Editorial

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In this, our seventh issue, we adopt a new focus. Four scholars representing a variety of disciplines (law, ethics, archaeology, art history, anthropology and museum management) examine the notion of a licit market in cultural property. Their object is to elucidate and test the proposition that cultural traffic benefits humanity; that those benefits are threatened by absolute, universal prohibitions on removal; and that a vigorous but honourable mercantile interest, far from subverting those benefits, can promote and enhance them.[1]

The subject has suffered from neglect. The UNESCO 1976 Recommendation Concerning the International Exchange of Cultural Property, which exhorted States to explore new ways of encouraging cross-border exchanges, was aspirational and inspired few visible initiatives. Scholarly and governmental neglect of the subject may be understandable, given the more exigent problems of restitution in the event of unlawful removal. But the question itself is not new. As John Merryman observes, in a paper entitled *A Licit International Trade in Cultural Objects*, international recognition of the value of disseminating cultural property can be traced back, via the UNESCO Convention of 1970,[2] to the Hague Convention of 1954.[3] While neither Convention (in common with the 1976 Recommendation) explicitly espouses the market as the proper vehicle for distribution, John Merryman detects in these instruments an "agreement in principle that the international movement of cultural objects... serves desirable ends and should be encouraged", and casts a sceptical eye upon the verities of "retentive cultural nationalism". There are resonances in this paper of David Murphy's critical examination of the embargo approach to the protection of antiquities in the People's Republic of China, published inour last (sixth) issue.[4] Clemency Coggins, in *A Licit International Traffic in Ancient Art: Let There be Light!*, rejoins that the Hague Convention had nothing to do with the art market and was concerned with the safety of the common heritage, not its commercial purveyance. She also questions whether the notion of a licit and officially-sanctioned trade, however logical and appealing in principle, would work in practice. Is it, for example, realistic to suppose that even under a more liberal regime a

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significant volume of important objects would qualify as nationally expendable; and would serious collectors want those objects which became available? If, in the event, the only objects to be released on to the market are those regarded by the market as inferior, the aims of the demarcation between the licit and illicit may be defeated. Demand will still exceed supply.

The tensions and countervailing factors are admirably summarised by Claude Daniel Ardouin, of the West African Museums Programme, in his paper entitled *Vers un Trafic Licite des Biens Culturals ? Quelques Réflexions et Questions à Partir d'une Perspective Anthropologique*. He emphasises the scholarly values of conservation and access to research, and seeks to establish a secure territory for these among other competing interests. Among the questions which he poses are the aims of a licit traffic and the interests which will be enhanced and prejudiced by it; the definitional problems of demarcating the essential national culture from that which can be traded; the cogency of the case for economic immobilisation of cultural property in the face of private ownership, family heritage and the demands of basic economic survival; whether private ownership can be combined with obligations of conservation and scientific study; and whether a controlled market can ever be detached from the reprehensible activities of thieves and pillagers. Hugo Weihe's paper, *Licit International Traffic in Cultural Objects for Art's Sake*, offers a spirited defence of the market. Speaking of monuments and excavations (though his perspective is much wider) he argues that to blame the worst depredations on "a receptive market in the rich countries" is to divert attention from "the lack of necessary control in the countries themselves". There is an interesting contrast between this argument and the proposition (favoured, perhaps, by Ricardo Elia and Lord Renfrew of Kaimsthorn)[5] that if there were no market there would be no need for 'controls'. In answer to this, Mr George Ortiz has said[6] that the great preponderance of finds are adventitious and not contrived. By acquiring discoveries, the collector is less likely to encourage and reward illegal excavation than to rescue the past from abandonment and destruction.

Readers will form their own conclusions and, we hope, communicate their reactions. To those who support or oppose the evolution of a principled market, or who feel that further arguments or interests demand attention, we offer a respectful audience. In order to further encourage debate, the following questions are asked.

First, do those who advocate the market pay sufficient regard to the sacredness of objects? Arguments about commodification tend, perhaps, to focus on the aesthetic and ideological, rather than the spiritual, opposition. It is one thing to argue that the sale of a nineteenth century picture for a record price at auction neither denigrates the picture nor distorts our perception of art. But what of an aesthetically humble domestic artefact which has irrefutable spiritual importance to the people who created or claim it? An object of this

nature will not necessarily have the spiritual paramountcy of the Afo-A-Kom, nor even perhaps satisfy the draft UNIDROIT Convention;[7] and yet its treatment as a subject of commerce can cause spiritual agony and great offence. An example, with a happy ending, was the Mount Newtown Cross Roads Bowl, now the subject of an entrustment Declaration among the Saanich Nature Heritage Society, the Simon Fraser University and the Simon Fraser Museum of Archaeology and Anthropology. Other cases have ended less happily and are the cause of much mistrust. The claimants in such cases may not be socialists and other ideological opponents of market capitalism, but holders of a profound and simple religious conviction that to trade in such objects is wrong. They have a principled basis for opposing the market, though it may not be susceptible to persuasion or compromise.

Secondly, do those advocates of mercantilism who acknowledge the need to outlaw the trade in stolen objects pay sufficient regard to the protection of possessory title? Do they, in fact, define theft widely enough? Nations enacting rhetorical ownership laws are not the only potential claimants of interred archaeological objects. In England, for instance, a land-owner in occupation has possessory title to those antiquities in the land which are not treasure trove. The problems of establishing a prior possession[8] in such circumstances are notorious, and of course such objects are not inventorised or documented within (say) the UNESCO Convention;[9] their presence is unknown until their removal. A possible case is that of John Browning, from whose land in Suffolk the 'Icklingham Bronzes' were allegedly removed.[10] A draft code of Principles to Govern Licit International Traffic in Cultural Property, presented by John Merryman at the Vienna Symposium, treats cultural property as stolen for the purposes of the code if (among other things) "it is wrongly taken from private possession". Whether this formulation is intended to cover situations like that alleged to have arisen at Icklingham, it may well do so on ordinary principles of construction. But if that were the intention, it might seem capricious to limit the principle to "private" possessors, thereby excluding (say) local or national authorities. Should it make any difference that a Bronze Age torc was illegally taken from land occupied by Farmer Giles, rather than from land occupied by Barsetshire County Council or by the Ministry of Agriculture? An alternative interpretation may be that an offence to the occupier's possessory title does not count as theft within the Principles. Such a lacuna might not command confidence among the owners of private property, socialist or otherwise.

Thirdly, how far should the values of truth, preservation and access be promoted? If these values are paramount, do they defeat not only those national restitutionary claims which based on infringement of export laws, but also those which are grounded on straightforward theft? In short, can it ever be legitimate to refuse to return a stolen object which is safer and more honoured in its recipient country, or to steal a cultural object which is endangered? Al-

though these justifications may not be compelled by the mercantile argument, they are not perhaps unanimously disowned by its advocates. Again, much may depend on the definition of theft. The nettle has yet to be grasped.

Fourthly, what of the illegal export of objects from a country which does not own them? It is tempting to decry the interest of the prohibiting State and to conclude that, whereas theft is a proper subject of redress by recipient States, the remedying of unlawful export is a matter purely for the embargo State, in which recipient States can legitimately decline to co-operate. Judicial authority shows some support for this distinction. It may be questioned, however, whether the time has not come for a closer and more selective examination of the concerns which inform individual export laws. It may be that, in certain countries, the prohibition is accompanied by a form of national interest which it would be reasonable to protect internationally. An example may again be drawn from England, where the owner of a work of art may receive 'conditional exemption' from capital taxes, and be permitted to remain in possession of the work, if certain conditions are observed.[11] One of these conditions is the availability of the work for public inspection; another is its non-removal from the country other than by permission. It would, perhaps, be a strong thing to deny the country some interest in the enforcement of the latter prohibition.

Fifthly, how far is it a persuasive argument for governmental tolerance of the market that many collectors eventually donate their collections to museums, when many museums may now be bound to refuse? If museums are ethically committed[12] to declining any object[13] which was stolen or unlawfully removed, or which lacks a full legal provenance, the prospect of being offered such an object is hardly tempting. One is reluctant to suspect a gap between principle and practice in this regard.

Whether or not the spirit of mobility enjoined by the UNESCO instruments cited earlier can truly be interpreted as an endorsement of the market, few would doubt that an examination of the legitimate scope of exchange is long overdue. Not least, such an exercise may produce common agreement on the demarcation of the licit from the illicit, and so discourage the latter. It may be that the best way to keep art is to let it go. But we should be astute to inquire what else may depart in the process.

Notes

1 These articles are edited versions of papers delivered at the *Fifth Symposium on The Legal Aspects of the International Trade in Art, Licit Trade in Works of Art*, held at Vienna in September 1994 under the auspices of the International Chamber of Commerce, in association with the International Cultural Property Society and under the Conference Presidency of Professor Pierre Lalive. The Editor is grateful for the permission of the sponsoring authorities to publish these papers in the present context.

2 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
3 Prreamble to the 1954 Hague Convention on Protection of Cultural Property in the Event of Armed Conflict.
4 (1994) 3 IJCP 227.
5 (1993) 46 Archaeology Magazine (No 3) 199.
6 In the New York symposium reported in our last issue: (1994) 3 IJCP 372.
7 Viz, that removal of the object from the territory of the requesting State significantly impairs "the use of the object by a living culture", or that the object itself "is of outstanding cultural importance for the requesting State": Draft UNIDROIT Convention on the International Protection of Cultural Property (1993 version), Art 5(2). The 1993 version is analysed by Siehr (1994) 6 IJCP 301. Compare the approach of the draft Vienna Principles (mentioned further below) which seek to assure "the retention and use of ceremonial objects by living cultures".
8 Prior, that is, to finders and other acquirers of the interred object.
9 Art 7(b)(i).
10 The claim has been settled by agreement.
11 For further examples of objectives which might inform particular export prohibitions, see O'Keefe, Feasibility of an International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property, a Report for UNESCO (Paris, 15 May 1994) para 24.
12 See, for example, clause 4.5 of the (UK) *Museums' Association Code of Practice*, which is based closely on clause 3.2 of the *Code of the International Council of Museums* (1986).
13 Whether offered by way of sale, gift, bequest or exchange.