The DePaul University College of Law
Technology, Law & Culture Series

Research Paper No. 09-007 • August 2009

Schultz and *Barakat*: Universal Recognition of National Ownership of Antiquities

Patty Gerstenblith
DePaul University College of Law

Patty Gerstenblith, *Schultz* and *Barakat*: Universal Recognition of National Ownership of Antiquities, 14 Art Antiquity & L. 21 (2009).

DEPAUL UNIVERSITY
COLLEGE OF LAW

www.law.depaul.edu

SCHULTZ AND *BARAKAT*: UNIVERSAL RECOGNITION OF NATIONAL OWNERSHIP OF ANTIQUITIES

Patty Gerstenblith

I. Introduction

Two decisions, one in the United Kingdom and one in the United States, decided just about five years apart, are significant for universalising the principle that vesting laws – laws that vest ownership of antiquities in a nation – create ownership rights that are recognised even when such antiquities are removed from their country of discovery and are traded in foreign nations. This basic principle has proven to be very controversial in the United States and has been subjected to bitter criticism; yet virtually the same legal principle, when decided in a British court, received little comment or criticism. Compounding the interest of these two decisions is that, although both decisions came to virtually the identical conclusion, they did so utilising different methods of analysis.

Although laws regulating cultural heritage have a long history, nations have enacted national ownership laws since the nineteenth century for the dual purposes of preventing unfettered export of antiquities and of protecting archaeological sites in which antiquities are buried. When ownership of an antiquity is vested in a nation, one who removes the antiquity without permission is a thief and the antiquities are stolen property. This enables both punishment of the looter and recovery of possession of the antiquities from subsequent purchasers. By reducing the economic value of looted antiquities by making them unsaleable, these laws have the purpose of deterring the initial theft because the looting of archaeological sites causes destruction to the historical record and inhibits our ability to reconstruct and understand the human past.[1] As the knowledge that can be recovered through controlled, scientific excavation of sites has increased throughout the nineteenth and twentieth centuries, the role of national ownership laws in protecting the contextual integrity of archaeological sites has eclipsed their role in preventing

1 For more detailed discussion of the value of scientific exploration of archaeological sites and of the preservation of original contexts, see Patty Gerstenblith, 'The Public Interest in the Restitution of Cultural Objects', 16 *Conn. J. Int'l L.* 197, 198-201 (2001), and Patty Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past', 8 *Chi. J. Int'l L.* 169, 170-74 (2007).

* Distinguished Research Professor, DePaul University College of Law.

removal of ancient artefacts from a particular country. Simon Mackenzie well summarised the relationship between looting of archaeological sites, the losses to the historical and cultural record, and the need for the law to impose detrimental consequences on those who directly or indirectly provide incentives for the looting of sites.

> [W]e can define looted antiquities as those taken illicitly from the ground, or from their place as an integral part of, or attachment to, a temple or other ancient structure. This looting happens routinely throughout the world. Looters, while digging, often destroy objects that they perceive to be of lesser value than the gold, silver and jewels that they prize. More serious, perhaps, is their destruction of stratified context. This refers to the placement of artifacts in a tomb, or the particular layer of the earth in which they are found: information valuable to a trained excavator that can add greatly to our knowledge about the human past. Archaeology is dedicated to the collection of such knowledge and its publication.
>
> A further detrimental effect of looting is in the loss to a country of its cultural assets as they travel to overseas markets. However, this loss is theoretically remediable if looted and smuggled objects are traced and returned to their country of origin. … The market structure of the global movement of antiquities leads us to see the reduction of demand for the purchase of looted antiquities as a productive avenue to the reduction of looting itself.
>
> [T]he United Kingdom is home to one of the world's largest market centres, in terms of volume of trade, for the sale of antiquities. Antiquities looted from source countries routinely travel here to be sold by international dealers and auction houses to other dealers, private collectors and museums. The other main international centre for the purchase of high-end antiquities is New York.[2]

As Mackenzie points out, London and New York are perhaps the two largest destination markets for antiquities in the world. The consequences that the law now imposes on traders and purchasers of looted antiquities in both the United Kingdom and the United States will decrease the demand for such antiquities, which in turn will diminish the supply, thereby helping to preserve archaeological sites.

National ownership laws were typically enacted as part of a larger legal regime that aimed to protect sites, limit permitted excavation to those with

2 Simon R.M. Mackenzie, 'Dig A Bit Deeper: Law, Regulation and the Illicit Antiquities Market', 45 *Brit. J. Criminol*. 249, 251-52 (2005).

certain qualifications, and provide for the disposition of artefacts recovered through excavation. Some of the earliest such laws were passed in Greece[3] and Egypt[4] as they threw off the yoke of the Ottoman Empire, which often did not have the interests of the local populations at heart.[5] Laws developed under British colonial or Mandate rule had an impact on the laws of formerly colonised nations.[6]

Within England and Wales, the discovery of embedded or lost articles is governed by the common law of finds[7] together with the statute-based law of

3 Greece enacted its first laws protecting its archaeological heritage in 1834, but national ownership was embodied in its Law 5351/32 'On Antiquities' of 1932. Neil J. Brodie, 'Historical and Social Perspectives on the Regulation of the International Trade in Archaeological Objects: The Examples of Greece and India', 38 *Vand. J. Transnat'l L*. 1051, 1057 (2005).

4 Egypt has enacted a series of laws protecting its cultural heritage, beginning with an ordinance of 1835, Ordonnance du 15 août 1835 portant mesures de protection des antiquités, Kurt G. Siehr, 'The Beautiful One Has Come – to Return: The Return of the Bust of Nefertiti from Berlin to Cairo', in *Imperialism, Art and Restitution* 114, 117 n. 14 (John Henry Merryman, ed. 2006). Its earliest vesting law seems to date to 1883, see Stephen K. Urice, 'The Beautiful One Has Come – to Stay', in *Imperialism, Art and Restitution* 135, 141-42 (John Henry Merryman, ed. 2006).

5 The Ottoman Empire passed a type of national ownership law in 1874, which vested title to newly discovered antiquities in the nation but also recognised that rights were to be divided among the government, the finder and the land owner. See Dalia Osman, 'Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts', 37 *Colum. J. Transnat'l L.* 969, 990 (1999). The 1884 Ottoman law established national ownership of all artefacts excavated in the Ottoman Empire and protected archaeological sites by requiring excavation permits. Morag M. Kersel, 'The Trade in Palestinian Antiquities', 33 *Jerusalem Q*. 21, 24 (2008). Kersel points out that this law can be viewed either as a national ownership law, in that all antiquities were owned by the National Museum in Constantinople, or as a legalisation of cultural imperialism by appropriating artefacts from the regions of the Empire. *Id*. Turkey itself has vested ownership of antiquities in the nation at least from the time of a 1906 decree. *Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032, *3 (D. Mass. 1994).

6 In the region of the Palestine Mandate, the area now occupied by Israel, Jordan and Palestine, the British archaeologist John Garstang, as the first Director of the Department of Antiquities, promulgated the Antiquities Ordinance for Palestine of 1920. This law followed the Ottoman pattern of vesting ownership of antiquities in the Civil Government, but it also established and regulated a legal trade in those antiquities that were not deemed appropriate for the national repository. Kersel, above, note 5, at 25-26. This combination of national ownership with a legal trade persists in Israel. The cultural heritage laws of India relate more directly to the British model and adopt the concept of 'treasure trove' in which finds must be reported to the Government, which has the right to acquire the find. If the Government does not acquire it, the find is divided between the finder and the landowner. Other statutes require a licence for the export of antiquities and protect designated archaeological sites and monuments. Brodie, above, note 3, at 1059-60.

7 According to the common law of finds, found articles may be assigned to the finder or the landowner depending on their classification as lost, abandoned, embedded or mislaid. The finder's or landowner's interest in the property would give way to the original owner or someone with superior right to possession until the expiration of the statute of limitations. Leanna Izuel, 'Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule', 38 *UCLA L. Rev*. 1659, 1670-73 (1991). Antiquities would typically be considered as embedded objects and would therefore belong to the landowner. In England and Wales, treasure trove originally consisted only of gold and silver objects that were intentionally hidden and, despite the fact that they are typically embedded, belonged to the Crown. *Id*. at 1666-69. In the United States, however, treasure trove does not belong to the Government but, in most states, is awarded to the finder.

treasure (the Treasure Act 1996 amended the previous law of treasure trove) which now vests a larger category of artefacts in the Crown than was previously the case,[8] and thereby protects them. Primary protection for archaeological sites is provided through the 1979 Ancient Monuments and Archaeological Areas Act.[9] Export of works of art more than 50 years old is governed through the Import, Export and Customs Powers (Defence) Act of 1939 and requires a licence; the decision as to whether or not such a licence should be granted rests with the Reviewing Committee on the Export of Works of Art, which applies the Waverley criteria to determine significance of the artistic work to the nation.[10]

The United States enacted a limited national ownership law, the Antiquities Act, in 1906.[11] Because of the federal system in the United States, which limits the authority of the federal government, the Antiquities Act and its successor the Archaeological Resources Protection Act of 1979[12] apply only to federally-owned and controlled lands, the equivalent of roughly one-third of the land mass of the United States. As with the Antiquities Act, ARPA vests ownership of archaeological resources found on federally-owned or controlled lands, with exceptions now provided in the Native American Graves Protection and Repatriation Act,[13] in the nation and requires that anyone who wishes to excavate or remove archaeological resources first obtain permission from

8 In *Attorney General of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd*., [1982] Ch. 277 (Eng. C.A. 1981), the court refused to classify a hoard of almost 8,000 third-century Roman coins as treasure trove because their silver content was too small. This decision was criticised as too restrictive to allow treasure trove law to serve as an effective method of protecting archaeological finds. See Norman Palmer, 'Treasure Trove and Title to Discovered Antiquities', 2 *Int'l J. Cultural Prop*. 275, 278-79 (1993); Simon Halfin, 'The Legal Protection of Cultural Property in Britain: Past, Present and Future', 6 *DePaul-LCA J. Art & Ent. L*. 1, 16-23 (1995). The Treasure Act 1996, while retaining the common law definition of treasure trove, has now absorbed that concept into the wider concept of treasure which includes any object which is at least 300 years old; coins at least 300 years old with a gold or silver content of at least 10 percent by weight (if there are ten or more coins, then the metallic content is ignored); and any object found in geographic and temporal proximity to an object in the first two categories. James Carleton, 'Protecting the National Heritage: Implications of the British Treasure Act 1996', 6 *Int'l J. Cultural Prop*. 343 (1997).

9 See also Halfin, above, note 8, at 10-14.

10 *Id*. at 29-32.

11 16 U.S.C. §§ 431-33. The Antiquities Act authorises the president to set aside as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" located on lands owned or controlled by the federal government, including Indian tribal lands, forest reserves, and military reservations. The Act also penalises the destruction, damage, excavation, appropriation, or injury of any historic or prehistoric ruin, monument or object of antiquity. It was declared unconstitutional in *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), because the term 'object of antiquity' was considered to be unconstitutionally vague.

12 16 U.S.C. §§ 470AA-HH. Each state has enacted an ARPA-equivalent statute pertaining to state-owned land and approximately half of the states now regulate Native American burials found on private land as well. Archaeological sites and historic structures are also protected through the National Historic Preservation Act, 16 U.S.C. §§ 470-470w.

13 25 U.S.C. § 3002.

the federal Government. ARPA also prohibits the trafficking in interstate and foreign commerce of any archaeological resources taken or held in violation of federal, state or local law.[14]

II. Recognition of National Ownership in US Courts

A. Background

The relationship between national ownership of antiquities and the National Stolen Property Act (NSPA)[15] was first litigated in *United States v. Hollinshead*[16] which involved the taking of part of a Maya stele from Guatemala. The defendants were convicted of conspiracy to transport stolen property in international commerce in violation of the NSPA. The more analytical and significant decision in *United States v. McClain* followed a few years later.[17] *McClain* involved the prosecution and conviction of a group of dealers for conspiring to transport in interstate commerce Pre-Columbian artefacts taken in violation of Mexico's national ownership of antiquities.[18] The *McClain* defendants raised many of the same arguments that Schultz would use 25 years later – essentially that a US court should not accept the characterisation given to property by a foreign nation.

The *McClain* decisions established certain principles for analysing the nature of foreign national ownership of antiquities. The primary principle is that legislation may vest ownership of antiquities in the nation, regardless of whether the nation has ever had actual possession of the objects. Such ownership legislation is recognised as an act inherent in the notion of sovereignty and it is regarded as an aspect of comity among nations. If an act of conversion, such as export without required permission, is taken after the effective date of the ownership legislation, then this is theft and the antiquities are considered stolen property under the NSPA. However, *McClain* also established limits on the doctrine. The ownership legislation must be sufficiently clear so as to give adequate notice of what conduct is prohibited, particularly in a criminal prosecution. A claimant must prove that the antiquities were found within the modern territory of the nation, and the act of conversion or theft must have taken place after the effective date of the vesting legislation. These requirements are necessary in order to avoid giving the national legislation extraterritorial or retroactive effect.

The *Schultz* case is the only subsequent reported criminal prosecution based

14 16 U.S.C. § 470ee(c).
15 18 U.S.C. §§ 2314-15.
16 495 F.2d 1154 (9th Cir. 1974).
17 *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); 593 F.2d 658 (5th Cir. 1979).
18 545 F.2d at 991-92. The Fifth Circuit reversed the defendants' convictions on substantive counts twice, finally allowing only their conviction on a conspiracy charge to stand because the court held that only Mexico's latest statute, enacted in 1972, was clearly an ownership law.

on a foreign nation's ownership law,[19] but the *McClain* doctrine was litigated several times in the ensuing 25 years in a civil context and more often served as the basis for settlement of suits. A foreign nation may use the doctrine to reclaim stolen antiquities by bringing a civil replevin suit.[20]

Two cases, one involving the Lydian Hoard purchased by the Metropolitan Museum of Art in New York and the other a hoard of 1,750 rare ancient coins,[21] relied on the *McClain* doctrine and were settled. In both cases the illegally excavated antiquities were returned to Turkey. The Lydian Hoard is a group of over 360 antiquities, including wall painting fragments; marble sphinxes; vessels such as pitchers, bowls, and incense burners made of gold, silver, and bronze; and jewelry of gold, silver, and glass. The objects came from tombs in west-central Turkey looted in the 1960s. The Metropolitan purchased the group soon after but did not announce the acquisition and kept most of the objects in storage in the basement. When Turkey sued for recovery of the hoard, the Museum first attempted to defend on the basis of the statute of limitation. Once the statute of limitation issue was decided in Turkey's favour,[22] the Museum quickly settled the case.[23]

The United States Government has utilised the *McClain* doctrine in civil forfeitures of antiquities on the basis that they are stolen property.[24] The

19 The *McClain* doctrine was used in at least one plea agreement in which the defendant, the dealer Joel Malter, pled guilty to conspiring to deal in smuggled antiquities that were removed from Turkey in violation of its national ownership law. U.S. Customs Service, Press Release, 'U.S. Customs Agents Intercept Smuggled Artifacts and Antiquities from Turkey', 25 Feb. 2000.

20 In two replevin cases, the court found that the requirements of the *McClain* doctrine were not satisfied. In *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Calif. 1989), aff'd, 933 F.2d 1013 (9th Cir. 1991, the district court found that the national vesting law was not a sufficiently clear declaration of national ownership and that it was not possible to prove that the Pre-Columbian antiquities at issue had come from within the national borders of modern Peru. For more on the *Johnson* case, see Roger Atwood, *Stealing History: Tomb Raiders, Smugglers and the Looting of the Ancient World* (2004). In the second case, *Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263 (1st Dept. 1994), appeal denied, 642 N.E.2d 325 (1994), a jury found that neither of the claimant nations (Croatia and Hungary) could prove that the 'Sevso treasure' had been found within its modern borders. Evidence that came to light after the trial seems to establish that the treasure was illegally excavated in Hungary, but Hungary has not so far attempted to recover the treasure based on this evidence.

21 *Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994).

22 *The Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44 (S.D.N.Y. 1990).

23 For descriptions of the Hoard, see Lawrence M. Kaye and Carla T. Main, 'The Saga of the Lydian Hoard: from Usak to New York and Back Again', in *Antiquities: Trade or Betrayed – Legal, Ethical and Conservation Issues* 150 (Kathryn W. Tubb, ed. 1995); İlknur Özgen & Jean Öztürk, *Heritage Recovered: The Lydian Treasure* (1996). Thomas Hoving, former director of the Metropolitan, recounts the story of the acquisition of the Hoard and the Museum's knowledge at the time of acquisition that the objects were looted from tombs in Turkey in Thomas Hoving, *Making the Mummies Dance* 217 (1993).

24 *United States v. Pre-Columbian Artifacts and the Republic of Guatemala*, 845 F. Supp. 544 (N.D. Ill. 1993); *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), aff'd on other grounds, 184 F.3d 131 (2d Cir. 1999). In *An Antique Platter*, the district court

McClain decision is referenced by Customs Directive No. 5230-15 that provides the basis for the detention of antiquities that come from countries with national ownership laws and that are brought into the United States without an export licence from the country of origin.

B. *United States v. Schultz*

The prosecution and conviction of the prominent dealer, Frederick Schultz, is probably the most significant US decision concerning the international art market for this generation,[25] establishing that the *McClain* doctrine is the law of the Second Circuit,[26] which encompasses New York, the centre of much of the United States' art market. The facts of the *Schultz* case give some insight into how the illegal aspects of the international market operate. The defendant, Frederick Schultz, was perhaps the most prominent antiquities dealer in the United States. He was president of the National Association of Dealers in Ancient, Oriental, and Primitive Art and an outspoken critic not only of the *McClain* decision but also of the bilateral agreements that the United States had negotiated under the Convention on Cultural Property Implementation Act (CPIA).[27] Schultz's co-conspirator, Jonathan Tokeley-Parry, was a British conservator who had arranged to smuggle artefacts out of Egypt by disguising them to look like tourist souvenirs and then restored them once the artefacts were in England.[28] Schultz and Tokeley-Parry concocted a fake 'old'

---

held that the phiale, an ancient gold bowl that had been illegally excavated in Sicily, was subject to forfeiture for two reasons – first, that it had been improperly imported into the United States because both its country of origin and its value were misstated on Customs forms; second, that it was stolen property because it was taken in violation of Italy's national ownership law. On appeal, the Second Circuit affirmed the forfeiture only on the first basis and did not address the question of national ownership. Another district court ordered the forfeiture of a moon rock that was given to the nation of Honduras and was subsequently stolen, referencing both the *McClain* and *An Antique Platter* decisions. *United States v. One Lucite Ball containing Lunar Material (One Moon Rock)*, 252 F. Supp. 2d 1367, 1377–78, 1380–81 (S. D. Fla. 2003).

25 178 F. Supp. 2d 445 (S.D.N.Y. 2002), aff'd, 333 F.3d 393 (2d Cir. 2003). One can see from the court's listing of the parties that filed amicus briefs in *Schultz* that most of the major players in the debate, with the exception of the museum community, were represented. The major dealer organisations as well as a group of concerned citizens supported Schultz, while a coalition of six archaeological and other preservationist organisations supported the position of the US Government.

26 The United States is divided into twelve federal appellate courts or circuits. The decisions of one circuit are binding on only the federal trial courts located within that circuit. Nonetheless, some circuits' decisions are considered more influential than others.

27 19 U.S.C. §§ 2601-13. This law is the means by which the United States implements its ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).

28 Tokeley-Parry is a flamboyant figure who created a colourful personal biography, took hemlock to evade his first criminal trial and, unfortunately for Schultz, kept copious diaries with details of their interactions which were later used to prosecute Schultz. Tokeley-Parry was convicted in 1997 on two counts of handling stolen Egyptian antiquities and was sentenced to six years in prison. The reported appellate decision referenced the 1951 Egyptian law vesting ownership of antiquities in the State but did not discuss or analyse the principle of national ownership. *R. v. Tokeley-Parry*, [1999] Crim LR 578, C.A.

collection, the Thomas Alcock collection, and claimed that Tokeley-Parry's uncle had collected the artefacts in Egypt in the 1920s and 1930s.[29] Tokeley-Parry handled as many as 2,000 looted Egyptian antiquities, including a pair of false doors from the tomb of Hetepka at Saqqara, a faience figure of a king kneeling at an altar, dubbed 'The Offeror', and the sculptural head of the 18th Dynasty pharaoh, Amenhotep III, the most important and most valuable of the objects involved in the Schultz conspiracy.[30] Schultz was charged with one count of conspiring to violate the NSPA by conspiring to deal in antiquities taken in violation of Egypt's national ownership law, Law 117.[31]

Schultz first moved to dismiss the indictment on the grounds that the antiquities involved in the case were not stolen property. The court's first task was therefore to determine whether Egyptian Law 117 is truly a national ownership law, vesting ownership of antiquities in the State, and not an export control 'in disguise'. If the latter, then a violation would not render the property at issue 'stolen'. Schultz also argued that even if Law 117 created an ownership interest in the nation, this vesting did not "give rise to interests entitled to protection under United States law". Finally, he argued that enactment of the CPIA indicated that Congress intended to substitute civil enforcement for criminal prosecution of conduct related to foreign antiquities.[32]

The trial court held an extensive evidentiary hearing on the nature of the Egyptian law with two Egyptian officials testifying – Dr Gaballa Ali Gaballa, Secretary General of Egypt's Supreme Council of Antiquities, and General Ali

---

29 Peter Watson, 'The Investigation of Frederick Schultz', 10 *Culture Without Context* 21 (2002). See also *Schultz*, 333 F.3d at 396-98.

30 The head was offered for approximately $1.2 million. As the portrait of one of the most important of the ancient Egyptian pharaohs, the head of Amenhotep III is an important archaeological and historical object, by virtue of its age (made some 3,350 years ago) and as the image of one of the most renowned of the Egyptian pharaohs. Amenhotep III's accomplishments are extensively documented in ancient texts as well as in stone. During his reign, monumental buildings at Karnak and Luxor were constructed, and the two Colossi of Memnon mark the site of his tomb in western Thebes – sites that have inspired awe among visitors to Egypt for centuries. Considered one of the most artistically productive periods in Egypt's history, the reign of Amenhotep III has been the subject of major museum exhibitions and numerous books.
As a letter from Professor Betsy Bryan of Johns Hopkins University submitted to the district court at the time of Schultz's sentencing indicates, only three other heads of Amenhotep III made from this particular stone (graywacke) are known to exist. This head is a representation of the pharaoh as a god, probably part of a series of life-size god statues used for ritual reenactments. The loss of the find spot and other contextual information means, however, that we do not know where these other statues are, nor the location of the temple complex in which these statues were placed. As Professor Bryan wrote, "[s]adly, the fact that this head was taken out of context and smuggled out of Egypt means that it will take years, and that is only if we are lucky, to regain the information that was lost by the actions of the looters."

31 More specifically, Schultz was charged with violating section 2315 of Title 18, which states that "whoever, receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise … which have crossed a State or United States boundary after being stolen … knowing the same to have been stolen … [is guilty of a crime]." 178 F. Supp. 2d at 446.

32 *Id*. at 446-47.

El Sobky, the Director of Criminal Investigations for the Egyptian Antiquities Police.[33] The court was seeking to determine whether the Egyptian law was enforced internally within Egypt, that is, whether Egyptians who discovered artefacts were required to turn over such antiquities to Egyptian authorities and whether those who failed to do so could be and were prosecuted. The trial court concluded that Law 117 did create an ownership interest in antiquities in the State. First, the court noted that the Egyptian law unequivocally asserts State ownership[34] and that it is vigorously enforced within Egypt, not just upon illegal export.[35] Once the trial court concluded that the law vested ownership in Egypt, the case went to trial and the jury convicted Schultz.

On appeal, Schultz again argued that Egyptian Law 117 did not vest the type of ownership in Egypt that should be protected under US law or that would render the antiquities as stolen property under the NSPA. In determining whether the law was an ownership law, the appellate court looked at two issues: whether the law on its face is a vesting law and whether the law is domestically enforced within Egypt. The court began by discussing the district court's analysis of the law and the evidence presented.[36] Because questions of foreign law are questions of law, this issue was subject to *de novo* review on appeal. The court agreed with the trial court that Law 117 is clearly on its face an ownership law and that it is enforced within Egypt. Furthermore, the NSPA has a broad purpose and encompasses property that is stolen in another country and owners who are foreign. The court next turned to Schultz's argument that the antiquities were not 'stolen' according to the meaning of the NSPA, and that Egypt does not truly own them.

Schultz's first contention was that the precedent of *McClain* conflicted with Second Circuit precedent on this issue. The court reviewed *McClain*, *United States v. Hollinshead*, and previous Second Circuit opinions (*United States v. Long Cove Seafood* and *United States v. An Antique Platter of Gold*).[37] The

33 *Id*. at 448.

34 *Id*. at 447. Egypt's Law 117, Article 1, clearly defines an 'antiquity' as "any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it …". Article 6 then states: "All antiquities are considered to be public property – except for charitable and religious endowments.... It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations." Other articles prohibit trading in antiquities and private possession except of those antiquities privately owned before 1983 when Law 117 was enacted.

35 178 F. Supp. 2d. at 448.

36 333 F.3d at 400-02.

37 *Id*. at 403-07. The only case which arguably departed from the *McClain* precedent was *Long Cove*, where the court distinguished, rather than disagreeing, with *McClain*. *United States v. Long Cove Seafood*, 582 F. 2d 159 (2d Cir. 1978). The statute at issue in *Long Cove* was a state environmental regulation that prohibited the harvesting of undersized clams. The state

court concluded that there was no conflict between Second Circuit precedent and *McClain*. Second, Schultz claimed that it was against US policy to enforce another country's export controls. Without considering whether this assessment of US policy was correct, the court dismissed the argument because Law 117 is an ownership law and not an export control.[38]

Schultz's third argument was that enactment of the CPIA precluded application of the NSPA to this case and that the CPIA is intended to be the sole Congressional statement on international cultural heritage policy. The court distinguished the CPIA from the NSPA because the CPIA is civil (while the NSPA is criminal) and although there are times when the same conduct may violate both statutes, this overlapping jurisdiction does not limit the scope of the NSPA.[39] Schultz also argued that artefacts that are considered stolen under the NSPA should be limited to those that fit the 'stolen cultural property' definition of the CPIA.[40] Finally, the court pointed to the CPIA's legislative history which states that the CPIA "neither pre-empts state law in any way, nor modifies any Federal or State remedies …".[41]

The court then turned to Schultz's argument that the antiquities do not fit the common law definition of 'stolen property'. However, Supreme Court precedent indicates that the term 'stolen' is not limited to its common law meaning because there is no single commonly accepted definition and the term 'stolen' includes all 'felonious takings' not just those that fit the common law definition of larceny.[42] The court concluded this part of its analysis, stating:

> Although we recognize the concerns raised by Schultz and the *amici* about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it "creates an insurmountable

---

purported to own only those wildlife that were illegally obtained. The federal court therefore held that those clams taken in violation of the regulation could not be characterised as 'stolen' under the NSPA because the statute was regulatory in nature rather than a vesting statute.

38 333 F.3d at 407-08. It is interesting to note, in light of the later discussion in *Iran v. Barakat*, that the Second Circuit did not agree with Schultz's contention that it is against US policy to enforce the export restrictions of foreign nations. At oral argument, one of the judges, who was part of the panel, asked what the NSPA means in referring to property that has crossed a State or United States boundary "after being stolen, unlawfully converted, *or taken* …". (emphasis added). The judge seemed to imply that the word 'taken' might include property illegally exported from another country. This theme was not taken up in the written opinion, however, probably because it was not necessary to resolve this issue to decide the case.

39 19 U.S.C. § § 2602-03 (implementing Article 9 of the 1970 UNESCO Convention by authorising the President to impose import restrictions on designated categories of archaeological and ethnological materials). The only penalty for violating the CPIA is civil forfeiture.

40 19 U.S.C. § 2607 (implementing article 7(b) of the 1970 UNESCO Convention). This section of the CPIA prohibits import into the United States of stolen cultural property that had been inventoried in the collection of a public or religious institution. Schultz's argument on this point would have proved too much because his interpretation of the NSPA would have prohibited application of the NSPA to cultural objects stolen from private collections.

41 S. Rep. No. 97-564, at 22 (1982).

42 333 F.3d at 409 (citing *United States v. Turley*, 352 U.S. 407, 410-11 (1957)).

> barrier to the lawful importation of cultural property into the United States." Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.[43]

The court thus reiterated that property owned by a foreign sovereign under a national vesting law and then stolen is to be treated no differently from any other type of stolen property. The notion that cultural objects should not be treated as owned property contradicts all concepts of both property and cultural heritage law, and the court clearly came down on the side of cultural heritage preservation through recognition of ownership laws vesting title to antiquities in the State.[44]

The *McClain* and *Schultz* decisions form the backdrop for the numerous recent restitutions of antiquities from US museums to Italy and, to a lesser extent, Greece. Over the past three years, the Metropolitan Museum of Art in New York,[45] the Boston Museum of Fine Art,[46] the Princeton Art Museum,[47]

---

43 *Id*. at 410.

44 The court also addressed several procedural and criminal law issues that are not relevant to the analysis of foreign national ownership laws. Probably the most interesting involved the trial judge's instruction concerning the finding of knowledge or intent based on the doctrine of conscious avoidance:
"[A] defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law. Therefore, if you [the jury] find that the defendant, not by mere negligence or imprudence but as a matter of choice, consciously avoided learning what Egyptian law provided as to the ownership of Egyptian antiquities, you may [infer], if you wish, that he did so because he implicitly knew that there was a high probability that the law of Egypt invested ownership of these antiquities in the Egyptian government. You may treat such deliberate avoidance of positive knowledge as the equivalent of such knowledge, unless you find that the defendant actually believed that the antiquities were not the property of the Egyptian government."
Id. at 413. The use of conscious avoidance in *Schultz* is important to the outcome of future cases; potential defendants cannot intentionally avoid learning the law in the hope that this will defeat the necessary *mens rea* element for the commission of a crime. Furthermore, sophisticated dealers like Schultz are more likely to be found to have the knowledge necessary for a criminal conviction.

45 Agreement between the Ministry for Cultural Heritage and Activities of the Italian Republic and the Metropolitan Museum of Art (21 Feb. 2006) (copy on file with author). See also Russell Berman, 'Met, Italy To Sign Deal Today Over 20 Disputed Antiquities', *N.Y. Sun*, 21 Feb. 2006, at 2.

46 Elisabetta Povoledo, 'Boston Art Museum Returns Works to Italy', *N.Y. Times*, 29 Sept. 2006, at B25. The text of the agreement and the objects returned are available at: <http://www.mfa.org/collections/index.asp?key=2656>.

47 'Princeton University Art Museum and Italy Sign Agreement over Antiquities', available at: <http://www.princeton.edu/main/news/archive/S19/37/62Q26/index.xml?section=topstories,featured>.

the J. Paul Getty Trust,[48] and the Cleveland Art Museum[49] have returned approximately 100 works of ancient art and antiquities to Italy. In addition, the private collector Shelby White[50] and the New York dealer, Jerome Eisenberg of Royal Athena Galleries,[51] have returned artefacts to Italy. While none of these situations involved litigation, it may be assumed that the threat of litigation based on Italy's national ownership law contributed to these voluntary restitutions.[52]

Nonetheless, the *Schultz* decision does not seem to have deterred all illegal conduct involving looted antiquities from foreign nations. An undercover investigation carried out over several years by US federal agencies culminated in January 2008 in a series of raids to execute search and seizure warrants on four southern California museums (the Los Angeles County Museum of Art, the Pacific Asia Museum in Pasadena, the Bowers Museum in Santa Ana and the Mingei International Museum in San Diego), the Malter Gallery in Encino, the Silk Road Gallery owned by Jonathan and Cari Markell in Los Angeles, and the home of Barry MacLean, a private collector in Chicago and trustee of the Art Institute of Chicago.[53] The affidavits submitted to obtain the warrants alleged an elaborate scheme in which the undercover agent, posing as a collector, was taken to the storerooms of an alleged smuggler who sold artefacts stolen and smuggled out of several Asian and Southeast Asian countries, including China, Thailand, Cambodia and Myanmar. The artefacts were given a valuation just below the $5,000 threshold, which requires more documentation of an object's value for tax purposes and which would trigger a violation of the National Stolen Property Act, and the 'collector' would then donate the objects to various museums for a charitable gift deduction. It is not yet clear whether these investigations will lead to any criminal indictments.

---

48 Press Release, *Italian Ministry of Culture and J. Paul Getty Trust Reach Agreement*, Aug. 1, 2007, available at <http://www.getty.edu/news/press/center/italy_getty_joint_statement_080107.html>. The Getty also returned two objects, a gold crown and a *kore* sculpture to Greece. Hugh Eakin, 'Getty Museum Agrees to Return Two Antiquities to Greece', *N.Y. Times*, 11 July 2006, at B1.

49 Steven Litt, 'Museum Returns Artwork to Italy', *Cleveland Plain Dealer*, 20 Nov. 2008, at 1.

50 Elisabetta Povoledo, 'Collector Returns Art Italy Says Was Looted', *N.Y. Times*, 18 Jan. 2008, at B1; Julie Bloom, 'Collector to Return Antiquities to Greece', *N.Y. Times*, 12 July 2008, at B8.

51 AP, 'Looted Art Returns to Italy from NY', 6 Nov. 2007.

52 The Italian national ownership law of 1939 was analysed in the District Court decision in *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), which held that the Italian law vested ownership in the nation. The 1939 Law was replaced in 2004by the Italian Code of the Cultural and Landscape Heritage, Legislative Decree No. 42 of 22 Jan. 2004, which continues national ownership of property of archaeological interest.

53 Bruce Zagaris, 'U.S. Tax Investigation Turns Up Apparently Stolen Cultural Artifacts,' 24 *Int'l Law Enf. Rep*. Apr. 2008; Edward Wyatt, 'Four Museums Are Raided in Looted Antiquities Case', *N.Y. Times*, 25 Jan. 2008, at A14; Edward Wyatt, 'Papers Show Wider Focus in Inquiry of Artifacts', *N.Y. Times*, 30 Jan. 2008, at A11.

III. Recognition of National Ownership in UK Courts

A. Background

Unlike the American litigation and controversies settled out of court surrounding the question of foreign national ownership of antiquities, previous reported litigation in the United Kingdom was relatively sparse. In addition to the *Tokeley-Parry* prosecution, in which the court stated but did not analyse Egyptian ownership of the antiquities involved in the case,[54] the only significant decision was *Attorney-General of New Zealand v. Ortiz*.[55] *Ortiz* involved a set of five antique carved Maori wood panels that had allegedly been smuggled out of New Zealand and were ultimately purchased by the European collector, George Ortiz. When Ortiz attempted to place the panels for auction at Sotheby's in London, New Zealand brought suit to recover the panels. New Zealand's Historic Articles Act of 1962 provided for forfeiture of protected categories of ethnographic objects to the national Government at the time such an object was illegally exported from the country. [56] However, the exporter legally owned the panels so long as the panels were still located within New Zealand.

The trial court held that title had passed automatically to the Crown upon illegal export of the panels, an English court would recognise the Crown's ownership rights, and it was in accordance with English public policy to do so.[57] The Court of Appeal reversed this decision, holding that forfeiture occurred only upon seizure and that since the panels were never seized, the Crown was neither the owner nor entitled to possession. Although it was unnecessary therefore to address the second issue, the Court of Appeal also decided that enforcement of such a statute could not be adjudicated in an English court. The House of Lords upheld the Court of Appeal, denying New Zealand's claim for restitution.

In the Court of Appeal, Lord Denning characterised the New Zealand law as a public law because it took effect only at the moment of illegal export and concluded that such a law could not be enforced in a foreign nation. Ackner L.J. focused only on the first issue – the characterisation of the New Zealand statute. He concluded that New Zealand was seeking to enforce a

---

54 See above, note 28.

55 [1982] 3 All E.R. 432, [1982] Q.B. 349, rev'd, [1982] 3 All E.R. 432, [1984] A.C. 1, aff'd, [1983] 2 All E.R. 93, [1984] A.C. 1. This decision is discussed in Robert K. Paterson, 'The Legal Dynamics of Cultural Property Export Controls: *Ortiz* Revisited', 1995 Special Issue *U.B.C. L. Rev*. 241 (1995).

56 New Zealand subsequently amended its legislation protecting its national heritage, most recently in the Protected Objects Act 1975, as revised 2007, available at <http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes>. This legislation implements New Zealand's ratification of both the 1970 UNESCO Convention and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.

57 [1982] Q.B. 349.

penal law because the law effected a confiscation of otherwise validly owned historic properties upon illegal export. In the House of Lords, Lord Brightman agreed that the New Zealand statute did not effect an automatic forfeiture and that neither ownership nor a right of possession had vested in New Zealand. However, he stated that recovery would be allowed in a case in which title to the historic article had vested in the Crown independently of seizure. Although interpreted by some as rejecting the concept of national ownership, the *Ortiz* decision merely states the requirements that were implicit in the American decisions – that the antiquities or artefacts in question have to be located within the country at the time the vesting of title takes place so that the vesting law has neither retroactive nor extraterritorial effect.

B. *Iran v. Barakat*

A full-fledged interpretation of the British position with respect to foreign national ownership laws had to await two decisions published in 2007 – a trial court decision, denying the efficacy of national ownership of antiquities, and an appellate decision reversing the lower court's decision and bringing UK law into line with that of the United States. This case, *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*,[58] involved application of Iran's national ownership law to determine the disposition of a cache of antiquities imported into England by a dealer, Barakat Galleries.

A large number of distinctive archaeological artefacts began to appear on the antiquities market in 2000. These artefacts were apparently looted from cemeteries, located in the Halil River Basin in the region of Jiroft in southeastern Iran, which were revealed after a flooding episode.[59] One of the most looted of these cemeteries was the Mahloulabad prehistoric cemetery, which was at the height of its use in the second half of the third millennium B.C.[60] The most distinctive of these artefacts are vessels of a soft green to grey stone (identified as steatite or chlorite). The vessels have elaborate figural, vegetal and architectural designs and are sometimes inlaid with colorful semi-precious stones and shell. Since 2001 Iranian authorities have confiscated thousands of these vessels, which were then placed in museums in Jiroft, Kerman, Yazd and Tehran.

Archaeological surveys carried out in the region of Jiroft since 2002 identified at least 170 ancient mounds of the Bronze Age (ca. 2880-2200 B.C.) in the Halil River Basin. The surveys also recorded signs of ancient quarries near mines of chlorite, steatite and serpentine.[61] Subsequent excavations by the

58 [2007] E.W.H.C. 705, Q.B., rev'd, [2007] E.W.C.A. Civ. 1374; [2008] 1 All E.R. 1177.
59 Youssef Madjidzadeh, 'Excavations at Konar Sandal in the Region of Jiroft in the Halil Basin: First Preliminary Report (2002-2008)', 46 *Iran* 69 (2008).
60 *Id*. at 71.
61 *Id*. at 74.

archaeologist Youssef Madjidzadeh have focused at some of the major sites, particularly Konar Sandal South and Konar Sandal North.[62] Vases of chlorite were found in these excavations that are very similar to the antiquities that are at the centre of the legal dispute.[63] Although examples of these distinctive vessels have been found at widely separated sites, ranging from Syria to Iraq and Saudi Arabia, it was not known where these vessels were manufactured. However, the large number of vessels found in the Jiroft area suggests that this was the location of most of the workshops where the vessels were manufactured and from which they were exported.[64]

Barakat Galleries had a collection of third-millennium B.C. antiquities consisting of eighteen chlorite jars, bowls and cups reportedly worth £0.5 million to £1 million and allegedly looted from the Jiroft region. Asserting that the antiquities found in London were taken in violation of its national ownership law, Iran sued Barakat in conversion to recover the objects.[65] The court focused on the question of whether Iran could establish an ownership or possessory interest under its law that would allow it to recover the artefacts or whether, as Barakat claimed, Iran was seeking to enforce a penal or public law, which is not justiciable in foreign court. In the alternative, Iran argued that even if these statutes did not confer an ownership interest, Iran had an immediate right to possession of the antiquities and that Barakat, by retaining the objects, was interfering with this right and had converted the objects. However, Barakat argued that since Iran never had actual possession of the antiquities, it could not now claim the right of possession.

The parties agreed that the law of Iran law, the *lex situs* of the antiquities at the time title was created, decides the question of title. Under the *lex situs* rule, if title in Iran was established while the artefacts were in Iran, that title would continue until it is superceded by someone with better title. If a transfer occurs, the laws of the place where the transfer took place judge the validity of the transfer.[66]

---

62 *Id.* at 69.

63 *Id*. at 78-79, figs. 11-12.

64 Richard Covington, 'Jiroft & Aratta Kingdom', 55:5 *Saudi-Aramco World* (Sept/Oct 2005), available at The Circle of Ancient Iranian Studies, <www.cais-soas.com/CAIS/Archaeology/Pre-History/jiroft.htm>. One looted grave reportedly yielded 200 artefacts, including 30 finely carved chlorite vessels, leading Madjidzadeh to posit that it may have been the grave of the lord of Aratta, the ancient kingdom that he has identified with Jiroft, although not all scholars accept this identification. For more extensive, but earlier discussion, of the Jiroft region, the excacations and the distinctive vases, see the articles in 'Jiroft: Fabuleuse Découverte en Iran', 287 *Dossiers d'Archéologie* (Oct. 2003).

65 [2007] E.W.H.C. 705, Q.B.

66 The primary English case to address the *lex situs* rule is *Winkworth v. Christie, Manson & Woods Ltd* [1980] 1 Ch 496, [1980] 1 All E.R. 1121, [1980] 2 W.L.R. 7. In *Winkworth*, works of art were stolen from the plaintiff in England and taken to Italy, where they were sold to a good faith purchaser, who, under Italian law, can gain title despite a theft in the chain of title. The purchaser then consigned the works to Christie's for sale in London. When the works

Both Iran and Barakat utilised expert witnesses to explain Iranian law, and the trial court found both witnesses to be equally persuasive. The trial court examined the various laws of Iran that pertain to its archaeological heritage, in particular the National Heritage Protection Act of 1930, the Executive Regulations of the National Heritage Protection Act of 1930, and the 1979 Legal Bill, which prohibits clandestine digging and illegal excavation to obtain antiquities and historical relics that are more than 100 years in age.[67] In examining the Iranian laws,[68] the court first looked at the Civil Code of 1928, which seemed to contain contradictory provisions that vested movable and immovable properties in the nation (Article 26) but also awarded found articles to the finder (Chapter 4, Article 165) and treasure trove (Chapter 5, Articles 173-176) to either the finder or the land owner. Under the 1930 National Heritage Protection Act, the accidental finder of an item of national heritage was required to inform the Ministry of Education but was entitled to half the value of the find (Article 10). Those who excavate illegally were to be fined and the discovered objects "shall be confiscated".[69]

---

were returned to England, the original owner attempted to recover them, arguing that a thief cannot convey title under English law. The court held that "the validity of a transfer of movable property and its effect on the proprietary rights of any persons claiming to be interested therein are governed by the law of the country where the property is situated at the time of the transfer ('the *lex situs*')." The original English owner was therefore unable to recover the stolen works. A subsequent decision, *City of Gotha v. Sotheby's,* [1998] 1 W.L.R. 114 (Q.B. 1998), recognised that there might be exceptions to the *lex situs* rule when applying the rule would be contrary to English public policy where, for example, the current possessor is the thief or one who acted in bad faith. Iran also suggested that recognition of property rights vested in the nation may be based either on the *lex situs* rule or on the act of state doctrine. Daily Transcript, 9 Oct. 2007, at p. 119 (hereinafter 'Transcript'). See also *Islamic Republic of Iran v. Berend*, [2007] E.W.H.C. 132 Q.B., [2007] 2 All E.R. (Comm.) 132) noted by Matthias Weller in (2007) XII *A.A.L.* 279, in which the court recognised that Iran had ownership of an Achaemenid relief from the site of Persepolis before the relief was looted from Iran, but that the current possessor, a French collector, had gained title to the relief under French law because of the *lex situs* rule; *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002), in which the court concluded that local (Austrian) law determines who has a property interest in an item such that the property can be stolen. But see Symeon C. Symeonides, 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property', 38 *Vand. J. Transnat'l L.* 1177, 1183-86 (2005) (proposing a rebuttable presumption that the lex rei sitae originis of stolen cultural objects should determine the legitimacy of any subsequent transaction affecting the rights of the person considered to be the owner under the law of the State of origin).

67 [2007] E.W.H.C. 705, Q.B.. at para. 6.

68 The court began its analysis of Iranian law with discussion of the Constitutional Movement of the late nineteenth century, culminating in the Basis of the Persian Constitution of 1906. For a more detailed history of the Constitutional Movement and the writing of the Civil Code, see Roy Mottahedeh, *The Mantle of the Prophet: Religion and Politics in Iran* 35-37, 52-61, 221-27 (1985). As part of the Constitutional Movement, all the properties of the monarch were transferred to the Government. [2007] E.W.H.C. 705 (Q.B.) at paras. 17-19.

69 The court pointed out that the Farsi term *zabt* may be translated as either 'confiscated' or 'seized', implying that the precise meaning of this word and how it relates to ownership is unclear. *Id*. at para. 22; para. 46. It is worth noting the main provisions of the 1930 Act. Article 1 states that movable heritage objects shall be protected; Article 10 imposes an obligation on the finder to report the discovery and requires the State to transfer to the finder half of the property or half of its value, giving the State a right of pre-emption or ownership

The court then analysed the 1979 Legal Bill regarding Prevention of Unauthorised Excavations and Diggings. The trial court characterised this statute as criminal in nature, without any vesting provisions, and interpreted the statute as granting the State the right to confiscate antiquities otherwise owned by the finder if the finder violated the law, rather than vesting title in the State *ab initio*.[70] The trial court stated several times that the attorney representing Iran could not point to any specific provision of Iranian law which explicitly vests ownership of the antiquities in Iran, although he argued that "it is the manifest purpose of … the legislation … to vest in Iran ownership in chattels which have been excavated, including the antiquities."[71] The trial court concluded that none of these statutory enactments made a clear statement of ownership, vesting title to undiscovered antiquities in the nation, and that State ownership could not be established "by default or as a matter of inference." [72]

The court then turned to the question of whether Iran has an immediate right to possession of the antiquities, so that the defendant had committed conversion or the tort of wrongful interference with goods. The court posited that for the claim to succeed on the basis of a right to possession, Iran had to demonstrate that its immediate right to possession was proprietary in nature.[73] While the court agreed that Iran had an immediate right to possession, because both the 1930 Act and the 1979 Bill required a finder to submit accidentally discovered antiquities to the State, Iran's right was not proprietary, as indicated by the court's earlier discussion of the failure of the law to clearly vest title in the nation.

Although Iran had failed to prove its ownership interest in the antiquities, the court turned to consider, in *obiter dictum*, the question of whether, if Iran's law were a vesting law, its ownership claim could be vindicated. The court cast this issue in terms of the justiciability of Iran's claim. Public laws of one nation, such as penal[74] and revenue laws, are not enforceable in another State. On the other hand, the court conceded that a nation could assert its ownership rights to property located in another State so long as the rights

---

once compensation is paid to the finder. Under this provision, the State does not seem to have ownership while the artefacts are still buried in the ground. Article 14 illustrates the system of *partage*, which was prevalent in many countries up until approximately the 1970s. Under this system, the State would take the first several objects found during a scientific excavation season (in the case of Iran, the first ten) and then divide the remaining objects with the excavator. Article 16 provides for punishment for those who excavate illegally, even if on their own lands, and provides that the objects shall be *confiscated or seized*. Whether this law can be interpreted as a national ownership law depends on the interpretation of Articles 10 and 16 (which seem to conflict) and the proper translation of the word for 'confiscation'.

70 *Id*. at paras. 53-55.

71 *Id*. at para. 30.

72 *Id*. at para. 59.

73 *Id*. at paras. 70-71 (relying on earlier precedent, including *Jarvis v. Williams* [1955] 1 All E.R. 108).

74 The court looked to the finding of two of the members of the Court of Appeal in *Ortiz* in that they viewed the forfeiture of the Maori panels upon illegal export as penal. *Id*. at para. 83.

arose while the property was located within that nation.[75] However, the court seemed to limit enforceable ownership rights to those acquired by means by which private individuals could acquire ownership, such as by purchase, gift and inheritance.[76] Because acquisition by means of a national ownership law is a method available only to sovereigns, the court characterised such laws as public in nature and held that Iran's claim was not justiciable. The court analogised Iran's claim to the same type of claim that New Zealand had attempted to assert in the *Ortiz* case; the court therefore characterised the law involved as a public law and concluded, based on its interpretation of *Ortiz*, that Iran could not assert its ownership claim.[77]

In an extensive decision, the appellate court reversed the trial court on the two main points.[78] The framing of these two issues – whether Iran had title to the antiquities and, if so, whether the court should recognise Iran's title – paralleled the analysis of the trial court. Similarly, the appellate court and the parties initially agreed that the *lex situs*, the place where the property rights originated (Iran), determined those property rights.[79] The other two principles of statutory interpretation adopted by the court were that the statutes should be given a purposive interpretation and special provisions dealing with antiquities take precedence over general provisions.[80]

The court first considered the nature of the interest in property necessary for a claimant to maintain an action in conversion or for wrongful interference with goods.[81] In analysing the English legal sources and treatises, the appellate court concluded, in contrast to the trial court, that a claimant could bring a cause of action in conversion based only on an immediate right to possession, without having to have a proprietary right as well.[82]

---

75 *Id.* at para. 85.

76 *Id*. at paras. 85-86.

77 It is unclear whether the court was relying on the penal nature of the forfeiture provision in *Ortiz*, stating that "[t]he fact that the mechanism chosen by Iran for protecting its heritage was by virtue of the state acquiring ownership of the antiquities … rather than by a provision for forfeiture (as in the case of *Ortiz*) seems to me to be a distinction without a difference." *Id*. at para. 90. Elsewhere, the court seemed to rely on the fact that Iran never had actual possession of the antiquities because, if it had, Iran would have been enforcing a proprietary right. *Id*. at para. 89.

78 *Islamic Republic of Iran v. Barakat Galleries Ltd*, [2007] E.W.C.A. Civ. 1374, [2008] 1 All E.R. 1177.

79 *Id*. at para. 86.

80 *Id*. at para. 54.

81 The court recognised that before enactment of the Torts (Interference with Goods) Act 1977, wrongful interference with a chattel could give rise to two different causes of action – detinue, based on an interference with the proprietary right, and conversion, based on an interference with the possessory right. But when a claim was brought against a third party wrongdoer, the claim could lie in either detinue or conversion. *Id*. at para. 17. The cause of action in detinue was abolished by the 1977 Act, so a cause of action for conversion is the appropriate cause, regardless of whether the claim is based on a right of ownership or a right of possession.

82 *Id*. at paras. 19-31 (distinguishing *Jarvis v. Williams*, above, note 73, on which the trial court had relied).

The appellate court then turned to determining the nature of Iran's interest in the antiquities. To do so, the appellate court first reviewed the trial court's discussion of the various Iranian laws and the laws themselves, including the Civil Code, the National Heritage Protection Act of 1930 and the 1979 Legal Bill. In so doing, the court articulated the standard was

> not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws. The issue with which we are concerned is whether the rights enjoyed by Iran in relation to the antiquities equate to those that give standing to sue in conversion under English law.[83]

The court thus utilised a more functional or substantive approach to analysing the Iranian laws. Rather than looking exclusively to the literal terms of the Iranian law, the court considered the fundamental nature of property ownership, that is that 'property ownership' consists of a bundle of individual rights, such as the right to transfer *inter vivos* or at death, to possess, to exclude and to lease. It is whether an individual or entity possesses these rights that determines the nature of the interest in the property.[84] The court concluded that Iran's 1979 Legal Bill confers both ownership and an immediate right to possession of newly discovered antiquities on the nation.[85]

While the 1979 Legal Bill is not clear in stating national ownership, it nonetheless grants to the nation all the rights that are incidents of ownership. The court also concluded that it is not possible to identify anyone other than Iran who is the owner of newly discovered antiquities. The question of ownership of antiquities may be contrasted with the treatment of one who discovers objects that do not meet the statutory definition of antiquities but may become

---

83 *Id*. at para. 49.

84 *Id.* at para. 73. This approach was urged in particular by Sir Sydney Kentridge Q.C., representing Iran, during the court's hearing. Transcript, above, note 66, at pp. 17-19.

85 [2007] E.W.C.A. Civ. 1374, [2008] 1 All E.R. 1177 at paras. 84, 86. Although the court seemed to believe that the 1930 Act did not confer ownership of antiquities on the State of Iran, *id*. at para. 62, this was not a necessary part of the court's conclusions at this stage of the proceedings, as it was agreed by the parties that the Jiroft antiquities at issue in the case left Iran between 2000 and 2004. The ownership status of antiquities prior to the 1979 Legal Bill was therefore irrelevant to the outcome of this case. However, the ownership status of antiquities during the 1930s may prove to be of considerable consequence in litigation pending in the US courts. Victims of a terrorism bombing in Jerusalem won a multi-hundred million dollar judgment against Iran as a sponsor of terrorism and are seeking to attach antiquities of Iranian origin in American museums and institutions to satisfy their judgment. Several of these institutions claim that they own the antiquities in question. The attachment claimants, however, are asserting that the antiquities are owned by Iran under the 1930 Act and can therefore be sold to satisfy their judgment. *Rubin v. Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 73383 (D. Mass. 2006); *Rubin v. Islamic Republic of Iran*, 2007 U.S. Dist. LEXIS 54983 (N.D. Ill. 2007).

the owner upon payment to the State.[86] The State is the owner and a finder may acquire ownership from the State under certain conditions. On the other hand, Article 2 of the Legal Bill states that the accidental finder is entitled to a reward, but the finder has no interest in the antiquities themselves. The appellate court then concluded that one who engages in illegal excavation cannot be in a better position than the accidental finder. The finder enjoys none of the attributes of ownership, as viewed through 'English eyes',[87] and therefore, no one, other than the State, can be envisioned as the owner under the provisions of the 1979 law.

The Court of Appeal then turned to Barakat's argument that the 1979 law was not justiciable in an English court, either because it was a penal law or because it was a public law.[88] The court began its analysis with the earlier case of *Attorney-General of New Zealand v. Ortiz*, focusing on the different reasoning of the judges of the Court of Appeal as to why New Zealand could not recover the panels. Lord Denning characterised the law as a public law and concluded that it was an act done in the exercise of sovereign authority, which could not be enforced outside of its own territory. Ackner L.J. characterised the law as penal, because it confiscated the panels (which had been legally owned) upon attempted or actual illegal export, and expressed doubt as to whether there were other types of public laws that were non-justiciable outside of the nation. O'Connor L.J. largely agreed that the law was penal in nature. In the House of Lords, Lord Brightman, while relying on the fact that New Zealand had not acquired title to the carvings while they were still located in New Zealand, clearly left open the possibility that they could have been recovered if title had vested in the nation regardless of whether they had been seized.[89]

With this background concerning the *Ortiz* case, the court acknowledged that English courts would not enforce the penal laws of another State but determined that a law should be characterised based on the substantive right sought to be enforced, rather than relying on its label or description.[90] Furthermore, the court emphasised that laws that include penal provisions may also have provisions that are not penal and only the provision relied on

86 Article 3 of the Legal Bill defines antiquities as "objects that according to international criteria have been made or produced one hundred, or more, years ago." Under Article 3, someone who discovers objects that are less than 100 years old becomes the owner after making a payment to the treasury.

87 [2007] E.W.C.A. Civ. 1374, [2008] 1 All E.R. 1177 at para. 72.

88 The basis for this view is that because a foreign State does not have international jurisdiction to enforce its law outside its own territory, the courts of the foreign State will not exercise their jurisdiction "in aid of an attempt by the foreign state to act in excess of its jurisdiction." *Id*. at para. 97. Barakat argued that if Iran had obtained actual possession of the antiquities while they were still in Iran, then Iran's claim would not have been based on a penal or public law. *Id*. at para. 87.

89 [1983] 2 All E.R. 93, at 98-100, [1984] A.C. 1 at 46-49.

90 [2007] E.W.C.A. Civ. 1374, [2008] 1 All E.R. 1177 at paras. 105-06.

in the particular case was relevant to determining justiciability.[91] The parts of the 1979 Legal Bill that vested ownership in the State were not penal because they were not retroactive and did not deprive anyone of an interest who was already the owner of the artefacts. The Iranian law affected the ownership only of antiquities that had not yet been found and therefore did not belong to anyone.

As for the interpretation of public laws, the court characterised as public those laws that attempt to have extra-territorial effect or purport to exercise sovereignty beyond the nation's borders. The court rejected the notion that all public laws are incapable of enforcement. The only public laws that will not be enforced are those that are equivalent to penal and revenue laws; the court used exchange control legislation as an example and perhaps export controls.[92] Recognising the need to distinguish ownership from export controls and referring to several earlier cases that touch on national ownership of cultural objects, the court held that "when a state owns property in the same way as a private citizen there is no impediment to recovery."[93]

The court then turned to the question of whether Iran needed to have taken actual possession of the artefacts in Iran in order to recover them in England. Whether Iran needed to have possession depends on how it acquired ownership. If it acquired title by confiscation or compulsory process, then it cannot recover the property unless it first had possession. Where Iran did not have possession (as in this case), then it may recover the artefacts if its claim is not based on compulsory acquisition. The court concluded that Iran's title was conferred by legislation – which the court called a 'patrimonial' claim,[94]

---

91 *Id*. at paras. 108-111.

92 *Id*. at paras. 125-130. While acknowledging that some earlier case law indicates that export controls on cultural objects are not enforceable in foreign courts, the court declined to speak definitively on this question, citing instead to the European Union Return of Cultural Objects Regulations, SI 1994/501, which would today prohibit export of such cultural objects without an export licence and require other EU Member States to return such objects. On the question of whether restrictions on the export of cultural objects should be enforced by other nations, see Siehr, above, note 4, at 121-24 (discussing the 1991 resolution on "the international sale of works of art from the angle of the protection of the cultural heritage" of the Institute of International Law).

93 [2007] E.W.C.A. Civ. 1374, [2008] 1 All E.R. 1177 at para. 136, citing *Kuwait Airways Corp. v. Iraq Airways Co. (no. 3)* [2002] U.K.H.L. 19 at 13, [2002] All E.R. 209 at 13, [2002] 2 A.C. 883, where the court stated: "governmental acts affecting proprietary rights will be recognised by an English court as valid if they would be recognised as valid by the law of the country where the property was situated when the law takes effect …".

94 Some of the literature concerning cultural property uses the term 'patrimony' to refer to State ownership of antiquities. However, in the hearing before the Court of Appeal, the term 'patrimonial claim' was defined as "a claim to property or to damages in relation to property. A person's patrimony is everything that he owns, the sum title of his assets and rights, and if it is a patrimonial claim then it is all right. Then it is not regarded as an assertion of sovereign authority." Transcript, above, note 66, at 131. That a patrimonial claim is simply a claim for property and could be asserted by both individuals and nations seemed to be accepted by both parties, *id*. at 131 and 150.

not a claim to enforce a public law or to assert sovereign rights – and Iran did not first have to have possession in order to enforce its claim in England.[95] The court thus distinguished between *recognition* of a foreign nation's ownership rights in property and *enforcement* of a foreign nation's laws in British courts. British courts should therefore recognise Iran's national ownership law as the basis for Iran to bring suit to recover its stolen antiquities.

The court further held that even if Iran's ownership law is a public law, British courts are not barred from enforcing such a law unless it is against public policy to do so.[96] In judging public policy, the court stated:

> In our judgment, there are positive reasons of policy why a claim by a state to recover antiquities which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out by the general principle invoked by Barakat. Conversely, in our judgment it is certainly contrary to public policy for such claims to be shut out. … There is international recognition that states should assist one another to prevent the unlawful removal of cultural objects including antiquities.[97]

The court then referred to international conventions to which the United Kingdom is a party, including the 1970 UNESCO Convention, the European Union's Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, and the Commonwealth Scheme for the protection of the material cultural heritage. While acknowledging that none of these legal instruments was directly applicable to the outcome of this case, the court interpreted these as indicating the "international acceptance of the desirability of protection of the national heritage" and the need for mutual assistance among nations to protect that heritage. The court further recognised that if actual possession were required before a nation could recover looted antiquities, as a practical matter such antiquities could never be recovered since such artefacts, by being looted directly from archaeological sites, are

95 *Islamic Republic of Iran v. Barakat Galleries Ltd*, [2007] E.W.C.A. Civ 1374, [2008] 1 All E.R. 1177, at paras. 143-150. In reaching this conclusion, the court referred to the outcomes both in *Schultz* and in *R. v. Tokeley-Parry*.

96 *Id*. at paras. 151-163. In supporting its view of public policy, the court quoted from Staughton J. in *Ortiz* that: "[i]f the test is one of public policy, applied to the foreign law in question in this particular case, there is in my judgment every reason why the English courts should enforce s. 12 of the Historic Articles Act 1962 of New Zealand. 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 their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion." [1982] 3 All E.R. 432, at 451, [1982] Q.B. 349, at 371-72.

97 *Islamic Republic of Iran v. Barakat Galleries Ltd*, [2007] E.W.C.A. Civ 1374, [2008] 1 All E.R. 1177, at paras. 154-55.

previously unknown and not part of a specific collection.[98] The court thus concluded that it is British public policy to recognise the ownership claim of a foreign nation to antiquities that are part of its cultural heritage.

IV. Reflections

The final disposition of the artefacts at issue in *Barakat* still awaits the determination of at least two crucial facts – whether the artefacts were discovered in Iran and whether they were removed from Iran after 1979.[99] Nonetheless, the legal doctrine established in the *Barakat* decision is highly significant as an additional element in the international legal regime that aims to protect the world's archaeological heritage, firmly recognising the principle of foreign national ownership of antiquities and harmonising the US and UK judicial approaches. As with litigation in the United States, it seems unlikely that the basic principle will be questioned in future cases, although such cases will need to analyse the nature of the particular national ownership law at issue and make factual determinations concerning the time and place of discovery of the antiquities involved.

The main differences in the analyses of the national ownership doctrine in the *Schultz* and *Barakat* cases seem to rest on the different levels of clarity required for the foreign national ownership law and the role of the fundamental nature of property ownership articulated in the two decisions. The *Schultz* court focused on two aspects of Egypt's national ownership law – what it said on its face and how it was applied domestically within Egypt. The Court of Appeal in *Barakat* downplayed both of these factors.[100] Rather, it took a functional approach in analysing the Iranian law, looking to the fundamental nature of property ownership and then determining who has ownership

98 *Id*. at para. 163.

99 Barakat may also persist in its defence that, even if the artefacts are considered the property of Iran, Barakat acquired title to them through transactions in France, Germany and Switzerland under the good faith purchaser doctrine. Iran asserted that the artefacts were not in those countries at the time of the sales, and it did not accept that Barakat had acted in good faith, as a knowledgeable and experienced dealer in antiquities from that part of the world. Transcript, above, note 66, at pp. 5, 118. As part of its ratification of the 1970 UNESCO Convention, Switzerland adopted legislation that, *inter alia*, provides the following definition of 'due diligence': "In the art trade and auctioning business, cultural property may only be transferred when the person transferring the property may assume, under the circumstances, that the cultural property: a. was not stolen, not lost against the will of the owner, and not illegally excavated; b. not illicitly imported." Cultural Property Transfer Act, Art. 16, § 1. The phrase 'under the circumstances' would seem to require that one who wishes to claim to have acted in good faith must have considered all the circumstances of the transaction. How a Swiss court would apply this new definition of good faith is unclear. Neither *Barakat* decision addressed these contentions, although they may be addressed in the future proceedings.

100 Some of the differences in the decisions may be attributed to the fact that *Schultz*, like the earlier *McClain* case, was a criminal prosecution, whereas the UK decision is a civil action. The emphasis in *McClain* and *Schultz* on facial clarity of the ownership law is the result of the need to give fair warning in accord with due process to a potential criminal defendant of what conduct is prohibited. See *McClain*, 545 F.2d at 995, 593 F.2d at 670.

based on an identification of the rights inherent in property ownership. As such, the *Barakat* decision displayed a more sophisticated understanding of fundamental property law principles.[101]

An earlier American decision, *Republic of Turkey v. OKS Partners*, used an analysis of Turkey's ownership law that more closely resembled that of the *Barakat* decision. After analysing the respective rights to antiquities of a finder and the State, the court concluded:

> [i]f 'title' is envisioned as a bundle of severable rights, the state has the biggest part of the bundle, and whatever attenuated rights remain in the finder depend upon strict compliance with the 1983 law. What is critical for the purpose of this case is that the Republic has an immediate and unconditional right of possession which accrues immediately upon the discovery of the antiquities.[102]

The court then concluded that this interest was sufficient for Turkey to maintain its replevin action against the possessors.

In examining the nature of property ownership, one argument against recognition of foreign national ownership laws that had been persistently asserted by Schultz and in earlier cases in the United States was that the foreign nation's ownership rights could be protected only if the nation had reduced the antiquities to actual possession before they were exported from the country of origin.[103] In the US litigation, the significance of actual possession seemed to rest in the desire to differentiate between ownership and export controls. Schultz, like his predecessors, argued that recognition of national ownership did not comport with American public policy, in part because of the latter's emphasis on private property ownership and in part because of a US policy to

---

101 The *Schultz* court gave some recognition to the complexity of defining what property could be considered stolen under the NSPA when it cited earlier precedent "that the NSPA applies to stolen property even where the person from whom the property was stolen may not have been the true owner of the property, and that the validity of the victim's title in the property is sometimes 'irrelevant'." *Schultz*, 333 F.3d at 402. The court also stated that property could be considered stolen even if the property "were 'never possessed by the original owner ….'" *Id*. at 403.

102 1994 U.S. Dist. LEXIS 17832 (D. Mass. 1994). In *Portrait of Wally*, the court also concluded that the possessory right of a bailee was a sufficient interest to allow the bailee to intervene in a civil forfeiture action concerning the bailed property. 2002 U.S. Dist. LEXIS 6445.

103 Schultz argued that the word 'stolen' in the NSPA could apply only to those antiquities that fit the description of antiquities that were stolen under the CPIA, implementing Article 7(b) of the 1970 UNESCO Convention. The CPIA provision prohibits the import of "cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution …." 19 U.S.C. § 2607; *Schultz*, 333 F.3d at 408; Brief for Defendant-Appellant, *United States v. Frederick Schultz*, 02-1357, at pp. 18, 26-27 (hereinafter 'Brief for Defendant-Appellant'). Schultz also argued, quoting Merryman and Elsen, that "[The] clear intention [of CPIA] is to restrict the category of stolen property to objects that were actually in the possession of the individuals or institutions from which it is claimed that they were "stolen."'" *Id*. at p. 27. See also *McClain*, 545 F.2d at 994.

encourage the importation of art.[104] Nonetheless, *McClain* had answered this point, when the judge wrote:

> [I]n addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. Moreover, the earlier [decision in *McClain*] had considered the evidence of the 1972 [Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act], its legislative history and UNESCO negotiations, holding nevertheless that neither statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A. so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country.[105]

In *Barakat*, the Court of Appeal related the question of possession to the issue of justiciability. If the foreign State acquired ownership through compulsory process or confiscation, then the State has to reduce the property to possession while the property is still located within the State.[106] If the foreign State has not obtained possession first, then it would be asking the foreign court to enforce its penal law. However, if the property was not taken from a private owner through compulsory acquisition, then prior possession is not needed to maintain a suit in a foreign court. The court stated:

> [Iran] asserts a claim based upon title to antiquities which form part of Iran's national heritage, title conferred by legislation that is nearly 30 years old. This is a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights. We do not consider that this is within the category of cases where recognition of title or the right to possess under the foreign law depends on the state having taken possession.[107]

Another way of analysing the question of possession is to view the nation as having taken 'constructive' possession of the antiquities buried in the nation's soil. Sir Sydney Kentridge Q.C., on behalf of Iran, analogised this type of ownership to that obtained by the Crown in treasure trove based on constructive possession. The extent to which someone has gained possession of property depends on the nature of the property. One way to establish possession is to

104 Schultz argued that foreign vesting statutes "are in conflict with our tradition of private property and aversion to state ownership." Brief for Defendant-Appellant, above, note 103, at p. 40.

105 593 F.2d at 664.

106 [2007] E.W.C.A. Civ. 1374 at paras. 143, 148. It is clear that the court did not view enactment of a national ownership statute such as Iran's as a confiscation.

107 *Id*. at para. 149.

exclude others from possessing the property or by establishing control over the property, as happens in salvage rights to sunken vessels.[108]

> [I]n a country like Iran or, for that matter, the United Kingdom, it is simply impossible for the Government to fence off every piece of land where there might be treasure hidden and to say, 'We are taking possession of this.' Possession is achieved by statutory provisions.[109]

Iran had done everything it could to reduce the antiquities to its possession, but by the nature of the property as unexcavated antiquities, it was not practical for the Government to have actual possession before their looting and illegal export. This view echoed the Fifth Circuit's statement in *McClain* (and quoted in *Schultz*) that if the pre-Columbian artefacts taken from Mexico after enactment of Mexico's 1972 vesting law were not considered to be stolen property:

> the Mexican government would be denied protection of the [NSPA] after it had done all it reasonably could do [to vest] itself with ownership to protect its interest in the artifacts.[110]

This approach recognises the fundamental problem with 'undocumented' antiquities – that is, antiquities that are looted directly from the ground and are therefore unknown and unrecorded before their theft. Iran had done everything it practicably could and it had taken possession through statutory enactment.

This leads to a second important point inherent in these decisions – that nations can establish ownership through statutory enactment. This point had previously been debated in US courts, although it did not feature explicitly in the *Schultz* or the *Barakat* decision. However, recognition that, as an attribute of sovereignty, nations can establish and alter through statute the relationship between private and public ownership is implicit, for example, in the changes in the definition of treasure trove achieved through the 1996 Act, which expanded on the categories of artefacts that belong to the Crown rather than to a private individual. It echoes Lord Brightman's comments in *Ortiz* and Judge Wisdom's statement in *McClain* that:

> [t]he state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.[111]

---

108 Transcript, above, note 66, at 101-03.
109 *Id*. at 103.
110 *McClain*, 545 F.2d at 1001-02, quoted in *Schultz*, 333 F.3d at 404.
111 545 F.2d at 1002-03.

This normalises the role of national ownership statutes, putting them on a par with other forms of ownership by both nations and individuals. Protecting these rights in the courts of a foreign nation does not then seem out of the ordinary, but rather should be viewed as simply recognition of property ownership.

A final point that needs to be considered is the relationship between the *Barakat* decision and the UK Dealing in Cultural Objects (Offences) Act 2003, enacted after the United Kingdom ratified the 1970 UNESCO Convention in 2002. The United Kingdom took the position that it did not need to enact implementing legislation for the UNESCO Convention. However, in 2003, it enacted new criminal legislation, the Dealing in Cultural Objects (Offences) Act 2003, which created a new offence for dealing in 'tainted cultural objects'.[112] A person commits this offence if he or she "dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted."[113] The statute defines a 'tainted object' as follows:

> (2) A cultural object is tainted if, after the commencement of this Act-
>
> (a) a person removes the object in a case falling within subsection (4) or he excavates the object, and
>
> (b) the removal or excavation constitutes an offence.[114]

Subsection 4 refers to objects removed from "a building or structure of historical, architectural or archaeological interest" or from an excavation. For the purposes of the statute, it does not matter whether the excavation or removal takes place in the United Kingdom or in another country or whether the law violated is a domestic or foreign law.[115]

This statute imposes the same rule as in *Barakat* – that cultural artefacts obtained in violation of local law are considered stolen property in the United Kingdom.[116] However, the *Barakat* decision brings several advantages. First, the statute applies only to artefacts taken after December 2003. The *Barakat* decision applies to antiquities stolen any time after the nation has enacted a vesting statute, thus bringing greater flexibility. A second difficulty with the statute is that, as a criminal statute, it is unclear whether it can be used by Customs authorities as a basis for holding, forfeiting and returning looted antiquities to their nation of origin in the absence of a criminal prosecution or whether it can be used as a basis for a foreign nation to achieve restitution in a

112 Dealing in Cultural Objects (Offences) Act 2003, Ch. 27.
113 *Id*. Section 1(1).
114 *Id*. Section 2(2).
115 Section 2(3).
116 It also mirrors one of the key provisions of the 1995 Unidroit Convention, in which Article 3(2) equates illegal excavation with theft when this is consistent with local law.

civil action. Because the *Barakat* decision allows civil actions for recovery of looted antiquities, it provides greater flexibility for restitution when the facts for a criminal prosecution may not be available.

Thus the *Barakat* decision and the criminal statute will work in concert, just as the *Schultz* decision and other domestic laws do in the United States. National ownership laws vesting title to antiquities in the State afford a unique legal solution to a unique problem – that, by definition, such antiquities are undocumented and unknown before they are stolen and appear on the international art market or in a collection in a destination market country. Now both the United States and the United Kingdom accept this legal solution. The *Barakat* decision thus brings these major market nations into alignment so that in tandem they can be more effective in reducing the financial incentives to the continued looting of archaeological sites.