Evolving Ethical Principles and Legal Standards in Cultural Heritage Diplomacy: Cultural Politics and the Return of Looted Antiquities

By: Barbara T. Hoffman[1]

Art and culture are two pillars on which a society builds both identity and a sense of community. The complexities of the interaction of various nations and cultures with each other and the difficulties of finding concepts that are meaningful to all of them in order to find legal relationships makes a coherent development of cultural heritage law and policies a difficult task. Western notions of property, ownership, and restitution may not even translate to other cultures, whose entire system of belief and values runs counter to such notions.

Unlike other forms of "property," to which traditional rights are more easily assigned, the formulation of rights in cultural property is complex and fact specific. Questions about cultural identity and the ownership of culture, repatriation, and restitution implicate broader issues of ethics, globalization, state sovereignty, governance, and distribution. The context in which cultural heritage is generated and preserved is important to its meaning which not only varies depending on the cultural community from which the term and definition emanate but also depends on the purpose and strategic use for which the term and definition are employed.

Resolving conflicts of cultural patrimony between and within nations requires an understanding of the psychological, emotional and value-laden issues that may lie

[1] Barbara T. Hoffman is a prominent New York based art, intellectual property and international cultural heritage lawyer who has practiced for more than twenty-five years in the field. Her clients include artists, non-profit foundations, governments, collectors and museums. She is the editor of *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge University Press, 2006. She is currently at work on several projects, including leveraging international funding sources for cultural heritage capacity building, mediation of art and cultural heritage disputes, and a foundation for the return of looted heritage properties.

beneath the stated conflict. For example, the statement made by Philippe de Montebello, former Director of the Metropolitan Museum, that "whether legally excavated or not, cultural objects have intrinsic qualities from which one can learn a great deal," represented the view of a cultural internationalist: truth, access and preservation trump issues of return, restitution, or repatriation. This view has its origin in an oft-quoted article by Professor John Henry Merryman, "Two Ways of Thinking About Cultural Property" (1986). This notion of cultural property contrasts sharply with the indigenous or nationalist views. For the former, western notions of property may have no relevance. For the latter, cultural context and identity politics require return. Should the quest for "truth and knowledge" sometimes trump cultural affiliation and what evidence is acceptable to prove such cultural affiliation?" By whom is the decision made and by what criteria?

Cultural internationalists, primarily western or Asian developed economies, and multinationals define the "common heritage of (hu)mankind" as a global commons free from claims of state sovereignty and often argue that raw, naturally occurring materials and cultural objects are free to the party that collects them, or owned by the party who first develops them, with the same consequences for natural resources as for cultural resources: a depletion of such resources in the poor source nations, and an asymmetrical flow to the wealthy industrialized nations, multinationals, and wealthy collectors. In the cultural property/cultural heritage debate, objects of outstanding artistic and cultural significance are "depropertized" as stateless "goods" of commerce to promote free-trade principles in art and cultural artifacts and to free them from what this group calls "retentive nationalist" claims.

Requests for the restitution of cultural property are not a new issue in international law. In the famous case of the so-called "Elgin[2] marbles," or "Parthenon marbles," Lord Byron was among the first to criticize the removal of the collection of marble figures and a frieze from the Parthenon by Lord Elgin, who offered them for sale to the British Parliament in 1816. The formal request by Greece in 1983 by Melina Mercouri, it's then Minister of Culture, for the return of the marbles remains the best known and most discussed paradigm in academic and political fora. Indeed the Greek delegation included in its statement to the UNESCO Intergovernmental Committee for the Return of Cultural Property to its Country of Origin that all countries have the right to recover the most significant part of their cultural heritage lost during periods of colonial or foreign occupation.

Evolving Ethical and Moral Principles

Recent cases involving demands for the return of stolen or looted objects from museums around the world, including claims by Peru and Italy, have focused once again discussion and debate on the international art trade and the relationship between such trade and the looting of archaeological treasures from source nations in Latin America and other areas of the world and the concomitant destruction of history, knowledge and cultural heritage. The ramifications of such looting go far beyond the theft of the object in question. An object that is removed from its site may still retain its aesthetic appeal, but only if it is excavated scientifically can archaeologists ever understand the full story of the ancient culture from which it derives, including that culture's way of life, religion, trade, social structure and economy.

[2] The French have coined the term of "Elginisme." 2 Grand Larousse De La Langue Francaise, 1528 (1972) n.m. (du n. de Bruce conte d'Elgin (1766-1841), diplomate anglais, qui constetua par des moyens parfois douteux d'importantes collections d'objets d'art etrangers.)

Other demands for return have focused on restitution of the “spoils of war.” The problem of looted “cultural goods”, which were plundered in wartime through acts of violence, confiscation or by apparently legal transactions or auctions, unfortunately remains part of human history even at the beginning of the twenty-first century. Such plundering occurred throughout the ages, but became more acute during the nineteenth and twentieth centuries. Claims for the return of objects taken during the age of imperialism by European powers or the United States became so common that in 2002, a statement entitled the “Universal Museum” was issued by directors of 18 major world museums following the demands by Greece and Turkey for the return respectively of the Elgin Marbles and Pergamon Alter.

Peru’s recent demand that Yale University return artifacts from Machu Picchu, admittedly acquired by legal transaction, involves significantly different and more complex issues. While some question Italy’s cultural affiliation to a Greek vase, Peru’s affiliation to Machu Picchu is unquestioned. Delicate negotiations aimed at repatriating the highest-quality materials had led to a 2007 Memorandum of Understanding, which by its terms set forth a collaborative relationship. The Agreement referred in its terms to collaborative stewardship of the artifacts, resulting in ownership. Why the negotiations failed is not clear to this writer. However, by adopting the adversarial litigation model, Peru has encountered the same technical obstacles and defenses that have faced other claimants who seek the return of cultural objects removed years ago on traditional property theories: statute of limitations, adverse possession, and undue delay. The gravamen of the thirty-one page complaint is that “These artifacts belong to Peru and its people and are central to the history and heritage of the Peruvian nation.”

Perhaps one of the most contentious subjects of debate in international cultural property law is whether and under what conditions archaeological rich nations (source nations) should be able to claim restitution of artifacts and antiquities that originated in ancient civilizations within their borders. Succinctly stated, restitution has always rested on the violation of the prohibition of theft and pillage. But what constitutes theft? How and who determines that an object is "stolen" and must be returned?

The Metropolitan Museum decision in February 2006 to give up its claimed bona fide title and return a 2,500 year old vase known as the Euphronios Krater as well as 19 other objects to Italy in exchange for long-term loans of other antiquities and objects of art and future collaborations on excavations and exhibitions represents a watershed in the debate and suggests both a new model for thinking about the concept of cultural property and a strategic use of cultural diplomacy rather than litigation to create solutions which accommodate the diverse interests of globalization, identity, access, preservation and benefit sharing.

The Euphronios Krater and the other objects were not war booty but illegally excavated artifacts stolen from Italy. The Metropolitan Museum claimed its reversal in position, after almost thirty years, resulted from "convincing evidence" that the antiquities were stolen from Italian archaeological sites in violation of Italy's law of 1939 vesting ownership of all antiquities found in the ground in Italy. But, the willingness of the Metropolitan Museum to engage in cultural diplomacy rather than litigation is a reflection of a changing legal, ethical and moral climate in the museum and world community. Many archaeologists believed at the time of the Krater's acquisition in the 1970s that it was stolen; however, this was the era of don't ask, don't tell,

Traditional common law property notions of title and ownership caused the Metropolitan Museum to litigate from 1982 to 1993 a claim by Turkey to the Lydian Hoarde. A favorable court ruling on the statute of limitations for Turkey resulted in the Metropolitan Museum's decision to return the cache of sixth century B.C. gold and silver allegedly looted from the Ushak region in Turkey, to Turkey.

In a further example of the evolving attitude of museums, the Getty, in June 2006, agreed to turn over to Italy 21 antiquities alleged to have been stolen by tombaroli and illegally exported through Switzerland to the United States. That was followed by the decision of the Museum of Fine Arts, Boston on September 28, 2006, to return over 13 archaeological treasures to Italy which Italy claimed were looted from Italian soil. As with the Metropolitan, the Italian government agreed as part of the deal that it would lend "significant works" for exhibition at the Museum of Fine Arts. Maurizio Fiorelli, the dedicated State Prosecutor and the Italian Government's chief architect of orchestrating returns from the Boston Museum, the Metropolitan, the Getty and other cultural institutions in the United States and elsewhere, praised the Boston Museum's position. "They thought more about cultural projects than cultural property" (*New York Times* September 29, 2006).

Cultural politics of return today center primarily on the return of objects which are the subject of illegal trafficking. Notwithstanding that the legal theories involved for the return of objects during times of war may differ from those of involved for cultural property taken in violation of an export law or taken as the result of illicit excavation, "spoils of war," have been the subject of return to their country of origin based on the same evolving ethical and moral principles discussed above.

For example, on November 16, 2007, 3,788 books were returned by Chile to Peru. They had been removed in 1881 during the Panfu War (1879-1883) from the National Library of Peru in Lima when it was occupied by Chilean troops. The Chilean Government stated at the time: "los bienes culturales, sean materiales o inmateriales, expresan de manera profunda la cosmovisión de los pueblos, la creatividad, imaginación y capacidad de transformación de sus habitantes y comunidades, como también son testimonio de su memoria, de sus sentidos de identidad y pertenencia, por lo cual es indispensable reconocer el derecho de los pueblos a su patrimonio cultural, como herencia privilegiada de los que les antecedieron y de los acervos para crear nuevas obras y contenidos culturales."

On 31 August 2008, on the occasion of a visit by the Italian President of the Council of Ministers, Italy returned to Libya the statue of the Venus of Cyrene. This headless marble statue, dating back to the 2nd century A.D., is a Roman copy of an original Hellenistic work that has never been found. It is also called the Venus "Anadyomene", that is the Venus coming out of the waves. Found in 1913 by the Italian troops nearby the ruins of the old Greek and Roman settlement of Cyrene, in 1915 the Venus was removed to Rome, where it was exhibited at the National Roman Museum. When the statue was found, Italy had already unilaterally annexed Libya (Tripolitania and Cyrenaica) that previously belonged to the Ottoman Empire (Italo-Turkish War of 1911-1912).

The International Legal Environment

The legal undergird for cultural diplomacy and the return of cultural property is embodied in the principles of international legal conventions. Definitions of "cultural property" in international conventions determines not only what is protected under the conventions, but set forth legal and ethical principles for states and by extrapolation for stakeholders, be they museums, collectors, salvors, indigenous groups or multinational companies with respect to cultural heritage.

The current significant international conventions that form the legal regime for the protection of moveable "cultural property" are the Hague Convention, the 1970 UNESCO Convention, and, its companion, the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995)) ("UNIDROIT"). The latter two are the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects during peacetime and thus, directly concern the theme of this Symposium.

The 1970 UNESCO convention was adopted in response to the widespread pillaging of archaeological sites and envisages diplomatic action at the interstate level to achieve the return of cultural property. Principally, UNESCO works at the level of government administrations: governments are required to take action at the request of a State party to the convention to seize cultural property which has been stolen. They must also collaborate to prevent major crises in the protection of cultural heritage.

For example, in 1985, at the request of the Peruvian government, Canadian customs officers and investigators seized a large group of pre-Columbian objects, including ceramic pottery dating from 1800 BC to 1400 AD. Illicitly exported from Peru, the objects were imported in violation of the Canadian Cultural Property Export and Import Act, and were destined for the United States. After having returned a first group of artifacts in 1997, Canada returned the remaining 59 objects to Peru in April 2000. The UNIDROIT Convention aims at providing individual victims with the right to

bring an action before domestic courts for the return of stolen or illegally exported cultural objects.

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) (Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151) was adopted by UNESCO on November 16th, 1972, partially in response to the changing social and economic conditions which aggravate the destruction of the cultural and natural heritage. Whilst the 1970 UNESCO and UNIDROIT dealt with illegal excavations, plunder and the illicit traffic in movables, the World Heritage Convention is concerned with the natural and built environment.

If the linking of culture and nature embedded in the World Heritage Convention was inspired by the environmental movement, so, too, is the linking of cultural diversity with biodiversity in the Convention on Biological Diversity (Convention on Biological Diversity, June 5, 1992, U.N.E.P. (1992)) (the "CBD"), adapted in 1992 under the auspices of the United Nations Conference on Environment and Development, Rio de Janiero. The CBD embodies the idea that states should have ownership of the natural biological resources in their territories, including their genetic resources, and imposes obligations with regard to conservation and biodiversity, recognizes the value of intellectual property rights to traditional knowledge, and seeks to address the needs of developing countries by requiring technology transfer and equitable benefit sharing in the results of research and discovery.

The Convention for the Safeguarding of the Intangible Cultural Heritage (Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003)

(“2003 Convention”) completes the current primary international legal framework for considering the principles affecting the protection of cultural heritage and the development of policy related thereto (United Nations Convention on the Law of the Sea (Montego Bay, 1982)). The 2003 Convention defines the intangible cultural heritage, or “living cultural heritage,” as the practices, representations, expressions, as well as the knowledge and skills, which communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

Article 2 of the Convention states:

> For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

The United States Perspective

The United States is the major art importing country in the world. It should be no surprise, therefore, that United States policy on the international movement and trade in cultural property, to the extent that one can speak of such a policy, is based on the free international movement of art works and cultural property and on the non-interference with private ownership of that art and cultural property. The United States Congress has enacted few laws with respect to the regulation of private ownership of such property or its movement interstate or internationally. Only the United States currently has no export restrictions on works of art. There are, however, growing limits on the export of archaeological objects and Native American cultural objects (NAGPRA 25 U.S.C. § 3002-3007, 2000).

There are also very few import restrictions, except as related to endangered species or politically embargoed goods and cultural property restricted under the Cultural

Property Implementation Act ("CPIA") discussed in the next section. Finally, the fact that an art object has been illegally exported does not in and of itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a United States court.[3]

The United States did not implement the UNESCO Convention until 1983. Since the 1970s, art dealers, the American Association of Museums (AAM), the Association of Art Museum Directors (AAMD) and auction houses had lined up against archaeologists, the International Council of Museums ("ICOM"), the International Council of Museums and Sites ("ICOMOS"), and others to debate whether and to what extent modern day governments should be entitled to claim artifacts, works of art and antiquities that originated in ancient civilizations now found within their borders. Museums had argued that the enforcement of such laws would hurt U.S. museums' abilities to collect and assemble collections and on the public's access to information. At the heart of what was often a charged and emotional debate implicating law, politics, economics, archaeology, and education, were three issues: (i) whether the United States should enforce foreign cultural patrimony laws and which U.S. legal principles should govern the application of such law; (ii) whether the U. S. should enforce the export prohibitions of foreign states with respect to cultural property disputes, and (iii) what (if any) the applicable statute of limitations applied to the recovery of such property should be.

The Cultural Property Implementation Act, 19 U.S.C. §§260-2613, which implements UNESCO, focuses primarily on implementation of Articles 7(b) and 9 of the UNESCO Convention, which call for concerted action among nations to prevent trade in

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[3] *United States v McClain*, et al 545 F. 2d. 988 (5th Cir. 1977) appealed after remand 593 F. 2d 658 (5th Cir., 1979).

specific items of cultural property in emergency situations. Perhaps the most important and effective diplomatic tool for source nations is the ability of the United states to enter into bilateral treaties with foreign governments which provide for cultural cooperation and, most importantly, the imposition of import restrictions.

Requests to the Cultural Property Advisory Committee seek United States cooperation in restricting the importation of archaeological or ethnological material whose the pillage places a nation's cultural heritage in jeopardy. The Committee is responsible for reviewing such requests and recommending action by the United States. The US Department of State provides the Committee with technical and administrative support to carry out its advisory function.

The Cultural Property Advisory Committee has approved emergency import restrictions for fourteen countries, including Peru, Mali, China, Italy and Colombia. The import restriction becomes effective on the date that a descriptive list of the objects is published in the U.S. Federal Register. Thereafter, restricted objects may not enter the United States without an export certificate issued by the country of origin or documentation that the object left the country of origin prior to the effective date of the restriction.

The United States did not adopt the Hague Foreign Convention until 2009. Foreign claimants in the United States have also benefited from the evolving legal, ethical and moral climate of the cultural diplomacy.

The issue of whether archaeological materials that a foreign country had claimed were stolen could be seized by the United States Government under the National Stolen Property Act was resolved by the United States Court of Appeals for the 2nd Circuit's in

June 2003. The Court affirmed the conviction of dealer, Frederick Schultz, on one count of conspiring to deal in stolen property, a decision that sent shockwaves through the dealer and collecting community. This decision confirmed that the United States, consistent with prior precedent as established by the *McClain* doctrine, would enforce under appropriate circumstances the cultural patrimony laws of foreign nations on the theory that the cultural objects so exported were "stolen".

While obstacles still exist under both the National Stolen Property Act and the CPIA for foreign nations to work diplomatically with the United States on the return of their cultural patrimony, both the courts and the United States Department of Justice and Homeland Security have increasingly devoted legal resources to assisting foreign nations in their recovery of stolen antiquities under a variety of legal theories.

Beyond Title

While a general consensus has emerged regarding the need to preserve and protect the world's cultural, biological, and natural resources, often divergent opinions exist regarding the means and ultimate goals of such efforts. Cultural politics in the past centered about debating cultural heritage diplomacy in terms of questions of ownership: who owns the past? Such questions focusing on questions of title may no longer be relevant to 21st century cultural politics which seek to reconfigure the boundaries between private property and the public domain and to give meaning to terms such as common heritage of (hu)mankind and equitable benefit sharing. The cultural diplomats of today ask, how can we promote global and national economic development while at the same time preserving local diversity and cultural identity? How can the conservation of traditional cultures be achieved without leaving the stakeholders and human vessels in a

perpetual state of poverty? What is the compass which is to chart a course of globalization that is fair, just and benefits all, including those whose cultures risk extinction when confronted with globalization?