

ACQUIRING FOSSILS: A COMPLEX PICTURE

by Janet Ulph



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This article explains why museums should avoid acquiring fossils which lack sufficient provenance and where the circumstances are suspicious. It argues that, regardless of whether one considers fossils to be cultural property or not, the Museums Association's Code of Ethics should be followed not only in order to maintain public trust in museums but also to ensure compliance with current laws

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I: Introduction

The concept of heritage has been expanded by different academic disciplines to the extent that 'almost anything' has the potential to fall within a definition of heritage.¹ In any legislation applying to 'cultural' objects, it can therefore be challenging to provide a definition which is sufficiently precise and appropriate.² It could be based upon the special cultural significance or rarity of objects.³ Even so, should there be further restrictions, requiring a link to human creativity? Antiquities and works of art would satisfy this restriction but fossils would not. Nudds has suggested that fossils should not be regarded as cultural objects given that,

'... fossils are not part of the developed culture of the country in which they happen to have been preserved ... The evolution of life did not take cognizance of today's political boundaries.'⁴

The argument is that fossils are not the product of a particular culture:⁵ first and foremost they provide evidence of an earlier geological age and are therefore worthy of scientific study.⁶

One difficulty in drawing clear bright lines is that objects can be seen in different ways.⁷ Many traders and collectors may view fossils primarily as items of commerce. As regards museums, collections were

often built up from chance donations over a long period of time. In the nineteenth century, fossils would have been accessioned along with many other scientific objects, and might well have been used to assist in providing a science-based evolutionary narrative. However, since then, museums have made efforts to engage the public in different ways and to provide less directed and more multi-sensory approaches to collections.⁸ Consequently, as members of the public are encouraged to make their own decisions in interpreting and responding to collections, some may well be attracted to fossils on an emotional level because they are linked in their minds to a particular community or country. These people may well see fossils in collections as cultural objects.⁹ As museums reach out to new sectors of the public, there is a serious risk of a conceptual blurring of 'heritage' with science.

In judging any definition of 'cultural' objects, it is surely best to take account of the context. Writing in 2001, Nudds discussed the wonderful fossils which were for sale at trade fairs but which often lacked details in relation to their provenance. Nudds suggested that museums should be able to purchase fossils even where there might be reason to suspect that they had been smuggled out of their source countries.¹⁰ He objected to a wide definition of cultural

¹ Harrison 2013, p. 3; Forrest 2011, p. 1.

² For discussion relating to defining 'cultural property' and 'cultural heritage,' see Visconti 2015, pp. 264-266; Blake 2000, p. 64.

³ Merryman 2005, p. 11.

⁴ Nudds 2001, p. 193.

⁵ Martin 2004, p.158.

⁶ For further discussion, see Martin 2004, pp. 158-159.

⁷ Loulanski 2006, p. 209.

⁸ Macdonald 2007, pp. 186-187.

⁹ Cross 2001. For a wider discussion, see Besterman 2001, p. 203.

¹⁰ Nudds 2001.

property which included fossils because, in his view, this meant that fossils automatically became subject to cultural property laws which restricted their export and dealings with them.

Some strong arguments are made by those who suggest that the law and museum ethics should permit an unrestricted trade in fossils. For example, a thriving market in fossils will induce local people to 'rescue' fossils which may be revealed by coastal erosion and this will prevent the fossils from disintegrating.¹¹ Furthermore, few would disagree with the idea that the information which fossils carry belongs to the international scientific community, to be held in trust for everyone.¹² In pursuing the argument that fossils should be easily traded, Nudds criticised the 1999 version of the Museums Association's Code of Ethics for muddling 'the fossil trade with the trade in antiquities' and that 'looted material is not a major constituent of the fossil trade in the way that it is for antiquities.'¹³ In his view, ethical principles which dictate that museums should reject suspicious objects which may have been illicitly traded, could result in catastrophe from a scientific perspective, with vital knowledge lost to the scientific community. Nudds argued that palaeontologists working for museums should disregard the Code of Ethics and acquire objects which have left their countries 'by whatever means' so that they could be researched properly and the results published.¹⁴ Nudds assumed that museum palaeontologists would remain within the law if they did so.

Yet, if legal regulation is not excessive, it can serve to protect and preserve cultural objects for the benefit of all mankind. And, despite Nudds' protests, it is not uncommon for fossils to be stolen or looted. For example, a UNESCO Information Kit noted that, 'In the United States, a survey conducted in 1991 shows that in Nebraska 28% of sites of particular importance have been damaged by illegal excavators looking for fossils.'¹⁵ When a fossilised elephant's tooth and bones were stolen from the Joint Mitnor cave in Devon in 2015, the site was badly damaged in carrying out this theft.¹⁶ There are reports of theft and looting in Mongolia and China by organised gangs of

criminals.¹⁷ Thousands of smuggled fossils have been seized in China in recent years.¹⁸ Although the development of scientific knowledge is of the utmost importance, there are other policy considerations. Fossils such as dinosaur skeletons can fetch millions of pounds at auctions.¹⁹ Transnational organised criminal groups may become involved in the illicit trade in fossils because of the huge profits which can be made. There is a risk that these groups will invest the profits in other criminal activities. If there is an unregulated market where people can easily buy and sell unprovenanced fossils, this will encourage traffickers to carry out more looting in order to satisfy demand. This will undermine the development of scientific knowledge because fossils which have been unlawfully excavated will usually have been stripped of their context: information of their stratigraphic location is invaluable to the scientific community but will be lost forever. Furthermore, if it is easy to sell unprovenanced objects without any questions being asked, it will facilitate the sale of fakes. These policy concerns support Besterman's argument that good science can only be founded on sound ethical practice at every step 'from specimen origination, research and curation to interpretation and publication.'²⁰

Was Nudds correct to assume that palaeontologists who acquire objects which they suspect may have been smuggled out of a source country are safe from being prosecuted? And does the Museum Association's Code of Ethics go too far? The ethical principles in the Code are intended to maintain the public's trust.²¹ As a minimum, they cannot encourage conduct which contravenes English criminal laws. This article therefore considers not only ethical principles but also the law in relation to dealings in fossils, introducing the discussion by examining the international context. In doing so, this article questions whether the debate in 2001 regarding the classification of fossils continues to be significant in the light of new legal developments affecting acquisitions. This article will seek to demonstrate that anyone, whether a museum employee or not, who suspects that certain fossils have been smuggled out of a source country, will acquire them at their peril.

¹¹ Martill 2001, p. 214; Nudds 2001, p. 194.

¹² Martin 2004, p. 159.

¹³ Nudds 2001, pp. 192-193.

¹⁴ Nudds 2001, pp. 193-194.

¹⁵ 'The Fight Against the Illicit Trafficking of Cultural Objects; The 1970 Convention: Past and Future' Information Kit (UNESCO, 2013) 4.

¹⁶ 'Thieves steal 100,000-year-old elephant tooth fossil' BBC News 23 September 2015.

¹⁷ A Hannaford, 'The Trade in Stolen Dinosaur Fossils' The Telegraph 30 October 2013.

¹⁸ Schmidt, 2000, 215.

¹⁹ H Samuel, 'Forget Old Masters, New Trend in Art is Prehistoric' The Telegraph 13 April 2018.

²⁰ Besterman 2001.

²¹ See Ulph 2016.



A fossilised elephant's tooth stolen from the Joint Mitnor cave in Devon in 2015. Photo: William Pengelly Cave Studies Trust., Buckfastleigh, Devon, UK.

II: THE INTERNATIONAL CONTEXT

The 1970 UNESCO Convention

International conventions do not give private individuals the right to sue and they do not create criminal offences. Consequently, although there are a number of international resolutions and Conventions which are concerned to protect cultural heritage, their principles are often vaguely stated and it is left to governments to inject more detail in implementing their ideas into domestic law. However, they may provide a powerful moral message and they may prompt governments to create new domestic laws before ratification. For example, in 2002, the UK Government ratified the United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 ('1970 UNESCO Convention').²² The Convention declared that governments should accept a general obligation to combat the illicit trade in cultural property. The UK Government did not need to create any new laws before ratifying the Convention but accepted that it was desirable to add one further criminal statute (which became the Dealing in Cultural Property (Offences) Act 2003, discussed below). But the Convention's key strength has arguably been its ethical stance: it has been responsible for raising public consciousness of the importance of protecting cultural property.

The 1970 UNESCO Convention put forward a series of social, ethical and civil measures. It encouraged governments to protect their own heritage by recording information and educating its people to respect

the special values inherent in cultural objects. Article 6 required Contracting States to establish a system whereby any object which was exported needed to be accompanied by an export certificate; by Article 3, any object which was imported without an export certificate would be viewed as 'illicit.' Article 5(e) called upon Governments to establish rules for museums and traders which were in conformity with the ethical principles in the Convention. This provision encouraged the development of ethical codes of conduct which would inhibit trafficking in heritage objects.

The Convention does apply to fossils and other palaeontological material.²³ Article 1 makes this clear. It provides a list of different types of objects which are designated as 'cultural property.' This long list begins with a category of objects which have scientific value: 'Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest.' However, not every such object is necessarily cultural property: they must be specifically designated by the Contracting State (whether on religious or secular grounds) as being of 'importance for archaeology, prehistory, history, literature, art or science.' It is left to Contracting States to decide what property is worthy of special protection. If a State wishes to do so, it can treat all objects falling within each category enumerated in Article 1 as designated objects. This makes the scope of the Convention potentially very wide. But blanket bans upon the export of all of the objects listed in the 1970 UNESCO Convention are controversial for various reasons; for example, it is argued that it is best if museums can display objects from different countries in order to encourage the public to learn about other cultures.²⁴

Although Article 1 permits Contracting States to opt for all-encompassing designations, the UK has not taken this approach. The UK Government stated, when it ratified the UNESCO Convention in 2002, that it would interpret the term 'cultural property' as limited to those objects listed in Directive 1993/7/EEC (now Directive 2014/60/EU) on the return of cultural objects unlawfully removed from the territory of a Member State, and the definition contained in Regulation 3911/1992 (now Regulation 116/2009) on the export of cultural goods. The narrow definitions mean that only the most important objects are protected. The objects must be 'national treasures' which possess 'artistic, historic or archaeo-

²² 14 Nov 1970 (1971) 823 UNTS 231.

²³ The same approach is taken by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995, Article 2; this Convention has not been ratified by the UK Government.

²⁴ For discussion of the views of cultural internationalists, see for example, Merryman 1998, at pp. 9-12.

logical value' under national legislation. The listed categories cover objects of palaeontological interest. But the Annex adds a further requirement which is that these objects must be worthy of inclusion in a collection and must therefore be relatively rare, not normally used for their original purpose, and should be the subject of special transactions outside the normal trade in similar utility articles and of high value.²⁵

Although the UK Government has restricted the scope of 'cultural goods,' other governments have taken a different approach. The 1970 Convention created universal principles but stated them in manner which provided considerable flexibility in relation to how they were implemented at a local level. Thus Article 5 encouraged States to take steps to make laws 'as appropriate' to combat this trade. Some variation in domestic laws from one Contracting State to another was therefore permitted. This means that anyone concerned with whether they can legally export fossils will need to check the export laws of the country in which the fossils are located; anyone wishing to purchase an object will need to ensure that they comply with their domestic laws. English museums, dealers and collectors will need to ensure that they act in a manner which avoids any violation of English criminal laws and which does not leave them exposed to a civil action for recovery of the objects concerned.

Convention against Transnational Organised Crime 2000

International cultural property conventions such as the UNESCO Convention have primarily concentrated upon the in situ protection of cultural objects, encouraging respect for their provenance and facilitating the forfeiture and return of stolen items.²⁶ But there are also international conventions and resolutions concerned with drug trafficking, corruption, and other forms of serious crime. The most significant is the UN Convention against Transnational Organised Crime 2000, which requires Contracting States to create criminal offences to deter participation in an organised criminal group and to combat money laundering.²⁷ General Assembly Resolution

55/25 of 15 November 2000 was linked to the 2000 Convention and it expressly recognised the need for an international response in relation to heritage crime. It can be argued that, in doing so, it placed an emphasis upon the monetary value of cultural objects, rather than their intrinsic worth to science and/or humanity. It stated:

'Strongly convinced that the United Nations Convention against Transnational Organised Crime will constitute an effective tool and the necessary legal framework for international co-operation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organised crime and terrorist crimes.'

In the years following the 2000 Convention, the UN discussed strategies to deter the illicit trade in cultural property, such as developing the capacities of the police and the customs services.²⁸ Yet, in 2010, the UN Economic Council acknowledged that serious problems remained, not least because traders showed little interest in carrying out proper checks on the provenance of cultural objects.²⁹ An Information Kit, *The Fight Against the Illicit Trafficking of Cultural Objects*, published by UNESCO in 2013, commented that 'It is estimated that 98% of the final market price of an object remains in the pocket of middlemen.'³⁰

Although there has been international concern to prevent trafficking in any cultural objects, it is antiquities which have been the main focus of attention recently. This is because it is feared that antiquities are being looted on a large scale by terrorists in countries where law and order has broken down, such as Syria. On 24 March 2017, the UN Security Council focused upon cultural property and unanimously adopted Resolution 2347. The Security Council deplored the theft of cultural objects from museums and sites during armed conflicts. Resolution 2347 encouraged governments to take appropriate steps to counter the illicit trade in cultural property. It listed among other items those of 'rare scientific' impor-

²⁵ See *Collector Guns GmbH v Hauptzollamt Koblenz*, European Court of Justice, Case 252/84 at [24].

²⁶ Nafziger 1985. p. 846.

²⁷ 15 November 2000, 2225 UNTS 209. <http://www.unodc.org/unodc/treaties/CTOC/> This Convention was ratified by the UK Government in 2006. See Borgstede 2014.

²⁸ Resolution 2010/19 entitled, 'Crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking.' See further, Resolutions 66/180, 68/186 and 2011/42, 'Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking.'

²⁹ *Discussion Guide for the Thematic Discussion on Protection against Trafficking in Cultural Property: Notes by the Secretariat*, E/CN.15/2010/6 (para 25), May 2010.

³⁰ 'The Fight Against the Illicit Trafficking of Cultural Objects; The 1970 Convention: Past and Future' Information Kit (UNESCO, 2013) 2.

tance and which would therefore include certain fossils. It called upon governments to engage with the museum sector and art trade on standards of provenance documentation and due diligence measures.³¹ There is therefore pressure upon the UK Government to scrutinise the acquisition procedures adopted by museum professionals and dealers as part of a much broader strategy to combat terrorism.

III: GENERAL CRIMINAL LAWS AFFECTING ALL MOVABLE PROPERTY

Introduction

There are a number of criminal laws which apply to any moveable object; the fact that this object has a special intrinsic value to science or the arts will not determine whether an offence has been committed but may well affect the length of sentence handed down. Some laws, such as theft, purport to cover a broad spectrum of economic criminal activity. There are also laws which focus upon protecting cultural heritage. Enforcement agencies will consider all of the relevant laws before choosing which ones are the most appropriate in relation to the facts before them.

Theft and handling stolen goods

The Theft Act 1968 creates offences which cover all movable property, including cash. As it includes items severed from the land,³² fossils are capable of being stolen. Section 1(1) of the Act states, 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.'

Property is therefore only capable of being stolen if someone owns it, or has some property interest in it, so that it can be described as 'belonging to another.'³³ If the accused has taken a fossil from a museum, or storage facilities, or a private home, this requirement

is clearly satisfied. What if the accused goes on to someone's land to dig up fossils? He can normally be charged with theft because the fossils are presumed to belong to the owner or occupier of the land³⁴ (under the current definition, they will not be viewed as treasure which would belong to the Crown³⁵). What if a fossil is simply lying on the ground? Normally, any fossils lying on the ground will belong to the land owner provided he has shown an intention to control the things which might be found on his land.³⁶ But could someone who picks up a fossil argue that it has been abandoned? If it was abandoned, no charge could be brought not only because it would not belong to anyone but also because the finder would not be dishonest in taking it.³⁷ Yet it is very difficult to prove that an object has been abandoned and this analysis is unlikely to apply in these circumstances: it would need to be shown that the previous owner has given up any intention to own the fossil and has not transferred ownership to anyone else.³⁸

The position is more complex where the object has been excavated in another country and sent to England. The domestic law of the state of origin will need to be examined in order to discover whether an offence had been committed. A number of governments claim ownership of undiscovered objects which lie buried in the ground (often described as a 'patrimonial law'). In order to determine whether a fossil can be described as 'stolen,' the terminology of the particular law will need to be studied very carefully. It must extend to palaeontological objects and not just to antiquities.³⁹ Furthermore, the law must assert ownership of unexcavated fossils. It is not enough to declare 'state protection' of fossils or to attempt to control the export of fossils. But, where the patrimonial law states that the government owns the fossils then, if they are removed and taken abroad, they can be said to belong 'to another' and can therefore be viewed as stolen objects.⁴⁰

³¹ Resolution 2017/2347, art 17(g). Available at: <http://unscr.com/en/resolutions/doc/2347> (accessed 26 July 2017).

³² Theft Act 1968, s 4. The Theft Act 1968 does not extend to Scotland or Northern Ireland,

³³ Theft Act 1968, s 5(1).

³⁴ *Waverley B.C. v Fletcher* [1995] QB 334 (CA); *Parker v British Airways Board* [1982] QB 1004 (CA); *Webb v Ireland* [1988] IR 353 (Sup Ct).

³⁵ For a definition of 'treasure,' see Treasure Act 1996, s 1. For the position in Scotland, see MacFayden, C.C.J. 2008. Scottish Fossil Code, Scottish Natural Heritage, 82 pages.

³⁶ *Parker v British Airways Board* [1982] QB 1004 (CA); *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437 (CA); Ulph and Smith 2012, p. 176.

³⁷ Theft Act 1968, s 2(1)(c) provides that a person is not dishonest if the property is taken in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

³⁸ *R (Rickets) v Basildon Magistrates' Court* [2010] EWHC 2358 [2011] 1 Cr App R 15 (Admin).

³⁹ See the interesting discussion by Liston in relation to whether dinosaur eggs fall within the definition provided by China's Cultural Relics Protection Law 1993: Liston 2013, p. 549.

⁴⁰ For example, the Chinese Government passed the Cultural Relics Protection Law in 1982 asserting ownership over fossils of scientific value remaining underground: Liston and You 2015.

If a fossil has been stolen, then anyone who dishonestly receives the fossil or assists someone in, for example, smuggling the fossil into England, could be charged with handling stolen goods.⁴¹ In *R v Tokeley-Parry*,⁴² Tokeley-Parry arranged for an associate, Mark Perry, to bring Egyptian antiquities to England. Egyptian law declared that all antiquities belonged to Egypt and it was therefore clear that the antiquities were stolen: Tokeley-Parry had dishonestly assisted Mark Perry in their removal and was duly convicted of handling stolen goods.

Dishonesty is assessed objectively, and the conduct of the accused will be judged by the standard of 'ordinary decent people.'⁴³ The prosecution must also show, in relation to handling, that the accused knew or believed that the goods were stolen. Where the market is secretive, it is inevitably going to be difficult to bring forward sufficient evidence of dishonesty.⁴⁴ If a dealer has failed to make sufficient enquiries, this evidence is not sufficient to demonstrate dishonesty. There have been relatively few convictions for cultural property offences which require proof of dishonesty because of the difficulty in collecting convincing evidence. In *R v Tokeley-Parry*,⁴⁵ the prosecution was assisted in its task of proving dishonesty by the evidence of the dealer's assistant Mark Perry, together with notes which the accused had kept of artefacts which he had smuggled out of Egypt.

If it could be shown (as Nudds argued) that fossils are rarely if ever stolen, it would be difficult to convict a collector or trader who did not make sufficient enquiries: he could argue that he did not believe that the fossil was stolen. Furthermore, it would be difficult to prove that the collector or trader was dishonest. Even so, it is in the interests of purchasers to be able to show that they have exercised due diligence because, if they can, they are protected from civil claims as well. In England, according to section 4(2) of the Limitation Act 1980, legal title to an object such as a fossil may be lost six years after the stolen object has been acquired by a good faith purchaser.⁴⁶ This means that the fossil will no longer be regarded

as stolen;⁴⁷ the purchaser will own it outright. But, in order to demonstrate that he had acted in good faith under the 1980 Act, the purchaser must show that he had made all necessary and appropriate enquiries before acquiring the object.⁴⁸

The three main money laundering offences

Money laundering is the process of making money or objects which were once part of an illegal activity (such as theft) appear legitimate. In order to do this, the objects will usually be exchanged with other property. The Proceeds of Crime Act 2002 tackles money laundering by creating three offences which can apply to anyone, whether they are museum employees, professional dealers or private individuals. They are wide in scope and to an extent overlap with each other. Offenders may be jailed for up to 14 years. However, there must be an antecedent offence.⁴⁹ Where a foreign government asserts ownership over fossils and bans their export, the antecedent offence would be theft. But this is not the only possibility. If a dealer bribes public officials in order to take fossils out of a source country and to bring them to the UK, bribery would be the antecedent offence. Where a dealer creates false documents, or makes false statements (such as in stating the location from where they had originated), fraud would be the antecedent offence.⁵⁰ In these circumstances, the fossils and any proceeds of sale would be viewed as criminal property.

The three money laundering offences are set out in sections 327-329 of the Proceeds of Crime Act 2002. Section 327 makes it an offence to conceal, disguise, convert or transfer criminal property or remove it from the jurisdiction. Consequently, a dealer who buys and sells objects which he knows or suspects could be looted is at risk. Section 328(1) makes it an offence for a person to become involved in an arrangement which he knows or suspects will facilitate the laundering of criminal proceeds. This section is directed in particular at those 'middlemen' who never own the criminal property concerned, such as auctioneers.⁵¹ It could also apply to academics or

⁴¹ Theft Act 1968, s 22; *R v Bloxham* [1983] 1 AC 109 (HL), 113.

⁴² [1999] Crim LR 578 (CA).

⁴³ *Ivey v Genting Casinos* [2017] UKSC 67 [2018] AC 391 at [74].

⁴⁴ *R v Forsyth* [1997] 2 Cr App Rep 299 (CA).

⁴⁵ *R v Tokeley-Parry* [1999] Crim LR 578 (CA).

⁴⁶ A good faith purchaser will not be guilty of theft: Theft Act 1968, s 3(2).

⁴⁷ Theft Act, s 24(3).

⁴⁸ *Nicole de Préval v Adrian Alan Ltd* (QB, 24 January 1997).

⁴⁹ *R v GH* [2015] UKSC 24, SC [20].

⁵⁰ Fraud Act 2006, s 2. The Fraud Act 2006 does not extend to Scotland. The Customs and Excise Management Act 1979, ss 167, 168, also creates various offences relating to making untrue statements or counterfeiting documents and this Act extends to Scotland.

⁵¹ *R v Griffiths* [2006] EWCA Crim 2155.

museum professionals who suspect that a fossil is looted but nevertheless go on to provide an opinion which helps to authenticate it, as this will facilitate its sale.

Section 329 is concerned with those who acquire, use or have possession of criminal property. An offence will be committed where the item was obtained for inadequate consideration; in other words, the price was 'significantly less than the value of the property.'⁵² The burden of proof is on the prosecution to show this.⁵³ Finding proof of inadequate consideration may not be a significant obstacle: it is likely that any surreptitious purchase of stolen fossils will be at a price which is significantly lower than its true value.

If a fossil is stolen from a museum overseas, and purchased by a dealer to ship to the UK, the dealer may be prosecuted for money laundering. It is no bar that the theft occurred abroad: criminal conduct is defined as conduct which constitutes an offence in any part of the UK or would constitute an offence if it occurred in the UK.⁵⁴ There is a statutory defence available which can be pleaded where the accused knew or reasonably believed that the criminal conduct was legal under the criminal law applying in that country.⁵⁵ However, the conduct must be of such a minor nature that, had it occurred in the UK, it would have been punishable with a maximum of 12 months' imprisonment.⁵⁶ This defence would not assist someone who suspected that he was purchasing looted objects.

It is much easier to prosecute someone for money laundering than for offences which require proof of dishonesty (such as handling stolen goods) because the police only need to show that the accused knew or suspected⁵⁷ that the property was derived from crime.⁵⁸ As regards 'suspicion,' it was suggested in the case of *R v Da Silva* that, 'the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'⁵⁹

The court will consider the state of mind of the

accused, taking account of any expertise which he might have and whether there were suspicious circumstances. A person may be convicted where he appears to have deliberately closed his eyes and failed to ask questions. It is a matter of looking at all the facts. For example, anyone dealing in fossils from China should expect to be provided with a unique Ministry of Land and Resources number;⁶⁰ if this is not supplied, further enquiries should be made.

It is tempting to acquire important objects at a bargain price and to avoid posing difficult questions about their provenance - particularly where other people seem confident about purchasing them. However, the scope of English money laundering offences contained in the Proceeds of Crime Act 2002 is wider than their equivalent in some other countries, where the threshold for a prosecution may involve proof of knowledge and intention rather than mere suspicion. Principle 2.5 of the MA's Code of Ethics, which demands that museums reject any item where there is any 'suspicion' that it was wrongfully taken, could be seen as sensible advice in these circumstances.

Money laundering: obligations imposed upon 'high value' dealers

Since 1993, there have been a series of money laundering regulations. At their core has been a requirement of due diligence, which includes verifying the identity of customers, monitoring transactions, training staff and keeping records. A failure to exercise due diligence could lead to criminal charges. Originally, these regulations only applied to banks and financial businesses but they have been expanded over the years to include solicitors, accountants, high value dealers and others. 'High value' dealers are defined as dealers who accept cash of 10,000 euros or more in respect of a transaction or linked transactions.⁶¹ Until now, these regulations have not affected most auction houses and dealers in the UK because they only applied to those who accepted cash transactions. However, this is all set to change. There is a 5th EU Directive (2018/843) which requires governments to take action to improve transparency in commercial dealings by January

⁵² POCA 2002, s 329(2)(3).

⁵³ *Hogan v DPP* [2007] EWHC 978, [2007] 1 WLR 2944 (Admin) at [27]-[30]; *R v Davis (Craig)* [2008] EWCA Crim 2756 [18], *R v Rahila Kausar* [2009] EWCA Crim 2242 [8].

⁵⁴ POCA 2002, s 340(2).

⁵⁵ POCA 2002, s 327(2A), s 328(3), s 329(2A).

⁵⁶ The Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 (SI 2006/1070).

⁵⁷ POCA 2002, s 340(3)(b).

⁵⁸ POCA 2002, s 340(9); *Prosecution Appeal (No 11 of 2007) R v W* [2008] EWCA Crim 2 [15].

⁵⁹ *R v Da Silva* [2006] EWCA Crim 165, [2007] 1 WLR 311 (CA), at [16]. A fleeting thought would not be sufficient: at [17].

⁶⁰ Liston and You, 2015; Liston, 2014.

⁶¹ Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Reg 14.

2020. One of the proposed changes is to widen the scope of the regulated sector to include all 'persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses' in transactions (or linked transactions) valued at 10,000 euros or more, irrespective of the payment method (such as a credit card or inter-bank transfer). Although the Directive refers to 'works of art,' it may well be that, in implementing the Directive, the UK Government will fall back on standard definitions contained in Directive 2014/60/EU and Regulation 116/2009.⁶² This would mean that transactions involving rare palaeontological material valued at over 10,000 euros would be included.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 impose a series of obligations upon high value dealers and others. They require risk assessments to be carried out. For example, do the countries from where the goods originate pose special risks?⁶³ Any cash dealer in fossils should be suspicious where fossils come from countries where it is well known that there have been unlawful excavations, such as China. Dealers will also need to examine the purpose of any transaction and to consider whether it appears to make commercial sense. Questions will therefore need to be asked where, for example, someone wishes to do a deal quickly, with split invoices, using large bundles of cash.⁶⁴ The dealer must also consider the characteristics of the other contracting party, such as whether he is a politician or part of a politician's family. The Regulations expect high value dealers to create systems to identify risks and to keep a check on transactions.⁶⁵ Regulation 86(3) provides a defence where the accused took all reasonable steps and exercised due diligence to avoid committing an offence.

These Regulations will pose enormous difficulties for dealers at trade fairs. They will be expected to demand proof of identification of the other party, such as a passport and utility bill. If they fail to identify the person properly, they risk committing an offence. This could be particularly frustrating at an international fair because some participants may be resident in countries which do not have the equivalent laws to these Regulations; these people may recoil at the prospect of providing detailed informa-

tion about themselves or the transaction.

The Regulations herald a transformation in the market, putting pressure upon auction houses and dealers to ask questions rather than to assume that all is well. They only apply to traders and therefore will not apply to museums, even when they are extended further. However, the Regulations may have a broader impact in relation to all acquisitions because banks will be subject to the Regulations and they may require more information in relation to proposed purchases. Although the MA's Code of Ethics has been criticised for placing so much emphasis upon carrying out due diligence checks before purchasing objects, or accepting them as gifts, one can see that these ethical principles are in harmony with modern professional practice. Indeed, once the Regulations apply across the board, they will be at least as stringent as the ethical guidelines.

IV: CRIMINAL LAWS SOLELY CONCERNED WITH CULTURAL PROPERTY

Dealing in Cultural Objects (Offences) Act 2003

When the Ministerial Advisory Panel recommended in their report that the UK Government should ratify the 1970 UNESCO Convention, it was suggested that an additional law would help to reinforce the obligations created by the UNESCO Convention.⁶⁶ In particular, the Panel recommended legislation to deal with situations where artefacts were dug out of the ground or forcibly removed from buildings or other structures. There was a gap in the law because it is not always possible to charge someone with theft or handling. For example, a government may not be able to claim that the object belongs to the state if it does not have a patrimonial law. The object may be ownerless or, where there is an identified owner of a site, that owner may have consented to its removal. The UK Government therefore passed the Dealing in Cultural Objects (Offences) Act 2003.⁶⁷

The 2003 Act made it an offence to dishonestly import, deal in or be in possession of any cultural object which has been unlawfully excavated or removed and which was therefore a 'tainted' object. Although the Ministerial Advisory Panel had includ-

⁶² See n. 25 and accompanying text above.

⁶³ 2017 Regulations 17, 18. High value dealers are also subject to reporting requirements under the Proceeds of Crime Act, s 330.

⁶⁴ *S L Wines Limited v The Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0575 (TC) at [42-43].

⁶⁵ 2017 Regulations 19, 28.

⁶⁶ *Illicit Trade in Cultural Objects*, Report of the Ministerial Advisory Panel, London, December 2000.

⁶⁷ The Act took effect on 30 December 2003. It does not extend to Scotland.

ed palaeontological material in the recommendations,⁶⁸ section 2(1) of the Act defined 'cultural object' to mean 'an object of historical, architectural or archaeological interest.' Is palaeontological material included? Archaeology involves the study of human activity in past times through analysis of artefacts, monuments and other remains. Palaeontology is different: it is a science concerned with the study of fossils. Yet it could be the case that the drafters used this phrase because it is to be found in Directive 1993/7/EEC (now 2014/60) on the return of cultural objects unlawfully removed from the territory of a Member State, and Regulation 3911/1992 (now 116/2009) on exports. But the Explanatory Notes to the Act do not clarify the scope of the Act, merely noting that 'organic material' would be included. Guidance issued by the Department of Culture Media and Sport (DCMS) suggested that the Act covered objects 'excavated contrary to heritage legislation.'⁶⁹ An unsatisfactory degree of uncertainty has been created as a consequence.

It is surprising to have such a vague definition of 'cultural object' because the Act was intended to facilitate the implementation of the 1970 UNESCO Convention. Unfortunately, there is no further guidance provided by the courts. There has only been one conviction so far, perhaps because of the difficulty of proving that the accused was dishonest and knew or believed that the object was tainted. In 2016, the police seized statues, bibles, and other religious relics from the address of Christopher Cooper: these relics had been taken from churches in England and Wales. Cooper was convicted of dealing in tainted cultural objects under the 2003 Act, as well as theft and fraud. However, as he pleaded guilty to the charges, the parameters of the 2003 Act were not tested. The application of the 2003 Act to those who acquire fossils in suspicious circumstances therefore remains unclear. Due to this uncertainty, it is unlikely that any charge will be brought under the Act alone; enforcement authorities will seek evidence to enable them to bring charges under other legislation as well.

Iraq (United Nations Sanctions) Order 2003

In August 1990, after the invasion of Kuwait, trade sanctions were imposed upon Iraq by the United

Nations Security Council in Resolution 661. As the country became poorer, looting of archaeological sites became widespread. The subsequent invasion of Iraq in 2003 led to increased illegal excavations, as well as the theft and destruction of collections in the National Museum of Iraq in Baghdad.⁷⁰ As a consequence, the United Nations Security Council adopted Resolution 1483 of 22 May 2003 which required governments to take appropriate steps to create criminal offences and facilitate the return of cultural property.

The Iraq (United Nations Sanctions) Order 2003 created criminal offences where a person either dealt with illegally removed cultural property or if, being in possession or control of such property, there has been a failure to transfer it to a constable. The property itself was defined as follows:

'Iraqi cultural property and any other item of archaeological, historical, cultural, rare scientific or religious importance illegally removed from any location in Iraq since 6th August 1990.'⁷¹

The Order therefore applies to fossils where they can be categorised as of 'rare scientific importance.' As fossils have been discovered in Iraq, such as marine fossils, the 2003 Order is of some relevance to museums, as well as dealers.⁷²

The Order places pressure upon museums, collectors and dealers, to be suspicious and to ask questions. They will be guilty of an offence under the Order unless they can prove that they 'did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property.' In order to ensure that any prosecution does not violate the right to a fair trial,⁷³ the prosecution will still be expected to produce evidence that the accused should have known that the object was Iraqi cultural property removed after 1990; the burden would then shift to the accused to rebut that evidence. There have been no convictions so far under the 2003 Order. One problem is that it may be very difficult to show that the cultural object has been illegally removed from Iraq since 6 August 1990. Even so, the 2003 Order can be seen as a legislative intervention which puts pressure upon acquirers to carry out due diligence.

⁶⁸ *Illicit Trade in Cultural Objects* (2000) Annex E: 'Collections of historical, palaeontological, ethnographic or numismatic interest' valued at over £39,600.

⁶⁹ DCMS, 2004, 4.

⁷⁰ George, 2008.

⁷¹ SI 2003/1519, as amended by SI 2004/1498, Article 8(4). The Order came into force on 14 June 2003.

⁷² S. Pappas. Marine Reptile Fossil Found in Iraq Shows Prehistoric Creature's Unlikely Survival. *Live Science*. 16 May 2013.

⁷³ Human Rights Act 1998, Sch 1, Art 6.

Export Control (Syria Sanctions) Order

There has been continuing internal conflict in Syria since 2011. Archaeological sites, museums and religious buildings have been severely damaged and there has been extensive looting of archaeological material.⁷⁴ In response, the Order creates an offence of dealing in cultural objects exported from Syria on or after 15 March 2011 'where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law.'⁷⁵ Unfortunately, the drawback of a law which has such a country specific focus is that it may be easy for traffickers to label objects as having originated elsewhere.

It is an offence to import, export or transfer Syrian cultural property 'of archaeological, historical, cultural, rare scientific or religious importance, including those listed in Annex XI.' This Annex defines cultural property to include:

- (a) Collections and specimens from zoological, botanical, mineralogical or anatomical collections;
- (b) Collections of historical, palaeontological, ethnographic or numismatic interest.⁷⁶

Although the main concern has been the looting of antiquities by terrorist groups, this Order does apply to those who receive or deal in fossils. Yet although the definition of cultural property appears to have a wide scope, it is restricted by the condition that the collections referred to must be 'relatively rare.'⁷⁷ Consequently, items such as fragmentary bones of dinosaurs which may be found in the rocks of Syria should not fall within this definition.

Cultural Property (Armed Conflict) Act 2017

The Cultural Property (Armed Conflict) Act 2017 came into force on 12 December 2017. It enabled the UK Government to ratify the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (the 'Hague Convention') and to accede to its two Protocols. The Convention aims to safeguard cultural property during armed conflicts. It creates offences in relation to intentional acts

of destruction and theft of cultural objects by armed forces and terrorist groups.

Section 17 creates an offence where someone deals in unlawfully exported cultural property 'knowing or having reason to suspect' that it has been unlawfully exported.⁷⁸ The Act could apply to unlawfully exported palaeontological material but only in the narrowest of circumstances. Section 2 of the 2017 Act defines 'cultural property' as having the meaning given in Article 1 of the Hague Convention. This includes scientific collections 'of great importance to the cultural heritage of every people.' It would therefore only be relevant if a museum, dealer or collector was in possession of very rare and scientifically important fossils. Furthermore, the section 17 offence only applies to property exported from territory unlawfully occupied by the government of another state such as Northern Cyprus (and not by a militant group). Thus, although the offence adds further protection for cultural property and provides an additional reason for acquirers to carry out due diligence checks, it has a very limited application in the context of palaeontological materials. Even so, the objective test of 'having reason to suspect' in the section 17 offence is further evidence that criminal laws applying to dealings in cultural property are becoming stricter thereby moving into line with the ethical principles set out in the MA's Code of Ethics.

IV: ETHICAL CODES

Museums and ethical standards

The development worldwide of ethical codes of conduct was prompted by the 1970 UNESCO Convention. From that year museums and traders were expected to exercise 'due diligence' in making searches or verifying facts before acquiring cultural objects. DCMS guidance for museums, Combating Illicit Trade, reflects this view, stating that 'Museums should acquire or borrow items only if they are certain they have not been illegally excavated or illegally exported since 1970.'⁷⁹ The year 1970 has no particular significance for criminal legislation. However, the DCMS guidance is referring to an ethical rather than a legal standard of conduct.

⁷⁴ Cunliffe, 2012, 11.

⁷⁵ Export Control (Syria Sanctions) Order 2013/2012, article 12A, as amended by the Export Control (Syria Sanctions) (Amendment) Order 2014 SI No 2014/1896. Article 11c was inserted by EU Council Regulation No 1332/2013. See further Regulation 2015/827.

⁷⁶ Annex XI can be found in EU Council Regulation No 1332/2013.

⁷⁷ *Collector Guns GmbH v Hauptzollamt Koblenz*, European Court of Justice, Case 252/84 referred to in EU Council Regulation No 1332/2013.

⁷⁸ DCMS 2017. As regards the mental test for the offence, the Supreme Court has ruled that the plain words of a slightly different phrase 'reasonable cause to suspect' involved an objective test: *R v Lane (Sally)* [2018] UK SC 36, [2018] 1 WLR 3647.

⁷⁹ DCMS, 2005, p. 4.

The International Council of Museums (ICOM) Code of Ethics asserts that a museum must not acquire a cultural object unless it is satisfied that the object has not been stolen or illicitly obtained. Principle 2.2 states that 'Evidence of lawful ownership ... is not necessarily valid title.' This is an example of where law and ethics divide. Governments of countries such as China, Mongolia and Brazil may assert ownership of fossils but there are various countries where the law allows good faith purchasers to obtain a good title to a stolen object without difficulty. A museum must not acquire an object with this type of provenance because of ethical principles which hold it to a higher standard in acting for the benefit of the public. Principle 2.3 of the ICOM Code suggests that, in exercising due diligence, every effort should be made and museums should 'establish the full history of the item since discovery or production.' A 'full history' is far more than is required by law. It might seem that a comprehensive history should reduce any risks posed by an object to zero; even so, there is always the possibility that false documents have been created by a seller to make the fossil appear legitimate.

The final provision in the ICOM Code on the illicit trade is Principle 2.4 which states that,

'Museums should not acquire objects where there is reasonable cause to believe their recovery involved the unauthorised, unscientific, or intentional destruction or damage of monuments, archaeological or geological sites, or species and natural habitats.'

Principles 2.4 and 2.5 of the MA's Code of Ethics 2015 similarly emphasise the need for due diligence steps and rejection of any item where there is 'any suspicion' that it was wrongfully taken. Museums may well have their own collections policies which flesh out these principles.⁸⁰

Although the ethical codes contain very simple statements of principle, more detail can be found in DCMS guidance on *Combating Illicit Trade*.⁸¹ The guidance sets out 'due diligence' steps which museums should take, such as examining the object and any labels or markings for the purposes of identification; assessing risks by considering the nature of the

object and the likely source country from where it originated; scrutinising evidence of lawful export of the object; and assessing the seller (or donor) and evidence of provenance (such as auction catalogues and receipts of purchase).⁸² External sources, such as obtaining the advice of experts or undertaking searches of databases are encouraged where appropriate. The guidance briefly acknowledges the ICOM's Red Lists,⁸³ which alert dealers and collectors to looting; these Red Lists include references to fossils and palaeontological material from Peru and Colombia. The guidance is reinforced by the checklist available from the Collections Trust which reminds museums to check the Red Lists and note their findings accordingly.⁸⁴ By encouraging museums to be cautious, to ask questions and to assess risks, the guidance is consistent with money laundering legislation.

Where a fossil has immense scientific value, but where there are suspicious circumstances, the decision to refuse it will be a painful one. The rejection may involve the loss of a fossil which might complete a gap in a museum collection; that fossil might disappear into a private collection forever, never to be seen again. However, the ethical codes make it clear that, in order to uphold public trust in museums, this must be done.

Collectors and dealers

There has been a long history of fossil dealers, such as Mary Anning, supporting and promoting scientific discoveries.⁸⁵ Sale of fossils by dealers to museums is not uncommon. Yet dealers are not restricted by ethical codes in the same way as museum professionals. Traders of cultural property do not form a uniform group because cultural property is so diverse. Typically, traders specialise and have their own codes of conduct. Major auction houses support the Code of Practice for the Control of International Trading in Works of Art,⁸⁶ which has a vague statement to the effect that members undertake to the best of their ability not to deal in stolen objects or objects which have been unlawfully imported or exported. But there is little guidance aimed specifically at fossil dealers in England and Wales. This may reflect the fact that the position is not a simple one. In some areas, fossils may be common and of low financial

⁸⁰ Accredited museums in the UK will also adhere to the Collections Development Policy Template, which emphasises the importance of due diligence procedures in deterring the illicit trade.

⁸¹ DCMS 2005.

⁸² DCMS 2005, p. 6.

⁸³ Available at: <http://icom.museum/programmes/fighting-illicit-traffic/red-list/>

⁸⁴ 'Acquiring Objects - Due Diligence Checklist.' <http://collectionstrust.org.uk/resource/acquiring-objects-due-diligence-checklist/>

⁸⁵ Larson 2001; Torrens 1995.

⁸⁶ Available at: <http://collectionstrust.org.uk/resource/the-code-of-practice-for-the-control-of-international-trading-in-works-of-art/>.

and scientific value. They may be located in areas which face rapid erosion, such as coastal cliffs, where retrieving fossils may save them from destruction. There is a voluntary code of conduct aimed at amateur fossil hunters which encourages them to take their finds to museums and conservation groups. There are also regional codes, such as the Fossil Collecting Code of West Dorset. Both the UK Fossils Network's Code of Conduct and the West Dorset Code sensibly warn collectors of the need to obtain landowners' permission in order to avoid being prosecuted for theft. There may be pressure in the next few years to develop more demanding ethical guidance for dealers, due to international concerns regarding the illicit trade in cultural property.⁸⁷ However, the current position is that museum staff should be aware that in their dealings with others, such as academics, commercial palaeontologists and amateur collectors, that these people are not necessarily held to the high ethical standards set by the Museums Association's Code of Ethics, although they will be restrained by the general law.

V: CONCLUSIONS

A number of palaeontologists have argued that fossils, such as dinosaur skeletons, should be seen solely as objects for scientific study. They therefore object to any approach which categorises fossils as cultural objects or as financial assets. These arguments would be particularly forceful in the context of a repatriation claim, where a foreign government is attempting to recover an object from a museum and a decision needs to be made on ethical grounds. However, the main focus of this article has been upon the law and the issue of whether museums can justify acquiring objects which they suspect have been looted on the basis of their scientific worth and importance. I would suggest that the question over how one classifies fossils serves as a distraction in this context. No-one would dispute the scientific value of excavated fossils: they can reveal astonishing information about the world's eco-system millions of years ago. But this article has sought to demonstrate that times have changed significantly since 2001, when Nudds and others were discussing the expected ratification of the 1970 UNESCO Convention and the Convention's inclusion of fossils in its list of protected cultural property. In my opinion, the debate over whether fossils should be regarded as cultural objects or not may appear dated in this context. There are new laws which are policy driven:

they have been made in response to the threats posed by transnational economic crime and terrorism and as a result they emphasise the commercial value of objects.

This article reveals a complex picture not only in relation to English law but also in relation to international conventions and resolutions. From its inception, the 1970 UNESCO Convention was concerned with protecting cultural objects from theft and looting by encouraging governments to protect their own heritage and to facilitate the return of looted items. However, the Convention can now be viewed as playing a vital part in deterring transnational organised crime. The fossil-selling industry is worth at least £100 million a year;⁸⁸ there is no reason why criminal syndicates would not be attracted to this trade, in the same way as they are to other trades such as antiquities. Equally, conventions which bring governments together to co-operate in fighting crime, such as the UN Convention against Transnational Organised Crime 2000, can help to protect cultural heritage by discouraging looting and thereby avoiding the degradation of important sites. A combination of strategies is required to effectively combat trafficking in fossils and other objects.⁸⁹

The inclusion of fossils in UNESCO Convention's list of cultural property may well have influenced the definitions contained in criminal laws which started life in the international arena, such as those relating to Syria and Iraq. However, it is source countries' patrimonial laws and the details of our domestic criminal laws which are most likely to affect acquisitions. The cultural property laws discussed in this article do not cover every type of fossil but are confined to those which are relatively rare and valuable. These restrictions can be justified on policy grounds: these are the fossils which are most important in scientific or cultural terms and therefore most in need of protection; they are also the fossils most sought after by criminals because they are so profitable. But what of the fossils which fall outside these restrictions? Depending upon the circumstances, acquirers will still need to be careful to avoid committing an offence. Long established offences such as theft have required proof of dishonesty which can be exceptionally difficult to establish where a market is secretive.⁹⁰ In contrast, recent legislation creates offences where proof of suspicion will suffice. The best advice is therefore that anyone should refuse to accept objects where there is a suspicion that they

⁸⁷ See Resolution 2347 of 2017.

⁸⁸ C Milmo, 'Fossil Theft: One of our Dinosaurs is Missing' *The Independent*, 25 November 2009.

⁸⁹ Schmidt 2000, 185.

⁹⁰ Transparency International, 2015, p. 63.

have been smuggled in to the UK, regardless of whether the law considers them to be cultural property or not.

The law has therefore largely caught up with the MA's Code of Ethics, which has required museums to carry out due diligence and to reject objects where there are suspicions that they have been wrongfully traded. The concerns underlying ethical principles differ to an extent from the law. Both are based upon a desire to deter people from acquiring illicit objects because this is likely to encourage a trade which involves damaging sites and puts money into the hands of criminals. However, the MA's Code of Ethics is also intended to bolster public trust in museums. Newly acquired fossils can be an opportunity to reach out to new sections of the public and to inspire them, but museums must avoid the risk of sharing objects which are so tainted that the public loses faith in the museums concerned.

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