

Recent Developments in Restitution and Return of Cultural Property

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INTRODUCTION	2
I. RESTITUTION	4
II. RETURN	14
CONCLUSION	22

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Works of art, artifacts, temples and monuments have been prized throughout history as being of ultra-significant importance. This has been so not only because of their aesthetic value, but also because they perform the vital function of preserving and recording the talent and endurance of humanity for all time. This store comprises the cultural heritage of mankind. Cultural property, in this sense, is universal in character. It is the medium through which intellectual exchange is possible among the peoples of the world. The object of this short article is to analyze recent developments in the field of restitution and return of cultural property of great importance to the heritage of the state where they were either found, purchased or looted. During the twentieth century a majority of states have become increasingly concerned about the depletion in their cultural resources and have sought to protect them from further destruction. Foreigners are seen as blameworthy, but so too are local persons who either pillage archaeological sites, discovered or yet undiscovered, steal from museums or simply illegally export that which in ordinary property law terms belong to them. Concerned states have approached the question from different angles; first, they have sought to prevent, by way of legislation, the exportation of property that is of value to their cultural heritage;¹ secondly, they have sought to promote the restitution of objects that have been illegally exported contrary to such legislation; and thirdly, they have endeavoured to encourage "collector" states to return items of cultural property that may have been acquired centuries ago during a colonial period of occupation.

The concerns addressed centre around two questions: whether cultural property is a matter to be dealt with autonomously by the state of origin - or of possession, if it is different - or whether such property, being the fruit of humanity's evolution, is truly the common heritage of all and therefore should be dealt with on that basis for the benefit of all mankind regardless of nationality? Should cultural property be seen as transcending normal conceptions of ownership and, being a medium for all nations equally, would not questions of restitution and return recede in importance so long as the property remains in the public domain, perhaps supervised by an international body set up for the purpose? This body would perhaps have its own galleries in a number of different continents and would promote cultural interchange between states in its own exhibitions and also by encouraging long-term loans and exhibitions between state museums. This type of international

collaboration is perhaps the only answer in solving what may be otherwise impenetrable problems fraught with politics and nationalism. This approach would not be an impingement on the cultural identity of states, as it would in effect improve the means for disseminating the expression of the populations of states. It would encourage peoples to be aware of their individual state backgrounds - but also to embrace the cultural personality of other groups from other countries. Cultural property is a means of communication and interchange, and therefore a collection held by an international body which is representative of the heritage of all states and which will seek to preserve and present it for all time may be the mode of cooperation that will surface. Only time will tell.

Until that time, the current problems concerning "restitution" and "return" remain - the terms are used with different emphasis. "Restitution", with its inbuilt connotations of illegality, is used in circumstances when the cultural property in question has been removed from the territory of the state without its consent, in contravention of its cultural property export laws. On the other hand, "return" is reserved for cases where the property was removed long before such legislation was in place, perhaps even with technical legality during the colonial period. If a "return" is asked for, it bears no inference of bad conduct, it is suggested,² and this may assist states to decide that the time is ripe for sending back to their places of origin property acquired many years before.

In November 1978 the General Conference of Unesco at its twentieth session established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Cases of Illicit Appropriation. This Committee, composed of twenty member states of Unesco, is a "good offices" committee. It has the purpose of promoting cooperation between museum authorities at all levels, bilateral, multilateral and regional. It may also act as an arbitration body in the event of disputes.

I. RESTITUTION

In theory, the most effective answer to the problem of preventing the illicit traffic in art is a multilateral convention. It was to this end that the international community, aware of the dangers involved in the rapid increase in the illicit trade in art and cultural objects in general, in recent years attempted to fill the gap to avert catastrophe. The 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³ was adopted. This Convention has the basic aim of determining the means to prohibit and prevent acts which have the effect of impoverishing cultural property.⁴ Although the Convention deals with measures to prevent the import, export and illicit transfer of cultural objects, it places great emphasis on nurturing a state's interest in protecting and preserving its cultural heritage. It is clear that the Convention can work only if there is wholesale ratification of the Convention by a majority of states. It is useless if only the "art rich" states, from which the illicit exports or transfers are emanating, are the ones that become states parties to the treaty. It is necessary that the "art poor" prospective importer states also commit themselves, to ensure a double-edged attack on the clandestine traffic in cultural property. It is only if these latter states undertake to implement measures to prevent museums and individuals situated in their territories from acquiring cultural property which has been illegally taken from another state party, that protection will be complete. Not only will there be the possibility of restitution and prosecution of the traffickers but also the deterrent value of an ironclad scheme.

However, in the period 1970 to date the illicit traffic in cultural property has not ceased. Thefts still occur, for example, of irreplaceable paintings from Italian churches. Museums too are targets and the pillage of archaeological sites in Guatemala, Turkey and many other countries continues, resulting in the loss of again irreplaceable material of historical and scientific importance. The illicit trade, instead of being reduced, may even be becoming more organized in some states. Many less developed countries that are culturally well-off have inadequate resources to guard their sites, to control their borders, to evaluate property presented for export and, most importantly from the long-term perspective, to educate their people that by illicitly digging and selling artifacts they are raping their country of its heritage for a few pence. Coupled with this lack of resources to provide an adequate infrastructure, that would try to control the export of cultural

property, is the other side of the problem. The majority of importing states have not yet ratified the Convention. Of the industrialized states, only Canada,⁵ Italy and the United States have ratified.

For a proper control to be exercised this position must be ameliorated. There are several reasons for this failure to ratify the Convention. Some states have taken the view that the obligations in the Convention would place undue strain on the customs service at ports of entry.⁶ Others have looked beyond such practical questions and have addressed the difficulty in civil law of obliging a *bona fide* purchaser of a cultural object to give it up to a requesting state even where compensation is present.⁷ Still others have argued that domestic, constitutional⁸ and administrative⁹ concerns have prevented them from ratifying, while some feel that the definition of "cultural property" is too ambiguous.¹⁰

It must be re-emphasized that for some states the answer may lie in simply ironing out any problems in their domestic laws. With others it may be a more logistic matter. For the export side, inventories must be drawn up and personnel trained. Likewise for the import side the need would be for precise lists of cultural property prohibited from import and export. It is only when all the gaps are stopped that the protection will be complete. The Intergovernmental Committee met in Istanbul in May 1983 and made recommendations that actions to combat illicit traffic be strengthened on an international and national level. They also recommended that codes of ethics be adopted by museums, and that bilateral agreements be drawn up between states of the same region.¹¹ The Committee stressed the core of the problem when it underlined the importance of concerned action on the international level in order to curb the illicit traffic effectively. It brings the whole matter into question if the Convention is just yet another international paper tiger. Protection measures at the national level are important but standing alone are not enough. In fact they are useless without the international network of import control and scheme of restitution. It is clear that in principle there is agreement by states on the need for this working approach to the problem. It is to be hoped that more will join the fight officially by depositing their instruments of accession or ratification.

Concerning restitution under the 1970 Unesco Convention there have been two interesting cases recently. A collection of some ten to twelve thousand Ecuadorian archaeological objects "belonging" to a certain Giuseppe Salomone was said to be in Italy towards the end of 1974.¹² It comprised ceramic vessels and figurines and a number of models displaying "as in a mannequin parade, masks, earring, bracelets, pectorals and other gold jewellery used for ceremonial purposes in ancient civilizations" that had once been ancient Ecuador.¹³ On other occasions Ecuador had failed to gain restitution of items of cultural property, on account of the fact that it was impossible to prove that the same had left Ecuador at a point in time subsequent to the enactment of their legislation prohibiting the export of cultural property from their territory.¹⁴ In this case, according to one commentator from Ecuador,¹⁵ Salomone had indicated in the Italian press that he had acquired the collection himself while "travelling and prospecting"¹⁶ in Ecuador. He indicated that he "was born in 1943, in Piedmont".¹⁷ On that basis it was not such a difficult task to prove that this immense collection of immeasurable worth to the state of Ecuador had left that country in violation of its cultural property legislation, as that legislation has been in operation since 1945. Salomone was hoist with his own petard, but in fact during the legal battles which followed he managed to disappear from the scene of the dispute.¹⁸

The property, it was shown, had left Ecuador in absolute violation of its laws. The final hearing of the case was on 19 February 1982. It was held that the objects in question were "the full and exclusive property of the Republic of Ecuador". The President of the Turin Magistrature ordered that the objects be restituted to their country of origin. This judgment was appealed. The appeal was dismissed in January 1983 and it was subsequently ordered that the collection of cultural objects be handed over to the Ecuadorian consul in Turin.¹⁹ This case illustrates a couple of factors. First, that it can be a difficult, if not impossible matter to prove that an item of cultural property left the state of origin or possession after the enactment of cultural property export legislation; secondly, even in a case where the state of import is a party to the Unesco Convention, the process may be a protracted one.

The second case that has important ramifications concerning the interpretation of cultural property import legislation is that of the Nigerian "Nok". The Nigerian Government was aware that a rare terracotta sculpture of the ancient Nok tribe was in the possession of New York art dealers. This item of cultural property was without a doubt a piece that would fall within the definition of an "antiquity" in terms of the Nigerian cultural property legislation of 1957²⁰ and therefore would have needed an export certificate to leave the country legitimately. This was never obtained. The Nigerian Government, through its High Commission in Ottawa, asked the Canadian Department of External Affairs to cooperate with them, when they were notified by the Glenbow Museum in Calgary that the piece of sculpture would be coming to Canada.²¹ The Department of External Affairs informed the RCMP of the matter.²² The rare, 13 inch high terracotta kneeling figure from the ancient Nok tribe was brought into Canada without a Nigerian export licence by two New York dealers, Ben Heller and Issaka Zango. The dealers had taken the "Nok" to Calgary, Alberta in connection with a possible sale to Mobil Oil of Canada. They were negotiating with Mobil to sell the object for approximately \$650,000.

The "Nok" entered Canada on 2 December 1981 and was seized by the RCMP at the Glenbow Museum where it had been taken to be authenticated. The New York dealers and their Canadian agent, Firaz Kassin, were arrested. The "Nok" was put into RCMP custody. The arrest was on the basis of section 37 of the Canadian *Cultural Property Export and Import Act*²³ which prohibits cultural property entering Canada which has been illegally exported from a reciprocating state.²⁴ The three men pleaded not guilty to charges under the Canadian Act and were released on their own recognizance after having been remanded for a court appearance.²⁵

The two dealers had, according to the RCMP, declared the "Nok" sculpture to Canadian customs at Calgary Airport. They listed its value at \$ 650,000.²⁶ They argued that the "Nok" did not require an export licence on account of the fact that it had left Nigeria before 1960, long before the 1970 Unesco Convention had been adopted; likewise, it was long before the enactment in Canada of the Canadian *Cultural Property Export and Import Act*. Mr. Heller argued that they had been set up and that Canada was looking for a test case.²⁷ This would have been the first criminal

prosecution for illegal export under the legislation. A preliminary inquiry into the matter was held and in June 1983 the charges against Heller and Zango were dismissed. The Crown immediately launched an appeal.²⁸ The issue raised by this case and the one upon which the dismissal was based was the retroactive effect of the Canadian Act. The accused contended that the sculpture had been exported from Nigeria before 1960 and had remained in private collections in France and other countries in the interim. This was well before both the 1970 Unesco Convention and the Canadian Act. Thus, they argued, neither applied to the case of the "Nok".

Section 31(2) of the Act stipulated that:

From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State.

It is clear on a simple reading of this section that it must be interpreted to mean that it is illegal to import into Canada any foreign cultural property that has been illegally exported from a reciprocating state. However, it can be argued further that the export as well as the import must occur after the coming into force of a cultural property agreement (as defined in section 31(1) of the Act) between Canada and the reciprocating state.

This proposition can be made for two reasons: first, the basis of the 1970 Unesco Convention itself; secondly, on the basis of general principles of statutory interpretation in Canada. As to the Unesco Convention, one of the major questions that arose before the adoption of the final articles of the Convention was the question of retroactivity. France maintained that :

[T]he proposed text rightly contains no provisions for measures with retroactive effect. Except in the case of any bilateral agreements which may be negotiated, the Convention should and can only apply to the future.

Italy stated that:

[T]he Convention should have no retroactive effect, since this leaves intact the bilateral and multilateral agreements of wider scope concluded before its entry into force, thus avoiding the submission of unjustifiable claims.²⁹

Italy observed that the principle of non-retroactivity was not explicitly set forth in the draft Convention which, under article 11, merely made provision for the future "possible conclusion of successive agreement between States parties to the Convention regarding restitution".³⁰ Italy wanted to have an amendment by adding to the draft Convention a specific provision formally stating non-retroactivity.³¹ The United States was of the same viewpoint.³² The final conclusion was that there should be non-retroactivity. This is obvious from article 7 which in all of its paragraphs uses the phrase "after entry into force of this Convention, in the States concerned". Of particular relevance to the Nok sculpture case was article 7(a) which stipulates that states parties undertake:

[T]o prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned [...].

Further, it should be noted that, under article 8 of the *Vienna Convention on the Law of Treaties*,³³ a treaty has no retroactive effect unless it is clearly implied. As stated, there is no such implication in the Unesco Convention. As Canada became a party to the Convention only by acceding to it on 28 June 1978, its "cultural property agreement" with Nigeria was not in force until that point and, under the Convention, there was therefore no legal obligation on Canada to take action as regards property which had been exported from Nigeria before 1978.

Concerning retroactivity and the Canadian Act, there is a general principle at common law that statutes dealing with substantive rights are not to be given retrospective effect. As a result,

statutory provisions which are substantive rather than procedural will not apply to acts which occurred before the enactment of the statute, unless there is an express intention to the contrary.³⁴ There is also a well-established principle of statutory interpretation that penal laws are not to be given retrospective effect.³⁵ It can be argued that section 31(2) of the Canadian Act which came into force, as fixed by proclamation on 6 September 1977, is both penal and substantive. The Act provides in section 37 that no one shall import or attempt to import into Canada any property that it is illegal to import into Canada under Section 31(2). Section 39 provides that every person who contravenes the provisions of the Act, including section 37, is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding five years or both, or on conviction upon indictment to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding twelve months, or both. There was no express provision in the Act that it should be given retrospective effect. At the time that the property was exported from Nigeria, it was not a criminal offence to do so in Canada. The obligation to prosecute in Canada lies only where both the export and the import of cultural property occurs after the entrance into force of the Unesco Convention or other "cultural property agreement" between the parties. Provincial Court Judge Stevenson ruled at the preliminary hearing that neither the treaty nor the legislation is retroactive. The Canadian legislation is only starting to be tested. Even though the major thrust of the Act is to keep in Canada cultural property of importance to the Canadian cultural heritage, Canada has shown that she is willing to assist other states parties to the 1970 Convention to try to recover items of importance to their heritage should they fall within the scope of the Convention.

There is one other recent case that should be mentioned. It is not one that falls truly under the title of implementation of the 1970 Unesco Convention but rather it demonstrates the problem of restitution where the state of importation has not ratified or acceded to that agreement. The case of *Attorney General of New Zealand v. Ortiz*³⁶ illustrates quite clearly that the threat to cultural property posed by the illicit traffic and illegal export and import will go on unimpeded unless there is wholesale cooperation by states. It is necessary for the participation of the importing states in order to achieve either prevention or deterrence of the traffic, or if not this at least restitution.

The facts of the *Ortiz* case were as follow. The "Taranaki Panels" consisted of five wooden panels, beautifully carved, which formed the great door of a treasure house of a Maori chief. The carvings depicted human figures with serpent bodies and wide pointed heads. For centuries this great door had been lost in a swamp near Waitara in the province of Taranaki in the North Island. In 1972, a tribesman came upon the door and carried it home. In early 1973 this man sold the panels to Lance Entwistle, a dealer in primitive art works from London, for \$6,000. Entwistle took the panels to Auckland and from there to New York. From New York he telephoned George Ortiz, a collector of African and Oceanic works of art, in Geneva. Ortiz flew immediately to New York. Entwistle told Ortiz that the Taranaki Panels had been exported from New Zealand without a permit but that he was still the owner of the door and could pass on a good title to it. On 23 April 1973, Ortiz bought the carved door with five panels from Entwistle for US \$65,000 Ortiz sent it to Geneva and kept it in his collection there.

By force of circumstances, Ortiz had to sell the panels. His daughter had been kidnapped and in order to raise the ransom money to obtain her release, he sent the panelled door and other items in his collection to Sotheby's in London to have them auctioned on Thursday, 29 June 1978. The New Zealand Government became aware of the impending auction of the panels when a coloured photograph depicting them appeared in Sotheby's catalogue announcing the forthcoming auction. The Attorney General of New Zealand, three days before the sale, issued a writ claiming a declaration that this carving belonged to the New Zealand Government and also an injunction to prevent the sale or the disposal of the door. Sotheby, faced with the writ, agreed not to proceed with the sale of the panels and to hold them pending further order. Ortiz managed to get enough from the other items to pay the ransom and by the time the case came to trial he stated that he did not now propose to sell it. The main line of the New Zealand Government's argument was that under the New Zealand *Historic Articles Act 1962* it was illegal to export Maori antiquities without the requisite permit. If such an object was removed in breach of section 5(1) of that Act it was forfeit to the government. By an order of the Queen's Bench master, whose decision was upheld on appeal, two preliminary issues were tried by the Commercial Court: first, whether "Her Majesty the Queen has become the owner and is entitled to possession of the carving [...] pursuant to the

provisions of the *Historic Articles Act 1962* and the *Customs Act 1913* and *1966*?"; secondly, "whether in any event the provision of the said Acts are unenforceable in England as being foreign penal, revenue and/or public laws?"

There was no dispute for the purpose of these questions that the carved panels were exported contrary to the 1962 Act. The issues concerned whether, on construing section 12 of the 1962 Act (incorporating certain provisions of the *Customs Act*), the carving was forfeited automatically and immediately on unlawful exportation without a certificate and title at that time passed to Her Majesty. On this basis the Crown would be seeking possession of an article to which it had title and would not be seeking to enforce foreign penal or public laws. On the other hand, did the legislation render the property liable to forfeiture only in the future, taking effect only on the seizure by New Zealand police or customs authorities? This had not occurred. It was contended, *inter alia*, by the plaintiff, that the purpose behind the 1962 Act was to "preserve articles relating to the heritage of New Zealand in New Zealand" and therefore, as the forfeiture provisions were incident to that purpose of the statute, they did not bring the Act within the foreign penal or public laws category. Mr. Justice Staughton in the Commercial Court³⁷ found for the plaintiff and held that New Zealand had become the owner of the carved panels immediately and had title and therefore the right to possession. He held further that section 12(2) of the 1962 Act was neither revenue nor penal in nature and consequently could be enforced in England. On appeal to the Court of Appeal,³⁸ it was held to the contrary that the words "shall be forfeited" contained in section 12(2) of the 1962 Act did not mean that the forfeiture was automatic but rather that it would occur only when the property was actually seized. As the property had not been seized, there had been no forfeiture, and hence, Her Majesty in right of New Zealand, had no title to the carvings and no right to possession. Leave was given to appeal to the House of Lords³⁹ and Lord Brightman speaking for the Court agreed with the Court of Appeal and dismissed the appeal. There was no seizure and the inescapable conclusion was therefore that New Zealand had no right to possession. The House of Lords expressed sympathy to the New Zealand Government but could do nothing else in the circumstances, based on a proper construction of the statutes involved.

This case raises an important issue that was addressed by the Court of Appeal but not felt necessary to a decision in the case by the House of Lords and therefore not dealt with in their reasons. The issue is simply put: if it had been held that there was a right to possession on the part of New Zealand, would the British courts have recognized and enforced that claim? With respect to the 1970 Unesco Convention, would the fact that the United Kingdom is not as yet a party to that treaty have any bearing on that decision? Does this type of case demonstrate the problem of trying to reconstitute cultural property illegally exported, where either the claimant state cannot prove seizure but only illegal export or the importer state does not have legislation to implement the 1970 Convention? Lord Denning, MR, addressed this most important question. He queried whether the *Historic Articles Act 1962* of New Zealand should be enforced by the Courts of England. He stated that:

*It might be very desirable that every country should enforce every other country's legislation on the point: by enabling such articles to be recovered and taken back to their original home. But does the law permit of this?*⁴⁰

The Master of the Rolls went on to point out that English courts will not enforce the penal or revenue laws of another state. The question was whether this refusal extends to "other public laws" of a foreign state and whether cultural property legislation would fall within that category. His conclusion was that legislation prohibiting the export of works of art and providing for automatic forfeiture of them to the state should they be exported falls into the category of "public laws" that will not be enforced by the courts of the reporting country or any other country. This is on the basis that the legislation will not be given extra-territorial effect. Mr. Justice Staughton, at first instance, had held that foreign laws dealing with cultural property should be enforced on the basis of reciprocity. Lord Denning felt that retrieval should be based on diplomacy. He went so far as to suggest that an international convention on the subject and implementing legislation by states parties would be a good idea. He appeared not to have appreciated the fact that the Unesco Convention 1970 exists. This appreciation would not have changed the outcome of the decision but might well have aided the consideration made by Staughton J. that perhaps cultural

property legislation should be separate and apart from penal or revenue or other public laws of a state.

II. RETURN

The last number of years have seen a dramatic increase in literature concerning the return of cultural property to its countries of origin. "Return" as indicated in an earlier section of this article is reserved for cases of appropriation that occurred before the 1970 Unesco Convention came into operation. In essence it refers to cultural objects that were transferred to other countries as a result of colonialism or occupation. The list of items that could fall into this category is great. It is also an issue that can be full of highly charged emotion. The press makes much of such instances, but it is important, from an objective standpoint, to differentiate between the emotional argument, the legal argument, the technical argument, the museological argument, and the universalist argument.⁴¹

To give but a few examples of cultural property in this position: probably the most publicized actual request has been that of the Greek Government concerning the Parthenon marbles acquired by Lord Elgin in the early nineteenth century, while the Turks were occupying Greece, and returned to England where they were eventually purchased by the British Museum.⁴² While Greece has not, to date, made requests for other material taken from the Parthenon, it should be mentioned that a slab and fragment of a frieze, one metope and other fragments are in the Musée du Louvre in Paris; two heads from a metope that is in the British Museum are in Copenhagen; the head from a metope that is in the British Museum is to be found in Würzburg; fragment of a frieze are in Palermo; fragments of metopes, friezes and pediments are in the Vatican, fragments of friezes are in Heidelberg University, The Kunsthistorisches Museum, Vienna, the Antikensammlung, Munich and, lastly, a metope fragment is in Strasbourg University. Other examples abound. Sri Lanka has made requests for return of items of valuable cultural property to the United Kingdom,⁴³ the Netherlands and the Federal Republic of Germany. Other countries too have cultural treasures located abroad, but it is unclear whether official requests for

return have ever been made to the governments concerned, rather than simply to the holding museums. In 1897, during a punitive expedition, British forces took from the Royal Palace in Benin City the "Ivor Mask" as a war booty. This, along with the other controversial "Benin Bronzes", were removed to Britain. In another war in 1874 British troops seized regalia "by right of conquest" from the Asante people of Ghana which are today in London. Both India and Pakistan would like to have returned (it is a matter of dispute as both lay claims) the Kohinoor diamond that is in the British crown jewels; India also claims the sword of Shivaji that is in England; Iraq would like France to return the Code of Hammurabi from the Louvre; Tanzania claims the Royal Throne of Karagoue from the Federal Republic of Germany. The list could go on but the above would appear to serve the purpose of demonstrating the enormity of the problem.

Neither time nor space permits me, in this particular article to analyze the sample cases. That is for another day. Nevertheless, these examples illustrate the need for some type of process to facilitate an amicable arrangement between the holding and requesting countries. To this end it is possible to see how Unesco, since 1974, has been trying to set up a means of returning cultural property to countries of origin.⁴⁴ An appeal was launched on 7 June 1978, by Mr. Amadou Mahtar M' Bow, the Director General of Unesco. He called for "the return of an irreplaceable cultural heritage to those who created it".⁴⁵ He stated that: "these men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish".⁴⁶ He viewed the matter as a legitimate claim and stipulated that Unesco is actively encouraging all that needs to be done to meet it.⁴⁷ This plea antedated the creation of the Intergovernmental Committee, whose mandate is essentially to seek ways and means of facilitating return and restitution of cultural property to its country of origin through bilateral negotiations and bilateral and multilateral cooperation. It called for the member states of Unesco, *inter alia*, to conclude bilateral agreements for the return of cultural property to countries from which it had been taken and to promote long-term loans and other methods of encouraging the fairer international exchange of cultural property.

At the outset, it is clear that there will be two groups of countries involved in this problem of "return". On the one hand, there are the requesting states. Their arguments revolve around the moral right to recover items of cultural property that are vital to their cultural identity and were removed in a period of colonial rule.⁴⁸ On the other hand, there are the countries that are in possession of the desired items of cultural property. Their positions are based on a number of grounds. First, there is the legal argument that the cultural work was in fact, at the time in question, legally acquired. There is also another legal argument based on national legislation, that museums, and in particular national museums, cannot alienate objects in their collections, without changes in the laws of the land. Secondly, there is a museological argument that to best conserve the objects they should stay where they are as, if returned, they would suffer injury or deterioration either in transit or in substandard museum conditions in the state of origin. Thirdly, there is a technical argument that perhaps museum authorities in the two countries can work out some type of arrangement. This would depoliticize the issue. Fourthly, there is the universalist argument that the large national museums in the holding countries are the best showcases for the objects as they give wide publicity and afford greater appreciation for the objects.

The recent developments in this area are twofold. There are the cases of returns that have occurred either through bilateral negotiations between the requesting and holding states or the good offices of the Intergovernmental Committee. There is also the production of the Standard Form Concerning the Request for Return or Restitution and the draft guidelines prepared by the International Council of Museums (ICOM) for the use of that form. As to the former, the Intergovernmental Committee since its inception in 1978 has been concerned in promoting cooperation and negotiations. Concerning "return", the Committee is seeking to a great extent to remove cultural items from holding countries that are diligently conserving them in their museums and returning them to their countries of origin. As the Chairman of the Committee, Salah Stetie, stated in 1980: "the issue is one of giving the cultural and moral rights of some precedence over the purely legal rights of others",⁴⁹ and herein lies the crux of the debate. It is essentially a question of international equity and a recognition of the right of the states that in earlier times were deprived of their heritage to seek cultural wholeness and cultural self-determination. The

Committee considered it important that the cultural property to be the subject of return should be "that which is particularly representative of the cultural identity of a specific people".⁵⁰ It should be returned to the country of origin - in other words the country "to whose cultural tradition the object is linked".⁵¹

A number of returns have occurred. However, it is difficult to link them specifically to the work of the Committee. They may well have occurred not because of the use of the good offices of that Institution so much as out of bilateral negotiations. There may have been a sense of obligation on the part of the holding state that the cultural items were intrinsic to the particular people's heritage and identity and that they should be reunited. Further, it is perhaps on account of a feeling of solidarity, in the sense that it is a common cause to protect cultural property and promote international comity and exchange. In 1977 (before the inception of the Committee), under the terms of an agreement concluded in 1970, Belgium sent to Zaire several thousand items.⁵² In 1976, the Peabody Museum of Harvard University made a long-term loan to the Museo del Hombre in Panama of a series of cultural objects which enabled it to reconstitute a pre-Columbian tomb. The Museum of Pennsylvania University also returned ceramics that had been obtained from an important archaeological site. Starting in 1977-1978 the Netherlands returned to Indonesia Buddhist and Hindu statues and also items from ancient royal collections. In 1977 and 1978, the Australian Museum in Sydney returned cultural objects to Papua New Guinea and the Solomon Islands. In 1980, France and Iraq carried out a mutual long-term loan under which fragments of Babylonian codes, that were contemporary with the Code of Hammurabi, were returned to the Iraq Museum in Bagdad. In February 1981, sculptured birds that had been in the Cape Museum, South Africa, were returned under an exchange agreement to Zimbabwe. In 1981, The Historic Places Trust of New Zealand returned approximately, if not more than, one thousand cultural items to the Solomon Islands. In March 1981, the Australian Museum, Sydney, returned a large ceremonial slit drum that was of major importance to Vanuatu. At the end of 1981, the United Kingdom returned to Kenya a two million-year-old skull, that of the "Proconsul Africanus". Under the auspices of Unesco, The Wellcome Institute in London returned a collection of Himyarite items to the Museum of Sana'a.⁵³

The other notable development has been the procedure designed for enabling greater success in ensuring returns of appropriate cultural property. A standard form concerning requests for both return and restitution has been approved by the Intergovernmental Committee.⁵⁴ The aim of the form is that it will be used when bilateral negotiations have either failed or have come to a standstill. It is supposed to provide both requesting and holding states with objective arguments and highly detailed information about the item in question. Its purpose is therefore to enable means by which negotiations can be reopened. Although the form is to cover restitution as well as return it will, in all probability, be of more relevance to the latter, as restitution is covered by the mechanisms of the 1970 Unesco Convention. Discussions between states as to return may encounter psychological problems, as the holding state may declare the items to have been legally acquired, albeit in a colonial period. Perhaps the use of the standard form will help to minimize the holding states' contention of lack of legal or moral obligation to return the property and will temper the emotions of the parties. Objectivity is the keynote. The forms endeavour to anticipate objections and prepare, according to the replies that are received, the steps that should be taken. For example, the root of the problem may be resolved if a museum infrastructure is planned for the requesting state. The form will allow the holding and requesting states to set out the technical and legal preconditions for the return of the object(s) and the necessary minimum standards acceptable. The form contains questions including those concerning:

- a) description of the object;
- b) the state of conservation of the object;
- c) references and documentation about the background of the objects, how they were obtained by the holding country, the significance to the holding state's heritage and its importance to that country's research or intellectual life;
- d) the circumstances under which it left country of origin (necessarily this lays the ground for any legal action, and also determines whether it is a case for return or restitution);

- e) the type of institution where the object is located - a public or semi-public collection or perhaps even a private or semi-private collection;
- f) the particular significance to the requesting state (is the object an important element related to the cultural identity of that state?);
- g) the significance of the object for the holding state (information should be given as to why the holding state attached importance to it. Has it been modified through the ages? Has it been integrated into an architectural setting in some way?);
- h) details of similar objects located elsewhere;
- i) conservation matters;
- j) ownership, present status of the object, and legal conditions appertaining thereto;
- k) previous negotiations;
- l) proposals for returns; and
- m) future status if returned.

At the time of the third session of the Intergovernmental Committee that took place in Istanbul on 9-12 May 1983, only Sri Lanka had made use of the procedure. It was felt, however, to be unfortunate that the form used was the standard form that was submitted to the second session rather than the revised form that was adopted by it. The earlier draft had a number of lacunae and also Sri Lanka failed itself to provide all the required information. On June 17, 1982 the forms were returned to Sri Lanka, coupled with up-to-date blank forms and an explanatory letter. During the Istanbul meeting the Committee welcomed the draft guidelines for the use of the standard form produced by the International Council of Museums (ICOM). It asked ICOM to take note of all the modifications to these guidelines proposed at that session and further invited discussion of the document at the ICOM annual conference in London in August 1983. On the

basis of discussion by ICOM and by all states members of the Committee and observer states it is hoped that a revised version will be produced and distributed by Unesco in the near future.⁵⁵ The Committee noted that concern had been expressed by the representatives of Turkey, Nigeria and the Arab World regarding the expatriation of their cultural heritage and their interest in the procedures set out by the Committee.⁵⁶ Likewise the interest and agreement to the procedures for bilateral negotiations indicated by the Islamic Republic of Iran and Greece were taken note of.⁵⁷

It will be a matter of time before judgment can be rendered on the usefulness of this form. It will certainly not be sufficient if only the requesting states file the requisite documents and not the holding states. There has to be solidarity here which will overcome the national chauvinism inherent in states and will produce a common will to obtain justice and equitable sharing of the cultural heritage. Without this cooperation all the high-flown language of Unesco and the Intergovernmental Committee will mean nothing. Holding states may not have a legal obligation to return disputed items of cultural property. However, in certain cases where the object is of prime importance to the cultural identity and heritage of the requesting state, where it is furthermore amply demonstrated that the objects will be publicly displayed in an institution that will protect their conditions, and where it is agreed that the objects will not be sold on the international art market, then it would appear that there is a moral obligation to return, or if not return to send on long-term loan or exchange, these rare items of intrinsic value to the people of the country of origin. As long as the conditions of a) primacy of the object, b) proper conservation if returned, and c) public exhibition were fulfilled, then holding states would not need to fear that they would have to disgorge themselves of all foreign exhibits. It is going to be the rare case in which a requesting state will be able to demonstrate that they fulfil the above-mentioned conditions. The collector-holding states' museums will still be repositories of the cultural heritage of all of mankind but they will have created international goodwill between the culture-rich (requesting) states and culture-poor (collector) states. It will be a bridge in the North-South dialogue.

CONCLUSION

It is clear that both in the areas of restitution and return of cultural property it will not be plain-sailing. For the resolution of smuggling and looting problems of the past and the present, the answer will lie in the agreement of states to work together for a reasonable solution. The thrust of the 1970 Convention would appear in principle at least to be acceptable to all states, even though for reasons discussed there may be some problems with ratification. No one today questions that states have the right to determine the movement of their cultural resources and therefore requests for restitution will be met with if the requisite laws are in place. The effort here must be to encourage ratification and implementation into domestic law, where necessary, of the provisions of the 1970 Convention. This would fill the gaps currently present. It is the area of return that is fraught with international political ramifications and emotional arguments. This is harder to solve. Hopefully, through the auspices of Unesco and its Intergovernmental Committee, the friction will be erased and in a calm light matters can be discussed and solutions found.

FOOTNOTES

1. For a detailed account of some such attempts see S.A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (New York: Oceana Publications, 1978). See also B. Burnham, *A Handbook of National Legislations* (International Council of Museums, 1974).
2. See Unesco, *Backgrounder: Return and Restitution of Cultural Property*, at 10.
3. 14 November 1970, Unesco Doc. 16C/17, (1971) 10 I.L.M. 289.
4. *Ibid.* at 3.
5. As of 15 May 1983, there were 52 states parties. See 30 August 1983, Unesco Doc. 22/C 93, at 7.
6. See Unesco Doc. 20 C/84. Notably France, the Federal Republic of Germany, Japan, the Netherlands, Switzerland and the United Kingdom.
7. *Ibid.* Note the position here of Finland and the Netherlands.
8. *Ibid.* Note Switzerland has these concerns.
9. *Ibid.* Denmark, New Zealand and the Federal Republic of Germany voiced administrative and practical concerns.
10. *Ibid.* Note comments by the Federal Republic of Germany and Finland.
11. *Supra* note 5.
12. R. Pallates Zaldumbide, "Return and Restitution of Cultural Property", (1982) XXXIV Museum 132.
13. *Ibid.*
14. Law of National Artistic Patrimony (22 February 1945).
15. *Supra* note 12 at 132-133.
16. *Ibid.* at 133.
17. *Ibid.*
18. *Ibid.*

19. La Corte d'Appello di Torino, Sezione II Civile, 28 January 1983.
20. See the *Antiquities Ordinance (No. 17) of 1953*, and *Antiquities (Export Permits) Regulations*, 1957.
21. "Mounties Mysteriously Seize \$1 million Nigerian Figurine" *The [Toronto] Sunday Star* (10 January 1982) A14.
22. *Ibid.*
23. S.C. 1974-75-76, c. 50 [hereinafter "Canadian Act"].
24. That is, another state party to the Unesco Convention, such as Nigeria.
25. See Art Newsletter (1982) at 7.
26. The [Toronto] Globe and Mail, (5 December 1981) 35.
27. *Supra* note 25.
28. "Crown Loses Art Import Case" *The [Toronto] Globe and Mail* (18 June 1983) A15.
29. Unesco Doc. SHC/MD/5 Annex 1 at 11.
30. *Ibid.*
31. *Ibid.*
32. *Ibid.* at 22.
33. 23 May 1969 U.N. Doc. A/CONF. 39/27. (1969), 8 I.L.M. 679.
34. There are a number of criminal law cases in Canada that support this proposition, for example, *R. v. Ali*, [1980] 1 S.C.R. 221.
35. *R. v. Lesarge* (1975), 26 C.C.C. (2d) 388 at 395 and 396 (Ont. C.A.).
36. *Attorney General of New Zealand v. Ortiz*, [1983] 2 All E.R. 93 (H.L.).
37. *Attorney General for New Zealand v. Ortiz*, [1982] 1 Q.B. 349.
38. [1982] 3 All E.R. 432, 450 C.A.
39. *Supra* note 36.
40. *Supra* note 38 at 456.

41. 11 June 1982, Unesco Doc. CLT/CH/4.82 at 1.
42. See W. St. Clair, *Lord Elgin and the Marbles* (London: Oxford University Press, 1967). See also, *An Historical Guide to the Sculpture of the Parthenon* (London: British Museum Publications, 1962). Note the Report of the Select Committee appointed to inquire into the expediency of purchasing the Elgin collection (1816, vol III, at 49).
43. One of the items is the tenth-century bronze statue of Tara now in the British Museum.
44. *Supra* note 41 at 3. This document details the various resolutions.
45. *Ibid.*
46. "A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created it" (1979) XXXI Museum 58.
47. *Ibid.*
48. See *supra* note 41 at 3.
49. "The Intergovernmental Committee: Mechanisms for a New Dialogue" (1981) Museum XXXIII 116-117.
50. *Supra* note 41 at 3.
51. *Ibid.*
52. *Ibid.*
53. This information was taken from *supra* note 41 at 5 and 6.
54. See Second Session. September 1981, Unesco Doc. CC 81/CONF. 203/10 at 10.
55. Unesco Doc. CLT 83/CONF. 216/7, Rev. 27 May 1983.
56. *Ibid.* at 3.
57. *Ibid.*