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ORDER FROM CHAOS? THE CURRENT STATUS OF INTERNATIONAL LAW REGARDING THE ILLEGAL EXPORTATION OF CULTURAL PROPERTY FROM LATIN AMERICA

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I. INTRODUCTION

A. PUBLIC INTEREST IN THE PROTECTION OF CULTURAL PROPERTY

IT has been pointed out by John Henry Merryman, one of the foremost authorities on art and antiquities law, that there is great empirical evidence to demonstrate the international interest in the protection of cultural property.¹ “The existence of thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; brisk markets in art and antiquities; university departments of art, archeology, and ethnology; [and] historic preservation laws [. . .] all demonstrate that people care about cultural property.”² An enormous amount of time, effort, and money are all spent in attempts to create, discover, acquire, and display cultural objects in the world today.³

The benefit and importance of cultural property is further supported by its protection in international law.⁴ “International law strongly encourages the protection, preservation, and display of the world’s common cultural heritage in nations which possess the resources to provide protection as well as the development of facilities to study cultural artifacts placed in their care.”⁵ Unfortunately, this interest has also had negative consequences for the world, especially for the nations with large reservoirs of cultural property. As a result of this widespread interest in cultural property, there has been an increase in the demand for cultural objects, which has contributed to the growing problem of illegal exporta-

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1. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 343 (1989).

2. *Id.*

3. *Id.* at 344.

4. Mark F. Lindsay, Note, *The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage*, 22 CASE W. RES. J. INT’L L. 165, 173 (1990).

5. *Id.*

tion of cultural property.⁶

B. THE GROWING PROBLEM OF ILLEGAL EXPORTATION

The struggle between those nations that are characterized as art rich and those that are characterized as art poor has contributed to the rise of illegal exportation of cultural objects from their nations of origin.⁷ Art rich nations are those that produce a large portion of the world's cultural property while maintaining ample cultural resources.⁸ Surprisingly, these countries are frequently described as underdeveloped.⁹ Mexico is an example of an art rich Latin American country.¹⁰ Art poor nations are those that have the resources to, and are attempting to, expand their collection through acquisition from other nations.¹¹ The United States and Great Britain are both examples of art poor nations.¹²

In recent years, art rich nations have taken a hard line in an attempt to retain their cultural heritage. In this attempt, they have passed laws restricting or even preventing the export of cultural property from their borders.¹³ However, the demand for cultural property has not diminished in art poor nations.¹⁴ This has led to many attempts to circumvent the system to realize the financial gains that come from the sale of cultural items in art poor nations like the United States.¹⁵ The wealth of countries like the United States and various western European countries has created a market that is so economically rewarding that illegal activity is practically encouraged.¹⁶ As a result, countries like the United States face a dilemma in deciding whether to support those nations whose cultural heritage is being threatened or, on the other hand, to foster trade in art and antiquities.¹⁷ This conflict has resulted in a lack of legal clarity.

6. *Id.* at 167.

7. *See id.*

8. Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 *SUFFOLK TRANSNAT'L L.J.* 609, 613 (1992).

9. Lindsay, *supra* note 4, at 166.

10. *Id.*

11. Margules, *supra* note 8.

12. Lindsay, *supra* note 4, at 167.

13. *See id.* at 172.

14. Since 1972, the value of unlawful trade in art and antiquities has doubled from approximately one billion dollars per year to an estimated two billion dollars in 1990. Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 *COLUM. J. TRANSNAT'L L.* 179, 180 (1992).

15. *See* Lindsay, *supra* note 4, at 168.

16. *Id.*

17. Church, *supra* note 14, at 181-82.

II. THE CURRENT STATUS OF THE LAW REGARDING ILLEGAL EXPORTATION OF CULTURAL PROPERTY FROM LATIN AMERICAN COUNTRIES

The current status of the law regarding the illegal exportation of cultural property is murky for a number of reasons. First, cultural property trade law is a relatively new area of study; therefore it lacks "consistency, coherence, and elegance."¹⁸ "Key concepts have not been refined. Important questions await legislative, judicial, and scholarly attention."¹⁹ A second reason for the lack of clarity in this area is due to legislation and agreements. The legislation and agreements passed thus far can only be effective to the extent that the nation into which the cultural property is being imported chooses to enforce them.²⁰ This problem has left it unclear when legislation will be enforced and when it will be overlooked.

A. EXPANSIVE MULTILATERAL AGREEMENTS

The first major piece of international legislation on the subject was the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 Convention).²¹ The 1970 Convention is regarded as "the primary international instrument regulating trafficking in cultural property."²² The parties to the 1970 Convention agreed, among other things, to: (1) oppose the illegal import, export and transfer of ownership of cultural property "with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations;"²³ (2) consider the import, export or transfer of ownership of cultural property, in violation of the Convention's provisions, illegal; and (3) prevent the importation of these illegally exported objects and to facilitate their return to their nation of origin.²⁴

Even though the 1970 Convention has been a critical part of the attempt to protect cultural property, it is also flawed. The flaws of the 1970 Convention appear in four areas. First, of large art poor nations, only the United States and Canada have ratified the Convention.²⁵ Second, the Convention poses problems for art rich nations that are often undevel-

18. John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 *CARDOZO ARTS & ENT. L.J.* 51, 52 (2001).

19. *Id.*

20. Church, *supra* note 14, at 181-82.

21. See Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971), available at http://www.unesco.org/culture/laws/1970/html_eng/page1.htm (last visited Oct. 23, 2002) [hereinafter 1970 UNESCO Convention].

22. Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1053 (1993).

23. 1970 UNESCO Convention, *supra* note 21.

24. *Id.*

25. Theresa Papademetriou, *International Aspects of Cultural Property*, 24 *INT'L J. LEGAL INFO.* 270, 296 (1996).

oped and lack the economic resources to implement adequate measures to pursue repatriation claims for cultural property around the world.²⁶ Third, the ratifying states' obligation to return the illegally exported cultural property was severely limited by article 7 of the Convention.²⁷ Under article 7, the duty to return cultural property applies only to that property which has left the source nation as a result of "theft from museums, religious or secular, or public monuments or from similar institutions."²⁸ The 1970 Convention does not apply in circumstances of theft from privately-owned collections or institutions or to property that has been illegally exported in a manner other than actual theft.²⁹ Finally, the Cultural Property Implementation Act, which codified the 1970 Convention in the United States, requires that the institution seeking to recover its cultural property has previously inventoried and documented the item.³⁰ This inventory requirement has frequently been criticized because of its impracticability for many institutions.³¹

B. REGIONAL AGREEMENTS

Narrower bilateral and multilateral regional agreements have actually proven more effective in controlling the illegal movement of cultural property between its signatory nations than the more expansive legislation discussed above.³² An example of such legislation is the Treaty of Cooperation Between the United States and Mexico Providing for the Recovery and Return of Stolen Archeological, Historical, and Cultural Properties (Mexican Treaty), which was implemented in 1970 as a response to Mexico's overwhelming loss of cultural property from archeological sites.³³ The purpose of the Mexican Treaty is to "encourage the protection, study, and appreciation of properties of archeological, historical or cultural importance, and to provide for the recovery and return of such properties when stolen."³⁴ The treaty ensures the recovery of specifically classified cultural property that is owned by the government of any party to the treaty and has been stolen and transported to another nation that is a party to the treaty.³⁵

26. Mastalir, *supra* note 22, at 1055.

27. Papademetriou, *supra* note 25, at 295.

28. *Id.* at 294.

29. *Id.*

30. Margules, *supra* note 8, at 623 (citing the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1983)).

31. *Id.* (citing Partington & Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?*, 12 COLUM.-VLA J. L. & ARTS 395, 399 (1998)).

32. Clemmency Coggins, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT'L L. 183, 184 (2001).

33. Margules, *supra* note 8, at 627; Recovery and Return of Stolen and Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494 [hereinafter Mexican Treaty].

34. Mexican Treaty, *supra* note 33.

35. *Id.* (providing that:

Each Party agrees, at the request of the other Party, to employ the legal means at its disposal to recover and return from its territory stolen archeo-

C. REPATRIATION

Repatriation of cultural property has become a common topic for debate in any forum on the subject, as well as a common theme for international cultural property law. This topic was an underlying theme of the 1970 Convention and has been the subject of numerous United Nations General Assembly provisions.³⁶

Repatriation in practice may have one of several meanings, including (1) repurchase of objects for their return to their source nation or people (repatriation beyond the means of most source nations), (2) theft (on the principle that the end justifies the means, and the property belongs to the source nation), and (3) repatriation by agreement.³⁷

As discussed above, the 1970 Convention provided for repatriation by requiring the signatory nations to ensure the return of illicitly exported cultural property to the source nation.³⁸ However, as also previously mentioned, this attempt at repatriation was severely limited by article 7 of the Convention.³⁹

Repatriation has long been a subject of concern for the United Nations.⁴⁰ In 1973, the United Nations commenced passage of a series of resolutions providing for the repatriation of cultural property.⁴¹ The 1993 adoption of Resolution Number 48/15 on the Return or Restitution of Cultural Property to the Countries of Origin pointed out the importance of repatriation in promoting "universal cultural values."⁴²

Attempts to enforce repatriation provisions have had mixed results. Recent attempts by New Zealand and Greece to realize the return of their cultural property ended unhappily.⁴³ However, a Greek Orthodox Church successfully achieved the return of mosaics that had been previously exported in the case of *Autocephalous Church v. Goldberg & Feldman Fine Arts Inc.*⁴⁴ Attempts by Latin American nations to enforce repatriation provisions could conceivably be resolved either way.

logical, historical, and cultural properties that are removed after the date of entry of force of this Treaty from the territory of the requesting party.)

36. Mastalir, *supra* note 22, at 1056.

37. *Id.*

38. 1970 UNESCO Convention, *supra* note 21.

39. Papademetriou, *supra* note 25, at 294.

40. *Id.* at 293.

41. *Id.*

42. Return or Restitution of Cultural Property to the Countries of Origin, G.A. Res. 48/15, U.N. GAOR, 47th plen. mtg., Supp. No. 49, U.N. Doc. A/48/49 (1993).

43. See Mastalir, *supra* note 22.

44. *Autocephalous Church v. Goldberg & Feldman Fine Arts Inc.*, 917 F.2d 278 (7th Cir. 1990). While the repatriation in this case was not sought under any of the above discussed sources of repatriation legislation, it does provide general support for the success of the concept.

D. NATIONAL OWNERSHIP LAWS

While national ownership laws are not technically international in nature they are pertinent to this topic as a result of their international impact. The 1970 Convention requires each of its signatory nations to take steps to protect their cultural heritage.⁴⁵ In an attempt to protect their cultural heritage, numerous source nations have adopted legislation designating cultural property as the property of the nation where it was discovered.⁴⁶ These national ownership laws may be adopted for another reason as well.⁴⁷ In the absence of a treaty, courts refrain from enforcing another nation's export laws. However, if national ownership laws are in place and govern the piece of property in question, then the taking of the property has become a theft, and courts are much more likely to take action.⁴⁸

A prime example of national ownership legislation is the state ownership law passed by Mexico in 1972.⁴⁹ This piece of legislation, which provided that all pre-Columbian artifacts discovered anywhere in Mexico are the property of the people of Mexico, was the basis for the successful return of cultural property in *United States v. McClain*.⁵⁰ In *McClain*, the U.S. Government brought criminal charges against the McClains under the National Stolen Property Act.⁵¹ The court recognized Mexico's ownership of the property, declared that the property was stolen by the McClains, and sent them to prison.⁵² The court also returned the property in question to the Mexican government, the rightful owner.⁵³

While the *McClain* case was a success, it is unclear at this point whether the holding in that case will allow the success of civil claims based on the national ownership laws as well.⁵⁴ In *Government of Peru v. Johnson*, the court declined to extend the *McClain* ruling to encompass a civil action alleging that cultural artifacts were stolen under Peruvian national ownership laws.⁵⁵ However, in another case the Italian courts did enforce Ecuador's national ownership law.⁵⁶ The issue of whether the *McClain* doctrine extends to civil litigation is undecided as of yet.⁵⁷

45. 1970 UNESCO Convention, *supra* note 21.

46. Mastalir, *supra* note 22, at 1051.

47. See Merryman, *supra* note 18, at 58.

48. *Id.*

49. See *United States v. McClain*, 593 F.2d 988 (5th Cir. 1979). Mexico is not the only Latin American country with such legislation in place. Guatemala, Ecuador, and Costa Rica all have laws declaring cultural property found within their borders to be the property of the national government. See Mastalir, *supra* note 22, at 1093, n.57 (citing LYNDAL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE 188-97 (1984); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974)).

50. *McClain*, 593 F.2d at 988.

51. *Id.*; see 18 U.S.C. § 2314 (1994).

52. See *McClain*, 593 F.2d at 988.

53. *Id.*

54. Merryman, *supra* note 18, at 59.

55. See *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989).

56. Merryman, *supra* note 18, at 60.

57. *Id.*

III. CONCLUSION

The law in the area of the importation of cultural property is still unclear and relatively undefined. This uncertainty is particularly an issue for many of the countries in Latin America whose wealth of cultural property is endangered by illegal exportation.⁵⁸ To resolve this problem of illegal exportation, it is necessary to clarify the existing multinational treaties, regional treaties, national laws, and case law. The cultural property of Latin America cannot be protected until these laws are clarified.

58. Latin American countries like Mexico are particularly susceptible to pillaging. Margules, *supra* note 8, at 628.

