THE NEW INTERNATIONAL LEGAL FRAMEWORK FOR THE RETURN, RESTITUTION OR FORFEITURE OF CULTURAL PROPERTY

JAMES A. R. NAFTZIGER*

I. Introduction .................................. 789
II. Municipal Enforcement of Cultural Property Law ............................................. 793
   A. The General Pattern .......................... 793
   B. A Frustrating Example: Attorney General of New Zealand v. Ortiz ................. 795
III. New Means of International Cooperation .......... 799
   A. Non-Governmental Cooperation ................ 799
   B. The United Nations General Assembly and UNESCO Resolutions ...................... 801
IV. Elements of a New International Legal Framework ............................................. 806
   A. Salient Values ............................... 806
   B. Derivative Principles for Bilateral Arrangements ......................................... 807
   C. Examples of Bilateral Cooperation ........... 810
      1. Belgium-Zaire ............................. 810
      2. Netherlands-Indonesia ..................... 811
V. Conclusion .................................... 812

I. INTRODUCTION

Developments of the last decade have reshaped the framework within which states cooperate in the return, restitution or forfeiture of cultural property across national frontiers. This study will summarize and appraise the present framework, identify the pertinent values, list fundamental principles and offer two examples to help formulate bilateral agreements which would permit the retention of “foreign” cultural prop-

* Professor of Law, Willamette University College of Law; Chairperson, Law and the Arts Section, Association of American Law Schools.

Imaged with the Permission of N.Y.U. Journal of International Law and Politics
property by states while responding to legitimate appeals made by countries of origin.

Requirements to return cultural property to countries of origin date back at least to Greek and Roman times. Until recently, those requirements were addressed almost exclusively to military-related problems of plunder, the spoils of warfare and occupation.¹ The Hague Conventions of 1899² and 1907,³ followed by the reparation provisions of the Treaties of Versailles⁴ and Saint-Germain⁵ after the First World War, confirmed the illegality of military plunder and articulated the remedy for victim states. Twenty-five years later, during the Second World War, a leading scholar⁶ urged moderation in dealing with the Germans by referring back to the then novel approach of the Treaty of Saint-Germain. Its provisions for the return of historical and cultural material took account, on a reciprocal basis, of the cultural heritage of both the victor, Italy, and the loser, Austria:

[The Treaty] stated, however incompletely, the reasonable principle that historical material belongs, wherever possible, to the land of its birth; and though it might prove highly impracticable to carry this principle through to its ultimate conclusions, the mere fact of its enunciation on reciprocal terms, while the smoke of the battle and revenge still clung to Europe, was a noble signal of growth.⁷

Another signal of growth in this sphere of law was the inception of municipal prosecutions for theft in peacetime of archeological material. The conviction in 1924 of André

---

¹. Rollet-Andriane, Precedents, in Return and Restitution of Cultural Property (special issue), 31 Museum 4, No. 1 (1979) [hereinafter "Rollet-Andriane"].
⁶. Rigby, Cultural Reparations and a New Western Tradition, 13 Am. Scholar 273 (1944).
⁷. Id. at 280.
Malraux on a charge of filching some stones and bas-reliefs from a Khmer temple was a rather memorable example.\(^8\) Thus, the practice of Elginism\(^9\) was becoming discredited.

The spoils of war and occupation still threaten the world's cultural heritage,\(^10\) but a booming art market has shifted most attention to peacetime trafficking. For example, under mysterious circumstances, the Boston Museum of Fine Arts acquired a 4,100 year-old painting looted from an Egyptian tomb.\(^11\) Halfway around the world, the Japanese entered the art market the way the Dutch bought tulips in the seventeenth century: when Mr. Yamamoto bought a Renoir nude, Mr. Fuji wanted one too.\(^12\) Further evidence of this worldwide trafficking has been the reappearance of sawed-off stelae of Mayan origin in public institutions.\(^13\) The circulation has continued at a faster and faster pace. Today illicit trafficking in antiquities is second only to drug smuggling as a global crime.\(^14\) The chief participants are souvenir-hungry tourists; dollar-hungry esteleros [scavengers], tomb robbers and other indigenous traders; urban art dealers; museums with questionable acquisition policies and practices; and investment firms that transform art into a financial commodity.

Public concern about this post-war phenomenon led to the development of new international legal controls. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of

---

10. See, e.g., Kunstsammlungen zu Weimar v. Elicoton, 678 F.2d 1150 (2d Cir. 1982).
12. Meyer, supra note 8, at 118.
Cultural Property is the best known single effort in this direction. The same public concern has led more recently to a substantial strengthening of another form of international co-operation: the return, restitution or forfeiture of cultural property illegally removed in past years and centuries. It is this development, and not policing or international legal control of trafficking, that has offered the greatest promise during the past decade.

Most often, former colonies bring claims against their parent states whose public institutions have acquired possession of property looted from the colonies. Nigeria, for example, claims to have lost more than half of its cultural property in this way. The notorious Benin massacre of 1897 involved the pillaging of tens of thousands of wood, ivory and bronze objects. The British Museum brazenly and controversially exhibited some of these bronze sculptures in 1982, even after repeated, unsuccessful attempts by the Nigerians to persuade the United Kingdom to return the loot. It is estimated that the British Museum alone may contain some 90,000 African artifacts.

Source countries which were not under colonial domination also make demands for the return of property. Examples include Greek demands for the return of Elgin marbles from the British Museum, Iraqi demands for the return of the Code of Hammurabi from France and Mexican and Colombian demands for the return of pre-Columbian treasures. Sometimes, one former colony may demand restitution of cultural property from another colony; Malaysian demands for ethnological and historical material from Singapore are an example. Whatever the circumstances, claimant states have become more assertive.

18. Id.
Claimant states have also become more successful in achieving the return or restitution of cultural property from other territory. The explanation for this success lies in a combination of diplomatic pressures, an awakened conscience among museum officials, a measure of municipal enforcement and new means of international cooperation. The first two of these influences lie outside the scope of these remarks except to note that the ascendancy of Third World politics during the past decade and the role of the International Council of Museums (ICOM) have inspired both more enlightened ethical standards among some museums and reexaminations of their acquisition and restitution policies.  

II. Municipal Enforcement

A. The General Pattern

Only one art-importing state, Canada, has become a party to the UNESCO Convention. Nevertheless, many others, having signed the Convention, are obligated under article 18 of the Vienna Convention on the Law of Treaties to do nothing that would defeat the object and purpose of the Convention. Some states have also taken active measures during the last decade to cooperate in the restitution of cultural prop-


21. Telephone interview with U.N. Information Office (Nov. 15, 1982). It should be noted, however, that as of this writing the United States is in the process of becoming a party to the Convention. Telephone interview with U.S. Dept. of State Office of Communication and UNESCO Affairs (Apr. 4, 1983).


A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
erty to countries of origin. For example, the United States has entered into an executive agreement and a treaty of cooperation providing for the recovery and return of stolen archaeological, historical and cultural properties.23 Also, the Congress enacted Public Law 92-587,24 Title II of which regulates the importation of pre-Columbian monumental or architectural sculpture and murals. This legislation makes it illegal to import into the United States certain listed pre-Columbian stone carvings and wall art unless the country of origin issues a certificate that exportation of such objects is not in violation of the laws of that country.25 The latter measures are, however, nearly ten years old.

Otherwise, courts have played an ancillary role with respect to the restitution of cultural property. Prosecution is often difficult because of evidentiary problems.26 Customs authorities often immunize potential criminal defendants to ex-
pedite recovery of property. The limited litigation includes the Hollinshead and McClain cases which established the competence of the United States to prosecute individuals under the National Stolen Property Act for the importation into the United States of cultural property taken out of the country of origin in violation of that country's laws. Australian law enforcement has also been active. Similarly, a court in Torino, Italy, recently ordered the return of certain art objects to Ecuador. These kinds of cases, though rare, typically raise issues of legislative extraterritoriality and enforcement of foreign judgments. A recent opinion from the United Kingdom in the case of Attorney-General of New Zealand v. Ortiz is especially instructive of the difficulties in relying upon municipal judicial enforcement to effect the return, restitution or forfeiture of cultural property to the country of origin.

B. A Frustrating Example: Attorney-General of New Zealand v. Ortiz

Maori fishermen, according to Sir James Frazer, traditionally put the first fish caught back into the sea in order to conciliate other fish and tempt them, too, to be caught. In resolving a dispute involving Maori cultural property, the

32. Fouquet, supra note 17.
33. [1982] 3 W.L.R. 570.
English Court of Appeal (Civil Division) has done the Maori fishermen one better by throwing a fish back into the sea in a manner that demonstrated that court's determination to throw back all such fish. Attorney-General of New Zealand v. Ortiz addressed important issues of private international law and emphasized the British rejection of legislative extraterritoriality.

In Ortiz the "fish" was a series of five totaro wood panels carved by Maori craftsmen to form the great door of a Taranaki treasure house. Lost for centuries in a swamp, the panels eventually appeared in the London art market. Three days before a scheduled auction at Sotheby's, the plaintiff, on behalf of the Crown in right of the Government of New Zealand, sought a court injunction restraining the sale and an order effecting a forfeiture of the item to the plaintiff government. The government claimed that the item had been removed from New Zealand in violation of its antiquities and customs laws. In separate opinions, Lord Denning, Master of the Rolls, and Lord Justices Ackner and O'Connor concurred in allowing an appeal of a judgment which had generally given effect to the government’s claim.

The two principal issues were as follows: 1) whether, under New Zealand law, the Crown had become the owner of the carving and was entitled to possession, and 2) whether the New Zealand laws could be enforced by an English court. The court answered no to both questions. It first rejected the plaintiff's claim of forfeiture, holding that the government of New Zealand had not seized the property before it left the country, and that New Zealand and English law required actual seizure of an object in the territory of origin in order to effect its forfeiture. That is, the court concluded "forfeiture" could not be automatic or implied, nor could it be effected extraterritorially. The three justices also agreed that English courts could not enforce the New Zealand forfeiture provisions

35. 3 W.L.R. at 575.
36. Id. The door was brought from New Zealand to England by George Ortiz, a dealer in primitive art and defendant in this suit.
37. Id. at 572-73.
38. See id. at 575 (op. of Lord Denning, M.R.); id. at 585 (op. of Ackner, L.J.); id. at 594 (op. of O'Connor, L.J.).
39. Id. at 576.
40. Id. at 576-77, 581, 595.
LEGAL FRAMEWORK FOR CULTURAL PROPERTY

regardless of whether they were labeled "penal" or "public." The judges relied on precedent that included the well-known United States Supreme Court opinion in *Huntington v. Attrill* and Judge Cardozo's opinion for the New York Court of Appeals in *Loucks v. Standard Oil Co. of New York*, as well as on "plain meaning" interpretations of statutory law, principles of verbal incorporation and an explicit rejection of the telelogical approach to interpretation that had been employed by the trial court to reach the opposite result.

The opinion of Lord Denning, which was among his last, is particularly interesting for its insularity and emphatic rejection of legislative extraterritoriality. Even though, in considering the enforceability of New Zealand law, Lord Denning "hope[d] our New Zealand friends will forgive me calling them a 'foreign state,'" he first turned to English statutory law because "New Zealand has inherited the common law of England; and also because its statutes and methods of interpretation are on much the same lines as our own." Lord Denning also ventured to predict the outcome had a United States court decided the case. Unfortunately, his conclusion, doubting that a United States court under the same circumstances would compel the return of the cultural property, failed to note the recent controversial decisions of two U.S. federal courts. The Fifth and Ninth Circuits have held that violations of export restrictions under foreign antiquities laws are to be deemed "thefts" under the National Stolen Property Act, compelling forfeiture of objects brought into this country under those circumstances.

Lord Denning rejected the notion of legislative extraterritoriality in two respects. First, he denied that the New Zealand

41. *See id.* at 581-85 (op. of Lord Denning, M.R.); *id.* at 591-94 (op. of Ackner, L.J.).
42. 146 U.S. 657 (1892).
43. 224 N.Y. 99, 120 N.E. 198 (1918).
44. 3 W.L.R. at 578-80, 586-91.
46. 3 W.L.R. at 581.
47. *Id.* at 576.
48. *Id.* at 585.
49. *See* notes 28, 29 supra.
Parliament could ever have intended to give its laws an extraterritorial reach; therefore, even if the court were to adopt a "purposive" approach to statutory interpretation, it could not assign to the parliament an intent to effect extraterritorial forfeiture. Second, whatever the legislative intent, Lord Denning further held that legislative extraterritoriality is impermissible under international law. In his words, "no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory." Moreover, a sovereign has no right to exercise sovereign authority beyond its territorial limits. Even more generally, Lord Denning held that "by international law every state has no sovereignty beyond its own frontiers [sic]. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority."

Another question of interest on the facts of Ortiz was whether the New Zealand laws automatically "affected" the property before its patrimony. After all, the object was not just any old object; it was specially protected property from the plaintiff state. The court, however, seemed willing to enforce an automatic forfeiture only where the property was obtained through trespass or trover and to allow recovery only where the objects were acquired by the sovereign either through nationalization or actual sovereign possession.

In sum, Lord Denning wrote,

if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of 'public laws' which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory.

50. 3 W.L.R. at 581.
51. Id. at 580.
52. Id.
53. Id. at 582.
54. See id. at 576-81 (op. of Lord Denning, M.R.); id. at 586-91 (op. of Ackner, L.J.).
55. Id. at 585.
Having denied a judicial remedy, Lord Denning suggested that the retrieval of works of art exported in violation of foreign law "must be achieved by diplomatic means. Best of all, there should be an international convention on the matter where individual countries can agree and pass the necessary legislation. It is a matter of such importance that I hope steps can be taken to this end." Actually, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides a number of means that would have compelled a different result in Ortiz had New Zealand and the United Kingdom been parties to that agreement. In particular, the UNESCO Convention contains a provision for certifying the exportability of objects, a related provision for municipal penalties or administrative sanctions against persons responsible for infringing foreign export prohibitions and provisions for bilateral agreements on restitution of objects and for cooperation in response to requests from Parties which claim that their cultural patrimony is jeopardized from pillage. There is also a provision whereby a Party agrees to undertake, consistent with municipal laws, to facilitate the recovery of stolen and inalienable foreign cultural property from its territory.

III. New Means of International Cooperation

A. Non-Governmental Cooperation

The past decade has been distinctive in its regulating the international movement of cultural property, mostly because of successes in implementing non-governmental means of cooperation between national cultures in establishing new legal norms of restitution. The International Council of Museums has been instrumental in promoting this non-governmental cooperation, principally among museums. It has encouraged

56. Id.
57. See note 15 supra.
58. Id. art. 6.
59. Id. art. 8.
60. Id. art. 15.
61. Id. art. 9.
62. Id. art. 13.
national groups, including the American Association of Museums, to adopt or better implement codes of ethics and has encouraged individual institutions to adopt or better implement acquisition policies.63

The result of this cooperation on the return of cultural property during the last decade has been impressive. For example, objects have been returned to Mexico, Panama and Peru by five United States museums, namely the Peabody Museum of Archaeology and Ethnology, Harvard University, the Brooklyn Museum, the Oakland Museum and the Pennsylvania University Museum.64 The Australian Museum Trust made a gift of seventeen artifacts to the National Museum and Art Gallery of Papua, New Guinea in honor of the opening of new museum buildings in Port Moresby. One year later, in June of 1978, the Trust gave the Solomon Islands Museum two canoe-prow carvings to celebrate the independence of the Solomon Islands from the United Kingdom.65

Ironically, although the New Zealand government failed to persuade an English court to order the forfeiture of the Maori property in the Ortiz case discussed earlier, the Wellington, New Zealand museum has cooperated in the restitution to Papua New Guinea of ethnographic material.66

Not all requests or offers to return cultural property come from former colonies. An Irish museum has offered to return some aboriginal Australian pieces to Australia, and a U.S. museum has asked an Australian museum to return an unusual ritual object originating among the Chumash Indians of California.67

The International Council of Museums has also encouraged the return and restitution of objects by facilitating and coordinating short- and long-term exchanges of similar ob-


64. Monreal, Problems and Possibilities in Recovering Dispersed Cultural Heritages, in Return and Restitution of Cultural Property (special issue), 31 Museum 49, 57, No. 1 (1979) [hereinafter “Monreal”].


66. Monreal, supra note 64, at 57.

jects. In 1978 ICOM began the Museums Exchange Program, which has four functions:

(a) collecting information and relevant practical details about museums willing to exchange or loan objects or receive loans; (b) proposing different forms of contract for the adoption of bilateral agreements between museums; (c) offering technical and legal advice for solving any problems which may arise in carrying out the exchanges; and (d) acting as negotiator between the institutions concerned. 68

B. The United Nations General Assembly and UNESCO Resolutions

In 1976 the General Conference of UNESCO expressed its support for exchange of material by adopting a Recommendation to Member States on the International Exchange of Cultural Property. 69

[That instrument is] based on the principle that a systematic policy for the exchange of cultural property will contribute to a better distribution and use of the cultural heritage on a world-wide scale and will be a means of combating illicit traffic and the rise in price of such property, which renders it inaccessible to the least-favoured countries and institutions. 70

In 1978 the General Conference of UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriations. 71 The Committee is entrusted with the task of promoting bilateral agreements for the return or restitution of cultural property, particularly that resulting from colonization and military occupation, to countries of origin. The Committee also seeks to assist countries in build-

68. Monreal, supra note 64, at 51.
69. A Brief History of the Creation by UNESCO of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, in Return and Restitution of Cultural Property (special issue), 31 Museum 59, No. 1 (1979) [hereinafter “Brief history”].
70. Id.
71. Id. at 60-61.
ing representative collections of cultural property, to prepare national inventories, to inform public opinion, to help develop museum personnel, to implement the recommendation on international exchange and to advise UNESCO on pertinent issues. 72

Most significantly, however, the United Nations General Assembly has adopted an annual series of resolutions since 1973. 73 Although they have differed in wording, the essential provisions each year have been the following: to affirm the salutary implications of international cooperation in the restitution of cultural property to countries of origin; to invite states to take adequate measures to prohibit and prevent illicit trafficking in objets d'art; to invite states to prepare national inventories; to invite states to become parties to the UNESCO Convention; to strengthen museum infra-structures; and to marshall professional expertise, the media and public opinion in favor of programs of restitution. 74

The trend during a decade of such resolutions is illuminating. Very simply, they have become less strident and more accommodating of the interests of the target states. At first they were crude and unconditional; now they are refined and moderate. For example, the 1975 version 75 affirmed the need for prompt restitution of cultural property, without charge, as just reparation for damage; 76 none of the italicized wording appears in the 1981 version. 77 The 1975 resolution called upon "those States concerned which have not already done so to proceed to the restitution of" 78 cultural property; the 1981 version merely invites states to deter illegal trafficking. 79 Finally, the later versions eliminate a reference in the 1975 version that recog-

72. Id.
73. For a list of these resolutions, see Return or Restitution of cultural property to the countries of origin, U.N. Doc. A/36/L. 22/Rev. 1 and Rev. 1/Add. 1 (1981) [hereinafter "Return of Cultural Property"].
74. Id.
76. Id.
77. See Return of Cultural Property, supra note 73.
78. See Restitution of Art, supra note 75.
79. See Return of Cultural Property, supra note 73.
nized a "special obligation" of countries advantaged by their "rule over or their occupation of foreign territory." The result of such revisions has been to strengthen the influence of the resolutions and to disarm much of the initial opposition to the unconditional wording of the first versions.

Despite this trend toward moderation, one provision in the 1981 version proved slightly controversial. Although the 1981 resolution was adopted by a vote of 109 in favor and none against, with 13 abstentions, a separate vote on Paragraph 7 elicited 105 in favor and 1 against (the United States), with 14 abstentions. That provision

[a]ppeals to museums and public and private collectors to return totally or partially, or make available to the countries of origin, particularly the items kept in the storehouses of such museums and help the countries of origin, with the co-operation of the United Nations Educational, Scientific and Cultural Organization, in their endeavours to formulate an inventory of these collections.

The United States explained its negative vote on the ground that the provision far exceeded the provisions for return of property and formulations of inventories found in the UNESCO Convention, notwithstanding the fact that the United States had not yet become a party to the Convention.

In order to help implement the General Assembly-UNESCO-ICOM resolutions and programs, an Ad Hoc Committee appointed by the ICOM's Executive Committee adopted a Study on the principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages. Because this detailed study has been quite influential in the field, it is useful at this point to summarize and appraise it.

The Study is divided into two main sections and a conclusion. The first section discusses the principles and conditions of restitution or return of cultural property and the second

80. See Restitution of Art, supra note 75.
82. See Return of Cultural Property, supra note 73.
83. See note 81 supra.
84. Return and Restitution of Cultural Property (special issue), 31 Museum 62, No. 1 (1979) [hereinafter "Study"].
analyses both the obstacles to be overcome and the means to overcome them. In the section on principles and condition,85 the Study defines the critical categories of cultural property, recognizes the problems of geographical-historical attribution, notes the ambiguity of the notion of "country of origin" and emphasizes the importance of inventories and evaluations of significance. The section concludes by stating that, "any effective policy for restitution or return should never lose sight of the three-fold requisite of protection, accessibility to the public and transmission of the objects. In no case should an object restituted or returned be subject to conservation conditions that do not meet international standards."86

The second section identifies three main obstacles impeding restitution: information gaps, psychological difficulties and legal obstacles.87 The list of legal barriers includes problems of derestriction by the target state or public institutions, the even more complex problem associated with demands for return of privately held property, obligations of institutions to donors or testators and equitable compensation for bona fide purchasers of property requested for return or restitution. The means to overcome these obstacles include long-term exchanges, especially those renewable ad aeternum by tacit agreement, good will, state preemption at public sales (as by French law), and special funding and financial assistance to facilitate purchases.88

The Study arrives at a number of interesting and controversial conclusions, the first being that:

The reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived thereof, is now considered to be an ethical principle recognized and affirmed by the major international organizations. This principle will soon become an element of jus cogens of international relations.89

---

85. Id. paras. 8-20.
86. Id. para. 20.
87. Id. paras. 21-36.
88. Id. paras. 29-36.
89. Id. para. 38.
Second, the Study emphasized the importance of bilateral negotiations to accomplish return and restitution, clearly a departure from the earlier, unconditional General Assembly resolutions that called for automatic return or restitution to countries of origin. Third, the Study recognizes the efficacy of private arrangements among concerned museums and scientific institutions. Finally, the Study identifies the critical role of international organizations, including implicitly the role of UNESCO in serving as a clearinghouse for the return of cultural property.

The most disputable of these conclusions is the notion that the General Assembly resolutions evidence a custom of such significance as to "soon become an element of jus cogens." An earlier reference in the Study even more ambitiously asserts that "it is equally true that the community of nations now considers as an element of jus cogens the right of all peoples to recover cultural property which forms an integral part of their cultural identity." Article 53 of the Vienna Convention on the Law of Treaties explains the concept of jus cogens as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Although there is much dispute about the identity of those peremptory norms, they would include, for example, restraints on the illegal threat or use of force under article 2(4) of the United Nations Charter, the principle of pacta sunt ser-

90. Id. para. 39.
91. Id. para. 40.
92. Id. para. 37.
93. Id. para. 38.
94. Id. para. 8.
95. Vienna Convention, art. 53, supra note 22.
96. U.N. Charter art. 2, para. 4.
prohibitions on such egregious violations of human rights as apartheid, slavery and the use by states of torture and the principles of self-determination and minimum human welfare. At this stage of development, it is very doubtful that the notion of a right to the return and restitution of cultural property constitutes a peremptory norm of general international law, from which no derogation is permitted.

In contrast, the other conclusions, emphasizing international and non-governmental cooperation and a reliance on bilateral arrangements, signify a promising route towards implementing the General Assembly Resolutions. Clearly, the latter cannot operate by themselves. Furthermore, municipal or unilateral controls have proven to be only marginally effective. Finally, self-help measures are worst of all, as the French-Mexican tension over a purloined codex demonstrates. How, then, as the conclusions of the Study suggest, can two countries best effect a harmonious return and restitution of property from one to the other within the framework of international cooperation?

IV. Elements of a New International Legal Framework

A. Salient Values

Thirteen values, perhaps not an unlucky number in this case, seem cogent in developing a comprehensive regime to

---

97. *Pacta sunt servanda*, simply means that treaties are binding. A promise or obligation given through a signature to a treaty or otherwise must be carried out, even though the obligation itself may not be law. See L. Henkin, R.C. Pugh, O. Schachter & H. Smit, International Law 4, 69 (1980).


99. In mid-1982 Mexico and France were involved in a dispute over the theft from the French National Library of a fifteenth-century codex consisting of colored drawings used as a horoscope. It is undisputed that a Mexican national absconded with the codex to Mexico, and upon his arrest by Mexican authorities, turned it over to the Mexican government, which retained custody of it. The thief claimed that he had simply recovered stolen property from France, even though the codex appears to have been in France, after a series of legitimate transactions, since the nineteenth century. Riding, *Between France and Mexico; A Cultural Crisis*, Int'l Herald Trib., Aug. 31, 1982, at 1, col. 5. Such self-help measures, if endorsed by governments on the basis of United Nations resolutions or otherwise, pose a serious threat to the future of international cooperation in managing the flow of cultural property.
manage the international flow of cultural property. These same values provide a useful framework for devising bilateral arrangements for the more specific purpose of returning and restoring cultural property to countries of origin. They are as follows:

(1) the preservation of archeological evidence, particularly in an on-site context; (2) the association of art with its geographical-historical milieu; (3) the preservation of the national patrimony for reasons of awakening the national conscience, fostering community pride, socializing youth, enhancing local scholarship, and elevating national civilization; (4) the preservation of both individual objets d'art and, when significant, sets and collections of them; (5) the enhancement of an exporting or loaning state's foreign policy and the financial resources of its museums; (6) the enrichment of the importing state's civilization; (7) the promotion of international understanding through diffusion of art; (8) the respect for cultural diversity, acknowledgement of a global patrimony, and a shared heritage of significant art, as well as the elimination of parochialism; (9) the widest possible visibility and accessibility of significant objects; (10) the protection of significant objects, under the best possible circumstances, in both the country of origin and the importing country; (11) the encouragement of respect for the law and the mutual development of shared controls; (12) the enrichment of aesthetic and intellectual interests of individual collectors, museums, and museum viewers; and (13) restraints on the production of forgeries.100

B. Derivative Principles for Bilateral Arrangements

Several principles emerge from this list of values and from the consensus of concerned states and professionals. First,

every country should be allowed to possess that property which is essential to an understanding of itself and its origins.\textsuperscript{101} Second, former states that have acquired cultural property as the result of colonization or military occupation have a special obligation, as a matter of international solidarity, to cooperate in the return and restitution of at least some of that property to the former colony or territory of occupation.\textsuperscript{102} Third, special circumstances of acquisition ought to be considered, including understandings of donors and testators that might preclude return or restitution.\textsuperscript{103} Fourth, only that cultural property of fundamental or genuine significance, privity and cogency to a claimant state should be subject to return, restitution or forfeiture.\textsuperscript{104} Fifth, return or restitution of “foreign” cultural property should not significantly dismantle collections of individuals or public institutions.\textsuperscript{105} Sixth, the relative importance to the target state of the cultural property ought to be considered, for example, the importance of Chinese vases to eighteenth century European artists, the importance to France of particular African tribal objects in the development of modern French art or the importance to Austria and Spain of pre-Columbian material identified significantly with the conquistadores.\textsuperscript{106} Seventh, the claimant state must ensure that the recovered property will be protected by conservation, safety and security measures that meet international standards, and that the object will be adequately displayed and, normally, accessible to the public.\textsuperscript{107} Eighth, where restitution in kind is


\textsuperscript{102} Moulefera, \textit{Algeria}, in \textit{Return and Restitution of Cultural Property} (special issue), 31 Museum 10-11, No. 1 (1979) [hereinafter “Moulefera”].

\textsuperscript{103} Study, \textit{supra} note 84, para. 34.

\textsuperscript{104} de Silva, \textit{Sri Lanka}, in \textit{Return and Restitution of Cultural Property} (special issue), 31 Museum 22, 23, No. 1 (1979); Moulefera, \textit{supra} note 102, at 11. “However, in describing this property, we open up the possibility of a discussion about how the countries to which it originally belonged appreciate it. The notion of ‘fundamental’ is not always perceived in the same light by those claiming the property and those giving it back.” \textit{Id.}

\textsuperscript{105} Monreal, \textit{supra} note 64, at 53.

\textsuperscript{106} Study, \textit{supra} note 84, para. 13.

\textsuperscript{107} \textit{Id.} paras. 28, 40. A 1978 Recommendation of the General Conference of UNESCO recommends that Member States should adopt a series of measures aimed in particular at strengthening security systems in museums.
impossible, there should be provision, under the Chorzów Factory rule, for "payment of a sum corresponding to the value which a restitution in kind would bear. . . ."\textsuperscript{108} Ninth, the purposes of the return or restitution should not be defeated by a reappearance of the object on the international art market, as in the notorious case of the Afo-A-Kom statue.\textsuperscript{109} Finally, and similar institutions, at improving the protection of private collections, religious buildings and archaeological sites, eliminating risks during transportation and temporary exhibitions and at combating such crimes against cultural property as theft, illegal excavations and acts of vandalism. It also recommends the adoption by museums or similar institutions of a risk management programme to enable them to secure the best possible insurance terms from the point of view of cover and cost, as well as the establishment of total or partial governmental guarantees to cover risks incurred during temporary exhibitions or other loans of cultural property for cultural purposes.

Brief history, \textit{supra} note 69, at 59.


\textsuperscript{109} The Afo-A-Kom story is well-told, as follows:

In 1966, an African wood carving known as the Afo-A-Kom was taken from its ancestral home and transported to a New York Art Gallery where it appeared for sale. The events surrounding the transaction are cloudy, although members of the royal family of Kom appear to have been involved.

The Afo-A-Kom is a statue which is said to embody the soul of the people of Kom. Its spiritual significance is such that it is the personification of the Kom belief in Animism, through which the spirits and souls of a rich cultural heritage communicate with the present citizens of Kom. The effect of its disappearance on the people of Kom was profound. An integral part of their spiritual life was gone. Essentially a superstitious people, the Kom blamed any of their misfortunes on the loss of the Afo-A-Kom.

When a Peace Corps volunteer located the statue in New York, Americans quickly registered their outrage. Some went so far as to threaten the dealer who had purchased the piece with physical violence, even though he did so without any knowledge of its tribal importance. Through the efforts of (a) the press, (b) public opinion, (c) a formal request from the Cameroon government, and (d) numerous public contributions, the Afo-A-Kom was returned to its ancestral home.


Presumably the Afo-A-Kom should remain in its country of origin, yet within a short period after its return the statue was again being offered for sale on the international market.

\textit{Id.} at 119.
there should be written evidence of the following measures prior to the return or restitution of an object or class of objects: an assessment of the losses suffered by the claimant state so as to enable priority to be given to the most significant objects; an inventory of objects preserved in the claimant state and a survey of measures taken on a national level to identify, preserve and present them to the public; an inventory of all objects claimed in foreign collections; and precise provisions for compensation, or waiver of it, for objects whose return, restitution or forfeiture is requested but impossible.

C. Examples of Bilateral Cooperation

1. Belgium-Zaire

Despite antiquities laws to protect the cultural property of Zaire, hundreds of items of very high quality have illicitly left that country since it gained its independence from Belgium. In response, Belgium has agreed to return important cultural property to its former colony in accordance with a bilateral agreement that came into force in 1970, three years before the first General Assembly resolution calling for unconditional restitution. This agreement offers Zaire specialized Belgian scientific and technical personnel to assist in organizing a museum network, sets in motion a transfer of ethnographical and art collections from Belgium to Zaire and provides for the physical conservation and preservation of Zairian cultural property.

The first step in the new agreement called for the two countries to collaborate in drafting legal texts for the Institut des Musées Nationaux du Zaire (IMNZ) and for the protection of the national artistic heritage of Zaire. Full-time curators were placed at the disposal of the Institute. The Belgian government provided qualified specialists who have carried out short-term missions on behalf of the IMNZ. These included field missions to collect ethnographical and archaeological material and to conduct excavations, musicological re-

110. Monreal, supra note 64, at 53.
112. Id.
search and collections and classification and evaluation of the IMNZ's emergent collections. Also, several Zairian scientists attended extended training courses in Belgium, including one on the conservation and restoration of objects.113

The bilateral agreement has also led to a program for surveying, inventorying and collecting ethnographical objects. Its purpose has been to preserve those cultural documents which would otherwise disappear due to decay or illicit export.114

2. Netherlands-Indonesia

Also within an historical context of colonialism, the Netherlands and Indonesia worked out and began to implement an elaborate program of restitution during the past decade. This program involves the following six levels of considerations.115

First, the immediate return of state-owned objects linked directly with Indonesians of major historical and cultural importance, or with crucial historical events in Indonesia. Second, assistance by the Netherlands government, "within the limits of its competence," in establishing the necessary contacts with private owners of objects considered to be of first-level importance. Third, a pledge by the Netherlands to establish contact with private owners of property of high cultural value to Indonesia once such property is discovered, and to further arrangements for its return to Indonesia. Fourth, joint investigation into instances where ownership of objects of high cultural value is unclear. Fifth, a joint program of visual documentation for ethnological and archaeological objects of cultural importance, defined in terms of their manufacture, use and value to the user group. Finally an understanding that archives should be kept by the administration which originated them, with provision for the reproduction and transmission of reproduced copies of archives to the other state.116

113. Id.
114. Id.
116. Id.
V. Conclusion

International means are essential to effect the return, restitution or forfeiture of cultural property frequently found in the territory of former colonial or occupying powers. A recent British judicial opinion, Attorney-General of New Zealand v. Ortiz, demonstrates the pitfalls of relying on municipal procedures alone to carry out this objective.117 However, recent international, non-governmental cooperation, principally among museums and other institutions, is promising. The past decade has also witnessed the introduction of a series of resolutions and recommendations by several international organizations on the restitution, return or forfeiture of cultural property. These have evolved from rather crude, unconditional appeals to genuinely cooperative, realistic instruments. The organizations which adopted these instruments, namely the United Nations General Assembly, UNESCO and ICOM, have rapidly developed the basis for an effective regime to implement these documents. In order to build on these constructive rudiments, bilateral agreements are crucial. Such agreements might be negotiated by considering and incorporating a variety of artistic, cultural, legal and political values and principles. Examples of successful bilateral cooperation between Belgium and Zaire and between Netherlands and Indonesia offer further guidance and support for working out such arrangements. Today, the sharing and reallocation of the common cultural heritage of mankind is an issue which merits and is finally beginning to receive serious global attention and adjustment.

117. See notes 33-62 and accompanying text supra.