



## IADAA NEWSLETTER SEPTEMBER 2021

### *UNESCO conference, The Fight against the illicit trafficking of cultural property: for a strengthened global dialogue, September 14, 2021*

Another UNESCO conference where genuine trade representation and engagement was close to non-existent.

Those gathered focused on three themes:

- Regional needs and specific priorities
- Due diligence of professionals
- Provenance, online sale and situation of countries in emergency situations

Some recognition was given to the fact that countries are not really living up to their obligations under Article 5 of the Convention to protect their domestic cultural heritage, including vulnerable sites.

Various reasons were given for this, ranging from a lack of resources or understanding to countries' failure to prioritise cultural heritage or update laws accordingly.

#### **Provenance and Due Diligence**

Marina Schneider of UNIDROIT emphasised that the UNIDROIT Convention held the key to what constituted proper due diligence in response to varying standards across many countries.

Article 4:4 of the Convention set this out, she explained. It reads as follows:

“In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.”

This reflects the standards already long imposed on members by associations like IADAA and the UK's Antiquities Dealers' Association via their codes of conduct.

Alessia di Gregorio of the European Commission added that the EU had also set the standard in its [2014/60 directive](#) on the return of cultural objects unlawfully removed from the territory of a Member State. Article 10 rules that fair compensation should be paid by the Member State to whom the item is returned if the possessor can show that they have exercised due care and attention in acquiring the object. Together with Recital 17, it then sets out what such due care means, which is relatively straightforward if a little open-ended, a weakness that leaves dealers and collectors vulnerable to losses almost regardless of the lengths to which they have gone to establish bonafides.

#### **UNESCO's failure to engage with the art market despite its claims to do so**

Kate Fitz Gibbon, a cultural property lawyer and Editor of *Cultural Property News*, gave a hard-hitting critique of UNESCO's persistent failure to engage with the art market properly when debating issues and forming policy, despite the industry's many requests to be included. This failure led to unworkable regulations and policies, such as the work in progress by UNESCO to impose a new code of conduct on the industry. As one example, she explained that Article 2 of the draft proposal ignores the legal obligations imposed on auction houses and others to maintain confidentiality of clients.

She also appraised the general approach to updating provenance and due diligence compliance: “It's unreasonable to make laws for today that ignore the facts of the past,” she said, pointing to the disparity over time in requirements for documentation proving legal export from source countries.

In an attempt to settle the Orphan works question, dealers have suggested drawing a line in the sand of

2010, before the Arab Spring, as the cut-off point from which the new rules should apply. Fitz Gibbon explained that that was the moment when proper written provenance was adopted wholesale by the industry and argued that any new code should focus on modern-day looting.

She concluded by heavily criticising UNESCO's "wilful" embracing of bogus figures, notably in its 2020 anniversary campaign *The Real Price of Art*. "UNESCO should clean its own house," she concluded. Emmanuel Kasarhérou, President of the Quai-Branly-Jacques Chirac Museum in Paris, said that the obligations of carrying out due diligence meant that a number of potential acquisitions had to be abandoned. The process just took too long, he explained, which meant the museum missed out.

### **eBay, and how online platforms should police their content**

Much of the debate on technology centred on eBay and what it could/should do to police its site. Wolfgang Weber, the company's Global Head of Regulatory Policy, acknowledged that eBay could do more and was willing to listen. Central to his challenge was that however good the technology, eBay did not have the in-house expertise to determine whether an item was genuine or legitimate. Katie Paul, co-founder of the ATHAR Project, which studies trade and items offered via social media platforms, said that tech companies needed to hire human moderators to help with this, enough to eradicate the problem. How large this team of moderators would need to be was not made clear.

### **Dramatic claims from Interpol**

Corrado Catesi of the Works of Art Unit at Interpol appeared to say that data available to him showed the astonishing figure of more than 800,000 illicitly excavated items of cultural property recovered in 9,000 seizures across 72 countries in 2020 during the pandemic. Despite asking for clarification on this, it never came. Were those the figures he was claiming? Were the 800,000 items antiquities? What evidence was there to show illicit excavation? These and a number of other questions relating to this important revelation were not asked, so unless he revisits it, we may never know.

### **Why it's good to chat**

In some ways the chatroom that ran alongside the main event generated a more interesting debate. Pleasantries slipped only occasionally between rival factions competing for space.

UNESCO's Director of Culture and Emergencies Lazare Eloundou Assomo attempted to brush aside the scandal over bogus figures and billion dollar claims from his organisation as a "minor dispute", but was a lone voice in seeming to think that they did not matter. He also promised to "continue consultations with the art market", a rather empty pledge as what little input has been permitted from the market so far has been roundly ignored. Nonetheless, it reads well in [media reports](#) of the event, which give the misleading impression that the art market has been invited in to the heart of the discussions.

Dr Donna Yates, an academic researching looting and trafficking who is openly against any trading in antiquities, agreed that the numbers quoted were "outrageous and there is no evidence for them". Where she and the trade agree is on the need for accurate data that can be relied on. "Policy based on bad (and totally weird) numbers is not useful to anyone," she rightly concluded.

Dr Yates also acknowledged the fact that antiquities collecting is not driven by money or investment: "I'd be really surprised to hear that much ancient art collecting is for investment," she wrote in the chat room. "I've never interviewed an antiquities collector who was in it for the money. I think it is easy to paint the market as money focused, but that ignores the meaningful connections between people and objects and further weakens the effectiveness of regulatory responses. I'm not being an apologist for the purchase of unprovenanced cultural objects, but rather for regulatory responses that take into account the real motivations for the behaviour we seek to regulate."

Others emphasised that monetary value was only one consideration when assessing the scale of the problem of looting and trafficking. Cultural loss is just as important, a fact that trade campaigners agree with. However, agreement on what the solution is to this seemed no nearer than before the conference. The looting of vulnerable sites is the fault of the art market, according to those who oppose the antiquities trade, while for others what encourages poor local people to loot are the screaming headlines promoting bogus figures about illicit trade being worth billions.

## **Time to tackle the double standard**

While the focus was very much on how the trade should behave – session two was directly devoted to that – of equal importance is how those who attack it behave. It would have been valuable to hold a session on the ethics and moral behaviour behind UNESCO's bogus campaign *The Real Price of Art*, as well as the motivations governing the behaviour of those whose careers depend on demonstrating the existence of a severe problem with antiquities trafficking.

When senior figures within the EU contribute to the spread of false data, as happened during this conference, questions should be asked as to why they have not verified the information they use first. In this case, an offending statement from Margaritis Schinas, Vice President of the European Commission, was then picked up and repeated by other speakers. He said the European art market remains largely unregulated (before listing the laws to which the market is subject) and quoted the German (ILLICID) study, saying: "a study recently funded by the German Ministry of research, concluded that only 2% of the antiquities traded in Germany from the eastern Mediterranean have a legal origin."

What the ILLICID study actually concluded was that only 2% of artefacts of Middle Eastern origin that it studied would meet provenance requirements under Germany's stringent new import law for cultural property. However, as that law is entirely unrealistic in its retroactive approach to documentation and does not apply outside Germany, this is meaningless. What ILLICID has not yet done is state how many of the 386,500 it studied were conclusively looted and trafficked. Could the answer be none? It certainly seems so at the moment.

The manner in which Vice President Schinas presented the ILLICID findings gave them a credence they have not earned, and the way in which his statement was then repeated by other speakers indicates that it may well join the raft of other misleading statistics to blight this area of study. In turn, the false picture that all this creates directly influences policy and legislation, as was demonstrated with the EU's new import licensing regulations.

## **What next?**

How to move forward? Clarifying the data announced by ILLICID and Interpol's Corrado Catesi would be a start. Publishing the effective results of joint international operations (at least seven have taken place in as many years) organised by Interpol, Europol and Customs, as well as national police forces, would be another. Mass headlines concerning arrests and seizures have blitzed the internet; however, we have yet to hear how many of the arrests led to successful prosecutions and how many of the seizures were later shown to be valid. That is the data that really counts. If Europol cannot come up with this data, what was the point of the operations and all the money spent on them?

## **So where does this leave us with provenance and due diligence?**

In a bit of a mess really. The trade associations have long-established and thorough codes of conduct. CINOA, as a trade federation, has a clear code of ethics. None of these have been taken into consideration by UNESCO as it embarks on its review of due diligence and how the art market should behave. Despite its claims to the contrary, UNESCO has not involved the market centrally in this review and update. Instead, belatedly it sent out a poorly drafted questionnaire that demonstrated how little it understands the issues at hand. Exasperated market representatives have informed UNESCO about its failure to address key issues in this review and they have also challenged many of the questions, which do not make sense. Having blithely ignored these concerns, UNESCO has instead congratulated itself on how well it has engaged with the market – Lazare Eloundou Assomo did this again here towards the end of the conference. Meanwhile, the European Commission, having masterminded and introduced the new import licensing regulations, with their endless demands for documentation (11 different types and counting – and potentially limitless under the rules), is now also reviewing due diligence obligations while depending on those introduced in 2014, which also leave the level of commitment required open ended. In this ever-changing world of compliance, what are dealers and collectors supposed to do? If they meet due diligence obligations set out under Article 4:4 of the UNIDROIT Convention, will these be enough under the EU's 2014/60 directive? Or existing UNESCO requirements? Or UNESCO's new requirements? Or the EU's import licensing regulations? Or the EU's new due diligence requirements when they are published?

## What is going on?

A major problem is that significant organisations including UNESCO and the European Commission seem not to care at all that they are promoting bogus data and a false picture – even when it is brought to their attention and clearly demonstrated. UNESCO has only doubled down on its errors, both in continuing to promote the bogus data and claims – its bogus advertising campaign remains widely available on the internet. Where is the regret, shame and contrition over this? None was in evidence here.

UNESCO's vision includes the following statement: "Cultural diversity is under attack and new forms of intolerance, rejection of scientific facts and threats to freedom of expression challenge peace and human rights."

Tolerance, scientific facts, human rights: UNESCO values these so highly they are at the core of its being. So why is it so intolerant of legitimate trade and the human rights of dealers and collectors? Why does it abandon the truth in favour of bogus data so readily and enthusiastically? And why is its brazen behaviour allowed to go unchecked?

### *Decades-long scheme exposed: UI professor and grad student uncover forged antiquities*

Daily lowan: September 2: A follow-on from the scandal surrounding the Sadigh Gallery fakes, this article reveals how academics uncovered a host of forgeries (90 in all) among the collection at the Hoover Museum.

### *The Stargazer Judgment – Some key lessons*

Martin Wilson, Linked In: September 9: Martin Wilson is the former Chief General Counsel for Christie's, the auction house at the centre of this case. Now as Chief General Counsel for Phillips, who do not trade in antiquities, his interest in the subject is academic, but he shows a firm grasp of the relevant arguments at hand.

This detailed article gives the back story to how Turkey ended up launching a legal claim for the return of the Guennol Stargazer, an Anatolian marble figure dating to around 3,000 BC. It also explains why Turkey lost its claim in the District Court. A lack of evidence to support its claim combined with its failure to act for years when it could have done so weakened Turkey's case beyond hope here.

Arguably Wilson's most important observation is as follows: "It is sometimes assumed that, because of the complex ethical, political and historical issues which surround them, cultural restitution claims are not subject to the same evidential requirements and rules of justice which apply to other claims or at least that these rules should be applied less rigidly. This ruling illustrates that this will not be the approach where the parties bring their dispute before the US Courts. It confirms that in common with any ordinary civil ownership dispute, a party claiming restitution must, if it hopes to prevail in a US court of law, be able to satisfy the evidential burden of proving the facts necessary to establish ownership in accordance with the requirements of the law."

This may also explain why Italy has avoided going to court in its claim against [Alan Safani](#).

Wilson notes the increasingly commonplace arguments used by source countries in their attempts to reclaim artefacts: "It is not uncommon for the parties on either side of the debate in cultural property restitution cases to assume bad faith and wrongdoing. The Turkish government followed a line of argument which is commonly used in cultural restitution cases – that an antiquity outside of its country of origin without evidence of how it came to leave that country should be treated by collectors as a red flag and that there is a presumption of illegal export or excavation which arises in such circumstances."



*The Guennol Stargazer.  
Image via the New York Times.*

Fortunately, although source countries' attempts to reverse the burden of proof in this way may work under the terms of their Memoranda of Understanding with the United States, it is a different matter when these claims go to court, as this case shows.

Wilson also reminds us that statutes of limitation do count, although they are constantly overlooked. Crucially, he concludes with some sound advice: "While the judgment does not say so, the outcome of the Stargazer case highlights the shortcomings of the debate over cultural property being expressed as a question of "ownership"." Certainly, while source countries continue in their attempts to ride roughshod over individuals' legal rights, no one will be satisfied.

### [Auction of stolen Mexican patrimony cancelled in Rome](#)

Aldia News: September 29: Another report that jumps the gun on the status of the artefacts in question. As reported on numerous occasions, Mexico objects to any trade in its cultural heritage, regardless of whether pieces were legally sold and exported in the past. It objected again in this case and the Italian police intervened to stop the sale.

What has not been shown, however, despite the headline of this article, is whether the items were actually stolen. The article itself acknowledges this, which calls into question the competence of its editor: "The pieces have been submitted for examination as to their illicit provenance in order to, if confirmed, return them to Mexico," the statement said.

Does this mean that if the evidence is not forthcoming, after all, the pieces will be returned to those trying to sell them?

Not if the Carabinieri chief is to be believed. He seems already to have made up his mind on the matter: "Roberto Riccardi, head of the Carabinieri Command for the Protection of the Cultural Heritage of Italy, confirmed that all the pieces are safeguarded and that they are working on the steps to verify the origin of the pieces and to be able to return them to Mexico."

### [Wikimedia and ICOM have joined forces to mobilise the Wiki community and Internet users to protect Afghan cultural heritage at risk of looting and illicit traffic](#)

ICOM: September 21: A joint initiative to promote the ICOM Red List of Afghanistan Antiquities at Risk, the article does not make the exact nature of the project clear. It seems to be inviting people to upload any pictures of artefacts that might come from Afghanistan onto the Wikimedia website. How it will distinguish between what is legal and what is not remains unclear, especially as it seems to be inviting people to upload images of museum exhibits.

A click-through link takes viewers to a page with more detail, including the vital caveat: "It is important to highlight that a Red List is not a list of stolen objects. The cultural goods depicted on the lists are inventoried objects within the collections of recognized institutions and they serve to illustrate the categories of cultural goods most vulnerable to illicit traffic."

The general intention of this project is admirable – especially as it targets items being offered via social media – but if it turns into a free-for-all where non-experts start to report everything they see, it could prove very hard to manage. That would be a shame, because an effective alert system is certainly needed.

### [American couple arrested at Athens airport with antiquities](#)

Ekathimerini.com: September 21: The couple involved here have either been incredibly naïve and stupid or cynical and offhand in their behaviour.

It appears that, as tourists, they decided to pick up a number of keepsakes (*pictured right*) from cultural heritage sites around Greece and packed them in their luggage. The man, a pastor, is said to have told police that he teaches Greek history and wanted the fragments to display to his students.



### *German auction of Latin American antiquities goes ahead, but many works fail to sell*

The Art Newspaper September 22: Another example of source countries demanding the return of works they say are cultural patrimony, but for which they have no evidence that a crime has been committed. In this case, seven Latin American countries plus Mexico tried to halt the sale, which went ahead on the grounds that no legal reason could be provided to prevent it.

The wording of the article is interesting. It states: “A controversial auction of pre-Colombian artefacts went ahead in Germany on Tuesday, even though diplomats from seven Latin American countries supported a Mexican bid to halt the sale.”

The use of the words “even though” are more akin to comment than straightforward news reporting and appear to grant credibility to the objections despite there being no evidence to support them.

Detailing the objections of the Ambassador of Panama, it is clear that the source countries’ claims have nothing to do with the legal status of the items in question but their various updated national policies on cultural heritage.

Yet again, those calling for the sale to be halted have attempted to reverse the burden of proof on the provenance of the objects. Effectively, this confuses their arguments: either they claim that the items were stolen and illegally exported, or they claim that their national patrimony laws should now supersede any prior legal sale and export and that the items should be returned without compensation, a policy that would seem to confound their undertakings as signatories to the 1970 UNESCO Convention.

There is a great deal of difference between crime and a changing political viewpoint. As with many other articles on this topic, not much effort is made to draw the distinction. Editors need to decide whether this approach is really suitable for supposedly impartial news reports or should be reserved for opinion pieces.

### *U.S. Solicits Public Feedback on Anti-Money-Laundering Rules for Antiquities Dealers*

Wall Street Journal: September 23: This update on progress towards US AML legislation involving the art market makes some interesting points.

Stating that “a recent legal action by the U.S. Justice Department illustrates how antiquities may pose the type of terrorism financing threat that lawmakers hope to mitigate with the new regulations”, it refers back to the [Abu Syyaf raid of 2015](#) – the only reliable source available giving any sort of indication about the size and scope of ISIS’s exploitation of antiquities for revenue.

If that case showed anything, it was just how small a part of ISIS’s illicit trade antiquities made up, despite claims to the contrary.

It notes that the lack of a clear definition for antiquities is posing a problem.

However, it also states: “FinCEN’s notice on Thursday said a range of factors make the antiquities market prone to money laundering, including customs around client confidentiality and the subjectivity of prices for antiquities.”

This ignores the illiquidity of antiquities in the market, as well as their low value compared with other artworks such as Contemporary paintings and sculpture. It is telling that whenever articles covering this topic try to justify the inclusion of antiquities, they refer back to the case of two Russian oligarchs and their sanctions-busting activities using... Contemporary art.

FinCEN’s arguments over client confidentiality also do not hold water. Such confidentiality is common across the market, not because of attempts to conceal crime, but because of contractual obligations and the desire of buyers and sellers to stay under the radar for reasons such as personal security and insurance cover.

[The Art Newspaper](#) has also covered this issue.

### *What distinguishes an art criminal from a regular crook?*

The Art Newspaper: September 27: This article exposes an extraordinary and inaccurate prejudice at the heart of one of the most influential people working against the antiquities market.

It begins thus: “The people who deal in antiquities—and we’re talking about a socio-economic strata that you and I can never hope to attain, with their limousines waiting at the curb and with their bespoke suits—are capable of the same base criminality as common hoodlums in the streets of lower Manhattan. For me, honestly, they’re just the same.”

Who says these words? If the writer has reported accurately, it is New York Assistant District Attorney

Matthew Bogdanos, a man who has targeted dealers in New York with a vengeance and whose actions, some in the trade believe, are motivated by just such a prejudice as displayed in this statement above rather than evidence-based due process.

Quite apart from the fact that most antiquities dealers are not wealthy at all, Bogdanos's dismissal of them as a class as the same as "common hoodlums" surely makes him unfit for office. How can any of these dealers have confidence that they will be dealt with fairly and dispassionately under the law by someone who espouses such views?

### *Restitution—what's really going on?*

The Art Newspaper: September 29: Institute of Art and Law Assistant Director Alexander Herman has a new book out called *Restitution: the Return of Cultural Artefacts* (Lund Humphries). This article looks at the big picture surrounding restitution, putting it in historical context and, perhaps even more importantly, current geopolitical context.

"The restitution debate has afforded certain governments a new way of establishing themselves through diplomatic links and geopolitical influence, a particularly cultural form of 'soft power'," Herman writes.

"Macron's Burkina-Faso speech can be seen not merely as a way of doing good, but also as a way for France to reassert its validity in francophone Africa."

Subscribers to this newsletter will know how this issue has consumed the antiquities trade in recent years ([See the lead article in the August 2021 newsletter on MoUs](#)).

Herman details developments in source countries and how these and the increase in restitution is helping to revive cultural patrimony, while also oiling the wheels for the world's greater powers to spread their influence within these nations.

What the article does not deal with – but perhaps the book may address – is the consequent erosion of rights and other valid interests that takes place in the wake of this movement. It is one thing to return artefacts that are the clear products of crime (taking into account statutes of limitations), just as it is up to nations if they want to atone for past wrongs by emptying their museums. However, as argued in the August newsletter, and as demonstrated by events in the past month reported above, it is another thing entirely to confiscate or prevent trade in items without evidence of wrongdoing, simply on the basis of political expediency.