

Three formulae have been employed by Article 149 to identify the state(s) of origin: (1) "State or country of origin"; (2) "State of cultural origin"; and (3) "State of historical and archaeological origin." It is argued that the reason for the inclusion of the three formulae was to ensure that all states having a "spatial or qualitative" link with the discovered objects have a legal basis to promote their interests.¹⁹ For example, the term "State of cultural origin" gives emphasis to the cultural link between an object and a state, while the term "State or country of origin" to the territorial link.

In many cases, the determination of the state of origin would be extremely difficult. However, even if it is possible to identify traces of origin, the qualification of more than one state as claimants to the recovered items might create considerable difficulties.²⁰ What is needed is the establishment of *criteria* on the basis of which the decision can be made whether a particular item *belongs* to the cultural heritage of one state or another. In the existing legal framework, two of the main criteria for determining the property that constitutes part of the cultural heritage of each state are *nationality* and the *territorial link* of cultural property. In the context of Article 149, the decisive criterion would seem to be that of nationality, since the objects concerned are found in areas beyond national jurisdiction. In case of conflict, the "effective link" of nationality envisaged by the ICJ in the *Nottebohm* case (*Liechtenstein v. Guatemala*)²¹ may be used as a criterion for resolving the dispute. Preference should be given to the state to whose cultural heritage the object in question is more closely linked.

In concluding, if the 1970s were characterized by aggressive restitution debates between so-called art "importing" and art "exporting" countries, the 1980s and the 1990s represent a multidisciplinary approach toward a new legal and political framework. There is a trend toward balancing the interests of the art-rich countries in recovering objects that reveal their cultural identity, and the interests of other members of the international community in the cultural heritage of humanity. However, at this stage of the development of the law, the cultural heritage of mankind principle is too vague to become effective as an operational concept. One may even question whether it has any normative content at all beyond its hortatory effect in specific treaties. Above all, the concept should never inhibit efforts to provide for the return of the most important objects of a national patrimony.

THE EXPERIENCE OF UNESCO WITH THE RETURN OF CULTURAL OBJECTS

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Cultural objects have been in movement throughout history. Why has this been considered by some as a "North–South" issue? The way in which the topic has been set suggests a confrontation. But in fact it is not geography but economics that divides states on this issue and, as I hope to show, there is a good deal of cooperation across the dividing line. The reason why the issue is of such concern today is that the strength of the art market in the industrialized, economically advantaged states creates unprecedented pressure on

¹⁸ In addition, the Convention fails to designate an appropriate international organization to implement the proposed regime. See, A., Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 I.C.L.Q. 859–894 (1991).

¹⁹ Racounas, E., *Submarine Archaeological Research: Some Legal Aspects in THE INTERNATIONAL LEGAL REGIME OF THE MEDITERRANEAN SEA* 309–334 at 328 (U. Lebanza, ed., 1987).

²⁰ This is one of the main reasons that the inclusion of the preferential rights in Article 149 has been criticized. In particular see D.R. Watters, *Law of the Sea Treaty and Underwater Cultural Resources*, 48 AMERICAN ANTIQUITY 808–816 (1983) and G.F. Bass, *Marine Archaeology: A Misunderstood Science*, 2 OCEAN Y.B. 137–152 (1980).

²¹ 1955 ICJ Rep. 4 at 22.

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cultures in poorer countries, many of whom are facing the prospect of losing their most important material culture.

UNESCO has as its mandate both the promotion of cultural interchange and the preservation of the cultural heritage.¹ UNESCO will be fifty years old in 1996 and it is interesting to chart the changes that have occurred in the implementation of this mandate.

In its early years, and following the experience of the 1930s and early 1940s when the Germans were largely insulated by the Nazi authorities from foreign cultures, the emphasis was strongly upon facilitating exchange of cultural materials—this was, for example, the aim of the Agreement on the Importation of Educational, Scientific and Cultural Materials (the “Florence Agreement”) of 1950. It soon became evident, however, that the art market itself was a power and in need of no further assistance in facilitating the movement across boundaries of cultural material. Indeed, by the 1960s evidence was emerging of systematic looting of sites and organized thefts in religious buildings and museums. Much of this material was finding its way into the illicit market. UNESCO’s response to this threat to the preservation of the cultural heritage was the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1970.²

What is being illicitly trafficked? The 1970 UNESCO Convention includes a long list of objects that states may choose to protect as part of their cultural heritage. To mention only three that currently cause considerable concern: objects of archaeological interest (as mentioned by Professor Merryman), whose illegal removal from a site inevitably damages the site and the information that could have been extracted from it; artworks in private hands, museums and churches, and of which there have been some recent spectacular thefts; and fossils, in which there is presently a rampant illegal market leading to the removal from sites of remains that date back millions of years.

Although this illegal trade undoubtedly enhances the movement of material culture, it inevitably damages the cultural heritage of humanity. It is clear to police forces around the world that the looting of sites and planned multiple thefts are now carried out by organized criminal groups.³ Some of the material disappears from view completely; in other cases it cannot be detected when it appears in the market (such as objects clandestinely excavated and thus not recorded). Either way the material is disconnected from its context, and the information it carries is destroyed.

I agree entirely with John Merryman that it is important to avoid simplistic thinking when considering this problem. However I fear that the tags “cultural internationalism” and “cultural nationalism” or “retention” provide examples of the kind of simplistic thinking that should be avoided.⁴ The concern of the international community is not forwarded by the destruction of and damage to the cultural heritage caused by the illicit trade. “Internationalism” is not therefore furthered by unrestricted movement of cultural objects, but by its careful control. As for “cultural retentionism,” the International Council of Museums (ICOM), asked for its views at the height of debate on claims for repatriation in the 1970s, proposed the principle that each culture should be entitled to a representative collection of the best examples of its own culture, to instruct its children and stimulate its artists. This seems a principle difficult to deny. It is surely in the interests of humanity in general that vibrant cultures should not be deprived of the material crucial to their continued creativity.

¹ Constitution, Art. 1(c).

² 9 ILM 1031 (1970).

³ This view was clearly expressed at the symposium of senior police officials, “Arts et Criminalités,” held at UNESCO Headquarters in Paris, March 28, 1995.

⁴ John Merryman, *Two Ways of Thinking About Cultural Property*, 80 AJIL 831 (1986).

I have recently been the witness of the efforts of an extraordinarily dedicated woman from Easter Island, a member of the indigenous community of Rapa Nui now living in France, who has, on her own initiative, undertaken the work of cataloging the holdings of Rapa Nui material in the museums of Europe. She has taken pictures back to Rapa Nui to show the islanders images of objects, unknown to them, of this extraordinarily rich and severely threatened culture, now on the brink of extinction. The loss of this unique living cultural tradition would be a loss to all humanity.

For many years, the response of the so-called "art-importing" states was to assert that the duty lay on the "art-exporting" states to prevent theft and site looting within their national territories. If they did not do so, then it was not the responsibility of others to control the transfer of the objects gained from these activities. This response is quite unrealistic; consider only three, of many other, cases. Iraq has over 10,000 known archaeological sites, not to mention the many not yet inventoried. Cambodia, apart from its extraordinarily dense complexes at Angkor Wat and other known sites, has many more still being discovered. The richness and number of Mayan sites in Guatemala is well known. These countries cannot provide supervision for all these sites, even if they put the whole of their military and police forces to the task. If these sites are to be saved for humanity, there is no alternative but international collaboration.

UNESCO's response to the problem has been two-fold. The first has been to assist states of origin as far as possible in their efforts to prevent illicit trade. Thus, UNESCO will assist them with expert advice in the drafting of legislation.⁵ It publishes national legislations so that they will be known and serve as source materials for other states facing similar problems. It has issued a study on the steps a national state may take to hinder the illegal trade. It has carried out regional seminars on illicit traffic at which appropriate government and cultural officials, police and customs, participate in order to set up internal and regional networks⁶ and to acquaint them with the international networks that can assist (such as INTERPOL, ICOM and databases of stolen cultural objects) and is currently producing a guide on the conduct of national workshops on the topic in order to assist national governments to carry these training initiatives on at the national level. In exceptional cases it is also active on the international level. In Cambodia we have organized a national workshop; arranged training for police and customs officers; assisted with the drafting of legislation; contributed to training of university students; assisted in the drafting of a notice for tourists in six languages, to be enclosed with every visa, on the need to respect the cultural heritage; arranged a poster competition on the topic and provided additional measures for security at the Angkor Conservation Centre and expert advice on security at other sites.

The second kind of response is to reinforce international collaboration. Concrete action is to assist states in implementing the 1970 UNESCO Convention and encouraging other states to join.⁷ Where sufficient inventory detail and an image (photographic or other

⁵ Over the last five years missions have been fielded to the Czech Republic, Eritrea, the Maldives, Morocco, Namibia, Nepal, Romania and the Russian Federation.

⁶ Such regional and sub-regional meetings have been held in the Asia-Pacific region (Brisbane, 1986); Asian sub-region (Jomtien, 1992); Central and Eastern European region (Keszthely, 1993); Southern African sub-region (Arusha, 1993); and West African sub-region (Bamako, 1994). One planned for Latin-American states in Cuenca, Ecuador for February 1995 has had to be postponed because of the situation in the area, and it is hoped that it will be held later this year.

⁷ There are currently eighty-one states parties to this convention, including the United States. On December 31, 1994, the Director-General of UNESCO issued an Appeal to those states not yet party to the Convention to become party. The French Minister of Culture and French Language has announced that his government is at the stage of formulating the instrument of acceptance, and the Swiss Government expects to put the legislative scheme to enable adoption of the Convention by Switzerland to its federal parliament this year. Two Asian states, according to their discussions with UNESCO, are close to acceptance. New Zealand has prepared a bill that should enable it to participate in the Convention, which has yet to be submitted to its Legislature.

adequate representation) are available, the Organization also distributes notices of stolen cultural property at the request of a state party to the Convention to other states party to the Convention. Other notices publicize action by member states to implement the Convention, such as, in the case of the United States, the imposition of import controls in specific cases. UNESCO and the UN Institute for the Prevention of Crime and the Rehabilitation of Offenders held a meeting at Courmayeur, Italy, in 1992, in order to encourage the exchange of information between different databases of stolen cultural objects.

Another part of this work of international collaboration is to help provide the international legal framework. For those of you unfamiliar with the UNESCO Convention of 1970, the two most important provisions of that instrument are the establishment of a system of export certificates and specific procedures at the diplomatic level for requests for the return of cultural objects stolen from museums and similar institutions and included in their inventories.

A major effort is now under way in conjunction with the International Institute for the Unification of Private Law (UNIDROIT), which has initiated over forty international instruments on trade law, to formulate a draft convention on the private law aspects of the restitution and return of cultural property. This work was proposed to UNESCO in an expert report in 1982, and UNESCO has supported UNIDROIT in two studies on the subject⁸ and has been active in negotiations on the text.⁹ A diplomatic conference will be held in Rome at the invitation of the Italian Government between June 7–24, 1995, with the aim of adopting a final text. The negotiations have not been at all easy, and it is clear that, if a text is to be achieved, it will be a compromise document. However, the current draft does make some significant advances. The foremost is a provision that will require a possessor to return a cultural object if proven to be stolen; moreover, he or she will not receive compensation in legal systems where this would normally have been the case, unless the acquirer can prove that she or he used diligence in making the acquisition. A number of factors are suggested as tests for diligence, including consideration of the circumstances of the transaction (place and time), the character of the parties, whether an appropriate database of stolen cultural property has been consulted and so on. If accepted, this provision will make a significant change in current practice whereby objects stolen from owners in civil law systems can generally be retrieved from common law jurisdictions (which as a general rule follow the *nemo dat* rule), but cultural objects stolen from within common law jurisdictions cannot be retrieved from civil law countries because the acquirer is generally shielded by the rule protecting the bona fide purchaser. (Although the degree of care required of a bona fide purchaser varies among the civil law systems, in the majority bona fides is assumed and is very difficult to disprove.)

The 1970 UNESCO Convention applies only to cultural objects stolen after that date. The UNIDROIT Convention also, if adopted, will not be retroactive. What about objects expatriated before that date?

For claims concerning these cultural objects UNESCO has established an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation. This Committee, which was established in 1978, has only received six claims. One was resolved by litigation (Ecuador versus Italy); two by agreement (Jordan versus the United States; Turkey versus the German

⁸ Reichelt, G. *International Protection of Cultural Property*, UNIFORM L. REV. 43 (1985); *Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property in the Light also of the Comments Received on the first Study* (UNIDROIT, 1988).

⁹ A Study Group of Experts drew up a draft text at three meetings between 1988 and 1990 and this has been studied closely at four meetings of governmental experts between 1991 and 1994.

Democratic Republic); one is in litigation (Iran versus Belgium) and two current (Turkey versus Germany; Greece versus the United Kingdom). Three other states have indicated that they would like to bring claims, but in cases where the Committee does not have jurisdiction. Such a record hardly justifies claims by some museums that responding to such requests would provide dangerous precedents and result in “emptying the museums of Europe.”

Nor is this the experience of states on the bilateral level. Some years ago Australian museums drew up an inventory of all their holdings of Polynesian and Melanesian materials. It took some six years, and some museum staff in other countries warned them that this would result in a flood of claims for return. In fact, as far as I am aware, not one single claim for return has been made as a result of this inventory. Museums in the countries concerned made many requests—but for photographs, further details, information on conservation and so on. An atmosphere of trust has developed between museums in the region, partly because it is clear that the holding museums are not trying to conceal what they have. Exchanges of material for exhibitions and of staff for training and fieldwork have improved. The Australian Museum in Sydney has returned, on its own initiative, a number of objects to help fill gaps in collections in the national museums of certain Pacific countries. As a result, and in a truly Polynesian gesture, it has received rare cultural objects in return¹⁰ and is welcome to collect cultural objects in these countries, who know that the museum will be honest in disclosing its finds and conforming to the local law.

The result of such experience is to show that the quest for cultural objects need not divide states. Museum professionals can operate within regions and across regions to the benefit of the cultural heritage of all humanity to ensure broadened access to and the requisite care of the cultural objects concerned. Finally, at the intergovernmental level, the opportunities for regional and inter-regional cooperation are high. A customs agreement between Malaysia and Singapore has been used to prevent illegal outflow of cultural objects from Malaysia. The United States has an important program of import controls for certain countries in the Latin American region, and has recently instituted them for Mali (the first non-American state for whom this action has been taken). Both Australian and Canadian legislation will enforce the export controls of other countries by reciprocal import controls. Countries of the Eastern and Central European regions signed an agreement on the subject at Plovdiv in 1986—it remains in force despite the political changes that have since taken place, although the freeing of border controls in the area has made the policing of the illicit traffic a major concern in the area. The African regional meetings at Arusha and Bamako¹¹ have made clear the desirability of greater regional cooperation between African states to stop the transit of stolen and clandestinely excavated cultural objects within that area.

The opportunities for regional cooperation for the protection and exchange of cultural objects are numerous.

DISCUSSION

PROFESSOR MERRYMAN: Of all the nations in the world that are substantial importers of cultural property, the United States is probably the principal importer, and it is also the one that has been the most solicitous of the demands coming from and the interests of the source nations. The United States has become a party to the UNESCO Convention. It has adopted implementing legislation. It has entered into treaties with a number of source

¹⁰ Such as a basket of feather money from the Solomon Islands.

¹¹ *Supra* note 6.