
International Association of Legal Science 1996
Conference on the Protection of Cultural Property
Rabat, 11 – 12 September 1996

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An international Congress entitled “The Protection of Cultural Property” was held at the Faculty of Legal, Economic and Political Science, Mohammed V University, Rabat, Morocco, on September 11 and 12, 1996. The Congress was organized by the International Association of Legal Science, in co-operation with UNESCO and the Rabat Faculty, and attracted 29 participants from ten countries.

The International Association of Legal Science (IALS) was founded in London in 1950, under UNESCO auspices. The IALS seeks to promote the development of legal science through the study of foreign legal systems and the use of comparative methods. The IALS has 43 member organizations consisting of national or other comparative law organizations with similar objectives to the IALS itself. The Rabat meeting was the latest in a series of annual conferences at which national reporters present reports of a general or country-specific nature on a particular topic considered to be of special contemporary significance.

Dean Abdelghani Kadmiri of the Faculty of Legal, Economic and Political Science at University Mohammed V opened the 1996 Rabat Congress. Dean Kadmiri remarked on the special concerns Morocco has about protecting its cultural heritage and the work of members of his own faculty in the area. His remarks were followed by introductory comments from Madame Salman el Madini, the chief of UNESCO in Rabat, and Professor Xavier Blanc-Jouvan, the President of the IALS, in Paris. The first session of the Rabat meeting comprised a discussion of the protection of cultural heritage in internal law and was chaired by the Associate Dean of the Rabat Faculty, Professor M’hamed Dasser.

Professor Robert Paterson of the Faculty of Law, University of British Columbia, Vancouver, Canada, presented a general report on the protection of cultural property in internal law. He began by outlining several themes currently affecting the topic. These include financial and other problems undermining efforts by national governments to implement schemes to protect their cultural patrimony, the liberalization of customs barriers restricting the movement of cultural and other property, the existence of political instability facilitating the illicit excavation and smuggling of artworks, the

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increased awareness amongst citizens of the risks faced by their cultural heritage, and the growing overlap of international and domestic laws affecting cultural heritage.

Professor Paterson referred to the increase in the number of national court decisions and the passage of legislation that have enhanced the return of cultural property to minority indigenous groups. Sometimes such developments had occurred on a negotiated basis, such as the recent Nisga'a repatriation in Canada.¹ On the other hand, national implementation of international agreements (such as the 1970 UNESCO Convention²) had met with only random success and was often undermined by technical legal issues such as complex domestic criminal procedures and constitutional guarantees. Against this legal framework, art museums and professional associations of archaeologists and anthropologists often promulgate statements of principles that effect solutions to particular problems, such as sales of illegally excavated or stolen objects, requests for repatriation and de-accessioning. Professor Paterson concluded his overview of cultural heritage in domestic law by referring to the important role played by international organizations (such as UNESCO). Increasing media coverage of cultural heritage issues has enhanced the level of public awareness of material cultural issues. In his view isolated solutions by individual states to deal with cultural heritage questions would likely form the basis for the content of future international initiatives.

This general overview of the cultural heritage in internal law was followed by the presentation of three reports on the law of cultural heritage in three separate countries: Turkey, Morocco and Spain. This session was chaired by Professor Blanc-Jouvan, President of the International Association of Legal Science. Professor Dr. Ergun Özsunay, Professor of Civil and Comparative Law, Faculty of Law, University of Istanbul, first outlined the development of Turkish cultural heritage law. A 1906 patrimony decree of the Ottoman Empire had declared immovable and movable cultural objects to be state property. This decree had continued until the creation of the Republic of Turkey in 1923, when it was reinforced (in 1926) by the adoption of the Turkish Civil Code. The 1906 Decree was not replaced until 1973, when another law on antiquities came into effect. All these laws upheld the principle of state ownership.

Professor Özsunay explained how the current 1983 provision obliged finders to report their discoveries to the authorities, which were then ruled on by state museums. Museums determine whether newly-discovered cultural property requires protection and, if so, take it under their care. There are provisions for payment of compensation to finders. Turkish law also provides for the registration of dealers and restricts imports and exports of cultural property. Professor Özsunay ended his extensive discussion of Turkish cultural heritage law with reference to well-known recent cases involving proceedings in United States courts for the recovery of illegally ex-

ported Turkish antiquities (the Lydian Hoard and the Oxbow Corporation cases³). He viewed this litigation as evidence of the Turkish government's determination to give effect to its laws regarding ownership of Turkey's cultural patrimony.

Professor Abdelaziz Jazouli, Professor of Public Law, Faculty of Law, University Mohammed V, Rabat, then spoke on the protection of ancient monuments in Morocco. Morocco is a Contracting State to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁴ but did not sign either the 1970 UNESCO Convention or the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.⁵ The export of Moroccan classified cultural treasures is regulated by Statute No. 22 of 1980 which to a large extent has taken French provisions as a model.

The last national report was by Professor Gabriel Garcia Cantero of the Faculty of Law, University of Zaragoza, Spain. He started with the interesting statement that Spain seems to be the only state which provides for the protection of cultural property in its constitution. Article 46 of the Spanish Constitution of 1978 reads: "The public authorities shall guarantee the preservation, and promote the enrichment, of the historical, cultural and artistic patrimony of the peoples of Spain and the property that it comprises, regardless of juridical status and ownership. The penal law shall punish any offenses against this patrimony."⁶ The protection of cultural property is provided for in the 1985 Statute on the Spanish Historic Patrimony⁷ and at the level of the seventeen Autonomous Communities by statutes of these communities. Registered cultural objects are not allowed to be exported without governmental permission.

The four papers summarized above were the subject of extensive question periods. Professor Kurt Siehr, of the University of Zürich, described a case in which Turkey had sought to recover tombstones found in Switzerland but the Swiss courts refused to order in favour of Turkey since they found Turkish law to be ambiguous.⁸ Professor Siehr said he thought source country laws should make clear that cultural property was the *private* property of the state. This would, he thought, reduce the risk that such laws would not be recognized in the courts of market states, on the basis that they were public laws (and not laws regarding the ownership of movable property).

Professor Özsunay asked Professor Paterson about his theory that priority should be afforded to the "interests" of cultural objects themselves, particularly in cases of competing national claims to ownership or possession. Professor Özsunay thought this theory (based on an analogy to the "interests of the child" in custody disputes) should defer to the special concern of source states (like Turkey) with the preservation of their own cultures – in the face of illegal excavation and export. Professor Siehr suggested that the "interests" of the object concept was similar to the "internationalist" approach advocated by Professor John Merryman of Stanford Uni-

versity.⁹ Professor Merryman had, however, recognized an exception for the special case of sacred objects belonging to indigenous peoples.¹⁰

On the second day of the Congress, the focus shifted to discussion of cultural heritage in international law. The first part of this second session of the Rabat Congress consisted of the presentation of a general report by Professor Kurt Siehr of the Faculty of Law, University of Zurich, Switzerland. His presentation was chaired by Professor Dr. K. D. Kerameus, Director of the Hellenic Institute of International and Foreign Law, Athens, Greece.

Professor Siehr's paper, entitled "The Protection of Cultural Heritage and International Commerce," dealt with the different sets of rules which seek to resolve conflicting national policies in international transactions. Professor Siehr began with examples of suits for the recovery of stolen or illegally excavated cultural property objects. In the *De Contessini* case, in Italy, for example, France lost its claim before the Italian courts which applied the law of the *lex situs* and upheld the title of a local *bona fide* purchaser.¹¹ It is characteristic of such actions that they are usually commenced in the place where the objects have finally been discovered and the laws of that place will apply, if no international agreements govern – this usually means that the protection of cultural property is governed by the weakest of the potentially applicable laws.

Professor Siehr then examined international solutions to the problem of the movement of cultural property. In particular, he discussed the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.¹² While not yet in force, the Convention has been signed by 22 states – including France, Switzerland and the Netherlands. If the provisions of the UNIDROIT Convention had applied in the *De Contessini* case, the Italian buyer could not have relied on Italian law; France would have had the tapestries returned to it, and the *bona fide* purchaser would have received compensation. Professor Siehr said he thought that claims were of an "international character" (which is required under Article 1 of the Convention) if the owner was domiciled elsewhere than where the *bona fide* purchase took place.

Professor Siehr then discussed the very difficult issue of the enforcement of foreign cultural property export prohibitions. He referred to the bias national courts often have against enforcing such public laws. In the case of a Goya painting put up for sale in London, Spain avoided this problem by seeking a declaration that a Spanish export permit for the painting was a forgery.¹³ This judgment, in effect, prevented anyone except Spain from buying the work (which is what occurred).

Unless the plaintiff can prove good title, laws against exports of cultural property are usually only enforceable pursuant to international agreement. Professor Siehr discussed the European Directive of March 1993 on the return of cultural objects unlawfully removed

from the territory of a member state.¹⁴ The Directive implements rules similar to those established under the UNIDROIT Convention, but only about half the countries of the Community have implemented it – thus the result in the *De Contessini* case would have been the same as if the UNIDROIT Convention had governed. Professor Siehr noted, however, that the European Council Regulation of 1992 on the export of cultural goods¹⁵ means that Community states will not have their differing national export controls undermined as far as enforcing them in countries outside the Community is concerned.

A question and answer period followed Professor Siehr's presentation. Professor Jazouli (Rabat) thought there was some reluctance in civil law countries to apply *bona fide* purchaser rules in cases of goods exported in violation of export control laws (especially given the difficulty of proving the origin of such goods). Professor Paterson thought such approaches favouring source states were also typical on the part of courts of first instance in common law jurisdictions. Professor Siehr cited Article 5(3) of the UNIDROIT Convention and the limits it places on an importing state's obligation to return illegally exported objects. He referred to the case of an English woman who wanted to return to England (along with her valuable French paintings) after living in Italy for some 20 years.¹⁶ It might, he suggested, be difficult for Italy to argue her paintings were of "significant cultural importance" to that country under Article 5.

The second part of the second day at the Rabat Congress dealt with the protection of cultural property in armed conflict. This portion was chaired by Professor Abdelaziz Jazouli of the Faculty of Law, University Mohammed V in Rabat. Professor Folarin Shyllon of the Faculty of Law, University of Ibadan, Ibadan, Nigeria, presented a general report, in the form of his paper entitled, "Protection of Cultural Property in Time of War."

The topic of cultural property in time of armed conflict is especially timely given the presence of conflicts in such places as the former Yugoslavia, Lebanon and elsewhere. Professor Shyllon looked at the whole history of cultural property and armed conflict, beginning with ancient Greece. With the Renaissance came an increasing appreciation of works of art for their intrinsic beauty. The 1815 Congress of Vienna saw France compelled to effect one of history's first large-scale restitutions of art works. This marked the start of several instances of the restitution of looted objects.

Professor Shyllon traced in detail the history of legal instruments dealing with the protection and return of art in wartime – starting with the 1863 Lieber Code. The most important of these documents is now the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹⁷ After outlining the provisions of the Hague Convention, Professor Shyllon traced its review at several conferences. He then discussed the controversial "military

necessity” exception, which had been included under pressure from such countries as China and the United States, who afterwards had never signed the convention!

Professor Shyllon surveyed other conventions and such other sources of international law as United Nations resolutions and decisions of international tribunals. He went on to examine the special role of UNESCO as the body responsible for the administration of the 1954 Convention and its Protocol. During the 1967 Middle East war, for instance, two Commissioner-Generals appointed by the Director-General of UNESCO discussed compliance with the convention with the states involved in the conflict.

Despite initiatives such as these, Professor Shyllon expressed his concern with the relatively small group of countries that had signed the 1954 Convention (88 as of June 1996). Plunder and destruction of cultural property continues at an alarming rate (such as during the current conflict in Afghanistan). There were, however, instances that gave grounds for optimism, such as the establishment by the Security Council of international criminal tribunals for the former Yugoslavia and Rwanda. The statute of the Yugoslavian tribunal specifically confers jurisdiction over cultural war crimes. Professor Shyllon’s very extensive paper ended by setting out a set of “Principles for the Protection of Cultural Property in War Times.” These include the proposition that the principles of the Hague Convention are now *jus cogens* and form a prohibition on the export of cultural property from occupied territory.

The second day of the Rabat conference ended with a lively question and answer period. Professor Méliné Topakian of the Faculty of Law, St. Joseph University, Beirut, Lebanon, outlined how Lebanon was revising its cultural property legislation. Professor Topakian expressed her concern about a recent decision to rebuild Beirut in the form of a new city, rather than preserve the old city by reconstructing the old buildings. She also proposed the creation of a permanent international court to resolve cultural property issues. Professor Siehr said he thought there would be problems with the enforcement of rulings by such a body but agreed with the need to give greater publicity to the extent of wanton destruction of cultural property – especially when it was motivated by what appeared to be sheer malice and not any sort of military necessity. Professor Shyllon referred to the deletion of a provision on cultural property from the 1948 Genocide Convention¹⁸ and the need for this issue to be revived.

The 1996 Rabat Congress on the Protection of Cultural Property was closed by Dean Kadmiri of the Faculty of Legal, Economic and Political Science at University Mohammed V and by Professor Xavier Blanc-Jouvan, the President of the International Association of Legal Science. Professor Blanc-Jouvan thanked the Rabat University for its role in hosting the Congress and for its gracious hospitality.

Special mention should also be made of the outstanding work in organizing and supervising the conference by Mr. Meir Leker,

Secretary-General of the International Association of Legal Science, and by Professor Walter A. Stoffel, of the Faculty of Law, University of Fribourg, Fribourg, Switzerland, Scientific Director of the International Association of Legal Science. Without their long hours ensuring that the Congress went as planned, it would not have been the intellectually stimulating and informative event it was.

Notes

- 1 The Nisga'a are an Aboriginal people living in the Nass River Valley of British Columbia, Canada.
- 2 UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 U. N. T. S. 231.
- 3 Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S. D. N. Y. 1990); Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992); 146 Federal Rules Decisions 214 (D. Mass. 1993).
- 4 249 U. N. T. S. 216, 240.
- 5 See 5 INT'L J. CULT. PROP. 155 (1996).
- 6 Constitución española of 27 December 1978, B. O. E. 29 December 1978. Article 46 reads: "Los poderes públicos garantizarán la conservación y promoverán el enriquecimiento del patrimonio histórico, cultural y artístico de los pueblos de España y de los bienes que lo integran, cualquiera que sea su régimen jurídico y su titularidad. La ley penal sancionará los atentados contra este patrimonio."
- 7 Ley 16/1985 of 25 June 1985 del Patrimonio Histórico Español, B. O. E. 29 June 1985; see also B. REVERDINI, C. BISCARETTI DI RUFFIA & M. FRIGO, LA TUTELA E LA CIRCOLAZIONE DEI BENI CULTURALI NEI PAESI MEMBRI DELLA C. E. E. 401 (Rome 1992).
- 8 Bundesgericht of 22 May 1996 (Türkische Republik gegen Kanton Basel Stadt und Peter Ludwig (unpublished).
- 9 John H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831–53 (1986).
- 10 John H. Merryman, *The Retention of Cultural Property*, 21 U. C. DAVIS L. REV. 477–513, 495–98 (1988).
- 11 Tribunale di Roma 27 June 1987 (Stato francese c. Ministero per I beni culturali e ambientali e De Contessini), 71 RIVISTA DI DIRITTO INTERNAZIONALE 920 (1988); Corte di Cassazione 24 November 1995, n. 12166, Foro italiano 1996, I, 907.
- 12 *Supra* note 5.
- 13 Kingdom of Spain v. Christie, Manson & Woods Ltd., [1986] 1 Weekly Law Reports 1120 (Ch. D.).
- 14 Official Journal of the EC of 27 March 1993, No. L 74/74.
- 15 Official Journal of the EC of 31 December 1992, No. L 395/1.
- 16 Consiglio di Stato January 1989, n. 22 (Pagenstecher c. Provincia autonoma di Bolzano), 40 Il Consiglio di Stato. Rassegna di giurisprudenza e dottrina I p. 41 (1989); Consiglio di Stato 23 September 1991, n. 7, 29 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 43 (1993).
- 17 *Supra* note 4.
- 18 Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, 78 U. N. T. S. 277.