Institute convened a meeting in Paris attended by representatives of UNESCO, the Conference for Security and Co-operation in Europe, Council of Europe, ICOM, Interpol and the US Information Agency to discuss the concept. The participants agreed on the need for an international documentation standard to identify specific items of cultural heritage. A

series of meetings was then held with interested parties as listed above and broad consultations made. Out of these efforts came 'Object ID'.

The following is the agreed check list for recording of details of an object:

Take Photographs

Photographs are of vital importance in identifying and recovering stolen objects. In addition to overall views, take close-ups of inscriptions, markings, and any damage or repairs. If possible, include a scale or object of known size in the image.

Answer These Questions:

Type of object

What kind of object is it (eg painting, sculpture, clock, mask)?

Materials and Techniques

What materials is the object made of (eg brass, wood, oil on canvas)? How was it made (eg carved, cast, etched)?

[350] Measurements

What is the size and/or weight of the object? Specify which unit of measurement is being used (eg cm, in) and to which dimension the measurement refers (eg height, width, depth).

Inscriptions and Markings

Are there any identifying markings, numbers, or inscriptions on the object (eg a signature, dedication, title, marker's marks, purity marks, property marks)?

Distinguishing Features

Does the object have any physical characteristics that could help to identify it (eg damage, repairs, or manufacturing defects)?

Title

Does the object have a title by which it is known and might be identified (eg 'The Scream')?

O'Keefe, 'International Arts Law Update'

Subject

What is pictured or represented (eg landscape, battle, woman holding child)?

Date or Period

When was the object made (eg 1893, early seventeenth century, Late Bronze Age)?

Maker

Do you know who made the object? This may be the name of a known individual (eg Thomas Tompion), a company (eg Tiffany), or a culture (eg Hopi).

Write a Short Description

This can also include any additional information which helps to identify the object (eg colour and shape of the object, where it was made).

Keep It Secure

Having documented the object, keep this information in a secure place.

Object ID was endorsed by the 30th General Conference of UNESCO in November 1999, following a Recommendation by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation which adopted Object ID as the international standard for recording minimal data on movable cultural property which should be used to the fullest extent possible by all Member States. It has been endorsed by other nongovernmental organisations and incorporated a number of law enforcement databases, including the National Stolen Art File of the United States Federal Bureau of Investigation. It has been translated into more than 13 languages. Following the abolition of the Getty Information Institute by its parent body, the J Paul Getty Trust, the Object ID project found a new home at the Council for the Prevention of Art Theft (CoPAT) in the United Kingdom. However, CoPAT has done nothing to advance Object ID outside Europe and very little inside. It has been promoted in workshops like those in Asia run by UNESCO, ICOM, Interpol and similar bodies. A computer inventory system based on it has been sponsored by the Tropenmuseum Amsterdam and the Netherlands Government. The system has been the basis of pilot projects in English and French in Viet Nam and Mali respectively.

The administration of the Cultural Triangle in Sri Lanka is a great supporter of Object ID and is gradually converting its records to incorporate the standard. At Polonnaruwa Museum participants in the workshop engaged in an exercise of describing various objects in terms of the standard. It quickly became apparent that heritage experts saw the objects in terms of their cultural context, for example, saying that [351] the figure was wearing a dhoti with a sacred band over one shoulder. Police and Customs officials saw it as dressed in a semi-transparent cloth reaching half way down one leg and to the ankle on the other. The exercise brought out the necessity to avoid using technical terms in describing an object so that officials in other countries can more easily recognise an object if it comes into their hands.

Certainly the most important result of these workshops was this recognition that there are different ways of seeing things and the necessity for all involved in preventing unlawful trade in cultural objects to work together. Contacts made in the workshops enable exchange of information and experiences not only internationally but also within countries. Networks are built and administration becomes more effective and efficient. International conventions and national laws based on them set the framework but cannot make progress by themselves without the results of their practical implementation.