

# STRENGTHENING THE INTERNATIONAL REGIME FOR THE PREVENTION OF THE ILLICIT TRADE IN CULTURAL HERITAGE

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*[Whilst the illicit movement and trade of movable cultural heritage has long been of international concern, it has re-emerged in recent times as a contemporary problem for international law — states in conflict, such as Afghanistan, Iraq and Palestine, have opened up new sources of terrestrial cultural heritage in need of protection, and improved diving technologies have exposed the riches of underwater cultural heritage to unscrupulous operators. The UNESCO Convention was adopted in 1970 to address such issues, with only limited success due to the reluctance of ‘market’ states to become state parties. This commentary considers a number of recent moves that have contributed to a strengthening of the current regime to prevent the illicit recovery, movement and trade in cultural heritage, including the adoption by UNESCO of a convention specifically aimed at protecting the underwater cultural heritage. Given the difficulty of enforcing foreign cultural heritage laws in ‘market’ states, ‘source’ states have had to rely on claims of ownership, rather than illicit recovery and exportation claims, as the basis for repatriation. This commentary also considers the landmark Schultz case in the US, the world’s major market state for cultural heritage, which has taken a more stringent approach to enforcing foreign state ownership laws.]*

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## I INTRODUCTION

In 1970, due to concern with the growing market demand for cultural heritage and the illicit trade that has resulted from this demand, the United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’) adopted the *Convention on the Means of Prohibiting and Preventing the Illicit Import,*

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*Export and Transfer of Ownership of Cultural Property*.<sup>1</sup> Despite this, the hope of reducing exploitation of the world's archaeological and cultural heritage has been eroded as illicit trade has increased over the past three decades.<sup>2</sup> The trade is now estimated to be worth up to US\$2 billion a year, second only to the illicit trade in drugs and weapons.<sup>3</sup> Recently, however, there has been a resurgence in the battle against this illicit trade, both in the international and domestic spheres. In part, this may be a result of concerns with regard to cultural heritage in danger from military activities and regimes which often spawn an illicit trade, as demonstrated by the destruction of the Bamiyan Buddhas in Afghanistan,<sup>4</sup> the historic town of Nablus in Palestine<sup>5</sup> and more recently, the destruction and looting of the National Museum of Iraq, Baghdad's National Library and other archaeological sites in Iraq.<sup>6</sup> These concerns have necessitated a reconsideration of the international regime of conventional international cultural heritage law as embodied in a series of conventions. In a similar manner, the discovery in 1985 of the *RMS Titanic* wreck has indirectly contributed to the development of a new instrument aimed at the protection of underwater heritage.

In November 2001, UNESCO adopted the *Convention on the Protection of the Underwater Cultural Heritage*.<sup>7</sup> The *UCH Convention*, while not yet in force, will supplement UNESCO's three other heritage conventions: the 1954 *Convention on the Protection of Cultural Heritage in the Event of Armed Conflict*,<sup>8</sup> the 1972 *Convention concerning the Protection of the World Cultural*

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<sup>1</sup> Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) ('*UNESCO Convention*'). As at 1 October 2003, there were 100 states parties.

<sup>2</sup> Neil Brodie, Jennifer Doole and Colin Renfrew (eds), *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* (2001) xi. Brodie and Doole note that empirical data on the rates of archaeological destruction is often difficult to obtain, if not unobtainable: Neil Brodie and Jennifer Doole, 'Illicit Antiquities' in Neil Brodie, Jennifer Doole and Colin Renfrew (eds), *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* (2001) 1, 3. See also Neil Brodie and Kathryn Tubb (eds), *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology* (2002) 280.

<sup>3</sup> Accurate data is difficult to obtain as the trade is illicit: see Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material* (2000) 23.

<sup>4</sup> Martin Bailey, 'Bamiyan Buddhas May be Rebuilt', *The Art Newspaper* (London, UK), March 2002, 1.

<sup>5</sup> Robert Bevan, 'Our Man Returns from Nablus: The Historic Core Has Been Wrecked', *The Art Newspaper* (London, UK), November 2002, 8.

<sup>6</sup> Martin Bailey, 'International Outrage as Great Museum is Sacked', *The Art Newspaper* (London, UK), May 2003, 1, 6; Eric Gibson, 'Steal This Vase? Iraqis Get Some of Their Own Back', *The Wall Street Journal (Eastern Edition)* (New York, US), 18 April 2003, W13; David D'Arcy, 'Iraq's History is Our History Too', *The Art Newspaper* (London, UK), November 2002, 1.

<sup>7</sup> Opened for signature 3 November 2001, 41 ILM 40 (2002) (not yet in force) ('*UCH Convention*'). The *UCH Convention* was adopted at the plenary session of the 31<sup>st</sup> General Conference of UNESCO on 2 November 2001 by a vote of 81 in favour, 4 against (Norway, the Russian Federation, Turkey and Venezuela) and 15 abstentions (Brazil, Colombia, the Czech Republic, France, Germany, Greece, Guinea-Bissau, Iceland, Israel, the Netherlands, Paraguay, Sweden, Switzerland, the UK and Uruguay). The *UCH Convention* will enter into force three months after the date of the deposit of the 20<sup>th</sup> instrument of ratification, acceptance or approval.

<sup>8</sup> Opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) ('*1954 Hague Convention*'). As at 1 October 2003, there were 105 states parties.

and Natural Heritage<sup>9</sup> and the 1970 *UNESCO Convention*. The adoption of a new international convention in this sphere enables the provision of a more integrated protection regime for terrestrial and underwater cultural heritage. However, equally important is the extent to which the existing conventions are increasingly having a positive effect on the fight against this illicit trade, not only through existing states parties' implementation of the *UNESCO Convention*, but also through its increasing adoption by market states. This commentary will consider these developments in the battle to prevent the illicit trade in cultural heritage.

## II THE ILLICIT TRAFFIC IN UNDERWATER CULTURAL HERITAGE

The illicit trade in cultural heritage is certainly not a new phenomenon. However, technological developments have dramatically increased the ability of unscrupulous agents to access a greater quantity of cultural heritage items with more efficiency and in more remote areas.<sup>10</sup> This has included underwater areas, where new diving techniques and remotely-operated vehicles have enabled access to underwater cultural heritage lying in the deepest points of the world's oceans.<sup>11</sup> Recreational diving techniques and technology have also allowed a greater number of people to access shallower waters. With this ability has come an increase in the illicit recovery of and trade in underwater cultural heritage.<sup>12</sup>

The *UCH Convention* is an attempt to address this emerging concern. The scope of the earlier UNESCO conventions does encompass underwater cultural heritage. However, the *UCH Convention* is instrumental not only in giving greater recognition to underwater or maritime archaeology as a discipline within archaeology, but also because it more clearly includes underwater cultural heritage within the problem of illicit excavation and trade in all cultural heritage. While it is beyond the scope of this commentary to consider the *UCH*

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<sup>9</sup> Opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975). As at 1 October 2003, there were 176 states parties ('*World Cultural and Natural Heritage Convention*').

<sup>10</sup> Doole and Renfrew, above n 2, 1.

<sup>11</sup> See Brodie and Tubb, above n 2, 1, 137. For example, artefacts were recovered from the wreck of the *RMS Titanic*, from a depth of 12 500 feet (approximately 3800m): see generally *RMS Titanic, Inc v Haver*, 171 F 3d 943 (4<sup>th</sup> Cir, 1999).

<sup>12</sup> Sarah Dromgoole, *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (1999) ix.

*Convention* in its entirety,<sup>13</sup> the extent to which the *Convention* might contribute to the international regime that seeks to prevent the illicit international trade in cultural heritage will be considered.

Underwater cultural heritage is perhaps more at risk of illicit excavation than terrestrial cultural heritage, primarily due to the difficulties associated with the surveillance and policing of protected underwater sites.<sup>14</sup> Looters can remove artefacts from the territorial waters more readily than from the land territory of a state, particularly as a site on the outer reaches of the territorial sea or contiguous zone may be well beyond the horizon. Two recent cases concerning the illicit excavation and export of underwater cultural heritage can be used to illustrate the problems faced by 'source' nations in the protection and possible repatriation of their cultural heritage.<sup>15</sup>

On 12 September 2001, 71 939 ceramics items illegally exported from Indonesia were returned by Australia pursuant to the *Protection of Movable Cultural Heritage Act 1986* (Cth) ('the Act').<sup>16</sup> The ceramics had been recovered by an Australian salvage company from the wreck of the 19<sup>th</sup> century Chinese vessel the *Tek Sing*, which had sunk off Bangka Island in Indonesian archipelagic waters. Between November 1999 and February 2000, 47 shipping containers of ceramics arrived in Adelaide.<sup>17</sup> Shortly thereafter, the Australian Customs Service was advised by an informant that the ceramics had been illegally exported from Indonesia. This raised the possibility of the seizure of these artefacts and their return to Indonesia under the *Protection of Movable Cultural Heritage Act 1986* (Cth). In order to activate the seizure provisions of

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<sup>13</sup> For a detailed discussion of the *UCH Convention*, see generally David Bederman, 'The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal' (1999) 30 *Journal of Maritime Law and Commerce* 331; Sarah Dromgoole and Nicholas Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) 14 *International Journal of Marine and Coastal Law* 171; Paul Fletcher-Tomenius and Craig Forrest, 'Historic Wreck in International Waters: Conflict or Consensus?' (2000) 24 *Marine Policy* 1; Paul Fletcher-Tomenius and Craig Forrest, 'The Protection of the Underwater Cultural Heritage and the Challenge to UNCLOS' (2000) 5 *Art, Antiquity and Law* 125; Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 *International and Comparative Law Quarterly* 511; Constance Johnson, 'For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage' (2000) 1 *Melbourne Journal of International Law* 19; Patrick O'Keefe and James Nafziger, 'The Draft Convention on the Protection of Underwater Cultural Heritage' (1994) 25(4) *Ocean Development and International Law* 391; Patrick O'Keefe, 'Protection of the Underwater Cultural Heritage: Developments at UNESCO' (1996) 25 *International Journal of Nautical Archaeology* 169; Patrick O'Keefe, *Shipwreck Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002).

<sup>14</sup> Policing an underwater site is extremely difficult. A number of underwater cultural heritage thefts from sites protected by national laws have been reported: see, eg, Roger Dobson, 'Divers Loot 'War Graves' of D-Day Troops Sunk off the Normandy Coast', *The Independent* (London, UK), 31 October 2000, 10; Michael Horsnell, 'Wreck Plunderers Find Way through Law on War Graves', *The Times* (London, UK), 4 April 1994, 7.

<sup>15</sup> This commentary uses the terms 'market state' and 'source state' in a very general sense to distinguish between those states recognised as having a net loss of archaeological material and those in which a thriving market for this material exists. However, it is acknowledged that some states may exhibit both 'market' and 'source' trends.

<sup>16</sup> Department of the Environment and Heritage (Australia), *Annual Report 2001–02* (2002) 235.

<sup>17</sup> Department of the Environment and Heritage (Australia), *Unlawful Import of Cultural Heritage Objects into Australia* <<http://ea.gov.au/heritage/awh/movable/import.html>> at 1 October 2003.

the *Act*, it was necessary for Indonesia to confirm that the ceramics were Indonesian cultural heritage objects, which had been exported in contravention of domestic cultural heritage laws.<sup>18</sup> Whilst complications arose with regard to the documentation purporting to allow export from Indonesia, the bulk of the artefacts were exported from Australia to the EU, with the Australian Customs Service unable to take action until the question of illegal export was determined. The artefacts were then sold at auction in the EU.<sup>19</sup> However, seven containers were later discovered to have remained in Australia, and these were seized by the Australian Federal Police pursuant to their powers under the *Act* and returned to Indonesia, following Indonesia's determination that the artefacts had indeed been illegally exported.<sup>20</sup>

The second example concerns the wreck of the East Indiaman *Dodington* off the coast of South Africa.<sup>21</sup> On 1 October 1997, the National Monuments Council<sup>22</sup> of South Africa received a copy of an article published in *The Times* entitled 'Clive of India's Gold Found in Pirate Wreck',<sup>23</sup> which included a reference to the forthcoming London auction at which 1214 gold coins,<sup>24</sup> weighing a total of 620 ounces, were to be sold. What was of particular significance was the claim made in the article that these coins were part of the 653 ounces of gold that Robert Clive (better known as Clive of India) took with him when he sailed from England for India via Africa, and which were part of the hoard lost when the *Dodington* was shipwrecked in Algoa Bay, South Africa on 17 July 1755. The wreck and its contents lie within South African territorial waters and are protected by South African heritage legislation, which includes a mandatory requirement for an export permit before items of heritage can leave the territory of South Africa. No such export permit had ever been issued for these coins. Similarly to the *Tek Sing* case, the South African authorities were only able to repatriate a small portion of these coins, with the remaining portions being sold at auction in the EU, as the legal and financial burden of proceedings for repatriation was prohibitive.<sup>25</sup>

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<sup>18</sup> The *Protection of Movable Cultural Heritage Act 1986* (Cth) regulates the handling of illegal imports. Section 14(1) makes unlawful imports subject to forfeiture; s 34 authorises the seizure of protected objects; s 41(2) requires that the government of the foreign source country must request return of objects before repatriation procedures can be instituted.

<sup>19</sup> A list of the prices at which *Tek Sing* artefacts were sold is available at Nagel Auktionen, 'Order Results List' <[www.auction.de](http://www.auction.de)> at 1 October 2003.

<sup>20</sup> Department of the Environment and Heritage (Australia), *Unlawful Import of Cultural Heritage Objects into Australia*, above n 17.

<sup>21</sup> For a more extensive discussion of the factual details of this case and the legal issues it raised with respect to repatriation, see Craig Forrest and John Gribble, 'The Illicit Movement of Underwater Cultural Heritage: The Case of the *Dodington* Coins' (2002) 11 *International Journal of Cultural Property* 267.

<sup>22</sup> The National Monuments Council was renamed the South African Heritage Resources Agency ('SAHRA') in 1999 under the provisions of the *National Heritage Resources Act 1999* (South Africa) ss 11, 14.

<sup>23</sup> John Vincent, 'Clive of India's Gold Found in Pirate Wreck', *The Times* (London, UK), 29 September 1997, 8.

<sup>24</sup> While *The Times* article reported 1400 gold coins (see *ibid*), the total was in fact 1214 coins weighing 620 ounces.

<sup>25</sup> Personal communication with John Gribble, 27 March 2001.

These two cases clearly illustrate the problems associated with repatriation of cultural heritage illegally exported from the 'source' state.<sup>26</sup> Such problems are not new and states have been grappling with potential solutions at an international level for a number of decades. As previously mentioned, this problem is perhaps coming to light in recent times in cases involving the discovery of underwater cultural heritage at previously unreachable depths beyond the source state's horizon, due to advances in diving technology.

### III THE EXPORTATION OF CULTURAL HERITAGE AND CONVENTIONAL INTERNATIONAL LAW

#### A *The Problem of Enforcing Source State Exportation Laws*

A fundamental principle of international law is the recognition of the equality of states and respect for the sovereignty of each state. From this concept derives the principle that no state will require another to enforce its public laws. This includes not only penal and revenue laws, but also exportation laws, including those that prohibit the exportation of cultural heritage. As such, no state is required to declare illegal the importation of cultural heritage illegally exported from the state of origin. The UK, for example, has long refused to enforce foreign public law. In *A-G (New Zealand) v Ortiz*, a case concerning the illegal export of Maori ceremonial doors from New Zealand, the English High Court upheld the rule that 'English courts have no jurisdiction to entertain an action ... for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state'.<sup>27</sup> Similarly, in *King of Italy v Marquis Cosimo de Medici Tornaquinci*,<sup>28</sup> a case that concerned a petition for the granting of an injunction to prevent the sale of historic documents, the same court would not enforce the exportation laws of Italy.<sup>29</sup> The UK government, in response to a UNESCO inquiry concerning the *UNESCO Convention*, stated that

[i]t is not possible for [Her Majesty's] Government to take measures against individuals or organizations unless the law of the United Kingdom is broken ... There is no provision in the laws of the United Kingdom for proceedings to be taken against persons suspected of having infringed the export controls of other countries.<sup>30</sup>

Therefore, as Prott and O'Keefe note, 'claims for the recovery of property from importing States may find themselves defeated by rules of longstanding which are, however, very uncertain in application and whose effect it is

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<sup>26</sup> Similar cases of historic wrecks being plundered and the artefacts being removed from the territory of the coastal state, without the coastal state's knowledge or cooperation, include that of the *Geldermalsen*, suspected of having been excavated in Indonesian territorial waters: see George Miller, 'The Second Destruction of the *Geldermalsen*' in Lyndel Prott and Ieng Srong (eds), *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) 94.

<sup>27</sup> [1982] 1 QB 349, 364 (Staughton J).

<sup>28</sup> (1918) 34 TLR 623.

<sup>29</sup> *Ibid* 624.

<sup>30</sup> Lyndel Prott and Patrick O'Keefe, *Law and the Cultural Heritage* (1989) vol 3, [1482].

impossible to predict.<sup>31</sup> In the case of the *Dodington* coins, which had been illegally exported, it was clear that the UK would not regard the importation as illegal and the South African authorities were unable to have the coins repatriated on these grounds.

The justification for restrictions on the exportation of cultural heritage are diverse and controversial — many commentators have criticised the strictness of the export limitation laws of many source states as contributing to the flourishing of the black market in cultural heritage, hindering the development of understanding between nations regarding their individual cultures, and preventing the free exchange of cultural property that belongs to all humanity.<sup>32</sup> While it is beyond the scope of this commentary to consider these criticisms in detail, the use of export limitation laws clearly plays an important role in the protection of certain classes of cultural heritage, particularly archaeological material. In addition, it is integral to the protective system for archaeological sites that would ordinarily include the granting of excavation permits as well as export permits. Thus, many states have entered into bilateral agreements that recognise the public export laws of the other state and declare illegal the importation of illegally exported cultural heritage. However, the difficulty of entering into many bilateral agreements has necessitated the development of a multilateral treaty in the form of the *UNESCO Convention*.

#### B *The Protection Regime under the UNESCO Convention*

The *UNESCO Convention* is the most important international convention dealing with the problem of the illicit movement of cultural heritage.<sup>33</sup> It was designed to implement a system of import and export controls to stem the illicit traffic in cultural heritage.<sup>34</sup> The *UNESCO Convention* includes a number of

<sup>31</sup> Ibid [1260]. For a more detailed discussion of the UK government's changing views with regard to the illicit trade in cultural heritage, see below Part III(E).

<sup>32</sup> See generally Paul Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 307–10; Karen Jore, 'The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws governing Cultural Property?' (1987) 13 *Brooklyn Journal of International Law* 55, 60, *contra* 79–80; John Henry Merryman, 'A Licit International Trade in Cultural Objects' (1995) 4 *International Journal of Cultural Property* 13; John Henry Merryman and James Nafziger, 'The Private International Law of Cultural Property in the United States' (1994) 42(Supp) *American Journal of Comparative Law* 221, 240–4. A particular critique of restrictions on the free movement of modern art is provided by William Buranich, 'The Art Collecting Countries and Their Export Restrictions on Cultural Property: Who Owns Modern Art?' (1988) 19 *California Western International Law Journal* 153, 169. See also the analysis of the problems associated with translating foreign laws in the US judicial context in Judith Church, 'Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in US Courts' (1992) 30 *Columbia Journal of Transnational Law* 179, 227–9.

<sup>33</sup> For a detailed account of the 1970 *UNESCO Convention*, see Patrick O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (2000).

<sup>34</sup> For further discussion on the 1970 *UNESCO Convention*, see Ronald Abramson and Stephen Huttler, 'The Legal Response to the Illicit Movement of Cultural Property' (1973) 5 *Law and Policy in International Business* 932, 948–70; Joseph Edwards, 'Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects' (1991) 22 *University of Toledo Law Review* 919, 926–30; Raymond Goy, 'The International Protection of the Cultural and Natural Heritage' (1973) 4 *Netherlands Yearbook of International Law* 117; Kifile Jote, *International Legal Protection of Cultural Heritage* (1994) 194–241; Gerte Reichelt, 'International Protection of Cultural Property' [1985] 1 *Uniform Law Review* 43, 43–79.

articles that require states to recognise the importance of other states' cultural heritage, and to cooperate in the protection of this heritage.<sup>35</sup> Specifically, the implications of arts 3, 6 and 7 will be considered.

Article 3 provides that 'the import, export or transfer of ownership of cultural property affected contrary to the provisions adopted under this *Convention* by States Parties thereto, shall be illicit'. Article 6 provides that states will establish a system of export permits, without which cultural heritage cannot be exported from their territory.<sup>36</sup> A more specific import and export regime is provided for in art 7. Section 7(a) requires a state to prevent its museums or similar institutions from acquiring cultural heritage that has been illegally exported from the source state, whilst s 7(b) requires a state to prevent the importation of cultural heritage stolen from a museum or religious site within the source state.

A broad interpretation of these provisions will ensure that all cultural heritage (both terrestrial and underwater) will be protected: if it is exported illegally, the state of importation will regard the importation as illegal, and ordinarily will have the heritage returned to the state of origin. Australia and Canada have interpreted the *UNESCO Convention* as such and have implemented national legislation to give effect to this.<sup>37</sup> Australia's *Protection of Movable Cultural Heritage Act 1986* (Cth) provides that foreign cultural heritage exported contrary to the state of origin's export laws will be considered as an unlawful import into Australia. This is not limited in application to states parties of the *UNESCO Convention*, but applies to all states whose cultural heritage is illegally imported into Australia. In the case of the *Tek Sing*, after having obtained a declaration from the Indonesian government that the ceramics had been illegally exported from that state, Australian authorities seized the remaining objects and had them returned to Indonesia.

Unfortunately, not all states apply such a broad interpretation to these articles. While the US, arguably the world's most powerful market state, is a party to the *UNESCO Convention*, its interpretation of the *Convention* and its implementing legislation<sup>38</sup> are extremely narrow in scope, providing that only in the instances specified in art 7 is a state party bound to limit the importation of cultural property.<sup>39</sup> Article 3 is regarded as being subject to art 7.<sup>40</sup> As such, the US

<sup>35</sup> See, eg, arts 2, 4, 9.

<sup>36</sup> Article 6 reads:

The States Parties to this *Convention* undertake:

- (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
- (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
- (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

<sup>37</sup> *Cultural Property Export and Import Act*, SC 1975, c 50, s 31 provides that Canada will recognise the export laws of reciprocating states, either by way of a bilateral or a multilateral treaty.

<sup>38</sup> *Convention on Cultural Property Implementation Act*, 19 USC §§ 301–315(b) (1983).

<sup>39</sup> *Convention on Cultural Property Implementation Act*, 19 USC §§ 308, 310 (1983).

<sup>40</sup> The US declared that art 3, even if taken together with art 6, would not require illegally exported cultural heritage to be declared illicit by the importing state: O'Keefe, *Commentary on the UNESCO Convention*, above n 33, 42.

would not, for example, consider it illegal for a private individual, or an institution that it does not directly control, to import cultural heritage illegally exported from a foreign state if that property had not been stolen from a museum or religious institution of the foreign state. Under this interpretation, the *Dodington* coins and the *Tek Sing* ceramics could have been legally imported into the US by a private individual notwithstanding the US Government's ratification of the *UNESCO Convention*.

While in this light US implementation of the *UNESCO Convention* is narrow in its general scope, it is worthwhile to note its adoption of a number of bilateral agreements with source states whose cultural heritage is in specific danger of being illicitly recovered and illegally exported to the US. The US has entered into such agreements with a number of states, including Bolivia, Cambodia, Cyprus, El Salvador, Guatemala, Italy, Mali, Nicaragua and Peru.<sup>41</sup> These bilateral agreements, while not uniform, generally adhere more clearly to a wider interpretation of the *UNESCO Convention*.

Although the *UNESCO Convention* applies to all cultural heritage found within a state's territory, including underwater cultural heritage found in its territorial seas, its provisions potentially have the effect of excluding underwater cultural heritage that lies undiscovered in the state's waters. For cultural property to be protected under the *UNESCO Convention*, the definition requires that, not only should the artefacts fall within one of the prescribed categories listed, but also that the cultural heritage be 'specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'.<sup>42</sup> This requirement of specific designation is susceptible to different interpretations, and state practice has evidenced a range of responses: from a narrow interpretation in which the state specifically lists individual items, to a wider response by which a state designates all such items within their territory. A narrow interpretation would result in a situation where, although the artefacts from both the *Tek Sing* and *Dodington* would fall within the list of cultural property, Indonesia and South Africa would have had to have known of the existence of the sites and designated them as protected places in order to invoke the *UNESCO Convention*. While some states do take a broad interpretation of this designation requirement, it does not necessarily mean that this interpretation will be recognised by the importing state. More problematic is the task of proving that the cultural heritage in question is indeed covered by the broad designation.

Even though some market states, such as the US, do adopt a narrow interpretation of the *UNESCO Convention*, it should be remembered that its effectiveness is primarily undermined by the fact that very few market states are actually party to the *Convention* and may substitute a number of bilateral agreements in its stead. So, for this reason, as neither the UK nor South Africa was a party to the *UNESCO Convention* at the time of the *Dodington* coins dispute, no relief was available for the repatriation of the coins.

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<sup>41</sup> See Bureau of Educational and Cultural Affairs, Department of State (US), *Chart of Current and Expired Import Restrictions under the Convention on Cultural Property Implementation Act (2002)* <<http://exchanges.state.gov/culprop/chart.html>> at 1 October 2003.

<sup>42</sup> *UNESCO Convention*, above n 1, art 1.

Ultimately, while the *UNESCO Convention* has laid the foundation for an international framework for the protection of cultural heritage, it is clear that its provisions are susceptible to a myriad of interpretations and therefore may not be sufficiently robust to provide an adequate protective regime — particularly with respect to illicitly excavated and exported underwater cultural heritage. In this regard, the *UCH Convention*, which will be discussed below, offers some possible improvements in the protection regime.

### C The UNIDROIT Convention

The inherent weaknesses of the *UNESCO Convention*, particularly those relating to private law issues of ownership, prompted UNESCO to request that the International Institute for the Unification of Private Law ('UNIDROIT')<sup>43</sup> consider drafting a parallel convention, which was subsequently adopted in 1995.<sup>44</sup> Specifically, the *UNIDROIT Convention* deals with both stolen and illegally exported cultural heritage, establishing a system for the return of objects to the true owner in the case of stolen objects, or otherwise, to the state of export. The new owner is not necessarily deprived of ownership, as the return of objects is subject to a regime of limitation periods and possible compensatory payments to bona fide purchasers.<sup>45</sup> The *UNIDROIT Convention* achieved a delicate compromise between source states and market states, and between civil and common law jurisdictions. Source states did not wish any limitation periods to apply, and wanted the *Convention* to apply retrospectively, in direct opposition to the market states' position. While the latter claim was unsuccessful, a system of limitation periods was agreed upon.

Additionally, states from common law and civil law jurisdictions clashed over the application of the principle of *nemo dat quod non habet*. The compromise that was reached required compensation payments to bona fide purchasers. While the *UNIDROIT Convention* did achieve this extremely delicate compromise, it had the effect of limiting the number of possible states parties to the *Convention*, given the constitutional and political arrangements of many market and source states.<sup>46</sup> These positions were entrenched to the extent that the market states' obligation to their constituents required the promotion of a free trade of cultural heritage, whereas source states required the protection of national cultural heritage by preventing any trade whatsoever. As a parallel convention to the *UNESCO Convention*, these difficulties compounded those apparent in the earlier instrument, resulting in few states signing, and even fewer ratifying, the *UNIDROIT Convention*.

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<sup>43</sup> UNIDROIT is an independent intergovernmental organisation established in 1926. Its secretariat based in Rome, Italy.

<sup>44</sup> *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 34 ILM 1326 (1995) (entered into force 1 July 1998) ('*UNIDROIT Convention*'). As at 1 October 2003, there were 21 states parties.

<sup>45</sup> For a more detailed discussion of the *UNIDROIT Convention*, see Lyndel Prott, *Commentary on the UNIDROIT Convention* (1997).

<sup>46</sup> Paul Jenkins, 'The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*' (1996) 1 *Art, Antiquity and Law* 163, 164–5, 169.

## D The UCH Convention

The *UCH Convention* grants protective jurisdiction over underwater cultural heritage to a territorial state with regard to those items found within its territory, including its territorial sea. In the case of underwater cultural heritage recovered beyond the territorial sea, the excavator's state of nationality may exercise jurisdiction. However, the ability of an excavator to avoid territorial or nationality jurisdictional claims made by states calls for a system that allows a third state to take some action in order to protect underwater cultural heritage. As this third state will have neither territorial jurisdiction over the place of the illicit activity, nor nationality jurisdiction over the excavator, the only jurisdiction that it might possess must relate to the object recovered and brought into its own territorial jurisdiction. The *UCH Convention* therefore requires these states to implement a system that prevents illicitly excavated underwater cultural heritage from being brought into its territory,<sup>47</sup> and to impose sanctions for infringements, including seizure of the items of underwater cultural heritage.<sup>48</sup>

The annex to the *UCH Convention* contains the *Rules concerning Activities Directed at Underwater Cultural Heritage* ('the *Rules*'), which provide a benchmark for best archaeological practice that states parties agree to implement in areas under their jurisdiction and impose on nationals and vessels over which they exercise jurisdiction. Included in the *Rules* is the requirement that before any activity directed at an underwater archaeological site is undertaken, an appropriate project design must be drafted and authorised by the competent authority.<sup>49</sup> In areas beyond coastal state jurisdiction, this authorisation will be granted by the 'coordinating state',<sup>50</sup> which in the case of underwater cultural heritage on the continental shelf would ordinarily be the coastal state.<sup>51</sup> This authorisation would actually allow for activity directed at the underwater cultural heritage to take place. Although it is envisaged that the authorising state will ordinarily be the state in which the recovered underwater cultural heritage will be landed, this is not necessarily the case with regard to underwater cultural heritage recovered beyond a coastal state's jurisdiction. As art 14 requires each state to implement a system preventing the entry into its territory of underwater cultural heritage that is not recovered in accordance with the *Rules*, a second authorisation may be necessary — one that relates solely to the entry into the territory of the underwater cultural heritage, rather than its excavation.

Article 14 provides that

States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this *Convention*.

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<sup>47</sup> *UCH Convention*, above n 7, arts 14–15.

<sup>48</sup> *Ibid* arts 17–18.

<sup>49</sup> Rule 9 states that '[p]rior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authority for authorization and appropriate peer review'; while r 11 declares that '[a]ctivities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.'

<sup>50</sup> *UCH Convention*, above n 7, arts 10(4), 10(5)(b), 12(4)(b).

<sup>51</sup> *Ibid* art 10(3); see also art 12(2).

It is unfortunate that the wording of art 14, particularly the use of the conjunctive/disjunctive ‘and/or’ may cause confusion.<sup>52</sup> A broad interpretation suggested by Patrick O’Keefe, which appears to be the most desirable interpretation, would entail a state taking measures to prevent the entry of illicit cultural heritage into its territory in any of the following three scenarios:

- 1 underwater cultural heritage recovered contrary to the recovery rules of the *UCH Convention*, but legally exported;
- 2 underwater cultural heritage recovered in accordance with the recovery rules of the *UCH Convention*, but illegally exported; or
- 3 underwater cultural heritage recovered contrary to the recovery rules of the *UCH Convention* and illegally exported.<sup>53</sup>

Article 14 does not specify what measures need to be taken, but it is clear that declaring the importation illegal would be the most obvious measure. Read in light of arts 17 and 18, a comprehensive prevention regime would provide criminal and civil sanctions for such an infringement, as well as seizure of the cultural heritage.<sup>54</sup>

While any reference to the use of permits was removed from the *UCH Convention*,<sup>55</sup> it is expected that most states will make use of permits issued prior to any proposed activity directed at underwater cultural heritage.<sup>56</sup> This is to be expected, as permits — either import or excavation permits — are utilised by a number of states to regulate the recovery of both terrestrial and underwater cultural heritage,<sup>57</sup> and in particular are required under art 6 of the *UNESCO Convention*. The use of excavation permits would ensure that activities directed at underwater cultural heritage are undertaken in accordance with the provisions for appropriate archaeological excavations contained in the *Rules of the UCH Convention*, and therefore would have a number of benefits in the preservation regime. Import permits would ensure that underwater cultural heritage that has been recovered in accordance with the *Convention* can enter a state where the excavation took place beyond coastal state jurisdiction. By the same measure, an export permit will allow for underwater cultural heritage recovered in accordance with the *UCH Convention* in one state’s territorial water to be exported to another state. In this latter respect, the *UCH Convention* provides for a much

<sup>52</sup> O’Keefe, *Shipwreck Heritage*, above n 13, 103.

<sup>53</sup> *Ibid.*

<sup>54</sup> *UCH Convention*, above n 7, arts 17–18.

<sup>55</sup> An earlier draft of the *Convention* contained this version of art 8:

Should an excavation or retrieval of underwater cultural heritage occur without a prior authorisation of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the *Charter*.

Draft Convention on the Protection of the Underwater Cultural Heritage, UNESCO Doc CLT-96/CONF.202/5 Rev.2 (1999) Institute of Marine Archaeological Conservation <<http://www.imacdigest.com/99draft.html>> at 1 October 2003.

<sup>56</sup> For further discussion on the use of permits, see generally Angela Croome, ‘The United States *Abandoned Shipwreck Act* Goes into Action: A Report’ (1992) 21 *International Journal of Nautical Archaeology* 39; Sabrina McLaughlin, ‘Roots, Relics and Recovery: What Went Wrong with the *Abandoned Shipwreck Act of 1987*’ (1995) 19 *Columbia-VLA Journal of Law and the Arts* 149.

<sup>57</sup> See Bonnie Burnham, *The Protection of Cultural Property: A Handbook of National Legislation* (1974).

broader obligation on states than the *UNESCO Convention*, by ensuring that all illegally exported underwater cultural heritage will be subject to the importing state's protection measures. Thus, underwater cultural heritage that may not have been protected under the *UNESCO Convention* will be protected under the *UCH Convention*.

Unfortunately, this comprehensive import and export regime does not apply to terrestrial cultural heritage that is beyond the protection of the *UNESCO Convention*. It may be that underwater cultural heritage will enjoy a wider protection from becoming illicit international traffic than terrestrial cultural heritage. Much, however, will depend on which states become party to the *UCH Convention*. Many market states have not become party to the *UNESCO Convention* and it appears that many of these same states have indicated opposition to the *UCH Convention*, including Germany, the United Kingdom and the United States.

For those states that become party to both *Conventions*, there will clearly be a need to harmonise the permit systems and legislation concerning the receipt of cultural heritage illegally exported from another state. This harmonisation will have the effect of integrating the systems applicable to underwater cultural heritage on the one hand, and that applicable to terrestrial cultural heritage on the other. In many cases, this will necessitate the management of these resources in one administrative unit.<sup>58</sup>

#### E *A New Wave of Membership for the UNESCO Convention*

While it is evident that in the past many market states have not become a party to the *UNESCO Convention*, and may be reluctant to become a party to the *UCH Convention*, recent developments indicate a changing attitude to the *UNESCO Convention* and an appreciation of the difficulties posed to source states by the illicit trade in cultural heritage.

Within the last 24 months, a number of market states have indicated that they will ratify the *UNESCO Convention*. Japan, a major importing state, recently ratified the *Convention*, and it came into force for that State on 9 December 2002.<sup>59</sup> The Japanese legislation implementing the terms of the *Convention* requires that all imported cultural heritage be accompanied by an export permit from the state of origin.<sup>60</sup> Within the Asian region, this will be of particular importance given Japan's history of failing to investigate or have regard for the provenance of Chinese, Cambodian other Asian cultural heritage entering the country. It is unfortunate that Singapore, a major transit and market state for Asian cultural heritage, is not a party to the *Convention*. However, it is encouraging to note that Sweden and Belgium — the latter being a major transit

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<sup>58</sup> While not related to the *UCH Convention*, such a move has been evident in the UK for example, where the administration of the *Protection of Wrecks Act 1973* (UK) c 33 has recently been transferred from the Department of Culture, Media and Sport to English Heritage, the body responsible for the administration of terrestrial cultural heritage: see Department of Media, Culture and Sport (UK), *Historic Environment: Archaeology* <[http://www.culture.gov.uk/historic\\_environment/Archaeology+.htm](http://www.culture.gov.uk/historic_environment/Archaeology+.htm)> at 1 October 2003.

<sup>59</sup> Jenny Doole, 'In the News' (2002) 11 *Culture without Context* 11.

<sup>60</sup> Fiona Wilson, 'Japan Moves towards Ratifying *UNESCO Convention*', *The Art Newspaper* (London, UK), May 2002, 14.

state for African cultural heritage — have indicated that they will ratify the *UNESCO Convention*.<sup>61</sup>

Switzerland has long been one of the most important market states for fine art, and has never had any legislation that distinguishes cultural heritage from other types of goods. As such, cultural heritage has been freely traded in Switzerland, and Swiss law has not regarded as illegal the import of cultural heritage illegally exported from a source state. Switzerland has, however, recently considered ratifying the *UNESCO Convention*,<sup>62</sup> and has proposed legislation that will, to some extent, implement the obligations of the *Convention*. While this is certainly encouraging, it is unfortunate that the draft Swiss Cultural Goods Transfer Law 2003 takes its lead from the US implementing legislation and adopts a narrow interpretation of the *Convention*. In particular, cultural heritage is narrowly defined to include only a small subset of the cultural heritage identified in the *Convention*, pertaining mainly to archaeological, palaeontological and ethnological objects.<sup>63</sup> It is envisaged that the broader protective mechanism outlined in the *Convention* will only be implemented through bilateral conventions, which may be concluded with developing countries in Africa, Asia and South America. It is clear that much of the illicit trade in fine art will not be affected by this legislation, and will continue to be a major component of Swiss commercial activity.

Given the historic ties that Australia has with the UK, and the resulting inter-state cultural heritage market, as well as the relevance of the UK to the *Dodington* coins case, the UK's ratification of the *UNESCO Convention* in August 2002 assumes some importance.<sup>64</sup> It appears that the UK has not implemented any legislation giving effect to the *UNESCO Convention*, suggesting that the existing legal framework is considered sufficient to do so. This in turn would indicate a rather narrow interpretation of the *Convention*, allowing the UK to continue to act as a centre for the international trade in cultural heritage. However, there would certainly be important administrative and policy changes that would have some effect on the scale of the illicit trade in cultural heritage.

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<sup>61</sup> Doole, above n 59, 12.

<sup>62</sup> Cultural Goods Transfer Law 2003 (Switzerland) <<http://www.admin.ch/ch/f/ff/2003/4019.pdf>> at 1 October 2003. An English translation of the draft legislation is available at 'Federal Act on the International Transfer of Cultural Goods: Draft (Transfer of Cultural Goods Act, TCGA))' (2001) 6 *Art, Antiquity and Law* 167. For an examination of the draft legislation, see Roman Plutschow, 'Will Switzerland Finally Ratify the *UNESCO 1970 Convention*?' (2002) 7 *Art, Antiquity and Law* 163.

<sup>63</sup> Cultural Goods Transfer Law 2003 (Switzerland) art 2(2) <<http://www.admin.ch/ch/f/ff/2003/4019.pdf>> at 1 October 2003.

<sup>64</sup> The UK, as a market state, had long been opposed to interference with its prominent role as one of the world's leaders in the art and antiquities trade. It is noteworthy that the UK did not even participate in the Meeting of Experts to discuss the Secretariat draft of the *1970 UNESCO Convention*. The state's trade, however, has increasingly been under close scrutiny, and a report by the UK government's Ministerial Advisory Panel on Illicit Trade in December 2000 revealed approximately 30 seizures of cultural goods by Customs and Excise every year. In 1999 alone, the London Interpol Unit investigated 132 cases of illicit traffic: Dalya Alberge, 'Britain Acts to Prevent Illicit Trade in Art', *The Times* (London, UK), 15 March 2001, 13. Accession to the *1970 UNESCO Convention* was one of the principal recommendations of the Advisory Panel: see Ministerial Advisory Panel, Department for Culture, Media and Sport (UK), *Ministerial Advisory Panel on Illicit Trade: Report* (2000) [61].

While these proposed accessions are encouraging, it remains to be seen how these market states will implement the *UNESCO Convention* in their national legislation and administrations. At the very least, these developments represent a welcome resurgence of interest in the *UNESCO Convention*.

Given the relationship between the *UNIDROIT Convention* and the *UNESCO Convention*, increased ratification of one gives rise to the possibility of increased ratification of the other. This outcome is not a given, as exemplified by the UK's decision not to ratify the *UNIDROIT Convention*. However, there are indications that the *UNIDROIT Convention* is slowly but consistently gaining support, having received 20 accessions or ratifications, a third of which occurred during the 18-month period preceding August 2003.<sup>65</sup>

#### IV A PRIVATE INTERNATIONAL LAW PERSPECTIVE: REPATRIATION ON THE BASIS OF OWNERSHIP

The *UNESCO Convention* and the *UCH Convention* respond to public law concerns of illegal export or import of cultural heritage. Where the cultural heritage has been stolen and then exported, private law issues of ownership are implicated, and avenues for repatriation are available outside the public international law regime.

As one commentator has noted, '[a]ll national legal systems prohibit and punish theft, and the courts of all nations are open to actions by foreign as well as domestic owners to recover their stolen property.'<sup>66</sup> Thus, ownership laws of one state will be recognised by another, subject to the possible rights of a bona fide purchaser in good faith and the operation of statutes of limitations. An owner of cultural heritage will therefore be able to enforce ownership rights in cases where the heritage has been stolen and exported to another state.<sup>67</sup> As such an approach is based on ownership, it is not necessary to establish an instance of illegal export in order to facilitate repatriation of the cultural heritage. Problems arise, however, over the determination of ownership after illegal export has occurred. Some states, for example, will declare that all cultural heritage illegally exported will be confiscated and forfeited to the state, refusing to recognise private claims of ownership.<sup>68</sup> Claims for repatriation will therefore be made on the basis of this ownership rather than on the basis of the illegal export. Thus, questions of ownership become entangled with the application of public laws.

Difficulties may also arise where states apply laws that declare all cultural heritage found within the state to be state property, irrespective of whether the heritage is in a museum, in a private collection, or still undiscovered

<sup>65</sup> See UNIDROIT, *Status Report: UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* <<http://www.unidroit.org/english/implement/i-95.htm>> at 1 October 2003.

<sup>66</sup> Merryman, above n 32, 18.

<sup>67</sup> See, eg, *Kunstsammlungen zu Weimer v Elicofon*, 536 F Supp 829 (EDNY, 1981), aff'd 678 F 2d 1150 (2<sup>nd</sup> Cir, 1982). In this case, two Dürer paintings were stolen from the East German Government Museum, exported to the US, and sold to Elicofon, who was unaware that they were stolen and bought them in good faith. The US court recognised the ownership of the East German government and ordered the return of the paintings to Germany, without compensation to the purchaser in good faith. See also *Autocephalous Greek Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc*, 917 F 2d 278 (7<sup>th</sup> Cir, 1990), in which it was ordered that frescoes be returned to the Church as owner.

<sup>68</sup> See, eg, *A-G (New Zealand) v Ortiz* [1982] 1 QB 349.

underground or underwater.<sup>69</sup> If the heritage is then removed from the source state to a market state, the source state would simply need to declare that the heritage originated in its territory to assert ownership. A number of market states, however, will require more than this simple assertion and therefore will not necessarily recognise these vesting laws. Often market states will measure these claims of state ownership asserted by source states against their own standards of validity and clarity.

The US, having taken such a narrow interpretation of the *UNESCO Convention*, does not necessarily declare illegally exported cultural heritage to have been so imported. Many claims for the repatriation of cultural heritage from the US are based on claims of ownership; particularly ownership that arises from the source state's vesting laws. Generally, such laws are closely scrutinised by US courts. However, there has been a recent willingness to repatriate cultural heritage that can be shown to have been stolen, or to have belonged to the source state under its blanket vesting laws (notwithstanding the question of illegal export) demonstrated in cases such as *United States v An Antique Platter of Gold*<sup>70</sup> and *United States v Schultz*.<sup>71</sup>

One of the earliest cases in which US courts showed a willingness to recognise these vesting laws was *United States v McClain*.<sup>72</sup> In *McClain*, the court found that 1972 Mexican legislation vesting ownership of all cultural heritage in the state was clear and unambiguous, and therefore recognised state ownership. While this was sufficient to find the defendants guilty of conspiring to deal in pre-Columbian antiquities smuggled from Mexico, they were acquitted of the charge of actually dealing in stolen property because Mexico could not prove that these artefacts were indeed exported after 1972.<sup>73</sup> The *McClain* case is important in establishing that, in order to succeed in an action for repatriation, the source state must prove:

- 1 that the artefact in question is indeed the artefact that was stolen;<sup>74</sup>
- 2 that the artefact was found within the borders of the state claiming repatriation;
- 3 that the artefact was discovered after the effective date of the vesting legislation; and
- 4 that the vesting legislation does in fact vest ownership in the state with sufficient clarity so as to give notice of what conduct is prohibited.<sup>75</sup>

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<sup>69</sup> See, eg, *Cultural Heritage Act 1979* (Ecuador).

<sup>70</sup> 991 F Supp 222 (SDNY, 1997), aff'd 184 F 3d 131 (2<sup>nd</sup> Cir, 1999). This case involved the seizure and forfeiture of an ancient gold phial that had originated from Sicily. The trial court held both that the phial was stolen property and that it had been improperly declared on customs forms upon entry into the US.

<sup>71</sup> 178 F Supp 2d 445 (SDNY, 2002), aff'd 333 F 3d 393 (2<sup>nd</sup> Cir, 2003) ('*Shultz*'). This case involved a US conspiracy to deal in and possess stolen Egyptian antiquities that were declared to be the property of the Egyptian government under its 1983 vesting law.

<sup>72</sup> 545 F 2d 988 (5<sup>th</sup> Cir, 1977), aff'd in part 593 F 2d 658 (5<sup>th</sup> Cir, 1979) ('*McClain*').

<sup>73</sup> See also *United States v Hollinshead*, 495 F 2d 1154 (9<sup>th</sup> Cir, 1974).

<sup>74</sup> See, eg *Bumper Development Corp Ltd v Commissioner of the Police of the Metropolis* [1991] 4 All ER 638, where the Court had to rely on complex and expensive procedures to prove the identity of an illegally excavated idol of the Hindu God Shiva. This included proving similarities in metallurgical analysis, artistic style, soil samples and termite runs found on the idol to those found on other artefacts from the illicitly excavated site from which the idol in question allegedly originated.

The final requirement can be difficult to overcome, as was the case in *Peru v Johnson*.<sup>76</sup> The court in this case found that Peru's legislation conferring ownership of cultural heritage in the state lacked sufficient clarity and certainty to be relied upon. As such, the pre-Columbian jewellery and ceramics were not found to be owned by the Peru and therefore could not be considered to be stolen. A similar approach is taken in the UK: in the case of the *Dodington* coins, it emerged that the South African legislation, which was considered by the National Monuments Council to vest ownership in the state, was in fact unclear on this point, and could not be relied upon in court.

Even if the source state's vesting legislation is clear, further difficulties arise in addressing the other criteria laid down in *McClain*. For example, in *Johnson*, the court found that it was unable to establish that the artefacts in question came from within the modern borders of Peru. Furthermore, even if this could be established, the court was unable to establish that the blanket legislation was in force at the time of removal.<sup>77</sup> Similarly, in *R v Heller*,<sup>78</sup> the Alberta Provincial Court in Canada held that there was no evidence to prove that the cultural heritage in question, a Nok sculpture, had been exported after the imposition of export limitations by Nigeria.

More recently, a US District Court held in *United States v An Antique Platter of Gold* that the relevant Italian legislation did indeed vest ownership of a 400 BC gold platter in the state.<sup>79</sup> On appeal, it was unfortunate that the Court did not address this issue, failing to endorse the trial court's findings in this regard. However, the District Court did find that the platter was subject to forfeiture on the basis of false customs declarations and it was subsequently returned to Italy.

The latest result of the appeal in *Schultz* has reinforced the willingness of US courts to repatriate cultural heritage owned by the source state on the basis of its vesting laws,<sup>80</sup> and has caused quite a furore in the US antiquities market.<sup>81</sup> Frederick Schultz, a New York dealer and immediate past chairman of the National Association of Dealers in Ancient, Oriental and Primitive Art, was convicted and sentenced to a prison term for conspiracy to receive, possess and sell stolen property contrary to the *National Stolen Property Act*.<sup>82</sup> The property in question included the head of a statue of Amenhotep III, the most powerful pharaoh of the 18<sup>th</sup> dynasty of Egypt, dating from 1580 BC and worth in excess

<sup>75</sup> See Patty Gerstenblith, 'United States v Schultz' (2002) 10 *Culture without Context* 27; Howard Spiegler and Lawrence Kaye, 'American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal' in Neil Brodie, Jennifer Doole and Colin Renfrew (eds), *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* (2001) 121.

<sup>76</sup> 720 F Supp 810 (CD Cal, 1989), aff'd sub nom *Peru v Wendt*, 933 F 2d 1013 (9<sup>th</sup> Cir, 1991) ('*Johnson*').

<sup>77</sup> *Johnson*, 720 F Supp 810 (CD Cal, 1989), [2]–[4]. The court also found that the blanket legislation was not in fact enforced within Peru, and therefore amounted to nothing more than export legislation that, as foreign public legislation, the US would not enforce: *ibid* [5]. See also Merryman and Nafziger, above n 32, 233.

<sup>78</sup> (1983) 27 Alta LR (2d) 346, [53] (Stevenson PJ).

<sup>79</sup> 991 F Supp 222 (SDNY, 1997), aff'd 184 F 3d 131 (2<sup>nd</sup> Cir, 1999).

<sup>80</sup> 178 F Supp 2d 445 (SDNY, 2002), aff'd 333 F 3d 393 (2<sup>nd</sup> Cir, 2003).

<sup>81</sup> See, eg, William Pearlstein, 'Letter to the Editor: Implications of the *Schultz Case*', *The Art Newspaper* (London, UK), February 2003, 4.

<sup>82</sup> 18 USC § 2315 (1934).

of US\$1 million.<sup>83</sup> Egyptian law in 1983 declared all artefacts over a hundred years old to be public property.<sup>84</sup> The Court found this law to be sufficiently clear to vest ownership of the artefact in the state. This is an important finding in that while the US might not necessarily regard as illegal the importation of illegally exported cultural heritage, it will recognise source state vesting laws. Such a finding does, however, have the same effect as enforcing a foreign state's export laws where the foreign state also vests all cultural heritage in the state, and thus to some extent appears to contradict the narrow intent of the US implementing legislation for the *UNESCO Convention*. Nevertheless, this clear endorsement of the *McClain* precedent is a welcome development for those states that have cultural heritage in demand in the lucrative US market, and that have not entered into a bilateral agreement with the US.

*Schultz* has a second important feature, which is to put antiquities dealers and collectors on notice that ignorance of a foreign law is 'no excuse'. The Trial Court found that the plaintiff could not claim that he was not aware of the foreign law, as 'a defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law' of the foreign state in whose cultural heritage he is dealing.<sup>85</sup> The Court found that it was highly probable that Schultz knew of the Egyptian laws, or at the very least, chose not to inform himself. This 'conscious avoidance charge' was endorsed by the Court of Appeals for the Second Circuit.<sup>86</sup> It is interesting to note that the UK Advisory Panel on Illicit Trade recommended the creation of a database containing all states' legislation pertaining to cultural heritage, which interested parties (especially dealers) could access, thus ensuring that an adverse inference could be drawn from a defendant's failure to inform themselves of applicable legislative provisions.<sup>87</sup>

Given that many states will need to implement legislation to give effect to the *UCH Convention*, it is important to ensure that, if a state wishes to vest undiscovered or unexcavated cultural heritage in the state, the legislation is drafted with clarity in this regard. It will also be important to ensure that this legislation is widely disseminated, so that all who might come into contact with cultural heritage from the state are aware of its provisions. This is particularly important in the context of underwater cultural heritage, where a finder might not ever enter the state's land territory. This will mean that even if a number of market states do not become a party to the *UCH Convention* or the *UNESCO Convention*, further avenues for repatriation are available.

## V CONCLUSION

Although it is unfortunate that the illicit trade in cultural heritage has continued to increase since 1970, it is clear that there is a resurgence in the battle to stem this trade. The number of states parties to the *UNESCO Convention* is increasing, particularly among those traditionally considered to be major market

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<sup>83</sup> *United States v Schultz*, 333 F 3d 393, 396 (2<sup>nd</sup> Cir, 2003).

<sup>84</sup> *Law on Protection of Antiquities 1983* (Egypt) arts 1, 6.

<sup>85</sup> 333 F 3d 393, 413 (2<sup>nd</sup> Cir, 2003).

<sup>86</sup> *Ibid*.

<sup>87</sup> Kevin Chamberlain, 'UK Accession to the 1970 *UNESCO Convention*' (2002) 7 *Art, Antiquity and Law* 231, 232.

states. Whilst underwater cultural heritage is currently under-protected, greater adoption of the *UCH Convention* will result in underwater cultural heritage being better protected than terrestrial cultural heritage. Simultaneously, the rise in interest in these public law conventions may have the flow-on effect of increasing recognition of the *UNIDROIT Convention*. This goes to demonstrate that these instruments do not work in isolation, and form part of a network of international cultural heritage law. Inevitably, a resurgence of interest in one area leads to a consideration of the others. Thus, the evident and high profile damage to cultural heritage caused by armed conflict has drawn further attention to the more subliminal illicit trade.

This commentary has argued that the volume of illicitly traded cultural heritage could be reduced further. This would be achieved not only through increased co-operation and support for the treaty regime; it needs to be accompanied by a commitment by each state to implement compatible and unambiguous national legislation. Such commitment may be encouraged by the developments in case law in countries that generally take a limited and strict view of repatriation issues in the context of implementing foreign states' domestic legislation. It can nevertheless be said that there is a growing consciousness of the damage that the illicit trade is causing to the cultural fabric of source states; in this light, it is welcome that the *UNESCO Convention* is experiencing renewed vigour.