EXPORT AND IMPORT CONTROLS ON MOVEMENT OF THE CULTURAL HERITAGE: PROBLEMS AT THE NATIONAL LEVEL

P.J. O'Keefe*

Prof. O'Keefe examined the implications, for export and import controls, of national court decisions.

I. THE CASELAW

A. KING OF ITALY V. MARQUIS COSIMO DE MEDICI TORNAQUINCI[1]

This was an action in England in 1918 to prevent the auctioneers, "Christie's," from selling the "Medici papers." These were documents, dating from the eleventh to the eighteenth century, that had been collected by the Medici family. They included letters to and from Lorenzo the Magnificient, as well as others belonging to the State of Florence. About half of the 800 lots were state papers. The other half were of great historical interest; their export was forbidden, and the Italian State had a right of preemption. The judge granted an injunction, pending the trial of the action, to prevent the sale of the state papers, but not of the others. The other papers were subsequently sold at auction, despite the judge's warning that this might expose the vendors and the purchasers to an action for damages. It appears that the decision, which was interlocutory only, was arrived at without detailed argument.

B. ATTORNEY-GENERAL OF NEW ZEALAND V. ORTIZ[2]

This case concerns five carved wooden panels which at one time probably formed the end wall of a Maori *pataka*, or raised store-house.[3] The event which led to the case was a television news

---

* Senior Lecturer in Law, University of Sydney; Visiting Fulbright Senior Scholar, Syracuse University, 1982-83.

1. [1918] 34 T.L.R. 623 (Ch.).

2. [1982] 1 Q.B. 349, *rev'd*, [1982] 3 W.L.R. 570 (C.A.), *appeal dismissed*, [1983] 2 W.L.R. 809 (H.L.). The factual background to the case is set out in Cater, *The Taranaki Panels—A Case-Study in the Recovery of Cultural Heritage*, 34 MUSEUM 256 (1982). The description above is based on this article.

3. The importance of the panels is evident in the following:

> This carved wall undoubtedly represents the single most exciting unit of the now-extinct Taranaki carving style, a local style considered by many to be one of the most interesting and certainly the most distinctive of the dozen or so different classic Maori regional styles. It is a true masterpiece of Maori art.

Yaldwyn, *The Taranaki Panels—Their Significance and Mana*, 34 MUSEUM 259 (1982).

broadcast, in early June 1978, seen in Taranaki, New Zealand. It concerned a forthcoming auction at Sotheby Parke Bernet & Co., London, of items from the collection of George Ortiz, an Italian resident in Switzerland. Lot No. 150, a series of five carved wooden panels, was recognized by a resident of Taranaki, Mr. Meads, as identical to some he had seen six years earlier at the home of a nearby resident. Some time later, at a social event, Meads mentioned this to Mr. Lambert, the Director of the Taranaki Museum. Lambert contacted the Chairman of the New Zealand National Committee for the International Council of Museums (ICOM), who in turn informed the Department of Internal Affairs. Photographs in the auction catalogue convinced the authorities that the panels had been in Taranaki in about 1972. No export permit had been issued for them to leave the country, as required by the then extant New Zealand legislation, the Historic Articles Act 1962.[4]

The person alleged to have been in possession of the panels, a Maori tribesman named Manukonga, was interviewed by the police. He freely admitted finding the panels in a swamp in 1972. They had been buried there by the Taranaki tribe in the 1820's when under attack from a neighboring tribe. Manukonga sold the panels to an English dealer in primitive works of arts, Lance Entwhistle, for $6,000. Entwhistle took the panels to Auckland and then illegally exported them to New York. There he telephoned Ortiz in Switzerland. Ortiz came to New York and, on April 23, 1973, purchased them for $65,000. Their value at the time of auction, June 1978, was said to be £ 300,000.[4a]

The New Zealand government sought an interim injunction to prevent the sale from taking place pending proceedings to determine the question of ownership. Sotheby's and Ortiz, however, agreed to remove the panels from the auction. In New Zealand, Cabinet, i.e., the collective body of government ministers, on July 10, 1973 agreed:

> that all necessary legal steps should be taken "to secure the return of the five panels . . . and if necessary, to apply for a Court Order to the effect that the artifact is the property of the Crown in New Zealand, provided that such steps shall not include negotiations with a view to a financial settlement without further authority from Cabinet."[5]

Throughout 1978 and 1979, evidence was collected, and

4. [1962] 1 N.Z. Stat. 405. This was later replaced by the Antiquities Act, [1975] 1 N.Z. Stat. 337.

4a. Approximately U.S. $550,000.

5. Cater, *supra* note 2, at 257.

maneuvering took place concerning the way the litigation should proceed. The New Zealand legal advisors wished the matter to be considered in a single main trial. Ortiz and Entwhistle, as first and third defendants, sought trial on two preliminary issues: 1) whether the New Zealand government had become the owner and was thus entitled to possession of the panels, and 2) whether the New Zealand legislation that provided for this was enforceable in England. The point went to the Court of Appeal which settled it in favor of the defendants. Concerning the collection of evidence, Dr. Prott and I were called on to assess whether the law of New Zealand, which seeks to protect its articles of historic importance, is very usual.[6]

The matter came to trial in June 1981 and on July 1, Judge Staughton handed down his judgment. He found that, under the Historic Articles Act 1962, such articles, if exported without a license, were automatically forfeited to the Crown, i.e., the government.[7] Further, he found that the legislation was enforceable in England.[8]

The defendants appealed to the Court of Appeals which reversed the decision of Staughton.[9] That court held that forfeiture did not take place automatically but only upon seizure by the Crown. The Crown was neither the owner, nor entitled to possession of the panels. On the second preliminary point two of the judges, Ackner and O'Connor, classified the New Zealand legislation as penal and therefore not enforceable in England. Lord Denning, Master of the Rolls, considered the legislation as falling "into the category of 'public laws' which will not be enforced . . . because it is an act done in the exercise of sovereign authority which will not be enforced outside its [the legislating state's] own territory."[10]

The New Zealand government appealed to the House of Lords

---

6. The department approached Dr. Lyndall [sic] V. Prott and P.J. O'Keefe of the University of Sydney, Australia, for an assessment of this matter. Both had considerable experience in the field of laws relating to the protection of cultural property. By December 1980 they provided a statement covering aspects of the relevant legislation of no fewer than 119 different jurisdictions. Their statement showed that New Zealand's law fell within a group of seventy-one jurisdictions which had some provision for forfeiture of [sic] confiscation of cultural heritage items which were being illegally exported.

Id. at 258.

7. [1982] 1 Q.B. at 362.

8. *Id.* at 371-72.

9. [1982] 3 W.L.R. 570 (C.A.)

10. *Id.* at 585.

which considered the matter on March 7, 8, and 9, 1983. These three days were fully occupied with argument on the first preliminary point: the issue of automatic forfeiture. The House then adjourned to consider this issue and in April ruled in favor of the respondents, Ortiz and Entwhistle.[11]

C. *UNITED STATES V. HOLLINSHEAD*[12]

This case concerned a U.S. dealer in pre-Columbian artifacts who conspired with another person to procure such objects in Central America. One of them was a rare stele, known as Machaquila Stele 2, taken from a Mayan ruin in the Guatemalan jungle, cut into pieces, labeled "personal effects" and dispatched to Hollinshead in the United States. According to Guatemalan law, such a stele was the property of the Guatemalan Republic and could not be removed without the permission of the government. Hollinshead was convicted under the U.S. National Stolen Property Act.[13]

D. *UNITED STATES V. MCCLAIN*[14]

One of the defendants in this case, Rodriquez, arrived in San Antonio, Texas with a truckload of Mexican pre-Columbian art. He was unwise enough to offer it to the Mexican Cultural Institute in that city, which happened to be run by the Mexican government. Under a 1972 Mexican statute, the Federal Law on Archaeological, Artistic and Historic Monuments and Zones,[15] all pre-Columbian antiquities are the property of the state. The Mexican Cultural Institute contacted the F.B.I., and the defendants were prosecuted and convicted under the U.S. National Stolen Property Act.[16] The conviction was, however, reversed on appeal on the ground that the question whether these artifacts could have been owned privately[17] should have been left to the jury to decide.[18] The case was remanded for further proceedings.

At the second trial, testimony was admitted concerning the relevant Mexican law which was alleged to vest ownership of all

---

11. [1983] 2 W.L.R. 809 (H.L.).
12. 495 F.2d 1154 (9th Cir. 1974).
13. 18 U.S.C. § 2314 (1982).
14. 545 F.2d 988 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979).
15. 312 D.O. 16 (1972).
16. 18 U.S.C. § 2314.
17. In other words, the jury should have decided whether or not the objects had come legally into the hands of private persons before the date of the Mexican Act which made these types of objects subject to state ownership.
18. 545 F.2d at 1003.

pre-Columbian artifacts in the Mexican government since 1897. The trial judge left to the jury the question of whether and when Mexico *validly* enacted national ownership of the artifacts involved. The defendants were once again convicted and again appealed. The appeal[19] was allowed on the ground that:

> the most likely construction of Mexican law upon the evidence at trial is that Mexico declared itself owner of all artifacts at least as early as 1897. And under this view of Mexican law, we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.[20]

E. *Decision of the German Federal Court of Civil Claims of 22 June 1972 in S.B. & Co. v. G.H.*[21]

In this case, a Nigerian company had entered into an insurance contract with a German company to cover the transport by sea of three cases of African masks and statutes from Port Harcourt, Nigeria to Hamburg. The shipment was in violation of Nigerian law on the export of cultural objects. Six bronze statutes were lost, and the plaintiff was seeking damages under the insurance contract. German law, however, will not enforce a contract contrary to public policy.[22] The court considered the UNESCO Convention on the Means of Prohibiting and Preventing the Import, Export and Transfer of Ownership of Cultural Property of 1970[23] and found that this represented the emerging international public policy on the issue. Therefore, even though the Federal Republic of Germany was not a party to the Convention, the German court held that the contract was unenforceable in Germany, since, it said, "[t]he export of cultural property contrary to a prohibition of the country of origin for that reason merits, in the interest of maintaining proper standards for the international trade in cultural objects, no protection from the civil law. . . ."[24]

---

19. 593 F.2d 658 (5th Cir. 1979). For a discussion of these cases in the context of the law of the United States, see Upton, *Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts*, 10 N.Y.U.J. Int'l L. & Pol. 569 (1978); Walters, *Art Law, Protection of Foreign Antiquities Using Domestic Statutes: United States v. McClain, 545 F.2d 988 (5th Cir. 1977)*, 10 Conn. L. Rev. 727 (1978).

20. 593 F.2d at 670.

21. Urteile v. 22 Juni 1972 i. S. Allg. Vers. G.H. w. E.K., 59 BGHZ 83 (Bundesgerichtshof 1972).

22. *Id.* at 84-85.

23. *Id.* at 85-86.

24. "Die Ausfuhr von Kulturgut entgegen einem Verbot des Ursprungslandes verdient daher im Interesse der Wahrung der Anständigkeit im internationalen Verkehr mit Kunstgegenständen keinen bürgerlich-rechtlichen Schutz . . . ." *Id.* at 86.

II. EXPORT CONTROLS

A. VOLUME OF LITIGATION

The vast majority of jurisdictions have legislation forbidding the export of items of cultural heritage. In many instances, this dates back to the beginning of the twentieth century and in some cases it applied much earlier. Yet the cases described above represent the most significant litigation on breach of that prohibition. Surely this relative lack of litigation does not mean that there has been little breach of the law. The illicit trade in antiquities is notorious. Rather, there would appear to be three reasons for this relative lack of legal action. First, until recently, administrators were not very concerned with enforcing these laws. It was often said that crimes against the cultural heritage were "victimless crimes": that nobody was hurt by illegal excavation or unauthorized export. This attitude has now changed and it is seen that society as a whole is a victim of the loss caused by such action: loss of contextual information, associated destructions and damage caused to that heritage. With this change of attitude has come a greater desire and willingness to act to enforce such laws. Second, the cost involved in taking legal action in a foreign jurisdiction is so high as to dissuade most governments from attempting it. Such costs include not only fees to foreign lawyers, but also the time of senior officials in preparing the case. The possibility of losing the case and an adverse award of costs must also be considered. Third, particularly when pursuing archaeological material, there are significant problems in positively identifying the material. For example, in *United States v. McClain*,[25] it was fatal to the government's case that it could not be proven when the artifacts were exported from Mexico.[26]

---

25. 545 F.2d 988.

26. The court stated:

> In order to say whether any of the pre-Columbian movable artifacts were "stolen," it is necessary to know first when that artifact was exported from Mexico. If the exportation occurred after the effective date of the 1972 law, the artifact may have been stolen—but only if it were not legitimately in the seller's hands as a result of prior law. . . . If the exportation occurred before 1972, but after the effective date of the 1934 law, it would be necessary to show that the artifact was found on or in an immovable archaeological monument. If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican government, and illegal exportation would not, therefore, subject the receiver of the article to the strictures of the National Stolen Property Act. Because the jury was not told that it had to determine when the pre-Columbian artifacts had been exported from Mexico and to apply the applicable Mexican law to that exportation, convictions of all the appellants must be reversed.

Id. at 1003.

On the other hand, Machaquila Stele 2, in *United States v. Hollinshead*,[27] could be conclusively proven to have been in Guatemala after the date of the relevant legislation. Similarly, the panels in *Ortiz*[28] had been photographed by Manukonga before he sold them to Entwhistle. These photographs were produced for the police and clearly matched the panels put up for auction in London. Many of the known facts were then admitted by the defendants in that case, and they defended the action against them on legal grounds.

B. *Effect of Prohibitions*

The above cases illustrate the range of practical problems involved in discussing movement of cultural heritage. The items whose export is prohibited are not the same for all jurisdictions, and in many cases, cover what are called "antiquities," which we might say in broad terms refers to archaeological and ethnographic material. There is not the space nor is this the place to examine whether it is possible or desirable to make a distinction between such material and fine art objects for the purpose of export control. Archaeological material in particular is subject to strict controls on its excavation in many jurisdictions. In most it is an offense to excavate such material without a permit. Many movements thus involve two illegal activities: excavation and export.

Besides the question of what, precisely, is covered by the export prohibition, a further difficulty arises from the penalty imposed for illegal export. In our study for the New Zealand government, Dr. Prott and I found that, out of 124 jurisdictions, seventy-four provided for either forfeiture of the material to the state, or its confiscation. Of the remaining fifty jurisdictions, a number claimed ownership of all undiscovered antiquities and thought it unnecessary to also provide for forfeiture or confiscation; while others, such as the Marxist-Leninist legal systems, have wide powers to appropriate property, and these are not restricted to the cultural heritage. But the problem does not end there. Even though the law may provide for forfeiture, confiscation, or seizure, when does this take place? We referred briefly to this issue in our study, *Existing Legislative Protection of the Cultural and Natural Heritage of the Pacific Region*:

> Frequently the legislation permits the government or administration to seize the relic, though there are considerable variations in

27. 495 F.2d 1154.

28. [1982] 1 Q.B. 349, *rev'd*, [1982] 3 W.L.R. 570 (C.A.), *appeal dismissed*, [1983] 2 W.L.R. 809 (H.L.).

> how it is done. In some laws confiscation appears to occur automatically as an act of law on commission of the offence. For example, in the law of Western Samoa the relic *shall be forfeited* and vested in the Government. In New Caledonia, Resolution No. 226 of 7 July 1960 is to the effect that objects and fragments of objects exported illicitly which are discovered *will be confiscated.* The *Antiquities Act* of 1975 of New Zealand states that export or attempted export of an antiquity in breach of the Act results in *forfeiture* to the Crown; the provisions of the *Customs Act* 1966 on forfeiture apply. On the other hand, other legislation appears to require some judicial or administrative act before forfeiture can occur. The Joint Regulation of Vanuatu states that the Court having jurisdiction *may order confiscation* of any object involved in an offense against the Regulation. In Fiji, if a permit to export is not produced an "object of archaeological or palaeontological interest *may be confiscated* and disposed of as the Minister may direct" (s.19(4)). What is the effect on title to the relic of confiscation or forfeiture? This is a matter for the law of the jurisdiction but attention needs to be paid to the question of the effect of that law in a foreign jurisdiction. For example, if an item is smuggled out of the jurisdiction can it be recovered through action in the courts of a foreign country where it is found? What attention will the foreign court pay to the prohibition on export without a license?[29]

The answers to the questions posed here depend on a number of factors. For example, does the state claim ownership of the antiquity in question under general vesting legislation? Has it possessed the antiquity? Does the action merely require recognition of the state's title, or does it require the foreign court to enforce that claim? What effect will later transactions have on claims of title?

C. *Claim of Ownership*

A large number of jurisdictions lay claim to ownership of all antiquities discovered subsequent to a specified date. Such claims are not restricted to any one political or social system but range across the spectrum.[30] Other jurisdictions, as was noted above, pro-

---

29. L.V. Prott & P.J. O'Keefe, Existing Legislative Protection of the Cultural and Natural Heritage of the Pacific Region 100-01 (UNESCO 1982).

30. Some examples are: Belize, Brunei, Bulgaria, Costa Rica, Cyprus, Dominican Republic, Ecuador, Gibraltar, Greece, Haiti, Hong Kong, Hungary, Iceland, Iraq, Israel, Italy, Kenya, Kuwait, Libya, Malaysia, New Zealand, Romania, Sri Lanka, Sudan, Taiwan, Tanzania, Tunisia, Turkey, Venezuela, and People's Democratic Republic of Yemen.

vide for forfeiture on export, or attempted export, without a license. The crucial issue here concerns at what stage the forfeiture takes place. Does it require actual seizure and reduction to possession by the authorities? Is it automatic on the occurrence of the illicit export? The answer to this question is important, in that it will determine what action the foreign courts will be asked to take.

The first preliminary issue in *Ortiz*[31] was whether or not the forfeiture was automatic.[32] The issue as stated by Judge Staughton was:

> whether the words "shall be forfeited" in section 12(2) [of the Historic Articles Act 1962] have the effect that the ownership of an article is immediately transferred to Her Majesty by operation of law, or whether such transfer only takes effect when the article is seized pursuant to provisions of the Customs Acts or is later condemned pursuant to those Acts. The issue is important because the carving in this case never was seized pursuant to the Customs Acts nor condemned; nor can it now be seized or condemned, first because it is outside New Zealand, and secondly, because, as will be seen later, there is a time limit of two years after which seizure cannot take effect from the date of export or attempt to export.[33]

Because of the reference to the Customs Act of 1913,[34] under which it was well established that forfeiture was not automatic, the effect of the provision in the Historic Articles Act of 1962 was debatable.

---

31. [1982] 1 Q.B. 349, *rev'd*, [1982] 3 W.L.R. 570 (C.A.), *appeal dismissed*, [1983] 2 W.L.R. 809 (H.L.).

32. Section 12 of the Historic Articles Act 1962 provided:

Application of Customs Act 1913—(1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913.

(2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913.

(3) Where any historic article is forfeited to Her Majesty pursuant to this section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions:

Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose.

[1962] 1 N.Z. Stat. 405, 410.

33. [1982] 1 Q.B. at 355.

34. [1913] 4 N.Z. Stat. 401.

Judge Staughton concluded that it did provide for automatic forfeiture. His interpretation was not accepted by the Court of Appeal.[35] As previously mentioned, the House of Lords also decided that it was not automatic.[36] This episode emphasizes the necessity for very careful legislative drafting if the intention is to leave ownership of antiquities with individuals but to prohibit export except under license, and to subject materials exported without license to automatic forfeiture.

Another aspect that the judgments in the *Ortiz* case bring out concern the necessity to establish precisely what is meant by "export." If forfeiture is to take place on "export," when is the antiquity to be regarded as exported? In particular, does the forfeiture take place within the territory of the jurisdiction or outside it? In the Court of Appeal, Lord Denning took the view that "forfeiture would take place and would come into effect as soon as the historic article was *exported*, i.e. as soon as it left the territorial jurisdiction of New Zealand. That would be a piece of extra-territorial legislation which is invalid by international law."[37] But is Lord Denning correct in his view of when "export" takes place?

Judge Staughton, in the court of first instance, had clearly taken a different view, stating that "[i]t was within the territorial jurisdiction of the New Zealand legislature at the moment when the forfeiture took effect, albeit very soon to leave that jurisdiction. . . ."[38] The term "export" was not defined in the Historic Articles Act 1962 but, in section 69 of the New Zealand Customs Act 1966,[39] the following appears:

> For the purposes of this Act the time of exportation of goods shall be deemed to be the time at which the exporting ship leaves the limits of her last port of call in New Zealand, or at which the exporting aircraft departs from the last Customs airport at which it landed immediately before proceeding to a country outside New Zealand.[40]

Surely this is a more logical concept of "export" than a very technical notion of something which occurs as the vessel passes over

35. [1982] 3 W.L.R. 570 (C.A.).
36. [1983] 2 W.L.R. 809 (H.L.).
37. [1982] 3 W.L.R. at 580-81.
38. [1982] 1 Q.B. at 355.
39. [1966] 1 N.Z. Stat. 77.
40. *Id.* at 115.

the boundary of the territorial sea. Particularly with the development of concepts such as the contiguous zone, the territorial boundary notion is fanciful at best. However, the issue should preferably be put to rest by careful drafting.

D. *RECOGNITION OR ENFORCEMENT OF LAW ON TITLE*

It is well established that courts of one country will not enforce certain laws of another country although they may be prepared to recognize them. The two questions that emerge are: what laws will not be enforced, and what is comprehended in the idea of enforcement? Three fact situations commonly arise: the state has both ownership and possession before removal from the jurisdiction; the state has ownership but not possession, the state has neither ownership not possession.

1. *Ownership and Possession*

In *Princess Paley Olga v. Weisz*,[41] there was a Soviet government decree vesting title to the Paley Palace, and its contents, in St. Petersburg in the Soviet Republic. Weisz purchased some of the art objects from the government and took them to England. The Princess subsequently took action to claim them back but failed. The English court, recognizing the effect of the Soviet decree that had vested title in that government, declared Weisz to be the rightful owner.

In the Court of Appeal in *Ortiz*, Lord Justice Ackner said:

> It is common ground that if the question in this case was one of *recognizing* the Historic Articles Act 1962, then it is a law which the English courts would recognize. Thus, if the carving had been seized and condemned in New Zealand, thereby being reduced into the possession of the New Zealand government, then that government would have been entitled to enforce its proprietary title in this country by reference to the Historic Articles Act.[42]

However, the New Zealand government never had possession of the panels.[43]

2. *Ownership But Not Possession*

In this situation the state is taking action in the foreign court to seek return of the material concerned. In *King of Italy v. Mar-*

41. [1929] 1 K.B. 718 (C.A.).

42. [1982] 3 W.L.R. at 592.

43. In this respect the case is similar to the *McClain* case where the Mexican government apparently had never had possession of the pre-Columbian artifacts.

quis Cosimo de Medici Tornaquinci,[44] there was a group of papers owned by the state but not in its possession. The court granted the injunction to prevent their sale. In doing this the court, in effect, enforced the title of the state. On the other hand, it appears that these papers had, from their creation, been the property of the state. What of the situation where the material becomes the property of the state through a legislative act of that state? In seeking return of the material, is the state seeking enforcement of the title to the property, or of the law from which that title derives?

English courts will recognize a transfer of title by governmental act if that act was valid and effective by the law of the *situs* at the time it took place, and the property concerned was then situated within the jurisdiction. This would have been the case in *Ortiz* if the forfeiture had been automatic. However, even though the foreign court might recognize title in the state, will it take further action to give effect to that recognition? The argument against taking that further step is that it involves enforcing a foreign law, and this may be contrary to local public policy.

> Thus, counsel for the Attorney General cannot validly contend that he is suing to enforce a proprietary title and not to enforce a statute. In order to make good his title in these proceedings, he has to rely on the Historic Articles Act, since he cannot rely on any previous possession or other root of title.[45]

Does this necessarily follow? Surely it is illogical to recognize title, yet refuse to enforce it.[46]

If the claimant state cannot rely on its title *per se*, but must seek to enforce the governmental act through which it acquired that title, what will be the obstacles it faces? In the common law it is established that two categories of foreign law will not be enforced: penal laws, and revenue laws. Some suggest there might be a third category of "public laws."[47] The last was seized on by Lord Denning in *Ortiz*. He took the view that the New Zealand legislation involved an exercise of sovereign authority beyond the territory of New Zealand and could not be enforced.[48] In support of his proposi-

---

44. [1918] 34 T.L.R. 623 (Ch.).

45. [1982] 3 W.L.R. at 592.

46. To a certain extent, the case Jabbour v. Custodian of Israeli Absentee Property, [1954] 1 W.L.R. 139 (Q.B.), supports this view.

47. 1 DICEY & MORRIS ON THE CONFLICTS OF LAWS 89-90 (J. Morris 10th ed. 1980).

48. [1982] 3 W.L.R. at 585.

tion, Lord Denning quotes *Don Alonso v. Cornero*,[49] *King of Italy v. Marquis Cosimo de Medici Tornaquinci*,[50] *Princess Paley Olga v. Weisz*,[51] and *Brokaw v. Seatrain U.K. Ltd.*[52] None of these cases was directly and significantly on point. Ackner would not support Lord Denning although he expresses no conclusive opinion on the matter.[53]

Ackner, with whom O'Connor agreed, considered the New Zealand legislation to be penal in nature. In his view, it sought the vindication of a public right through confiscation. Once again, this is a harsh characterization of the legislation. The penalization of the illicit exporter was only a by-product of the basic purpose of the Act, which was to ensure that important items of the cultural heritage remained in New Zealand. Many other states which have adopted similar legislation have often provided for other penalties for the illegal exporter because confiscation of the property itself is not seen as a penalty but rather as a means of retaining the material.[54]

It is submitted that the views of Judge Staughton are to be preferred to the contradictory approaches of the Court of Appeal. Rejecting all grounds for refusing to enforce the New Zealand legislation, Judge Staughton adopted a positive stance:

> Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within

---

49. [1611] Hob. 212, 80 E.R. 359.
50. [1918] 34 T.L.R. 623 (Ch.).
51. [1929] 1 K.B. 718 (C.A.).
52. [1971] 2 Q.B. 476 (C.A.).
53. Ackner stated:
> In these circumstances it is unnecessary for me to consider the question of whether there is a third category of foreign laws which our courts do not enforce, namely public law, and if so, what it comprises. Without reaching any firm conclusion, I am impressed by the reasoning of the learned judge that there is no vague general residual category and, that if the test is one of public policy, there is no reason why English courts should not enforce § 12 of the Historic Articles Act 1962 of New Zealand.

[1982] 2 W.L.R. at 594.
54. As Judge Staughton stated in the court of the first instance:
> But the purpose of the provision for forfeiture in section 12 is not, in my judgment, the vindication of the public justice. Its purpose is to preserve as the property of the people of New Zealand an historic article. It is not, therefore, a penal provision.

[1982] 1 Q.B. at 366.

> their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion.[55]

In the United States, a different approach has been taken because of the existence of the National Stolen Property Act.[56] This Act prohibits transportation in foreign or interstate commerce of any goods known to be stolen which are worth more than $5,000. As stated by the Fifth Circuit Court of Appeals in *United States v. McClain*:

> Deferring to this legitimate act of another sovereign, we agree with the earlier panel that it is proper to punish through the National Stolen Property Act encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation.[57]

Thus, if the state can prove ownership, even under a general vesting statute, illicit removal of the material to the United States would be sufficient to bring the National Stolen Property Act into play.[58]

3. Neither Ownership Nor Possession

In a number of jurisdictions the state does not have title to items of the cultural heritage found in its territory, but does forbid export except under license. If export occurs without a license, this may expose the smuggler to a fine and/or jail term if he is caught. It may also mean that the material is liable to forfeiture, either automatically or in the event of seizure.[59] When forfeiture only takes place on seizure, the seizure, if export has occurred, would have to be made by the authorities of a foreign jurisdiction, e.g., customs officers. These authorities may be willing, and legally able, to cooperate on an administrative level. There may also be legislation establishing procedures for the return of illegally exported cultural material.

Public international law does not say that "no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory."[60] As Bogdan

---

55. *Id.* at 371-72.

56. 18 U.S.C. § 2314 (1982).

57. 593 F.2d at 671.

58. For the scope and application of this Act, see Upton, *supra* note 19, at 569; Walters, *supra* note 19, at 727.

59. The problems of automatic forfeiture have been discussed above in II. B. *Effect of Prohibitions.*

60. *Ortiz*, [1982] 3 *W.L.R.* at 580 (Lord Denning, M.R.).

points out, the view that expropriation going beyond the jurisdiction of the expropriator[61] is contrary to public international law has no support in international practice.[62] States generally feel free to legislate as to property abroad, and there appears to have been no diplomatic protests indicating that such laws are considered to violate international law. It is a separate question whether other states will enforce such laws, but there is nothing in public international law to stop the expropriating state from applying to the courts of the state where the property is situated for assistance in enforcing that law. However, the outcome of such a court action would be highly problematic and, considering the issues of costs, evidence, etc., may not be a viable option for many states where the matter in issue is material of the cultural heritage.

The German case, *Decision of the German Federal Court of Civil Claims of 22 June 1972 in S.B. & Co. v. G.H.*,[63] is relevant here in that, while the foreign court may not apply the state's export laws, its refusal to uphold a contract intimately associated with the transaction in breach of those laws may well dissuade persons from engaging in illicit export. As the court said:

> In the community of nations there exist basic convictions as to the right of every country to protect its cultural heritage and as to the evils of "practices" . . . which impair it and which must be controlled. The export of cultural property contrary to a prohibition of the country of origin for that reason merits, in the interest of maintaining proper standards for the international trade in cultural objects, no protection from the civil law, not even through the insurance of the shipment by which the cultural property is to be exported from the area subject to the foreign legal system contrary to the prohibition of export designed for its protection. No insurable interest provides a basis for such a contract. . . . The former customary and tolerated disregard of the wishes of other nations to keep possession of their cultural treasures, an attitude referred to by the appellate court, cannot be used as the standard of what is compatible with public policy in contemporary opinion.[64]

---

61. The expropriator attempts to take over assets located beyond his territory.
62. M. BODGAN, EXPROPRIATION IN PRIVATE INTERNATIONAL LAW 15 (1975).
63. 59 BGHZ 83 (Bundesgerichtshof 1972).
64. Translated from:
In der Völkergemeinschaft bestehen hiernach bestimmte grundsätzliche Überzeugungen über das Recht jedes Landes auf den Schutz seines kulturellen Erbes and über die Verwerflichkeit von Praktiken . . . , die es beeinträchtigen und die bekämpft werden müssen. Die Ausfuhr von Kulturgut entgegen einem Ver-

III. IMPORT CONTROLS

Certain jurisdictions have enacted legislation imposing controls on the import of material of the cultural heritage which has been exported contrary to the laws of another jurisdiction. Two such jurisdictions are Canada and Papua New Guinea.

The Canadian Cultural Property Export and Import Act[65] states that "it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State."[66] Section 31 defines "reciprocating State" as meaning "a foreign State that is a party to a cultural property agreement."[67] Such an agreement is itself defined to mean "an agreement between Canada and the foreign State or an international agreement to which Canada and the foreign State are both parties, relating to the prevention of illicit international traffic in cultural property."[68] It is said that Canada "had to incorporate these sections on international cooperation and foreign cultural property in the Act in order to ratify the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property."[69]

The National Cultural Property (Preservation) Act 1965[70] of Papua New Guinea is not formally predicated on the existence of an international agreement. Nevertheless, there must be reciprocity. The responsible Minister must be "satisfied that arrangements have been made or will be made under the law in force in some place outside the Territory whereunder any national cultural property

---

bot des Ursprungslandes verdient daher im Interesse der Wahrung der Anständigkeit im internationalen Verkehr mit Kunstgegenständen keinen burgerlichrechtlichen Schutz, auch nicht durch die Versicherung einer Beförderung, durch die Kulturgut aus dem von der ausländischen Rechtsordnung beherrschten Gebiet dem seiner Sicherung dienenden Ausfuhrverbot zuwider ausgeführt werden soll. Einem solchen Vertrag liegt ein versicherbares Interesse nicht zugrunde .... Die in früherer Zeit übliche und geduldete Mißachtung des Wunsches anderer Völker, im Besitz ihrer Kunstschätze zu bleiben oder sie selbst zu verwerten, die das Berufungsgericht erwähnt, kann nicht zum Maßstab des nach heutiger Auffassung mit den guten Sitten Verträglichen gemacht werden.

Id. at 86-87.

65. [1975] 1 Can. Stat. ch. 50.

66. *Id.* at § 31(2).

67. *Id.* at § 31(1).

68. *Id.*

69. William, *The Protection of the Canadian Cultural Heritage: The Cultural Property Export and Import Act*, 16 CAN. Y.B. INT'L L. 292, 302 (1976).

70. National Cultural Property (Preservation) Act, Papua New Guinea Stat. (No. 26 of 1965).

which is a prohibited export from the Territory by virtue of the last preceding subsection is a prohibited import into that place, the Minister may, by notice in the *Gazette* declare that the provisions of this section apply in relation to that place."[71]

In Papua New Guinea, the Comptroller of Customs must be satisfied that: the "collection, article or thing" comes from a place as designated above; its export from that place "was prohibited under the law in force in that place for reasons essentially similar to the reasons for the prohibition of export contained in this Act;" and that the export was in contravention of the law.[72] If the Comptroller of Customs is so satisfied, the "collection, article or thing" is a prohibited import within the meaning of the customs legislation.

In practice, there would not seem to be any significant difference in the coverage of the Papua New Guinean, and the Canadian legislation. The latter defines "foreign cultural property" as meaning, in relation to a reciprocating State, "any object that is specifically designated by that State as being of importance for archaeology, prehistory, history, literature, art or science."[73] There would not seem to be any great difference between this and "collection, article or thing" whose export is forbidden for "reasons essentially similar to the reasons for the prohibition of export contained in this [the National Cultural Property (Preservation)] Act."[74] "National cultural property" for the purposes of that Act means "any property, movable or immovable, of particular importance to the cultural heritage of the Territory, and in particular (but without limiting the generality of the foregoing) includes . . . any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the Territory, past or present. . . ."[75]

While the coverage of the two pieces of legislation is similar, the procedures by which they operate are considerably different. The Canadian legislation is activated by a request from the government of the reciprocating State to the Secretary of State of Canada. The Attorney-General of Canada then "may institute an action in the Federal Court of Canada or in a superior court of a province

---

71. *Id.* at § 21(1).
72. *Id.* at § 21(2)(b).
73. [1975] 1 Can. Stat. ch. 50, § 31(1).
74. National Cultural Property (Preservation) Act, § #21(2)(b), Papua New Guinea Stat. (No. 26 of 1965).
75. *Id.* at § 4(a).

for the recovery of the property by the reciprocating State."[76] If the Court is satisfied that the foreign cultural property was illegally imported into Canada, it may make an order ensuring return of that property.[77] Such return may be conditional on payment of compensation by the reciprocating State to a *bona fide* purchaser for value, or any other person who has acquired valid title to the property without knowledge of its illegal export.[78]

The sanction under the legislation of Papua New Guinea is much more direct, but not as extensive in point of time. As mentioned above, the position is governed by the customs legislation on prohibited imports, and thus only applies for the period of time during which the customs can so control the material. During this time, however, the Minister may direct that the "collection, article or thing" may be seized without compensation and "forwarded to the appropriate authorities in the place from which it was exported."[79]

IV. CONCLUSION

Three major suggestions emerge from the above analysis. First, draftsmen must pay much greater attention to the export provisions of national cultural heritage legislation. In many cases, these have been drafted with lack of precision. Probably both draftsmen and experts in the area of cultural heritage have been uncertain as to what they wanted to achieve apart from a general prohibition of export. The relationship between ownership, export and recovery must be examined in depth.

Second, the possibility of an international convention to regulate the issues of private international law raised in this paper could be explored. Agreement on these issues would expedite and make more predictable legal action to obtain return of material, thus, assisting jurisdictions to overcome the problems mentioned in this paper as inhibiting such actions. The possibility of an international convention concerning both these matters, and the rules on the *bona fide* purchaser mentioned in Dr. Prott's paper following, could be investigated.

---

76. [1975] 1 Can. Stat. ch. 50, § 31(3).

77. *Id.* at § 31(5).

78. *Id.* at § 31(6).

79. National Cultural Property (Preservation) Act, § 21(3), Papua New Guinea Stat. (No. 26 of 1965).

Third, the possibility of reciprocal agreements, whether formal or informal, for return of illegally exported material should be examined by states for which this is a problem. The scope and method of operation of such agreements and the legislation necessary to implement them must be studied. States or jurisdictions seeking such agreements must always remember that these agreements will seldom be willingly reached in isolation; more can be achieved if the negotiations are tied to some objective of the other state.