

The background image shows an archaeological excavation site. In the upper left, a person wearing a yellow shirt, khaki shorts, and a green bucket hat is standing and writing on a clipboard. In the upper right, another person in a green shirt and light-colored pants is crouching, working on the ground. The site is filled with reddish-brown soil and various stone ruins, including walls and foundations. A black plastic crate is visible on the left side.

COMMENTARY



Do Archaeologists Have an Ethical Obligation to Report Looting? A Legal Approach

By Luigi Marini

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ABOUT THE AUTHOR



Luigi Marini is Justice at the High Court, Rome, Italy. Previous to this position, Mr. Marini served as Legal Advisor at the Permanent Mission of Italy to the United Nations (2014-2020), with a special dedication to the Rule of Law, Human Rights issues, protecting cultural heritage, with specific work on UN Security Council resolution 2347/2017, and countering corruption, organized crime and terrorism.

In 2001-2002 and from 2006 to 2014, he served as justice at the High Court in Rome. In 2006-2007 he lead the European Project aimed at strengthening the institutional role and the performances of the Judiciary in Albania. From 2002 to 2006 he served as elected member at the High Council of the Judiciary, with a special dedication to judicial training and international relations. In previous years he served as prosecutor and judge from 1982 to 1996. From 1996 to 2001 he served as staff member of the Ministry of Justice. He is an author of various publications on legal and criminal matters and publications dedicated to the protection of cultural heritage as well as to the culture of lawfulness

ABOUT THE THINK TANK

The Antiquities Coalition unites a diverse group of experts in the global fight against cultural racketeering: the illicit trade in art and antiquities. This plunder for profit funds crime, armed conflict and violent extremist organizations around the world—erasing our past and threatening our future. Through innovative and practical solutions, we tackle this challenge head on, empowering communities and countries in crisis.

In 2016, as part of this mission, we launched the Antiquities Coalition Think Tank, joining forces with international experts, including leaders in the fields of preservation, business, law, security and technology. Together, we are bringing high-quality and results-oriented research to the world's decision makers, especially those in the government and private sectors. Our goal is to strengthen policymakers' understanding of the challenges facing our shared heritage and more importantly, help them develop better solutions to protect it. However, the views expressed in these policy briefs are the author's own, and do not necessarily reflect those of the Antiquities Coalition. We invite you to learn more at thinktank.theantiquitiescoalition.org. *Author photo courtesy of the author.*



Read Dr. Balestrieri's brief at
thinktank.theantiquitiescoalition.org

Executive Summary

More is needed for legal excavation campaigns: the establishment of a network with authorities, the academy and the community at the national and local levels.

The policy paper presented by Blythe Alison Bowman Balestrieri^[2] highlights a critical dilemma faced by field archaeologists – a dilemma that any person dedicated to protecting cultural heritage should consider carefully.

Any legal excavation campaign is part of a complex process, based on research, fund raising, accurate planning, permit procedures, logistic efforts and personal commitment. But something more is needed: the establishment of a network with authorities, the academy and the community at the national and local levels. This network cannot be established and maintained without long-standing relations and mutual trust.

The complexity and sensitiveness of these steps cannot be underestimated by legal experts and deserves the utmost attention while approaching the question introduced by Dr. Balestrieri about the archaeologist's duty to report acts of looting.

We very well know that laws and regulations should be tailored to the real world and consider the complexity of the issue to be regulated, including a wide range of needs, challenges and human behaviors. In a similar way, legal practitioners have the professional duty to refrain from approaching cases in a dogmatic way and provide interpretation and response that embrace the complexity of life as it is.



Introduction

Even in the absence of a legally binding rule at the national level, the international system provides principles and provisions that can guide the behavior of those working in the field.

Field archaeologists cannot ignore the basic principles of the international legal system and cannot “turn a blind eye” on the framework surrounding his/her choices and actions. In fact, even in the absence of a legally binding rule at the national level, the international system provides principles and provisions that can guide the behavior of those working in the field.

United Nations documents, including UN Security Council Resolution 2347 (2017), treat equally the heinous consequences of systematic illegal excavation and the destruction of archaeological sites and call upon Member States to prevent such conduct and to hold perpetrators accountable. At the same time, Resolution 2347^[3] and resolutions adopted by the UN General Assembly^[4] highlight the need to address in a coordinated way the threats to cultural heritage posed by national and international criminal networks that manage illegal trade and trafficking in cultural property.^[5]

The same approach is adopted by regional organizations. For instance, both European Union’s directives and the 2017 Council of Europe’s Convention signed in Nicosia^[6] encourage all actors to pay the highest attention to the multiple connections between illegal excavation and looting, on the one side, and illegal markets on the other one: supply and demand are closely connected in this field, too.

Dr. Balestrieri’s paper provides us with a clear and documented information about the different motivations for archaeologists’ inaction in presence of evidence of illegal excavation and looting. We know how much the decision to report incidents to proper authorities is a sensitive one. The report could strongly affect the relationship with the local community and its leaders^[7] that is so important both to the daily work of the archaeologist and to future activities. It could cause a hold on excavations and make connections with local authorities difficult and problematic. The decision to file a report could even impact donors’ engagement.

The aim of the present comment is to argue that the above mentioned and similar motivations, like compassion toward subsistence diggers or the risks related to bribery and corruption, can be effectively addressed in the frame of a comprehensive approach, that does not leave the archaeologist alone in front of the choice to be undertaken.

No Answer Fits All

We are convinced that “no answer fits for all”: any excavation campaign, in any part of the world is to be tailored to the specific condition and must comply with laws, regulations, contracts and relationships that differ from others. I have just highlighted the core principles of the international legal system and am aware of the need to enhance the harmonization among national disciplines. At present, only a limited number of countries is provided with updated and adequate laws and regulations, and this represents an additional reason to develop global standards and common coherent behaviors.



A comprehensive approach should grant connections between international (global) rules and local conditions, taking into account legal, organizational and cultural aspects.

In this respect, a comprehensive approach should grant connections between international (global) rules and local conditions, taking into account legal, organizational and cultural aspects. The paper we are discussing offers the opportunity to integrate this specific aspect into a wider framework and to take advantage of the experience and know-how that field archaeologists have developed in decades of hard work and debates.

Coming back to the choices to be undertaken by archaeologists, the different sources of the duty to report differ in strength and consequences. I am referring to:

- Mandatory reporting law and regulation;
- Permit, contract and agreement;
- Code of conduct and professional statute.

The guideline II.B.18 endorsed by UN Resolution 69/196 (endnote iv) highlights how critical the reporting is and encourages Member States to make such reporting mandatory and to criminalize, in appropriate ways, the “failure” to meet this obligation. This provision introduces more than one problematic aspect.

Key Considerations

First, we should consider that in many cases archaeologists are non-citizens of the Country where they are acting. This introduces uneasy questions about their submission to the domestic legal system. For instance, they cannot be qualified as “civil servant” by the hosting Country, and we should consider that, in general terms, domestic laws impose the duty to report on domestic qualified servants and officials only: citizens are not mandated to file a report about a crime or suspicious conduct. Of course, archaeologist's duty could be foreseen by the permit to excavate and any relevant agreement, but, in case a permit and agreement do not include a specific duty at this end, the inaction does not imply a legal breach and cannot give ground to legal liability in any form.

Second, this basic conclusion does not address the entire spectrum. Foreign archaeologists do not work alone and in most circumstances are part of a team that includes local professionals and experts, who are submitted to domestic law. In my opinion, this interaction could, in some contexts, offer a solution and protect foreign archaeologist in case the team decides to file a report.

From a different point of view and in general terms, we should recall that the experience in lawmaking goes in favor of progressive measures and the distinction between the omission of ethical duties and what can be considered illegal / criminal behavior. This means that criminal liability should be adopted as a last resort.

The above-mentioned guideline also pushes us into a different ground: the relation between archaeologists and national/local authorities. Although respectful of Member States’ sovereignty, let me mention just a few sensitive aspects that may have impact on field archaeologists’ concerns and decisions. In particular, archaeologists have to face and, consequently, could provide us with important information and critical thought about, the impact of:

- Ongoing conflict and subsequent chaos;



- Post-conflict environments with fragmented and weakened authorities. A situation that makes looting and trafficking easier and could put archaeologists' safety at risk;
- Legal and institutional systems in “authoritarian” countries; in particular, unpredictable changes in the legal and regulatory systems, risk of unmotivated repressive measures and uncertain level of trust in local authorities
- Inadequate Rule of Law standards and existing legalization of torture and the death penalty;
- Distrust in local authorities, inter alia, based on evidence or suspicion of intentional inaction, bribery and corruption or, even, direct participation in looting activities.

Some of these aspects could also deeply affect permits and agreements to be signed, whose provisions and implementation are definitely influenced by the political and social environment of the host territory.

An increasingly relevant phenomenon is the potential conflict between preservation cultural heritage and modification of the environment following development projects.

In this respect I wish to mention briefly a phenomenon that's increasingly relevant all over the world: the potential conflict between preservation of cultural heritage and modification of the environment following development projects. Just to mention a few, road and railways construction improvement of critical infrastructures and cities' expansion have or may have a deep impact on cultural and archaeological sites. This impact can be prevented through coordinated studies and plans, but we are aware that – in many cases - administrators and investors refrain from suffering obstacles, additional costs and delays “just to protect few ancient stones”. In these cases, archaeologists could face a very difficult challenge and uncomfortable position.

Finally, I cannot ignore the (mostly hypothetical) consequences in case an investigation comes to the conclusion that excavations and looting actions provided resources to terrorists or terrorist group. An analysis of criminal liability, submission to sanction regimes and their respective implementation cannot be carried out in the present context and would deserve a dedicated paper, but we could not underestimate the importance of such critical issue, even in times when international terrorism has a low profile and is following new strategies.

Why A Comprehensive Approach

The connection between “local” looters, illegal trade and national and international criminal networks should discourage archaeologists from taking decisions about reporting under a narrow light.

In some cases, poor looters wish to take advantage of “minor” looted items by selling them directly to local collectors or tourists. In some other cases, they are just the final link of a long chain of trafficking that exploits their services, with heavy burden of risk and very little money as compensation. It's not the archaeologists' job to check about the alternative between opportunistic and organized looters, and to take any decision in this respect. This means that archaeologists should provide law enforcement with due information and let officials value the appropriate response.

As a consequence, by omitting to report ongoing and/or past excavation and looting, archaeologists prevent law enforcement from investigating facts, identifying stolen



Reporting to proper authorities about past or current looting activities does not coincide with reporting about looters.

cultural property, tracing steps and connections and from providing important information to national authorities and to Interpol. Mapping looted sites and identifying the characteristics of relevant items provide essential points of reference to those who work on tracing illegal paths, recovering suspicious items and matching them with evidence of provenance. Let me stress that bringing poor looters to justice is not the core goal of our efforts, and we could initiate a discussion with lawmakers and national authorities whether some form of immunity could be acceptable in case of minor offenses, as well as in case of looters' effective cooperation with justice in the course of investigation on serious crimes. Our goal is to contribute to make authorities aware of any illegal action in order to collect evidence, identify illegal chains, make criminal actors accountable and, finally, trace stolen items in order to make recovery and restitution possible.

In this respect let me just mention that reporting to proper authorities about past or current looting activities does not coincide with reporting about looters: this distinction would deserve deeper consideration and could have important consequences at the legal and operational levels.

From a different perspective, UNSC Resolution 2347 (2017) confirms the importance of inventories and lists: we need to identify what is missing as well as the collection or site of provenance. Once again: even in case of depredated sites, no possible information can be missed as it could be of the utmost importance in the future.

This leads to the conclusion that archaeologists should be an active part of the wider framework and contribute to develop increased standards and procedures. The contribution of all relevant actors is critical at this end: lawmakers, international bodies, judicial authorities and law enforcement, customs officials, international and local experts, private and public collectors, donors: this is a wide, but necessary, crowd. It is definitely the group of actors called to protect cultural heritage at all levels.

One more actor is to be considered: local communities. Local leaders can play a critical role in supporting archaeologists or making their work complicated; in providing them with reliable information or hiding what's important. They can consider searches and excavations as an opportunity and resource or, on the contrary, as a threat that deprives the community of its history and treasures and even economic opportunity.

We need shared vision and coordination action to integrate archaeologists within a project that systematically addresses the chain that connects local looters to the final destination of illegally exported and trafficked antiquities.

At this point, my question is: how we could integrate archaeologists within a project that systematically addresses the chain that connects local looters to the final destination of illegally exported and trafficked antiquities? The answer I submit is: we need shared vision and coordinated action.

Laws and regulations in force in Member States differ significantly, and the path toward harmonization is far from completion. This represents an important challenge and has meaningful consequences.

Also, procedures, conditions and duties related to permits and agreements are far different, while international standards are not sufficiently clear and uniform. Donors, universities, associations and archaeologists know this very well, while different actors are most likely not aware of the complexity and sensitiveness of those aspects.



Recommendations

The above leads to a critical conclusion: interdisciplinary work and substantive exchange of information and experience are indispensable.

- a. Archaeologists and relevant associations should be provided with a better picture of criminal aspects, international legal system, law enforcement's activities and international cooperation, and should include these aspects both in operational choices and the reporting line. Education, curricula and training should tune accordingly.
- b. Archaeologists could also share information and comments about the relations with local communities and their leaders. Certainly, such relations imply cultural and ethical questions and involve economic aspects as well.
- c. Law enforcement, prosecutors and judges should become aware of what's behind survey, excavations and relevant activities, as well as of the difficulties and outputs of any action archeologists carry out in the field.
- d. Local authorities should advance in considering the international framework, in making efforts towards harmonized laws and regulations, in improving the quality of procedure and text of permits and agreements, in supporting and assisting the field work and the final assessment.
- e. Universities and professional associations connected with archaeological activities should take advantage of the interdisciplinary work and advance in educational plans, research, analysis and operationalization.
- f. Donors themselves would benefit from a clearer picture of the environment, would better understand risks and solutions, would be comforted by the existence of shared principles and rules.
- g. Finally, museums, the art market and collectors could be included in the positive dialogue and provide an important contribution.

Conclusion

My professional experience reinforces the belief that interdisciplinary contribution and comprehensive approach are at the core of any ambitious initiative.

Thus, further comments to Dr. Balestrieri's paper would be welcome and could contribute to encourage relevant actors to promote a dedicated research and related project, aimed at advancing both in the comprehension of the above-mentioned criticalities and in identifying possible solutions.



Endnotes

[1] Luigi Marini, currently serving as Justice at the Italian High Court in Rome, started his career in 1982 as judge in criminal matters at the First instance Court in Turin. Served later as public prosecutor, staff member of the Minister of Justice, elected member of the Superior Council of the Judiciary, Justice at the High Court (2006-2014). Also served as legal expert at the Permanent Mission of Italy to the United Nations in New York (2014-2020), inter alia drafting and negotiating numerous UN General Assembly and UNSC resolutions dedicated to cultural heritage, human rights, terrorism and organized crime.

[2] The policy paper titled: *Do Archaeologists Have an Ethical Obligation to Report Looting? Protecting Antiquities and an “Ethical Double Standard”*, presented by Blythe Alison Bowman Balestrieri as a contribution to The Antiquities Coalition Think Tank (n.6, March 2020) has been followed on 29 April 2020 by an online debate moderated by Ms. Deborah Lehr, President of the Coalition. Some of the points raised during the debate are addressed in the context of the present paper.

[3] The Security Council resolution focuses on the protection of cultural heritage in armed conflicts and with reference to terrorists’ activities, but contains also important general principles and recommendations. With respect to the present debate, let me highlight that Member States are encouraged by the Resolution to counter all forms of crime against cultural heritage “that benefit or may benefit organized criminal groups, terrorists or terrorist groups” (OP11). The Resolution calls upon Member States to cooperate in investigations and criminal proceedings referred to the above mentioned crimes (OP12). Finally, OP17 encourages Member States: (a) to create inventories and data bases; (c) to collect all relevant information; (i) to provide education programs “at all levels”; (j) to create inventories of illegally exported items and coordinate to ensure the safe return of such items

[4] Numerous GA resolutions deal with the protection of cultural heritage. Starting 2014 and the world-spread heinous actions of terrorist groups, Member States are called upon to strengthen their response in order to prevent destruction and any form of aggression, including illegal excavation and looting, and to combat trafficking and illegal trade. A comprehensive approach to GA resolutions is highly recommended and can offer important inputs to our discussion. Although addressed to Member States, these resolutions contain principles that can be declined and implemented at different levels by all relevant actors, including museums, academies, professional associations and, of course, archaeologists. Preliminary attention can be paid to Resolution 69/271 of 2015, dedicated to the attacks to Iraqi cultural heritage (in particular OP9, 12, 14, 15, 16), and the “omnibus” resolutions on crime prevention and criminal justice (inter alia, Res. 71/209 of 2016, OP37 and 38, and Res. 74/177 of 2019, OP49), with a special focus on prevention, technical support and training. Important languages and recommendations can be enucleated from Resolutions 70/76 and 73/130, dedicated to the restitution of illegally exported items. The call to international community “to contribute” to the protection and restitution includes non-state actors, and in this context training activities are strongly encouraged. In my opinion, Resolution 69/196 of 2014 deserves the utmost attention. It endorses the technical guidelines developed by UNODC and calls upon or encourages Member States to implement the relevant recommendations. Some of these guidelines directly refer to the issue we are discussing: guideline I.B.6 (reporting suspected trafficking cases to law enforcement authorities); I.B.7 (the role of cultural institutions and private sector and the importance of training); I.C.11 (monitoring activity); II.B.18 (the importance that Member States establish the obligation to report suspected cases and “criminalize the failure to meet those obligation(s)”).

[5] No doubt that, apart from minor conducts, illegal trade and trafficking carried out both at the national and international levels can be managed by “professional actors”, the only ones who can assure confidentiality, safe transportation, hidden storage, border crossing, appropriate relations, adequate pricing and so on.

[6] The [Council of Europe Convention on Offences relating to Cultural Property](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221) was adopted in Nicosia on 3 May 2017 (Council of Europe Treaty Series no. 221) - <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221>

[7] The existence of positive relationship with the local community is often instrumental to collect information about cultural sites and their status and history. This has important consequences. Since this kind of information is provided on the basis of mutual trust and confidentiality, the archaeologist is expected not to break these preconditions, and the unilateral act of reporting to local authorities would most likely bring trust and cooperation to an end.