Cultural heritage jurisprudence and strategies for retention and recovery*

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Abstract

A country seeking return of an item of its cultural heritage must be willing to confront numerous potential obstacles to successful international litigation. These range from procedural aspects such as standing to sue, to the finer implications of import and export legislation and domestic ownership rules. Many and varied interpretations could be given to the concept 'state of origin', for example. In order to address state claims to cultural heritage, courts have also resorted to conflict of laws doctrine. While traditional conflicts methodology is not always respected, these cases highlight how the application of foreign law can assist in resolving conflicts regarding cultural objects. A variety of tools are available in the subject-field, including directly applicable (mandatory) rules, international public policy and comity. Regrettably, certain rules of the conflict of laws may be applied in ways that conceal the true thrust of legislation designed to aid retention and recovery of items of cultural heritage, or that overshadow international public policy in the area.

INTRODUCTION

Judging from cultural heritage jurisprudence and strategies for the restitution of cultural objects stolen, lost or misappropriated across state boundaries, several problems routinely confront the country seeking the return of an item of its cultural heritage.[1] One immediate question is whether only so-called

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[1] *Republic of Ecuador v Danusso*, Civil and District Court of Turin, First Civil Section 4410/79; Court of Appeal of Turin, Second Civil Section 593/82; 18 *Rev dir int priv proc* 625 (1982); *Attorney-General of New Zealand v Ortiz* [1982] QB 349, reversed [1982] 3 All ER 432 CA; appeal dismissed [1983] 2 All ER 93 HL; *King of Italy and Italian Government v Marquis Cosimo de Medici Tornaquinci and Christies* 1918 34 TLR 623; *United States v Hollinsbead* 10970 (SD Cal 14 March 1973) affirmed 495 F 2d 1154 (9th Circuit 1974); *United States v McClain* 545 Fed Rep 2d 988 (1977); 593 Fed Rep 658 (5th Circuit 1979); *De Raad v OvJ* NJ 1983 445, rev'd on appeal to the Hoge Raad; *Government of Peru v Johnson* 720 F supp 810 (CD Cal 1989) affirmed, sub nom *Government of Peru v Wendt*, 933 F 2d 1013 (9th Circuit 1991), full opinion in 90-55521, 1991 US App LEXIS 10385 (9th Circuit 1991); *Kingdom of Spain v Christie, Manson and Woods Ltd* [1986] 1 WLR 1120; and

'states of origin' have a claim. The concept of state of origin may connote a number of vastly different notions. Standing to sue, identity and title may also affect the outcome of any strategy for recovery. The possibility of interpreting export control law as extraterritorial in so far as it may be regarded as affecting legitimacy of import, presents a further potential obstacle in litigation. Export control legislation generally applies primarily to privately held cultural objects, that is, to cultural objects held in private collections, private museums, or held by dealers and auctioneers. Illegal export in the sense of objects having been removed from the territory of a contracting state contrary to its law regulating the export of cultural objects,[2] and its effect on title — be it apparent or real — often create a conundrum. The difficulties are best explained by means of examples.

Example 1

The Netherlands may wish to have a Frans Hals painting returned after its Dutch owner concluded a private sale to a Canadian, and exported it to Canada illegally. Suppose that this painting could have been acquired by the state if it had exercised its right of *pre-emptio* (pre-emption) in terms of its domestic legislation. However, at the time of the illegal export, the painting belonged to a collector who had discovered it in an attic after years of neglect. Dutch law would have allowed him a defeasible title until notification or presentation of the find to the state authorities for appraisal and purchase. Having exported the painting illegally, the seller cannot sue for recovery in a Dutch court, and the Dutch government will be denied standing in the courts of the place where the object is located. Ultimately, and even if the painting had been sold lawfully, neither the original owner nor the nation would be able to retrieve it. Resale of the object may also prove difficult on account of the violation of export restrictions.

Example 2

The Metropolitan Museum in the US is exhibiting antique gold and silver vessels as well as frescoes originally crafted by Greek settlers. The find was unearthed in what is now Turkish territory, after alleged illegal excavations by local peasants. A state official managed to organise a false permit for export and sale abroad. The relevant Turkish laws apply to finds on both private and state land, and provide for acquisition by the state.[3] The government became aware of the existence of this treasure only after the relevant law took effect, but the treasure was removed shortly before it could be properly documented

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Republic of Turkey v The Metropolitan Museum of Art 762 F supp 44 (SDNY 1990).

[2]The Unidroit Convention uses the term 'illegally exported cultural objects' to designate objects removed from the territory of a contracting state contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (Article 1).

[3]*Cf Republic of Turkey v The Metropolitan Museum of Art* 762 F supp 44 (SDNY 1990). Turkey refers to this find as the 'Lydian Hoard'. The find was restored after twenty-five years. See in general Blake 'The protection of Turkey's underwater archaeological heritage — legislative measures and other approaches' 1994 *International Journal of Cultural Property* 273, 287*ff*; Church 'Evaluating the effectiveness of foreign laws on national ownership of cultural property in U.S. courts' (1992) 30 *Columbia Journal of Transnational Law* 179.

in situ.

Cultural self-determination is of growing importance in the modern world and continual evaluation and reassessment of our own thinking on the topic is required. This article begins with a general background to the illegal export and enforcement of another nation's export restrictions. Secondly, it illustrates issues arising in the context of standing to sue. Then follows an overview of modern legislative and judicial strategies for recovery, including rules of the conflict of laws and import and export laws.

ENFORCEMENT OF ANOTHER NATION'S EXPORT RESTRICTIONS

Where trans-national private law problems feature in civil cases and prosecutions, judicial strategy often hinges on the question of whether or not theft can be alleged. Often the question of illegal export involves determining whether removal in violation of export restraints of the state of origin, pre-empts legal transfer, or whether it constitutes theft.[4] The question of illegal export does not necessarily mean a preceding theft took place at the original location. At least there seems to be agreement that removal of inventoried property amounts to theft, no matter in what state of neglect the object may have been.

Paragraph 1 of the Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict has given rise to more than one interpretation. Paragraph 1 reads:

> Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property.

Some authors interpret this regulation as intending to ban all types of removal. If cultural objects were exported during an armed conflict, there would be an absolute right of restitution under the Protocol. Others see the regulation as imposing a duty on the occupying power to forbid any transactions contrary to the internal regulatory legislation of the occupied country. All issues of private law and conflict of laws were excluded from the Draft Convention because of irreconcilable differences in national laws. Public international law rules on restitution were included in an optional protocol.

Traditional international law does not oblige any nation to enforce another nation's restrictions on the export of privately held cultural objects. The 1970 Unesco Convention,[5] the 1995 Rome Convention,[6] and EU Council Directive

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[4]The legality of the removal of cultural objects during colonial rule is not discussed in detail here. See Thomason 'Rolling back history: the United Nations General Assembly and the right to cultural property' 1990 (22) *Case Western Reserve Journal of International Law* 47. For a discussion of the obligation to return anthropological and ethnographic items removed during colonial rule and currently forming part of the public collections of the former coloniser, see Walter *Rückführung von Kulturgut im internationalen Recht* (1988) 103*ff*.

[5]1970 Unesco Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property 823 *UNTS* 231.

[6]1995 Rome Convention on the International Return of Stolen or Illegally Exported Cultural Objects (1995) 34 *ILM* 1322.

93/7 of March 1993,[7] modify this principle to an extent,[8] but the debate continues. A number of states favour the idea that illegal export from one jurisdiction renders import into a second jurisdiction illegal. Whether illegally exported goods automatically constitute 'stolen' goods, within the meaning of an Act declaring state ownership in respect of certain objects, is a question typically related to the North-South, or art-poor and art-rich, divide. States that do not grant extraterritorial effect to what a foreign jurisdiction regards as criminal behaviour, allow import of these materials into their territory. Consequently, they are loath to concede that a taint may attach to the purchaser's title due to illegal export from a foreign jurisdiction. From their perspective, to concede this, would amount to an expropriation of the property of the purchaser.[9]

If country A enforces the export law of country B, it is possible that all the objects illegally exported from country B are considered stolen by country A or by the country in which they are located. Considering that thirty-six different cultures flourished on Turkish soil at different periods, that Turkey has more Roman towns and ancient Greek sites than Italy and Greece, and that a new theory links ancient Troy (in north-west Turkey) with the lost Atlantis,[10] Turkey may be concerned to know whether it will stand the best chance of success if it uses theft as the basis for recovery. Those interested may wonder whether Turkey's action for recovery should be allowed to succeed.

While the act of state doctrine, in one of its typical applications, relates to the taking of property by a state within its own territory, the doctrine will not be canvassed here. Usually, if the original taking of cultural objects by the state was compensated, foreign restitution claims against a *bona fide* purchaser would be recognised and such claims may be allowed.[11] The foreign immunity defence does not prevent a claimant state from suing for recovery

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[7]Council Directive (EEC) 93/7 of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State *OJ* L 74/74, 27.3.93.

[8]Article 7(a) of the 1970 Unesco Convention (*supra*) and arts 3 & 5 of the 1995 Rome Convention (*supra*).

[9]*Jeanneret v Vichey*, 541 F supp 80 (SDNY 1982); reversed and remanded, 693 F 2d 259 (2d Circuit 1982), discussed *infra*. The MA Museums Code takes an ambivalent approach to acquisition of illegally exported objects. For an analysis of clauses 4 and 5 of the Code, see Palmer 'Recovering stolen art' 1994 *Current Legal Problems* 215, 242-245.

[10]Blake n 3 above at 273.

[11]This was the nature of the action and the theory on which claims in respect of paintings, mosaics and artefacts were based in *Kunstsammlungen zu Weimar v Elicofon*; 678 F 2d 1150 (1982); *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992); *Government of Peru v Johnson, Wendt, Swetnam et al* 720 F supp 810 (CD Cal 1989) affirmed, sub nom *Government of Peru v Wendt*, 933 F 2d 1013 (9th Circuit 1991), full opinion in 90-55521, 1991 US App Lexis 10385 (9th Circuit 1991); *Republic of Turkey v The Metropolitan Museum of Art* 762 F supp 44 (SDNY 1990). The foreign immunity defence does not prevent a claimant state from suing for recovery in a foreign jurisdiction, if its government is recognised by the *forum* state. O'Keefe & Prott *Law and Cultural Heritage vol 3: Movement* (1989) 621.

in a foreign jurisdiction if its government is recognised by the *forum* state.[12]

ESCAPING THE INADEQUACIES OF RELYING ON EXPORT LAWS

The inadequacy of the existing international enforcement scheme and the resulting uncertainty over which nation is entitled to a particular cultural object, has prompted national[13] governments to draw legislation aimed at ensuring retention and ultimately recovery. Domestic legislation of this kind is generally based on the wish to retain or recover, an object once a country has sustained a loss. Import restrictions may be drawn up or tightened based on a hope for reciprocal treatment by other states. Another possibility is to check what legislative changes are required for a conflicts scheme to apply. The conflict of laws scheme is based on the willingness on the part of courts to give effect to foreign laws. All these counter-measures or strategies for recovery of unlawfully exported items of cultural heritage are investigated below, since poor source nations' efforts to retain their cultural heritage include demands for more favourable treatment of their claims for the return of illegally exported objects.

American authors have contributed significantly to the identification of the differences between theft and illegal export. As their work gave shape to case law and the 1995 Rome Convention, a significant section of this article deals with American law.

STANDING TO SUE AS A PRELIMINARY ISSUE

The judicial recognition or denial of standing to sue constitutes one of the most important determinants of the outcome of litigation over cultural objects, and is likely to be raised as a preliminary issue. *Union of India v Bumper Development Corporation Ltd*[14] raised some particularly interesting issues certain of which deserve discussion. Advocates of return will find many encouraging signals in the case.

A collector-agent bought a *Siva Nataraja*, a sought-after Chola bronze temple idol.[15] The transaction included a *Sivalingam*, a carefully fashioned stone object that formed the focus of religious worship. A labourer had unearthed the objects in the village Tamil Nadu, India, in 1976. After the illegal excavation and export from India, a complex series of transactions took place, including a sale, under false provenance, to a Canadian oil company (Bumper Development) in 1982. While the *Nataraja* was in the hands of the British Museum for appraisal and conservation, the Metropolitan Police seized it with the intention of restoring it to its true owner. Bumper Development brought an action against the Commissioner of Police, claiming return and damages.

When the claims to the *Nataraja* were brought before the English Court of

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[12]O'Keefe & Prott n 11 above at 621.

[13]Including central and federal governments, where applicable.

[14](Unreported, QBD) 17 February 1988. See Ghandi & James 'The god that won' 1992 *ICJP* 369 *ff*.

[15]*Siva Natarajas* are representations of the Hindu god *Siva* and are found in various forms. The estimated value of the *Siva* in this instance is in excess of £1.5 million.

Appeal (*Bumper Development Corp Ltd v Commissioner of Police of the Metropolis*[16]), the court held that the sculpture belonged to the god *Shiva* himself as 'localised' in a stone emblem at the site of a ruined temple in India, and had to be returned. The court had to consider the following:

- the legal capacity in India of a temple and/or *Sivalingam* to hold title to property and pursue an action in the UK directly or through a 'fit' person;[17]
- the sufficiency of a fit person's continuity of association with the temple to qualify as *de facto* trustee in terms of Hindu law;
- whether a foreign legal person, which would not be recognised as such under English law and which has an essentially inanimate content, can sue in the English courts;[18] and
- the comity of nations.[19]

In its consideration of the *locus standi* of a Hindu religious institution to sue for the recovery of property in an English court, the English Court of Appeal came close to deciding that the *Sivalingam* in issue was a juristic entity for the purpose of English law. The court ruled that the ruined 12th century Indian temple, the site of which yielded the object and recognised as a legal entity in Indian law, was entitled to sue for recovery and capable of being recognised as a legal entity in English law through the third claimant. Consequently, the third claimant (who claimed as a 'fit' person of the temple on his own behalf and on behalf of the temple itself) had standing to sue.

The finding was that the fourth claimant, the institution comprising the temple, had a valid title to the *Nataraja* superior to that enjoyed by Bumper, and that the state of Tamil Nadu would have title to the *Nataraja* under the provisions of Indian law, including the Indian Treasure Trove Act of 1878.[20] The dealer had to reimburse the foundation which owned the temple premises and the foundation received the right of possession for ten years.

The Court of Appeal treated the foreign law as a question of fact to be decided by the judge, in terms of the general rule that foreign law is assumed to be the same as English law unless the party asserting it to be different proves otherwise. Foreign law must be proved by expert evidence, and the judge may consider the texts relied on by the expert witnesses better to appraise the evidence.

English law, as the law of the *forum*, allows foreigners to be party to legal proceedings in the UK. Under the British Law Ascertainment Act 1859, it is possible for a judge to refer a dispute over the effect of a law of a Commonwealth country to the courts of that country. However, the situation presented to the court was different: could a foreign legal person that would not be

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[16][1991] 4 All ER 638.

[17]At 643.

[18]*Bumper Development Corp Ltd v Comr of Police* [1991] 4 All ER 638, 647.

[19]At 648.

[20]Ghandi & James n 14 above at 369 *ff*. The authors had access to the transcript in addition to the All English Reports.

recognised as a legal person by English law, sue before English courts? In this instance, the court recognised that the English law took a very limited view on legal personality compared with other systems (insisting on personified groups or series of individuals). It was declared that

> ...[t]he touchstone for determining whether access should be given or refused is the comity of nations ... [21]

and standing to sue for the recovery of the *Nataraja* was conceded. Having made the finding that the temple was a juristic entity for the purposes of English law, it was unnecessary to decide whether the *Sivalingam* was a juristic entity for the purposes of English law.

The idol was returned to India after having been entrusted to the Indian High Commission in London.

Public policy played a significant role in the decision. If the judgment means that any institution that is a legal entity in its own country will be held to have standing to sue in the UK to recover lost property, international protection of cultural heritage will have received a welcome boost.[22]

STRATEGIES FOR RECOVERY

Import restrictions

Import restrictions may be implemented in the wake of a bilateral treaty or executive agreement. Import restrictions may also be effected in terms of the 1970 Unesco Convention.

America concluded bilateral treaties with Mexico in respect of goods in US territory,[23] and executive agreements with Peru (1981), Ecuador (1983) and Guatemala (1984). The US imposed import restrictions on archaeological objects from an endangered zone in El Salvador (1987); on ethnographic textiles from a town in Bolivia (1989); on archaeological materials of an ancient culture from a site in Peru (1990); on archaeological materials from a state in Guatemala (1991); and on archaeological objects from a region in Mali (1993).

An import prohibition scheme is one of the possibilities raised by the 1984 Consultative Document on the Commonwealth Scheme for the Protection of the Material Cultural Heritage.[24] The country of location prohibits the import of items covered by the scheme that were exported without a permit as required by the country of export. The country of location does not enforce the prohibition so as to enforce the laws of the latter, but in order to enforce

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[21]At 647.

[22]Follow-up litigation was instituted before Canadian courts in 1995; see 1995 7 80 (Alb CA) *Western Weekly Reports*.

[23]Treaty of Cooperation between the USA and the United Mexican States Providing for the Recovery of Stolen Archaeological, Historical, and Cultural Properties 17 July 1970, 22 *UST* 494.

[24]See the criticism of Prott & O'Keefe n 11 above at 588, 606, 625; and the update by O'Keefe 'Protection of the material cultural heritage: the Commonwealth scheme' (1995) 44 *International and Comparative Law Quarterly* 147, 153.

its own laws. The laws of the country of export merely provide the operative event for bringing *forum* law into play (see below under *Encouraging signs*).

One of the best examples of import restriction legislation is Canada's Cultural Property Export and Import Act 1975 (CPEIA),[25] which entered into force in 1977. CPEIA controls the movement of cultural goods at the point of entry, *ie* the import into Canada of any 'foreign cultural property' that has been illegally exported from a 'reciprocating state' (a state that is party to the Unesco Convention), after the coming into force of a 'cultural property agreement' between the two countries. Once the property has been designated as having been illegally imported into Canada, the government of the reciprocating state is permitted to request the recovery and return of the property from the Minister of Canadian Heritage. If the property is located in Canada, the Attorney-General of Canada may bring action for recovery of such property on behalf of the reciprocating state. The court ordering return of an object may also order payment of compensation to a *bona fide* purchaser who holds valid title but who was unaware of the illegality of its exportation.

US enabling legislation adopted to give effect to the 1970 Unesco Convention requires a deliberate response to a country that requests the imposition of US import controls against their illegally exported endangered cultural property. Such a country must demonstrate the seriousness of the threat to its cultural objects before the US will be willing to impose controls.

The impact of import restrictions imposed by the US on source countries has varied. Bans may have diverted the illicit traffic to other art-importing countries, which find these objects all the more attractive.

Domestic ownership rules

So-called 'vesting laws' contain rules that define the property of the state or nation of origin. The 1970 Unesco Convention employs the term 'nation of origin' as

- the nation of cultural origin (a nation whose people are the artists who made the objects or the cultural descendants of those who made the objects); and
- the nation who inhabits the territory of a state where the object or the original site was reported or believed to be located at the time when the discovery was made in modern times.

Litigation that requires proof of foreign law before foreign courts may depend heavily on the relevant provisions. Many of the 'new' states of the post-war world have introduced comprehensive statutes asserting state ownership in the vestiges of the past. Examples of such vesting statutes are to be found among Latin, Central American and African states. Governments of forty-odd other countries — among them Greece — have established similar claims in respect of archaeological objects.

Legislative changes in the UK in the form of the Treasure Trove Act 1996, are

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[25]RSC 1985 c-51.

aimed at encouraging the effective reporting and monitoring of finds, the duty being enforced by the threat of the abatement or denial of a reward. Local agreements between coroners, local government archaeological officers and local and national museums indicate whether or not the items will be acquired by a museum and whether or not a coroner's inquest will be held. In this way, local agreements give substance to the principle that treasure vests in the crown. The national museum will be entitled to first right of acquisition.[26] Presumably the museum will wish to purchase only finds of national importance. In respect of non-treasure, ownership and right to possession must be settled by the ordinary civil process.[27]

The declaration of all natural and cultural property as state property is part of the Turkish system of legislative control. Article 5 of the Turkish Antiquities Law 1983,[28] is an example in point. It provides

> All movable and immovable cultural and natural property that needs to be conserved and is found or is to be found on property belonging to the state, public institutions or private institutions and individuals is considered state property.

The Law constitutes an 'umbrella statute' necessary for a state claim to the ownership of cultural property found above or below the ground or underwater within Turkish territory. Characteristically, vesting laws prohibit export or sale for export, or they restrict both activities to guard a nation's jurisdiction and its power to regulate use or disposition.

Nations such as Guatemala, Mexico and Peru have national legislation declaring broad categories of objects to belong to the nation — whether discovered or undiscovered, whether found on public or private land, and whether possessed by public institutions or private individuals.

When these laws are applied to portable or monumental antiquities from an earlier civilisation within a country's frontiers, it may be asked which state of origin has a rightful claim to the objects. Cultural nationalists would suggest that the 'state of origin' has the strongest claim. Yet, the term can be very confusing. It could refer to

- the nationality[29] of the artist or the manufacturer;

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[26]Subject to the rights of the Museum of London and Bristol Museums and Art Gallery in respect of finds in the relevant franchise.

[27]Marston & Ross 'The Treasure Trove Act 1996: Code of Practice and Home Office Circular on Treasure Inquests' (1998) 6 *The Conveyancer & Property Lawyer* 252*ff*.

[28]Law Protecting Cultural and Natural Property, Kanun 2863 published in *Regulations Concerning Cultural and Natural Property* The Republic of Turkey, Ministry of Culture (Ankara 1990) 1–21. See Blake n 3 above at 273, 276*ff*.

[29]Jayme traces the predominance of the nationality of the artwork in claims for restitution of cultural property, and the historic origin of national policies, to the role played by Canova (1757–1822) in the return of Roman artworks from Paris to Rome. See Jayme *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz* (1991); *id* 'Die nationalität des Kunstwerks als Rechtsfrage in internationaler Kulturgüterschutz' Wiener Symposion 18–19 October 1990 7*ff*. Jayme

- the place where it was created or where it was excavated;
- the place from whence it was exported;
- cultural context;
- the place where it forms part of the unique cultural identity of a people; and
- the place where it was excavated if cultural descendants of those who made the objects still inhabit the territory where antiquities have been found.

The return of objects originating from excavations in a place where there are no cultural descendants of those who made the objects left, is never a matter easily negotiated. The heritage may possess characteristics that apply to an entire region of antiquity. The heritage may even lack all relation to the state that has a territorial claim. Which nation is the entitled nation? Under the 1970 Unesco Convention, the legal bases for restitution or return by market nations to source nations, refer to the nationality of the artist, and to foreign artist's works created on the territory (article 4). It reverts to a territorial theory of enforcement, and promotes the return of cultural objects to the people and territory of origin. The nation of origin is the only nation that may rightly retain or claim repatriation of cultural objects, and that has authority to control and regulate location, to determine title and disposal of cultural materials.

The last-mentioned basis serves as the basis of Turkey's claim to the putative horde of King Priam of Troy, found by Schliemann among Trojan ruins. It vanished from the Berlin Museum in 1945, and recently turned up in the Pushkin Museum in Moscow. A state that first documented the existence of an object in modern times does not necessarily establish a stronger relation with the objects recovered, than the people who made either the discovery or the purchase. The recording state may have lost its connection with the modern history of the object in question. Where its connection with the object of the history is still intact, its claim is well-founded.

Domestic export law

A number of developing nations have enacted domestic export embargoes.[30] These usually contain a prohibition on the export of privately owned cultural property classified in some way as 'national treasure' or national cultural patrimony. There are many variables connected with such laws. They differ in the type and amount of objects placed under restriction, and a variety of systems are used to enforce them. While some countries have comprehensive legislation, others have more rudimentary provisions. Legislation may take the form of total prohibition, or it may entail a total prohibition on listed objects only with permit requirements for other objects, or a scheme based on export permits for broad classes of goods.[31] Many countries, among which members of the Commonwealth, have enacted export prohibitions on cultural materials. Canada, Cyprus, India, Malaysia, New Zealand, Nigeria, Papua New Guinea,

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opts for allocation of artworks on a national basis, as the only and most peaceful way in which the particular is to be protected in a world of uniformity.

[30]Murphy 'The People's Republic of China and the illicit trade in cultural property: is the embargo approach the answer?' 1994 *International Journal of Cultural Property* 227, 231*ff* for an overview of PRC embargo legislation.

[31]An example of the latter is the PRC's 1982 Cultural Relics Law.

Swaziland and Zimbabwe as well as South Africa count among these. This type of regulatory export law may include forfeiture and confiscation clauses, which physically restrict the object to a particular territory. Commerce based on fraudulent documentation is obviously illegal. Consequently, many have argued that export restrictions only stimulate illicit trade. Nonetheless, there have been initiatives to encourage a licit market.

Forfeiture and confiscation clauses have implications beyond limiting physical removal from the boundaries of a state. The civil or penal nature of forfeiture proceedings in the US is a technical issue, complicated by the differing scope and content of statutes authorising civil forfeiture.[32] Most civil forfeiture laws incorporate the procedures of customs laws that allow the government to seize property on a showing of probable cause.[33] Automatic transfer of title to the state upon illegal export (forfeiture) has been implemented in Mexico, New Zealand and Australia. When contravened, the enforcement of the export prohibition may secure return where international co-operation and negotiations fail.

In countries such as Sweden and the United Kingdom, cultural objects are legally protected and controlled only if a request is made to export an item. UK law requires export permits for certain cultural objects and works of art.[34] The government is allowed to acquire the object for its stated value or the price that another party has agreed to pay. UK authorities are less prone to attitudes of national property or cultural nationalism. Nevertheless, and despite rather minimal regulation, art export laws are praised for their general effectiveness, balance and moderation.[35]

The Canadian Cultural Property Export and Import Act 1975 implements the 1970 Unesco Convention and establishes a system of controls on the export from Canada of significant cultural property. British and Canadian export controls are selective. Export permission is withheld for a small number of objects of outstanding importance only; in order to allow the government and domestic institutions an opportunity to buy such objects at their full price.[36] Canadian export control legislation and British laws reflect a keen regard for trade.

The US is often categorised as a country without any export controls for cultural objects. However, there are federal statutory prohibitions on the export of objects illegally removed from federal and Indian lands.[37] A legal framework was constructed in recent years for repatriating indigenous cultural

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[32]Pretorius & Strydom 'The constitutionality of civil forfeiture' (1998) 13 *SAPR/PL* 385, 392*ff*.

[33]*Id* at 403.

[34]Import, Export and Customs Powers (Defence) Act 1939 with ministerial announcement on the open general export licence, 7 July 1989; the Export of Goods (Control) Order 2070 (1987); Notice to Exporters (Relating to Export of Works of Art and Antiquities) (1972).

[35]Palmer *Current legal problems* (1994) 252.

[36]*Id* at 215*ff*.

[37]16 USC §470 ee(c) 1988.

heritage objects within the US. The success of the initiative supports the conclusion that national legislation is an effective means for avoiding and resolving issues related to the possession and repossession of items of cultural heritage within a single country. However, there is no systematic scheme of export controls similar to the British, Canadian or South African laws.

To the extent that export prohibitions exceed those allowed under article XX(f) of the GATT (which seek to prohibit the export of a wide range of indigenous cultural material), they render the country liable for GATT-sanctioned retaliatory measures from importing market countries.

Conflicts techniques

The doctrine of conflict of laws is aimed at achieving uniformity of result. Rigid application of some of the rules of this branch of the law by the judiciary may, from time to time, defeat the aim of preserving the cultural heritage of countries.

Two judgments bode particularly well for foreign governments seeking recovery of stolen property in circumstances where they are not assisted by international and bilateral agreements.

In the *Kunstsammlungen zu Weimar v Elicofon* case,[38] two Albrecht Dürer paintings stolen from a German castle in 1945 were sold to an American citizen in 1946. The court applied New York law as *lex rei sitae* rather than German law as *lex furti*. The application of German law would have required the application of the German statute of limitations, which allows a thirty year period, and which would have meant that the Weimar Museum's claim had been extinguished. Instead, it was decided that the statute of limitations period should run from 1966, when the Weimar museum made several demands for the return of the paintings, and not 1946 when the original transaction took place, thus allowing the suit to be brought in 1969.

The *Goldberg* case concerned four surviving Kanakaria Mosaics from the 6th century apse of a Greek-Orthodox Church located at Kanakaria in Northern Cyprus.[39] The mosaics were stolen sometime between 1976 (two years after Turkish occupation of Northern Cyprus) and 1979 (when the theft was reported). They were exported from the island but their location remained unknown despite repeated efforts by the Cypriot government to locate them. In an action before the courts of Indiana, the church succeeded in its claim against Peg Goldberg, a dealer who had bought them in the free port area of Geneva airport in 1988. The law of Indiana, including Indiana conflict of laws, was applied since the court characterised the replevin action as a matter of

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[38] *Kunstsammlungen zu Weimar v Elicofon* 678 F 2d 1150 (1982).

[39] *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F supp 1374 (SD Ind 1989) affirmed 917 F 2d 278 (7th Circuit 1990) cert denied 112 S Ct 377 (1992); See in general Byrne-Sutton 'The Goldberg Case' 1992 (1) *IJCP* 151; Crowell 'Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc: choice of law in the protection of cultural property' (1992) 27 *Texas International Law Journal* 173*ff*; Pinkerton 'Due diligence in fine art transactions' 1990 *Case Western Reserve Journal of International Law* 1, 3.

tort rather than as a question related to the transfer of ownership.[40] It applied Indiana substantive law as the law 'having the most significant contact' with the defendant's acquisition. Under Indiana law, a case is time-barred under the statute of limitations as soon as more than six years have passed since the cause of action accrued. The limitation period was taken to have accrued in 1988, in favour of the plaintiff's case being heard, and not 1979 when the theft was reported to the Cyprus governmental authorities.

The resolution of the conflict was positive in both instances, although the application of the conflict of laws suffered from shortcomings in intellectual rigour. The application of New York law is not altogether convincing, and the application of Indiana law was not supported by traditional conflict of laws method.

Certain well-known techniques of the conflict of laws have the potential to enhance the global protection of cultural heritage.[41] The ordinarily applicable rule of choice of law may be by-passed and effect may be given to provisions of foreign law on export or excavation of cultural objects. Where a satisfactory level of consensus exists, mutual recognition of judgments and legislation is a further possibility.[42] International regimes tend to oblige importing states more and more to regulate imports according to a universally recognised scheme of values. Yet, even the most sophisticated system of export controls will not prevent removal of all stolen or illicitly exported objects. The readiness of importing states to recognise and enforce foreign export controls is therefore critical.

TRANSNATIONAL CONSEQUENCES

Legislation claiming title

So-called 'vesting laws' contain rules that define ownership of cultural property — the property of the state or nation of origin. A declaration of ownership of monuments, relics, contents of tombs and other items as state property

- neutralises the concern over lack of standing;
- confers standing to sue for the return of objects removed subsequently;

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[40]In Indiana, the statute of limitations for recovery of personal property is six years; Indiana Code Ann §34-1-2-1 (1983).

[41]Reichelt considered the application of a foreign rule to be justified 'in order to reach a certain measure of harmonization between the different laws'. Verheul regards the extraterritorial application of national export prohibitions related to objects in the public domain as justified. 'Foreign export prohibitions: cultural treasures and minerals' (1984) 31 *NILR* 420.

[42]Movement of important cultural heritage items frequently involves exporting, transit and importing states, sometimes several of them. The majority of claims for recovery of ownership have been brought by states. The question of recognition and application of foreign law has been raised in an important subset of disputes where states and government agencies have invoked foreign law. In general see *Attorney-General of New Zealand v Ortiz* n 1 above; 1982 3 All ER 432 CA; 1983 2 All ER 93 HL; *US v McClain* n 1 above; 593 F 658 (5th Circuit 1979); *Government of Peru v Johnson* 720 F supp 810 (CD Cal 1989) affirmed by *Government of Peru v Wendt* 933 F 2d 1013 (9th Circuit 1991); *De Raad v Ouf* NJ 1983 445 reversed on appeal to the Hoge Raad.

- confers a right to intervene in the proceedings as guardian of a national cultural patrimony; and
- means that theft will trigger the usual private law remedies.[43]

It may be necessary to decide whether export restrictions and declarations of title promulgated by foreign nations should be respected or not. Once a nation declares ownership of an artefact, it may allege theft in the event of illegal export. A vesting law gives a measure of control over the dispersal of creative works and artefacts emerging from a culture or a nation.

Although the US is accused of insufficient efforts to formulate government policy on broad claims of national ownership and has no vesting law of its own, the principle guiding the provisions of the Archaeological Resources Protection Act of 1979 (ARPA) is consistent with claims of government ownership. ARPA gives the federal government authority over artefacts found on public and Native American Lands.[44] It prohibits the sale, purchase, exchange and transport in interstate or foreign commerce of any archaeological materials taken in violation of any state or local law but does not mention privately owned land. In *US v Gerber*,[45] the US Court of Appeals interpreted the Act expansively and upheld a conviction for theft of archaeological materials from a Native American Indian site located on private land.

Forfeiture provisions and automatic transfer of title upon illegal export
Forfeiture, confiscation and seizure are primarily penalties for illegal export, although it may be argued that these penalties embody a spirit of national ownership, meant to secure the enjoyment of historic articles for the people of a country in the territory of that country. Where the foreign state asserts title, which only vests in it as a result of illicit export, it may be asked when forfeiture, confiscation or seizure took place, and whether courts elsewhere will regard the foreign law as attributing ownership to the state.

If state ownership manifests exclusively in a penalty upon attempted export, a question mark rests on the issue of how conservation or preservation is supposed to be accomplished.

The US Supreme Court has approached the nature of civil forfeiture proceedings in an inconsistent manner. Findings vacillated between the conclusion that civil forfeiture proceedings are non-punitive in nature and that they are, in fact, punitive.[46] US statutes authorising civil forfeiture vary in scope and content to a considerable degree.

Conflicts scheme
A conflict of laws scheme has gained in significance, especially in common law countries, to assist recovery by a country. Pleas for the enforcement of export

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[43]Murphy n 30 above at 232.

[44]16 USCA § 470aa–470mm (West supp 1989).

[45]999 F 2d 112 (7th Circuit 1993).

[46]*Various Items of Personal Property v US* 282 US 577 (1931); *US v One Assortment of 89 Firearms* 465 US 354 (1984); *US v Ursery* (1996) 116 S Ct 2135. See Pretorius & Strydom 'The constitutionality of civil forfeiture' (1998) 13 *SA Publiekreg/Public Law* 285, 293*ff*.

scope and content to a considerable degree.

Conflicts scheme

A conflict of laws scheme has gained in significance, especially in common law countries, to assist recovery by a country. Pleas for the enforcement of export laws by importing countries are in line with the recognition that international law extends to the right of every state to its historical and cultural wealth. States do not generally dispute the necessity of developing and protecting national cultures so as to enrich the culture of mankind.

In many ways, the traditional conflict of laws methodology remains ill-adapted to the protection of cultural objects. Connecting factors, in particular the *lex situs* rule, are often static.[47] As a result, there is a continuing need for the rules of the conflict of laws to take account of realities. The last decade of this century bears witness to the polycategoric role that the conflict of laws has assumed in the battle against art smugglers. The co-existence of the conflictual and policy-oriented methodologies (functional and result-selecting methods) has boosted the multiplicity and diversity of solutions available to private law problems of a trans-national nature.

Attention has focused less on a choice of law rule for return than on pliant techniques of the conflict of laws that can override ordinary choice of law rules when the enhancement of the global protection of cultural objects so requires, and that may also be applied where a government is the plaintiff.[48]

A growing number of parties have sought a determination of their rights in the courts by bringing claims for restitution in respect of a variety of different categories or classes of objects. Cases instituted by governments now form an important subset of cultural heritage jurisprudence.[49] Whereas foreign penal

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[47]The *lex situs* rule is not always able to harmonise national and private interests and public and private law. See Roodt 'Keeping cultural objects "in the picture": traditional legal strategies' 1995 *CILSA* 314.

[48]Reichelt argued that national laws prohibiting export should be allowed to limit the resale of (registered) works and objects geographically. She considered the application of a foreign rule to be justified 'in order to reach a certain measure of harmonization between the different laws'. See Reichelt 'International protection of cultural property' 1985 *Uniform Law Review* 105*ff*, reprinted as Unidroit Study LXX Doc 1 1986, 45 (hereafter 1986 Study).

[49]*Republic of Ecuador v Danusso* n 1 above; *Attorney-General of New Zealand v Ortiz* n 1 above; *King of Italy and Italian Government v Marquis Cosimo de Medici Tornaquinci and Christies* n 1 above; *United States v Hollinshead* 10970 (SD Cal 14 March 1973) affirmed 495 F 2d 1154 (9th Circuit 1974); *United States v McClain* 545 F 2d 988, 551 F 2d 52 (5th Circuit 1977); 593 F 2d 658 (5th Circuit), cert denied, 444 US 918 (1979). More recently also *De Raad v OvJ* (*supra*); *Government of Peru v Johnson, Wendt, Swetnam et al* 720 F supp 810 (CD Cal 1989) affirmed, sub nom *Government of Peru v Wendt* 933 F 2d 1013 (9th Circuit 1991), full opinion in 90-55521, 1991 US App Lexis 10385 (9th Circuit 1991); *Kingdom of Spain v Christie, Manson and Woods Ltd* [1986] 1 WLR 1120; and *Republic of Turkey v The Metropolitan Museum of Art* 762 F supp 44 (SDNY 1990). See Church 'Evolving US Case Law on Cultural Property Disputes' 1993 *IJCP* 47; *id* (1992) 185*ff*; Kenety 'Who owns the past? The need for legal reform and reciprocity in the international art trade' (1990) 23 *Cornell International Law Journal* 1, 19–22; O'Keefe 'Export and import controls on movement of the cultural heritage: problems at the national level' (1983) 10 *Syracuse Journal of International Law and Commerce* 352; Reichelt (1986 Study) 18.

enforcement of legislation on national cultural patrimony has the obvious advantage of dealing with a unique object in the unique way the state of origin had intended for it.[50] It is small wonder then that a modern stream of thought in the conflict of laws would support recognition and enforcement of foreign public law before municipal courts in the absence of treaties on mutual recognition of legislation and statutes prescribing reciprocity. If courts should entertain and adjudicate, recognise and enforce claims based on public rules of inalienability, classification, pre-emption, notification of transfer, export control in respect of important and identifiable items, or control of archaeological excavations, then application of the legislation of a foreign state in the courts of the *situs* of the object may create effects very similar to reciprocal import restrictions.[51] To the extent that the question of indigenous title to movable cultural objects arises, claims as between market state purchasers and former source state possessors may be complicated. If the market state courts defer to source country laws on title, these laws may now include recognition of indigenous title.[52]

The practical effect of enforcement of such claims by the court of the place where the object is situated may be very similar to reciprocal import restrictions. The shorthand for this idea is a 'conflicts scheme' — which relies on the willingness of courts in the importing state to enforce export controls of another country to assist recovery by that country. Pleas for the enforcement of 'vesting laws' or foreign law provisions relating to claims to title are part of this issue. These title claims usually define the property of the state or nation of origin.

In deciding which country's laws should apply according to well-established rules concerning the applicable law so as to develop common law solutions, considerations of public policy are relevant. Application[53] of these types of foreign laws flies in the face of the traditional axiomatic rule of non-application

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[50]See 9(2) Unidroit.

[51]Import restrictions implemented in the wake of a bilateral treaty or executive agreement are a sensible alternative to litigation.

[52]Walker & Ostrove 'The Aboriginal right to cultural property' 1995 *UBCLR Special Issue* 13, 24*ff*.

[53]Although the line between recognition and enforcement is not very clear, English courts differentiate between enforcing a foreign law and recognising a foreign law. A foreign law is recognised whenever a contract which requires its violation, is not upheld (*eg* the unenforceability of contracts violating a state's exchange control). English courts have recognised foreign statutes vesting title in a foreign government by means of expropriation of property which at the time of the transfer was located in the expropriating country as long as it is in keeping with its own public policy. Under Canadian law it is not necessary for enforcement of foreign export control that the source state claims title to the object. However, this procedure is unavailable in England. In the *Ortiz* case, enforcement proceedings left New Zealand with no option but to argue that it held title to the carvings. The trial judge regarded the claim as amounting to one for enforcement rather than recognition, because the claim of title was through forfeiture.

of foreign public law in the conflict of laws.[54] The principle that foreign revenue and penal laws will not be directly or indirectly enforced is a public policy exclusion of the *lex causae*.[55] In South Africa, this principle was recently reiterated in *Pinchas and another v Pienaar*,[56] albeit not in the context of cultural heritage law. When negotiations to purchase a flat situated in Israel fell through, an Israeli court made a finding against the seller. When the prospective buyers sought to enforce the decision in South Africa, the court referred to the rule of non-enforcement of foreign penal and revenue laws.[57]

When a court must deal with foreign legislation of a public character, the dimension of enforcement of foreign government regulations and laws of a public nature may appear daunting. Emerging legal recognition of title may be a further complicating legal factor.[58] Generally, few problems are encountered with the recognition of foreign laws affecting private rights, such as the law of tort or contract.

The US Supreme Court has recognised that the statutory labelling of a proceeding as either civil or penal can never be decisive of its real and *de facto* nature.[59] Nonetheless, the characterisation problem caused by the possibility of classifying the law prohibiting export as penal or as public and not enforceable lurks in every case dealing with smuggling. The outcome of a case depends on whether the whole of the foreign law is applied, including the penalties it prescribes. Where criminal sanction is the primary conditioning force of the legal order under consideration in any particular case, the general gist of the foreign law may remain concealed by the practice of non-application.

Famous rulings have distinguished categories besides 'penal' and 'revenue' laws, and occasionally the principle has been extended to a third category altogether, namely the rules of public law, without any regard for their closeness to the public law 'core'.[60] Assimilating export regulations to 'other

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[54]Spiro *Conflict of laws* (1973) 46; Kegel *Internationales Privatrecht* (1977) 290; Dolinger 'World public policy: real international public policy in the conflict of laws' (1982) 17 *Texas International Law Journal* 167, 176, 179; Rule 3 Dicey & Morris *The conflict of laws vol 1* (2000) 89.

[55]Be it the law governing proprietary aspects of transfers (the *lex rei sitae* rule), or the law governing contractual aspects of transfers.

[56]2000 3 SA 632 (W) 636.

[57]At 636.

[58]Walker & Ostrove 1995 *UBCLR* 13, 24*ff*.

[59]*Halper v US* 490 US 447.

[60]See Rule 3 in the influential text of Dicey & Morris n 54 above; also in general Williams *Protection of movable cultural property* (1978) 106. When a foreign state sues to give effect to its own law, English courts consider it to be a request to enforce a foreign law. *Attorney-General of New Zealand v Ortiz* n 1 above *per* Staughton J 443–4; Denning MR 457; *Re Helbert Wagg & Co Ltd, Re Prudential Assurance Co Ltd* [1956] 1 All ER 129, 138–9 *per* Upjohn J. In the *Ortiz* case n 1 above, the House of Lords did not express any opinion on the general question of enforceability of penal and public laws. The Court of Appeal regarded a forfeiture provision in the plaintiff state's laws to be unenforceable in England, on the basis of the principle of non-application of foreign laws of a certain kind. While Denning

public laws' has heightened the awareness of the supposed non-binding nature of foreign rules that regulate the export of cultural objects because of their cultural significance and of foreign vesting laws that extend to archaeological finds on private land in general.[61]

English law is marked by uncertainty as to the criteria for recognition of a law as a public law, and as to whether such laws should be enforced. Generally, the common law perspective of the category 'foreign public law' is that it contains little besides the notion of domestic public policy. This means that if the export controls of the reciprocating foreign state are significantly different from the domestic controls (much more or much less discriminating), they may not be enforced. The fact that the Canadian Cultural Property Export and Import Act supersedes considerations of public policy renders it commendable. Nevertheless, no foreign representative has standing to institute recovery proceedings. The Attorney-General of Canada may decline a foreign request to institute recovery proceedings if the government regards certain aspects of the request unreasonable or contrary to Canadian public policy. It cannot be predicted how Canada would assist in the enforcement of foreign export control laws whose scope vastly exceed that of Canadian laws.[62]

The continental approach, as followed in Italy, is different. The application of foreign public law is not frowned upon. Rather, if not applied, reasons are often sought.[63]

A technique that effectively eliminates the public law exception to the *lex situs* rule, is the enforcement of export restrictions at the border of the art-importing nation. The 1975 Canadian Cultural Property Export and Import Act has abolished the distinction between foreign vesting statutes, mandatory laws and export regulations, with favourable consequences.

Article 9 of the Unidroit Convention 1995 allows contracting states to apply rules more favourable to restitution or the return of stolen or illegally exported cultural objects than the Convention provides for, but without creating an obligation to recognise and enforce foreign decisions that depart from the provisions of the Convention.

Mandatory rules or directly applicable rules

It is possible to counter the effects of the axiom of non-application by the theory of *lois de police* (directly applicable rules) and by comity. The theory of *lois de police* functions as a limitation on party autonomy. *Lois de police* may be defined as domestic laws binding on all persons within the country and not subject to waiver by parties to a contract. These rules are also referred

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MR considered it to be a foreign public law (457), Ackner LJ considered the forfeiture clause to be a foreign penal law (467). It was not explained whether there is an additional category of public laws, apart from revenue and penal laws, which the court would not enforce.

[61]Kenety (1990) 23 *Cornell International Law Journal* 1, 35.

[62]Paterson *UBC law review* (1995) 251.

[63]See *Géri v France* 1918 Clunet 1249.

to as domestic *ius cogens*, *lois d'application immédiate*, peremptory or imperative rules. They interrupt the choice of law process and demand immediate application either on their express terms or by their nature.

In South Africa the *lex fori* substitutes the proper law if the court is required to give effect to or recognise the validity of a contract the performance of which implies the violation of a South African statute.[64] In *Pinchas v Pienaar*,[65] Cloete J stated that the non-enforcement of a penalty for some breach of duty to the state has nothing to do with the equities of the foreign legal system or its application. Rather, it has to do with the refusal to carry out acts of sovereignty on behalf of another state.

The theory of *lois de police* first attracted attention as a private law tool for effecting return and facilitating recovery in cases where countries of origin sue for recovery, when Reichelt conducted her two Unidroit studies at the request of Unesco.[66] Reichelt suggested introducing a rule, or a special connection rule that would ensure recognition of mandatory rules, which would (a) effect restitution to the country of origin; and (b) reflect international cooperation to prevent illicit traffic.[67] The theory was considered once again at the conflict of laws session of the XIV[th] International Congress of Comparative Law, held in 1994.[68]

Courts in common and civil law systems share the view that their rulings should not enforce contracts concluded in the course of private transnational transactions, or entered into with the purpose of undermining foreign public law or of smuggling goods into or out of a foreign state. In this regard they seem willing to allow the inter-penetration of private and public law and the application of foreign public laws in a suit between two private parties.[69]

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[64]Joubert (ed) *LAWSA vol 2* (1993) par 468; *Boissevain v Weil* 195 AC 327.

[65]*Supra* with reference to *Jones v Krok* 1995 1 SA 677 (A); *Commissioner of Taxes, Federation of Rhodesia v McFarlans* 1965 1 SA 470 (W) at 473D–474A.

[66]First study 1986; Reichelt *The international protection of cultural property, second study* Unidroit Study LXX Doc 4 (1988) 32–7.

[67]Reichelt (1988 Study) 32*ff*.

[68]31 July to 2 August 1994 in Greece. Vrellis 'Le statut des biens culturels en droit international privé' (general report).

[69]English courts will not enforce a contract that is illegal by the proper law of the contract or by the *lex loci solutionis*. *Libyan Arab Foreign Bank v Bankers Trust Co* [1987] 2 FTLR 509, 519; see generally *Ralli Brothers v Compania Naviera Sota y Aznar* 1920 2 KB (CA) 287 (foreign price control). A further set of English rulings refused to enforce contracts offending against the laws of states which merely had a strong interest in the contract. In *Regazzoni v KC Sethia (1944) Ltd* (2) [1956] 2 All ER 487 (CA) 490 319, the proper law of the contract was English law, but an Indian mandatory rule prohibiting export to South Africa was applied. None of the parties resided or traded in India, yet India was the *lex loci solutionis*, and the contract required the violation of Indian law. The court was reluctant to enforce any contract requiring the procurement of objects from a foreign country prohibiting their export. A decision of the German Federal Court of Civil Claims, *Allgemeine Versicherungsgesellschaft v EK* 22.6.72 59 BGHZ 83, confirmed that German courts are not likely to enforce foreign export control, but will not uphold a contract in breach thereof. A contract was signed between a German insurance company and a Nigerian company to cover the transport by sea of three cases of African masks and statues from Nigeria to Hamburg. The shipment violated a

Pleas for the enforcement of export laws of foreign countries by importing countries, while by no means extraordinary,[70] remain contentious when modelled in the cast of foreign *lois de police*. The application of foreign *lois de police* is not easily reconciled with the non-application rule, and for that reason remains hotly debated.[71]

Different *fora* may be expected to apply the same choice of law rule differently. Legal systems that derive their choice of law rules governing the exchange of goods from the Rome Convention on the Law applicable to Contractual Obligations of the European Communities[72] (specifically article 7), may be expected to be favourably disposed towards recognition of the mandatory public laws of other states. According to article 7, where every relevant element links a contract to the legal system of a particular country, a court bound by the Convention may apply that country's relevant rules.[73] Application of a third state's mandatory rules is not compulsory under the Convention.

The ultimate effect of the Convention will not be determined for many years to come. A proper investigation of article 7 of the Convention reveals many avenues for circumventing its application. Germany, the UK and Portugal exercised their right to abstain from applying it. Interestingly enough, English

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Nigerian export prohibition on cultural objects. In an action on the policy, one of the arguments in the shipping insurer's defence was the lack of an insurable interest because the transaction was *contra bonos mores*. The German Federal Supreme Court granted that the precepts of *boni mores* common to both Nigeria and West Germany had been violated, finding that the Unesco Convention represented emerging international public policy on the issue. Although Germany had not ratified that Convention at the date of the decision, the court drew its conclusion in the interest of maintaining proper standards for the international trade in cultural objects. An *in rem* agreement had not been established with certainty. Consequently, the contract was not declared to be contrary to German public policy and the rule against the enforcement of immoral, illicit and impossible contracts was interpreted to refer only to those contracts offending against the mandatory rules of domestic law.

[70]Reichelt, second study (1988); in general also Verheul 'Foreign export prohibitions: cultural treasures and minerals' (1984) 31 *NILR* 419–420, 423; O'Keefe & Prott n 11 above at 655–6; Pecoraro 'Choice of law in litigation to recover national cultural property: efforts at harmonization in private international law' (1990) 31 *Virginia Journal of International Law* 1, 11.

[71]See Guedj 'The theory of the *lois de police*, a functional trend in continental private international law — a comparative analysis with modern American theories' (1991) 39 *AJCL* 661, 666; in general McLachlan 'The New Hague Sales Convention and the limits of the choice of law process' (1986) 102 *Law Quarterly Review* 591; Verheul 'Foreign export prohibitions: cultural treasures and minerals' (1984) 31 *NILR* 419, 422.

[72]Concluded 19 June 1980; 19 *ILM* 1492 (1980); entered into force on 1 April 1991. The convention was incorporated into UK law with the promulgation of the Contracts (Applicable Law) Act of 1990. Germany ratified the convention in 1986 and incorporated the provisions of the convention into the German private international law in 1987.

[73]Parallels have been drawn between art 7 and the decision of the Hoge Raad in *Alnati* [1967] Nederlandse Jurisprudentie 3 also known as *Van Nieveldt, Goudriaan & Co's Stoomvaartmij NV v NV Hollandsche Assurantie Societeit and Others*. In general see Schulze 'Private international law and jurisdictional problems relating to offshore joint venture agreements' (1995) 28 *CILSA* 383 at 389.

exercised their right to abstain from applying it. Interestingly enough, English case law affords examples of refusal to enforce contracts offending against the laws of states with a strong interest in the contract. French courts invariably prefer to apply French law rather than foreign public law.

Other treaties that incorporate this technique follow the modern practice of reserving the right of states to reject foreign domestic law, which is applicable according to the treaty, if it is manifestly against public policy. The parties to the European Convention on Offences relating to Cultural Property[74] have committed themselves to the reciprocal enforcement of contracting parties' mandatory rules. Those that have mandatory rule clauses in their national law will be equally prepared to follow this course, even if they adhere to a formulaic or mechanistic application of the *lex situs* rule.[75] Member states of the European Union enjoy reciprocal rights of action in the courts of fellow member states. In and of itself, this represents a vast advance on the non-applicability rule.

Comity

In a globally interdependent world, basic notions of comity have the power to neutralise the axiom of non-applicability. The notion of an international public order demands deference to the comity between nations, which may go a long way in the battle to limit trans-border trafficking. English,[76] German[77] and Italian courts have demonstrated a willingness to consider the concept. When the English Court of Appeals in *Bumper Development Corporation v Commissioner of Police*[78] allowed a Hindu religious institution to sue in an English court for the recovery of an object, which the institution had the right to recover in terms of its own country's laws, it stated that

> [t]he touchstone for determining whether access should be given or refused is the comity of nations ... .[79]

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[74]1985 European Convention on Offences Relating to Cultural Property 25 *ILM* 44 (1986).

[75]*Eg* art 19 of the Swiss Private International Law Statute which states that a provision of a law, other than the one designated by this statute and that is meant to be applied mandatorily, may be taken into account if 'legitimate' and 'clearly overriding interests' so require and the case is closely connected to that law. A foreign law strictly regulating all commerce in ancient objects and declaring them to be state property seems to fulfil the requirements.

[76]Staughton J declared as follows in *Attorney-General of New Zealand v Ortiz* n 1 above at 371–2: 'Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion.'

[77]In *Allgemeine Versicherungsgesellschaft v EK* n 69 above, reference was not made to comity by that name, yet it was recognised that decency in international trade of cultural objects and high standards of international cultural cooperation may require the observation of a foreign export prohibition.

[78]All ER [1991] 4 648.

[79]At 647.

In *Loucks v Standard Oil Co of New York*,[80] Cardozo J stated that

> [t]he courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Furthermore, there are concrete examples of the incorporation of international public policy into Canadian law. Judicial recognition has been given to an increased international acceptance and preference for private arbitration of international business disputes.[81]

Italy is most direct in basing its position on comity. In a landmark decision an Italian court, in *Republic of Ecuador v Danusso*,[82] upheld Ecuador's claim to more than 25 000 pre-Columbian antiquities. These had been sold to an Italian speculator in Ecuador and clandestinely exported to Italy in violation of the Ecuadorian law. The Italian dealer put them up for sale in Italy, but Ecuador brought suit before they could be resold to a *bona fide* purchaser. At the time, Ecuadorian law did not contain any direct claim to ownership of all cultural objects. The regime authorised prohibition of free trade, imposition of limitations on acquisition by private individuals, and prohibition on export.[83] Investigations finally culminated in civil proceedings, at which point Ecuador passed legislation declaring the state to be the owner of all archaeological objects beneath the soil. The Italian court took cognisance of this new law clarifying the state's declaration of ownership. Consequently, it recognised a type of property intermediate between private property and property owned by the nation in the public interest — somewhere on the continuum between mere assertion of ownership and actual possession. Ecuadorian law was regarded as fully compatible with the Italian regime, which declares certain cultural objects outside the bounds of ordinary commerce.

The decision to uphold a foreign state's mandatory rule that renders inalienable and indefeasible its protective powers as part of its *dominio eminente*, makes the *Danusso* case a notable one. It is even more notable for its affirmation of the 1970 Unesco Convention as a statement of international policy, notwithstanding the fact that the Convention had not entered into force at the time of the events in question and was not directly applicable. The Appeal court in Turin upheld the decision, despite the retroactive applicability of a vesting statute not constituting a popular basis for demanding restitution.

As an expression of a new conception of international comity, the international public order is not a matter of legal obligation, nor is it mere courtesy. It is best understood as a pragmatic response to the international context of the transnational movement of cultural objects. In *Hilton v Guyot*,[84] Justice Gray described it as

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[80](1918) 224 NY 99, 111.

[81]Paterson n 61 above at 249.

[82]Note 1 above.

[83]Second Civil Section, 632-3.

[84](1895) 159 US 113, 163.

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of the laws.[85]

Comity favours acceptance of the laws of foreign states, particularly where they 'do not encroach on any cognizable interest of the forum'.[86] Portugal, with a remarkably internationalist spirit, adopted a provision of domestic law that supports recognition of foreign legislation in the realm of cultural heritage protection. Transactions in Portuguese territory concerning objects of artistic, archaeological, historic and bibliographic value originating in a foreign country are rendered null and void when effected in breach of that country's legislation regulating alienation or exportation.[87]

The relationship between international public policy and the common law is more uncertain.

Comity is an appealing basis for application of foreign law in that it is familiar and avoids characterising foreign legislation as illegal, thus lessening the need for extraterritorial application of legislation that may raise questions of justifiability.[88] Verheul regards a refusal to apply foreign laws that protect values that are universally shared on account of their nature as public laws as contrary to 'a new trend on the ground that it is not in conformity with the archaic concept it has supplanted'. He extends this view to a court in a state that is not a party to international conventions on the subject.[89]

Encouraging signs

International cooperation may lead to taking into account foreign public law that restrains certain transactions, irrespective of whether the *lex fori* or the foreign law applies.[90] The 1975 Wiesbaden Resolution of the Institut de Droit International documents an emerging consensus in favour of the general application of foreign public law not only as a *datum*, but also as 'an incidental but determinative element of the *lex causae*'[91] to the extent that the public policy considerations of the *forum* may allow this. The 1977 Oslo Resolution reflected a tripartite approach to the treatment of public law claims of foreign states, stating that they should be admissible if based on propositions of public law which, as viewed by the *forum*, are 'consequential or accessory to private law claims'. Moreover, even when from the perspective

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[85]See also Dolinger (1982) 17 *Texas International Law Journal* 167, 186, 191 on enforcement of international contracts.

[86]Pecoraro (1990) 31 *Virginia Journal of International Law* 126 with reference to Maier.

[87]Article 1 Decree-Law 27633 of 3.4.1937; article 31 Law 13 of 1985; in general O'Keefe & Prott n 11 above at 607.

[88]Schachter *International law in theory and practice* (1991) 259.

[89]Verheul (1984) 31 *NILR* 420.

[90]See Ehrenzweig *Private international law* (1967) 83–4 on 'foreign rule by nonchoice'; Baade 'Operation of foreign public law' in *International encyclopedia of comparative law vol 3* chapter 12, 16; Lipstein *Principles of the conflict of laws, national and international* (1981) 66.

[91]*Institute of International Law Yearbook vol 56 Session of Wiesbaden* 1975 20th Commission, res 4: The application of foreign public law, 551–3.

of the *forum*, the objective of such a claim is connected to the exercise of governmental power, they can be considered admissible where the *forum* state views this as justified by 'the convergence of the interests of the states concerned' for example. The public law claims of foreign states, which can be fitted into standard categories such as contract or property, ought not to be excluded as a matter of principle. Sovereign claims, which are the equivalent of private law entitlements, should not have failed for being based on public law,[92] even where the relics concerned have not been in the possession of the state.

Article 13 of the Swiss Federal Law on Private International Law of 18 December 1987 reiterates that a foreign provision of public law may be applied provided that it is not in conflict with Swiss public policy. Articles 14-16, and 27 of the European Convention on Offences relating to Cultural Property have very much the same in mind.[93]

CONCLUSION

The restitution of property stolen, lost or misappropriated across state boundaries is a complex issue that is explained with reference to examples. Strategies for retention and recovery include rules belonging to the area of the conflict of laws and import and export laws.

If the progressive *Danusso* case is anything to go by, Turkey's action for recovery in *Example 2* above could be allowed to succeed. At least the action need not be based on the retroactive applicability of a vesting statute, since the statute had been promulgated by the time the illegal excavation was undertaken. If the Turkish government bases its claim on its status as nation of origin, it would have its strongest chance of success to effective protection if it had thoroughly documented the site in question before the excavation took place.

Mandatory rules of another country that express a vital interest of the legislating state may be co-existent with a common concern of states. These concerns may lead to international cooperation to frustrate activities designed to undermine shared public policies. A policy of international law may be invoked in order to promote some international end or in order to recognise the mandatory rules of a third state. The policy may neutralise other choice of law rules such as the law of the *situs*. Countering the effects of the axiom of

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[92]*Per* Powell J in the 'Spycatcher' case; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd.* [1988] i NZLR 129 (CA); *Attorney-General (UK) v Heinemann Publishers Australia (Pty) Ltd [No 2]* (1988) 62 ALJR 344 (HC of A); 1988 78 ALR 449, 457. The majority of the High Court of Australia regarded the non-enforcement rule to be applicable to 'claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government'. In *US v Ivey* (1969) 139 DLR (4th) 570 the Canadian court did not apply the non-application rule, and opted to enforce a US federal court judgment ordering the defendants to reimburse the US government for its environmental clean-up of a waste disposal site.

[93](1989) 25 *ILM* 1382. In general also Pecoraro (1990) 31 *Virginia Journal of International Law* 25; Ehrenzweig-Jayme *Private international law vol III* (1977) 26-7.

non-application by means of the direct application of the mandatory rules of a foreign jurisdiction is controversial however, because the two approaches stand in direct opposition to each other.

It remains to be seen how South African courts will regard a foreign provision of public law concerning the protection of foreign cultural heritage that is not in conflict with its public policy. A governmental claim for recovery of an item of cultural heritage will give South African courts the opportunity to consider the scope and application of the comity principle and to recognise that such a claim, being substantially of a private law nature, does not render the non-application rule automatically applicable.