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Case Egyptian Archaeological Objects – United States v. Frederick Schultz

United States/Etats-Unis – Frederick Schultz – Egypt/Egypte – Archaeological object/objet archéologique – Post 1970 restitution claims/demandes de restitution post 1970 – Judicial claim/action en justice – Criminal offence/infraction pénale – Illicit exportation/exportation illicite – Illicit importation/importation illicite – Ownership/propriété – Enforcement of foreign law/applicabilité du droit public étranger – Judicial decision/décision judiciaire – Unconditional restitution/restitution sans condition

On 16 July 2001, Frederick Schultz, a New York antiquities dealer, was indicted on one count of conspiring to receive stolen Egyptian antiquities in violation of the National Stolen Property Act (NSPA). Under the NSPA, it is a crime to deal in property that has been "stolen, unlawfully converted or taken, knowing the same to be stolen". The court found that "the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law".

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

I. Chronology

Post 1970 restitution claims

- **1990s**: Frederick **Schultz**, one of New York's most prominent art dealers, worked in partnership with Jonathan Tokeley-Parry, a British national, and Ali Farag, an Egyptian tomb robber, to **smuggle antiquities out of Egypt** and to **bring them to the United States** for resale. To deceive potential buyers, Schultz and Tokeley-Parry disguised the antiquities as cheap souvenirs and created a false provenance history by inventing a fictional collection called the "Thomas Alcock Collection".[1] Tokeley-Parry and Farag had also been cooperating with corrupt Egyptian police officers as early as 1994. These officers not only turned a blind eye on their illicit activities, but also offered them various antiquities held in their possession. As a result, several highly valuable ancient artefacts were smuggled out of Egypt, including a sculpture of the head of Pharaon Amenhotep III and a sculpture of Meryet Anum. This **illicit exportation** was in contravention of **Egyptian Law No. 117 of 1983** ("Law 117"). Law 117 declared that all antiquities discovered after its enactment constituted the property of the Egyptian Government. The smuggling of such antiquities outside the State was prohibited and punishable by a prison term and a fine.[2]
- **16 July 2001**: **Schultz was indicted** on one count of conspiring to receive stolen Egyptian antiquities in violation of the **National Stolen Property Act** (NSPA).[3] Schultz **moved to dismiss the indictment**.
- **3 January 2002**: The United States District Court for the Southern District of New York **denied the motion to dismiss**.[4] Schultz was tried before a jury in January and February 2002.
- **February 2002**: **Schultz was convicted** under the NSPA. The jury found Schultz guilty on the sole count of the indictment.
- **11 June 2002**: **Schultz was sentenced** to a term of 33 months of imprisonment and a fine of $50,000. Schultz appealed the verdict.
- **25 June 2003**: The United States Court of Appeals for the Second Circuit **affirmed the conviction**.[5] The Supreme Court of the United States denied a petition for writ of certiorari.[6]

[1] With Schultz's knowledge, Tokeley-Parry restored the antiquities, using methods popular during the 1920s, and created fake labels, designed as though they had been printed in the 1920s.
[2] Nora Crumpton, "Cultural Property Law Theory and United States v. Schultz," *SAFE*, October 22, 2007, accessed August 31, 2012, http://www.savingantiquities.org/cultural-property-law-theory-and-united-states-v-schultz/.
[3] It states that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods [...] [or] merchandise [...] of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud, [...]" (18 U.S.C. § 2314); and that "[w]hoever receives, possesses [...] sells, or disposes of any goods [...] [or] merchandise of the value of $5,000 or more [...] which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted or taken [...] [s]hall be fined under this title or imprisoned not more than ten years, or both" (18 U.S.C. § 2315).
[4] *United States v. Frederick Schultz*, 178 F.Supp.2d 445 (S.D.N.Y. 2002).
[5] *United States v. Frederick Schultz*, 333 F.3d 393 (2nd Cir. (N.Y.) June 25, 2003) (No. 02-1357).
[6] *Cert. denied*, 540 U.S. 1106 (Jan 12, 2004) (No. 03-592).

II. Dispute Resolution Process

Judicial claim – Judicial decision

- The NSPA, enacted in 1934, provides a basis for prosecution and return of stolen or illicitly exported objects. Originally, the federal criminal statute was enacted to aid in the government's recovery of stolen motor vehicles. At the time it was introduced – as it is today – it does not mention cultural objects. Regardless, Interpol and foreign governments occasionally submit requests for the detention or seizure of stolen objects under the NSPA. Normally, the return of such materials is coordinated with the countries of origin.[7]
- Four years after Tokeley-Parry's conviction,[8] US prosecutors pressed charges against Frederick Schultz. Much of the US government's case against Schultz relied on his documented correspondence with Tokeley-Parry. Thanks to this evidence, the prosecution proved that Schultz was both funding smuggling operations and receiving looted antiquities from Tokeley-Parry, and that he had knowledge of the objects' looted nature.[9]
- During the criminal proceedings, Frederick Schultz raised the following arguments:
    - Law 117 is not a patrimony law (or ownership law) but rather an export regulation because it does not vest true ownership rights in the State, but instead aims to regulate the exportation of cultural objects; consequently, as archaeological objects were never possessed by anyone prior to the exportation, they could not be "stolen" and their exportation could not constitute "theft" within the meaning of the NSPA;
    - even assuming that Law 117 did operate as a patrimony law, United States law, including the NSPA, does not regard objects taken in violation of a foreign ownership law as stolen property;
    - the Cultural Property Implementation Act (CPIA)[10] superseded the NSPA in cases of illicit importation of cultural objects;
    - Schultz did not maintain the requisite knowledge that importing antiquities owned by Egypt violated the NSPA.

- The District Court and the Court of Appeals rejected Schultz's arguments on the following grounds:
    - Law 117 was a patrimony law aimed to transfer the ownership of antiquities to the Egyptian State – not a disguised export regulation – and it was enforced within

[7] James A.R. Nafziger, Robert Kirkwood Paterson and Alison Dundes Renteln, *Cultural Law* (Cambridge/New York: Cambridge University Press, 2010), 479.
[8] In 1994, Tokeley-Parry was arrested in Great Britain and charged with dealing in stolen antiquities. He was convicted in 1997 and sentenced to six years in prison (*R. v. Tokeley-Parry* [1999] Crim. L. R. 578).
[9] Nora Crumpton, "Cultural Property Law Theory and United States v. Schultz."
[10] 19 U.S.C. §§ 2601 et seq. With the CPIA, which was enacted in 1983, the United States implemented the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (17 November 1970, 823 UNTS 231).

Egypt;[11] as a result, any antiquity excavated after the law's enactment and removed without permission constituted stolen property and the person responsible was a thief;
- the ownership rights established by Law 117 should be recognized by the United States for the purposes of criminal prosecution under the NSPA; the NSPA should be interpreted broadly, so as to cover cases not only where the true owner is not in the United States and is not a citizen of the United States, but also where the property was stolen abroad in violation of foreign patrimony laws;
- the NSPA had been consistently applied by the courts of the United States to thefts in foreign countries in violation of domestic ownership laws and subsequent transportation into the United States; this jurisprudence could be seen as an implicit recognition of the interest of the United States in combating the illicit trade in stolen or illicitly exported cultural material;
- nothing existed in the language or the history of the CPIA to support the view that it constituted the only legal tool for dealing with stolen artefacts, and no inconsistency existed between the application of the CPIA and the NSPA to cases concerning cultural property illicitly removed from a foreign country; although instances could exist when the same conduct might violate both statutes, this overlapping jurisdiction does not limit the scope of the NSPA.

III. Legal Issues

Criminal offence – Illicit exportation – Illicit importation – Ownership – Enforcement of foreign law

- The Court of Appeals ruled that a foreign State may validly claim ownership over a wrongfully removed art object so long as its ownership was previously declared by law, even if that foreign State had not reduced the object to its possession prior to exportation. In other words, the *Schultz* decision established that the property "stolen" in a foreign country is considered "stolen" property pursuant to the NSPA after its entry into the United States. Thus, if national legislation merely imposes an export restriction, then a violation would not automatically render the exported property "stolen".[12] This means that the NSPA has the ability to enforce a foreign country's policy and legislation within the United States, regardless of whether or not the United States has entered into a bilateral agreement with that country.

[11] This conclusion was reached thanks to the extensive evidence presented during a hearing conducted by the trial court with the testimony of Dr. Gaballa Ali Gaballa, at the time the Secretary General of Egypt's Supreme Council of Antiquities, and General El Sobky, Director of Criminal Investigations for the Egyptian Antiquities Police. *United States v. Frederick Schultz*, 178 F.Supp. 2d 445, 448.
[12] Patty Gerstenblith, "*Schultz* and *Barakat*: Universal Recognition of National Ownership of Antiquities," *Art Antiquity and Law* 1 (2009): 28.

- The Court of Appeal's decision reaffirmed the precedents establishing the courts' ability to enforce foreign patrimony laws.[13] In particular, the Court relied on doctrine established by the *McClain* Court[14] stating that an object may be considered stolen in the United States provided that the country of origin can prove that: (1) the object was discovered within its territory; (2) a patrimony law that unequivocally vested ownership of such object in the State – even without physical possession – was in effect when the object was removed from that country; and (3) such foreign patrimony law is not so vague as to violate the due process requirements of the United States Constitution. In this respect, the Court of Appeals emphasised that the courts of the United States "are capable of evaluating foreign patrimony laws to determine whether [...] they are intended to assert true ownership of certain property, or merely to restrict the export of that property".[15] The obverse of the same coin is that the countries that want to protect their heritage and benefit from the assistance of United States courts should enact clear statutory provisions regarding State ownership. Properly drafted provisions will provide notice of the prohibited conduct and clearly distinguish between ownership and export controls.[16]
- The *Schultz* decision is also significant for establishing the current applicable law in the field of cultural property protection. As previously stated, the Court of Appeals rejected Schultz's contentions that "the CPIA was intended to be the only mechanism by which the United States government would deal with antiquities and other 'cultural property' imported into the United States".[17] The Court underlined that the CPIA and the NSPA have different purposes and scopes of application: the CPIA provides a mechanism for the United States Government to establish import restrictions on "cultural property" at the request of another signatory State of the 1970 UNESCO Convention, whereas the NSPA is a federal criminal statute. It thus concluded that "the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations".[18] To illustrate, the Court of Appeals affirmed that "CPIA does not state that importing objects stolen from somewhere *other than* a museum is legal. If, for instance, an artifact covered by the CPIA were stolen from a private home in a signatory nation and imported into the United States, the CPIA would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the NSPA".[19]

[13] See, e.g., *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir.1999); *Government of Peru v. Johnson*, 720 F.Supp. 810 (C.D. Cal. 1989); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir.1974).
[14] In effect Schultz raised many of the same arguments that the *McClain* defendants used 25 years earlier, essentially that a US court should not accept the characterization of stolen property given by a foreign country's law.
[15] *United States v. Frederick Schultz*, 333 F.3d 393, para. 83.
[16] Patty Gerstenblith, "The McClain/Schultz Doctrine: Another Step against Trade in Stolen Antiquities," *Culture without Context* 13 (2003), accessed August 31, 2012, http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue%2013/gerstenblith.htm.
[17] *United States v. Frederick Schultz*, 333 F.3d 393, ibid., para. 76.
[18] Ibid., para. 79.
[19] Ibid., para. 77.

IV. Adopted Solution

Unconditional restitution

- The United States Court of Appeals for the Second Circuit affirmed the judgment and the sentence of 33 months imprisonment and a $50,000 fine. The antiquities seized by US authorities were returned to the Supreme Council for Antiquities of Egypt.

V. Comment

- Frederick Schultz's conviction for illegally importing stolen Egyptian artefacts drew tremendous public attention to issues within the illicit trade in antiquities. The case demonstrated an effective enforcement of the NSPA and how criminal prosecution could be used as a powerful device in the fight against illicit trafficking. Such interest was further amplified by the fact that Schultz had been the owner of a successful art gallery in Manhattan, the President of the National Association of Dealers in Ancient, Oriental and Primitive Art, and had served as an adviser to the Clinton administration on the Cultural Property Advisory Committee,[20] where he actually opposed increasing the restrictions on the trade of cultural materials![21]
- The *Schultz* decision established the principle that national patrimony laws created legally recognizable ownership rights: if removed after a patrimony law's enactment, antiquities are considered stolen for the purposes of the NSPA when they transported to foreign nations without requisite permission.[22] Thus, the *Schultz* decision revealed that the courts of the United States and its government shared two common goals: to fight against the illicit traffic of art objects and to protect the owners of stolen property through civil or criminal suit, leading to the recovery and restitution of wrongfully dispossessed archaeological objects. It is expected that this precedent will persuade US courts to address these issues in future disputes and move away from the abstract legal arguments relying on the default rule against enforcing such protective laws of art-rich countries. Future cases should focus more on the factual circumstances of each case, such as the specific conduct of the parties involved and the law of foreign nations.[23]
- The *Schultz* decision demonstrates that, today, the courts of the United States can utilize anti-theft laws like the NSPA to recognize and give extra-territorial effect to foreign patrimony laws vesting the ownership of certain objects in the national government. The same legal solution has been adopted in the United Kingdom, another market country, with the *Barakat*

[20] The Cultural Property Advisory Committee is the body responsible for reviewing the requests for import bans submitted under the CPIA by other signatory States of the 1970 UNESCO Convention.
[21] Nora Crumpton, "Cultural Property Law Theory and United States v. Schultz."
[22] Patty Gerstenblith, "*Schultz* and *Barakat*" 21, 25.
[23] Patty Gerstenblith, "The McClain/Schultz Doctrine".

decision.[24] These two landmark decisions confirm that source countries' ownership laws and market States' courts can work in tandem to reduce the financial incentives to the looting of archaeological sites. Such efforts also present a unique legal solution to a unique problem, i.e. archaeological objects are undocumented and unknown before they are stolen and sold on the international art market.[25]

- It can be argued that the *Schultz* decision forms the backdrop for the restitutions of antiquities from US museums to Italy and other countries that have taken place in the last decade. In other words, it could be assumed that the threat of litigation before US courts based on Italy's national ownership law convinced these museums to return the contested objects.[26]
- It is also interesting to consider that the *Schultz* case served to emphasise that art professionals are required to abide by higher standards of conduct. The courts rejected Schultz's argument claiming he was unaware that importing antiquities owned by the Egyptian Government violated the NSPA. Both the District Court and the Court of Appeals underlined that antiquities dealers, such as Frederick Schultz, cannot feign ignorance that cultural property laws have become increasingly strict in art-rich countries, such as Egypt. In particular, the Court of Appeals ruled that a "defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law" of the foreign State in whose heritage he is dealing.[27] In any case, the prosecutor proved beyond a reasonable doubt that Schultz knew that he was dealing with stolen antiquities. This was possible thanks to the correspondence between Schultz and Tokeley-Parry (which continued after the latter's arrest) and its documentation in records and journals kept by Tokeley-Parry. Were it not for this extensive evidence, prosecutors would have had a difficult time proving that Schultz had violated the NSPA under the *McClain* doctrine. As mentioned, in the case of undocumented artefacts, it can be extremely difficult to prove that the artefacts had been excavated within the borders of a modern nation after the enactment of an ownership statute.
- On appeal the Court received two *amicus curiae* briefs in support of Schultz.[28] These briefs argued that allowing Schultz's conviction to stand would threaten the ability of legitimate American collectors and sellers of antiquities to do business. The Court of Appeals dismissed this contention and affirmed that, "[a]lthough we recognize the concerns raised by Schultz […] about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it 'creates an insurmountable barrier to the lawful importation of cultural property into the United States'. […] The *mens rea* requirement of the NSPA will protect innocent art

[24] *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWHC 705 QB; *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWCA Civ. 1374. On this case see Alessandro Chechi, Raphael Contel, Marc-André Renold, "Jiroft collection – Iran v. The Barakat Galleries Ltd.," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.
[25] Patty Gerstenblith, "*Schultz* and *Barakat*" 48.
[26] Ibid., 32.
[27] *United States v. Frederick Schultz*, 333 F.3d 393, para. 101.
[28] The first brief was filed by the National Association of Dealers in Ancient, Oriental & Primitive Art, Inc.; the International Association of Professional Numismatists; the Art Dealers Association of America; the Antique Tribal Art Dealers Association; the Professional Numismatists Guild; and the American Society of Appraisers filed a brief. The second brief was filed by a group called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property, made up of politicians, academics, and art collectors.

dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations".[29] In reality, Schultz's conviction has not caused an avalanche of litigation under the *McClain* doctrine.[30] On the contrary, it could be argued that by criminalizing the traffic in stolen objects, this precedent-setting decision has not only reduced the market demand and the destructive looting of archaeological sites, but also expanded the activity of legitimate traders.

VI. Sources

a. Bibliography

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b. Court decisions

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- *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir.1974).

c. Legislation

- Egyptian Law No. 117 of 1983.
- National Stolen Property Act, 18 U.S.C. § 2315.
- Cultural Property Implementation Act, 19 U.S.C. §§ 2601 et seq.

[29] *United States v. Frederick Schultz*, 333 F.3d 393, para. 84.
[30] Nora Crumpton, "Cultural Property Law Theory and United States v. Schultz."