

Patrick J. O'KEEFE

**PRELIMINARY STUDY ON THE ADVISABILITY OF PREPARING AN
INTERNATIONAL INSTRUMENT FOR THE PROTECTION AND PROMOTION OF
MUSEUMS AND COLLECTIONS
(LEGAL AND TECHNICAL ASPECTS)**

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Introduction

1. In response to a request from UNESCO: “This study will focus on the interest of [sic] an international regulation on the promotion and protection of museums and collections and on the feasibility of establishing specific public policies in this field. It will also analyse the legal response of museums to conceptual, practical, social, educational, environmental and developmental changes that have occurred in the field of museum activity over the last forty years.”

2. In 190 EX/Decision 11 on the “Protection and promotion of museums and collections” the Executive Board of UNESCO requested the preparation of an “... independent preliminary study, with extra budgetary resources, of the technical and legal aspects as well as the scope, rationale, added value and administrative and financial implications relating to the desirability of a standard setting instrument on the protection and promotion of museums and collections, for examination by the Executive Board at its 191st session, with a view to inscribing this item on the agenda of the 37th session of the General Conference”.

3. It should be pointed out that UNESCO has a number of important provisions concerning museums in standard-setting instruments already adopted. These include the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954 (generally applicable) and its two Protocols (1954 and 1999); the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (generally and especially Article 5(c)); the Convention on the Protection of the Underwater Cultural Heritage 2001 (Articles 2(6), 14, 17 and 18, Annex Rule 2); the Convention for the Safeguarding of Intangible Cultural Heritage 2003 (its general provisions are relevant to museums e.g. Articles 2, 11-15 and museums are specifically referred to in the Operational Directives to the Convention at paragraphs 109 and 118 while paragraphs 116-117 do not specifically refer to museums but are directly relevant to their operations).

Museum activities are clearly promoted through the register of Best Safeguarding Practices, showing the paramount role of museums in the preservation of intangible heritage and its related tangible elements. There are also implications and guidance for museums, whether or not they are administered by the State, in the Convention for the Safeguarding of the Protection and Promotion of the Diversity of Cultural Expressions 2005: Articles 2, 11-15. There are also a number of important UNESCO recommendations including: Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone 1960; Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property 1964 (see especially paragraphs 8 and 16); Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968 (paragraphs 12 and 34); Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972 (paragraph 64); Recommendation concerning the International Exchange of Cultural Property 1976 (Paragraph 12) and the Recommendation for the Protection of Movable Cultural Property 1978 (generally). Provisions of the Recommendation on the Safeguarding of Traditional Culture and Folklore 1989 (Articles C(c) and E(d) and (e)) are also relevant, but it should be noted that the priorities of experts and traditional practitioners of intangible cultural heritage have been updated in the Convention for the Safeguarding of the Intangible Cultural Heritage 2003 to give the bearers of this heritage more control than appears in the 1989 Recommendation. UNESCO's very first Recommendation on International Principles Applicable to Archaeological Excavations 1956 embodies principles of importance to museums in its paragraphs 12 (education) and 23-31, though the evolution of practice and ethics suggests that its provisions may need now to be revised having been overtaken by developments in professional practices in archaeology.

4. In addition there are other important instruments in international law to which States may be Parties. Some of these complement the legal instruments of UNESCO. The most significant for museums is probably the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 which complements the 1970 UNESCO Convention and has very important implications for museums (such as the requirements of due diligence in

seeking provenance for an object). The Council of Europe Framework Convention on the Value of Cultural Heritage for Society 2005 may give inspiration to heritage workers in governmental and nongovernmental institutions. The Berne Convention for the Protection of Literary and Artistic Works 1979 as amended and the WIPO Copyright Treaty 1996 set out the basic international rules on copyright which are important for museums' educational work. Also highly significant are the 1977 Additional Protocol I to the 1949 Geneva Convention (Articles 53 and 85(4)(d)) and the 1998 Rome Statute of the International Criminal Court (Articles 8(2)(b)(IX) and 8(2)(e)(IV)), both of which deal with sanctions for, among other things, intentional attacks against buildings dedicated to religion, art and historical monuments provided they are not military objectives. Museums should also be aware of Article 8(j) of the Convention on Biological Diversity 1992 and the Akwé:Kon Guidelines 2004ⁱ for their implementation has significant implications for museum collection practices.

5. Finally there are declarations of some significance in the cultural field which are also relevant to museums. These include three from UNESCO, the Declaration of Principles of International Cultural Cooperation 1966, the UNESCO Universal Declaration on Cultural Diversity 2001, and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage 2003. Another instrument of major importance is the United Nations Declaration on the Rights of Indigenous Peoples 2007 and the related Principles & Guidelines for the Protection of the Heritage of Indigenous Peopleⁱⁱ, both of which foreshadow further developments for museums in revising and improving their policies on return of cultural objects and human remains. UNESCO has also promulgated an International Code of Ethics for Dealers in Cultural Property 1999.

6. There are also declarations or recommendations of international meetings which examine subjects of particular relevance to museum staff and other heritage workers, such as the Seoul Declaration on the Protection of Cultural Heritage in Emergency Situations 2012 and the Seoul Recommendation of the International Conference of Experts on the Return of Cultural Property 2012. Such declarations are not legally binding but often advance discussion and are able to inspire new modes of action. Where there has been

considerable international activity on particular issues, some States have themselves prepared national legislation or Guidelines for their own institutions. Examples are the Native American Graves Protection and Repatriation Act 1990 (NAGPRA) of the United States of America or the Restitution and Repatriation and Guidelines for Good Practice (2000) of the Museums and Galleries Commission of the United Kingdom. These are not binding on other States or foreign institutions but are often of considerable use to them when considering the adoption of their own rules on such issues. Finally there are international non-governmental bodies such as the International Council of Museums (ICOM) which works through national committees and over 30 specialised scientific or technical committees to set standards for particular issues, such as the ICOM Code of Ethics for Museums which is an essential resource for such institutions.

Form of instrument

7. As indicated above UNESCO has essentially three kinds of standard-setting instruments: Conventions, Recommendations and Declarationsⁱⁱⁱ. The first two are mentioned in the Constitution of the organization and the last has developed through adoption by the General Conference of this category following United Nations General Assembly practice.

International conventions are subject to ratification, acceptance or accession by States; they define rules with which the States undertake to comply and create a network of reciprocal obligations between the States Parties.

Recommendations are instruments in which “the General Conference formulates principles and norms for the international regulation of any particular question and invites Member States to take whatever legislative or other steps may be required - in conformity with the constitutional practice of each State and the nature of the question under consideration - to apply the principles and norms aforesaid within their respective territories” (Article 1 (b) of the Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution). These are therefore norms which are not subject to ratification but which Member States are invited to apply. Emanating from the

Organization's supreme governing body and hence possessing great authority, recommendations are intended to influence the development of national laws and practices. As far as standard setting recommendations are concerned, the Legal Adviser pointed out in 1955 that all Member States of UNESCO are committed by the Constitution to “report periodically to the Organization, in a manner to be determined by the General Conference ... on the action taken upon the recommendation”^{iv}. Periodic reporting has not been a success, and a select number of recommendations are now subject to monitoring.^v

Declarations are another means of defining norms which are not subject to ratification. Like Recommendations, they set forth universal principles to which the community of States wishes to attribute the greatest possible authority and to afford the broadest possible support. UNESCO's Constitution does not include declarations among the proposals which may be submitted to the General Conference for adoption. However, the General Conference may decide to give a document submitted to it for consideration and adoption the form of a declaration which has its own particular scope -- and has indeed already done so on several occasions in the past (Declaration of Principles of International Cultural Co-operation 1966, UNESCO Universal Declaration on Cultural Diversity 2001, UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage 2003). Declarations rely on their moral authority and seek to establish universal ethical principles.

Procedure for the adoption of standard-setting instruments in UNESCO

8. Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution have been developed.^{vi}

International conventions adopted by the General Conference and recommendations to Member States are prepared in accordance with a pre-established procedure, namely, the [Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution](#).

This standard-setting procedure provides for the following stages: first a preliminary study of the technical and legal aspects of the question to be regulated at the international level. This study must be submitted for prior consideration to the Executive Board, whose

responsibility it is to include the proposal for international regulation in the agenda of the General Conference.

The General Conference is then required to decide on the desirability of the regulation contemplated and on the form which such a regulation should take (convention or recommendation).

The Director-General is then instructed to prepare a preliminary report setting forth the position with regard to the problem to be regulated and to the possible scope of the regulating action proposed. Member States are invited to present their comments and observations on this report. In the light of these comments and observations, the Director-General prepares a final report containing one or more drafts of the convention or recommendation, which he communicates to Member States. This final report is submitted either direct to the General Conference or, if the Conference has so decided, to a special committee of governmental experts.^{vii}

The General Conference considers the draft texts submitted to it and, if it sees fit, adopts the instrument.

It should be noted that EX/Decision 11 on "Protection and promotion of museums and collections" does not conform to this procedure, having required the preparation of the preliminary study on the technical and legal aspects at the same time as a preliminary study on the possible scope and content of the instrument, without having had the decision of the General Conference between these two steps as required by the Rules of Procedure.

9. The reasons for the adoption of these rules of procedure, which has appeared to some as clumsy and unnecessarily long, lie in the efforts of many Member States over a number of decades to ensure that they have sufficient time to consult their experts and citizens. They may have to translate the proposal into more than one language. They may have to consult experts who are widely distributed within their territory and who may have to resolve diverging views. Where the relevant functions are devolved to regional authorities who have the constitutional power to deal with this subject, they may have to wait on their agreement. They may have to consult the views of independent bodies, such as private museums, which are not subject to State administration: e.g. for example the Netherlands has over 700 private museums. Finally there may be issues which, simple in some States, are regarded as highly problematic in others.

10. Until 2005 there were no rules of procedure for UNESCO declarations similar to those relating to the drafting, adoption and implementation of the UNESCO Rules of Procedure concerning recommendations and conventions. Declarations were adopted by an ordinary resolution of the General Conference. At its 33rd session (2005), the General Conference adopted the “Multi-stage procedure for the elaboration, examination, adoption and follow-up of declarations, charters and similar standard-setting instruments adopted by the General Conference and not covered by the Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution”, which is set out in the UNESCO Basic Texts (cf. Part G, 2012 Edition). The desirability of such an instrument, the consultation of States, its examination, adoption and follow-up are all subject to this multi-stage procedure. Declarations are adopted by resolutions of the General Conference and every effort is made to achieve consensus. How the Conventions, Recommendations and Declarations relate to national law will be discussed throughout this study. The UNESCO Legal Advisor has stated that “... it should not be deduced from the foregoing that any one of these various instruments is superior to the others. It is simply that their functions are essentially different ...”^{viii}

Feasibility

11. This study is to focus on the desirability of an international regulation for the promotion and protection of museums and collections and on the feasibility of establishing specific public policies in this area. The three possible international instruments that may be used are mentioned above. However, a declaration would be unsuitable. These are usually short documents and have no legal, as opposed to moral or political, effect. They are usually focussed on a single objective rather than the multitude of issues involved in protection and promotion of museums. While some may think a convention is the best solution, it has a number of drawbacks: it takes time and resources for parties to come to such an agreement; it is often a compromise achieved with great difficulty; it is difficult to amend, and, if serviced by an intergovernmental committee (which is now preferred by many States), it absorbs a great deal of resources which could otherwise be used in operational activities. It is often

highly political because it establishes reciprocal inter-State obligations. On the other hand, a recommendation can set out in effect a blueprint for how the international community envisages the management of museums and collections should be now and into the future. It can enter into considerably more professional detail and its revision is not subject to the same requirements as in the case of a convention. New developments can thus be more easily taken into account. For these reasons **this study will strongly propose that the new instrument on the protection and promotion of museums take the form of a recommendation.**^{ix}

12. It is certainly feasible to produce such a recommendation. But this is not to say that it will be easy or fast. Negotiation of the instrument could well take a number of years depending on what it includes and the degree of support that can be raised for it. Although only a simple majority is required for adoption of a Recommendation, if it is to give weight to arguments in national legal systems those who rely on it must be able to point to substantial international backing – substantial both in terms of numbers and support from States that have significant collections of their own. This immediately raises the question of what collections are going to be affected. The 190/EX Decision 11 referred to a standard-setting instrument on the protection and promotion of museums and collections.

National standard-setting

13. All collections (which of course includes museums) exist, to a greater or lesser extent, within a complex web of legal regulation. This is true whether the collection is a large encyclopaedic museum or a small one, the product of one person's enthusiasm for assembling examples of a particular object. The law should be fashioned to enable each collection, no matter how large or small, no matter how complex or simple, to be protected to the greatest extent possible. However, law can only provide a framework for protection; it cannot govern every aspect of the management of a collection. To try and do so would stifle initiative and it is through the ideas of those who work with collections that they develop and improve.

14. Law has to be flexible to incorporate new ideas. Collections are a tiny part of the civil society for which legislators are responsible. It is often difficult to bring a proposed law applying to collections to the attention of law makers. First the administration must be persuaded that such a law is needed. Then its proposed content must be negotiated between government departments and, in a federal State, between the component parts if they have responsibilities for culture. Once a draft is in existence, a place must be found in the legislative timetable for it to be considered by parliament. Even if accepted by the legislators, they may well amend it. Once passed by Parliament it will have to be implemented by the administration. How this is done will depend on how those responsible interpret it. Ultimately, interpretation may become a matter for the courts of law.

15. This shows how essential it is for persons who want new law for protection and promotion of museums and collections to engage continuously in this process whereby the law is brought into existence. It is not sufficient to propose a new law and then hope that it will eventuate. Bills on cultural matters are often deferred to give place to bills on what are seen as more pressing issues. At every stage the draft law must be monitored to see that it progresses through the system and that no unacceptable changes are introduced. Once the bill has been passed by parliament, it is unlikely that legislators will want to come back to the subject in the near future. Moreover, in many instances, once they have passed the legislation, legislators consider they have solved any problems that may have existed.

16. Following the progress of proposed legislation and ensuring it remains true to the intent of its sponsors will not be easy. It takes a great deal of time. Legislators have to be persuaded to back the measure and to continue to back it. It may be necessary to build a public support base. Those supporting legislative action can be helped by an international statement of what a national law should contain in order to counter these arguments.

17. Over the past 52 years UNESCO has adopted a number of recommendations of relevance to museums. These will be referred to during the course of this study. However, 52 years is a long time and there has been much development in the nature and philosophy of protection and promotion of museums and collections over that period. Moreover, there has been little

promotion of existing recommendations. For example, the 1960 Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone was closely associated with the ideologies prevalent in the Cold War and probably for that reason was not generally promoted by the international community, bearing in mind that UNESCO then served a much smaller community (97 Member States in 1960). However, the immense success and growth of museums all over the world have perhaps made this Recommendation less necessary than it may have been in 1960. In a 2006 survey of UNESCO recommendations, this was one of five, the principles of which were considered to be generally accepted and applied and therefore needed neither follow-up nor monitoring.^x However, this is only one example. There is a need for an updated recommendation that incorporates all developments in one document that can be used as a basis for modification of existing national legal practices.

Scope, Rationale and Added Value

18. As the above shows, the scope of the proposed Recommendation is what the States decide. That being said, the scope should be such that museums can draw on it to justify changes in the law affecting their operations. When a Recommendation is adopted by the General Conference, all Member States are obliged to bring it to the attention of the appropriate authorities in their countries and report to UNESCO on their implementation of it or the reasons why they cannot.

Although the recommendations of the General Conference are not subject to ratification, the mere fact that they have been adopted entails obligations even for those Member States that neither voted for it nor approved it.^{xi}

This study will allow the formation of a set of suggestions for the scope of a Recommendation based on the discussions that follow.

19. The rationale for proposing a new instrument is simply that museums and other collections need an instrument fitting for the milieu in which they operate now and in the future. Professor Mairesse has outlined the changes in

this milieu that have taken place over recent decades, changes that require a new look at old law and the introduction of new rules to deal with new problems. An example would be new law to accommodate return of looted Holocaust objects and possible changes in law to deal with seizures of loaned objects. While UNESCO has many instruments – conventions, recommendations and declarations – and, while these may contain some provisions on protection and promotion of museums and collections, they are not comprehensive. The new Recommendation should endeavour to cover as many legal aspects as possible.

20. The museum or collection operates in a particular social setting. Recent decades have seen it expand its activities into completely new areas. An example is that of the museum actively seeking to engage with the community in which it is located rather than waiting passively for people to visit. The added value of a Recommendation is in the guidance it can give museums and collections in expanding their roles. There are few legal implications in this apart from ensuring that the museum complies with any legal obligation that may already exist.

What is a “collection”?

21. Museums are of course collections but the Executive Board Decision refers to “museums and collections” thus indicating there should be a differentiation between the two. If the former is defined then logically any collection that does not meet the definition is not a museum. This then leaves two questions. First what is a collection? The initial point to make is that what could be a collection for a museum expert may not necessarily meet a legal definition. For example, must there be more than one object to constitute a collection? Does the intent of the owner need to be taken into consideration? The second point is whether all collections should be covered by the proposed Recommendation? Professor Mairesse has suggested a category of “heritage collection” which seems a useful concept.

Museum

22. The first issue then is the meaning of “museum”. In 1960 UNESCO used the following in Article 1 of its Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone.

... the term `museum' shall be taken to mean any permanent establishment administered in the general interest for the purpose of preserving, studying, enhancing by various means and, in particular, exhibiting to the public for its delectation and instruction, groups of objects and specimens of cultural value: artistic, historical, scientific and technological collections, botanical and zoological gardens and aquariums.

The International Council of Museums (ICOM), the largest non-governmental organization in the world concerned with museums, in 2007 adopted this wording in Section 1 of its *Statutes*.

A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.^{xii}

This definition is now internationally recognized and contains the basic professional standards that museum professionals agree to follow.

23. These definitions emphasize certain aspects such as the necessity for a permanent establishment and the provision of public access for the purpose of education and instruction. But the effect of 52 years development is shown in the move from a definition of collection including only material objects as emphasized in the 1960 definition to the more general ICOM emphasis on “the tangible and intangible heritage of humanity and its environment”. The definition of “museum” in the Recommendation should adopt that of ICOM.

Use of “museum” in the name

24. Should legislation impose restrictions on the use of the name “museum”? In such countries as Australia, Canada, France, United Kingdom and the United States of America, there are no restrictions. Anyone can describe their

collection as a “museum”. However, the Recommendation is in effect establishing standards for the activities of museums. It may be that governments wish to reserve the use of the name “museum” to bodies established under particular legislation because they are thus able to ensure those standards are observed and funding is directed to them alone. This would not prevent others from, for example, opening collections for display; rather that they would not be able to use the word “museum’ in the title. This study does not take a position one way or the other but it is an issue those drafting the Recommendation may wish to consider.

Collection

25. A definition of “collection” appears in the Instituto Brasileiro de Museus (IBRAM) Paper on *Inputs for a Debate on, and Construction of an International Normative Instrument for the Preservation and Promotion of Museums, Museological Heritage and Collections* presented to the Expert Meeting, Rio de Janeiro, July 2012. This reads:

Collection: cultural heritage of whether tangible or intangible nature, including natural heritage property , maintained by individuals or organizations of public or private nature, bearing reference to the history, memory and identity of different individuals and social groups, which are not under [sic] the custody of museums and whose cultural interest justifies their protection and promotion.

Paragraph 10 of the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property 1964 also applies to property in private ownership. That Recommendation calls for the inclusion of cultural property in private ownership in a national inventory. It also states that the inclusion of such property should not affect its ownership status (Article 10). However, that provision is almost 50 years old. Since its adoption, international human rights law concerning property and laws on privacy have grown in significance. For example, the First Protocol 1952 to the European Convention on Human Rights 1950 states that everyone is entitled to the peaceful enjoyment of his

possessions subject to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest" (Article 1). Although this is 12 years older than the Recommendation it was originally controversial and took time to develop its potential.^{xiii} Now any move to compel the creation of an inventory of heritage objects in private ownership could perhaps be held by a court to amount to interference with peaceful enjoyment of the collection. Consider a collector with houses in several countries and a yacht and who is accustomed to taking objects with him as he moves from one to the other. The only controls that might be applicable at the moment would be export prohibitions depending on the State concerned. Registration on an inventory would curtail this freedom of movement. Furthermore, it is unlikely that simple registration would be sufficient for those supporting the proposal. Some would argue that the purpose for having private cultural property of great importance on any proposed inventory would not be to control or restrict the legitimate movement of any privately owned property but to assist in the prevention of illicit traffic. They would further argue that that interference with enjoyment, ownership or freedom of movement would not necessarily take place due to the existence of private property on a national inventory; that such property would not be subject to any form of interference whatsoever until permission was given. This assumes a great degree of forbearance on the part of government officials – one that would be sorely tested as time passed. It should be noted that the IBRAM paper already refers to "protection" of such collections.^{xiv}

26. A large number of States (e.g. Australia, European Union, Japan, Morocco, Peru, and United States among others) have now adopted legislation to ensure the privacy of their citizens. This legislation often covers matters such as how personal information is collected, used and disclosed as well as accuracy, security and access. Who would decide how information on these collections is to be acquired and stored? What measures would be taken to ensure that the information would not be obtained by criminals in order to facilitate thefts?

27. Some argue that citizens already provide information to the State which is protected from access by unauthorized persons. In support of this the

examples of land registries and taxation collection procedures are offered. However, such arguments are inappropriate. Land is an immovable and so a system of registration can be more easily administered. Even so, land title registers are not universally accepted. Taxation is also a false argument as it applies generally to all citizens whereas registration of collections applies only to certain individuals. In Canada the National Firearms Registry has been in existence for 10 years but is now in the process of being abolished following concern being raised over matters of privacy and security. Art dealers and auctioneers have traditionally refused to reveal details of their clients who provide them with objects for sale. They will undoubtedly be unwilling to see this practice done away with. This study raises the issue in order that those drafting the proposed Recommendation will be aware that this is a controversial area and one where great care must be taken to find the right balance of interests.

28. Should the Recommendation apply to all collections in private ownership or only those where the owner has consented? The Recommendation for the Protection of Movable Cultural Property 1978 already signalled a nuanced approach. Paragraph 3 included in the concept of movable cultural property “objects belonging either to the State or public bodies or to private bodies or individuals”. Paragraph 14 then dealt with private collections by “inviting” the owners to make inventories of their collections and give officials access to those inventories. Owners would also be invited, “if the situation required”, to grant access to “component official curators and technicians in order to study and advise on safeguarding measures”. Furthermore, incentives would be provided to owners “such as assistance for the conservation of items listed in the inventories or appropriate fiscal measures”. In light of these precedents, drafters of the Recommendation will need to consider whether it should include within its coverage only those collections whose owners have consented. There are many ways to accomplish this and the Recommendation might suggest some. For example, in return for allowing access to a collection, the owner might be granted a taxation concession.

29. Some States have undertaken registration of material in private collections where it is of great significance both from a heritage point of view and, in addition, politically acceptable. The Protected Objects Act 1975 (reprinted

2011) of New Zealand requires registration of a collection of *taonga tuturu*^{xv}. Apart from disposal by gift or bequest to a relative, transfer can only be to another registered collector, to a public museum, or through the offices of a licensed auctioneer or a licensed secondhand dealer (Section 14). Any change in the place where the collection is held has to be notified to the Chief Executive.

Management of museums and collections

30. The following paragraphs deal with many legal aspects of museum and collection management. As already noted, all museums and collections exist within a framework of legal rules and regulations. Some will be intended to bear directly on the museum. These include those that govern its structure as discussed below. Other laws will apply to particular aspects of its operations such as the acquisition of objects for the collection. The museum may also be required by government to undertake designated tasks. For example, under the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, States Parties undertake to endeavour to do certain things. Among these is the adoption of “appropriate legal, technical, administrative and financial measures” aimed at fostering the creation or strengthening of institutions for training in management of intangible cultural heritage; ensuring access to such heritage; establishing and facilitating access to documentation institutions (Article 13). A museum could well be the institution chosen by the State to perform the activities indicated. The State is required to introduce whatever legal measures are needed to carry out the three functions listed above, but the museum needs to know what measures will be needed. For example, under the applicable copyright laws does the museum have the right to protect information and images placed in its care as a documentation institute? If not, the laws should be amended.

31. The laws and regulations governing the operation of the museum need to be brought to the attention of staff so that they know what to do in a particular situation. This must be done on a regular basis. For most staff these will not be matters they come across on a routine basis. Over time they will

forget what they have been taught. Staff is also replaced over time and new members need to be made aware of their obligations.

32. Professor Mairesse has signalled the significance today of museum education programmes. Law also falls within the scope of the museum to provide education. Law provides a basis for ethics and is an educative tool. It can be used as a means to teach museum officials and the public the adverse consequences that flow when law and ethics are overlooked. An example is that of the exhibition “Shipwrecked: Tang Treasures and Monsoon Winds” proposed to be sent on a world tour beginning in the Freer and Sackler Galleries at the Smithsonian Institution in Washington. Many archaeologists and museum professionals, including people at the Smithsonian, objected, alleging objects in the exhibition had come from a wreck that had been commercially exploited in contravention of the principles of the Convention on the Protection of the Underwater Cultural Heritage 2001.^{xvi} Following the controversy, the Smithsonian decided not to proceed with the exhibition. The option was left open to stage an exhibition educating the public.

Such an exhibit provides a framework through which the Smithsonian (and other institutions as part of an exhibit tour) can discuss the value associated with the careful excavation and preservation of heritage sites both underwater and on land. This would be an opportunity for archaeologists and museums to explain the importance of their Statement of Values and Codes of Conduct along with a presentation of the series of international conventions that specifically apply to these heritage sites.^{xvii}

33. Museum management must also pay close attention to the activities of specialist members of its staff. Are they allowed to undertake work for outside bodies or individuals? Are they aware of the laws and regulations that apply to their activities? Breach of these may result in criminal convictions for the persons responsible and reflect badly on the museum itself. Consider the situation of conservators who may be on museum staff or use museum facilities without considering the laws on illicit traffic.

.. a conservator owes a duty of care to the archaeological resource as a whole. By rendering antiquities more aesthetically pleasing, more

lasting and less traceable, the conservator becomes complicit in an illicit trade that obtains the object at the expense of context, of the site, which action constitutes destruction of the past.^{xviii}

The legal structures of museums

34. The legal structure of a museum greatly influences its management. This will depend on the overall framework that a particular country thinks is desirable. Museums can be created as statutory bodies under either general or particular legislation. The latter is a law designed for the sole purpose of creating a particular museum such as the British Museum and the National Maritime Museum in England, each operating under its own statute.

35. National legislation is not the only way of providing for the creation of a museum. Much will depend on the legal structures that can be created for various purposes in particular legal systems. For example, many European countries allow a person to create foundations which are legal bodies independent of their creators with the capacity of owning and managing property. One of these could be formed to own and display collections and so operate as a museum. They will, however, be subject to the law governing such foundations. In Australia, the Australian Museum operates as a corporation with the corporate name "Australian Museum Trust" the members of which are appointed by the Governor on the nomination of the Minister.

36. A commercial company could undertake the same role. However, a commercial company is governed by specific rules which have nothing to do with the protection and promotion of collections. In particular, such an organization may not be able to continue in existence if it cannot pay its creditors. Liquidators may be called in to take over the remaining assets and sell them at the best price possible. This will not necessarily respect museum principles. For example, there have been situations where the liquidators have seen no need to keep the collection and its documentation together. Indeed, the documentation has been seen as of no commercial value and disposable. For example, the Chatterley Whitfield Mining Museum in England was set up as a registered charity which was also a company limited by guarantee. The company went into liquidation and part of the collection was put up for sale by

the liquidators who were legally obliged to obtain the best price possible. The museum documentation was removed together with the company records to the offices of the liquidator who, it is alleged, “were not at all anxious that anyone should have access to the documentation”.^{xix}

37. However, there are definite advantages in creating legislation applying to museums in general. One is that it provides a uniform system of administration. This does not mean that the initiative of individual members of staff is smothered. It does mean that all concerned – staff, supervisors, and the public – have a general idea of what the museum and its members should be doing. No legislation is going to cover all the legal aspects of running a museum. Hopefully, there will be general legal principles acting as a background to the legislation. For example, the English legislation referred to above is rarely very detailed concerning the duties of the museum’s board of trustees. Those duties are spelt out in more detail in the law that applies to trustees in general. It is quite possible that it will be necessary from time to time to ask the courts for an interpretation of the legislation.

38. A new Recommendation should direct the attention of museums firstly to their own legal structure. All staff should be aware of what that structure means for their duties. This is particularly the case for senior administrators where, for example, the museum is constituted as a trust since the general law on trustees usually has strict rules on what the board of trustees can and cannot do. If the museum is part of a commercial company, its administration will ultimately be by the board of directors whose actions are governed by company law. Where there is a general law on museums, it will apply, although many matters may be left to the civil law e.g. issues relating to human resources. Secondly, the proposed Recommendation should stress that legislation should simplify administration, particularly where the general law is not well developed, and assist the public to recognize whether the museum and its staff are properly performing their functions. In this respect international ethical standards as represented by the ICOM Code of Ethics for Museums provide good guidance for developing national laws.

Access to museums

39. This should be dealt with in the proposed Recommendation and guidance given as to what it entails. The general principle is already stated in the Recommendation concerning the most Effective Means of Rendering Museums Accessible to Everyone 1960: “Member States shall take all appropriate steps to ensure that the museums on their territory are accessible to all without regard to economic or social class”. The removal of the ability to exclude on grounds of income or class or minority status is significant, relates to many current statements of cultural rights and should be reiterated in the proposed Recommendation. While there are other provisions dealing with the material arrangements for admission in the 1960 Recommendation, they do not go much beyond saying that museums should be open every day at hours convenient to all categories of visitor.

40. The ICOM definition of “museum” uses the phrase “open to the public”. A court in the United States of America had to consider the issue in relation to the famous Barnes collection of paintings. The Foundation which administered the collection had been recognized as a public charity and exempt from taxes. However, the public as such were refused entry to the gallery. The court recognized that some limitations may be imposed on the public’s frequenting of the gallery.

... the general public cannot use the gallery at will. Orderliness requires that there be hours of opening and closing ... that hours or days be set aside for rest of personnel, for taking inventory, for cleaning and repairing the property and facilities. But no library would be considered public if the public could be admitted only upon the caprice, whim, and arbitrary will of its administrators.^{xx}

This case also raised other issues arising out of donor-restricted gifts to museums such as the prohibition of the sale of items, the removal of works for temporary loan and changes in the arrangement of the collection’s display. This may be relevant to the issue of “deaccessioning” (divestment) and the variations in how this is treated at law in different States^{xxi}, discussed further below. It flows from this approach that, where there is a requirement of public access it means the greatest degree of such access that is possible taking into account the efficient running of the museum.

41. Although members of the public have access to the museum, it may be necessary to limit their activities, particularly in respect of photography. Quite apart from issues of conservation (such as damage by light), if the public are allowed to photograph the objects, there is an issue in its use for publishing or other commercial purposes, as it will reduce the value to the museum of those objects as images. Museums are under a duty to disseminate information about their collection as widely as possible but copyright law could require a substantial investment in fees and royalties before this can be done. The museum must be sure it has the copyright in materials it seeks to reproduce. In acquiring material for the collection, if at all possible, it should seek to obtain the copyright as well. Records should be kept and copyright dealt with at the time of acquisition. If they are already in the collection and no information is available on the copyright position then efforts must be made to settle the matter.

Democratization and access

42. The proposed Recommendation should also consider access to museums and collections in the context of democratization. Does “access to museums without regard to economic or social class” indicate that there should be free access, whether it be permanent or temporary or should there be some kind of ceiling on admission price? If access is to be free then there will be demands for greater subsidization by governments than otherwise or for increased fundraising by museums. Totally free access to museums could be a burden in some countries and a brake on museum development. Is legislation necessary to ensure free access? This will depend to a certain extent on the form of governance the museum has and whether it receives some funding from the government. If it already receives public funding the government will have considerable leverage on charging for admission. Some museums have dealt with this issue by having “free days”. This allows anyone to come, but the museum will be much more crowded than on the days where the visitors pay. For example the Louvre provides free admission for all visitors on the first Sunday of each month and on 14 July.^{xxii}

43. Does the option of providing free access to museums for a certain number of days per year (or other temporary free access arrangements) comply with the Recommendation of 1960 that “museums...are accessible to all without regard to economic or social class”? The United Kingdom has had a policy since 2001 of free entry to national museums. Initially VAT (valued added tax) regulations posed a problem to the introduction of universal free entry as charging museums were able to reclaim VAT on their expenditure which posed a major disincentive to removing charges. In 2001 the United Kingdom Chancellor made the necessary changes to VAT in the budget. Following these measures an agreement was reached between the government and national museums for them to drop their charges in return for compensation for lost income from the Department of Culture, Media and Sport. Museums continued to charge admission for special exhibitions. Compensation was calculated on the basis of the loss of income from the number of visitors the museums received before free entry was reintroduced.^{xxiii}

44. This policy has seen an increase in visitor numbers of 151% (between 2001 and 2011) for museums that charged fees prior to the changes and 22% for those museums that had always been free.^{xxiv} These results show a considerable increase in visitor numbers to affected museums as a result of these changes while there is little evidence to show any significant decrease in visitor numbers to non-affected museums (i.e. museums that charge an admission).^{xxv} These results seem to be in line with the 1960 Recommendation Concerning the most Effective Means of Rendering Museums Accessible to Everyone. In fact, in a document released by the Department of Culture, Media and Sport shortly upon its announcement of the intention to introduce these measures, a number of themes were set out as follows:

- the promotion of access for the many not just the few
- the pursuit of excellence and innovation
- the nurturing of educational opportunity; and
- the fostering of the creative industries

These themes are largely in line with the Recommendations^{xxvi} set out in the Final Conclusions Adopted at the Expert Meeting on the Protection and Promotion of Museums and Collections, Rio de Janeiro, 11-14 July 2012.

45. Free access does not systematically equate to a diversification in the profile of visitors. An active promotion of the role of museums, as well as a concrete museum and visitor policy must be undertaken beforehand. Other solutions should be explored for enhancing access to museums, but those initiatives have a greater chance of success when coupled with special programming and activities. In this regard, events such as the International Museum Day, when properly promoted, are playing a paramount role in many countries for the promotion of museums and their connecting with diverse local audiences that are not regular museum visitors.

46. Obviously, the provision of universal free access to museums in many countries may not be feasible due to political and budgetary issues, especially in today's climate of economic hardship. There are, however, other models that serve as examples of potential measures that enhance access to a wider section of the population. One such model is the Illinois state legislation,^{xxvii} which provides that museums are able to charge an admission fee but that they must provide free access to the public for a period equivalent to 52 days per year. The Act was amended however so that such days of free admission were available only to residents of Illinois. This kind of provision could be open to legal challenge where strong anti-discrimination legislation applies. An example with an international context comes from a decision of the European Court of Justice which recently ruled that Italy was acting illegally by charging pensioners from overseas to visit its museums while allowing free entry to Italian pensioners.^{xxviii} One must keep in mind the introduction of the final conclusions and recommendations adopted by the expert meeting mentioned above, which stated that "social participation and education in museums could be expanded as means for cross-cultural dialogue, peace building and understanding, raising awareness about environmental, social, health and economic issues".

Promotion and development of museums and collections

47. Museums and collections must be promoted and developed to properly play their role in society. For example, the 1960 Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone

states that museums “should serve as educational and cultural centres in their own localities” and contribute to the intellectual and cultural life of the community (paragraph 13). Law provides a framework in which the museum operates but should not dictate how the museum performs the functions indicated other than in very general terms. If legislation, for example, is too detailed and confining of the operations of the museum it can inhibit useful ideas. It can prevent the emergence of new programs by the museum designed to respond to new situations and opportunities. This is particularly important where educational programmes are involved. The museum must be free to take account of new means of delivering educational content and dealing with new content itself.

48. The museum will have to be able to respond to tasks government may place upon it flowing from new international agreements. Consider, for example, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society 2005 and the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

49. The 2005 Framework Convention is the more general of the two. While museums are not mentioned in the text, they could play a significant role in bringing about its objectives. For example, States Parties have undertaken “through public authorities and other competent bodies” to “establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities” (Article 7(b)). A museum is certainly a “competent body” and, with its collections, would be well placed to engage in a process of conciliation provided it has staff who have been trained in conciliation procedures. Museums also have a role to play in respect of Article 13: “Cultural heritage and knowledge”. Here States Parties “undertake to (a) facilitate the inclusion of the cultural heritage dimension at all levels of education, not necessarily as a subject of study in its own right, but as a fertile source for studies in other subjects”. Museums are certainly one of the institutions that could perform this function.

50. The Convention for the Safeguarding of the Intangible Cultural Heritage 2003 also illustrates how the promotion and development of museums can be achieved through the relevant international instruments. For example, Article

13 (b) requires States Parties to endeavour to “designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory”. A museum may well be such a body. Taking on this role would certainly promote the museum in the community but care would have to be taken that it has the necessary specialist staff – that the task is not just added on to the duties of persons not trained to perform the function. Furthermore, funding needs to be specifically allocated to the task – it should not be taken from existing funding for other museum functions.

Preservation of museums and collections

51. The term “preservation” will be used here in the sense of “long term care”. A balance must be struck between this long term care and public access. If there is no access to an object is that object valueless? The judge in *Commonwealth v. Barnes Foundation* certainly thought so.

A painting has no value except the pleasure it imparts to the person who views it. A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well not exist.^{xxix}

This might be seen as an extreme view but there is a kernel of truth in it. Some preservationists might like to see particular objects withdrawn from all public access but what ultimately is the point of preserving them?

52. The preservation of objects is the first listed objective for museums in the ICOM definition. But what does this mean? One study has drawn significant consequences from failure to observe it.

One could well argue that, because it sees the conservation of objects as a prime function of museums, certain famous museums in Europe and North America are not really museums: too many of their treasures are quietly decaying in their galleries and storerooms.^{xxx}

Preservation thus leads to conservation -- protection of the collection from wear and decay.

53. Depending on their contractual relationship to the museum, conservators could be liable for failure to meet the requisite standard of care in discharging their professional duties. They could, for example, be liable for negligent conduct. In addition certain States have legislation that may apply to conservators. The Irish National Monuments Act 1930, as amended, states in s. 25 that it is unlawful for any person to alter any archaeological object otherwise than under and in accordance with a licence in that behalf. Because conservation work by its nature alters the object, conservators working on archaeological objects under this legislation are required to have the necessary licence. The conservator may also have a code of ethics that applies to what he or she does.^{xxxix}

54. Although the emphasis is usually on an object in a collection or a group of objects, there may be situations when a collection should be preserved as an entity. A collection of cultural heritage objects may acquire greater value for history, art or science than the sum of the individual values of which it is composed. In particular, a collection with a unifying theme permits comparisons and classification to be made. It can illustrate the history of collecting or of collecting fashion at a particular time or by a particular person. For example, the Wallace Collection in London shows the taste of one particular family – the Seymour-Conways, Marquesses of Hertford. A collection may in fact freeze a moment in history. A shipwreck has been said to be a “time capsule” because everything about it – cargo, equipment and structure – were all in use at the moment of sinking. There is great value in keeping these all together. Documentation associated with the collection should also be preserved. Certain collections or types of collection can be declared to be indivisible by legislation. In Ecuador Article 37 of Law 3501 on Cultural Patrimony 1979 reads:

Goods belonging to the State Cultural Patrimony that have been gathered under coherent criteria by a governmental entity by a natural or by a private juridical person, can be declared a collection. For juridical purposes, the collection constitutes a sole good, with indivisible character...^{xxxix}

55. Preservation must also extend to the inventory of the museum or other collection. This is an indispensable aid to their management as is emphasized

in the Recommendation for the Protection of Movable Cultural Property 1978 paragraph 12(a) which states that States should:

Encourage the systematic inventorying and cataloguing of cultural property, with the fullest possible details and in accordance with methods specially developed for the purpose (standardized fiches, photographs – and also, if possible, colour photographs – and, as appropriate, microfilms). Such an inventory is useful when it is desired to determine damage or deterioration to cultural property. With such documentation the necessary information can be given, with all due precautions, to the national and international authorities responsible for combating thefts, illicit trading and the circulation of fakes.

The proposed Recommendation on protection and promotion of museums and collections might reiterate this provision with amendments to take account of modern technology. Provision can also be made for a copy of the inventory to be held, with appropriate safeguards, in another institution, even in another country. When the Kabul Museum in Afghanistan was ransacked there was a copy of its inventory held by the Musée Guimet in Paris.

Preparation for unforeseen events

56. The Recommendation should advise all museums to prepare for the consequences of armed conflict, terrorism, riots, vandalism and other human-made and natural disasters. Armed conflict ranges from full scale war between States; to invasion of one State by another; to guerrilla warfare and to large scale riots. Terrorism can take many forms – physical attacks on individual objects in the collection; attacks on the museum building and even cyber-attacks. Museums could face collateral damage from a large scale cyber-attack on military installations or cities. No State can regard itself as entirely outside the possibility of one of these occurring. Consequently, all museums must have contingency plans in place to deal with the possibility that their buildings may be attacked and the contents put at risk. This includes not only the collections but also the archives - the records of acquisition, conservation etc. Recent examples of loss include that from museums in Vukovar, Kabul, Baghdad and Cairo.

57. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 together with its two Protocols (1954 and 1999) is a first point of reference. The Hague Convention applies to international armed conflicts generally and to non-international armed conflicts (Article 19). The Hague Convention Second Protocol of 1999 also applies to non-international conflict but not to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (Article 22(2)). All States Parties are “to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict” (Article 3 of the Hague Convention). Museums are specifically mentioned in the definition of “cultural property” (Article 1(b)). Museums can thus call on their own State, if it is a party to the Convention and its Protocols, to provide the level of protection set out in them. They may also urge it to insist on these provisions being fulfilled by other States involved in the conflict. In particular, in times when terrorism and riot are the most likely cause of damage, Article 4(3) of the Hague Convention provides a useful basis to exhort the States party to the Convention to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property”. It should be noted that “ fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of international customary law”^{xxxiii} and therefore obligatory not only for the 126 States who have become party to it but for all States in the international community.

58. While museums can call on States to take the steps the Convention and its Protocols require in preparation for the possibility of conflict, they also need to take action themselves. These do not fall within the legal aspects of the proposed Recommendation but are appropriate matters for guidance at an administrative level. They include the provision of adequate guards who must be well paid and provided with working conditions sufficient to motivate them to take good care of the collections. It should be noted that the Second Protocol to the Hague Convention has a special provision (Article 9 (2)) for a State Party to engage in “close cooperation with the competent national authorities” of occupied territory when there is any alteration, or change in

use, of cultural property. Museum staff needs to be aware of their duties and their right to be consulted if such changes are proposed by the occupier.

59. There are many other disasters that can befall a museum: fire, flood, tsunami, earthquake; electrical failure; strikes. While preparations can and must be made to cope with these it is not possible to foresee every disaster and all consequences. Nevertheless, the application of risk management techniques helps to identify what risks are likely to arise and what steps may be taken in advance to deal with them. Such techniques involve not only identification and assessment of the risk but also prioritization among risks and an assessment of the best means to counter them. The 2011 Seoul Declaration on the Protection of Cultural Heritage in Emergency Situations could provide some guidance in this area. The declaration came out of the first International Conference of the International Committee of the Blue Shield (ICBS) (which is made up of organizations relevant to the protection and promotion of museums (i.e. International Council of Archives, ICOM, International Council on Monuments and Sites, International Federation of Library Associations and Coordinating Council of Audiovisual Archives). It stated that the Blue Shield community should:

... seek to mobilise and further develop cross-sectoral research initiatives and collaborative professional frameworks, permitting 1) the development of training activities in emergency preparedness and response for heritage institutions, as well as all concerned professionals, with priority given to those areas which are most at risk, and 2) the improvement of monitoring methods, using information technologies and geographic information systems, to better assess the extent of damage as disasters unfold, and, after such events, to anticipate their occurrence in high risk areas; thus permitting the gathering of information allowing for the drafting of comprehensive reports addressed to international organisations, governments and civil society.

These directives apply to museums. The proposed recommendation might call on governments to seek assistance from the relevant ICBS network in implementing these strategies for emergency preparedness.

60. The Recommendation for the Protection of Movable Cultural Property 1978 sets out extensive protective measures that Member States should seek to ensure with regard to museums and other similar institutions (Articles 12 and 13) and certain private collections (Article 14) . Much is purely administrative and does not require any legal backing. Insurance may be available to offset all or some of the risk. In any case where there is a contract or other legal agreement a lawyer knowledgeable in the conduct of museum affairs should be involved in its drafting and implementation. Museum staff should not rely on their own knowledge which may not be adequate to deal with the complexities of drafting a contract capable of providing against possible future problems.

61. The proposed Recommendation can also deal with governmental guarantees to underwrite specified losses otherwise known as indemnity schemes. The nature of these guarantees can vary greatly from State to State (see below) and depends to some extent on what the State thinks it can pay in the event of a disaster. It is preferable that there be legislation to underpin such a scheme as part of a permanent programme although some States have done this administratively. If properly drafted and implemented guarantees are very useful for museums as they provide relief from costs associated with commercial insurance where the premiums can be prohibitively expensive. The breadth of the guarantee needs to be understood as well as what actions by the museum or its staff will void the undertaking. For example, there may be objects in the collection which cannot be fully covered by the guarantee scheme and the museum has to be aware of this in making loans. This was the case with objects accepted by the British Government *in lieu* of tax and transferred to a museum. If the object was damaged during a loan the compensation would be paid only up to the tax settlement figure for that object.^{xxxiv} There is brief reference to government guarantees in the Recommendation for the Protection of Movable Cultural Property 1978 (Articles 21-24).

62. An example of an indemnity scheme is that of the United Kingdom referred to above and established under the National Heritage Act 1980. The scheme, which is available to both national and non-national entities “exists for the UK public benefit. It aims to enhance and widen access to objects of a scientific,

technological, artistic or historic nature. By giving undertakings to lenders, the GIS [Government Indemnity Scheme] enables certain institutions to borrow objects to an extent they could not otherwise afford. The scheme therefore facilitates loans to museums, galleries, libraries and other kinds of bodies such as the National Trust as well as between each other".^{xxxv} Another scheme is that for the indemnity of touring exhibitions in New Zealand. Indemnity is granted by the Minister of Finance on the recommendation of the Minister of Arts, Culture and Heritage, under the Public Finance Act 1989 for touring exhibitions, helping to reduce the costs of international exhibitions visiting New Zealand and enhancing accessibility to significant touring cultural exhibitions.

63. Anti-seizure legislation should also be considered. This exists in such countries as Austria, Belgium, Canada, Germany, Israel, Switzerland, United Kingdom and United States of America. Legislation to implement such policies has been introduced in Australia. Normally this type of legislation renders any object brought within the State immune from legal action to seize it. Even a decade or so ago, normally when such legal action it was usually only to seize objects that had been taken from their owner – including cases where such an appropriation was legal under the law of the country where it took place. For example, a collection would be seized by a State from one of its citizens under an expropriation decree. The collection might have been placed in a local museum and then, years later, a museum in a foreign country might want to borrow it. At this point, however, a descendent of the original owner would threaten to bring legal proceedings to claim it, if it arrived in another State. Legislation in the State of the borrowing museum can prevent any proceedings succeeding. A famous episode of this nature involved works by Matisse loaned to the Centre National d'Art et de Culture Georges Pompidou in Paris by the Hermitage and Pushkin Museums in Russia. Some of the works came from the Shchukin collection, nationalized by the Russian Government following the 1917 Revolution. Shchukin's daughter, a French citizen, began preliminary proceedings to retain the paintings in France until the question of ownership could be resolved. There were two decisions by the courts but certain aspects of the law were still unclear. Consequently, a law was enacted protecting from seizure all cultural items lent by a foreign power, local authority or cultural

institution to the French State or any other legal person designated by the French State, for public exhibition in France.^{xxxvi}

64. In more recent years, proceedings to seize objects have been launched to enforce judgments obtained in entirely unrelated matters. An example is a series of related actions that to this day continue through Courts in the United States of America in proceedings collectively known as *Rubin v. Islamic Republic of Iran*. Victims of a suicide bombing in Israel that took place in 1997 brought a civil action in 2003 in the United States for damages against the perpetrators Hamas and their alleged financial backers, the Islamic Republic of Iran.^{xxxvii} The plaintiffs obtained judgment against Iran and, having exhausted other options, sought to have it enforced by claiming antiquities in various museums across the United States. Among other issues, such as the factual question of whether it was Iran or the American museums who actually owned the antiquities, was the question of foreign State immunity. This issue involved a consideration of the U.S. Foreign Sovereign Immunities Act (FSIA)^{xxxviii} which provides a presumption of immunity for a foreign sovereign's property, with a number of exceptions which enable the presumption to be set aside. While the cases are at various stages of appeal, to date the plaintiffs have not been able to successfully claim any of the antiquities.

Acquisition and the management of museums and collections

65. The ICOM definition discussed earlier in this study states that the central aspect of a museum is a permanent collection formed for the public benefit for purposes including scientific study and educational display. To attain this goal there must be a rational process of selecting the objects for the collection. That process can be highly significant in any argument over whether a museum is entitled to tax relief. The issue of whether or not the assembly of objects constitutes a museum needs to be considered. This is illustrated by a case decided in the English courts concerning an artist who had directed in his will that his studio and its contents be maintained in perpetuity as a museum endowed from his estate. This was contested by members of his family. The Court of Appeal held that the testator's wishes failed. Evidence was given that

the contents of the studio had no educational value whatsoever. The judge concluded:

I can conceive of no useful object to be served in foisting upon the public this mass of junk ... there is a haphazard assembly - it does not merit the name collection, for no purpose emerges, no time nor style is illustrated.^{xxxix}

66. Acquisition of new objects for the collection is often seen as a central feature of the museum's activities. Thomas Hoving, then Director of the Metropolitan Museum of Art in New York, once wrote: "The chase and the capture of a great work of art is one of the most exciting endeavours in life – as dramatic, emotional, and fulfilling as a love affair".^{xl} But museum administrators cannot allow their staff to pursue this love affair as they often would wish. There are laws to be observed and their disregard may have disastrous consequences for the museum – sometimes years later when an object is claimed by a former owner.

67. The ICOM Code of Ethics for Museums has a section setting out the principles for acquiring collections. Paragraph 2.1 reads: "The governing body for each museum should adopt and publish a written collections policy that addresses the acquisition, care and use of collections." That policy needs to be adapted to the circumstances of the museum in question using the ICOM Code as a starting point. For example, paragraph 2.3 deals with provenance and due diligence to which all museums should pay strict attention:

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.

68. There are two classes of objects that all museums should be very careful in acquiring – human remains and sacred/secret material. Most museums will already be aware of issues involving the former. Australian Aborigines,

Canada's First Peoples, Native Americans and New Zealand Maoris have been very active in seeking the return of the remains of their peoples found in museums worldwide. But it is not only these groups of indigenous peoples who are active. For example, in 1994 the remains of Inakayal, a Patagonian chief who died in La Plata Museum in 1888, were returned to his homeland to be interred with full military honours. However, it required legislation by the Argentinian Parliament to bring about the return. The British Parliament passed special legislation – s. 47 of the Human Tissues Act 2004 – to enable listed museums to transfer human remains from their collections.^{xli} The ICOM Code of Ethics for Museums has several paragraphs referring to the treatment of human remains by museums. For example, Paragraph 2.5 states:

Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known.

Material of sacred significance can come from a variety of sources. Indigenous peoples contribute a great deal that can be controversial because of the way it was obtained – theft and fraud are often alleged. But there can also be problems with relics sacred to Christian churches, icons and other objects.^{xlii} Museums should be scrupulous to investigate the provenance of such objects if they wish to avoid adverse consequences.

69. Museums affected by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995, if found to be in possession of a stolen cultural object, must return it. If they can prove that they “neither knew nor ought reasonably to have known that the object was stolen and can prove that [they] exercised due diligence when acquiring the object” they will be entitled to “fair and reasonable compensation” (Article 4(1)). In Article 4(4), the Convention contains guidance as to what would be acceptable “due diligence”.

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.

The museum contemplating an acquisition has to satisfy itself that it has fulfilled this duty of due diligence. It is not an absolute standard. The possessor has to prove that the research undertaken into provenance was reasonable in the circumstances. The activities mentioned are intended as guides only.

70. The management body of the museum has to contemplate the possibility that failure to fulfil the due diligence duty may result in loss of the object without being able to obtain any compensation. Some systems of law would enable the museum to sue the seller of the object but that person could well have disappeared or the passage of time may mean that legal action is barred. The museum would be left with not only the loss of the object but also the money paid for it. Much will depend on the legal system controlling the museum's operations, but this could expose a governing board to personal liability or even criminal charges.^{xliii} The proposed Recommendation needs to refer to the matters set out above emphasizing in particular the necessity for a rational policy in collecting and the exercise of due diligence in acquiring objects for the collection.

Theft

71. It would be highly desirable for the proposed Recommendation to incorporate the statement in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995; namely, that, the possessor of a cultural object which has been stolen shall return it. This is the most explicit statement on the implications of theft made by States and the aim should be to have that principle implemented in all relevant national laws on cultural heritage. It is one of the strongest defences against theft by preventing wrongful acquisition of cultural objects by persons who ignore basic inquiries into provenance. It is

aimed at preventing thieves and those who launder stolen objects from profiteering.

72. There are currently (December 2012) 33 States party to the 1995 Convention. It is complementary to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. Those who are not yet party do not necessarily disagree with its provision on theft – there are other aspects those States have not yet accepted. But the failure to take this approach means thieves can more easily profit from their activities as loopholes have not been closed. Some museums object on the basis that a claim may be made against an object in their collection. What they overlook is the possibility that an object may be stolen from their own collection and then they need the best available means of recovering it.

73. Article 7 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 makes specific mention of theft and museums. Firstly, States are required to “prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the State concerned”. The measures taken to do this must be “consistent with national legislation”. As we have seen, in many countries there will be museums which are not under State control. Consequently, these will not be directly affected by Article 7 although those museums in receipt of State funding may be restricted if they do not comply with official directions. This problem is acknowledged in Article 10 of the European Convention on Protection of the Archaeological Heritage (Revised) 1992 which places a similar obligation on States Parties where there are museums and similar institutions “whose acquisition policy is under State control”. The proposed Recommendation should incorporate an obligation along these lines. The new instrument might usefully urge such States to consider incentives to museums (such as subsidies or assistance with professional training programmes) to adopt this principle. It should be born in mind that the refusal to return improperly acquired objects by foreign museums increasingly influences the foreign relations between States.

74. The second paragraph of Article 7 requires States Parties to prohibit the import of cultural property stolen from a museum in another State Party to the Convention after the entry into force of the Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution. Most States were able to do this under their general laws on theft. However, the restriction of this Article to objects on an inventory reduces its effectiveness. For example, as is well known, the inventories of museums are sometimes less than complete. Not all objects in the collections are in fact recorded. The records themselves may have disappeared. The proposed Recommendation might advise States to extend this principle to any object which the museum can prove was part of its collection. In addition it might further insist on the greater use and completion of inventories in public and private collections.

75. A major problem for museums in dealing with issues of theft is identification of objects. This can arise if an object is stolen from the collections and the museum has to provide details to enable its identification for purposes of recovery. The mirror situation is when the museum wants to buy an object and needs the best possible information on whether it has been stolen. In 1993 the Getty Information Institute initiated a collaborative project with government administrations, museums, dealers, police, Customs authorities, the insurance industry and appraisers to develop an international documentation standard for the information needed to identify specific items of cultural property. Out of this came "Object ID" which has been widely adopted around the world. For example, it was endorsed by the 30th General Conference of UNESCO (September 1999) following a recommendation contained within a report (1998-1999) by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in case of Illicit Appropriation. The Committee adopted Object ID as the international standard for recording minimal data on movable cultural property, to be used to the fullest extent possible by all Member States. It is essential for rapid dissemination of information through INTERPOL to maximise the chance of recovery of stolen objects. Object ID first recommends the taking of photographs. It then enumerates the vital details of information to be supplied: type of object; materials and techniques; measurements; inscriptions and markings; distinguishing features; title; subject; date or period;

maker; a short description. The information needs to be kept in a safe place. Assembling information using Object ID does not need a computer although this certainly makes it easier. It can be done using a camera, a pencil and a card or piece of paper. The proposed Recommendation might exhort State to bring Object ID to the attention of museums and their staffs. Museums should use the technique in preparing their internal catalogues, adding further information as is felt desirable. However, Object ID is a standard for identification and not an inventory system, even though it can be used in this purpose for museums where the inventory system is absent or incomplete. For museums with an important collection and a sophisticated inventory system, the Object ID standards and norms are “included” in most modern computerised inventory programmes.

Illicit traffic

76. There are five international agreements of immediate relevance to the issue of illicit traffic: the two Protocols to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970; the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 and the Convention on the Protection of the Underwater Cultural Heritage 2001. All of these apply between States and are not directly applicable to museums. However, they all impact on the activities of museums.

77. The First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954 deals essentially with cultural property taken from occupied territory during an international armed conflict. Such property has to be returned as has been the case for Croatia, Kuwait and Iraq. Given the rise in the number of these conflicts, museums have to be aware of this when acquiring objects likely to be from areas where conflict has occurred and have an obligation to check the provenance of such objects. Under Article 9 of the Second Protocol, States Parties in occupation of the territory of another State Party are required to prohibit and prevent any illicit

export, other removal or transfer of ownership of cultural property in relation to the territory.

78. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 has been UNESCO's premier instrument in the fight against illicit traffic of cultural material. It has now been in force for 40 years and is still attracting new States Parties. The proposed Recommendation could strengthen its effect by giving explicit meaning to Article 3: "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit". This can be interpreted as meaning that States Parties are required in their national law to render imports illicit when they are illicit exports from another State. Both Australia and Canada have followed this interpretation. The proposed Recommendation might clarify the divergent interpretation of Article 3 by providing that this principle be inserted in national legislation. It would significantly strengthen the fight against illicit traffic as currently many States take the view that the only obligation is under Article 7, which, as this study shows, is a very limited provision. The United States of America and Switzerland have used a subsidiary system of bilateral agreements based on Article 9 of the Convention but this is very time consuming, introduces another layer of bureaucracy and to date has applied to a very limited number of States.

79. Chapter III of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 deals with the return of illegally exported cultural objects. This makes available a special procedure whereby a State can request a court in another State Party to the Convention to return a cultural object illegally exported from its territory. The requesting State must prove that the removal of the object from its territory significantly impaired one of four listed criteria or "establishes that the object is of significant cultural importance for the requesting State". The proposed Recommendation might include provisions relating to this Chapter of the UNIDROIT Convention, since it is a considerable advance on the narrow interpretation of the 1970 Convention.

80. Article 14 of the Convention on the Protection of Underwater Cultural Heritage 2001 requires States Parties to prevent the entry into their territory,

the dealing in, or the possession of underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to the Convention. This is a complex provision but basically it renders any transaction in certain material which has been excavated contrary to the provisions of the Convention illegal. If this occurs, there is provision for seizure and disposition of the material as well as penalties for those responsible. It would be desirable for the proposed Recommendation to bring these provisions to the attention of museums. Museums in States Parties to the Convention will be subject to whatever legislation those States have adopted or will adopt to implement the Convention. They should be very aware that if material affected by the Convention is found in their possession they may well have it seized with no possibility of compensation (Article 18) and sanctions may be applied (Article 17). Museums in States not party to the Convention should not acquire or exhibit such materials as it will encourage further damage to the underwater cultural heritage.

81. These five international agreements listed above require States on becoming party to implement the provisions outlined. How this is done depends on the Constitution of the individual State but will usually require legislation unless the agreement automatically becomes part of the law of the land. Museums need to be aware of what agreements their State is party to and what law applies to them. They should also be aware of the law that exists in other States where any object they are considering purchasing originated or where there could have been transactions affecting its ownership. The First Protocol to the 1954 Hague Convention and the 1970 Convention have been in existence for many years. Even the UNIDROIT Convention and Second Protocol to the Hague Convention are now almost 20 and 15 years old respectively. Despite this there are still reputable museums that buy objects with little regard to their legal status or to the possibility that they may have been illicitly removed from another country. They expose themselves to claims for return which, even if ultimately unsuccessful, generate adverse publicity, damaging the museum's reputation.

82. The many museums that are members of ICOM must also be aware of the organization's Code of Ethics for Museums. Paragraph 7.2 states that "[m]useum policy should acknowledge the following international legislation

that is taken as a standard in interpreting the *ICOM Code of Ethics for Museums*.” Among the instruments listed are the five discussed above. Failure to follow the Code could lead to action being taken by the organization against the museum. ICOM has an active Ethics Committee. Its function is to monitor the application of the Code; inform the Executive Council of serious violations of the Code, and eventually request that certain recommendations be published in ICOM News.

83. The proposed Recommendation should list the Conventions named above and enjoin all States to become party. At present (December 2012) there are 102 States Parties to the First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and 64 to the Second Protocol; 123 to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970; 33 to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995; 41 to the Convention on the Protection of Underwater Cultural Heritage 2001. It is obvious that the fight against illicit traffic and the possibility of recovering objects that have been illicitly removed would be greatly improved if more States were to become party to these Conventions. The need is not for new Conventions but for improved State participation in those that already exist. Not only does there need to be greater participation, but all States Parties should examine their implementation. Issues to be examined include whether it fully complies with the scheme of the Convention and whether all the necessary legislation been passed? Museums should take responsibility to encourage their governments to become party to the conventions.

84. The proposed Recommendation should also aim to strengthen the role of the Conventions in museum practice. Although the Conventions are legally applicable relations between States their principles can be used as a framework for museum operations. But it is not enough just to incorporate a reference to them in a code of ethics or acquisitions policy. In the hunt for new objects even the most senior official can be tempted to ignore ethical policies. All levels of the museum must be regularly reminded of the obligation to be vigilant against illicit traffic.

Financial resources

85. The IBRAM paper on *Inputs for a Debate on, and Construction of an International Normative Instrument for the Preservation and Promotion of Museums, Museological Heritage and Collections* advocates the investment in museological heritage and collections of a minimum of 15% of national government budgets allocated to the field of culture (Paragraph 12.5.1). The Recommendation could support this as an aspiration or goal. Nevertheless, government financial authorities dislike any proposals that would restrict the freedom of government to dispense funds based on the political needs of the time.

86. New developments in museum funding have produced new ways of quantifying the value of museums to their community and national economy, beyond entrance fees and museum shop profits. Such new methods have produced stronger support from national and local sources. The proposed Recommendation should endorse these and suggest they be undertaken by all museums. An example of this in practice is provided by the Queensland Museum which in 2008 commissioned a Contingent Valuation Methodology (CMV) study to determine the public value of the Museum.

... it was concluded that the people of Queensland place a value on the Queensland Museum that is more than twice that reflected in current government funding for day to day operations... . Since the completion of this CMV study the state government has provided four million dollars to the Cobb+Co Museum for the construction of the National Carriage Factory. This was a direct response to the Toowoomba community's previous efforts in actually raising \$1.7 million towards this project. This supports the validity of the CVM survey, because the respondents' WTP [willingness to pay] was matched by their actual payment for the public good in question.^{xliv}

87. The IBRAM paper also urges the creation of an international fund "to support museums and collections with a view to strengthen those areas in developing countries that hold museological heritage" in their custody (Paragraph 12.5.2). The proposed Recommendation can go no further than urging the creation of such a fund. Some Funds that already exist under the

supervision of UNESCO, such as the World Heritage Fund, were established in an international convention. Other funds have been established according to special arrangements with particular contributing States. While a Recommendation cannot create a Fund, it can propose the creation of such a Fund which would have to be established and money contributed. Before taking any action for the further development of an international funding process, it will be necessary to identify a detailed set of priorities, draft a prior list of existing funds and explore the means to promote them. However it is also important to bear in mind that the management of such a Fund within UNESCO would place a further considerable load on a Sector which is already very hard pressed.

88. Funding is often a major problem for museums. Money is needed for a vast range of activities: maintenance of the museum buildings and the collections; payment of staff; new acquisitions and new exhibitions are often the most pressing. The source of funding will be influenced by the legal structure of the particular museum. If it is owned by the State then the State will usually provide the bulk of the necessary funds. However, it may not be sufficient for all needs. These museums will need to look to the same sources as non-State-owned museums do. They include possible income from a foundation, donations, sponsorship, entrance fees, sale of images, museum shops and deaccessioning.

89. Tax incentives are crucial to securing donations from sources outside government. The Recommendation should draw attention to the need to have legislation on taxation which is conducive to this. Donations might be increased if, when they are made from sources outside the country, there is reciprocal extension of tax relief. For example, if people in State A raise funds for a museum in State B will they pay less tax against their income in State A? This is an issue for international agreements that seek to avoid double taxation. Sponsorship is another form of donation as, for example, where a commercial company agrees to underwrite the cost of creating an exhibition in the museum. Does the taxation system encourage this form of donation?

90. Recommendation 1634 (2003) of the Parliamentary Assembly of the Council of Europe on Tax Incentives for Cultural Heritage Conservation is

evidence of international support for such tax incentives. This Recommendation, which refers to cultural heritage both movable and immovable and objects of historic and cultural interest, is applicable to museums and collections. Further, the Parliamentary Assembly expresses views regarding the relevance and value of such objects in line with those expressed in the Final Conclusions and Recommendations of the 2012 Expert Meeting on the Protection and Promotion of Museums and Collections, namely;

... the Parliamentary Assembly also stresses its [cultural heritage] significance and value in economic and educational terms and in relation to creating international understanding and goodwill.

This Recommendation, in stating that fiscal arrangements can be flexible provides examples of the following possible tax measures:

- restricting tax relief to, for example, the upkeep of rarely used churches or recently privatised property;
- making tax relief conditional on, for example, public access, proper maintenance or legacy to the State (this recommendation is in line with UNESCO Recommendation for the Protection of Movable Cultural Property 1978)

The Council of Europe Recommendation also proposes that the Council of Ministers:

- consider ways in which tax incentives may be coordinated, so that they may be applied at European or international levels;
- encourage governments to recognise and support the role of intergovernmental bodies such as, *inter alia*, UNESCO, with regard to tax incentives for their activities;
- engage in direct dialogue with relevant EU authorities to ensure that future EU legislation on VAT includes specific recognition of heritage protection, particularly in relation to the regular maintenance and upkeep of properties (which would include museums).

91. An example of a success story arising out of tax incentives is that of the Museum of Modern Art in Sao Paulo, Brazil. Around 80% of the museum's revenue comes from contributions from businesses taking advantage of the Federal Law of Culture Initiative (Law Rouanet (8313) 1991). The law allows individuals and corporations to receive a tax exemption proportional to the investment made in cultural institutions or productions.^{xlv}

92. Another source of funds that has become important for museums in recent years is the sale of images. Photographs of objects in the museum collection were often sold on postcards etc. but this was never regarded as a significant source of funds. Then it was realized that that these images could be quite valuable if made available to a large photobank organization or utilized in multimedia projects. The law on copyright varies widely from country to country. The Recommendation should draw the attention of museums to the need to fully protect their rights in all circumstances.

93. In recent times many museums have raised substantial funds by operating shops selling objects more or less related to their collections. But how this is done needs careful examination of the legal position. The museum may decide to operate the shop itself. Will it still be regarded as a museum? Would this affect its tax situation, its management structure or its legal status? If the shop makes a profit, does the museum have to pay tax on this to the government? What if suppliers of objects to the shop are not paid? Do they have a right of recourse against the collections in order to recover the debt? Should the museum set up another legal entity – perhaps a commercial company – to manage the shop? Once again there are possible tax questions and problems of transferring any profits to the museum's general funds. Should the number of shops operating under the museum's umbrella affect the outcome of any decision on these matters? The Recommendation might endorse the use of shops in museums to raise funds. It will have to take into account the tax issues raised above.

94. As a means of raising funds, deaccessioning is regarded as a last resort. The Convention on the Protection of Underwater Cultural Heritage 2001 requires that arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design

(Annex, Rule 32). The archive i.e. any underwater cultural heritage removed and all supporting documentation, is to be kept together and intact as a collection “as far as possible” (Annex, Rule 33). This recognizes that it may be necessary to disperse the collection, or part of it. On the other hand, the Convention states that the collection is to be managed according to “international professional standards” (Annex, Rule 34).

95. Deaccessioning is a recognized element in professional collection management. To start with, the museum must consider its own governing legal rules. For example, certain museums in the United Kingdom are prohibited from deaccessioning, with limited exceptions, anything from their collections. The approach of any national professional body to which the museum belongs also has to be taken into account. There are significant philosophical considerations. Some museum professionals take the view that once an object becomes part of a museum collection it is then in the public domain and, if it should ever leave that collection, it should go to another museum collection. Others argue that objects can be sold provided the money is used to buy additions to the collection or, for example, to up-grade the quality of objects in the collection. Yet others take the view that, if money is necessary for essential tasks such as repairs to the museum building, sale is permitted. In all cases, what must be avoided is a situation where the collection comes to be seen as an “asset”, similar to “business assets”, to be traded like a commodity. The UNESCO Manual for Activities Directed at Underwater Cultural Heritage states that deaccessioning is not what the Rules try to avoid “as long as it does not imply feeding the antiquities market with finds”.^{xlvi}

96. The ICOM Code of Ethics for Museums recognizes the concept but imposes a strict set of conditions to be satisfied before disposal of an object from a collection:

The removal of an object or specimen from a museum collection must only be undertaken with a full understanding of the significance of the item, its character (whether renewable or non-renewable), legal standing, and any loss of public trust that might result from such action.
(Paragraph 2.13)

Particularly significant is the possible loss of public trust. There are strict rules governing the method of deaccessioning.

Each museum should have a policy defining authorised methods for permanently removing an object from the collections through donation, transfer, exchange, sale, repatriation, or destruction, and that allows the transfer of unrestricted title to any receiving agency. Complete records must be kept of all deaccessioning decisions, the objects involved, and the disposal of the object. There will be a strong presumption that a deaccessioned item should first be offered to another museum.

(Paragraph 2.15)

97. Deaccessioning is thus a possible but an exceptional step to raise funds; one that is only to be undertaken in rare and pressing circumstances. Moreover, other reputable collections should have the first offer. As stated specifically in the UNESCO Manual for Activities Directed at Underwater Cultural Heritage, deaccessioning cannot be used as a means of feeding antiquities into the art market. While this is said in the context of the Convention on the Protection of Underwater Cultural Heritage 2001, it is a universally valid principle. The proposed Recommendation could usefully contain a provision dealing with deaccessioning based on the ICOM approach.

Modernization of infrastructure

98. The term “infrastructure” is fluid but basically can cover such things as buildings while another strand refers to the organizational substructure or underlying system of the organization. Both strands will be briefly discussed below.

99. Buildings housing collections vary greatly. Professor Mairesse has referred to the great modern museums such as the Guggenheim Museum in Bilbao. But many collections are housed in old buildings, often originally used for other purposes. Even if the building was purpose built at the time, many no longer meet modern standards for collection display and storage. This often relates to temperature control, light levels, moisture prevention etc. Bringing such matters up to a desirable standard takes time and, more significantly, money. As has been shown, there are significant obstacles to obtaining funding

through selling objects from the collection even where there are fundamental repairs to undertake such as a leaking roof.

100. Museum buildings are often important historically and form a significant part of the urban environment. Heritage preservation laws will normally be applicable in all matters relating to the building, particularly the exterior. The nature and extent of these laws will vary from State to State. Their basic purpose is to preserve the physical structure – to keep that structure in a state where it will not deteriorate and to prevent any inappropriate alterations. In 1964, in Venice, Italy, the Second International Congress of Architects and Technicians of Historic Monuments adopted the International Charter for the Conservation and Restoration of Monuments and Sites (“Venice Charter”). While part of the Charter is technical, certain general principles are stated. For example, the “concept of an historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or an historic event”. Conservation should be intended to protect the historical evidence imbued in monuments as well as their artistic value. Setting was seen as an essential part of a monument. The Charter is still highly influential although various countries have adopted their own versions to take account of local conditions; for example, the Burra Charter in Australia. Museum administrators need to comply with applicable historic preservation laws when undertaking any work affecting the fabric of the museum or its appearance. It should be remembered that often government officials have the power to order reversal of unauthorised work at the cost of those who undertook it.

101. In some cases there is an intimate connection between the collection and the structure which houses it, so much so that the heritage value of the entity as a whole is greater than the individual parts which comprise it. There many museums that are in this situation e.g. a factory with the machinery that once operated there inside it; the residence of a famous person with all the furniture that person used; the studio of an artist existing as it was the day he or she died. Maintaining the integrity of such a museum is essential but difficult. The Council of Europe has produced a Recommendation^{xlvii} which endeavours to balance the interest of society against others who may also have an interest e.g. the heirs of the artist. This Recommendation is a useful

instrument for studying the problems that the complex raises although it does not solve them all in a satisfactory manner. One difficulty not adequately dealt with is that where return is sought of an object taken from the complex without permission.^{xlviii}

102. Turning to the second strand identified above i.e. that relating to the substructure or underlying system of the organization, it must be realized that many museums are venerable institutions. They operate under legislation which can date back decades. It has been said of the legislation in Australia:

... the actual legislative framework for museums is generally old-fashioned, and differs markedly in style and sophistication from one jurisdiction to another. There is often a disparity between the vision and mission statements published by museums from time to time and the objects and substance of the legislation governing those museums. There may well be a case for reform of the museum legislation at Federal, State, and Territory levels, taking into account recent scholarship on museological study of both indigenous and other cultures.^{xlix}

Guidance on the museological aspects is available in Professor Mairesse's study.

103. The underlying system of the museum must also take into account changes in the society in which it is embedded. An illustration of this comes from the impact holocaust studies have had on museum operations. Towards the end of the 1940's, museums began to forget the looting that had occurred during World War II. Post-war reconstruction and the advent of the Cold War directed attention elsewhere. This began to change in the 1990's as new information emerged. Under pressure from international fora such as the Council of Europe, the Washington Conference on Holocaust Era Assets and the Vilnius International Forum on Holocaust Era Looted Cultural Assets museums began to search their collections for objects that had been looted by the Nazis.

104. Many returns were made. However, as noted above certain museums in the United Kingdom are prohibited from returning anything subject to limited exceptions such as duplicates. These included the British Museum, the

Imperial War Museum, the National Gallery, the Tate Gallery and the Victoria and Albert Museum. The British Government had established a Spoliation Advisory Panel to which persons aggrieved by the decision of a museum not to return an object could appeal. The Panel, if it upheld the claim, could give advice to the claimants, the museum and the Minister. But, even when it advised return of an object, the museum could not comply because it was prohibited by legislation establishing the museum. For example, the Metropolitan Chapter of the Cathedral City of Benevento in southern Italy claimed for return of a missal in the possession of the British Library. It was alleged to have been taken between September 1943 and April 1944. The Panel found that a moral claim had been made but that return was barred by the British Library Act 1972 and the British Museum Act 1963.¹ In 2009 the British Government passed the Holocaust (Stolen Art) Restitution Act. This permits the listed museums to transfer objects from their collections provided the Advisory Panel had recommended it and the relevant Minister had approved that recommendation. The legal infrastructure of these British museums was thus updated to allow them to comply with community expectations that had developed in the past 12 years.

105. One change in society that museums have to consider is the emphasis now being placed on sustainable economic development. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society 2005 provides in Article 10 on “Cultural heritage and economic activity”:

In order to make full use of the potential of the cultural heritage as a factor in sustainable economic development, the Parties undertake to:

- a raise awareness and utilise the economic potential of the cultural heritage;
- b take into account the specific character and interests of the cultural heritage when devising economic policies; and
- c ensure that these policies respect the integrity of the cultural heritage without compromising its inherent values.

Museums will have to deal delicately in emphasizing the “economic potential of the cultural heritage” while respecting its integrity.

Human resources

106. There are no international legal aspects of human resources relating directly to museums. International agreements on human rights would provide some guidance. For example, the Universal Declaration of Human Rights in Article 27 provides: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” It is for the museum to contribute to bringing about this right in practice so that all may enjoy it.

107. More immediately important for the museum is its own national law. On matters of human resources this differs from country to country. Many countries have laws prohibiting discrimination, however based; whether on remuneration; age; religion or professional qualifications or some other bases. The museum must be careful that none of these are breached in dealing with its staff and the public. Race or gender discrimination is the subject of legislation in some countries. Legislation may also protect the “whistle blower” or person who makes public matters where the museum has not fulfilled its legal obligations. The museum has to be very careful not to treat such a person in ways contrary to the legislation. The Recommendation should contain a general provision directing the attention of museum administrators to the existence of these laws and the necessity to observe them in relations with staff.

Conclusion

108. There is a very substantial case that there be a new UNESCO instrument on the promotion and protection of museums and collections. UNESCO has existing international instruments with provisions affecting this subject matter. But now is the time to produce one instrument applying specifically to museums and collections. As Professor Mairesse has illustrated in his study, it is a time of great change for museums as their role in society ventures into new and challenging areas. The subject matter of the proposed new standard setting instrument for the protection and promotion of museums will be

detailed and will be drawn from a broad spectrum of existing legal, practical and ethical sources as demonstrated by the information given in this preliminary study. Major themes can be seen from the contents page of this study. It will seek to identify and promote best practice among States by encouraging them to improve national legislation and administration. The conclusions of the Expert Meeting on the Protection and Promotion of Museums and Collections held in Rio de Janeiro, 11-14 July 2012, and organisations such as ICOM reflect expertise of the highest importance in assisting museums and cultural administrators to improve their operations, financing, research and education. This content, which is not dependent on political issues which might require the form of a convention, suggests that the best standard-setting instrument in this case would be that of a recommendation.

109. Paragraph 11 stated that this study would propose a Recommendation as the appropriate standard setting instrument on the protection and promotion of museums and collections. Declarations are short statements of principle and are not appropriate. While some may think a convention is the best solution, it has many drawbacks. Chief among these is the often political atmosphere in which conventions are drafted, because of the reciprocal legal obligations it establishes between States. This means that technical and professional issues of importance may be lost because delegates may not appreciate their significance in terms of the political goals with which they are primarily concerned. Moreover, revision of a convention is difficult and can lead to a complex situation where States are party to the original convention, the new convention, possibly both or possibly neither. On the other hand, a recommendation is flexible. States can implement it to the extent and in the format that is appropriate to their specific circumstances. A recommendation can set out in effect a blueprint for how the international community envisages the management of museums and collections should be now and into the future. It can enter into considerably more professional detail; its revision is not subject to the same requirements as in the case of a convention and can thus more easily be updated to reflect new developments if necessary. On the other hand, a Recommendation still creates legal obligations for all Member States of UNESCO. Because it lacks the political atmosphere of a Convention, a

Recommendation can promote international co-operation in giving negotiators more flexibility in choosing words and phrases. Principles can be adopted that contribute to the cultural dimension of development. Finally while States have to report to UNESCO on measures they have taken to implement Recommendations, they have flexibility in how they actually do this.

110. This study strongly advocates the adoption of a recommendation on the protection and promotion of museums and collections.

Biography of the author

Patrick J. O’Keefe worked in the Australian Commonwealth Public Service for five years after graduating in 1968 and then taught for 17 years in the Faculty of Law, University of Sydney. After moving to Paris in 1990, he spent 12 years as a consultant on cultural and natural heritage law and management to, among others, UNESCO, the Council of Europe, the World Bank, the Commonwealth Secretariat, ICOM and ICOMOS and various governments and private clients. Retiring in 2002 and returning to Australia, he became Adjunct Professor, ANU from 2003 to 2008 and Honorary Professor, University of Queensland since 2006. In 2008 he was made a Member of the Order of Australia. He is a Fellow of the Society of Antiquaries of London, the Society of Advanced Legal Studies London; the Australian Academy of the Humanities and an Associate Fellow of the Institute for Indigenous Resource Management. He was the Founding Chairman of the Cultural Heritage Law Committee of the International Law Association and held the position for 14 years before retiring. He has been a member of the ICOM International Committee on Management and the ICOMOS Legal Administrative and Financial Committee and remains a member of both organizations. He has a Ph.D. from the University of Sydney, an LL.M. from the ANU and a M.A. in Business Law from the City of London Polytechnic as well as a B.A. and LL.B from the University of Queensland. He is the author of five books; co-author of four others and has written over 200 articles, reports and other documents. Among others he is the author of *Trade in Antiquities: Reducing Destruction and Theft; Commentary on the 1970 UNESCO Convention* (3rd ed. pending); *Shipwrecked Heritage: A Commentary on the UNESCO Convention on the Underwater Cultural Heritage* and joint author of *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries*. He is on the editorial boards of the *International Journal of Cultural Property*; *Art Antiquity and Law* and *Public Archaeology*.

ⁱ <http://www.cbd.int/traditional/guidelines.shtml> accessed 16 Dec 2012

ⁱⁱ Elaborated by the Special Rapporteur, Erica-Irene Daes, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995).

- iii http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html .See also the General Introduction to the standard-setting instruments of UNESCO http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html# accessed 16 Dec 2012
- iv UNESCO/CUA/68, 9 August 1955, 3-4.
- v For a summary of developments see O’Keefe, P.J. & Prot, L.V. *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries* (Art Antiquity and Law, Builth Wells, 2011) 207
- vi Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution available at http://portal.unesco.org/en/ev.php-URL_ID=21681&URL_DO=DO_TOPIC&URL_SECTION=201.html accessed 16 Dec 2012
- vii [Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution.](#)
- viii General introduction to the standard-setting instruments of UNESCO p.4 http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html
- ix The following paragraphs consequently refer to the “proposed Recommendation” or the “new Recommendation”
- x UNESCO Doc. 175 EX/27 p.14
- xi Footnote vi above
- xii <http://icom.museum/the-organisation/icom-statutes/3-definition-of-terms/#sommairecontent>
- xiii O’Keefe, P.J. “Archaeology and Human Rights” (2000) 1 *Public Archaeology* 181
- xiv “inputs for a Debate on, and Construction of an International Normative Instrument for Preservation and Promotion of Museums Museological Heritage and Collections, Rio de Janeiro, Brazil, July 2012, p.2
- xv taonga tūturu means an object that (a) relates to Māori culture, history, or society; and (b) was, or appears to have been, (i) manufactured or modified in New Zealand by Māori; or (ii) brought into New Zealand by Māori; or (iii) used by Māori; and (c) is more than 50 years old
- xvi The United States of America is not a party to the Convention.
- xvii Greene, E.S. et.al. “Archaeology vs. Commercial Exploitation: How the Smithsonian Could Display Objects from the Belitung Shipwreck” <http://culturalheritagelaw.org/blog?mode=PostView&bmi=773188>
- xviii Tubb, K.W. “Shifting Approaches to Unprovenanced Antiquities among Conservators” in Prot, L.V.; Redmond-Cooper, R & Urice, S. (eds.) *Realising Cultural Heritage Law; Festschrift for Patrick O’Keefe* (Institute of Art and Law, Builth Wells, 2013) 145, 147
- xix Cannon-Brookes, P. (ed.) “University and Foundation Collections and the Law: Proceedings of a Seminar Held in the Courtauld Institute of Art, London, 23 June 1994” (1994) 13 *Museum Management and Curatorship* 378
- xx *Commonwealth v. Barnes Foundation* 159 A.2d 500 at 506
- xxi Gerstenblith, P. “Museum Practice: Legal Issues “ in Macdonald, S (ed.) *A Companion to Museum Studies* (Wiley-Blackwell, Oxford, 2006) 442
- xxii <http://www.louvre.fr/en/hours-admission/admission> accessed 17 Dec 2012
- xxiii <http://www.insights.org.uk/articleitem.aspx?title=To+Charge+or+not+to+Charge+%E2%80%93+Museums%2527+Admission+Dilemma#References>
- xxiv http://www.culture.gov.uk/what_we_do/museums_and_galleries/3380.aspx
- xxv <http://www.insights.org.uk/articleitem.aspx?title=Museums%20%E2%80%93%20The%20Impact%20of%20Free%20Admissions>
- xxvi See specifically paragraph 1 of those Recommendations

- ^{xxvii} Park District Aquarium and Museum Act
- ^{xxviii} <http://www.telegraph.co.uk/news/1419136/Italy-discriminated-against-British-pensioners.html>
- ^{xxix} 159 A.2d 500, 502.
- ^{xxx} Pigott, P.H. *Report of the Committee of Enquiry on Museums and National Collections* (Australian Government Publishing Service, Canberra, 1975) 7.
- ^{xxxi} O’Keefe, P.J. “International Rules and Codes of Ethics” in Byrne-Sutton, Q.; Renold, M-A & Rótheli-Mariotti, B. (eds.) *La restauration des objets d’art* (Sculthess Polygraphischer Verlag, Zurich, 1995) 13
- ^{xxxii} Translation from the Spanish.
- ^{xxxiii} Extract from Resolution 3.5 on the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) adopted at the 27th session of the General Conference of UNESCO (Paris, October- November 1993). See also UNESCO Declaration concerning the International Destruction of Cultural Heritage 2003, Preamble paras. 8 and 9 and Art. 1
- ^{xxxiv} Discussed along with other details of the United Kingdom scheme and those in other countries in Palmer, N. “Safekeeping, Insurance and Indemnity” in Palmer, N. (ed.) *Art Loans* (Kluwer Law International, London, 1997) 117
- ^{xxxv} http://www.artscouncil.org.uk/media/uploads/pdf/National_guidelines.pdf
- ^{xxxvi} Redmond-Cooper, R. “Disputed Title to Loaned Works of Art: The Shchukin Litigation” (1996) 1 *Art Antiquity and Law* 73, 76
- ^{xxxvii} *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258, 261 5D.D.C. (2003)
- ^{xxxviii} See 28 U.S.C. §§1602 though 1611
- ^{xxxix} *In re Pinion decd.* [1965] 1 Ch, 85,107.
- ^{xl} Hoving, T. “The Chase, the Capture” in Hoving, T. (ed.) *The Chase, the Capture: Collecting at the Metropolitan* (Metropolitan Museum of Art, New York, 1975) 1.
- ^{xli} See further Prott, L.V. *Witnesses to History: Documents and Writings on the Return of Cultural Objects* (UNESCO, Paris, 2009) 263-294
- ^{xlii} O’Keefe, P.J. “Repatriation of Sacred Objects” in Prott, L.V. *Witnesses to History: Documents and Writings on the Return of Cultural Objects* (UNESCO, Paris, 2009) 225
- ^{xliiii} Urice, S.E. “Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act” (2010) 40 *New Mexico Law Review* 123, 159.
- ^{xliiv} Tranter, D. *Museums and Communities: Changing Dynamics* (Common Ground, Champaign, Illinois, 2012) 258
- ^{xlv} http://archives.icom.museum/icomnews2011-3_eng/files/assets/seo/page4.html
- ^{xlvi} <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/general-principles/commercial-exploitation/>
- ^{xlvii} Recommendation No. R(98)4 of the Committee of Ministers to Member States on Measures to Promote the Integrated Conservation of Historic Complexes Composed of Immoveable and Moveable Property
- ^{xlviii} O’Keefe, P.J. “The Council of Europe Recommendation on Historic Complexes” (1998) 3 *Art Antiquity and Law* 389
- ^{xlix} Boer, B. & Wiffen, G. *Heritage Law in Australia* (Oxford University Press, Melbourne, 2006) 21
- ^l *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library* (The Stationery Office, London, 2005, HC 406)
- <http://www.culture.gov.uk/publications/7412.aspx>