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International Cultural Property

DANIEL W. ECK, PATTY GERSTENBLITH, AND MARILYN PHELAN*

I. Introduction

The illicit market in artworks, antiquities, and other cultural property continues to be a matter of international concern, and the year 2001 saw significant developments in the field of cultural property law. For example, pursuant to the Convention on Cultural Property Implementation Act¹ (CPIA), the U.S. government entered into significant bilateral agreements with Italy and Bolivia to require importers to prove legal export of archaeological artifacts and considered renewal of the bilateral agreements with Canada and Peru. It indicted an influential art dealer in New York who allegedly received ancient artworks that had been stolen and illegally removed from Egypt. Further, a civil action brought by the United States, pursuant to U.S. ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,² led to the return of a Wang Chuzhi Marble Wall Panel to the Cultural Relics Administration of the People's Republic of China.

Also in 2001, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the UNESCO Convention on the Protection of the Underwater Cultural Heritage, which provides a legal regime to protect the many millennia of history that resides in shipwrecks and underwater sites. Further, in its new Universal Declaration on Cultural Diversity, UNESCO will require its member States to combat the illicit traffic in cultural property.

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1. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 et seq. (2001).

2. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Apr. 24, 1972, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

II. UNESCO Convention on the Protection of the Underwater Cultural Heritage

After more than four years of negotiation among expert groups including government representatives, archaeological and historical experts, and commercial salvage interests, on November 2, 2001, the General Conference of UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage.³ The fourth convention adopted by UNESCO to protect cultural property,⁴ it states that underwater heritage is under grave threat due to major advances in underwater salvage and excavation technology and the very substantial financial rewards that can be obtained in both the legal and illicit world markets for antiquities and other relics from sunken vessels and sites. In response, the Convention mandates specific measures to protect “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.”⁵ The treaty is now open for ratification or accession by all UNESCO member States and will come into effect when twenty States have adopted it in accordance with national treaty law procedures. Although the United States is not a member of UNESCO, it is eligible to ratify the treaty.

The Third United Nations Convention on the Law of the Sea (UNCLOS III), which was negotiated from 1974 to 1982 and came into force in 1994, already imposes a duty on States to protect objects found at sea that are of an archaeological and historical nature.⁶ However, UNCLOS III grants States the right to protect the underwater cultural heritage only in their contiguous zone, which extends 24 miles from the shoreline, and not in their Exclusive Economic Zone (EEZ), which can extend 200 miles from a State’s coast, or the continental shelf, which also extends 200 miles from the shore.⁷ In addition, UNCLOS III does not set out precise procedures for protecting underwater sites.

The new UNESCO Convention on the Protection of the Underwater Cultural Heritage extends the right of States to “prohibit or authorise any activity directed at [the cultural heritage]” to their EEZ or to the continental shelf.⁸ States are also asked to “preserve

3. Press Release, General Conference of UNESCO, General Conference Adopts Convention on the Protection of Underwater Cultural Heritage (Nov. 2, 2001), available at http://www.unesco.org/culture/legalprotection/water/html_eng/convention.shtml (last visited Aug. 1, 2002). The text of the Convention is also available on the UNESCO Web site.

4. The other three are: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (249 U.N.T.S. 270); the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231); and the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1037 U.N.T.S. 151). The United States has ratified the 1970 Convention (albeit in a somewhat restrictive format—the CPIA, 19 U.S.C. §§ 2601 *et seq.*) and the 1972 Convention (16 U.S.C. § 470a-1—part of the 1980 amendments to the National Historic Preservation Act, 16 U.S.C. §§ 470a-w). The United States is a signatory of the 1954 Hague Convention and its ratification is under consideration.

5. *Draft Convention on the Protection of the Underwater Cultural Heritage*, U.N. GAOR, 31st Sess., Agenda item 8.4, art. 1, U.N. Doc. 31C/24 (2001) [hereinafter *Protection of the Underwater Cultural Heritage*].

6. *Third United Nations Conference on the Law of the Sea: Final Act*, U.N. Doc. A/Conf.62/121, 21 I.L.M. 1245 (1982), arts. 149 and 330.

7. *Id.* art. 303. Article 56 of UNCLOS III grants a coastal State sovereign rights over all natural resources of its EEZ, including the seabed resources, but it does not grant a State sovereignty over non-natural objects.

8. Protection of the Underwater Cultural Heritage, *supra* note 5, art. 9. Critics of the new UNESCO Convention argue that this provision upsets the carefully negotiated provisions of UNCLOS III regarding the scope of the coastal states’ powers over their EEZ and the continental shelf.

underwater cultural heritage for the benefit of humanity,"⁹ through the preservation *in situ* of underwater cultural heritage if at all possible.¹⁰ The Annex sets forth more specific rules for the preservation and proper excavation of underwater cultural resources and is derived from the ICOMOS Charter for the Protection and Management of the Underwater Cultural Heritage. Finally, the commercial exploitation of underwater cultural heritage for trade or speculation is deemed "fundamentally incompatible with the protection and proper management of underwater cultural heritage."¹¹

III. UNESCO Universal Declaration on Cultural Diversity

At its General Conference on November 2, 2001, UNESCO also adopted a major new international ethical standard for cultural development and cultural relations. The new UNESCO Universal Declaration on Cultural Diversity reaffirms the conviction of UNESCO member States that "intercultural dialogue is the best guarantee of peace."¹² The comprehensive instrument elevates "cultural diversity to the rank of 'common heritage of humanity—as necessary for the human race as bio-diversity in the natural realm'—and makes its protection an ethical imperative, inseparable from respect for human dignity."¹³ The document also specifies that "particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists" and that cultural goods "must not be treated as mere commodities or consumer goods."¹⁴ Instead, "heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures."¹⁵ In its "action plan" for implementation, the document calls upon member States to take appropriate steps to formulate "policies and strategies for the preservation and enhancement of the cultural and natural heritage" and to combat "illicit traffic in cultural goods and services."¹⁶

IV. Cultural Property Implementation Act Developments

The CPIA¹⁷ represents a somewhat restrictive ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The United States enacted the CPIA in 1983 in recognition of the fact that free trade in cultural property had resulted in the pillage of archaeological and ethnological materials and had deprived many nations of their cultural heritage. The United States has entered into bilateral agreements pursuant to the CPIA in an attempt to stem the flow of illicitly excavated works that regularly enter the United States.

9. *Id.* at 2, 3.

10. *Id.* at annex, Rule 1.

11. *Id.* at annex, Rule 2. The rule states that underwater cultural heritage shall not be traded, sold, bought, or bartered as commercial goods.

12. Press Release, General Conference of UNESCO, General Conference Adopts Universal Declaration on Cultural Diversity, available at http://www.unesco.org/confgen/press_rel/021101_clt_diversity.shtml (last visited Aug. 1, 2002).

13. *Id.*

14. *Id.* art. 8.

15. *Id.* art. 7.

16. *Id.* at 5, ¶ 13.

17. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* (2001).

A. BILATERAL AGREEMENT WITH ITALY

On January 19, 2001 the United States formally agreed with Italy to impose import restrictions on Italian archeological material from the pre-classical, classical, and imperial periods. The far-reaching agreement prohibits unlicensed imports of Italian antiquities ranging from Etruscan pottery to treasures of the Roman Empire and dating from the ninth century B.C. to the fourth century A.D. Such restricted objects may enter the United States only if accompanied by an export permit issued by Italy or by documentation demonstrating that the objects left Italy prior to the date of the import restriction.¹⁸

B. APPLICATION BY HONDURAS

On August 22, 2001 the Republic of Honduras requested that the U.S. State Department impose import restrictions on Honduran pre-Columbian archaeological materials. Honduran cultural patrimony legislation dates back to 1845, when unauthorized excavation was prohibited at the Mayan site of Copan, and Honduran authorities have determined that Honduran archaeological materials are illicitly imported into the United States.¹⁹

C. MEMORANDUM OF UNDERSTANDING WITH BOLIVIA

On December 4, 2001 the United States entered into a Memorandum of Understanding with the Government of the Republic of Bolivia resulting in import restrictions on certain archaeological and ethnological materials originating in Bolivia.²⁰

D. PROPOSED RENEWAL OF BILATERAL AGREEMENTS WITH CANADA AND PERU

In 2001 the U.S. State Department proposed renewing the April 22, 1997 bilateral agreement with Canada that imposes import restrictions on archaeological and ethnological material of Canadian Aboriginal cultural groups. As part of the agreement, Canada pledged to recognize the existence of U.S. laws that protect archaeological resources and Native American cultural items, and to cooperate with the U.S. government in recovering such objects that have entered Canada illicitly.²¹ The United States also proposed extending the June 9, 1997 bilateral agreement with Peru. This agreement placed import restrictions on certain categories of Pre-Columbian archaeological artifacts and Colonial period ethnological materials from Peru.²²

18. Agreement to protect Pre-Classical, Classical, and Imperial Roman Archaeological Material, *available at* <http://exchanges.state.gov/education/culprop/itfact.html> (last visited Aug. 1, 2002).

19. Cultural Property Request from the Government of the Republic of Honduras Under Article 9 of the 1970 UNESCO Convention, *available at* <http://exchanges.state.gov/education/culprop/hn01sum.html> (last visited Feb. 16, 2002).

20. Archaeological and Ethnological Material From Bolivia, *available at* <http://exchanges.state.gov/education/culprop/b101fr01.html> (last visited Feb. 16, 2002).

21. U.S. Protection of Archaeological and Ethnological Materials, *available at* <http://exchanges.state.gov/education/culprop/cafact.html> (last visited Feb. 16, 2002).

22. U.S. Protection of Archaeological and Ethnological Material, *available at* <http://exchanges.state.gov/education/culprop/pefact.html> (last visited Feb. 16, 2002).

VI. Recent Cases or Controversies Involving Cultural Property

A. *ALTMANN v. REPUBLIC OF AUSTRIA*

In *Altmann v. Republic of Austria*, a California federal court ruled that Austria and the Austrian Gallery (collectively referred to as “Austria”) could be sued in California based on Nazi-era appropriations of artworks in Austria.²³ The court rejected Austria’s motion to dismiss the suit, which relied upon sovereign immunity, lack of personal jurisdiction, and *forum non conveniens*.

Altmann involves a Jewish family’s claims for ownership of six Gustav Klimt paintings, valued at approximately \$150 million, held by Austria in the Austrian Gallery. The Nazis seized the paintings from the plaintiff’s uncle, Ferdinand Bloch-Bauer, when he left Austria in 1938. Ferdinand died a few months after the war in Europe ended. Ferdinand’s wife, who died in 1925, had expressed a wish in her will for Ferdinand to donate his paintings to the Austrian Gallery upon his death, but Ferdinand never did so.²⁴

Austrian legal reforms after the war did not provide complete remedies for those who lost property to the Nazis. For example, in 1946, Austria enacted a law declaring that all transactions motivated by discriminatory Nazi ideology were deemed to be null and void; however, Austria often required the original owners of such property, including works of art, to repay to the purchaser the purchase price before an item would be returned.²⁵ Similarly, Austrian law “prohibited the export of artworks that were deemed to be important to Austria’s cultural heritage.”²⁶ After the war that law was used “to force Jews who sought export of artworks to trade artworks for export permits on other works.”²⁷

In 1947, a Swiss court recognized the plaintiff—who had escaped from Austria in 1938—as the heir to 25 percent of Ferdinand’s estate.²⁸ Ferdinand’s heirs then retained a lawyer in Austria to attempt to recover his property, including the paintings.²⁹ The Gallery first claimed that Ferdinand’s wife had bequeathed the paintings to the Gallery upon her death, and that the Gallery merely permitted Ferdinand to retain possession until his death. In 1948, after the Austrian Gallery learned that Ferdinand’s wife’s will did not contain such a bequest, it suggested “that export permits for Ferdinand’s collection be delayed for ‘tactical reasons’”³⁰ and concealed the will from the heirs.³¹ Thereafter, an Austrian official told the heirs’ lawyer that donations to the Gallery would have to occur in order to procure export licenses for any of Ferdinand’s collection. The lawyer agreed to donate the Klimt paintings in exchange for export licenses for the remaining items in Ferdinand’s estate. The plaintiff was unaware of the lawyer’s actions until 1999. The plaintiff never authorized the lawyer to negotiate on her behalf, nor did she authorize the “donation” of the paintings to the

23. *Altmann v. Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001).

24. *Id.* at 1192–93.

25. *Id.* at 1193.

26. *Id.* at 1193–94.

27. *Id.* at 1194.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Gallery. In fact, until 1999, the Gallery's misrepresentations led the plaintiff to believe that her family had legitimately donated the paintings.³²

In 1998, after the high-profile seizure of two Egon Schiele paintings in New York, Austria opened the Gallery's archives "to prove that no looted artworks remained in Austria."³³ As a result, a journalist exposed "the fact that Austria's federal museums had profited greatly from exiled Jewish families after the war,"³⁴ and the plaintiff thus discovered how the Klimt paintings came into the Gallery's possession.³⁵

In December 1998 Austria enacted a new restitution law "designed to return artworks that had been donated to federal museums under duress in exchange for export permits."³⁶ Pursuant to the new law, a committee of government officials and art historians "recommended that hundreds of artworks be returned to their rightful owners."³⁷ The Klimt paintings initially appeared to be among such artworks. Political pressure, however, led the committee to recommend that the paintings not be returned. Austria rejected the plaintiff's request for arbitration and suggested that her "only remedy was to go to court."³⁸

Because Austria has a consular office in Los Angeles and owns real property in Los Angeles,³⁹ the plaintiff filed suit in a U.S. federal court in California against Austria and the Austrian Gallery. The plaintiff sued for a declaratory judgment that the Klimt paintings should be returned pursuant to the 1998 Austrian restitution law, for replevin, for expropriation and conversion, and for violation of international law.⁴⁰ Austria argued that it was immune from suit under the doctrine of sovereign immunity and it contested both the jurisdiction and suitability of the court to hear the case.

The court rejected all of Austria's arguments. First, the court explained that the Foreign Sovereign Immunities Act⁴¹ (FSIA) is "the sole basis for jurisdiction over a foreign state and its agencies and instrumentalities . . . [f]oreign states are presumed to be immune from the jurisdiction of the United States courts unless one of the FSIA's exceptions applies."⁴² The court ruled that the plaintiff's suit fell within the "expropriation" exception to the FSIA because the plaintiff claimed that (i) the "aryanization" of the art qualified as a seizure in violation of international law; (ii) the Gallery, even though privatized in 2000, qualified as an Austrian agency or instrumentality; and (iii) the Gallery engaged in commercial activities in the United States, including advertising, selling an English-language guidebook, lending certain Klimt paintings to U.S. museums—including one of the Klimts in question—and receiving visitors from the United States each year.⁴³

The court also made significant rulings that permitted the suit to proceed in California despite that the critical events took place in Austria. First, the court ruled that a foreign state is not a "person" under the due process clause of the U.S. Constitution, so the legal

32. *Id.* at 1195 n.9.

33. *Id.* at 1195.

34. *Id.*

35. *Id.* at 1195 n.11.

36. *Id.* at 1195.

37. *Id.* at 1195-96.

38. *Id.* at 1196.

39. *Id.*

40. *Id.* at 1197.

41. 28 U.S.C. § 1602 *et seq.* (1994).

42. *Altmann*, 142 F. Supp. 2d at 1197-98.

43. *Id.* at 1201-06.

concept of personal jurisdiction was inapplicable in this case and was not grounds for dismissal. In addition, dismissal for lack of personal jurisdiction was unnecessary; any due process concerns had been satisfied by the plaintiff's allegations of Austria's commercial activity in the United States. The plaintiff made these allegations to establish the expropriation exception to the FSIA.⁴⁴ Second, the court refused to dismiss the suit based on *forum non conveniens*. The Austrian courts did not provide an "adequate alternative forum" because of its excessive court filing fees (up to \$200,000). In addition, the Austrian thirty-year statute of limitations may have barred the claim whereas California's "discovery rule," with regard to stolen works of art, would not bar the plaintiff's claim.⁴⁵ Finally, the court rejected Austria's argument that the other heirs to Ferdinand's estate were necessary and indispensable parties within the meaning of Fed. R. Civ. P. 19(a).⁴⁶

The FSIA arguments were immediately appealable, and the court certified the rest of the ruling for interlocutory appeal pursuant to 28 U.S.C. § 1291. Austria has appealed the order.

B. *SEA HUNT, INC. v. THE UNIDENTIFIED SHIPWRECKED VESSEL*

In 2001, the U.S. Supreme Court refused to hear a commercial salvage company's appeal of *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel*,⁴⁷ a decision that awarded Spain title to two sunken Spanish ships. This case was closely watched as an international test case on sovereign nations' right to prevent unauthorized salvage of government-owned vessels, namely, warships.

C. SIGNIFICANT RETURNS AND REPATRIATIONS

1. *Wang Chuzhi Marble Wall Panel*

From July to November 1995, the Hebei Provincial Institute of Cultural Relics, in cooperation with the Baoding Municipal Office of Cultural Relics and Quyang County Office of Cultural Relics, excavated a tomb of the Five Dynasties period on Xifen Hill at Xiyan-chuan Village of Quyang County. The burial custom, tomb structure, murals, human figure relief in white marble and astronomical map revealed in the grave are of great importance in Five Dynasties archaeology covering the early tenth century. In June of 1994, the Quyang County Public Security Bureau received a report that the ancient tomb of Wang Chuzhi had been robbed.

In December 1999, Y.C. Chui of M&C Gallery in Hong Kong consigned a wall panel sculpture of a guardian from the Tomb of Wang Chuzhi to Christie's in New York to sell at auction in 2000. In March 2000, the United States brought a civil action in the U.S. District Court for the Southern District of New York seeking forfeiture of the mural pursuant to the CPIA under its treaty obligation under the 1970 UNESCO Convention on

44. *Id.* at 1207-08.

45. *Id.* at 1209-10. California law provides for a three-year statute of limitations that accrues upon the discovery of a stolen article of artistic significance. See CAL. CIV. PROC. CODE § 338 (2001). The California law recognizes that owners of stolen works of art often are unable to immediately file a cause of action for recovery of the artworks.

46. *Altmann*, 142 F. Supp. 2d at 1210-11.

47. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001).

the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The People's Republic of China contended the tomb of Wang Chuzhi and its contents are state-owned cultural property of the People's Republic of China, and that it has ratified the 1970 UNESCO Convention. A deed of settlement in the case provided that the wall panel sculpture would be returned to Y.C. Chui who, in turn, agreed to give the sculpture to the Government of the People's Republic of China. U.S. Customs Service returned the marble wall panel to Chinese officials in May 2001. China has stated that the panel would become part of its national Museum's permanent collection.⁴⁸

2. *Cache of Artifacts Returned to Mexico, Peru, and Panama*

On August 2, 2001 the U.S. Customs Service returned a cache of over 900 artifacts to the governments of Mexico, Peru, and Panama. The artifacts were confiscated in 1994, but the suspected smuggler fled the United States. The authorities finally arrested the suspect in 1998 and he pled guilty to a number of charges. The suspect returned the artifacts as part of a civil settlement between the suspect and the Mexican, Peruvian, and Panamanian governments.⁴⁹

3. *Ceramics Returned to El Salvador*

In 2001 the U.S. Customs Service also returned several pre-Columbian polychrome ceramics, dating from approximately 1700 B.C. to A.D. 1550, to the Government of El Salvador. Customs officials seized the artifacts in San Francisco in October 2000.⁵⁰

4. *Stolen Artifacts Returned to Greece*

In January 2001 the FBI returned 274 artifacts to Greek officials. The artifacts were stolen in 1990 from the Archaeological Museum of Ancient Corinth. The FBI seized the artifacts after they were consigned to Christie's for auction. One individual pled guilty on charges related to possession of the collection, but the original thieves remain at large.⁵¹

D. U.S. INDICTMENT OF ART DEALER – RECEIVING AND POSSESSING ARTWORKS ALLEGEDLY STOLEN AND ILLEGALLY REMOVED FROM EGYPT

On July 16, 2001 the U.S. Attorney for the Southern District of New York indicted Frederick Schultz, president of Frederick Schultz Ancient Art in New York City and past president of the New York-based National Association of Dealers in Ancient, Oriental and Primitive Art (NADAOPA). The government accuses Schultz of violating the National Stolen Property Act (NSPA) by conspiring to receive and possess artifacts that had been stolen and removed illegally from Egypt.⁵²

48. See Press Release, U.S. Custom Service, U.S. Customs Service Returns Rare 10th Century Burial Sculpture to China (May 23, 2001), at <http://www.customs.ustreas.gov/hot-new/pressrel/2001/0523-04.html> (last visited Feb. 19, 2002).

49. See Press Release, U.S. Customs Service, U.S. Customs Returns Priceless Cultural Artifacts to Mexico, Peru, and Panama (Aug. 1, 2001), at <http://www.customs.ustreas.gov/hot-new/pressrel/2001/0801-00.htm> (last visited Feb. 19, 2002).

50. See Press Release, U.S. Dep't of State, Media Note Seized Pre-Columbian Objects Repatriated to El Salvador in First Implementation of U.S. Import Restriction (June 21, 2001), at <http://exchanges/state.gov/education/culprop/esstatepr.html> (last visited Feb. 19, 2002).

51. See Press Release, U.S. Embassy Athens, Stolen Corinth Artifacts Return to Greek Authorities (Jan. 18, 2001), at <http://exchanges.state.gov/education/culprop/greecepr.html> (last visited Feb. 19, 2002).

52. U.S. v. Schultz, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002).

The NSPA states that:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise . . . of the value of \$5,000 or more . . . which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.⁵³

The indictment alleges that the artifacts in question were “stolen” within the meaning of the NSPA because, pursuant to Egyptian Law 117, the Egyptian government owned all antiquities newly discovered inside the country after 1983. Egyptian Law 117 also prohibits sale or export of such antiquities without the government’s permission. According to the indictment in the early 1990s a British antiquities restorer⁵⁴ traveled to Egypt and purchased antiquities recently excavated by Egyptian “farmers and builders,” removed the objects from Egypt and consigned or sold them to Schultz.⁵⁵ The objects included the head of a statue of Amenhotep III, which Schultz allegedly sold in London for \$1.2 million. In order to make it appear that Schultz legally acquired the artifacts prior to enactment of Egyptian Law 117, he allegedly misled potential purchasers to believe that the artifacts were from the “Thomas Alcock Collection,” which he described as a collection that had belonged to an English family since the 1920s.⁵⁶

This case has received much attention due to Schultz’s high profile as a major figure in the antiquities trade and a vocal critic of international anti-looting efforts, such as the recent bilateral agreement between the United States and Italy. Furthermore, Schultz has challenged the long-debated *McClain* case,⁵⁷ which established that artifacts are stolen within the meaning of the NSPA if a foreign law vests ownership of the artifact in the government of that country.⁵⁸ The lengthy *McClain* proceedings resulted in convictions based on a 1972 Mexican law unequivocally declaring state ownership of all artifacts found in Mexico. It also reversed the portion of the convictions based on an earlier version of that law in which the declaration of national ownership was “not expressed . . . with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.”⁵⁹ Critics of *McClain* argue that such cultural patrimony laws do not actually create property rights in the state, but are merely export restrictions, violations of which are not prosecuted in the United States as theft under the NSPA.⁶⁰

53. National Stolen Property Act, 18 U.S.C. § 2315 (1997).

54. In 1997, an English court convicted the restorer, Jonathan Tokeley-Parry, of stealing artifacts from Egypt. See Steven Vincent, *Antiquities Dealer Gets Ready for Court*, THE ART NEWSPAPER.COM (2000), available at <http://www.theartnewspaper.com/news/article.asp?idart=7492> (last visited Feb. 19, 2002).

55. Government’s Indictment, at ¶ 7a-c, U.S. v. Schultz, 178 F.Supp. 2d 445 (S.D.N.Y. 2002) (No. 01-Cr-683-JSR).

56. *Id.* at ¶ 7e.

57. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (reversing NSPA convictions due to vagueness of Mexican law regarding ownership over artifacts), *rehearing denied*, 551 F.2d 52 (5th Cir. 1977), *on remand*; *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979) (affirming conspiracy conviction under NSPA for illegal removal of cultural property from Mexico).

58. Under such cultural patrimony laws—enacted to protect archaeological sites and control the export of artifacts—all artifacts unearthed or discovered in a country, even if discovered on private property, automatically belong to the government.

59. *McClain*, 593 F.2d at 670.

60. See, e.g., *McClain*, 545 F.2d at 994, 1002.

Challenging the premises and distinctions of *McClain*, Schultz moved to dismiss his indictment. He referred to *McClain* as “outdated,” “discredited,” and an “obsolete aberration.” In late December of 2001, Judge Jed S. Rakoff denied the motion.

Relying on *McClain*, Schultz largely contended that the definition in Egyptian Law 117 of “antiquities” was too vague to provide fair notice of the types of artifacts that were subject to the law.⁶¹ The court rejected that argument holding that the artifacts at issue in the indictment (“such as a pharaoh’s head and two Old Kingdom painted reliefs”) obviously fell within that description. Even if there was any ambiguity in the statute “around the edges,” it was certainly clear and understandable in this case.⁶²

Schultz also pointed to several provisions in Egyptian Law 117 that allow private possession of antiquities subject to restrictions on alienation and transferability. Based on these provisions, and his claim that the Egyptian government regularly allowed discoverers or private transferees to retain antiquities, Schultz argued that this law was in actuality and practice merely a licensing and export regulation, the violation of which does not constitute theft of property within the meaning of the NSPA.

Pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure,⁶³ the court held an evidentiary hearing and permitted Schultz to present two witnesses in support of his interpretation of Egyptian Law 117, including a professor of Islamic and Middle Eastern law from UCLA Law School. However, the witness could at best state that nothing in the law prevented the Egyptian government from leaving physical possession of an artifact in the hands of a private finder, as long as the private finder registers his find.⁶⁴ Directly refuting Schultz’s arguments, the government’s witnesses, including the Secretary-General to the Egyptian Supreme Council of Antiquities and the Director of Criminal Investigations for the Egyptian Antiquities Police, explained that the private possession portions of the statute applied only to artifacts discovered before 1983. They also cited tens of thousands of instances where the Egyptian state took possession, as well as ownership, of artifacts discovered after 1983, and presented evidence of the regular prosecution of violators of Egyptian Law 117.⁶⁵ Their testimony and evidence proved to the court that Egyptian Law 117 is not merely an export regulation, but also an ownership law as applied to objects discovered after 1983.

Judge Rakoff also rejected Schultz’s argument that Egyptian Law 117 is a “patrimony” law that creates a special kind of property right in a foreign state, and that such special

61. Article 1 of Egyptian Law 117 defines an antiquity as:

any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, literatures and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present and that has archaeological or historical value or significance as a relic of one of the various civilizations that have been established in the land of Egypt or historically related to it, as well as human and animal remains from any such period.

62. *Schultz*, 178 F. Supp. 2d at 447 n.1.

63. FED. R. CRIM. P. 26.1.

Determination of Foreign Law. A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination shall be treated as a ruling on a question of law.

64. *Schultz*, 178 F. Supp. 2d at 447.

65. *Id.* at 448.

property rights are not entitled to protection under U.S. law. The judge found no reason to carve out an exception to property law simply because the object has historical or archaeological importance.⁶⁶ Finally, the court rejected Schultz's argument that the CPIA superseded the application of the NSPA to the same subject matter. As the court pointed out, the CPIA's legislative history specifically stated that it "neither pre-empts state law in any way, nor modifies any Federal or State remedies."⁶⁷

Thus, despite the much-anticipated battle over *McClain*, Judge Rakoff apparently had little difficulty relying upon that case in denying Schultz's motion. Nor did he find Schultz's other wide-ranging arguments to be persuasive, and described some of them as "sufficiently meritless as not to warrant discussion."⁶⁸ To prove the conspiracy allegations, however, the prosecution must still establish at trial that Schultz actually knew the artifacts were stolen and that he intended to violate the law. The trial began on January 28, 2002, and was expected to last two to three weeks.

E. U.N. INDICTMENT FOR DESTRUCTION OF CULTURAL SITES

In February 2001 the United Nations International Criminal Tribunal for the Former Yugoslavia in The Hague indicted a former Yugoslav army general and three other former Yugoslav officers for violations of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.⁶⁹ The indictment arises out of their involvement in the 1991–1992 siege and shelling of the medieval Croatian port city of Dubrovnik. Two of the defendants have surrendered while the other two remain at large.

Founded before 667 A.D., Dubrovnik developed as a city-state loosely aligned with the Byzantine Empire. It was an independent republic from 1358 until 1808, although it was subject to varying levels of control by the Venetian, Ottoman and Austrian Empires. By 1918 Dubrovnik and the rest of Croatia had been incorporated into Yugoslavia. It was known as "the Pearl of the Adriatic" and renowned for its Gothic and Renaissance architecture. In 1979 UNESCO designated Dubrovnik's "Old Town" district as a World Cultural Heritage site. In compliance with UNESCO requirements for such a designation, Dubrovnik was de-militarized—all military installations and armories were relocated into neighboring regions. A number of buildings in the Old Town district, and the towers on the ancient city wall, were marked with the symbol mandated by the 1954 Hague Convention.⁷⁰

The U.N. indictment alleges that in October 1991 the Yugoslav Peoples' Army (JNA), under the command of defendants Pavle Strugar, Miodrag Jokic, Milan Zec and Vladimir Kovacevic, surrounded and isolated Dubrovnik as part of a plan to wrest control of the city from Croatia and annex it to Serbia/Montenegro.⁷¹ The Old Town district contained no military targets and the city's ad hoc defense force allegedly offered no threat to the JNA. After weeks of negotiations, Croatia refused to cede control of the city to the JNA. On

66. *Id.*

67. *Id.* at 449.

68. *Id.*

69. U.N. International Criminal Tribunal for the Former Yugoslavia, Indictment (No. IT-01-42), *available at* <http://www.un.org/icty/indictment/english/str-ii010227e.htm> (last visited Feb. 19, 2002).

70. *Id.* ¶¶ 31, 29–42.

71. *Id.* ¶ 18.

December 6, 1991, despite a cease-fire agreement covering all of Croatia, the JNA began bombardment of Dubrovnik and its Old Town district.⁷² Sporadic shelling continued into the middle of 1992. Approaching Croatian offensive forces finally caused the JNA to withdraw in October 1992.

An analysis conducted by the Institute for the Protection of Cultural Monuments, in conjunction with UNESCO, found that 563 of the 824 buildings in the Old Town district (68 percent) had been damaged by the attack. Nine buildings were completely destroyed. By the end of 1999, over \$7 million had been spent on restoring Dubrovnik and the project is expected to continue until 2003, at a cost approximating \$10 million.⁷³

These tribunal proceedings will be closely monitored, as, according to UNESCO Director General Koichiro Matsuura, this is the first prosecution by an international tribunal for destruction of cultural property during armed conflict since the Nuremberg and Tokyo tribunals in the aftermath of World War II.⁷⁴ The trial should also raise interesting philosophical and moral arguments contrasting “justified” and “legal” destruction during wartime with “unjustified” and “unlawful” war damage, as charged in counts 10 through 12 of the indictment: “devastation not justified by military necessity, unlawful attacks on civilian objects, destruction or willful damage done to institutions dedicated to religion and historic monuments” in “violation of the laws or custom of war.”⁷⁵ In fact, the BBC quoted defendant Ret. Gen. Pavle Strugar as stating upon his surrender: “I was a soldier for 42 years. I treated people and the state in a dignified and humane manner . . . That is how I acted during the war. I am not a criminal.”⁷⁶ The first trial is expected in late 2002.

72. *Id.* ¶¶ 57–63.

73. *Id.* ¶ 65.

74. See *Yugoslav General Surrenders to Hague Tribunal*, THE ART NEWSPAPER.COM (2000), at <http://www.theartnewspaper.com/news/article.asp?idart=7873> (last visited Feb. 19, 2002).

75. The first nine counts of the indictment contain allegations of “murder, cruel treatment and attacks on civilians” arising out of the death of forty-three civilians and the wounding of numerous others in the attack.

76. See *Dubrovnik Siege General Surrenders*, available at http://news.bbc.co.uk/1/1/english/world/europe/newsid_1611000/1611571.stm (last visited Feb. 19, 2002).