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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rachel Buckman

Sheilah L Martin

Darius Lee

Ruby Meagher

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# A KIMBERLEY PROCESS FOR CONFLICT ANTIQUITIES: DETERMINING THE VIABILITY OF A CULTURAL PROPERTY CERTIFICATION SCHEME

*Ruby Meagher\**

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*The trade in conflict antiquities – excavated and looted artefacts from conflict zones – is increasing due to the rising number of conflicts between states and rebel groups. Rebel groups loot conflict antiquities and sell them for profit to fund their movements. Current legal and non-legal regulations fail to deter participants in the conflict antiquities market, namely looters, smugglers, dealers and auction houses. This is because regulations are reactive, localised to single states and unable to be easily applied during a conflict. The Kimberley Process Certification Scheme has been successfully used to regulate a similar illicit market – conflict diamonds. It does so through a system of warranties certifying that each parcel of diamonds is free from conflict. To date, legal scholarship has recognised the similarities between conflict diamonds and conflict antiquities but has stopped short of analysing whether a certification scheme could similarly reduce the conflict antiquities market. This paper seeks to extend existing literature by undertaking this often absent analysis. It finds that a certification scheme is likely a workable solution for reducing the conflict antiquities market. Dealers and consumers may find such a database easy to use, incentivising participation. It may be an inexpensive solution for states and may help eliminate a form of rebel income. Finally, a certification scheme may better regulate the conflict antiquities market than alternative solutions.*

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## **I INTRODUCTION**

Illegally obtained artefacts saturate the conflict antiquities market. A significant number of these artefacts are obtained or looted in conflict zones by rebel groups and sold for profit, earning them the

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term "conflict antiquities".<sup>1</sup> While this is not a new issue, the rising number of internal conflicts between states and rebel groups has fuelled the conflict antiquities trade: it now comprises a "global and unprecedented threat to peace and security".<sup>2</sup>

In particular, rebel groups sell these artefacts to cross-border smugglers and retain the proceeds to fund their activities, with the Islamic State of Iraq and al-Sham (ISIL) being a key example.<sup>3</sup> While accurate accounts of the value of looting to ISIL are unverifiable,<sup>4</sup> investigators have identified that ISIL are controlling looting by requiring civilians to obtain digging permits and taxing discovered artefacts.<sup>5</sup> States have reported an increase in domestic circulation of artefacts with probable Syrian origin.<sup>6</sup> Symbolically, satellite imagery shows that all six of the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage sites in Syria have been damaged during the last decade.<sup>7</sup>

The conflict antiquities market comprises a three-stage supply and demand chain.<sup>8</sup> First, rebel forces loot artefacts from artefact-rich conflict states, referred to as "supply states".<sup>9</sup> Sometimes, rebel forces pay civilians to loot for them.<sup>10</sup> Or, in the case of ISIL, they allow civilians to keep artefacts but tax them for possession.<sup>11</sup> Many Middle East conflict states, for instance Iraq, Syria and Libya,

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1 See for example Samuel Hardy "The Antiquities Trade in Nigeria: Looting in the Midst of Economic, Environmental, Political and Professional Crisis" (November 2012) Conflict Antiquities Blog <[www.conflictantiquities.wordpress.com](http://www.conflictantiquities.wordpress.com)>; and Alice Stevenson "Conflict Antiquities and Conflicted Antiquities: Addressing Commercial Sales of Legally Excavated Artefacts" (2016) 90 *Antiquity* 229.

2 SC Res 2249 (2015) at [1].

3 See generally Andrew Terrill *Antiquities Destruction and Illicit Sales as Sources of ISIS Funding and Propaganda* (Strategic Studies Institute and US Army War College Press, Carlisle (PA), 2017) at 5.

4 Kathryn Tully "How to Buy Antiquities" *Financial Times* (online ed, London, 5 September 2015); Shlomit Heering "Ivory and Antiquities: A Tale of Two Trades" (2018) 23 *AA & L* 135 at 166; Peter Campbell "The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage" (2013) 20 *IJCP* 113 at 114; and António Guterres *Report of the Secretary-General on the Implementation of Security Council resolution 2347 (2017)* UN Doc S/2017/969 (17 November 2017) at [5].

5 Guterres, above n 4, at [5].

6 At [7]. See generally Rachel Shabi "Looted in Syria - and Sold in London: the British Antiquities Shops Dealing in Artefacts Smuggled by ISIS" *The Guardian* (online ed, London, 3 July 2015).

7 Guterres, above n 4, at [4].

8 Morag Kersel "From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities" in Neil Brodie and others (eds) *Archaeology, Cultural Heritage, and the Antiquities Trade* (University Press of Florida, Gainesville (FL), 2006) 188 at 189.

9 At 189.

10 Guterres, above n 4, at [5].

11 At [5].

are supply states due to their rich archaeological history.<sup>12</sup> Secondly, rebel forces sell artefacts to smugglers who hide them in geographically advantageous states, known as "transit states".<sup>13</sup> Here, smugglers produce forged documents for the artefact's legality,<sup>14</sup> proclaiming that the artefact has good provenance – an archaeological term describing the artefact's history of ownership.<sup>15</sup> Thirdly, smugglers pose as legitimate vendors selling artefacts to dealers, auction houses, museums and private collectors in other states, denoted "demand states".<sup>16</sup> The United States of America and the United Kingdom are two of the major demand states.<sup>17</sup>

It is hard to hold those who deal in conflict antiquities to account. Supply states are unable to enforce penalties on looters because they have limited resources, weak law enforcement and different priorities during conflict.<sup>18</sup> Customs and border protections tend to focus on recovering and returning lost objects because locating smugglers is difficult.<sup>19</sup> This means that smugglers are infrequently criminally prosecuted for their role.<sup>20</sup> It is hard to verify an artefact's legality in demand states because there is no way to easily trace an artefact's history or provenance.<sup>21</sup> Thus, dealers are also not held to account for their role in fuelling the trade.

This article argues that the best way to eliminate the conflict antiquities trade is to introduce a global scheme for certifying the conflict-free (and legal) nature of traded antiquities. This scheme shares many similarities with that created for the conflict diamond trade – the Kimberley Process Certification Scheme (Kimberley Process). The conflict diamond trade is commonly referred to as

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12 See "Endangered Archaeology in the Middle East and North Africa" EAMENA <[www.eamena.arch.ox.ac.uk](http://www.eamena.arch.ox.ac.uk)>; and Antonius Tjihuis *Transnational Crime and the Interface between Legal and Illegal Actors: The Case of the Illicit Art and Antiquities Trade* (Wolf Legal Publishers, Leiden, 2006) at 133.

13 Kersel, above n 8, at 191; and Terrill, above n 3, at 19-20.

14 See Kersel, above n 8, at 188.

15 Guterres, above n 4, at [5] and [29].

16 Kersel, above n 8, at 189.

17 Kenneth Polk "Wither Criminology in the Study of the Traffic in Illicit Antiquities?" in Penny Green and Simon Mackenzie (eds) *Criminology and Archaeology: Studies in Looted Antiquities* (Hart Publishing, Oxford, 2009) 13 at 15. See generally Samuel Hardy "Illicit Trafficking, Provenance Research and Due Diligence: The State of the Art" (paper presented to United Nations Educational, Scientific and Cultural Organization, 20 March 2016) at 7.

18 Neil Brodie "Syria and its Regional Neighbors: A Case of Cultural Property Protection Policy Failure?" (2015) 22 *IJCP* 317 at 319.

19 At 324-325.

20 Grant Strother "Resolving Cultural Property Disputes in the Shadow of the Law" (2014) 19 *Harvard Negotiation Law Review* 335 at 347.

21 Guterres, above n 4, at [29].

"blood diamonds" because of the human rights abuses rebel forces commit in the struggle to control diamond mines.<sup>22</sup> The paper draws on the international community's experiences with the Kimberley Process in order to show how and why a certification scheme is likely to work with antiquities.

Some scholars have suggested that the conflict antiquities trade may benefit from a Kimberley Process model.<sup>23</sup> However, their analysis is largely limited to describing conflict antiquities as "blood antiquities".<sup>24</sup> Existing literature lacks a comprehensive exploration of whether this comparison is useful, and whether a similar scheme would help reduce the conflict antiquities market.<sup>25</sup> This article seeks to carry out this often absent analysis.

The argument is established through five substantive parts. Part II describes the harms of the "conflict antiquities" trade and shows how current legal and non-legal initiatives fail to address these harms. Part III suggests that a conflict antiquities certification scheme could eliminate the harms of conflict antiquities more effectively than current methods. This proposal takes elements from the Kimberley Process and adapts them to the antiquities market. Part IV asks whether other regimes would be more appropriate for conflict antiquities. It concludes that a certification scheme may be a better method than alternatives because it balances the burdens on supply and demand states and applies in cohesive, universal manner. Part V sums up these arguments, determining that even if states are not enthusiastic about implementing a certification scheme, the latter could ultimately benefit them in the long run.

It is useful to note that conflict antiquities include artefacts stolen from museums and cultural sites and those that are looted through illegal excavations in conflict situations.<sup>26</sup> This article deals primarily with excavated material. This is because it is more difficult to show that an antiquity is

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22 Nigel Davidson *The Lion that Didn't Roar: Can the Kimberley Process Stop the Blood Diamonds Trade?* (ANU Press, Canberra, 2016) at 27.

23 See for example Simon Mackenzie "Do We Need a Kimberley Process for the Illicit Antiquities Trade?" in France Desmarais (ed) *Countering Illicit Trade in Cultural Goods: The Global Challenge of Protecting the World's Heritage* (International Council of Museums, Paris, 2015) 151 at 152; and Samuel Hardy and Sasan Aghlani "Tomb Raiders and the Profits of Doom" (2015) 71 *The World Today* 28.

24 Mark Vlasic and Jeffrey DeSousa "Stolen Assets and Stolen Culture: The Illicit Antiquities Trade, the Perpetuation of Violence, and Lessons from the Global Regulation of Blood Diamonds" (2012) 2 *Durham Law Review* 159 at 179; Samuel Hardy "The Conflict Antiquities Trade: A Historical Overview" in France Desmarais (ed) *Countering the Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage* (International Council of Museums, Paris, 2015) 21 at 21; and Paul Williams and Christin Coster "Blood Antiquities: Addressing a Culture of Impunity in the Antiquities Market" (2017) 49 *Case W Res J Intl L* 103 at 104.

25 But see Mackenzie, above n 23, at 152.

26 See Heering, above n 4, at 148; and Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulation for the Execution of the Convention 1954 247 UNTS 215 (opened for signature 14 May 1954, entered into force 7 August 1956), art 1.

stolen when the supply state was unaware of its existence than it is to prove illegal ownership of documented artefacts.<sup>27</sup> Any attempt to eliminate the conflict antiquities market must acknowledge the undocumented nature of the conflict antiquities trade.

## **II CURRENT STATE OF THE CONFLICT ANTIQUITIES INDUSTRY**

### **A The Need to Control Trade in Conflict Antiquities**

This section provides a brief explanation of the harms inflicted by the conflict antiquities market in order to show the aims of international and domestic action countering the trade. The harms broadly fall into two categories, tangible and intangible harms.

The most visible tangible harm is the fuelling of conflict through the proceeds gained by rebel groups selling artefacts to smugglers.<sup>28</sup> Rebel forces require money to pay for weapons and ammunition, recruit belligerents and maintain their support.<sup>29</sup> Looting precedes conflict and is an example of a high value immediate revenue stream.<sup>30</sup> Thus, the funds rebel forces receive from conflict antiquities help provide the initial revenue required to start a military strategy.<sup>31</sup> Once a conflict begins, it is essential for rebel forces to have the capacity to generate enough funds to maintain their cause.<sup>32</sup> This requires a constant revenue source.<sup>33</sup> When a taxation system regulates looting, as in the case of ISIL, it provides consistent revenue.<sup>34</sup> Thus, conflict antiquities provide rebel groups with the income required to continue fighting.

Secondly, the conflict antiquities trade damages artefacts. Amateur looters frequently destroy excavation sites in the process of extracting artefacts due to their lack of technical training and desire

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27 Neil Brodie "Auction Houses and the Antiquities Trade" in S Choulia-Kapeloni (ed) *International Conference of Experts on the Return of Cultural Property* (Archaeological Receipts Fund, Athens, 2014) 63 at 70.

28 Terrill, above n 3, at 5.

29 Achim Wennmann "Economic dimensions of armed groups: profiling the financing, costs, and agendas and their implications for mediated engagements" (2011) 93 *Int Rev Red Cross* 333 at 341.

30 Michelle D Fabiani "Disentangling Strategic and Opportunistic Looting: The Relationship between Antiquities Looting and Armed Conflict in Egypt" (2018) 7(2) *Arts* 22 at 3; and Wennmann, above n 29, at 344.

31 See Wennmann, above n 29, at 343.

32 At 343. See generally Terrill, above n 3, at 24.

33 Wennmann, above n 29, at 344.

34 At 344.

to locate objects quickly.<sup>35</sup> Both the objects taken and those that remain may be damaged.<sup>36</sup> Most states have laws vesting ownership of antiquities in the state, making looting illegal.<sup>37</sup> As a result, large artefacts are broken into smaller pieces by looters and smugglers to evade detection while exporting.

In terms of intangible harms, looting limits the understanding of human history and culture. Archaeologists rely on identifying an artefact's provenance to assess humankind's genesis and behaviour.<sup>38</sup> Conflict antiquities smugglers and dealers mask the true location and journey of an artefact in order to evade law enforcement. As Gerstenblith argues, once this context disappears, "the historic, cultural and scientific information that informs us about the object, is irreparably injured".<sup>39</sup> Indeed, without provenance, an artefact loses 80 per cent of its value to archaeologists.<sup>40</sup>

### ***B Lack of Deterrence in the Conflict Antiquities Supply and Demand Chain***

This section explains why the conflict antiquities trade is difficult to regulate at each stage in the supply and demand chain. Essentially, there are few consequences for market actors – looters, smugglers, dealers and consumers – who take part in the conflict antiquities trade.

At the first stage, rebel groups face few consequences for looting. Domestic law enforcement agencies in many artefact-rich states do not have the resources to monitor archaeological sites during peacetime, let alone during conflict. For instance, in peacetime Syria, there was only one guard per five archaeological sites.<sup>41</sup> Rebel groups also actively prevent law enforcement from regulating these sites during conflict situations. For example, during conflict, ISIL deter law enforcement by using violent techniques to gain access to sites.<sup>42</sup> In 2015, ISIL publicly beheaded Khalid al-Asaad, Director of Antiquities at the World Heritage Site of Palmyra, for remaining at Palmyra to protect the cultural

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35 Eric Posner "The International Protection of Cultural Property: Some Skeptical Observations" (2007) 8 Chi J Intl Law 213 at 217.

36 At 217.

37 Mackenzie, above n 23, at 154; and Kersel, above n 8, at 198.

38 Patty Gerstenblith "Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects" (2001) 16 Conn J Intl L 197 at 198.

39 At 199.

40 Raisa Patron "The Looting of Iraqi Archaeological Sites: Global Implications and Support for an International Approach to Regulating the Antiquities Market" (2008) 40 Geo Wash Intl L Rev 465 at 478.

41 Brodie, above n 18, at 319.

42 Guterres, above n 4, at [4]; and Fiona Rose-Greenland "Inside ISIS' Looted Antiquities Trade" (31 May 2016) The Conversation <[www.theconversation.com](http://www.theconversation.com)>.

site from destruction and looting.<sup>43</sup> Law enforcement agencies also struggle to remove artefacts from people's possession once they have been excavated, even before they leave the country.<sup>44</sup> Particularly, conflict states with open civilian borders, such as Palestine and Israel, lack the financial resources to train customs authorities to detect looted objects, meaning tourists can leave airport security with antiquities and without being questioned.<sup>45</sup>

There are also few disincentives from participating in the trade at the second stage – smuggling of artefacts to a transit state. This is for two reasons. First, artefacts are well hidden from law enforcement. Smugglers hide artefacts for months, even years, in duty free transit states, namely in Hong Kong, Singapore and Switzerland.<sup>46</sup> These states are chosen because stolen items can be stored in tax-free warehouses or at airports and ports.<sup>47</sup> Law enforcement rarely investigates these transit locations for a variety of reasons.<sup>48</sup> Smugglers choose transit layovers in large ports because they are less likely to be inspected by customs due to heavy traffic.<sup>49</sup> Artefacts are often hidden in large container ships, meaning they can be easily disguised.<sup>50</sup> Also, customs do not have the capacity to check each individual container because such process is intensive and expensive.<sup>51</sup> Even in the most resourceful ports, customs only have capacity to inspect approximately five per cent of containers.<sup>52</sup>

Secondly, even when law enforcements discover illegally obtained artefacts, they find it easier to pursue civil remedies and return the artefact to the excavated state than to criminally prosecute the possessors.<sup>53</sup> This is because most states have a lower burden of proof for civil actions.<sup>54</sup> Proving that an antiquity originated from a conflict state is difficult. Past cultures had different, or no, borders. Hence, artefacts originating from a conflict state may have the same features as artefacts from

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43 Guterres, above n 4, at [4]; and Rose-Greenland, above n 42.

44 Brodie, above n 18, at 320.

45 Kersel, above n 8, at 197.

46 Polk, above n 17, at 15.

47 Kersel, above n 8, at 193.

48 Ryan Casey "Transit: An Analysis of Networked Criminal Groups and Criminal Opportunities at Transit Ports" (2017) 3 *Cogent Social Sciences* 1 at 6.

49 At 6.

50 At 6.

51 At 6.

52 At 6.

53 Brodie, above n 18, at 324–325.

54 At 325.

neighbouring states.<sup>55</sup> Thus, customs and law enforcement agencies can rarely be sure of an artefact's true origin. Smugglers are undeterred by civil penalties and the risk of losing a few artefacts to seizures because of the potential gain. Once an artefact enters a demand state, its value greatly increases as it can hide in the legal market.<sup>56</sup> Indeed, smugglers perceive these civil penalties as merely "a cost of doing business that can be factored into the pricing arrangement."<sup>57</sup>

Moreover, at this stage, forged provenance documents are often created for the artefacts so they can then be shipped to demand states – primarily the United States of America and United Kingdom<sup>58</sup> – and disguised in the legal market.<sup>59</sup> Thus, by the time artefacts are exported to demand states, smugglers can be confident that their shipments are masked as legal.

It is also hard to hold sellers in demand states to account because it is difficult to determine whether dealers and auction houses knew the object in their possession originated in a conflict zone.<sup>60</sup> For instance, there is significant evidence suggesting that top auction houses, such as Christie's and Sotheby's, list items with suspicious and unverifiable provenances.<sup>61</sup> Until recently, dealers and auction houses would rarely reveal the provenance of objects for sale.<sup>62</sup> The market operated under "propriety of secrecy";<sup>63</sup> according to traders, buyers and public have no business in knowing where items were acquired.<sup>64</sup> It is potent that "not one auction house employee has faced criminal charges arising out of auction house malpractice".<sup>65</sup> And, though recovery of stolen antiquities from auction houses does occur, they neither act as a deterrent for customers nor damage profit margins because they occur infrequently.<sup>66</sup>

Therefore, it is relatively easy to deal undetected in conflict antiquities and relatively hard to be prosecuted for operating in the market.

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55 At 323.

56 At 326.

57 At 326.

58 Polk, above n 17, at 15.

59 Kersel, above n 8, at 193.

60 See Hardy, above n 17, at 9.

61 At 11; and Kersel, above n 8, at 194.

62 Kersel, above n 8, at 194.

63 Paul Bator *The International Trade in Art* (University of Chicago Press, Chicago, 1988) at 360.

64 At 360.

65 Brodie, above n 27, at 71.

66 At 71.

### ***C Current International Legal Regulations***

The international community acknowledges the harms caused by the trade and has attempted to eliminate the supply and sale of conflict antiquities. This section briefly lays out the current regulatory scheme for conflict antiquities. This draws from four main areas of international law: cultural property protection during armed conflict; international peacetime trade in cultural property; transnational organised crime; and terrorism financing.

First, international cultural property protections during armed conflict can be used to protect conflict antiquities. This regime is rooted in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) and its additional protocols. Parties to the Hague Convention undertake to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of" cultural property in the territory of another party to the Hague Convention, regardless of the presence of an armed conflict.<sup>67</sup> Parties are required to adopt measures establishing domestic liability when offences take place in the territory of the state or the alleged offender is a national of the state.<sup>68</sup> "Cultural property" is defined more widely than "conflict antiquities": it includes "moveable or immovable property of great importance to the cultural heritage of every people".<sup>69</sup> "Immovable property" refers to buildings of cultural significance, such as religious and ancient sites. Much of the Hague Convention focuses on protecting the destruction of immovable property.

Secondly, peacetime protections for international trade in cultural property aim to stem the illicit antiquities trade, of which conflict antiquities make up a significant proportion. The 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention) requires states to demonstrate due diligence when ascertaining the provenance of purchasing antiquities.<sup>70</sup> The 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) targets the recovery and return of cultural property.

Thirdly, the conflict antiquities trade is regulated as a transnational organised crime. The United Nations Convention on Transnational Organized Crime (UNTOC) aims to create a legal framework for international cooperation in combating, among others, "offences against cultural heritage".<sup>71</sup> It is

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67 Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215 (opened for signature 15 May 1954, entered into force 7 August 1956) [Hague Convention], art 4(3).

68 Article 3.

69 Article 1(a).

70 Article 7.

71 United Nations Convention Against Transnational Organized Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003), preamble.

illegal to conceal the true nature or location of property or use such property knowing it constitutes criminal proceeds.<sup>72</sup> This is wide enough to include market actors' concealment of artefacts' provenances.<sup>73</sup> Parties should "institute a comprehensive domestic regulatory and supervisory regime" for markets susceptible to laundering.<sup>74</sup>

Finally, it may also be possible to prosecute conflict antiquities crimes under the 1999 International Convention for the Suppression of the Financing of Terrorism (CSFT).<sup>75</sup> The CSFT applies to acts, both direct and indirect, that contribute to the financing of terrorism.<sup>76</sup> To the author's knowledge, there have been no international prosecutions under the CSFT for using cultural property to fund armed conflict. However, scholars have posited that it may be possible to hold individuals accountable for terrorist financing for trading in conflict antiquities.<sup>77</sup> If a purchaser reasonably believes that their payment may end up with a terrorist group (and dealers may easily draw the connection between increasing imports of Syrian antiquities and ISIL), they technically fall under the CSFT regime.<sup>78</sup> While this is likely the least expedient route to prosecution given the lack of precedent for antiquities crimes under this treaty, it shows that conflict antiquities violations may fall under financing terrorism laws, providing another potential avenue for action.

### ***D Weaknesses in Regulatory Methods***

This section criticises the effectiveness of the above regimes in regulating and preventing trade in conflict antiquities. While there is clearly an extensive international regime that aims to reduce the conflict antiquities market, it has not prevented the increase in cultural property offences.<sup>79</sup> Scholars have theorised as to why the conflict antiquities trade continues unabated.<sup>80</sup> This section outlines these concerns in three categories: the regulations' disproportionate focus on the states from which conflict antiquities are supplied (that is, supply-side regulations); the inability to enforce regulations made by

72 Article 6(a).

73 Heering, above n 4, at 159.

74 Hague Convention, above n 67, art 7(1)(a).

75 International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 (opened for signature 9 December 1999, entered into force 10 April 2002).

76 Article 2.

77 See for example Kristin Hausler "Cultural Heritage and the Security Council: Why Resolution 2347 Matters" (2018) 48 QIL Zoom-in 5 at 10; and United Nations Office on Drugs and Crime "We Must Strengthen Efforts to Safeguard Cultural Property in Conflict Areas, UNODC Chief Informs Security Council" (press release, 31 November 2017).

78 Heering, above n 4, at 158.

79 Posner, above n 35, at 215 and 221.

80 Lisa Borodkin "The Economics of Antiquities Looting and a Proposed Legal Alternative" (1995) 95 Colum L Rev 377 at 388 and 399.

states where conflict antiquities are consumed (that is, demand-side regulations); and the absence of a cohesive universal regime for regulating conflict antiquities.

In addition to the international regimes discussed above, domestic and non-legal methods also contribute to antiquities regulation. Where relevant, this section touches on these methods, showing that they are equally as problematic as international regulations.

### *1 Inefficient supply-side regulation*

Supply-side regulations include protections at archaeological sites, state-specific United Nations (UN) resolutions and lenient applications of treaty law. These measures do not work because they either are not comprehensive, cannot be applied during a conflict, or only benefit demand states.

First, many supply-side international regulations are insufficiently comprehensive to protect conflict antiquities. International action is generally reactive and oriented towards one country's conflict antiquities trade, leaving other supply states vulnerable.<sup>81</sup> This is achieved through UN Security Council "emergency actions" which are only instigated once looting is uncontrollable.<sup>82</sup> For instance, while artefact looting occurred throughout the 1990s, it was not until after the United States of America invaded Iraq in 2003 that the UN Security Council imposed bans on trading or transferring Iraqi artefacts and dedicated financial resources to preventing looting.<sup>83</sup> In the meantime, rebel groups were able to develop and strengthen smuggling routes devoid of any international attention.<sup>84</sup> This shows that a holistic approach to the conflict antiquities industry is missing.

Secondly, even where domestic regulations are comprehensive, enforcement of supply-side legal and non-legal mechanisms during (or after) conflict is often unrealistic. Physical site protection initiatives cannot offer long-term protection to cultural sites because of the high demands they place on state resources.<sup>85</sup> Supply states cannot protect their artefacts during conflict, even if they have good peacetime legislation and regulation, because resources are diverted elsewhere.<sup>86</sup> Even after the official conflict ends, states seldom prioritise looting prevention. For instance, post-conflict looting after the United States' 2003 invasion of Iraq was widespread.<sup>87</sup> However, protecting Iraqi oil facilities was more vital to redevelopment than upholding the principles of the UNESCO Convention.<sup>88</sup> This

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81 Brodie, above n 18, at 322.

82 At 322–323.

83 SC Res 1483 (2003) at [7].

84 Brodie, above n 18, at 321.

85 At 319.

86 Posner, above n 35, at 221.

87 Brodie, above n 18, at 321.

88 See Posner, above n 35, at 221.

likely means that even when useful international law exists, it is too onerous for states to uphold due to the demands of conflict. Thus, in these situations the question is not how to make better laws, but how to make the current laws easier to apply.

Thirdly, another reason for inefficient supply-side regulations is that the current international regime disproportionately favours demand states over supply states. The status quo is that states agree to protect other states' cultural property. Archeologically rich countries enter these treaties, but never expect to engage in military interventions in other countries because they are generally small, weak states.<sup>89</sup> Major military and powerful states know that they might want to intervene in another country so are not willing to submit to significant constraints on military discretion.<sup>90</sup> The United States of America is a key example. It refuses to ratify the Hague Convention, but considers many of its principles customary international law.<sup>91</sup> This permits the United States flexibility in applying cultural property protections in conflict states – as it did in Iraq when it prioritised other peace-building initiatives over cultural property.<sup>92</sup> Therefore, international law does not meaningfully constrain demand states when intervening in supply states because demand states are rarely also supply states.<sup>93</sup>

In short, resources are scarce during conflict and judgement calls have to be made. Cultural property rates lower than human security and military concerns, even if looting funds the fighters the state is trying to stop. It does not matter how comprehensive the law is if states are willing to prioritise other areas during conflict.<sup>94</sup> Thus, the solution to strengthening supply-side regulations is to make it so that states do not have to prioritise cultural property protection. As Part III shows, decreasing incentives to loot in the first place may mean that extensive in-country protections are no longer needed.

## 2 *Weak demand-side regulation*

Demand-side regulations are equally problematic. This sub-section considers burden of proof requirements in the two largest demand jurisdictions – the United States of America and United Kingdom – to show that domestic laws fail to deter participation in the conflict antiquities market.<sup>95</sup>

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89 At 220.

90 At 220.

91 At 221.

92 At 221.

93 At 228.

94 See generally Mark Vlastic and Helga Turku "Blood Antiquities': Protecting Cultural Heritage beyond Criminalization" (2016) 14 JICJ 1175 at 1195.

95 Polk, above n 17, at 15. See generally Hardy, above n 17, at 7.

International demand-side regulations focus on import bans and recovery and return policies. These mechanisms are reactive, and thus too late, to have any large influence on the conflict antiquities trade.

In terms of domestic laws, in the United States the burden of proof for cultural property theft rests on the prosecution. The defendant is advantaged from the outset: they can rely on the opacity of the antiquities market to argue that identifying the artefact's exact provenance is impossible.<sup>96</sup> In fact, one of the most successful prosecutions for cultural property theft demonstrates this point. The 2001 *Schultz* case concerned the indictment of the former president of the National Association of Dealers in Ancient, Oriental and Primitive Art for conspiring to deal in stolen antiquities from Egypt.<sup>97</sup> Schultz, along with British co-conspirator Jonathan Tokeley-Parry (convicted by the England and Wales Court of Appeal),<sup>98</sup> illegally imported many Egyptian antiquities into London and New York.<sup>99</sup> He was sentenced to 33 months' imprisonment under the National Stolen Property Act for violating Egypt's national ownership laws.<sup>100</sup> Schultz is the only person to face criminal prosecution based on a foreign nation's ownership law in recent times.<sup>101</sup>

While the Schultz case successfully shows United States' cultural property law in action, it is arguably the exception to otherwise deficient law. Schultz had been operating for years before he was finally prosecuted.<sup>102</sup> Time and again, his antiquities hauls had been confiscated at the border and involved in civil disputes.<sup>103</sup> He was known to law enforcement for some time before enough evidence was gathered to arrest him. While Gerstenblith suggests that reversing the burden of proof would make it easier for law enforcement to initiate prosecutions, the issue runs much deeper.<sup>104</sup> Schultz and Tokeley-Parry were unapologetic for their actions during their trials, with Tokeley-Parry firmly of the belief that: "It seems to me that as long as these objects are where the power is, and

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96 Patty Gerstenblith "Increasing Effectiveness of the Legal regime for the Protection of the International Archaeological Heritage" in James Nafziger and Ann Nicgorski (eds) *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce* (Martinus Nijhoff, Leiden, 2009) 305 at 316.

97 *United States of America v Frederick Schultz* 178 F Supp 2d 445 (2d Cir 2003).

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

99 *United States of America v Frederick Schultz*, above n 97, at 448. See also Alexi Shannon Baker "Selling the Past: United States v Frederick Schultz" (22 April 2002) Archaeology Archive <archive.archaeology.org>.

100 *United States of America v Frederick Schultz*, above n 97, at 449.

101 See *United States of America v McClain* 545 F 2d 988 (5th Cir 1997); and Patty Gerstenblith "Schultz and Barakat: Universal Recognition of National Ownership of Antiquities" (2009) 14 AA & L 21 at 25–26.

102 Baker, above n 99.

103 Baker, above n 99.

104 Gerstenblith, above n 96, at 316.

where the wealth is, they will be cared for".<sup>105</sup> Thus, deterrence alone does not stop dealers when profit is guaranteed. The only way to confidently ensure that dealers are deterred is to take away this source of revenue. As will be discussed later, a stringently applied requirement to obtain good provenance could help achieve this.

The United Kingdom's Dealing in Cultural Objects (Offences) Act 2003 is only marginally better than the United States' legislation. The Act requires knowledge of, or belief in, the tainted nature of the artefact for prosecution to occur.<sup>106</sup> The burden is on the defendant to prove that they did not have reason to believe the goods were obtained illegally.<sup>107</sup> However, this requirement only serves to increase a buyer's nonchalant attitude towards the artefacts' origin: due diligence mechanisms, such as inquiring into the provenance of the object upon purchase, work to the detriment of buyers.<sup>108</sup> Mackenzie's interview study found that dealers were largely unresponsive to the changes in the Act.<sup>109</sup> Business practices that had changed after the Act were predominantly cosmetic.<sup>110</sup> Thus, the Act fails to incentivise dealers to vet incoming antiquities more rigorously.

International demand-side regulations are also weak. International treaties and UN Security Council resolutions require demand states to enforce import bans on material from conflict states.<sup>111</sup> The enforcement of import bans tends to be, akin to supply-side regulations, country-specific.<sup>112</sup> For instance, Security Council Resolution 1483 established a "prohibition on trade in or transfer of" Iraqi cultural property.<sup>113</sup> The United Kingdom implemented this resolution through legislation making it a criminal offence to hold or deal in illegally removed Iraqi cultural property.<sup>114</sup> Between 2003 and

105 Nancy Wilkie "From the President: Pharaoh on the Stand" (2001) Archaeology Archive <[www.archive.archaeology.org](http://www.archive.archaeology.org)>.

106 Simon Mackenzie "The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market" in Stefano Manacorda and Duncan Chappell (eds) *Crime in the Art and Antiquities World* (Springer, New York, 2011) 69 at 73; and Dealing in Cultural Objects (Offences) Act 2003 (UK).

107 Gerstenblith, above n 96, at 316.

108 Mackenzie, above n 106, at 73.

109 At 71.

110 At 71.

111 See for example SC Res 1483, above n 83, at [7]; and Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property 823 UNTS 231 (opened for signature 14 November 1970, entered into force 24 April 1972), art 7(b).

112 See for example SC Res 2249, above n 2, at [17].

113 SC Res 1483, above n 83, at [7].

114 Neil Brodie "The Market Background to the April 2003 Plunder of the Iraq National Museum" in Peter Stone and Joanne Bajjaljy (eds) *The Destruction of Cultural Heritage in Iraq* (Boydell Press, Woodbridge (UK), 2008) 41 at 43.

2008, unprovenanced cylinder seals – commonly found in Iraq – have "disappeared from the London auction market".<sup>115</sup> While this is a positive domestic application of international soft law, it only shows the reduction of one type of artefact from one location. For instance, during the same period, United Kingdom customs authorities intercepted 1500 artefacts from Afghanistan.<sup>116</sup> This likely shows that smugglers change the artefacts they buy based on international attention, not that they reduce smuggling artefacts altogether.

International demand-side measures also focus on the recovery and return of artefacts. These policies are weak because they are reactive, focusing on fixing the harm after looting has taken place.<sup>117</sup> This ignores the key harms of looting: once an artefact is severed from its provenance, it has limited historical utility.<sup>118</sup>

Recovery and return models also divert attention away from the specific concerns of the conflict antiquities industry because of their wider focus on the illicit antiquities market. This means they are often subject to political considerations. For instance, museums have been accused of being institutions of colonial domination where "everything is stolen."<sup>119</sup> Similarly, the French government's public move to return African artefacts has been met with condemnation: European colonisers drew Africa's borders, so "how would one define what belongs to whom?"<sup>120</sup> These narratives make it difficult to focus on the return of conflict antiquities when they are tied up in much wider political issues.

Therefore, demand-side regulations fail to reduce the conflict antiquities market. Domestic measures lack a useful deterrence mechanism and international measures are country-specific and reactive. These regulations also show that the conflict antiquities trade cannot be fixed by strengthening current regulations alone.

### 3 *Absence of cohesive universal action*

Conflict antiquities regulations are also unsuccessful because action is largely uncoordinated in the international sphere. This is because states differ in their approach to domestic cultural property,

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115 At 43.

116 Brodie, above n 18, at 324.

117 At 324.

118 Gerstenblith, above n 38, at 198.

119 Nicholas Thomas "Should Colonial Art Be Returned Home?" *The Financial Times* (online ed, London, 7 December 2018).

120 Annalisa Quinn "After a Promise to Return African Artifacts, France Moves Toward a Plan" *The New York Times* (online ed, New York, 6 March 2018).

non-governmental organisation (NGO) programmes lack state support, and domestic warranties require international monitoring.

States have divergent domestic cultural property policies, which makes coordinating international action difficult. Merryman's cultural nationalism and international theories explain these differences.<sup>121</sup> Supply states are generally cultural nationalists, seeing cultural property as part of their national cultural heritage.<sup>122</sup> They have a special interest in retaining national artefacts because it provides a window into the history and culture of previous descendants of the state.<sup>123</sup> This is embodied in the UNESCO Convention through provisions facilitating the return of national artefacts.<sup>124</sup> Particularly, the preamble states "it is incumbent upon every State to protect the cultural property existing within its territory".<sup>125</sup> This can be read as saying that it is "right" for every state to retain national cultural property.<sup>126</sup>

Conversely, demand states practice cultural internationalism, generally believing that cultural property belongs to humanity and should be protected for the benefit of all cultures.<sup>127</sup> The Hague Convention is a classic example of cultural internationalism. The preamble states: "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind".<sup>128</sup>

These divergent interests hinder compromise between states seeking to form an international policy. States that favour restrictions on cultural property exports tend to be poorer supply states (with the exception of Italy) without international leverage to compel wealthy states to prosecute illicit trading.<sup>129</sup> Wealthy demand states have an incentive to pursue an internationalist policy because these states, and their museums and traders, operate in an economically beneficial antiquities industry.<sup>130</sup> Moreover, as conflicts are generally fought in poorer supply states, wealthy states' cultural property

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121 John Merryman "Two Ways of Thinking About Cultural Property" (1986) 80 AJIL 831 at 832. See also John Merryman "Cultural Property Internationalism" (2005) 12 IJCP 11.

122 Merryman "Two Ways of Thinking About Cultural Property", above n 121, at 832 and 843.

123 At 832 and 843.

124 Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, above n 111, arts 2, 7, 9, and 13.

125 Preamble.

126 Merryman "Two Ways of Thinking About Cultural Property", above n 121, at 844.

127 At 837.

128 Hague Convention, preamble.

129 Posner, above n 35, at 220; and Tjhuis, above n 12, at 134.

130 Posner, above n 35, at 220.

remains protected regardless of international regulations.<sup>131</sup> This means that wealthy states control the application of international policy in a way that is detrimental to supply states and does not result in their cultural antiquities being protected.

Another reason for a lack of cohesive domestic policies is that states prioritise other areas for protection. For instance, understandably, states are likely to prioritise directing resources to resolving economic or human rights concerns. This is because the financial, moral or political incentives acting on the state to resolve those issues are greater. The harms of the antiquities market are indirect and less intuitive than eliminating other social issues.<sup>132</sup> Calls from NGOs, such as INTERPOL, to increase specialised units for investigating cultural property crimes are therefore ineffective when states do not prioritise this crime.<sup>133</sup>

This lack of regulation in turn exacerbates the harms of the conflict antiquities market. The less attention states give to the conflict antiquities trade, the less market actors feel guilty about participating in the trade.<sup>134</sup>

A lack of domestic policy attention also means international measures backed by NGOs are ineffective. NGO databases generally require (and lack) buy-in from states, meaning their global reach is limited. State buy-in, and consequently NGO effectiveness, is further reduced because NGO action is not cohesive. For instance, UNESCO and the International Council of Museums (ICOM) publish red lists of cultural property at risk of illegal exportation to aid law enforcement and border controls.<sup>135</sup> These, and other NGO databases, such as the Art Loss Register or INTERPOL's Database of Stolen Works of Art, fail to bring all antiquities together in one place.<sup>136</sup> It takes massive resources from law enforcement to inquire into disparate databases to see whether an antiquity is registered as stolen on one of them. As long as these datasets remain disjointed, they cannot be fully utilised.

Moreover, where illegally excavated material is undocumented and unknown to the state, it will never be registered as stolen on databases.<sup>137</sup> Because the antiquities industry is only capable of

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131 At 220. See also Simon Mackenzie "Conditions for Guilt-Free Consumption in a Transnational Criminal Market" (2014) 20 *Eur Journal Crimin Policy Res* 503 at 508.

132 See for example Guterres, above n 4, at [60].

133 At [60].

134 See generally Mackenzie, above n 131, at 505.

135 See "Red Lists Database" International Council of Museums <[www.icom.museum.com](http://www.icom.museum.com)>; and Guterres, above n 4, at [62]–[64].

136 See "The Art Loss Register" The Art Loss Register <[www.artloss.com](http://www.artloss.com)>; and "Database" (1 March 2018) INTERPOL <[www.interpol.int](http://www.interpol.int)>. See also "UNESCO Database of National Cultural Heritage Laws" UNESCO <[www.en.unesco.org](http://www.en.unesco.org)>; and "About Object ID" ICOM <[www.icom.museum/en](http://www.icom.museum/en)>.

137 Brodie, above n 27, at 70; and Guterres, above n 4, at [69].

recording known artefacts, it would seem more effective (though time-consuming) to create a database of all known artefacts, rather than just recording known stolen artefacts. This would mean that artefacts not on databases could be assumed illegally excavated. Current databases that record legal and stolen antiquities, such as ICOM's Object ID, go part of the way to establishing such a dataset.<sup>138</sup> However, because they only register some objects and not all, a person cannot use the database to determine whether their antiquities are legal. Thus, NGO databases require, and currently lack, cohesive state participation and support in order to prevent gaps in their datasets.

Domestic warranty systems for antiquities are also ineffective; corruption can easily occur in the absence of a universal monitoring system. Currently, there is no clear way of proving an artefact's legitimacy once the object leaves the warrantee state. For instance, licenced antiquities dealers in Israel are obligated to provide buyers with an export licence, which has the registry number and a description of the purchased antiquities on it.<sup>139</sup> However, dealers do not provide the export licence unless customers (mainly tourists) request one.<sup>140</sup> If an export licence is not requested, dealers can reuse the registry number for a similar, but illicit, artefact because no formal record of sale for the first artefact exists.<sup>141</sup> If the owner of the first antiquity decides to sell their antiquity, it still appears on the registry because both objects are under the same code.<sup>142</sup> Without a way to verify the authenticity of the warranty regime, it is impossible to tell whether the artefact is legal. Similarly, many resolutions and treaties suggest that states should set up a warranty system.<sup>143</sup> These are also ineffective for the same reasons.

In summary, international action is uncoordinated because states have different agendas, NGO databases are isolated from one another, and warranty systems are easily corruptible.

### ***E Conclusion***

Current legal and non-legal mechanisms have limited effect on the antiquities market. Supply-side regulations are difficult to enforce during conflict and not prioritised by both supply and demand states. Demand-side regulations occur after a conflict has taken place, meaning the harms to the industry have already taken place. Finally, many domestic and international measures cannot be fully appreciated without universal support.

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138 See "About Object ID" ICOM <[www.icom.museum/en](http://www.icom.museum/en)>.

139 Kersel, above n 8, at 196.

140 At 196.

141 At 196.

142 At 196.

143 See for example SC Res 2347 (2017) at [17]; and Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, above n 111, art 5(b).

The above part has shown that modifying or strengthening an existing regime will not reduce the conflict antiquities trade. Stronger supply-side regulations will not deter states because they have different priorities during conflict. Stronger demand-side regulations will not deter unapologetic dealers. And databases and warranty systems require an additional international mechanism to link them together and prevent exploitable gaps.

### ***III PROPOSED SOLUTION: A CERTIFICATION SCHEME MODELLED ON THE KIMBERLEY PROCESS***

To resolve the problems discussed above, this article proposes a globalised system that neither unnecessarily burdens supply states nor inefficiently targets demand states. This part argues that an international framework that certifies conflict-free antiquities is appropriate. Part IV will then show why a certification scheme is more effective than other models.

#### ***A Explanation of Solution***

This section explains the proposed model.

The proposed conflict antiquities certification scheme would identify all known antiquities. A universal open source register of antiquities would be established to record this data. This would provide a database of legal, conflict-free antiquities. An electronic microchip would be placed on the object for ease of crosschecking data. By implication, any artefacts not on the register would be deemed conflict antiquities. Any state or other actor that refused to register national artefacts would be unable to trade legitimate artefacts on the world market. As an incentive to join, these states would also be unable to access recovery and return of their stolen cultural property until signing up. Several scholars have suggested variations of such a scheme.<sup>144</sup>

The aim of a certification scheme would be to devalue unprovenanced artefacts so drastically that rebel forces no longer have any incentive to loot. Given the ineffectiveness of supply-side solutions, the only meaningful way to deter rebels is to reduce the appeal of looting.<sup>145</sup> A certification scheme would reduce the economic value of artefacts because unregistered artefacts would be deemed to have no economic value: they could not be on-sold in the legal market. If they could no longer transition from the illicit to licit market, they would have no utility to legal market players such as museums and dealers.

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144 Simon Mackenzie *Going, Going, Gone: Regulating the Market in Illicit Antiquities* (Institute of Art and Law, Glasgow, 2005) at 237–246; and Mark Vlastic and Helga Turku "Protecting Cultural Heritage as a Means for International Peace, Security and Stability: The Case of ISIS, Syria and Iraq" (2016) 49 *Vand J Transnatl L* 1371 at 1413.

145 See Mackenzie, above n 106, at 83.

For such a scheme to work, there would need to be a time allowance for registering current artefacts.<sup>146</sup> Experts in the industry would need to be consulted to determine a reasonable timeframe. After this time, only the state may authorise and register artefacts. As most states currently approve legal excavations, the only added burden would be the issuing of electronic microchips to found objects and registering them online. During the registration period, parties would be able to bring ownership and other claims against artefacts, as they currently do. However, because a certification scheme assumes that artefacts registered after this period are legally obtained, it would not make sense to allow recovery claims on new artefacts except in serious cases such as government corruption. Claims of theft against a registered artefact would be easily solved. As Part III(C)(1) will show, given the inability to tamper with new technological data chains such as blockchain, thieves would not be able to rob and re-register an artefact to themselves. Hence, the black market for antiquities may be drastically reduced.

A certification scheme would rely on all market players – museums, private collectors, dealers and states – registering known antiquities in their possession. Arguably, this is neither too onerous nor inefficient to dissuade compliance. Most possessors of antiquities have some form of record for their antiquities. For instance, museums have inventories and private collectors have insurance policies. The problem is that these datasets are separate, and no one system is authoritative for possession claims. A certification scheme resolves this problem through the creation of one universal dataset. This would occur in much the same way as a system of deed registration here in New Zealand.<sup>147</sup> Once a person comes into possession of an antiquity, the seller and buyer would register it on the certification scheme database. As Part III(C)(2) will explain, technological developments would mitigate database tampering.

A certification scheme would avoid state confrontation between divergent internationalist and nationalist policies because states would still freely determine their domestic policy. For instance, if a person finds an antiquity during peacetime, such as on their land, domestic laws would still govern whether the person is entitled to retain the artefacts. For instance, the United Kingdom Treasure Act requires the possessor of an artefact to report it to authorities.<sup>148</sup> If the treasure is determined lost, then it becomes the property of the Crown.<sup>149</sup> All the certification scheme would add in this situation is to require the state to issue the artefact with a microchip and register the artefact on the database. State corruption in the registration chain is a potential harm to the scheme and will be addressed in Part III(C).

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<sup>146</sup> Mackenzie, above n 144, at 240.

<sup>147</sup> See generally Land Transfer Act 1952.

<sup>148</sup> Treasure Act 1966 (UK), s 8(1).

<sup>149</sup> Section 4(1).

Consumers that desire artefacts for intrinsic value alone would be undeterred by an economic devaluation of unregistered artefacts. However, this would be unlikely to hinder the effectiveness of a certification scheme for two reasons. First, the black market would be drastically limited to only these consumers. This vastly reduces the incentive for rebel forces to loot because of the inefficiencies in attempting to locate these buyers. Secondly, it would be far easier to identify unprovenanced artefacts at borders, meaning smugglers would be forced even further underground, at an extra cost to them. Thus, purchasing artefacts on the black market would become more expensive and more time-consuming. It would simply be easier to now invest in the legal market.

Lastly, this scheme describes non-registered artefacts as conflict antiquities because this is the most likely origin of an unregistered artefact. Once the scheme is set up, there are only few possibilities for coming across unregistered artefacts. First, a possessor may forget to register the object in time. Secondly, a possessor may find the object after a certification scheme is implemented. Thirdly, the object may come from a state that refuses to sign up to the proposed scheme. Fourthly, the object was looted from a conflict zone. The first and second options are easily dealt with through domestic legislation that can provide for registration of objects where it is highly likely the artefact did not come from a conflict-zone, for instance, if a possessor can show family history of ownership. If the object was simply found by them, then domestic finders laws govern.<sup>150</sup> The third and fourth options involve essentially the same analysis, as a conflict state cannot control what antiquities are exported. In both situations, law enforcement and customs agencies would seize unregistered artefacts, and do so more swiftly than current regulations.

### ***B Background to Solution: How the Kimberley Process Works***

The proposed scheme shares many similarities with the Kimberley Process: the regime that has been used to drastically decrease the numbers of conflict diamonds in circulation.

According to the Kimberley Process, conflict diamonds are "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments".<sup>151</sup> The trade is also referred to as that of "blood diamonds" due to the prevalent human rights abuses that occur in the fight between rebel groups to control diamond-rich areas.<sup>152</sup>

The conflict diamond market is similarly complex in its supply and demand chain to the conflict antiquities market: diamonds are mined from conflict states by parties to a conflict; diamonds are illegally exported to neighbouring countries; diamonds are shipped to wholesale trading centres where they are cut and polished; finished diamonds are transported to demand nations; and these diamonds

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150 See for example Treasure Act 1966 (UK), s 4(1).

151 Kimberley Process Certification Scheme Core Document (2013) Kimberley Process <[www.kimberleyprocess.com](http://www.kimberleyprocess.com)> [KPCS Core Document], s 1.

152 Davidson, above n 22, at 27.

are sold on the legal market.<sup>153</sup> Hence, like antiquities, numerous international trade connections mask the true nature of diamonds entering the legal market.<sup>154</sup>

By the early 2000s, the breadth and depth of the human rights abuses caused by the diamond trade was uncontrollable. Representatives from African countries gathered at Kimberley, South Africa, to discuss options for ending the trade in conflict diamonds.<sup>155</sup> The result was the Kimberley Process, a quasi-legal institution to regulate the diamond trade, instigated in 2002.<sup>156</sup>

The Kimberley Process certifies that diamonds have conflict-free origins.<sup>157</sup> It is best viewed as an international soft law regime:<sup>158</sup> the scheme is a voluntary system of industry self-regulation and state parties are free to enact legislation as required to enforce the Kimberley Process.<sup>159</sup> State parties undertake to only trade rough diamonds with Kimberley Process member nations.<sup>160</sup> Members of the Kimberley Process account for approximately 99.8 per cent of the world's rough diamond exporting states.<sup>161</sup> If state parties have rebel groups suspected of diamond mining within their borders, they are encouraged to share the areas of rebel occupation with other state parties and regularly update this information.<sup>162</sup>

The comparison between conflict antiquities and conflict diamonds is not a new one. Various scholars have suggested that the Kimberley Process may be a solution for the conflict antiquities trade.<sup>163</sup> However, accounts generally "raise awareness" of the parallel between the trades, rather than

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153 At 14.

154 At 14.

155 Audrie Howard "Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe" (2015) 15 Wash U Global Stud L Rev 137 at 145.

156 Martin-Joe Ezeudu "From a Soft Law Process to Hard Law Obligations: The Kimberley Process and Contemporary International Legislative Process" (2014) 16 Eur J L Reform 104 at 104.

157 KPCS Core Document, above n 151, preamble. See Lesley Wexler "Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime" (2010) 31 Cardozo L Rev 1717 at 1719.

158 Holly Cullen "Is There a Future for the Kimberley Process Certification Scheme for Conflict Diamonds" (2013) 12 MLSJ 61 at 61.

159 KPCS Core Document, above n 151, s 4(a).

160 Section 3(c).

161 Howard, above n 155, at 145.

162 Kimberley Process Certification Scheme Core Document, above n 151, Annex II(2).

163 See for example Vlasic and Turku, above n 94, at 1193; Kelly Hill "The Problem of Auction Houses and Illicit Antiquities: A Call for a Holistic Solution" (2016) 51 Tex Intl LJ 337; and Mackenzie, above n 23, at 152.

assessing the viability of such mechanism.<sup>164</sup> Indeed, Vlasic and DeSousa comment that it would be useful for scholarship to:<sup>165</sup>

... explore the similarities and differences between antiquities and blood diamonds to determine whether a regulatory framework similar to the Kimberley Process could be effectively applied as regulation of the illicit antiquities trade.

The following sections of this article explore this approach, concluding that a similar regulatory framework not only possible for the conflict antiquities market, but, as Part IV shows, is likely the most appropriate framework.

### ***C Translating the Kimberley Process to Conflict Antiquities***

This section illustrates how the proposed scheme works by taking the best elements of the Kimberley Process and adapting its weaker areas. In general, a certification scheme appears to be a workable solution to the elimination of the conflict antiquities market, despite several differences between the conflict diamond and antiquities trades.

This section will discuss the two core requirements for the proposed scheme: a system of identifying conflict antiquities and storing this data on a global database; and initial and ongoing support from NGOs, states and industry players.

#### ***1 Online global database for provenance identification***

A key problem in the Kimberley Process is the risk of forgery and tampering with certification certificates because there is no one prescribed certificate for all states.<sup>166</sup> States adopt their own tamper-resistant document and this creates loopholes in the certification procedure.<sup>167</sup>

To mitigate this concern, a certification scheme would create an electronic certificate for each artefact. This would appear in the form of a microchip that attaches to each artefact. Given recent technological advances, it would not be difficult to place a microchip on each artefact, allowing it to be scanned by customs and law enforcement agencies to determine history and ownership.<sup>168</sup> For

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164 Vlasic and Turku, above n 144, at 1413; Vlasic and DeSousa, above n 24, at 179; Mackenzie, above n 23, at 152; and Hardy, above n 24, at 21.

165 Vlasic and DeSousa, above n 24, at 179.

166 "Fraud Warnings: Fake Kimberley Process Certificates for Sierra Leone, Ghana, and Guinea" (22 December 2017) US Customs and Border Protection <[www.cbp.gov](http://www.cbp.gov)>; and "Enforcement" Kimberley Process <[www.kimberleyprocess.com](http://www.kimberleyprocess.com)>.

167 Tim Hughes "Conflict Diamonds and the Kimberley Process: Mission Accomplished – or mission impossible?" (2010) 13 SAJIA 115 at 125-126; and KPCS Core Document, above n 151, s 4(a).

168 See generally David Shamah "World's Smallest GPS Chip Makes Wearables More Wearable" (5 September 2014) The Times of Israel <[www.timesofisrael.com](http://www.timesofisrael.com)>; and Alwyn Hoffman "How Can Technology Assist

instance, radio frequency identification technology is currently used for animal and goods microchipping, with microchips approximately the size of a grain of rice.<sup>169</sup> Considering that these microchips have been used in humans, they may be possible to use on an artefact without damaging it.<sup>170</sup>

The biggest setback would be the cost of installing these microchips, especially in poorer states at risk of conflict. During the Kimberley Process negotiations, a similar individual identification system – a laser serial number inscription on each diamond – was rejected because it would have been too expensive for all industry players except De Beers.<sup>171</sup>

While a microchip may appear too costly for states to implement, in reality it may amount to no more than the current annual budget that states already (inefficiently) contribute to global illicit antiquities initiatives. Currently, states have pledged USD 75 million to the International Alliance for the Protection of Heritage in Conflict Areas (IAPHCA), an international fund for the protection of cultural heritage at risk due to armed conflict.<sup>172</sup> Many states have also contributed to the UNESCO Heritage Emergency Fund and Fund for the Protection of Cultural Property in the Event of Armed Conflict.<sup>173</sup> All these figures may be lower than the cost of an ongoing microchip system. For instance, companies currently produce microchips for goods for approximately USD 17 each. These have no ongoing costs because they only transmit information through radio waves.<sup>174</sup> They also last approximately 20 years.<sup>175</sup> Funds from IAPHCA alone would fund over four million artefact microchips.

The Kimberley Process also suffers from relying on the good faith of parties. That is, it relies on the honesty of traders to ensure that government inspectors are not bribed to deny that rebel groups control a mine.<sup>176</sup> The ability for corruption at this early stage in the chain is a constant issue for the

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Customs Authorities and Trade Corridors to Streamline Cross-Border Freight?" (27 May 2013) Freight into Africa <[www.freightintoafrica.com](http://www.freightintoafrica.com)>.

169 Gordon Kelly "It's Mine: Crime Prevention Now Cheap as (Micro) Chips" *Wired* (online ed, 5 February 2013); and Jane McGrath "How Pet Microchipping Works" How Stuff Works <[www.howstuffworks.com](http://www.howstuffworks.com)>.

170 Haley Weiss "Why You're Probably Getting a Microchip Implant Someday" *The Atlantic* (online ed, Washington (DC), 21 September 2018).

171 Carola Kantz "The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process" (2007) 9 *Business Power and Global Governance* 1 at 14.

172 Guterres, above n 4, at [104].

173 At [102]–[103].

174 Kelly, above n 169.

175 Kelly, above n 169.

176 Mackenzie, above n 23, at 153.

Kimberley Process.<sup>177</sup> For instance, the Kimberley Process certifies each parcel of diamonds, not each individual diamond. Thus, unlicensed rebel mines can extract diamonds and give them to legitimate mines to include in the next parcel of diamonds under the Kimberley Process certificate.<sup>178</sup> There is no way of telling which diamonds in the parcel are conflict diamonds.<sup>179</sup>

The proposed scheme could be able to mitigate this issue through the use of blockchain technology.<sup>180</sup> Blockchain can be used to store any type of digital information.<sup>181</sup> Information on a blockchain exists as a shared database.<sup>182</sup> It is not stored in any one location, meaning "no centralised version of this exists for a hacker to corrupt".<sup>183</sup> Its records are also public and easily verifiable.<sup>184</sup> Any data entered into a blockchain has a timestamp and links to previous data.<sup>185</sup> Users can only make amendments to parts of the blockchain they own.<sup>186</sup> To do so, they need a private key.<sup>187</sup> The network rejects edits made without a key.<sup>188</sup> Thus, the technology can easily spot potential hacks.

The certification scheme could use this technology at each stage in the conflict antiquities supply and demand chain. Unlike diamond parcels, artefacts would be individually registered on a blockchain. If an artefact were unearthed, only authorised personnel – such as archaeologists or state representatives – would have access to the blockchain key, thus reducing the chance of corruption. A microchip would then be placed on the artefact. This could contain information and signatures from those who uncovered the artefact, reducing chances for government corruption. Several scholars and archaeologists have suggested that the inability to tamper with blockchain's recording history may be

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177 Howard, above n 155, at 141.

178 At 141.

179 At 141.

180 See for example "Pioneers of Digital Provenance" Everledger <[www.everledger.io](http://www.everledger.io)>.

181 "What is Blockchain Technology? A Step-by-Step Guide for Beginners" (13 September 2018) Blockgeeks <[www.blockgeeks.com](http://www.blockgeeks.com)>.

182 "What is Blockchain Technology? A Step-by-Step Guide for Beginners", above n 181.

183 "What is Blockchain Technology? A Step-by-Step Guide for Beginners", above n 181.

184 "What is Blockchain Technology? A Step-by-Step Guide for Beginners", above n 181.

185 Bernard Marr "A Complete Beginner's Guide to Blockchain" (24 January 2017) Forbes <[www.forbes.com](http://www.forbes.com)>.

186 Marr, above n 185.

187 Marr, above n 185.

188 Marr, above n 185.

advantageous to the conflict antiquities industry.<sup>189</sup> Indeed, the world's first "archaeology coin" – Kapu<sup>190</sup> – was launched in 2017.<sup>191</sup>

Therefore, the proposed scheme builds on the Kimberley Process and may be able to mitigate corruption through a low-cost microchip identification system.

## 2 *Initial and ongoing support from civil society, states and industry*

The initial success of the Kimberley Process was, in part, due to heavy involvement and support by NGOs, states and industry. This sub-section shows that gathering support would be the hardest element to replicate in an antiquities certification scheme. For one, Kimberley Process actors were driven by gruesome accounts of the violence and human rights abuses in diamond-producing states; the antiquities industry lacks similar shock value.<sup>192</sup>

The reliance on NGO support is also one of the Kimberley Process's weaknesses: its legitimacy was affected when these impartial actors boycotted and later left the scheme.<sup>193</sup> This sub-section shows that it is difficult to predict whether participants in the proposed initiative would be motivated long-term.

It is useful to consider the reasons for the Kimberley Process's support and loss of support to see whether it is possible to replicate the initial positivity and reduce the chance of disinterest developing over time.

### (a) Initial Support

The involvement of NGOs is one reason why states and industry initially supported the Kimberley Process. Partnership Africa Canada and Global Witness spearheaded the campaign to bring the issue of conflict diamonds onto the global agenda in the late 1990s and early 2000s.<sup>194</sup> Their main

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189 Elliot Olson "Can Blockchain Save Cultural Heritage?" (2 October 2018) Global Heritage Fund <[www.globalheritagefund.org](http://www.globalheritagefund.org)>; Wolfie Zhao "University Researchers Turn to Blockchain to Preserve Cultural Heritage" (3 July 2018) <[www.coindesk.com](http://www.coindesk.com)>; and Peter Campbell "Archaeology and Blockchain: A Social Science Data Revolution?" *The Guardian* (online ed, London, 2 October 2017).

190 "Our Work" Kapu <[www.kapu.one](http://www.kapu.one)>.

191 Campbell, above n 189.

192 Virginia Haufler "The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2010) 89 *Journal of Business Ethics* 403 at 408; and KPCS Core Document, above n 151, preamble.

193 Andrew Winetroub "A Diamond Scheme Is Forever Lost: The Kimberley Process's Deteriorating Tripartite Structure and its Consequences for the Scheme's Survival" (2013) 20 *Ind J Global Legal Studies* 1425 at 1437.

194 Franziska Bieri "The Roles of NGOs in the Kimberley Process" (2010) 20 *Globality Studies Journal* 1 at 1.

contribution was their ability to place the issue on the global stage.<sup>195</sup> Both NGOs published a variety of research reports exposing the conflict diamond industry in the late 1990s.<sup>196</sup> The international community legitimised the NGOs' findings because they were seen as impartial third parties:<sup>197</sup> self-sufficient and disinterested in politics.<sup>198</sup>

NGO actors in the conflict antiquities trade are less unified and have different goals. This means that they may not all endorse a certification scheme. For instance, some NGOs are committed to recovering and returning artefacts to origin states, rather than facilitating a controlled trade.<sup>199</sup> A certification scheme has no direct provisions for the return of stolen objects and thus may be unlikely to elicit attention from these NGOs.

Another reason for cohesive international support for the Kimberley Process is that companies were forced to support the scheme. NGOs were able to directly criticise the reputation of the one industry player that controlled the global supply of diamonds: De Beers.<sup>200</sup> Until the mid-2000s, De Beers managed the world's rough diamond supply. Due to De Beers' practices of stockpiling diamonds and artificially creating limited stock,<sup>201</sup> they were often accused of monopolising the industry and arbitrarily inflating diamond prices.<sup>202</sup> Thus, De Beers was forced very early on to support the Kimberley Process or risk increased attention on their company practices.<sup>203</sup> NGOs also threatened De Beers' sales revenues by attacking diamonds as symbols of love and eternity.<sup>204</sup> De Beers' feared that a public campaign devolving the violence and bloodshed of the conflict diamond industry would

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195 At 1.

196 At 2. See for example Ian Smillie and others *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Partnership Africa Canada, January 2000); and *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* (Global Witness, December 1998).

197 Bieri, above n 194, at 2.

198 At 2.

199 See for example "Heritage Emergency Fund" UNESCO <[www.en.unesco.org](http://www.en.unesco.org)>; "Red Lists Database" International Council of Museums <[www.icom.museum.com](http://www.icom.museum.com)>; and "Database" (1 March 2018) INTERPOL <[www.interpol.int](http://www.interpol.int)>.

200 Bieri, above n 194, at 5.

201 Winetroub, above n 193, at 1441.

202 Anne Andrews "Diamond is Forever: De Beers, the Kimberley Process and the Efficacy of Public and Corporate Co-Regulatory Initiatives in Securing Regulatory Compliance Note" (2006) 2 South Carolina J Intl Law and Bus 177 at 198.

203 Andrew Grant "Consensus Dynamics and Global Governance Frameworks: Insights from the Kimberley Process on Conflict Diamonds" (2013) 19 Canadian Foreign Policy Journal 323 at 324.

204 Bieri, above n 194, at 5.

significantly alter consumer habits.<sup>205</sup> Finally, De Beers' involvement was expedited because they wanted to be able to influence the shaping of the Kimberley Process and ensure industry interests were fairly represented.<sup>206</sup>

It would be harder to galvanise action for a conflict antiquities certification scheme. This is primarily because there is no leading industry player in that market. Targeting the variety of different industry perspectives would take significant resources. Moreover, because antiquities consumers encompass only a subset of total consumers (namely high-end buyers), a general public awareness campaign targeting industry players is unlikely to succeed in reducing demand to the same extent as occurred in the diamond industry.<sup>207</sup> Furthermore, dealers and auction houses may be unlikely to support a certification scheme because it could reduce their sales inventory.<sup>208</sup> It may also decrease dealers' profit margins because illegitimate or suspect goods would not be able to be bought cheaply anymore.

Additionally, creating enough momentum to politicise states in favour of a certification scheme is likely difficult in the conflict antiquities industry as states have disparate policy incentives. As discussed earlier, states may not prioritise cultural property protections.<sup>209</sup>

Despite these limitations, support for a conflict antiquities scheme may be possible. Indeed, the criticisms above alone may be an overly pessimistic account of state, civil society and NGO priorities. There are other reasons that these actors might support a certification scheme that could help mitigate the limitations of the scheme's reach.

One key reason might be the "ethical turn" in consumer awareness and increase in corporate social responsibility practices.<sup>210</sup> As Van Bocksael notes: "the demand for fair or conflict-free, transparently and equitably sourced and traded goods and services has never been so high".<sup>211</sup> If the global norm is trending towards transparency in supply chains and meaningful forms of accountability for wrongs, it is possible that once the idea for a certification scheme is in the public domain, the public may latch onto the scheme as a solution.

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205 Winetroub, above n 193, at 1441.

206 Kantz, above n 171, at 10–11.

207 See Williams and Coster, above n 24, at 108.

208 See Mackenzie, above n 106, at 82.

209 Part II(D)(1).

210 Steven Van Bocksael "The Emergence of Conflict-Free, Ethical and Fair Trade Mineral Supply Chain Certification Systems: A Brief Introduction" (2018) 5 *The Extractive Industries and Society* 52 at 53.

211 At 53.

The rise of transnational activism – mobilisation of actors in different states against governments and international actors – may also help pressure states into accepting the scheme.<sup>212</sup> Social movements gain political leverage through the use of transnational networks, which enable them to effectively lobby governments and industry.<sup>213</sup> The lack of violence in the conflict antiquities trade is not a barrier to this form of activism: social mobilisation is linked to cultural issues.<sup>214</sup> More generally, civil society groups use transnational activism in the pursuit of "trade justice".<sup>215</sup> Fair Trade is an example of this, where international groups demanded openness in the agricultural supply and demand chain.<sup>216</sup> Given this, it is possible that civil society groups may be similarly motivated about the conflict antiquities trade. Television reports of ISIL's destruction of cultural property and satellite images of widespread looting holes have received global condemnation and outcry – these reactions from civil society bode well for transnational support.<sup>217</sup>

Demand states may favour a certification regime because it increases adherence to domestic laws; law enforcement can spend less time assessing whether a party is guilty of theft and more time on other priority areas. Given the difficulty of proving knowledge of engagement in conflict antiquities trade, demand-side prosecutions are rare.<sup>218</sup> A certification scheme allows states and industry players to easily verify the history of an artefact. Thus, the scheme could reduce legal time and resources. If it became easier and cheaper to prosecute for conflict antiquities trading, this may provide enough incentive for dealers to disengage in the market.

Supply states may be interested in such a scheme because it is less resource intensive than site protections and can eliminate a form of rebel income. As Part II(D) explained, weak supply states do not have the resources required to protect archaeological sites in both peacetime and war.<sup>219</sup> A

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212 See generally Heidi Moksnes and Mia Melin (eds) *Global Civil Society: Shifting Powers in a Shifting World* (Uppsala Centre for Sustainable Development, Uppsala, 2012).

213 Jackie Smith "Transactional Activism and Global Social Change" in Heidi Moksnes and Mia Melin (eds) *Global Civil Society: Shifting Powers in a Shifting World* (Uppsala Centre for Sustainable Development, Uppsala, 2012) 9 at 19.

214 Johanna Stenersen "Connected Citizens and Networked Resistance" in Heidi Moksnes and Mia Melin (eds) *Global Civil Society: Shifting Powers in a Shifting World* (Uppsala Centre for Sustainable Development, Uppsala, 2012) 131 at 131.

215 Herbert Moseki "African Civil Society in a New Era of International Trade Relations" in Heidi Moksnes and Mia Melin (eds) *Global Civil Society: Shifting Powers in a Shifting World* (Uppsala Centre for Sustainable Development, Uppsala, 2012) 167 at 171.

216 At 172.

217 Patty Gerstenblith "The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?" (2016) 15 *John Marshall Review of Intellectual Property* 336 at 360.

218 Posner, above n 35, at 217.

219 At 221.

certification scheme may mean that states do not have to guard these sites as much. If looted property cannot be sold on the legal market, it would be useless to rebel groups as an income stream. Hence, conflicts in supply regions may also be shortened as a funding stream is cut off. Supply states, therefore, may have a lot to gain from the proposal.

Industry too may also be supportive of such a scheme. Museums, auction houses and dealers face daily scrutiny as to how they obtained certain artefacts and are frequently involved in litigation.<sup>220</sup> The fact that these organisations have established codes of conduct means they are willing, at least on some level, to clean up the antiquities industry.<sup>221</sup>

A certification scheme may also be the first step in unifying NGOs' disparate policies. A certification scheme facilitates recovery and return models because it shows the chain of owners for legitimate antiquities. If the stolen antiquity is registered, one merely has to check the register to see its previous owner. Similarly, any artefact not on the register can be deemed stolen and subject to repatriation.

Thus, while it is difficult to see a certification scheme gaining the same level of international traction as the Kimberley Process, it is not impossible to foresee international actors supporting the scheme. The real difficulty is garnering and concentrating sufficient international attention to catalyse a certification scheme.

(b) Ongoing Support

It is difficult to predict how actors would respond to the proposed scheme after initial interest settles because it depends on how many (influential) states comply with the scheme.

The initial buy-in from states and NGOs in support of the Kimberley Process did not last. The Kimberley Process has a narrow definition of conflict diamond; it only includes diamonds mined by rebel forces.<sup>222</sup> In the late 2000s, Zimbabwe's armed forces were accused of human rights abuses in government-run diamond mines. Because government actions are excluded from the Kimberley Process, states were unable to agree on a course of action or penalties for Zimbabwe.<sup>223</sup> Many NGOs boycotted the 2011 plenary meeting in condemnation.<sup>224</sup> Global Witness resigned from the Kimberley

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220 See generally Brodie, above n 27.

221 See Kimberly Alderman "The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry" (2008) 14 ILSA J Intl L 549 at 568.

222 Winetroub, above n 193, at 1433.

223 At 1440.

224 At 1437.

Process that year,<sup>225</sup> lamenting that it had turned into a "cynical corporate accreditation scheme".<sup>226</sup> Thus, NGO's criticism of the Kimberley Process was targeted at instances of non-compliance and slow bureaucracy.

A certification scheme may suffer from similar definitional criticisms. It would be set up primarily to deal with conflict antiquities and not the general illicit antiquities industry. Thus, akin to the Kimberley Process, it may outgrow this narrow definition.

Even so, a certification scheme that begins by targeting one element of the illegal antiquities industry may be beneficial. In the conflict diamonds context, the World Diamond Council was established at the same time as the Kimberley Process and sets regulations for the wider jewellery and diamond industries that fill a gap left by the Kimberley Process – namely, ensuring the conflict-free nature of diamonds extends to cutting, polishing and jewellery industries.<sup>227</sup> The Kimberley Process was, therefore, not at risk of over-committing itself by monitoring the full supply chain because other NGOs were willing and able to take up this task. In the context of conflict antiquities, a certification scheme may be a good way to facilitate other NGO action. For instance, once the scheme is set up, NGOs could build in a reporting feature to the database so that owners can report stolen artefacts and find matches against the blockchain data. This would allow the certification scheme to expand coverage to the illegal antiquities market. However, it would not stretch state and NGO resources too far too soon.

Thus, while it may be difficult to imagine how the certification scheme would play out in practice, lessons from the Kimberley Process show that it may be possible to focus on a subset of the illicit antiquities industry – conflict antiquities – and retain state support.

### ***D Consequences of a Conflict Antiquities Certification Scheme***

Even if the proposed scheme serves its purpose, there is always potential for negative consequences. This section discusses anticipated consequences, ultimately concluding that they are outweighed by the scheme's potential positive effect on decreasing the conflict antiquities market.

Principally, if a certification scheme results in unprovenanced antiquities being no longer lucrative to rebel groups, might they simply destroy archaeological sites for shock, or hold them to ransom for their intrinsic value?<sup>228</sup>

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225 Mackenzie, above n 23, at 153.

226 Global Witness "Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable" (press release, 2 December 2011); and Mackenzie, above n 23, at 153.

227 "Who We Are" World Diamond Council <[www.worlddiamondcouncil.org](http://www.worlddiamondcouncil.org)>.

228 See generally Terrill, above n 3, at 23.

This is a real possibility. Groups like ISIL value the shock and fear of destroying cultural property.<sup>229</sup> If looting is essentially worthless, they may publicly destroy more artefacts or blackmail cultural property protectionists, such as NGOs and archaeologists, into providing revenue in exchange for the safe return of artefacts.

However, ISIL currently destroy cultural property even though they can receive income for looted artefacts; the law can do little to regulate this.<sup>230</sup> The fact that some groups will always value destruction of cultural property is not fixed by status quo. Moreover, this is likely not influenced to any great degree by a certification scheme. As Part II.(A) stresses, in eliminating a form of rebel income, conflicts may be shortened.<sup>231</sup> So, even if rebels destroy more cultural property during the period of conflict as a result of a certification scheme, it might only amount to the total looted and destroyed artefacts that a longer conflict would have produced in the absence of the proposed scheme.

### ***E Conclusion***

Thus, a certification scheme is a workable solution even though engaging and maintaining international support may be difficult and the scheme may have unintended consequences. Maybe, the increased attention groups like ISIL have given to the conflict antiquities market can provide the impetus needed to provide momentum for such a scheme.

### ***IV WHY NOT MODEL ANOTHER REGIME?***

Just because a certification scheme could work, this does not mean that it is the most appropriate solution. Scholars have suggested other solutions for combating the conflict antiquities market, some modelled from similar transnational criminal markets.<sup>232</sup>

This part argues that alternative mechanisms fail to address the harms of the conflict antiquities trade for similar reasons as to why current mechanisms for the antiquities trade fail.<sup>233</sup> They either: inefficiently focus on supply-side states; are too difficult to apply in demand states; or, are too hard to apply internationally.

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229 Claire Smith and others "The Islamic State's Symbolic War: Da'esh's Socially Mediated Terrorism as a Threat to Cultural Heritage" (2016) 16 *Journal of Social Archaeology* 164 at 173.

230 At 173.

231 Wennmann, above n 29, at 344.

232 See for example Patty Gerstenblith "Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past" (2007) 8 *Chi J Intl Law* 169 at 183; Peter Wendel "Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box" (2007) 76 *Fordham L Rev* 1015 at 1019; Posner, above n 35, at 230; Borodkin above n 80, at 412; Vlastic and Turku, above n 94, at 1195; and Vlastic and Turku, above n 144 at 1471.

233 See Part II(D).

The proposed solutions discussed in this part include: total legalisation of the antiquities trade; public awareness campaigns; a global stakeholder engagement group; and supply chain monitoring schemes.

Solutions modelling total industry bans, such as the United States of America's prohibition period and the illegal drugs industry, are not discussed below. This is because the status quo (laws prohibiting looting and buying of conflict antiquities) is already an attempt at a total ban. Moreover, extensive literature is dedicated to proving that total bans rarely succeed when demand is constant, as it is in the conflict antiquities industry;<sup>234</sup> total bans only fuel black markets further because trade is forced underground to meet demand.<sup>235</sup>

Furthermore, because this article has already shown that modifying existing regulations is unhelpful, these ideas – strengthening treaty provisions and domestic law – will not be considered again.<sup>236</sup>

## ***A Inefficient Supply-Side Regulation***

Some scholars argue that legalising the antiquities market is the most appropriate way to eliminate the black market.<sup>237</sup> This section considers two legalisation models: regulating conflict antiquities as ordinary property; and limiting legalisation through a government buy-back scheme.

### *1 Cultural property as ordinary property*

Posner argues that cultural property is no different from ordinary property and should, therefore, be regulated as ordinary property.<sup>238</sup> This is because, akin to ordinary property, the value of cultural property depends on the person's interests and not everyone values the same (or any) cultural property.<sup>239</sup> He rejects the argument that states have ownership rights to cultural property; the descendants of historical artefacts are unlikely to be within the same state lines as their ancestors due to migration changes throughout history.<sup>240</sup>

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234 See generally Charles Whitebread "Freeing Ourselves from the Prohibition Idea in the Twenty-First Century" (2000) 33 Suffolk U L Rev 235 at 236; and Anna Santos and others "Do Wildlife Trade Bans Enhance or Undermine Conservation Efforts?" (2011) 1 Applied Biodiversity Sciences Perspectives Series 1.

235 See Mackenzie, above n 23, at 156.

236 See Part II(D).

237 Gerstenblith, above n 232, at 183; Wendel, above n 232, at 1019; and Posner, above n 35, at 230.

238 Posner, above n 35, at 223.

239 At 223.

240 At 223.

However, a total legalisation model is unhelpful in the conflict antiquities context. Looting would drastically increase if it were completely legal to loot. This is especially so because artefacts are a non-renewable source; rebel groups may want to capitalise on the market while possible.<sup>241</sup>

Ultimately, even Posner argues that there would be many abuses by opportunistic looters in a total legalisation model. He admits that artefacts would disappear more readily into private collections and cultural nationalist states would continue to be frustrated that their cultural property is no longer within state control.<sup>242</sup>

## 2 *Controlled legalisation: A government buy-back scheme*

The second proposed scheme involves legalising looting and the government buying looters' findings.<sup>243</sup> However, this too is an unrealistic model for conflict states.

Borodkin suggests a controlled legalisation regime for antiquities: governments should incentivise finders of antiquities to stop using smuggling networks by buying found antiquities from looters at a higher rate than what they would receive through trafficking.<sup>244</sup> A government buy-back scheme allows states to issue legitimacy documents to found antiquities.<sup>245</sup> They are, therefore, able to pay a premium to finders by adding value to antiquities that smugglers cannot.<sup>246</sup> The government can run programmes on technical skills required for excavations to ensure artefacts are properly dug up.<sup>247</sup>

However, such a scheme is not possible to implement during conflict. First, it would likely be suspended due to the resources required to confirm the item's legitimacy and issue an authenticity certificate. Secondly, if rebel groups loot to fund armed conflict, governments will likely be dissuaded from providing them with such a lucrative funding stream. Likely, any buy-back scheme would be also suspended during conflict to mitigate chances of rebel forces lodging antiquities claims. Thirdly, the risk of forged government certificates increases when the government legalises antiquities trading, but is unable to control it during conflict. If such a regime is only implemented voluntarily by states at the domestic level, the risk of forgery increases.<sup>248</sup>

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241 See generally Heering, above n 4, at 268.

242 Posner, above n 35, at 230.

243 Borodkin above n 80, at 412.

244 At 412.

245 At 412.

246 At 412.

247 At 413.

248 See Part II(D)(2); and Kersel, above n 8, at 196.

It is interesting to note that as a peacetime measure, a government buy-back scheme could be usefully taped onto a certification scheme. Currently, finders are likely deterred from informing the state of found artefacts because the state would then take control of these objects. This is a particular issue for artefact-rich non-conflict states such as Italy.<sup>249</sup> If states' domestic laws provided for a buy-back scheme, more citizens may come forward with antiquities that belong to the state.

### ***B Weak Demand-Side Regulation***

One of the most frequently used demand-side regulations for black markets are public awareness campaigns. However, this section shows that by themselves, these campaigns would not disincentivise participation in the conflict antiquities market. However, another type of demand-side regulation – technological innovations – lends support for the effectiveness of a certification scheme.

Some scholars compare the conflict antiquities market with markets that benefit from public awareness campaigns, such as the fur industry.<sup>250</sup> During the 1990s and 2000s, educational campaigns about the treatment of animals in fur farms persuaded a large majority of the public that buying fur was unethical.<sup>251</sup> These campaigns focused on making the consumer feel guilty about participating in the market.

Change is unlikely to occur in the conflict antiquities market through similar public awareness campaigns. Reducing fur consumption only required some consumers to decide to avoid fur products. As a direct result, the numbers of fur farms decreased to meet reduced demand.<sup>252</sup> For the conflict antiquities trade, even if some consumers turn away from the engaging in the industry, it would likely be insufficient to counter the harms of the trade. This is because rebel forces will continue to loot as long as they can make money from it. In this way, the antiquities industry is similar to the ivory trade.<sup>253</sup> Public awareness campaigns may have affected consumer habits, but because there are willing buyers for ivory, poachers continue to kill elephants for their tusks.<sup>254</sup>

Consumers may also find it difficult to implement the messages from a conflict antiquities public awareness campaign. Because there is currently no way of accurately assessing the provenance of an

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249 See Sue Park "The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering its Antiquities" (2002) 23 U Pa J Intl Econ L 931 at 932.

250 See for example Heering, above n 4; and Kersel, above n 8, at 199.

251 See for example Jennifer Steinhauer "Fur Is Coming Out of the Fashion Industry's Closet" *The New York Times* (online ed, New York, 1 October 1997).

252 "With Global Consumers Rejecting Animal Fur as Fashion, Chinese Farms See their Profits Plummet" *Southern Weekly* (online ed, Guangzhou, 14 December 2017).

253 See generally Heering, above n 4.

254 Anton Peez "Elephant in the Room: The Illegal Ivory Trade, Wildlife and War" (March 7 2018) Peace Research Institute Frankfurt Blog <[www.blog.prif.org](http://www.blog.prif.org)>.

item, consumers cannot be certain that they are buying conflict-free artefacts. They may not be motivated enough to carry out a thorough search when purchasing artefacts. Choosing to wear fur or not is a much simpler decision because it does not involve inspecting a supply chain. A certification scheme may help consumers to easily identify the history of the artefact that they are purchasing. Thus, a public awareness campaign may be helpful in galvanising attention, but on its own, it would not appeal to consumers.<sup>255</sup>

The last types of demand-side regulations are those that are so similar to the goals of the proposed scheme, that they provide support for it; anti-piracy measures. The rise in online piracy is a global issue, with the approximate loss of revenue from pirating online material at USD 31 billion in 2016.<sup>256</sup> States with anti-piracy laws have seen little or no long-term change in consumer piracy habits.<sup>257</sup> However, technological innovations have drastically changed the market: illegal music and television downloads saw a major decline with the introduction of Spotify and Netflix.<sup>258</sup> Consumers are willing to sign up to these services because the switch from illegal to legal use is easy and cheap – not because they feel particularly guilty about engaging in the market.<sup>259</sup>

These innovations bode well for the antiquities industry. Similar to piracy, cultural property laws appear to have little effect on consumer behaviour, likely because in both scenarios, prosecutions for consumers are low.<sup>260</sup> The high-end antiquities consumer may be willing to only buy certificated antiquities under the proposed scheme because, similar to Spotify and Netflix, checking the provenance of the antiquity before they buy may be an easy and costless change, aided by microchip and blockchain technology.

Thus, the likely solution to the conflict antiquities trade is to make it easy for consumers to avoid the conflict antiquities trade. Public awareness campaigns may be part of this solution, but technological innovations – such as microchips and blockchain – may do far more to incentivise consumers.

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255 See Heering, above n 4, at 169; and Kersel, above n 8, at 200.

256 "Piracy to Cost TV and Film Industry US\$52bn by 2022" (30 October 2017) Digital TV Europe <[www.digitaltveurope.com](http://www.digitaltveurope.com)>.

257 Michael Ho, Joyce Hung and Michael Masnick *The Carrot or the Stick? Innovation vs Anti-Piracy Enforcement* (The Copia Institute, 2015) at 3; and Mike Masnick "The Right War to Stop Piracy" (8 October 2015) Techdirt <[www.techdirt.com](http://www.techdirt.com)>.

258 Ho, hung and Masnick, above n 257, at 3.

259 At 3.

260 At 3.

### *C Absence of Cohesive Universal Action*

International regimes for other areas of global concern and those proposed by scholars are not good alternatives to a certification scheme. They are inefficient in galvanising action, hard to enforce compliance or too onerous to apply to the conflict antiquities market. These regimes are: a stakeholder engagement group; supply chain monitoring groups; and ethical standard-setting agricultural schemes.

Vlasic and Turku propose a global stakeholder engagement group that brings states together and establishes an expert group to develop collective solutions.<sup>261</sup> While this has the benefit of allowing states to sign up to a system that they have all participated in creating, it seems overly bureaucratic. In contrast to a certification scheme, it is unlikely to sustain state buy-in. This is because the regime rests on cooperation and collaboration, meaning negotiations could be long and slow – especially as states have divergent conflict antiquities interests. Negotiations may even allow for reservations in order to secure more buy-in from states. This could result in gaps in the regime, or the regime losing its overall effectiveness. Initial enthusiasm for such a regime may be lost early on due to lengthy proceedings and dilution of goals.

Many existing supply chain monitoring schemes used to regulate supply chains similar to conflict antiquities are not easy for states to partake in. Thus, they are also ineffective. While the number of supply chain monitoring schemes has drastically increased in recent years,<sup>262</sup> these initiatives have been condemned for their "questionable inter-operability."<sup>263</sup> For instance, the United States of America's Dodd-Frank Act requires companies to disclose whether their products may contain conflict minerals from the Democratic Republic of the Congo.<sup>264</sup> This unleashed a "Pandora's box of unintended consequences" for United States companies operating internationally:<sup>265</sup> it became easier for companies to stop importing from the Democratic Republic of the Congo rather than investigate the supply chain.<sup>266</sup>

Conversely, inability to comply with the proposed conflict antiquities certification solution would be unlikely to occur. As aforementioned, once the initial registration of artefacts is complete, demand

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261 Vlasic and Turku, above n 94, at 1195.

262 Colin Kinniburgh "Beyond "Conflict Minerals": The Congo's Resource Lives On" (2014) 61 *Dissent* 61 at 64.

263 Jeroen Cuvelier and others *Analyzing the Impact of the Dodd-Frank Act on Congolese Livelihoods* (SSRC Conflict Prevention and Peace Forum, prepared for the DRC Affinity Group, November 2014).

264 Kinniburgh, above n 262, at 65.

265 At 64.

266 At 65.

nations can easily access a conflict antiquities' history through its microchip.<sup>267</sup> There is little ongoing monitoring for which resources are required. The additional resources and costs that the Dodd-Frank Act prescribes for conflict minerals are avoided.

The final group of international regimes are those that are too onerous to apply to the conflict antiquities market: ethical standard-setting agricultural schemes, such as FairTrade International.<sup>268</sup> These schemes are promoted to everyday consumers to change consumer preferences towards social goods.<sup>269</sup> Some scholars have suggested these regimes could translate to the antiquities market.<sup>270</sup> As suggested in Part III.(C).(2), the move towards transparency in ethical supply lines may help foster civil society support for a certification scheme. However, similar to public awareness campaigns, ethical standard-setting schemes cannot alone stop the antiquities trade. For instance, FairTrade International uses an independent certifier to check compliance with fair trading standards at each stage in the supply and demand chain.<sup>271</sup> This means it is costly to implement, with the burden of paying for certifiers to visit agricultural areas falling on suppliers.<sup>272</sup>

In the conflict antiquities setting, supply states may be deterred from signing up to such a regime; it may be too onerous a cost for them to bear (or pass on to excavators). A certification scheme may avoid the need for independent verification. While the proposed scheme relies on the good intentions of states, it may be less susceptible to corruption because of the inability to tamper with the blockchain data. It would also have less ongoing costs: a microchip only requires replacing every 20 years.<sup>273</sup>

Thus, international regulations are not easy to take part in and may have onerous and ongoing costs. A certification scheme may be better than these international models because it avoids the need for constant financial contributions from states.

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267 See Part III(A) and Part III(C)(1).

268 See for example "What Fairtrade Does" Fairtrade <[www.fairtrade.org.nz](http://www.fairtrade.org.nz)>; "Our Approach" Rainforest Alliance <[www.rainforest-alliance.org](http://www.rainforest-alliance.org)>; "GlobalGAP- Putting Food Safety and Sustainability on the Map" GlobalGAP <[www.globalgap.org](http://www.globalgap.org)>; "About ETI" Ethical Trading Initiative <[www.ethicaltrade.org](http://www.ethicaltrade.org)>; and "Our Approach" Marine Stewardship Council <[www.msc.org](http://www.msc.org)>.

269 Karen Ellis and Jodie Keane *A Review of Ethical Standards and Labels: Is there a Gap in the Market for a New 'Good for Development' Label?* (Overseas Development Institute, 2008) at 5.

270 See for example Vlasic and Turku, above n 144 at 1471; and Vlasic and Turku, above n 94, at 1194.

271 Vlasic and Turku, above n 144 at 1194.

272 Rohan Kariyawasam "Labelling Challenges in Fairtrade" in Brigitte Granville and Janet Dine (eds) *The Processes and Practices of Fair Trade* (Routledge, New York, 2013) 341 at 348.

273 Kelly, above n 169.

## V CONCLUSION

A certification scheme seems likely to be a useful forum for coordination action against the conflict antiquities market. This is not only because it is a workable solution, but also because it appears to have fewer limitations than other existing regimes. A certification scheme has the potential to bring together states with disparate policy incentives and could allow them to exhibit full sovereignty in exercising domestic regulations. At the same time, it creates a usable dataset for identifying the (non-) conflict-free status of artefacts.

This paper has shown that current regulatory mechanisms are inefficient and unhelpful at addressing the conflict antiquities market. Supply-side regulations are difficult to enforce during a conflict. Demand-side regulations fail to deter dealers from the market and are too reactive in nature to meaningfully influence the supply and demand chain. International action is fragmented and uncoordinated, meaning that these policies contain loopholes and cannot be fully utilised.

Taking lessons from the Kimberley Process, a certification scheme may have the capacity to eliminate these weaknesses. A global and unified database of all artefacts may simplify customs and law enforcements' interception of conflict antiquities. This is because each legal artefact is microchipped and connected to the database. Blockchain technology may help eliminate corruption in the supply chain. Looting could decrease because without a government-issued microchip and data, a conflict antiquity cannot be sold on the legal market. Therefore, the value of conflict antiquities may decrease.

Alternative solutions do not directly address the harms of the conflict antiquities industry. Total legalisation models would increase looting in supply states because there would be no penalty for excavating expensive artefacts. By themselves, demand-side public awareness campaigns also offer no deterrence from engaging in the market: consumers cannot easily avoid the conflict antiquities market if the provenance of artefacts is unknown. International schemes are too onerous for industry and states to implement and are costly to maintain.

However, the proposed solution is not flawless. The major disadvantage of a certification scheme lies in the difficulty of coordinating international action. Unlike the Kimberley Process, there is no obvious NGO to spearhead the proposed campaign. Similarly, states may not prioritise cultural property protection enough to involve themselves in the scheme.

But at the same time, states also have a major incentive to sign up to such a regime. Supply states could eliminate a form of rebel income, eventually reducing the length of conflicts. Demand states could more successfully implement domestic prosecutions against cultural property crimes, reducing legal time and resources. And ultimately, all states stand to benefit from eliminating the tangible and intangible harms to cultural property. This suggests that a certification scheme might receive enough support to succeed.

The international community should stop implementing small solutions to parts of the conflict antiquities problem. This article has shown that these regulations have not worked and are unlikely to do so in future. The proposed certification scheme may offer states the chance to retain their national antiquities and preserve cultural history for generations to come, in a way that current regulations cannot realise.

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