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The Ancient World Meets the Modern World: A Primer on the Restitution of Looted Antiquities

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Countries whose borders encompass the rich culture of ancient lands have struggled for decades to prevent the unauthorized excavation and smuggling of their cultural artifacts, and to attempt to reclaim them after they are discovered in the possession of museums, galleries, and collectors. A few recent developments serve merely as illustrations of the increasing number of claims being asserted by so-called "art-rich" countries around the world:

- On April 7, 2010, officials from more than 15 countries, including China, Greece, Italy, Nigeria, Mexico, and Peru, attended a two-day conference in Cairo, organized by Egypt's Supreme Council of Antiquities, to discuss the protection and restitution of cultural artifacts. Following the conference, on April 16, 2010, Switzerland signed an agreement to repatriate Egyptian cultural property.
- In February 2010, an Italian judge ordered the seizure of the iconic bronze statue, "Statue of a Victorious Youth," from the J. Paul Getty Museum, after several years of heated debate. On April 14, 2010, the Museum appealed the order to Italy's highest court, arguing that the statue was discovered in international waters.
- In May 2010, the Republic of Peru agreed to withdraw the fraud and conspiracy allegations it made against Yale University in a 2008 action brought in federal court in which Peru claimed title to hundreds and perhaps thousands of artifacts in Yale's possession. The main claims continue to be litigated. The objects were shipped from Peru to Yale between 1912 and 1915 by Yale historian and explorer Hiram Bingham. The key question in this dispute is whether Yale acquired title to the objects, or whether Peru merely loaned the artifacts to the university.

This article will briefly explain a few of the important legal issues that are involved in efforts made by foreign governments to reclaim stolen cultural property in the U.S., and examine the current climate where the peaceful resolution of claims without litigation seems to be gaining a foothold in this area.

Establishing Ownership

Underlying any claim for the recovery of antiquities in the U.S. is a single, fundamental rule: Under U.S. law, no one, not even a good-faith purchaser, may obtain good title to stolen property. When U.S. law is applicable, a true owner always has the right to reclaim stolen property, unless barred by the statute of limitations or other technical defenses. To exercise this right, a plaintiff must first establish that it owns the property in question. In a typical antiquities case brought in the U.S. by a foreign government, establishing ownership almost always poses several hurdles.

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First, the foreign government claimant must prove that the object in the defendant's hands is, in fact, the stolen item. Where the dispute involves a clearly identifiable object, particularly one stolen from a documented or catalogued collection, the question of establishing the identity of the object is straightforward. In many cases involving antiquities, however, objects have been pillaged from unexcavated archaeological or sacred sites, or removed from the country of origin before archaeologists or museum officials were able to view, much less inventory or document, the objects. As a result, it is often difficult for claimants to establish identity in these kinds of cases.

Often, identity can be proven only through the testimony of the original thieves recorded by the local police at the time of the original theft or perhaps years later when the antiquities have finally come to light. For example, the testimony of local villagers who had pillaged tombs in the Anatolia region of Turkey was critical in one of the first major cultural property cases brought in the U.S. courts, commenced to recover the objects taken from these tombs after they were discovered in the possession of the Metropolitan Museum of Art. This case, after years of litigation, eventually resulted in the recovery by Turkey of the fabled Lydian Hoard, a cache of exquisitely crafted silver jewelry, ceremonial silver and bronze vessels, incense burners, cosmetic accoutrements, fragments of wall paintings, and marble sphinxes created 2,500 years ago during the era of the legendary King Croesus of Lydia.¹

It is important to understand that it is not enough for a foreign government simply to show that antiquities similar to those being claimed had previously been discovered within its borders. The boundaries of ancient civilizations do not necessarily match the borders of the modern world. Therefore, the people from one of these ancient cultures may have lived and created antiquities now found in several different modern countries that traverse that area. This became a significant issue in a case heard several years ago by a New York state trial court involving the so-called "Sevso Treasure," considered one of the finest collections of ancient Roman silver ever found and valued at almost \$200 million. Three countries—Lebanon, Hungary, and Croatia—claimed ownership of the Treasure in the possession of Lord Northampton of England, as Trustee of the Marquess of Northampton's Trust, based on the similarity between the 14 silver pieces in the Treasure and pieces apparently found in each of those countries from ancient Roman times. After Lebanon dropped out of the case, and although the items may in fact have been looted from one of the two remaining countries, the jury hearing the case essentially determined that since neither Hungary nor Croatia could establish better

evidence of ownership than the other, the objects should remain with the defendant.²

Even if a foreign government can establish identity, however, that is still only one of the hurdles it must overcome to establish its claim. A foreign government plaintiff must also demonstrate that at the time the objects were discovered in and removed from its territory, there were laws in place that clearly vested the government with ownership rights, or some other proprietary interest, in the objects. Virtually all so-called "art-rich" countries have enacted laws, mostly in the early 20th century, declaring that anything found in or under the ground, even if not yet discovered, is owned by the government. These laws, called "patrimony laws," are usually the key to establishing the foreign government's ownership.

The interpretation of patrimony laws creates another obstacle for foreign government plaintiffs, for only if the laws clearly provide for ownership by the foreign government of antiquities discovered within its territory may they be the basis for a recovery lawsuit. Although one might expect that a government claimant would be in the best position to determine what its own laws provide, in an American court of law both sides bear the same burden of doing so. For example, in a long-fought litigation involving the Republic of Turkey, American businessman William Koch, and others over the ownership rights to ancient Greek and Lykian coins unearthed in a small town in Turkey, the attorneys for the Republic of Turkey were in the same position as the defendants' legal team: Both were required to produce experts on Turkish law, whose qualifications had to be proven to the court. The court eventually resolved the issue in Turkey's favor, but only after a four-day trial during which the court carefully weighed both sides' expert testimony on the meaning of the Turkish patrimony laws.³

For many years, possessors of antiquities looted from foreign countries argued against the use of foreign patrimony laws as a means of establishing ownership in U.S. courts. Their main argument was that foreign patrimony laws are fundamentally different from and contrary to American concepts of private property. But recent court decisions, particularly in the New York federal courts, have held that recovery claims arising under foreign laws that vest ownership of previously undiscovered antiquities in the foreign government will be honored, just as are private ownership rights. The courts' answer to the complaints about applying foreign law in a U.S. court is that the court is not using foreign law in place of U.S. law to determine these cases; rather, it is using foreign law to determine who owns the property in the first place and then using U.S. law to determine whether it should be returned. It



is a tenet of international law to recognize a sovereign nation's laws governing interests in property found within its territory.⁴ The foreign government, however, must be able to establish that its laws are truly ownership laws and not laws merely prohibiting the export of antiquities. Export laws are considered part of a country's internal policing regulations, and generally are not enforced by the courts of other countries. Only foreign laws clearly establishing that the government owns everything found in or under the ground will be applied in U.S. courts.

To avoid this distinction, several countries have entered into special bilateral agreements with the U.S. government pursuant to the Cultural Property Implementation Act of 1983,⁵ which implements the international Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁶ Pursuant to these agreements, the U.S. agrees to enforce the export laws of these countries, and will therefore seize and return items brought into the U.S. from these countries without a permit, even without requiring proof that the government owns those items pursuant to patrimony laws. But only 14 countries currently have such agreements with the U.S., including Italy and several Latin American countries, but not including Greece or Turkey.

The Current Climate: Resolution Rather Than Litigation?

Although foreign governments continue to make claims to repatriate cultural property and hard-fought litigations still occur as a result, there have been hopeful signs recently that we may be arriving at a new way of dealing with these issues.

Starting in 2006, there has been a new spirit of cooperation among art-rich countries and great museums that has led to some momentous agreements. In February of that year, the Metropolitan Museum of Art signed an agreement to return 21 looted artifacts to Italy in exchange for loans of other objects. The agreement included the famous Morgantina Collection, 16 silver Hellenistic pieces dating from the 3rd century B.C., which was returned to Italy this year. Also included was one of the museum's most prized possessions, the Euphronios krater,

a painted vase dating from the 6th century B.C. that was purchased in Switzerland by the museum in 1972 for \$1 million. It remained on display at the Met until January 2008 and was then returned. In return for the remaining four objects, Italy will lend objects of "equal beauty and historical and cultural significance" to the museum.



{ Euphronios krater on display at the Metropolitan Museum of Art in New York City. }

A few months later, the Getty Museum in Los Angeles turned to a long-standing claim by Greece, first asserted in the 1990s, that four items acquired by the museum were stolen and should be returned. Three of them—a gold funerary wreath, an inscribed grave marker, and a marble torso dating from 400 B.C.—had been purchased by the Getty for \$5.2 million in 1993. The fourth item, an archaic marble relief that depicts a warrior with spear, shield, and sword, had been purchased in 1955 by J. Paul Getty himself. In August 2006, the Getty returned the grave marker and the relief to Greece; then in March of the following year, it returned the funerary wreath and the marble

torso. All four objects are now on display at the National Archaeological Museum in Athens.

And finally, in September of that watershed year, the Museum of Fine Arts in Boston sent 13 pieces back to Italy—eleven 5th century B.C. vases, a "portrait statue" of Sabina, and a 1st century A.D. marble fragment relief of Hermes. The museum agreed that it will inform the Italian Ministry of Culture of any future acquisitions, loans, or donations of works that could have an Italian origin.

These historic agreements in 2006 appear to have inaugurated a new era of cooperation that has continued to this day. For example, in November 2008, the Director of the Cleveland Museum of Art and the Italian Culture Minister signed an agreement pursuant to which the museum will return 14 ancient treasures that had been looted from Italy in exchange for several long-term loans of 13 equally valuable artifacts for renewable 25-year periods. In December 2009, France agreed to return painted wall fragments that were stolen from the Luxor tomb in Egypt and that had been purchased by the Louvre in 2000 and 2003.

Postscript: The Elgin Marbles

Despite all of these cooperative efforts, one dispute continues to defy resolution, even though it has sparked controversy for some 200 years: the notorious case of the Elgin marbles.

In 2009, the new Acropolis Museum opened in Athens, a \$200 million, 226,000-square-foot state-of-the-art monument. Originals of the famous frieze of the Parthenon are displayed on the top floor of the new museum, with the Parthenon itself seen through the museum's wraparound windows. But alongside these original portions of the Parthenon are mere white plaster casts of other portions of the frieze. The originals of those portions, known as the Elgin Marbles, are in London at the British Museum, where they have been displayed for almost two centuries.

Thomas Bruce, the 7th Earl of Elgin and British ambassador to the Ottoman Empire from 1799–1803, had purportedly obtained permission from the Ottoman authorities, who ruled over Greek territory at the time, to remove pieces of the Acropolis. From 1801 to 1812, Elgin's agents removed about half of the Parthenon sculptures and transported them by sea to Britain. In England, some critics attacked Lord Elgin for looting these objects. But following a public debate in Parliament, he was exonerated, and the British government purchased the Marbles from him in 1816 and placed them on display in the British Museum.



{ Section of a frieze of the ancient Elgin Marbles (Parthenon Marbles) from the Acropolis in Athens }

The legality of their removal has been repeatedly questioned since that time, but the debate was rekindled in modern times in the early 1980s, when the actress Melina Mercouri became the new Greek Culture Minister and made the restitution of the Marbles a personal crusade as well as official government policy. Since then, the Elgin Marbles have become a powerful symbol of the struggle of art-rich countries to have their looted cultural patrimony returned. With the construction of the new Acropolis Museum, it is said that one argument against the return of the Marbles—that Greece was not able to care properly for them—has now been removed. The latest proposal for a resolution of the matter was Britain's recent offer to loan the Marbles to Greece for three months on condition that Greece recognize Britain's ownership. Greece responded by offering to loan Britain any masterpiece it wished as long as Britain relinquished any claim of ownership to the Marbles. The dispute continues.

Whatever the underlying merits of Greece's claim of ownership may be, it is apparent that any applicable limitations period for bringing a claim has long expired, and therefore this case will not be resolved in a court of law. The familiar moral and policy issues in this debate, however, will continue to be discussed—including the British Museum's claim that after almost 200 years, the Marbles have become an honored part of Britain's, not to mention the world's, cultural property. Hopefully, even this epic struggle will someday be resolved.

1 *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990). Herrick, Feinstein LLP represented the Republic of Turkey in this action.

2 *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (App. Div. 1990).

3 *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992), *motion denied by, motion granted by* 146 F.R.D. 24 (D. Mass. 1993), *summary judgment denied by* 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994), *summary judgment and partial summary judgment denied by, motion to strike denied by* 1998 U.S. Dist. LEXIS 23526 (D. Mass. 1998). Herrick, Feinstein LLP represented the Republic of Turkey in this action..

4 *U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004). Herrick, Feinstein LLC advised the Arab Republic of Egypt in connection with this action.

5 Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613.

6 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.