

Ethics, Law and Heritage

Dr. Guido Carducci, Chief, International Standards Section, Division of Cultural Heritage, UNESCO

The protection of cultural heritage has witnessed both ethical and legal, national and international initiatives. The former are usually in the form of a Code of Ethics, while the latter take the form of legislation (laws or decrees) at the national level and a recommendation or a convention at the international level.

> An important difference exists between law and ethics. While ethics may influence the elaboration of a legal rule, or even possess a principle identical to the content of a specific legal rule¹, ethics as such is not *legally* binding. Unless a legal instrument expressly stipulates consequences, non-compliance of an ethical rule or principle *per se* does not generally raise properly legal sanctions (i.e., imprisonment, forfeiture, fines, damages to be paid etc.)

> At the ethical level, UNESCO has adopted an *International Code of Ethics for Dealers in Cultural Property*² and ICOM has elaborated the *ICOM Code of Ethics for Museums*³.

> The interesting Preamble of the UNESCO Code of Ethics reads:
Members of the trade in cultural property recognize the key role that trade has traditionally played in the dissemination of culture and in the distribution to museums and private collectors of foreign cultural property for the education and inspiration of all peoples. They acknowledge the world wide concern over the traffic in stolen, illegally alienated, clandestinely excavated and illegally exported cultural property and accept as binding the following principles of professional practice intended to distinguish cultural property being illicitly traded from that in licit trade and they will seek to eliminate the former from their professional activities.

> Differently from a legal (binding) text which regulates and applies directly to its addressees (laws, decrees etc.), this Code, as other ethical sets of rules or principles, still needs acceptance by the members of the community concerned.

> If such acceptance exists, compliance with the Code is to be expected. However, this does not automatically mean that non-compliance with a Code of Ethics generates *per se* and automatically legal consequences and sanctions. This occurs only insofar as the ethical rule and the applicable legal rule coincide with respect to the same conduct (for instance, acquiring cultural objects of a doubtful provenance⁴).

> The basic distinctions between ethics and law being briefly reminded, most of the international protection of cultural heritage and the fight against illicit traffic is undertaken through international legal instruments, which establish and organize interstate cooperation and measures at a national level.

> While for centuries the practice of *Ius praedae* has witnessed the conqueror destroy and/or loot the cultural heritage of the defeated, slow though remarkable progress was made in the codification of international law for the protection of cultural heritage. Destruction of cultural property may still occur nowadays, though mostly illegally, to a degree varying with the national laws and international treaties applicable. As recent conflicts have shown, cultural heritage has also become a target of deliberate attacks and destruction, particularly for political or ideological reasons and in ethnic conflicts where cultural heritage represents an essential component of the history and identity of the enemy society.

> Indeed, the deliberate destruction of the Bamiyan Buddhas has led the international community represented within UNESCO to elaborate and adopt a UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*. Although this Declaration, as other soft-law instruments, is not directly legally binding on States, it possesses a moral value.

> Restitution of cultural property is a very sensitive and complex moral and legal problem. The focus here is on legal issues, certainly not all those raised by the protection of cultural property in both private and public international law but the legal status of restitution at the international law level. As the only UN agency with a mandate for the protection of cultural heritage, since its inception UNESCO has elaborated for this purpose several standard-setting instruments. Two Conventions are most relevant and binding for their State parties.

> First, the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (the "1954 Convention" or "the Hague Convention"), its 1954 and 1999 Protocols. This Convention represents the first multilateral treaty addressing specifically such protection and is currently in force among 114 States. The Second Protocol is the result of a review process of the Convention and, while not replacing the Convention, it ensures a higher threshold of protection of cultural heritage for its States Parties.

> Second, the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (the "1970 Convention" or "Illicit Traffic Convention"). This Convention also applies in cases of military occupation⁵. Indeed, history has shown that during conflicts and subsequent occupation, poverty and difficult conditions are likely to increase looting and theft, including that of cultural property. The 1970 Convention, currently in force among 107 States, was a "pioneer" instrument at the time of its negotiation and adoption.

> Twenty five years later, the 1970 Convention was complemented, primarily on the private law aspects of restitution, by the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* adopted in 1995⁶ which encompasses also illicitly exported objects, which are to be returned even if they were not stolen before being illicitly exported.

> All these instruments have entered into force vis-à-vis their respective States Parties and are operational within their scopes of application. Notably, none of them is retroactive.

> In exceptional situations, as those linked to armed conflicts, the international community may deem appropriate to elaborate and to adopt, usually on an *ad hoc* basis, other international law rules to apply to the restitution of cultural property. A significant example is provided by Resolution 1483 adopted by the United Nations Security Council on 22 May 2003 wherein Paragraph 7:

Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

> This brief overview of both the distinctiveness and coexistence of ethical and legal standards may contribute to raising public awareness of how crucial national and international legal (even more than merely ethical) instruments are to ensure an effective protection of cultural property. Implementation of ethics, not backed-up by legal rules and sanctions, basically relies on the degree of respect for and compliance with them that each individual chooses to employ.⁷

1. The more general the principle the more legal and ethical contents coincide (i.e., "thou shall not kill").

2. For all references to UNESCO texts, see: <http://www.unesco.org>

3. <http://icom.museum/ethics.html>

4. See for instance 2.3 (*Provenance and Due Diligence*) of the ICOM Code: "Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate

country in which it might have been owned legally (including the museum's own country).

Due diligence in this regard should establish the full history of the item from discovery or production."

5. Art.11. condemns illicit traffic "directly or indirectly" occasioned during a military occupation.

6. See <http://www.unidroit.org> (text and list of State parties).

7. Opinions expressed in this article are the author's, not necessarily those of UNESCO, and therefore do not commit the Organisation.