

Chapter 1

The Fundamental Importance of Archaeological Context

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Heritage advocates and nations of origin have an impressive and growing array of legal measures to help protect and preserve antiquities: national ownership declarations, export restrictions, and enforcement of these measures by various domestic and international courts and law enforcement agencies. Supporting these legal measures is a growing body of scholarship and empirical research.

Why has such a grand multinational legal regime and body of scholarship been created? There are a number of reasons, but three predominate: (1) these crimes destroy archaeological context; (2) these objects are often acquired and displayed by museums and institutions with important educational missions—which are of course perverted when theft and destruction are the root cause of the tragic journey of an object from its archaeological context; and (3) the United States gives valuable tax breaks to institutions, and this financing should never be used to violate the laws of other nations.

But at its heart, cultural heritage policy attempts to answer a more fundamental question: why does it matter if *tombaroli*¹ or archaeologists unearth antiquities? Imagine if the Euphronios Krater, a masterpiece of ancient art, was found in a kitchen, or a burial chamber, or a farmer's home, or a merchant's? What if it was found in Spain, Southern France, Sicily, North Africa, or even North America? These different contexts could tell us a great deal about the object, and also about the society that created it.

Archaeologists are currently researching important historical questions. How do the recently discovered mass graves found near Machu Picchu inform our understanding of that ancient city's importance? Was it advancing barbarians from Northern Europe who compelled the first Venetians to construct their fabulous canals? Was it the Romans who introduced the leek to Wales? Was it a shortage of women that caused the Vikings to expand their empire? These important historical questions are difficult to answer, to be sure. But they will be far more difficult if the areas containing the answers to these questions are spoiled by the looting and destruction of archaeological sites.

The widespread and unskilled illegal excavation of objects forever destroys this invaluable archaeological context. Precious information can be learned through careful excavation, which inexpert excavation destroys. In many instances, looters will destroy or toss aside intellectually important objects in search of easily sold objects made of gold or precious metals. Wherever possible, then, the preservation of archaeological information mandates that unearthing antiquities should be done by experts. As Patty Gerstenblith argues "today, ever more sophisticated scientific techniques, as well as interdisciplinary methods of



Maya ruins of Yaxha, Guatemala. The West Temple, North Acropolis.

Image source: Wikicommons, http://commons.wikimedia.org/wiki/Image:Yaxha_NorthAcropolis.jpg.

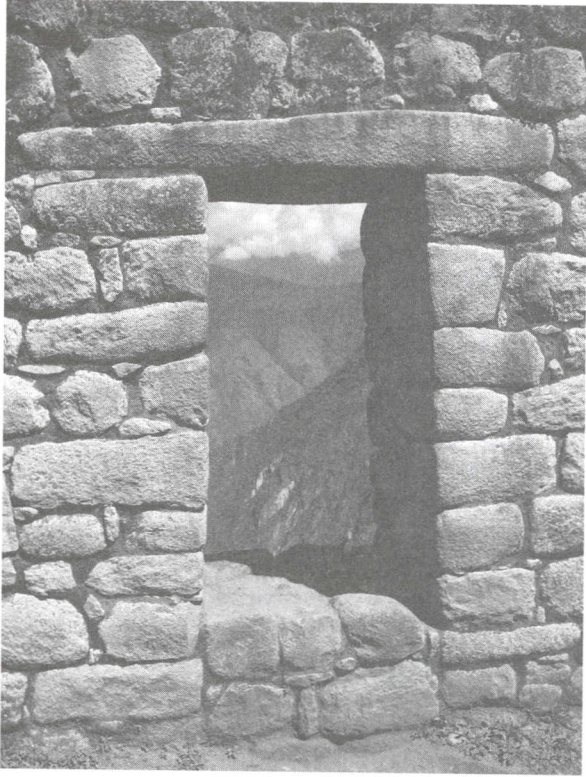
analysis, are available and routinely used in the reconstruction of past civilizations."²

These excavations continue because a market exists for these objects. The illicit trade in antiquities presents more difficult regulatory challenges than the trade in stolen art. No records exist for many newly discovered antiquities, particularly those that are looted. Nations of origin are justifiably reluctant to sell or lose to foreign institutions many objects that are unearthed legitimately by archaeologists. As a consequence, this only further fuels the illicit trade in antiquities by increasing demand, which can often only be met by the illicit and illegal trade.

In many cases, nations and cultural institutions are unable to devote resources to documenting and cataloguing the stores of antiquities that have been excavated but are not on display.³ A great deal of the trade in antiquities may include objects that have been illegally excavated, illegally exported, or even stolen from museums or storehouses. Illegal excavations destroy not only archaeological context, but sometimes even the actual objects, which are often chopped up or disguised to hide their value or render them more difficult to recognize. The illicit trade has the potential to remove large parts of a nation's cultural heritage. In 2002, Italy reported over 18,000 objects stolen from its museums, churches, historic sites, and archaeological sites.⁴ These objects are valuable for their artistic, cultural, and historical importance. When they are stolen or destroyed, we lose the ability to study and learn about our past.

Antiquities can move easily across borders, and too much enforcement still relies on self-regulation by buyers, dealers, and museums. Adding to the difficulty is the fact that there is no clear consensus on the best laws, policy, and penalties. Many in the antiquities-acquiring community argue that these objects are better served by being purchased, and thereby secured against theft or mutilation. They point out that preservation of art and antiquities is inherent to their "fundamental value."⁵ This includes preserving objects against mutilation or destruction, as well as maintaining artistic collections. Future generations will continue to be able to view, possess, or study art and antiquities as a product of their acquisition via excavation and purchase.

But there is also a national political agenda behind the preservation of cultural heritage. James Cuno has argued that the national ownership laws and export restrictions through "accident of geography" allow nations of origin to use heritage and antiquities as political and diplomatic pawns.⁶ Much of the scholarly interest in preservation aims to make sure "that the recovered property will be protected by conservation, safety, and security measures that meet international standards, and that the object will be adequately displayed and, normally, accessible to the public."⁷ However, this fails to acknowledge the critical role that acquisition may play in destroying archaeological context.



Author's photo of Macchu Picchu in Peru.

Many of the nations with the richest archaeological heritage are unable to support adequate measures to deal with the theft, excavation, or destruction of cultural property because of financial constraints, poor organization, or even corruption.

GUATEMALA: A CASE STUDY

Guatemala provides one such example, as a typical nation of origin with a wealth of cultural heritage. Clemency Coggins decried the damage being done to Mayan sites in Guatemala in 1969, which was among the first of the efforts to raise awareness about the illicit trade in antiquities. Coggins's work helped to usher in a wave of scholarship.⁸ Even today, as a result of economic difficulties, civil unrest, and the remoteness of many archaeological sites, national authorities have been unable to devote adequate resources to protecting sites. Guatemala has 5,000 recognized archaeological sites, many of which contain the remains of the Maya and Xinca civilizations. The most-prized Guatemalan antiquities include polychrome artefacts, jade carvings, and stela fragments.⁹

In his introduction to the history of the "Discovery, Looting, and Archaeological Investigation" of Río Azul, Richard Adams notes with clinical precision that the city "was reported in 1962, partially explored the same year, published in 1964, looted from 1976 to 1981, and investigated by a five-year project between 1983 and 1987."¹⁰ Sadly, such an account is all too typical of many important archaeological sites. This is just one account of one site in Guatemala's Péten region, but it is emblematic of a larger problem. Adams notes that an archaeologist, to reconstruct history and past civilizations, must "[juggle] time, space, and content."¹¹

Archaeology is the scientific study of ancient cultures through a number of different techniques. Excavations use scientific methods, history, art, ancient languages and mathematics to create a picture of an ancient civilization. When a stratigraphic study is begun at a site, it relies on a body of context that is painstakingly removed. Soil stratigraphy helps to date finds and features. Phases of human activity can be seen when a trench is viewed in profile. The unskilled and random unearthing of sites by looters destroys or limits this data.

At the excavations at Río Azul, stratigraphic excavation was an important tool. This rests on the principle that older material is the deepest, and the more recent material is on top. Also, ceramics and other objects change over time, and these changes can be documented and used to date other stratified and unstratified material in a room. The ancient Maya also left "another chronometric tool," their calendar system with dates "recorded on stone, in stucco, painted on tomb walls."¹² This data all helps to create a picture of the Maya civilization in this city. When radiocarbon dates were obtained in Tomb 19 at the site, for example, the pottery in the tomb was given a specific time window (roughly when it was created). This sequence could then be used to compare with other sites. When looters take objects, perhaps removing monumental objects such as calendar stele or destroy stratigraphic material, the archaeological record is diminished, and we lose invaluable and priceless information about the Maya civilization and how Río Azul played a part.

Looters take objects and spoil sites so they can sell objects to dealers. Paradoxically, the history of the Maya, and the remnants of this civilization, help give these objects value. Guatemalan archaeologist Juan Antonio Valdes described the looting of archaeological sites as:

[A] Social phenomenon that reflects the economic state of the nation and the lack of public awareness with regard to the meaning of cultural heritage. In Guatemala, ninety percent of the looting is done by illiterate farmers from the region surrounding the site of the looting. . . . The looting networks are becoming increasingly complex and are now involved with bands of drug traffickers based along the border with Mexico and Belize in the north of Guatemala. These people are armed with high-calibre weapons and

threaten to kill archaeologists and their teams if they refuse to leave the site they wish to rob.¹³

What, then, has Guatemala done to protect this data and its cultural heritage in the face of this tremendous adversity? Its constitution states that archaeological sites should receive special government consideration, and that all monuments and archaeological objects are owned by the state. Private individuals may serve as "trustees," but with the understanding that ownership of these objects rests with the state. Recent efforts have created a multi-institutional commission for the protection of Guatemala's cultural property, which brings together the airport security authorities, Public Prosecutor's Office, Ministry of Culture, Guatemalan Institute of Tourism, and national and international police authorities.

Other initiatives have encouraged advertising agencies and tour operators to promote archaeological tourism. One such measure has been particularly successful. A joint enterprise of Vanderbilt University, the National Geographic Society, and the humanitarian organization Counterpoint International pioneered a sustainable tourism and development project responsible for recovering an ancient Mayan altarpiece from the Guatemalan city of Cancuén.¹⁴ Researchers gained the trust of villagers and showed them how tourism can improve their lives, if these sites are developed. Though that kind of development carries a risk of destruction or damage to the cultural site, it is precisely the kind of private fundraising that must occur, as the budgets of many developing nations do not allow for an adequate response to the illicit trade in cultural property. Responsibly introduced private funding can help to ameliorate this.

Looters commit these crimes with the intention of selling the objects. By concerning themselves merely with the preservation of the most beautiful or desirable objects that make their way to the market states, preservation proponents are avoiding a critical component of the trade in illicit antiquities.

LOOTING IN THE UNITED STATES

We should not make the mistake of assuming these problems exist only in developing nations. In the United States, the illegal excavation of sites is a major problem as well. One estimate indicates that over half of the 6,000 important sites on National Forest land in Arizona have been destroyed.¹⁵ In Virginia, 95 percent of Native American graves in the southwest part of the state have been disturbed. In 1987, the evaluation and investigation arm of Congress, the Government Accountability Office (GAO), indicated that in the Four Corners area (New Mexico, Arizona, Utah, and Colorado), which comprised an area of 100 million acres, a total of only 271 individuals were employed to enforce the applicable laws.¹⁶ Lynell Schalk, a Bureau of Land Management ranger, remarked

in 2005 “[w]e didn’t exactly have them surrounded,” in describing the duties of 13 rangers tasked with policing an area of more than 12 million acres in California.¹⁷

Most nations of origin attempt to prevent the looting of archaeological sites by vesting ownership of undiscovered cultural objects and restricting their export. These are extremely important regulatory steps for securing the return of looted objects, and the punishment of those who violate these laws. However, these measures do not create a workable or effective cultural heritage policy.

Consequently, at the moment, heritage advocates find themselves in an uneasy position. The discourse during much of the 1980s and 1990s asked whether market states can or should enforce foreign export restrictions and ownership declarations. In recent years, a consensus has emerged: they have recognized and enforced these restrictions and declarations in a myriad of ways, and will continue to do so for the foreseeable future. Having then earned a powerful imperative, Italy and Greece have gained repatriations of some of the most impressive works of ancient art from institutions such as the Getty, the Metropolitan Museum of Art, and the Museum of Fine Arts in Boston.

LAWS AND DISCOURSES

It remains an open question as to whether this increasing recognition of foreign law and the attendant repatriations are adequately protecting and preserving ancient sites. The author looked at the underlying values of the shapers of antiquities policy, to ask whether the current state of American criminal penalties is up to the task of context-preservation in nations of origin.¹⁸ Alex Bauer has expanded on this approach to uncover the inconsistencies in the antiquities trade debate.¹⁹ All too often, heritage scholars have polarized their policy discussions. This is problematic, as it leaves no room for meaningful discourse. Antiquities are a limited resource, and constituent groups must work together to prevent theft and the looting of ancient sites. All members of the policy-shaping community, from archaeologists to dealers and museum directors, share a core set of priorities: they argue against the looting of sites. They differ dramatically, however, on how and what should be done to prevent that looting.

Effective regulation of cultural property requires an effective legal framework, resources to implement that framework, and a desire on the part of a nation’s citizens to protect and preserve their heritage. Because of either political choice or the lack of available funding, a well-funded antiquities protection framework is exceptional. The current market for art and antiquities does not inject funds back into developing source nations. When illicit antiquities are sold in market states, profits go to

auction houses, dealers, and those who avoid regulations in many source nations.

MODELS FOR FUTURE POLICY

The domestic legal framework for undiscovered antiquities in England and Wales has taken a novel approach to this conundrum. It has resulted in a better cultural policy that leads to less looting of important archaeological sites, allows for a tailored cultural policy, and has in fact produced a massive set of contextual information with which to conduct historical and archaeological research on an unprecedented scale. It has created this system by working cooperatively with finders and treasure-seekers, and rewards certain valuable finds.²⁰

There has been an impressive sea change in how shapers of cultural policy, particularly in the North American museum community, have viewed the antiquities trade and their role in the looting of sites. The American Association of Museums (AAM) has recently released a new standard for museum acquisition of archaeological material, which focuses squarely on the provenance of objects and transparency on the part of acquiring institutions.²¹ In 2008, the Association of Art Museum Directors announced new guidelines for the acquisition of antiquities.²²

There has been a paradigmatic shift in the way cultural policy makers view the antiquities trade and how it has led to the loss of our precious collective cultural heritage. Much work remains to be done, but the recent repatriations to Greece and Italy and the new guidelines adopted by the American Museum community signal a dramatic shift. Heritage advocates need to move beyond merely trying to account for antiquities that have already been looted. They must continue to press for public education, novel means of heritage protection, and a renewed effort from all interested parties, including nations and antiquities dealers, to ensure their actions are preserving objects and context.

NOTES

1. The Italian term for tomb-robbers; see Cristina Ruiz, *My Life as a Tombarolo*, *THE ART NEWSPAPER*, No. 112, 36 (2001).

2. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 *CONN. J. INT'L L.* 198, 199 (2001).

3. The Ka-Nefer-Nefer mask on display at the Saint Louis Art Museum was likely stolen from an Egyptian warehouse in the 1980s, where it had been stored since its discovery during a professional dig in 1951 at Saqqara south of Cairo. The Saint Louis Art Museum acquired the mask in 1998, but Egypt has requested its return. Malcolm Gay, *Out of Egypt*, *RIVER FRONT TIMES*, <http://www>

.riverfronttimes.com/2006-02-15/news/out-of-egypt/full (published Feb. 15, 2006).

4. INTERPOL, *Cultural Property Theft Statistics* <http://www.interpol.int/Public/WorkOfArt/statistics/StatPlace2003.asp> (last visited Aug. 10, 2008).

5. Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 276, 295 (1982).

6. JAMES CUNO, *WHO OWNS ANTIQUITY* (Princeton Univ. Press 2008).

7. James Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. AND POL. 789, 808 (1982-83).

8. Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969) (arguing "In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market.").

9. *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544 (N.D. Ill. 1993), in which a Guatemalan Stelae was seized and returned to Guatemala under the McClain Doctrine. See also *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), in which a dealer was convicted under the NSPA for dealing in Guatemalan antiquities.

10. RICHARD E. W. ADAMS, *RÍO AZUL: AN ANCIENT MAYA CITY* (Univ. of Oklahoma Press 1999).

11. *Id.* at 21.

12. *Id.* at 21.

13. Juan Antonio Valdés, *Management and Conservation of Guatemala's Cultural Heritage: A Challenge to Keep History Alive*, in ART AND CULTURAL HERITAGE 94, 95 (Barbara T. Hoffman ed., 2006).

14. Sean Markey, *Archaeologists Uncover Maya 'Masterpiece' in Guatemala*, NATIONAL GEOGRAPHIC NEWS, available at http://news.nationalgeographic.com/news/2004/04/0423_040423_mayapanel.html (last updated April 23, 2004).

15. Robert Hicks, *Time Crime: Protecting the Past for Future Generations*, FBI PUBLICATIONS, <http://www.fbi.gov/publications/leb/1997/july971.htm> (published July 1997).

16. General Accounting Office, *Problems Protecting and Preserving Federal Archaeology Resources*, GAO/RCED-88-3 (1987).

17. Lisa Schiffman. *Riding for the Brand*, ARCHAEOLOGY, <http://www.archaeology.org/online/features/schalk/index.html> (published Aug. 18, 2005).

18. Derek Fincham, *Why Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective and a Pragmatic Alternative*, 25 CARD. ART & ENT. L. J. 597 (2007).

19. Alexander Bauer, *New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORD. INT'L. L. J. 690 (2008).

20. For a detailed overview of the antiquities policy in England and Wales by the author, see Derek Fincham, *A Coordinated Legal and Policy Approach to Undiscovered Antiquities: Adapting the Cultural Heritage Policy of England and Wales to other Nations of Origin*, 15 INT'L J. CULT. PROP. 347 (2008).

21. American Association of Museums, *Standards Regarding Archaeological Material and Ancient Art*, <http://www.aam-us.org/museumresources/ethics/>

upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf (approved July 2008).

22. American Association of Art Museum Directors, *Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art*, <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (June 2008).