

To what extent is international law effective in securing the restitution of cultural objects that have been moved from one jurisdiction to another?

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Introduction

Cultural Heritage law comprises a vast body of legislation. This classifies cultural heritage in several categories. These are in turn classified into two parts. Firstly, tangible cultural heritage: “movable cultural heritage (paintings, sculptures, coins, manuscripts) immovable cultural heritage (monuments, archaeological sites, and so on) underwater cultural heritage (shipwrecks, underwater ruins and cities)¹” Secondly, intangible cultural heritage: “oral traditions, performing arts, rituals²”

This essay shall focus on tangible moveable cultural heritage, as it is the only class of heritage which can, by nature, be resituated. It would, however, be fruitless to deny the intrinsic intangible value of each cultural object, as their tangible value is fully dependent on their intangible value.

This essay shall be split into three parts of tangible moveable cultural heritage (TMCH): paintings & other art works; sculptures & other stone works and manuscripts & other literary works.

It is important to distinguish between these three so as not to become embroiled within each category highlighted in articles 1(a)-(k) in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³⁴.

Doing so would dilute the quality of the overall piece and remove the relevance of the points of law highlighted.

The tangible movable cultural heritage categories I have chosen are broad. The examples from each shall be representative of whether the law is effective in securing the restitution of these cultural objects to their ‘rightful’ jurisdiction.

To further clarify, jurisdiction shall be defined as: “The geographic area over which authority extends; legal authority; the authority to hear and determine causes of action⁵.” In general

¹ 'Definition Of The Cultural Heritage | United Nations Educational, Scientific And Cultural Organization' (*Unesco.org*, 2017) <<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/>> accessed 29 March 2017.

² *Ibid.*

³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1.

⁴ 'Convention On The Means Of Prohibiting And Preventing The Illicit Import, Export And Transfer Of Ownership Of Cultural Property' (*Portal.unesco.org*, 1970) <http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 22 April 2017.

⁵ <<http://legal-dictionary.thefreedictionary.com/jurisdiction>> accessed 26 April 2017

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terms we are referring to items which have crossed borders and been resituated to their original jurisdiction.

I shall conclude that international law has been effective, but not efficient for the restitution overall. However, it would be remiss to ignore the shortcomings of the legislation, which does not provide adequate temporal limits on restitution. This has led to cultural heritage taking longer than necessary to be resituated to its 'rightful' jurisdiction.

The definitions in the legislations are wide, hence the need for compartmentalisation of them into three main sections. This will give us a general idea of how the effective international law is at restitution. The latter section will be briefer, as most manuscripts recovered were found in auction houses, apprehended by authorities and returned to their jurisdiction of origin. This does not address the question. But it is important to introduce a variety of cultural objects to avoid the scope of this essay being too narrow.

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The Legislation

The Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), defines cultural heritage as: “movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above⁶.”

The 1954 convention protects cultural heritage by imposing a positive obligation to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property⁷.”

There are also two obligations to negate “requisitioning movable cultural property situated in the territory of another High Contracting Party.” And “They shall refrain from any act directed by way of reprisals against cultural property⁸.”

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines Cultural property as: “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science⁹.”

Similarly to the 1954 convention, the 1970 convention imposes both positive and negative obligations. Contracting parties must “respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories¹⁰.”

They must prevent misappropriation; ensure cooperation in restitution; admit actions for recovery of lost or stolen cultural property and recognize the right of each high contracting party to define which heritage it considered inalienable to its own national culture. Most importantly perhaps, these obligations must be *consistent with the laws of each State*¹¹. The

⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) Article 1.

⁷ Ibid Article 3.

⁸ Ibid Article 4.

⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), Article 1.

¹⁰ Ibid Article 12.

¹¹ Ibid Article 13.

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effect on signatory states is therefore diminished. Each state can define which cultural property they can protect. We shall see the significance of this later in the *McClain* case.

Hence the convention had a dual goal of protecting the cultural property from various countries against “theft, pillage or misappropriation¹²” and providing for the requisition of such property by the country of its origin¹³.

But the shortcoming of this convention is found in Article 7, which requires parties to the Convention to prohibit importation of cultural property stolen “from a museum or a religious or secular public monument” and to take measures to return such imported cultural property at the request of the “State Party of origin,” provided that the “requesting State” pay “just compensation to an innocent purchaser¹⁴.” Looking at the Porcellis & Buytewech the Younger paintings, we shall discuss the shortcomings of this approach of the bona fide purchaser doctrine.

There is a gaping hole here for property in the possession of private art collectors or auction houses which are in the possession of cultural objects, which have not yet been discovered¹⁵.

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 remedies the issues of the past two conventions in part. It refers to cultural objects as “objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science¹⁶...”

It sought to establish “uniform legal rules governing restitution claims for stolen cultural objects and return claims for illicitly exported cultural objects¹⁷.”

This convention expanded rights, for example, it not only applies to museums or state institutions, but it also applies to any “possessor of a stolen cultural object¹⁸.”

¹² Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) Article 7.

¹³ ‘Restituting Looted Cuban Art’ (2009) <<http://www.ascecuba.org/c/wp-content/uploads/2014/09/v19-jimenez.pdf>> accessed 8 May 2017.

¹⁴ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), Article 7.

¹⁵ ‘Conflicting Trends In The Flourishing International Trade Of Art And Antiquities: Restitutio In Integrum And Possessio Animo Ferundil Lucrandi’ (Elibrary.law.psu.edu, 1995)

¹⁶ Convention on Stolen or Illegally Exported Cultural Objects (1995) Article 2.

¹⁷ ‘Resolving The Disjunction Between Cultural Property Policy And Law: A Call For Reform’ (*Rutgers Law Review*, 2011)

¹⁸ Convention on Stolen or Illegally Exported Cultural Objects (1995) Articles 3,4.

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While this convention does ensure more effective restitution however it too is limited. It “is not retroactive and does not apply to pieces stolen from the host country before its ratification¹⁹.” Pieces of cultural heritage taken before a country ratifies this convention are not protected. Now there are more than 63 signatories to this convention, although most of them are source nations²⁰. Market nations were reluctant to sign up, initially, due to negative reviews of the UNIDROIT convention from art dealers²¹. They were concerned that it would limit exhibitions and sales of cultural property in signatory countries, as source nations might try to legally confiscate the cultural property.

It is worth noting some US legislation, which will be relevant later. The NSPA imposing fines on stolen goods²². Specifically relevant will be Section 2314 which states: “Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more [...] which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken [...] shall be fined under this title or imprisoned not more than ten years, or both²³”.

Finally, in cases where international conventions cannot be applied, the Intergovernmental Committee (ICPRCP) can step in²⁴. They are comprised by UNESCO Member States. If they have lost certain cultural objects of fundamental significance and are calling for their restitution or return, the Member States may call on the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation²⁵. Though their efficacy in resituating cultural heritage shall not be assessed, it is worth noting the committee’s existence.

¹⁹ Ibid Article 10.

²⁰ 'Status Map - Cultural Property - UNIDROIT - International Institute For The Unification Of Private Law - Institut International Pour L'unification Du Droit Privè' (*Unidroit.org*, 2017)

²¹ Jonathan Petropoulos, *The Faustian Bargain* (1st edn, Oxford University Press 2006), at page 109.

²² 'NATIONAL STOLEN PROPERTY ACT U.S. Code Title 18--Crimes And Criminal Procedure Sections 2314 And 2315' <<https://eca.state.gov/files/bureau/18-2314.pdf>> accessed 7 May 2017.

²³ 'NATIONAL STOLEN PROPERTY ACT U.S. Code Title 18--Crimes And Criminal Procedure Sections 2314 And 2315' <<https://eca.state.gov/files/bureau/18-2314.pdf>> accessed 7 May 2017.

²⁴ 'Restitution of Cultural Property | United Nations Educational, Scientific And Cultural Organization' (*Unesco.org*, 2017) <<http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/>> accessed 2 May 2017.

²⁵ Ibid.

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Paintings & other art works

The Bruno Schulz Mural

Bruno Schulz was a Polish Jew in the 'employ' of a Nazi Officer, Landau, in Ukraine during the second world war²⁶. In November 1942, Landau killed a Jewish dentist favoured by a rival Gestapo officer, Karl Günther. Soon after, on a day that has come to be known as Black Thursday, Günther saw his opportunity for revenge. He killed Bruno Schulz²⁷.

Schulz was painting the walls of a bedroom for Landau's children. The mural was rediscovered in 2001. Questions began to be asked: did the mural belong to Ukraine where it was found? Did it belong to Poland where Schulz was born? The issue became more difficult, as Bruno Schulz died in 1942 and had no apparent heirs. Copyright was made irrelevant, as potential claims made by the family expire 70 years after the death of the author²⁸.

Ultimately, the mural ended up at the Yad Vashem museum in Jerusalem, in the Holocaust Martyrs Heroes Remembrance exhibition. The museum asserted a "moral right"²⁹ over the work.

Ukrainian law does not recognise a moral right. The law on copyright and related rights defines the author as the "person who creates work by creative effort"³⁰.

The Country's law on "exportation, importation and restitution of cultural values bans illegal import and export of cultural values which are not in their jurisdiction"³¹.

Hence it would seem that the Yad Vashem acted contrary to Ukrainian law. This contradicts, also, the UNIDROIT convention, which makes clear that the country of origin's own laws must be complied with.

Ukraine could have argued that the moral right asserted by the Yad Vashem was barred by the "intentional distortion, mutilation, or other modification of a work (if that distortion is likely to

²⁶ Merima Bruncevic, 'The Lost Mural Of Bruno Schulz: A Critical Legal Perspective On Control, Access To And Ownership Of Art' (2010) 22 Law and Critique.

²⁷ (2002) <<http://www.newyorker.com/magazine/2002/12/16/the-lost>> accessed 23 April 2017.

²⁸ 'Ukraine: Law On Copyright And Related Rights' Article 28. (*Wipo.int*, 1994)

<http://www.wipo.int/wipolex/en/text.jsp?file_id=142655> accessed 24 April 2017.

²⁹ Merima Bruncevic, 'The Lost Mural Of Bruno Schulz: A Critical Legal Perspective On Control, Access To And Ownership Of Art' (2010) 22 Law and Critique.

³⁰ 'Ukraine: Law On Copyright And Related Rights' (*Wipo.int*, 1994)

<http://www.wipo.int/wipolex/en/text.jsp?file_id=142655> accessed 24 April 2017.

³¹ (1999)

<http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua_law_exportation_importation_engtof.pdf> accessed 26 April 2017.

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harm the author's reputation, and prevents the destruction of any work of recognized stature)³²"

The Yad Vashem claimed it acted openly and in cooperation with the Drohobycz authorities, and that its first interest was the preservation and safe conduct of Schulz's work³³.

The mural is now on long term loan to the Yad Vashem.

In this case, international law seemed to be in the favour of Ukraine, however it was not effective in restituting the murals to their original jurisdiction. Although the murals are legally the property of Ukraine, they reside in Jerusalem on long term loan. Hence the law is in this case ineffective.

Porcellis & Buytewech the Younger paintings

Continuing with the theme of WWII, "Ships in Distress on a Stormy Sea," by the marine artist Jan Porcellis and "Landscape with Goats" by the animal painter Willem Buytewech the Younger, were paintings taken by the Nazis during the war and returned to Canada³⁴.

Described as "little jewels³⁵" by Clarence Epstein, director of the Max-Stern Foundation at Concordia University, these paintings were recovered from Heidelberg and Hamburg. The buyer relinquished them willingly, having no idea they were stolen.

This case highlights the problem in international law of the buyer in good faith. The bona fide purchaser doctrine is rooted in international law. "A possessor will take optimal precautions to prevent theft if they are faced with the loss of their goods; and a purchaser will make an optimal investigation into their seller's title if faced with the loss of the goods³⁶." A possessor and a buyer cannot both be faced with the full loss, however. This presents a problem of "double moral hazard³⁷"

³² Moral Rights Basics' (*cyber.harvard.edu*, 1998)

<<https://cyber.harvard.edu/property/library/moralprimer.html>> accessed 24 April 2017.

³³ (2004) <<http://bostonreview.net/archives/BR29.6/paloff.php>> accessed 23 April 2017.

³⁴ (2017) <<http://artdaily.com/news/92409/Two-paintings-taken-by-Nazis-returned-to-beneficiaries-in-Canada#.WP3830XyjIX>> accessed 24 April 2017.

³⁵ (2016) <<https://www.thelocal.de/20161212/two-paintings-taken-by-nazis-returned-to-beneficiaries-in-canada>> accessed 24 April 2017.

³⁶ 'Rethinking The Laws Of Good Faith Purchase' (*Digitalcommons.law.yale.edu*, 2011)

<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5159&context=fss_papers> accessed 24 April 2017.

³⁷ Ibid.

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The buyer's incentive to search and the seller's incentive to investigate are both, thus, reduced. This creates a problem for the restitution of cultural heritage. In many cases, buyers of stolen art can keep the artwork claiming they bought it in good faith.

The US case *Solomon R. Guggenheim Foundation v. Lubell*³⁸³⁹ is a prime example of this. There, the court found the museum to be the original owners. A Chagall gouache was stolen from the Solomon R. Guggenheim Foundation in the 1960's. The claimants asserted they had searched diligently for the work, relying on the rule in an earlier case: *Deweerth V. Baldinger*⁴⁰. In that case, the claimant retained the stolen painting based on diligent searching. In *Lubell*, however, Wachlter, J. held: "The true owners of stolen artwork do not have a duty to exercise reasonable diligence to recover the item to defeat a statute of limitations defense to a replevin action⁴¹."

We can see that the law acts by assigning property rights to one or the other of the parties: "The possessor always, sometimes, or never can recover her goods from the ultimate purchaser; and the purchaser always, sometimes, or never can keep them⁴²." This is the case in the US but is also reflected internationally. This approach fails for two reasons.

The first is that with the current rules, owners do not take efficient precautions against theft or misappropriation, whilst the possessor doesn't take precautions against buying stolen goods unless he is being sued by the owner.

The second is that the owner's incentive to search for stolen/ misappropriated goods depends on their finding them, but when found this incentive to protect against theft fails⁴³.

Schwartz & Scott appeal for abandoning the property rights paradigm in favour of a tort paradigm⁴⁴. States should choose commercial laws which induce "privately efficient behaviour". Owners should lose the goods if they invest "suboptimal levels of care in precaution or searched sub optimally for goods". Equally buyers should always keep the goods against negligent owners and lose them to diligent owners.

³⁸ *Solomon R Guggenheim Foundation v Lubell* [1991] 569 NE2d 426 (NY Ct App 1991).

³⁹ 'THE SOLOMON R. GUGGENHEIM FOUNDATION, RESPONDENT, V. MRS. JULES LUBELL, APPELLANT. (THIRD & FOURTH-PARTY ACTIONS.)' (*Law.cornell.edu*, 1991)
<https://www.law.cornell.edu/nyctap/l91_0018.htm> accessed 10 May 2017.

⁴⁰ *DeWeerth v Baldinger* [1987] 658 F Supp 688 (SDNY 1987).

⁴¹ *Solomon R Guggenheim Foundation v Lubell* [1991] 569 NE2d 426 (NY Ct App 1991).

⁴² 'Rethinking The Laws Of Good Faith Purchase' (*Digitalcommons.law.yale.edu*, 2011)
<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5159&context=fss_papers> accessed 24 April 2017.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

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This combination will increase the incentives of both parties⁴⁵.

Hence as we can see the law for the restitution of goods moved from one jurisdiction to another is inefficient. The current system does not adequately protect either injured party. It negates any incentive they may have to prevent theft or adequately search for the items' restitution.

Pre-Vesuvius eruption, Pompeii senator Ascellius' frescoes

Briefly, a more recent example of the effectiveness of international law is found in the return of Senator Ascellius' frescoes in 2015. They were found in the garage of Madeleine Pickens, former wife of oil magnate T. Boone Pickens⁴⁶.

This was part of a bigger operation by ICE to recover stolen goods, such as this one stolen from a Neapolitan museum in 1997⁴⁷. This case of importance to us because the four stolen antiquities bought by Paulson were legally relinquished by the Allen E. Paulson Trust, allowing for their return to Italy.

In some cases, the job of international organisations is made easier by the cooperation of individuals. Here, the Trust handed over the stolen goods freely thus enabling the cogs of the legislation to work without having to discern ownership.

The US are not signatories to the UNIDROIT convention but they are a high contracting party to the UNESCO convention 1970⁴⁸. As this work was stolen from a museum in Naples, this legislation applies. The goods must be returned⁴⁹.

This case is a testament to the effectiveness of international legislation. Provided the party in possession of the stolen good cooperates with the authorities, cultural heritage will be returned to their 'rightful' jurisdiction without issue. However, this cooperation is seemingly the key to the legislations' swift success.

⁴⁵ Ibid.

⁴⁶ (2017) <<https://www.aol.com/article/2015/02/27/19-stolen-artifacts-returned-to-italian-government/21147594/>> accessed 9 May 2017.

⁴⁷ The <http://www.washingtontimes.com>, 'Hunt For Missing Pompeii Artwork Includes Stop In Boise' (*The Washington Times*, 2015) <<http://www.washingtontimes.com/news/2015/mar/28/hunt-for-missing-pompeii-artwork-includes-stop-in-/>> accessed 9 May 2017.

⁴⁸ 'Signatories To The 1970 UNESCO Convention' (*Dosfan.lib.uic.edu*) <<http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/unesco02.html>> accessed 10 May 2017.

⁴⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), Article 7.

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Sculptures & other stone works

Stolen Etruscan Vessel to Be Returned to Italy

Another Italian case is that of an Etruscan vessel from 470 B.C. valued at \$250,000⁵⁰. It was stolen by Gianfranco Becchina⁵¹ and ended up in New York⁵². District Attorney, Cyrus R. Vance Jr. claims that the bona fide purchaser rule is also ineffective but not for the same reasons as Schwarz & Scott. As opposed to the legislation giving no incentives to either party, he claims that looters “peddle stolen property for top dollar, they do so with the implicit endorsement of all those who knowingly trade in stolen antiquities⁵³.” Hence giving the seller lenience, if they have made optimal efforts to safeguard their purchase, should not be allowed.

The Vessel will be on display at the Italian Consul in New York before being returned to the Polo Museale del Lazio in Italy.

Becchina’s warehouse and gallery in Basel, Switzerland contained 4,536 looted cultural objects⁵⁴. Switzerland fought a 13-year legal battle to keep the goods. Ultimately the country had to return all 4,536 cultural items to Italy⁵⁵. There now exists a bilateral agreement between Switzerland and Italy over the importation and repatriation of cultural property⁵⁶.

We can draw from this that while the law is efficient in recovering looted goods, the process of countries relinquishing their hold over cultural property can be hard to overcome. The law is not adequately constituted to secure swift restitution of goods.

Eventually, however, most goods do reach their country of origin.

The law is effective in the restitution but not in the timely restitution of cultural objects.

Ceremonial Mask of the Kwakwaka’wakw First Nations

With a similar conclusion to the Bruno Schulz case, the museum in possession of this mask relinquished it on long term loan to its ‘rightful’ jurisdiction.

⁵⁰ 'Gianfranco Becchina | CHASING APHRODITE' (*Chasingaphrodite.com*, 2014)
<<https://chasingaphrodite.com/tag/gianfranco-becchina/>> accessed 24 April 2017.

⁵¹ Ibid.

⁵² (2017) <https://www.nytimes.com/2017/03/16/arts/design/stolen-etruscan-vessel-to-be-returned-to-italy.html?_r=1> accessed 24 April 2017.

⁵³ (2017) <<http://usa.greekreporter.com/2017/02/09/manhattan-district-attorney-returns-ancient-sarcophagus-to-greek-consulate/>> accessed 24 April 2017.

⁵⁴ (2014) <http://www.swissinfo.ch/eng/culture/co-operation-concludes_last-stolen-cultural-objects-returned-to-italy/38103036> accessed 24 April 2017.

⁵⁵ Ibid.

⁵⁶ Import Export And Transit Of Cultural Property.' (*Bak.admin.ch*)
<http://www.bak.admin.ch/kulturerbe/04371/04386/index.html?lang=en&webcode=d_02013_en>
accessed 24 April 2017.

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This mask represents an ancestral being or Crest of the indigenous Kwakwaka'wakw people, of the Pacific Northwest coast in Canada⁵⁷. It was made in 1910 and confiscated from Dan Cramer in 1921 on Village Island, 'Mimkwamlis, when he hosted an illegal potlatch⁵⁸.

Hosting and participating in potlatches was banned by Canadian Act of Parliament, the Indian Act, in 1884, as part of wider national efforts to assimilate First Nations people⁵⁹.

To clarify, a potlatch is “an opulent ceremonial feast at which possessions are given away or destroyed to display wealth or enhance prestige⁶⁰.”

The U'mista Cultural centre gives a different perspective: “The ceremony to tell our stories and to show social changes such as birth, marriage, name giving, standing up a new chief, and death...⁶¹”

Over 200 items of regalia were taken from this potlatch and sold to US museums. One of these masks ended up in the British Museum. Gloria Cranmer Webster, a Kwakwaka'wakw anthropologist, cultural bearer and daughter of Dan Cranmer⁶² recognised it.

The British museum is known for being custodian to many previously colonised nations' cultural artefacts.

Renown cultural heritage and intellectual property academic; Professor MacMillan explains this by describing metropolitan museums, as “a sort of physical embodiment of the history of imperialism⁶³.” She adds that more than merely presenting artefacts to further visitors'

⁵⁷ 'Mask' (*British Museum*)

<http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=527173&partId=1> accessed 8 May 2017.

⁵⁸ Andrea Sanborn, 'The Ceremonial Mask Of The Kwakwaka'Wakw First Nations From The British Museum -On Long-Term Loan- To The U'Mista Cultural Centre In Alert Bay, British Columbia, Canada' (<http://www.unesco.org>, 2017) <http://www.unesco.org/culture/laws/pdf/abstract_sanborn.pdf> accessed 8 May 2017.

⁵⁹ 'Mask' (*British Museum*)

<http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=527173&partId=1> accessed 8 May 2017.

⁶⁰ <<http://www.dictionary.com/browse/potlatch>> accessed 9 May 2017.

⁶¹ 'The History Of The Potlatch Collection | U'mista Cultural Centre' (*U'mista Cultural Centre*)

<<https://www.umista.ca/pages/collection-history>> accessed 9 May 2017.

⁶² 'Mask' (*British Museum*)

<http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=527173&partId=1> accessed 8 May 2017.

⁶³ Fiona MacMillan, 'The Protection Of Cultural Heritage: Common Heritage Of Humankind, National Cultural 'Patrimony' Or Private Property?' (2013) 64 Northern Ireland Legal Quarterly.

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knowledge, museums keep “all this looted stuff because it is part of British history and, thus, perhaps of British cultural heritage – although maybe this confuses history with heritage⁶⁴.” The British museum did not relinquish its control over the mask, instead it offered it on long term loan to the U’mista Cultural Centre in British Columbia⁶⁵.

The law is therefore effective. While Canada is not a part to the UNIDROIT convention it is a part of the UNESCO convention. The British museum has acted in line with the law by returning the mask to Canada but in doing so they retain the right to recall it at any time. Hence Britain can still feel, perhaps, as though they are in possession. We cannot discount the impact of global politics and mediation of international tension as a swaying factor in these transfers of cultural heritage.

The law has been effective in resituating this mask however the permanence of this restitution, while it would cause an international scandal, is uncertain.

Pre-Columbian Archaeological Objects – *United States v. McClain*

The *McClain* cases involved defendants who had travelled to Mexico and excavated pre-Columbian artefacts. Patty McClain and the other defendants then exported the artefacts without a permit or license, brought them into the United States, and were indicted under the NSPA⁶⁶. According to the NSPA, it is a crime to deal in property that has been “stolen, unlawfully converted or taken, knowing the same to be stolen⁶⁷” We can see the severity of the terms of the NSPA in the excerpt above.

The Court of Appeals for the Fifth Circuit established the “McClain doctrine”. Foreign patrimony laws vesting ownership in the State of cultural property found within its boundaries are acknowledged by the United States⁶⁸.

The defendants claimed that the FBI investigation into their acquiring the artefacts was unwarranted as the NSPA fails to define the word “stolen⁶⁹”. They claim that Mexico’s

⁶⁴ Ibid.

⁶⁵ Andrea Sanborn, 'The Ceremonial Mask Of The Kwakwaka’Wakw First Nations From The British Museum -On Long-Term Loan- To The U’Mista Cultural Centre In Alert Bay, British Columbia, Canada' (<http://www.unesco.org>, 2017) <http://www.unesco.org/culture/laws/pdf/abstract_sanborn.pdf> accessed 8 May 2017.

⁶⁶ 'Pre-Columbian Archaeological Objects – United States V. McClain — Centre Du Droit De L'art' ([Plone.unige.ch](http://plone.unige.ch), 2013) <<https://plone.unige.ch/art-adr/cases-affaires/pre-columbian-archaeological-objects-2013-united-states-v-mcclain>> accessed 8 May 2017.

⁶⁷ 'NATIONAL STOLEN PROPERTY ACT U.S. Code Title 18--Crimes And Criminal Procedure Sections 2314 And 2315' <<https://eca.state.gov/files/bureau/18-2314.pdf>> accessed 7 May 2017.

⁶⁸ 'Pre-Columbian Archaeological Objects – United States V. McClain — Centre Du Droit De L'art' ([Plone.unige.ch](http://plone.unige.ch), 2013) <<https://plone.unige.ch/art-adr/cases-affaires/pre-columbian-archaeological-objects-2013-united-states-v-mcclain>> accessed 8 May 2017.

⁶⁹ *United States v. McClain*, 545 F.2d, at 993.

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ownership legislation of pre-Columbian objects is not enough for the objects to fall within the scope of the NSPA because this statute uses the term “stolen” to apply only to acts which wrongfully deprive ownership rights⁷⁰, hence they could not have breached patrimony laws.

Most importantly: If the definition was so narrow that it did not cover the illegally exported pre-Columbian objects that occurred after the 1972 patrimony law, the Mexican Government would not be protected by the NSPA, even though it vested itself with ownership⁷¹.”

Here a huge precedent was set: this judgment confirmed the UNIDROIT convention does not formulate an independent supranational policy of international art trade. Rather the export laws of the country of origin are to be respected regardless of the US legislation⁷².

Hence, we can surmise that the international law regarding this is effective. International law allows for the country of the heritage’s origin to discern their own boundaries. This allows them greater control in cases of cultural objects which have changed jurisdictions. These laws will in turn be respected by the host country. More control equals more efficacy in returning cultural objects, as we have seen in this case where the items misappropriated were returned without issue.

Manuscripts & other literary works

El Mozo manuscripts

Three manuscripts of Luis de Carvajal, "El Mozo," were recovered by the Ministries of Foreign Affairs and Culture⁷³. They dated back to 1595. The manuscripts were stolen from the Mexican national archives in 1932.

Last year, one of the manuscripts was spotted at a London auction house. It was on sale for \$1,500, because the house had little awareness of its value⁷⁴.

Swann Auction Galleries in New York acquired the manuscripts which were purchased by the collector Leonard Milberg, who returned them to Mexico.

This case is worth mentioning as it goes beyond the law’s intervention. The El Mozo manuscripts were bought legally by a wealthy collector with a sense of moral direction, then

⁷⁰ Patty Gerstenblith, *Art, Cultural Heritage, And The Law* (3rd edn, Carolina Academic Press 2012).

⁷¹ *United States v. McClain*, 545 F.2d, at 1000-1001.

⁷² 'Pre-Columbian Archaeological Objects – United States V. McClain — Centre Du Droit De L'art' (*Plone.unige.ch*, 2013) <<https://plone.unige.ch/art-adr/cases-affaires/pre-columbian-archaeological-objects-2013-united-states-v-mcclain>> accessed 8 May 2017.

⁷³ 'The Manuscripts Of Luis De Carvajal (El Mozo), Part Of Our National Cultural Heritage, Are Returned' (*gob.mx*, 2017) <<http://www.gob.mx/sre/prensa/103150>> accessed 26 April 2017

⁷⁴ (2017) <<http://www.timesofisrael.com/lost-400-year-old-jewish-manuscript-to-be-returned-to-mexico/>> accessed 26 April 2017.

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returned to their country of origin. The Mexican consul-general in New York agreed for them to be displayed in the city before Milberg returned them to Mexico⁷⁵.

The law here is not effective. In some rare cases, collectors will circumvent the law and simply purchase the stolen goods and return them themselves without unnecessary and time-consuming legal maneuvering. The manuscripts were returned to their jurisdiction within thirteen months of being purchased⁷⁶. Much swifter than the 13 years which Italy had to wait, not to mention the legal costs it undertook, for the return of the Becchina horde from Basel.

'Stirpium Historiae' and 'Rariorm Plantarum Historia Anno 1601'

Finally, an Italian case linked to the Pompeii frescoes mentioned earlier. These books were taken from Italy's Historical National Library of Agriculture and sold to an antiquities dealer in Italy⁷⁷. The buyer and his siblings purchased the books from a source they believed was reputable, and he had what he believed was legitimate evidence: an invoice, emails and an exportation license from the Italian government⁷⁸. The books were part of 19 stolen cultural antiquities, uncovered during 11 separate investigations throughout the US⁷⁹.

All 19 cultural objects were returned to Italy within a year of their discovery. This case is worth mentioning as it highlights that the international law is effective and swift in its repatriation of cultural objects. As these were stolen from a museum, they fall under the UNESCO convention, to which the US is party, the objects were returned without quarrel.

Sometimes the law is effective and restitution is a simple affair. But. As we have seen, this is not always the case.

⁷⁵ 'Return Or Restitution Of Cultural Property To The Countries Of Origin' (*Ministry for Foreign Affairs*, 2003) <<https://www.mfa.is/news-and-publications/nr/2038>> accessed 26 April 2017.

⁷⁶ (2017) <<http://www.timesofisrael.com/lost-400-year-old-jewish-manuscript-to-be-returned-to-mexico/>> accessed 26 April 2017.

⁷⁷ Kristin J. Bender, 'Officials: Stolen 400-Year-Old Books Found In San Francisco Bay Area To Be Returned To Italy' (*US news 400*, 2015) <<https://www.usnews.com/news/us/articles/2015/02/26/400-year-old-books-stolen-in-italy-are-found-in-california>> accessed 9 May 2017.

⁷⁸ Veronica Rocha, 'Looted 400-Year-Old Books From Italy Turn Up In California' (*latimes.com*, 2015) <<http://www.latimes.com/local/lanow/la-me-ln-400-year-old-books-italy-20150227-story.html>> accessed 9 May 2017.

⁷⁹ (2017) <<http://www.washingtontimes.com/news/2015/feb/26/stolen-17th-century-books-found-in-san-francisco-b/>> accessed 9 May 2017.

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Conclusion

In summation, on balance we can see that the law is more effective than not with regards the restitution of cultural objects from one jurisdiction to another. The legislation is comprehensive. In theory, it should function without impediment but this is challenged in cases such as *Becchina's* where the origin of over 4,000 cultural artefacts had to be discerned⁸⁰. Equally, another issue to restitution is the possessing jurisdiction's insistence on superior rights to stewardship. We saw this in the *Kwakwaka'wakw* mask case but also in *Schulz Mural* case. In the latter, *Yad Vashem* museum forcibly removed the murals from Ukraine and displayed them in Jerusalem. In both cases, the artefacts could leave their possessor's jurisdiction based on a long-term loan. This allows the possessor to keep some hold over the object while satisfying the other party.

The UNESCO convention has been effective throughout due to its vast membership. However, it was fraught with issues and shortcomings which were largely addressed by the UNIDROIT convention. Its problem is that it does not have retroactive effect. Hence only goods from 1995 onwards are affected. Even so, the US are not party to the convention. This is a problem as they are one of the biggest market nations for stolen goods. Most of the signatories to the treaty are in fact source nations. The reasoning for this is clear, UNIDROIT affects source nations more positively than market nations.

US legislation, although they are not a party to UNIDROIT, has succeeded in securing the restitution of cultural objects, as we saw in the *Pompeii*; *McClain*; *El Mozo* manuscripts and '*Stirpium Historiae*', all of which have through the respect for national legislation, been resituated to their 'rightful' jurisdiction.

Overall, the legislation has in most cases resituated goods taken from one jurisdiction to another but has not done so efficiently. Whether through the cooperation of international organizations, lengthy legal battles or generosity of concerned private citizens, we see the restitution of most known misappropriated cultural objects. To this end, international law is effective. Ultimately all the above cases do see cultural objects being brought back to their original jurisdiction. This is a testament to the efficacy of the law, regardless of how efficient the repatriation process is.

⁸⁰ (2014) <http://www.swissinfo.ch/eng/culture/co-operation-concludes_last-stolen-cultural-objects-returned-to-italy/38103036> accessed 24 April 2017.

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