

## STEALING BEAUTY: STOPPING THE MADNESS OF ILLICIT ART TRAFFICKING

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## I. INTRODUCTION

The looting of museums in Iraq during the war on terrorism<sup>1</sup> and the recent theft of Munch's "The Scream" and "Madonna"<sup>2</sup> have once more thrown into the world's spotlight the issues of illicit art trade, its prevention, and repatriation. Governments around the world have recognized the importance of identifying and preserving each nation's cultural heritage and have enacted national legislation and international conventions to facilitate international cooperation toward those ends.<sup>3</sup> The purpose of these enactments is two-fold: the laws attempt 1) to deter theft of "cultural property" and 2) to facilitate repatriation of the property when appropriate.<sup>4</sup> In spite of heightened awareness and the implementation of preventive schemes within and among nations, the problem of black market art trade persists.<sup>5</sup> Based on extrapolations of incidents reported to major police organizations, illicit art trade generates billions of dollars in transactions each year.<sup>6</sup>

The still dominant conceptual framework conceived by John

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1. See, e.g., Paul Martin et al., *US Army Was Told To Protect Looted Museum*, OBSERVER, Apr. 20, 2003, at 4 (noting that in spite of advance warning by the Office of Reconstruction and Humanitarian Assistance that Iraq's national museum would be a "prime target for looters' and should be the second top priority . . . [to be secured] after the national bank," generals refused to deploy otherwise unoccupied forces, which resulted in the looting of at least 270,000 artifacts, a mere twenty of which have been recovered).

2. Walter Gibbs & Carol Vogel, *Munch's 'Scream' Is Stolen from a Crowded Museum in Oslo*, N.Y. TIMES, Aug. 23, 2004, at A6.

3. See generally Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 3511 U.N.T.S. 240 [hereinafter Hague Convention]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter UNESCO Convention]; Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

4. See *id.*

5. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 847-48 (1986) [hereinafter *Two Ways of Thinking*].

6. Anna Kisluk, *Stolen Art and the Loss Register*, Paper Presented at the Art Crime Protecting Art, Protecting Artists and Protecting Consumers Conference, Austl. Inst. of Criminology, *Stolen Art and the Loss Register* (Dec. 2-3, 1999), <http://www.aic.gov.au/conferences/artcrime/kisluk.pdf>.

Merryman for analyzing cultural property enactments rests upon a foundation of the binary opposition between cultural internationalism and cultural nationalism.<sup>7</sup> The former term denotes humankind's general interest in any given piece of cultural property, whose interest predominates over that of any nation, and correlates with the free movement of cultural property.<sup>8</sup> The latter term expresses the notion of a national interest in whatever may be considered "its" cultural property and correlates with restrictions on the international art market.<sup>9</sup> As will be explored in greater detail, Merryman reads two major international conventions as reflecting these competing concepts.<sup>10</sup> By extension, laws implementing such conventions and other national laws should also exhibit, to varying degrees, cultural nationalist and internationalist characteristics.

This Comment begins by discussing in Part II the factual and conceptual background of the international regulation of art theft. Subpart II.A discusses the significance of defining cultural property in determining regulatory scope. Subpart II.B describes the nature and causes of black market trade in stolen art. Part III discusses and critiques the theories of cultural nationalism and cultural internationalism, which are the two basic theories underpinning policies regarding regulation of the art trade and the repatriation of stolen cultural property. Part IV analyzes, criticizes, and recommends improvements to the laws that attempt to deter entry of cultural property into the black market and facilitate recovery of that property once it does so. Part V suggests that the goals of cultural property laws may never be achieved, but perhaps the worthier part is the dialogic process by which national officials, art dealers, museum administrators, lawyers, and academics alike contribute to the cultural property debate and the evolving legal framework.

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7. *Two Ways of Thinking*, *supra* note 5, at 831–32.

8. *Id.*

9. *Id.* at 832.

10. *Id.* at 831–33.

## II. CONCEPTUAL AND FACTUAL BACKGROUND AND ANALYSIS

### A. *Risky Business: Black Market Art Trade Will Never Be Completely Eliminated*

The income generated by illicit trade in art has been estimated to be as high as 6 billion dollars per year.<sup>11</sup> The loot comes from private collectors, public museums, churches, and archaeological sites, both discovered and undiscovered.<sup>12</sup> Only five to ten percent of objects are recovered,<sup>13</sup> and based on recovery data from The Art Loss Register, even when recovery succeeds, it takes an average of 13.4 years.<sup>14</sup> The international scope of art theft continues to expand.<sup>15</sup>

As with any illegal market, precise numbers are difficult to calculate<sup>16</sup> because often thefts remain unreported,<sup>17</sup> settle without publicity, or remain undiscovered until the property emerges on the official art market.<sup>18</sup> To further complicate

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11. EUR. PARL. ASS., *Report of the Comm. on Econ. Affairs & Dev.*, 2001 Sess., Doc. No. 9018 (2001), available at [Hhttp://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc01/H EDOC9018.htm](http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc01/H EDOC9018.htm).

12. *Id.* Of the victimized nations, Interpol reports that Italy, France, the Czech Republic, Poland, the Russian Federation, Germany, and Belgium bear the greatest losses. *Id.*

13. *Faking Art Attacks—Life Matters*, TOWNSVILLE BULL./TOWNSVILLE SUN (Australia), Jan. 22, 2005, at 22 (reporting F.B.I. art theft program manager Lynne Richardson's statement that "[w]orldwide, only 5 percent to 10 percent of artwork reported stolen is recovered").

14. See The Art Loss Register, <http://www.artloss.com/Default.asp> (follow "Theft & Recovery" hyperlink; then follow "Recoveries" hyperlink) (last visited Apr. 9, 2006).

15. *Report of the Comm. on Econ. Affairs & Dev.*, *supra* note 11, ¶ 55.

16. See Mati Wagner, *Tax Commissioner Steps Up War On Crime*, JERUSALEM POST, Jan. 12, 2004, at 15; see also Colin Renfrew, *Foreword* to *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* xi, xii (Neil Brodie et al. eds., McDonald Inst. 2001).

17. See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428 (1991) (noting museum's decision not to report theft for fear of decreasing recoverability by driving the stolen work underground); see also Hannah Beech, *Stealing Beauty*, TIME, Oct. 27, 2003, at 58 (estimating that only two percent of India's antiquities thefts are reported).

18. *Solomon R. Guggenheim Found.*, 569 N.E.2d at 428.

monetary estimates of the value of the black market trade, “[a]rt that has been off the market for many years is difficult to value.”<sup>19</sup> Often, institutional owners do not officially negotiate with thieves so as not to encourage the theft of art for ransom.<sup>20</sup> However, because their primary concern is for the safe return of the property, these same institutions frequently offer “finders fees” to middlemen who aid in recovery.<sup>21</sup> Victims may also underreport thefts because it would signal their vulnerability to other thieves. Moreover, it is difficult to separate statistically the theft of cultural property from ordinary theft.<sup>22</sup> In spite of this uncertainty, news media often report that the scope of this criminal market ranks fourth after that of narcotics smuggling, arms trafficking, and money laundering.<sup>23</sup> Interpol itself, however, maintains that there is no solid statistical foundation for such a conclusion.<sup>24</sup> In spite of numerous legal deterrents, illegal trade in cultural property thrives because of overwhelming demand,<sup>25</sup> political instability in certain nations,<sup>26</sup> inconsistent laws regarding ownership and repatriation of

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19. Timothy L. O'Brien, *The Castro Collection*, N.Y. TIMES, Nov. 21, 2004, § 3, at 1.

20. See Patricia Nealon, *Specialists at Odds Over Dealing for Art*, THE BOSTON GLOBE, Sept. 5, 1997, at B01 (exploring the tension between an owner's interest in retrieving an artwork at any cost and the risk of encouraging more theft).

21. Peter Watson, *Stolen Art: The Unromantic Truth*, TIMES (London), Aug. 29, 2003, at 4; see, e.g., Maxine Frith, *The Art of Stealing a Masterpiece*, INDEP. (London), Aug. 23, 2004 (describing the process by which one version of Munch's "The Scream" was recovered after its 1994 theft from Oslo's national gallery).

22. Joseph Hall, *It Takes A Thief, But What Kind?*, TORONTO STAR, Jan. 21, 2004, at B01.

23. Kate Dourian, *Traffic in Stolen Artwork Faces Attack*, L.A. TIMES, Nov. 24, 1991, at A30 (estimating that the worldwide illegal art trade generates between \$860 million and \$2.6 billion annually); Daniel Golden, *Hot Art*, BOSTON GLOBE, Feb. 12, 1989, at 16 (stating that art theft has become a booming billion-dollar illegal business, second only to narcotics). But see James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAWYER 835, 835 (1985) (lacking any substantiation for assertion about the scope of stolen art trade).

24. Interpol, Frequently Asked Questions, Stolen Works of Art, [Hhttp://www.interpol.com/HPublic/WorkOfArt/woafaq.asp](http://www.interpol.com/HPublic/WorkOfArt/woafaq.asp) (last visited Apr. 9, 2006).

25. Paul M. Bator, *An Essay on International Trade in Art*, 34 STAN. L. REV. 275, 291-92 (1982).

26. *Id.* at 324 (noting that the regulatory schemes that function in first world nations would be incompatible with less developed, art-rich nations).

cultural property,<sup>27</sup> increasingly permeable borders,<sup>28</sup> and improved methods of transportation.<sup>29</sup>

For the convenience of discussion, objects that are the subject of the black market trade in cultural property may be separated into four general categories of origin: 1) theft from private or public owners, individual or institutional; 2) theft from known archaeological or excavation sites or national monuments; 3) theft from undiscovered sites; and 4) illegal exportation of objects from a source nation.

The vulnerability of the first category of objects, those stolen from individuals and institutions, stems most notably from the prohibitively high costs of insurance and adequate security measures.<sup>30</sup> The cost of insurance is directly proportional to the value of the object, so the more famous and invaluable the work, the less insurable, and limited resources frequently result in less than state-of-the-art security employed by private and public owners.<sup>31</sup> For example, on August 22, 2004, two masked, armed robbers stole “The Scream” and the “Madonna” from the Munch Museum in Oslo.<sup>32</sup> Estimates of the value of the stolen work range from 83 million<sup>33</sup> to 100 million dollars for “The Scream” alone.<sup>34</sup> In August of 2003, Leonardo da Vinci’s “Madonna with the Yarnwinder” was stolen from Drumlanrig Castle and has

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27. See Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT’L L. REV. 131, 132 (2000).

28. Charter of Courmayeur, June 25–27, 1992, [http://www.unesco.org/culture/laws/courmayeur/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/courmayeur/html_eng/page1.shtml) (last updated Aug. 23, 2001) (predicting that “[t]he volume of [illicit art] trade was almost certain to grow . . . as national borders become more permeable to commerce and travel”).

29. See Hughes, *supra* note 27, at 131.

30. Doug Bailey, *Insuring Art That’s Priceless Is Pricey*, BOSTON GLOBE, Mar. 20, 1990, at 8.

31. *Id.*; see, e.g., Frith, *supra* note 21 (reporting that the daytime theft of Munch’s “The Scream” involved no alarms, no devices physically securing the painting to the wall, one security guard threatened at gun-point, and five minutes to take and escape with the loot).

32. Angie Brown, *‘The Scream’ Stolen from Oslo Gallery*, SCOTSMAN, Aug. 23, 2004, available at <http://news.scotsman.com/international.cfm?id=982852004>.

33. Rosalie Higson, *A Century of Stolen Beauty*, AUSTRALIAN, Aug. 24, 2004, at 30.

34. Gibbs & Vogel, *supra* note 2.

been valued at nearly 140 million dollars.<sup>35</sup> In 1990, two men gained entry to the Isabella Stewart Gardner Museum in Boston by impersonating policemen investigating a disturbance.<sup>36</sup> The thieves bound and gagged the guards and absconded with about 520 million dollars worth of art, including a Manet, three Rembrandts, several sketches by Degas, and Vermeer's "The Concert."<sup>37</sup> So far, none have been recovered.<sup>38</sup>

The second and third categories of thefts from known and unknown sites result from a combination of the activities of subsistence looters and organized crime,<sup>39</sup> and both pose similar regulatory challenges. As difficult and costly as it is to administer physical protection to known sites or monuments, the protection of unknown archaeological sites is nearly impossible. Unfortunately, the greatest destruction to unique archaeological sites and national monuments occurs at the moment of excavation.<sup>40</sup>

Subsistence looting<sup>41</sup> is endemic where a class of impoverished citizens can easily and profitably sell their nation's cultural patrimony on the black market.<sup>42</sup> In China, one heist can generate as much as a year's farming income.<sup>43</sup> In Iraq, strict economic sanctions since 1990 further exacerbate the desperation for cash.<sup>44</sup> Moreover, in the absence of financial incentive for reporting discovered artifacts on their property, landowners often opt to liquidate objects on the black market

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35. Jason Bennetto, *Gangs Using Stolen Art As Get Out of Jail Free Cards*, INDEP. (LONDON), Feb. 16, 2004, at 11.

36. Frith, *supra* note 21.

37. *Id.*

38. *Id.*

39. Bator, *supra* note 25, at 292; *see also* Barbara Crossette, *Iraqis, Hurt by Sanctions, Sell Priceless Antiquities*, N.Y. TIMES, June 23, 1996, § 1, at 8 (reporting expert opinion that "[l]ooters and grave robbers working with international smugglers are doing most of the damage").

40. *See* Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 466 (1988). The best recommendations attempt to discourage looting in the first place. *See infra* subpart IV.C.1.

41. *See* Moore, *supra* note 40, at 486.

42. *Id.*

43. Beech, *supra* note 17, at 1.

44. Crossette, *supra* note 39.

rather than risk loss of development value due to government excavation upon discovery of artifacts.<sup>45</sup> In light of the strong allure of looting and the impracticability of physical protection, many art-rich nations have enacted legislation claiming ownership and prohibiting the export of antiquities.<sup>46</sup> Combined with U.S. replevin laws,<sup>47</sup> for example, these declarations may provide a basis for recovering illegally exported cultural property.

The final category of illegally exported objects implicates the procedures by which nations may seek repatriation of illegally exported objects regardless of whether the prior chain of transactions were legal. Absent other law, illegal exportation alone is insufficient grounds for maintaining a recovery action.<sup>48</sup> However, if a foreign nation establishes ownership of an artifact, it may recover the object via U.S. statutory or common law protections of cultural property or as simple stolen property.<sup>49</sup> U.S. courts have discretion to recognize ownership declarations of foreign nations.<sup>50</sup> For example, in *United States v. McClain*, the court analyzed Mexican ownership laws and relevant expert testimony to conclude that Mexico had declared ownership of pre-Columbian artifacts with sufficient clarity<sup>51</sup> to facilitate recovery under the National Stolen Property Act (NSPA).<sup>52</sup>

Remedies like those available under the NSPA deter trafficking of stolen art, thereby decreasing demand for it.<sup>53</sup> Although this merely treats a symptom and not the cause, it is more practicable than policing illegal export, which is as

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45. See Suna Erdem, *New Trojan War Highlights Pillage of Turkey's Past*, REUTERS, Oct. 14, 1993 (stating that “[m]any Turkish landowners fear finding ancient artifacts on their land because this might block its development. Some would rather sell chance finds than surrender them to the state.”).

46. See Moore, *supra* note 40, at 466–67 (remarking on the difficulty of using legal penalties to deter poor locals from subsistence looting).

47. *Id.* at 467.

48. See *United States v. McClain (McClain I)*, 545 F.2d 988, 1000–01 (5th Cir. 1977).

49. See *id.* at 1001–02.

50. See *id.* at 996–1001.

51. *Id.* at 997–1000.

52. 18 U.S.C. §§ 2314–2315 (2000).

53. See Moore, *supra* note 40, at 471.

prohibitively expensive as physically protecting the work in situ.<sup>54</sup> Many, if not most, source nations cannot afford to protect their archaeological sites and national monuments<sup>55</sup> and therefore often prohibit export of certain antiquities in an effort to prevent the loss of cultural property.<sup>56</sup> Such prohibitions are ineffective due to, for example, inadequate customs services to screen for illegally exported objects.<sup>57</sup> Enforcing the import controls of market nations is somewhat less difficult than the border-control problem facing source nations.<sup>58</sup> However, this poses a problem for nations seeking recovery because they must enlist the cooperation of the market nation.<sup>59</sup>

A screening or licensed export system provides an alternative to a total export embargo. For example, the United Kingdom and Japan<sup>60</sup> opt for selective export regulation instead of outright prohibition.<sup>61</sup> In both countries, robust private collection and tax incentives for cultural donations make screening relatively successful.<sup>62</sup> However, the social, economic, and political preconditions for success in those countries do not exist in many other source nations.<sup>63</sup> Because the circumstances and interests of involved parties differ among and within the above categories, each context calls for slightly different preventive and restitutionary measures. Unfortunately, the risk of punishment is remote, and the actual punishment for trading

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54. *See id.* at 467.

55. Bator, *supra* note 25, at 289–94 (recounting the struggles of South America, Europe, and Asia with looting).

56. Moore, *supra* note 40, at 470.

57. *Id.* at 466–67.

58. Bator, *supra* note 25, at 327.

59. *See id.*

60. *Id.* at 322. Although the United Kingdom and Japan may be considered both source and market nations, their export controls derive from their roles as source nations. *Id.* at 319.

61. *Id.* at 319–22.

62. *See id.* at 321. *But see* Janet Koplos, *Sunrise, Sunset? The Japanese Art Scene*, ART IN AM., Apr. 1999, at 70 (reporting that the lack of tax deductions for private giving to public institutions and financial constraints on art institutions are having a constrictive trickle-down effect on commercial galleries).

63. Bator, *supra* note 25, at 324–25.

in any of the above categories is relatively light,<sup>64</sup> thus providing little deterrence for art theft.

*B. Beauty Is in the Eye of the Beholder: Defining Cultural Property and the Effect on Regulatory Application and Interpretation*

The impact of laws and international agreements regarding cultural property depend in large part on the nature and scope of the definition of cultural property.<sup>65</sup> For example, a definition that requires qualifying objects to be accordingly designated prior to theft would impede the restitution of “artefacts [sic] that have been removed from the country of origin before . . . officials have even been able to view, much less inventory or document, the objects.”<sup>66</sup> In such cases, a nation petitioning for repatriation may bear the unenviable legal burden of proving that the object’s provenance originates within its borders. A definition that reflects cultural internationalism creates a propensity for concluding that the world’s interest in any given cultural object is superior to that of the originating nation. Accordingly, the definition of cultural property significantly affects the legal and conceptual presumptions and subsequent application of regulations employing that term.

The term “cultural property” is inherently vague and at its broadest, like the term “art,” encompasses anything that one might subjectively consider as belonging to the category.<sup>67</sup>

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64. See, e.g., *Collectors or Looters?*, ECONOMIST, Oct. 17, 1987, at 117, 118 (describing the punishment of an American smuggler caught with objects valued at \$288,000 by a fine of \$1,000, a suspended sentence, and 200 hours of community service).

65. Cf. Lyndel V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, 217 RECUEIL DES COURS 215, 232 (The Hague, 1989) (supporting the notion that a discussion of “cultural heritage” is sufficiently analogous to “cultural property”).

66. Howard N. Spiegler & Lawrence M. Kaye, *American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE 121, 122 (Neil Brodie et al. eds., 2001).

67. See Jennifer N. Lehman, Note, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT’L & COMP. L. 527, 542 (1997) (noting that the UNESCO definition “includes just about every conceivable item of artistic value”).

Academics have disagreed on even finer distinctions between “art” and “artifacts,” as well as between “cultural property” and “cultural heritage.”<sup>68</sup> While such distinctions are not unimportant, this Comment adopts, for the sake of expediency, Paul Bator’s broad idea that cultural property includes “all objects that are in fact prized and collected, whether or not they were originally designed to be useful, and whether or not they possess ‘scientific’ as well as aesthetic value.”<sup>69</sup>

Three major international conventions represent the extent of international consensus on the definition of cultural property: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention),<sup>70</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (UNESCO Convention),<sup>71</sup> and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).<sup>72</sup>

The Hague Convention states:

[T]he term “cultural property” shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large

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68. See generally *infra* Part IV.

69. Bator, *supra* note 25, at 285.

70. See Hague Convention, *supra* note 3; *infra* subpart IV.A.1.

71. UNESCO Convention, *supra* note 3; *infra* subpart IV.A.2.

72. UNIDROIT Convention, *supra* note 3; *infra* subpart IV.A.3.

libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

- (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments.”<sup>73</sup>

Because the Hague Convention aims to protect cultural property during armed conflict, its broad definition includes the structures in which the objects are found.<sup>74</sup> During peacetime, the Hague Convention obliges party nations to safeguard against the foreseeable effects of armed conflict by such measures the nation considers appropriate, to refrain from use of cultural property that is likely to expose it to damage in the event of armed conflict, and to protect against theft of cultural property.<sup>75</sup> During armed conflict, the Hague Convention obliges a party nation occupying the territory of another party nation to support the occupied nation in protecting cultural property and, if the occupied nation cannot, to take necessary measures of preservation in cooperation with the occupied nation.<sup>76</sup>

The Hague Convention’s definition of cultural property, notably the language “irrespective of origin or ownership” and “of great importance to the cultural heritage of every people,” reflects cultural internationalism’s subordination of the interests of originating nations to all of humanity’s interest in preserving cultural property.<sup>77</sup> In applying the Hague Convention to the test case of the Elgin/Parthenon Marbles, John Merryman ultimately concluded that, all other things being equal, the considerations of cultural internationalism outweighed Greece’s national interest in repatriation.<sup>78</sup> The Hague Convention’s definition of cultural property and its attendant undertones of cultural internationalism favor a

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73. Hague Convention, *supra* note 3, art. 1.

74. *Id.*

75. *Id.* arts. 3–4.

76. *Id.* art. 5.

77. *See id.* art. 1; *see also infra* IV.A.1.

78. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1921–23 (1985) [hereinafter *Elgin Marbles*].

conceptual presumption that supranational interests tend to outweigh those of originating nations.

In contrast to the conceptual bias of the Hague Convention's definition, the UNESCO Convention's definition poses a potential legal obstacle for nations seeking repatriation by requiring that qualifying cultural property be specifically designated as such beforehand.<sup>79</sup> Cultural property under the UNESCO Convention is defined as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories."<sup>80</sup> The UNESCO Convention provides a laundry list of categories<sup>81</sup> that could reasonably be considered within the scope of the Hague Convention's language. Because the UNESCO Convention deals only with a peacetime context, its definition does not include the buildings in which cultural property is found.<sup>82</sup> The UNESCO Convention further requires party nations to oppose "illicit import, export and transfer of ownership of cultural property."<sup>83</sup> This focus on prevention of illicit trafficking, however, fails to safeguard against the looting of previously undiscovered artifacts. Because such artifacts have not been discovered, much less studied or inventoried, they are by definition incapable of having been "specifically designated by each State."<sup>84</sup> Thus, the burden of proving that the undiscovered object falls within the UNESCO Convention's definition and that the convention should govern poses an uphill battle for a nation petitioning for repatriation of the looted object. Moreover, different ratifying nations compound the confusion by adopting different definitions of cultural property and different implementation provisions.<sup>85</sup>

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79. See *supra* note 77 and accompanying text; see also UNESCO Convention, *supra* note 3, art. 1.

80. UNESCO Convention, *supra* note 3, art. 1.

81. *Id.*

82. See *id.*

83. *Id.* arts. 2-3.

84. *Id.* art. 1.

85. Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities*,

Noting the problems with the UNESCO Convention, UNESCO proposed that UNIDROIT draft a convention addressing its shortcomings.<sup>86</sup> After seven years of drafting, the UNIDROIT Convention was finalized in 1995.<sup>87</sup> It defines cultural property as objects “which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.”<sup>88</sup> The Annex enumerates verbatim the list in the UNESCO Convention.<sup>89</sup> While the coverage of the UNIDROIT and UNESCO conventions is identical, UNIDROIT, unlike the UNESCO Convention, does not require that party nations specifically designate the objects considered cultural property.<sup>90</sup> Thus, the UNIDROIT Convention closes the gap in the UNESCO Convention through which undiscovered artifacts had fallen. Moreover, the UNIDROIT Convention focuses not merely on “preservation and protection”<sup>91</sup> of cultural property, but further emphasizes the “restitution and return”<sup>92</sup> of stolen or illegally exported cultural property.

As the prior discussion has shown, the language of the definition affects whether a category of objects falls within the scope of an international agreement and whether international or national interests receive priority. Drafting the definition of cultural property is significant because the international conventions treat cultural property differently from other personal property by conferring upon them special legal consideration. Thus, the entity who drafts the definition of cultural property at the outset is largely the entity that controls whether a certain legal rule may be applied to a certain object. The question then is: Who gets to choose?

For any given cultural object, one may identify a “source

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23 U. PA. J. INT'L ECON. L. 931, 947 (2002).

86. Spiegler & Kaye, *supra* note 66, at 127.

87. *Id.*

88. UNIDROIT Convention, *supra* note 3, art. 2.

89. *Id.* at annex.

90. Compare UNESCO Convention, *supra* note 3, art. 1 with UNIDROIT Convention, *supra* note 3, art. 2.

91. UNIDROIT Convention, *supra* note 3, at pmb1.

92. *Id.*

nation” where the object originated.<sup>93</sup> Every other nation would be considered either a “market” or “transit” nation.<sup>94</sup> Setting aside the problem of creating objective standards for determining where an object originated, an important question is whether only a source nation, or other nations as well, are entitled to determine what objects are within the scope of cultural property and thus, subject to regulation of its commercial movement. It may appear self-evident that this right belongs to the source nation. However, this approach has been criticized as allowing nations to unilaterally restrain trade in certain objects.<sup>95</sup> Thus, some commentators recommend that the designation of an object as cultural property should be subject to international scrutiny.<sup>96</sup> Currently, there is no general operative procedure by which a nation could object to another nation’s cultural property designations.<sup>97</sup> Indeed, the notion that each country may exercise its own discretion as to substantive decisions regarding property from within its borders is sacrosanct.<sup>98</sup> In the case of undiscovered artifacts, for example, a source nation seeking repatriation faces an inherently undue burden if required to prove provenance as part of its prima facie case under another country’s definition, whereas the defending possessor may reasonably be expected to have or be able to obtain documentation proving legal excavation and transfer.<sup>99</sup> Accordingly, any presumption should favor the source nation, and the possessor should bear the burden of proving that the object was legally acquired or should not be designated as

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93. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995). Source nations have also been characterized as “nations of origin” or “artifact-rich nations.” *Id.*

94. Note that these designations are not mutually exclusive. If there is a domestic market for art, a source nation may also be a market nation. Lyndel V. Prott & Patrick J. O’Keefe, National Legal Control of Illicit Traffic in Cultural Property 2–5 (UNESCO 1983) (distribution limited).

95. See Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT’L L. 449, 450, 465 (2004) [hereinafter *U.S. Policy*].

96. *Id.* at 465.

97. *Id.* at 464–65.

98. See Bator, *supra* note 25, at 327–28.

99. See generally *id.* at 337–38, 368.

cultural property under the applicable law or convention. Such a presumption comports with the independent judgment of a sovereign nation in controlling which art objects are important enough to merit protection and, therefore, the scope of the administration required to enforce that protection.<sup>100</sup>

Objective considerations as to whether an object should fall within the definition of cultural property might include such factors as age, fair market value, scarcity, and the existence of similar items.<sup>101</sup> The greater the uniformity of the universe of objects included in various definitions of cultural property, the more predictable the application of laws and agreements employing those definitions. Although consensus may never be achieved, a continuing dialogue in political and academic arenas is necessary and beneficial to the process of attempting to achieve it.

### III. THE GRAND ILLUSION: CULTURAL NATIONALISM AND INTERNATIONALISM ARE NOT MUTUALLY EXCLUSIVE

The theories of cultural nationalism and cultural internationalism circumscribe the debate about the nature of ownership of cultural property and consequently, repatriation. Cultural nationalism describes the theory that cultural property belongs to a source nation by virtue of its part in the nation's history and cultural heritage.<sup>102</sup> It emphasizes the relationship between cultural property and a citizen's sense of self and community identity. Moreover, it preserves a nation's interest in promoting and preserving that relationship.<sup>103</sup> Typically, policies reflecting cultural nationalism tend to restrict the movement of a source nation's cultural patrimony. For example, the culturally nationalistic Preamble of the UNESCO Convention has been read as justifying national retention of cultural property.<sup>104</sup> The policies of source nations tend to reflect a cultural nationalist

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100. *See id.* at 368.

101. *U.S. Policy*, *supra* note 95, at 470.

102. *Elgin Marbles*, *supra* note 78, at 1911–12.

103. Bator, *supra* note 25, at 304–05.

104. *Two Ways of Thinking*, *supra* note 5, at 844.

perspective.<sup>105</sup> This is unsurprising because many art-rich nations have lost their cultural patrimony through a steady history of theft, illegal export, military occupation, and colonial plunder.<sup>106</sup>

In contrast, cultural internationalism describes the theory that all nations have an interest in each other's cultural property because it belongs to all of humankind.<sup>107</sup> This perspective focuses on preservation, access, and the nation where those goals are best pursued.<sup>108</sup> For example, the United Kingdom's refusal to return the Elgin/Parthenon Marbles to Greece has been based in part on the argument that without adequate Athenian facilities for display and preservation, the pollution in Athens would destroy the Marbles; as a result, they are best left in the British Museum.<sup>109</sup> Because laws based on cultural internationalism reflect a more liberal export of cultural property, the policies of market nations tend to reflect cultural internationalism. This is equally unsurprising because adopting cultural nationalism and embracing repatriation could shut down the museums and galleries of market nations.<sup>110</sup>

The two theories have, for the most part, been presented, argued, and framed as being mutually exclusive.<sup>111</sup> "Opposite,"<sup>112</sup> "dissonant,"<sup>113</sup> and "conflicting"<sup>114</sup> typify the language used to

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105. John H. Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L. J. 51, 58 (2001).

106. See Karen Goepfert, Note, *The Decapitation of Rameses II*, 13 B.U. INT'L L.J. 503, 504 (1995).

107. See *Elgin Marbles*, *supra* note 78, at 1916.

108. See *id.* at 1917–21.

109. *Id.* at 1917.

110. Thomas Maier, *Nations Fight to Recover a Past They Say was Plundered*, NEWSDAY, May 23, 1995, at B29.

111. See generally *Two Ways of Thinking*, *supra* note 5, at 831–32 (discussing the differences between "cultural nationalism" and "cultural internationalism"). But see Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L L. 235, 270 (1996) (analyzing cultural nationalism and internationalism as complementary and balancing the interests of sovereign nations and the world at large in cultural property).

112. Sean R. Odendahl, Note, *Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership*, 2001 U. ILL. L. REV. 475, 481.

113. *Two Ways of Thinking*, *supra* note 5, at 833.

114. Hughes, *supra* note 27, at 131.

contrast cultural internationalism and nationalism. Cultural nationalism has been characterized as being a “highly nationalistic, aggressive attempt by countries rich in historical artifacts to retain and seek the return of cultural items over which they claim rightful ownership[,]”<sup>115</sup> and as “serv[ing] no discernible domestic purpose other than asserting the right to keep [cultural objects].”<sup>116</sup> However, Merryman’s suggestion that a retention policy based on cultural nationalism reflects merely a hoarding mentality<sup>117</sup> is unmerited if the policy is viewed as a correction of an imbalance of bargaining power in the marketplace. Without such a retention scheme, poorer nations might readily sell cultural property to wealthier nations at “fair” market prices that do not, in fact, accurately reflect the intangible value to the nation’s heritage. In England, for example, the government often lacks the funds to utilize a buy-back provision in its licensed export regime to retain highly valued pieces of national patrimony, which allows works of great importance to escape at unnaturally low prices.<sup>118</sup>

On the other hand, cultural internationalism has been criticized as an echo of colonial imperialism, whereby typically wealthier market nations “use unfounded cultural internationalism as a justification” for refusing to return cultural property.<sup>119</sup>

While the Hague Convention embraces the theory of cultural internationalism,<sup>120</sup> the UNESCO Convention embraces the theory of cultural nationalism.<sup>121</sup> Merryman has noted this difference as reflected in their respective preambles.<sup>122</sup> The UNESCO Convention Preamble provides that “cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in

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115. *Id.* (footnote omitted).

116. *Two Ways of Thinking*, *supra* note 5, at 847.

117. John H. Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULTURAL PROP. 11, 22 (2005).

118. *See* Bator, *supra* note 25, at 322–23.

119. Odendahl, *supra* note 112, at 484.

120. *See Two Ways of Thinking*, *supra* note 5, at 832–33.

121. *See id.* at 831–32.

122. *Elgin Marbles*, *supra* note 78, at 1912, 1916.

relation to the fullest possible information regarding its origin, history and traditional setting.”<sup>123</sup> In contrast, the Hague Convention’s preamble provides that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”<sup>124</sup>

The proposition that the two theories are mutually exclusive, however, is not so clear.<sup>125</sup> Ostensibly, cultural nationalism’s position that cultural property is best appreciated within the context of its place of origin conflicts with cultural internationalism’s position that cultural property belongs to the whole world.<sup>126</sup> However, as a matter of conceptual scope, cultural internationalism merely constitutes a broader perspective that encompasses cultural nationalism. As such, the spirit of cultural internationalism is not inherently irreconcilable with that of cultural nationalism. A nation’s cultural property can “belong” to all humankind while still being best appreciated within the context of its place of origin, history, and traditional setting.

Exemplifying this, each convention contains language that suggests recognition of the theory that it does not appear to adopt. For example, the Hague Convention says that the reason that damage to any cultural property damages the heritage of all is because “each people makes its contribution to the culture of the world.”<sup>127</sup> The use of the possessive “its” in relation to “each people” recognizes that cultural property indeed originates with a specific group of people and, at least at some point, belonged to them. Likewise, the UNESCO Convention notes that cultural property “enriches the cultural life of all peoples.”<sup>128</sup> Read in context, the language of both conventions betrays a complexity that is frequently overlooked in the adversarial process of debate.

The positions advocated by these theories create a

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123. UNESCO Convention, *supra* note 3, at pmbl.

124. Hague Convention, *supra* note 3, at pmbl.

125. See Forbes, *supra* note 111, at 270 (arguing that cultural nationalism and internationalism are complementary).

126. See *U.S. Policy*, *supra* note 95, at 454.

127. Hague Convention, *supra* note 3, at pmbl.

128. UNESCO Convention, *supra* note 3, at pmbl.

misleading dichotomy in the debate. It is the competing interests in the benefits of possession underlying these abstract positions that are truly at odds. The theories employed in the debate merely serve as post hoc conceptual justifications for those interests. The pervasiveness of binary oppositions speaks to their attractiveness as a mental framework for ordering human perception.<sup>129</sup> However, a lack of awareness of such pairings of mutual exclusivity as mere mental constructs limits both their utility and our ability to entertain solutions that account for the gray areas of an issue.<sup>130</sup>

If cultural nationalism and cultural internationalism are not mutually exclusive, what is the true crux of the disagreement? The issue turns on the economic benefits that may be realized by the nation that retains possession of the disputed object. The positions discussed above merely retrospectively justify one nation's possessory interest dominating that of another. Cultural internationalism rationalizes the taking of another nation's cultural property in the name of preservation, access, or both.

Moreover, cultural internationalism originated from proscriptions on wanton destruction of cultural property during wartime and culminated in the Hague Convention.<sup>131</sup> In the context of war, there was no other way to persuade fighting nations to protect one another's cultural property except by appealing to a communal interest in the other nations' patrimony.<sup>132</sup> The preservation of cultural property in war provides a mutual benefit to participating nations. In the peacetime context, however, there is little parity in the "mutual benefit" conferred. Nonwartime preservation entails the forfeiture of possession by one nation in exchange for the preservation by another nation, which then retains for all

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129. See JACQUES DERRIDA, POSITIONS 40–41 (Alan Bass ed. & trans., Univ. of Chicago Press 1981) (1972).

130. See *id.*

131. See generally Victoria Brittain, *Property: Wanton Destruction*, CRIMESOFWAR.ORG, H<http://www.crimesofwar.org/thebook/property-wanton.html> (last visited Apr. 9, 2006).

132. *Id.*

perpetuity the economic benefits of possession.<sup>133</sup> The pecuniary inequity of such an exchange alone suggests that it may be inappropriate to extract the concept of cultural internationalism from its wartime context and to apply it as a general justification for the relocation of a nation's cultural heritage.

Justifying the retention of a work of art by a non-originating nation on the grounds of cultural internationalism means that the more significant a work of art—that is, the greater its cultural importance—the less right the source nation has to possess it; this is, of course, counterintuitive. This is not to say that preservation should not be promoted, but merely that it should not mask the separate consideration of the economic benefits attendant to possession. The promotion of preservation does not imply that exportation is the best means of achieving it.

If preservation is the key value in balancing the interests of source nations and the rest of the world, other solutions should be explored that do not involve the economic consequences of a possessory transfer. For example, nations that are truly concerned about preserving endangered objects could create, in cooperation with source nations and civil society organizations,<sup>134</sup> international funds for the protection of cultural property.<sup>135</sup> Liberal exchange or temporary loan programs would likewise further preservation while not requiring source nations to forfeit title to their cultural property.<sup>136</sup> Furthermore, if an object has been expatriated on the wings of preservation, then once the threat to its physical integrity has passed or sufficiently diminished, the object should be returned. The prospect of reclaiming possession would

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133. See generally Hague Convention, *supra* note 3, arts. 3–4.

134. See Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*, 29 HOUS. J. INT'L L. (forthcoming 2006) (describing the instrumental role that civil society organizations may play in addressing issues of international scope and building policy-making consensus among sovereigns and the private sector).

135. See *infra* subpart IV.C.2.

136. See General Conference of the United Nations Educational, Scientific and Cultural Organization [UNESCO], Nairobi, Kenya, Nov. 26, 1976, *Recommendation Concerning the International Exchange of Cultural Property*, ¶ 1, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13132&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html).

encourage source nations to implement or improve their preservation policies, and in the meantime, the expatriating nation would be compensated for its protective service by any benefits of possession—for example, tourist revenue.

There should be a rebuttable presumption that cultural property remain within the source nation. Generally, cultural property is best appreciated within the context of its place of origin. The transfer of cultural property outside its national context dilutes the complete message it would otherwise convey if exhibited in propinquity with objects related by era, creator, or geography. Such an approach comports with the recent trend in art history scholarship that has increasingly moved away from noncontextual, formal analysis and focused more on a contextual, anthropological approach to studying art objects.<sup>137</sup>

This is not to say that cultural property would invariably remain in a source nation. A nation seeking to obtain possession of the object could rebut the presumption by showing that other considerations, such as preservation, outweigh the source nation's interest in retention. For example, if substantial evidence of serious danger to the object in the source nation is shown, then the preservation interest might predominate. After another entity successfully rebuts the presumption, the source nation would relinquish possession upon receiving adequate compensation. After all, source nations would have little incentive to establish or improve preservation practices and policies if the procedures for determining possession were weighted against them.

Source nations have been criticized for hoarding cultural property not out of cultural pride, but merely for the economic benefits from tourism.<sup>138</sup> Even if this were true, the economic benefit arising from any given cultural item should accrue to the

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137. "Traditionally, art historians have employed one or more of these approaches: formal analysis, connoisseurship, iconographical analysis, criticism, and societal and contextual study. The last of these has come into particular prominence in recent years in the form of semiotics, structuralism, and deconstruction." Deirdre C. Stam, *Art Historians & Their Use of Illustrated Texts*, in Report of the Seminar on Scholarly Resources in Art History: Issues in Preservation, Commission on Preservation and Access (1989), available at [Hhttp://palimpsest.stanford.edu/byauth/Hmisc/cpaarth.html](http://palimpsest.stanford.edu/byauth/Hmisc/cpaarth.html).

138. See *U.S. Policy*, *supra* note 95, at 462.

source nation. Analogously, under the Convention on Biological Diversity, a source nation retains a right to economic benefit from, for instance, pharmaceuticals developed from its plants and other biological resources.<sup>139</sup> From a practical perspective, any economic benefits so generated add to the pool of resources available for the study, display, and protection of a nation's cultural patrimony. From an abstract perspective, each nation requires control over its cultural resources to develop, promote, and enrich its national identity just as each person, in order "to achieve proper self-development[,] . . . needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."<sup>140</sup> In the art world, personal property rights receive protection under, for example, the Visual Artists Rights Act of 1990,<sup>141</sup> which amended the Copyright Act to provide an expanded right for visual artists.<sup>142</sup> By protecting an artist's personal right to control his work, Congress legislatively affirmed the importance of the arts to our society, the fundamental relationship it has with our national character, and the consideration of art as a treasured national resource.<sup>143</sup> As a corollary to protecting an individual artist's rights, a nation's collective interest in its patrimony should manifest itself in legal protections as well.<sup>144</sup>

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139. See U.N. Convention on Biological Diversity art. 15, June 5, 1992, 31 I.L.M. 818.

140. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

141. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified as amended at 17 U.S.C. § 106A (Supp. II 1990)).

142. See 17 U.S.C. § 106A(d) (Supp. II 1990).

143. See H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.

144. Although a nation's ownership interest in cultural property created by its ancestors is an attenuated one, it should still receive legal expression and protection, albeit a proportionately reduced protection. Western philosophies dominate modern conceptions of ownership because Europeans pioneered the precursors to modern intellectual property law. See K. Kalan, Comment, *Property Rights, Individual Rights, and the Viability of Patent Law Systems*, 71 U. COLO. L. REV. 1439, 1452 (2000). The strong intellectual property protection afforded to inventors is founded upon Western individualistic notions of identity. Because individualistic conceptions of ownership prevail, the debate about rightful possession of artifacts has overlooked the possibility that cultural nationalism is an expression of a community property interest in a nation's cultural heritage. See Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT.

As previously discussed, protecting the interests of a nation in its cultural artifacts would be well served by a legal presumption that a source nation is entitled to possession, and thus the economic benefits, of its cultural property.<sup>145</sup> This would reward and encourage self-development of the source nation. Indeed, this comports with theories of free trade and intellectual property law, which provide incentives to entities to produce valuable goods and services by guaranteeing some retention of benefits derived therefrom.<sup>146</sup>

#### IV. PROTECTION OF CULTURAL PROPERTY

##### A. *International Agreements*

###### 1. *The 1954 Hague Convention*

The Hague Convention was the first international agreement “to deal solely with the protection of [national] cultural property.”<sup>147</sup> Reacting to the destruction and looting of World War II,<sup>148</sup> the Convention protects cultural property during war and applies to peacetime international trade of cultural property that was seized during war.<sup>149</sup> A signatory nation commits to implementing peacetime measures to protect cultural property within its borders in case of war.<sup>150</sup> Furthermore, a party state agrees “to foster in the members of their armed forces a spirit of respect” for the cultures of all peoples.<sup>151</sup> Signatory nations are further obliged to prohibit any theft, pillage, or vandalism of cultural property.<sup>152</sup> Even if a

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L.J. 1, 4 (1999). Although it is beyond the scope of this Comment to do so, it may be illuminating to investigate cultural nationalism in such terms and not dismiss it as merely an irrational or sentimental urge to hoard cultural property.

145. See *supra* text accompanying notes 129–137.

146. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, <http://www.law.duke.edu/boylesite/intprop.htm> (last visited Apr. 9, 2006).

147. *Two Ways of Thinking*, *supra* note 5, at 836.

148. See *id.* at 835–41.

149. Hague Convention, *supra* note 3, at pmb1.

150. *Id.* art. 3.

151. *Id.* art. 7(1).

152. *Id.* art. 4(3).

party state has not carried out its duty under the convention, the occupying state remains obliged to protect cultural property in the occupied territory.<sup>153</sup> Additionally, as a reflection of the communal interest in cultural property, an occupying nation “shall . . . take the most necessary measures” to assist the occupied nation’s authorities in preserving it.<sup>154</sup>

The Hague Convention has been criticized for its vague “military necessity” exception whereby the duties to protect cultural property under the convention may be waived.<sup>155</sup> Additionally, the convention provides no framework for a unified scheme of penalties for violators.<sup>156</sup> The application of the Hague Convention, however, is necessarily limited by its reference to circumstances arising from armed conflict. Although the Hague Convention is widely accepted,<sup>157</sup> it finds little application in a world of total war<sup>158</sup> and its resulting retaliation, which has little regard for collateral damage. Although the United States has not ratified the Hague Convention,<sup>159</sup> as a signatory to the convention, it should uphold the convention’s principles of preservation.<sup>160</sup> However, the protective effect of the convention is mitigated by the absence of a supranational entity empowered

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153. *See id.* art. 4(5).

154. *Id.* art. 5(2).

155. *Id.*

156. *Id.* art. 28.

157. Lehman, *supra* note 67, at 532.

158. *See* Johann Hari, *The Queen Should Apologise to Dresden*, INDEP. (London), Nov. 3, 2004, at 37 (defining the doctrine of total war as “the belief that when you are at war, anything and everything is a legitimate target”); *see also* Mark E. Neely, Jr., *Was the Civil War a Total War?*, 50 CIV. WAR HIST. 434, 434 (2004) (citing Charles Strozier’s suggestion that as early as the Civil War, the total war concept had been incorporated into the modern experience).

159. Lehman, *supra* note 67, at 532 (reasoning that the United States has not ratified the Hague Convention in part because it would limit the ability to use nuclear weapons).

160. Although not a party, the United States has accepted the burden of international custom articulated in the Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

to enforce its terms.<sup>161</sup>

Because the Hague Convention deals primarily with preventing the destruction of cultural property in armed conflict, it understandably does not deal sufficiently with repatriation<sup>162</sup> and enforcement issues.<sup>163</sup> Moreover, the implementation of laws imposing penalties on violators is left to each party state's discretion,<sup>164</sup> which creates inconsistent and unpredictable results. In the event of disagreement over the application or interpretation of the convention, agents of the parties to the conflict must meet;<sup>165</sup> however, there is no procedure for generating a binding decision.<sup>166</sup> Although the Hague Convention marked a significant step in promoting respect for and preservation of cultural property, further measures were required.

## 2. *The 1970 UNESCO Convention and Its Implementation in the United States*

By the 1970s, the international community had become increasingly concerned about the trafficking of cultural artifacts illegally obtained from source nations.<sup>167</sup> The 1970 drafting of an international agreement by the General Conference of UNESCO reflected this concern.<sup>168</sup> The nations attending the 1970 General Conference in Paris recognized that the black market of stolen artifacts was primarily responsible for the leak of cultural property from source nations.<sup>169</sup> International cooperation was

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161. See Andrea Cuning, *The Safeguarding of Cultural Property in Times of War and Peace*, 11 TULSA J. COMP. & INT'L L. 211, 232 (2003) (noting the inconsistent but increasingly strict application of the Hague Convention and customary international law).

162. Stanislaw E. Nahik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1082 (1976).

163. Arlene Krimgold Fleming, *A Shield From Marauders: The U.S. Can Help Stop Wartime Destruction of the World's Heritage*, WASH. POST, July 5, 1992, at C4.

164. Hague Convention, *supra* note 3, art. 28.

165. *Id.* art. 22.

166. *See id.*

167. Bator, *supra* note 25, at 282.

168. *Id.*

169. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 95 (1993).

considered the preferred method of protecting cultural property.<sup>170</sup> The UNESCO Convention can be seen as the peacetime corollary to the Hague Convention as it allows party nations to enforce the cultural property laws of fellow signatory nations.<sup>171</sup> The U.S. Congress did not implement the UNESCO Convention into domestic law until 1983,<sup>172</sup> and the United Kingdom did not implement the convention until 2002.<sup>173</sup> Belgium, Germany, and the Netherlands are the only other major market nations not parties to the convention.<sup>174</sup> The applicability of the UNESCO Convention is limited, however, by the requirement that the source nation specifically designate the property subject to the convention.<sup>175</sup> As mentioned above, objects from as-yet undiscovered or unexcavated archaeological sites remain unprotected.<sup>176</sup> Furthermore, consistent with the spirit of cultural nationalism, any cause of action pursuant to the UNESCO Convention belongs to the party nation, so private parties have no redress under the convention.<sup>177</sup> The convention empowers party nations to create private causes of action but does not provide a uniform guiding framework.<sup>178</sup> As with the Hague Convention, the absence of a method for binding dispute resolution<sup>179</sup> involving party states creates uncertainty and inconsistent application. Ironically, adhering to the UNESCO Convention by creating blanket export prohibitions may have nourished the black market flood of the very cultural property it seeks to protect.<sup>180</sup>

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170. UNESCO Convention, *supra* note 3, at pmbl.

171. *Id.* art. 13.

172. 19 U.S.C. § 2601 (2000).

173. Press Notice, Government Signs Up To UNESCO Convention To Tackle Illicit Trade in Art and Antiquities (Aug. 1, 2002), *available at* [http://www.culture.gov.uk/global/press\\_notices/archive\\_2002/dcms161\\_2002.htm?month=August&properties=archive\\_2002%2C%2Fglobal%2Fpress\\_notices%2Farchive\\_2002%2F%2C](http://www.culture.gov.uk/global/press_notices/archive_2002/dcms161_2002.htm?month=August&properties=archive_2002%2C%2Fglobal%2Fpress_notices%2Farchive_2002%2F%2C).

174. *See Two Ways of Thinking*, *supra* note 5, at 843.

175. *See* UNESCO Convention, *supra* note 3, art. 1.

176. *See id.*

177. *See id.* art. 7.

178. *See id.* art. 13.

179. *See id.* art. 17(5).

180. *See* Bator, *supra* note 25, at 317 (noting that absolutely prohibiting the export of artifacts fuels the black market).

The United States implemented the UNESCO Convention by adopting the Convention on Cultural Property Implementation Act (CPIA).<sup>181</sup> The CPIA empowers the executive branch to seize illegally imported foreign cultural property and restrict its importation.<sup>182</sup> The CPIA established the Cultural Property Advisory Committee to determine the import restrictions by which the United States may help protect the cultural property of other countries.<sup>183</sup> The U.S. Customs and Border Protection enforces the restrictions under the CPIA.<sup>184</sup>

The CPIA authorizes the executive branch to pursue the goals of the UNESCO Convention in two basic ways. First, upon request by a participating nation that contends endangerment of its cultural property, the President may enter into a bilateral agreement to apply import restrictions.<sup>185</sup> Second, the CPIA prohibits the importation of inventoried cultural property stolen from any party state's museums, religious or public monuments, or similar institutions after 1983 or the date of the party state's entry into the UNESCO Convention, whichever is later.<sup>186</sup>

Protection under the statute requires that: (1) the object be cultural property as defined in 19 U.S.C. § 2601; (2) the cultural property "is documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in a State Party;" and (3) the cultural property was "stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party concerned, whichever date is later."<sup>187</sup> This enactment greatly limits the scope of the UNESCO Convention by narrowing the types of situations to which it applies. To be considered cultural property, the object must be of "cultural significance," at least 100 years old (amended from 250 years

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181. See Pub. L. No. 97-446, tit. III, 96 Stat. 2329, 2350 (1983) (codified at 19 U.S.C. §§ 2601–2613 (2000)).

182. 19 U.S.C. §§ 2601–2613 (2000).

183. *Id.* § 2605.

184. *Id.* § 2613; see also 19 C.F.R. § 12.104(i) (2005).

185. 19 U.S.C. § 2602. Note that the President is under no obligation to enter such an agreement. *Id.*

186. *Id.* § 2607.

187. *Id.* § 2610.

old), discovered in an excavation, and the product of a tribal or non-industrial society.<sup>188</sup> Again, the definition of cultural property delimits its regulatory application.

The protection offered by the CPIA is inherently restricted because it deals primarily with the illegal import of foreign cultural property. Consistent with cultural nationalism, only foreign state parties to the UNESCO Convention may seek remedy under the CPIA;<sup>189</sup> the statute provides no private cause of action and “is limited to an extremely small, albeit important, subset of potential claims.”<sup>190</sup> Furthermore, the lack of retroactivity allows objects that were stolen before 1983 but after the United States joined the UNESCO Convention in 1970 to remain undisturbed.<sup>191</sup>

Although the CPIA is designed to implement the values of the UNESCO Convention through the executive branch, U.S. judges have cited the policy underlying the CPIA and the UNESCO Convention in decisions repatriating cultural property.<sup>192</sup> For example, the Seventh Circuit affirmed the awarding of mosaics to a Cypriot church based on its superior claim of title as compared to that of the defendant art dealers and corporation.<sup>193</sup> The court decided the issue by applying Indiana law on replevin, but Judge Cudahy in his concurrence urged that the judicial branch “reflect in its decisionmaking the spirit as well as the letter” of international agreements entered into by the executive branch.<sup>194</sup> As such, the decision appears to

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188. *Id.* § 2601(6) (referencing UNESCO Convention, *supra* note 3).

189. *See generally* 19 U.S.C. §§ 2601–2604, 2606, 2609. Under section 2609(c)(1), a prevailing State may be required in some circumstances to pay a good faith purchaser his out of pocket purchase price. *Id.* § 2609.

190. Ashton Hawkins, Richard A. Rothman, & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 83 (1995).

191. *See* 19 U.S.C. § 2607.

192. *See* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 295–97 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. An Original Manuscript Dated Nov. 19, 1778 Bearing the Signature of Junipero Serra, Located at Sotheby's, 1334 York Ave., N.Y., N.Y.*, No. 96 Civ. 6221(LAP), 1999 WL 97894, at \*1 (S.D.N.Y. Feb. 22, 1999).

193. *Autocephalous*, 917 F.2d at 296.

194. *Id.* at 294–96.

implicitly reflect a cultural nationalist perspective. Nevertheless, even supporters of the CPIA criticized it as "complex and cumbersome."<sup>195</sup> Numerous countries have avoided seeking remedy under the CPIA because of the cost, the year-long processing time for applications, and the ease with which applicants are rejected.<sup>196</sup>

### 3. *The 1995 UNIDROIT Convention*

Where the UNESCO Convention was unsuccessful, the UNIDROIT Convention has attempted to unify international law governing cultural property<sup>197</sup> and involved experts from forty-one signatory nations and observers from eight nonparty nations.<sup>198</sup> The convention seeks to balance the private interests of good faith purchasers for value with the recognized public need for protection of cultural monuments against theft and destruction.<sup>199</sup> The convention encourages international cooperation but is limited by its inability to levy penalties against nonconforming nations.<sup>200</sup> Because the UNIDROIT Convention does not have the UNESCO Convention's requirement that the party nation specifically designate items as cultural property, this extends protection to archaeological discoveries yet to be unearthed.<sup>201</sup> In fact, the UNIDROIT Convention deems as stolen any objects that have been "unlawfully excavated" and "unlawfully retained."<sup>202</sup> The UNIDROIT Convention further improves on the UNESCO Convention by extending a cause of action to any "claimant," which includes private parties.<sup>203</sup> The UNIDROIT convention

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195. David Sasson, *Black Market Flourishes Despite Law on Art Relics*, CHI. TRIB., Nov. 28, 1985, at 14D.

196. *Id.*

197. See Harold S. Burman, *Introduction to Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, June 24, 1995, 34 I.L.M. 1322.

198. *Id.*

199. See UNIDROIT Convention, *supra* note 3, at pmb1.

200. See *id.*

201. See generally *id.*

202. *Id.* art. 3(2).

203. Burman, *supra* note 197; see also UNIDROIT Convention, *supra* note 3, art. 3.

creates a duty on the part of the possessor to return stolen objects to source nations.<sup>204</sup> This contrasts sharply with the absence of any such duty under the UNESCO Convention<sup>205</sup> and reflects an even stronger expression of cultural nationalism. Professor Bator argues that such a “blank check” rule would be undesirable because it deprives the possessing nation of the discretion to determine what should and should not penetrate its borders and consequently frustrates the nation’s ability to determine the scope of feasible enforcement according to national interests.<sup>206</sup> This rule essentially creates a lowest common denominator consisting of the world’s most restrictive export controls and an overbroad prohibition of promoting legitimate interests served by permissive export of cultural property.<sup>207</sup>

Although the UNIDROIT Convention has improved upon the UNESCO Convention, without retroactivity its utility remains limited.<sup>208</sup> Strangely enough, neither the UNESCO Convention nor the UNIDROIT Convention explicitly prohibits black market art trade. As of April 1, 2006, thirty-eight nations were party to the UNIDROIT Convention, including twenty-two signing nations and twenty-seven ratifying / acceding nations.<sup>209</sup> Neither the market nations of the United States, the United Kingdom, nor Japan have become parties to the UNIDROIT Convention.<sup>210</sup> Without the participation of such major market nations, the convention lacks practical impact.

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204. UNIDROIT Convention, *supra* note 3, art. 3(1).

205. *See* UNESCO Convention, *supra* note 3, art. 7.

206. Bator, *supra* note 25, at 328.

207. *See id.* at 329.

208. UNIDROIT Convention, *supra* note 3, art. 10(2).

209. *See* UNIDROIT Status Report, <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Nov. 19, 2006).

210. *See id.* The fact that London, New York, and Tokyo are central antiquities markets belies the significance of their nonparty status. *See* Crossette, *supra* note 39, at 8.

## B. Cultural Property Protection in the United States

### 1. The Role of Criminal Law

The National Stolen Property Act (NSPA) criminalizes the knowing sale or receipt of stolen goods exceeding \$5,000 in interstate or foreign commerce and provides for a monetary fine, and maximum imprisonment of ten years.<sup>211</sup> Prosecutors have successfully used the NSPA to create criminal liability for trading in stolen art even though it was not enacted for that express purpose.<sup>212</sup> In the seminal case of *United States v. McClain*, several individuals were convicted under the NSPA for transporting and conspiring to transport stolen pre-Columbian artifacts in interstate commerce.<sup>213</sup> Appellants argued that Mexico's legislative declaration of "ownership" over all pre-Columbian artifacts was merely an export law that did not bring the objects under the NSPA.<sup>214</sup> Reflecting a cultural nationalist notion, the court rejected this argument, recognizing that as a sovereign nation Mexico had the "right . . . to declare, by legislative fiat, that it is the owner of its . . . national treasures"<sup>215</sup> and that it had established clear ownership of all pre-Columbian artifacts by 1972.<sup>216</sup> The court did agree with appellant's argument that, in the absence of a clear declaration of national ownership, the NSPA does not apply to mere illegal exportation.<sup>217</sup> However, upon further appeal, the court held that Mexico's declaration was sufficiently clear in establishing ownership so as to trigger application of the NSPA.<sup>218</sup> The court's *McClain* decisions facilitate the recovery of stolen foreign cultural property by allowing courts to vindicate a foreign country's claim "even though the [cultural property] may never

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211. 18 U.S.C. §§ 2314–2315 (2000).

212. See, e.g., *United States v. McClain (McClain I)*, 545 F.2d 988, 988 (5th Cir. 1977); *United States v. McClain (McClain II)*, 593 F.2d 658, 658 (5th Cir. 1979).

213. *McClain I*, 545 F.2d at 992.

214. *Id.* at 994.

215. *Id.* at 992.

216. See *id.* at 1000–01.

217. *Id.*

218. *United States v. McClain (McClain II)*, 593 F.2d 658, 670 (5th Cir. 1979).

have been physically possessed by agents of that nation.”<sup>219</sup> Ultimately, the court finely balances the considerations of the United States’ preservation of its judgment in applying foreign laws and Mexico’s right to declare the manner in which it controls property from within its borders.

The NSPA, however, is limited by an intent requirement on the part of the accused as to whether the property was stolen,<sup>220</sup> and because it is a criminal statute, courts tend to interpret the intent element strictly.<sup>221</sup> The difficulty of proving intent is compounded by the nature of the art market in which middlemen have a perverse incentive not to investigate thoroughly the provenance of an object that is suspected to have an illegal background.<sup>222</sup> In addition to being difficult to prosecute, suits under the NSPA are subject to the same slowness and expense as any other judicial proceeding. Nevertheless, the NSPA has been widely and effectively applied to recover property stolen in foreign countries and transported to the United States.<sup>223</sup>

## 2. *Civil Protection*

The Antiquities Act of 1906<sup>224</sup> is America’s expression of cultural nationalism, vesting ownership of antiquities found on public or private land in the national government.<sup>225</sup> The national ownership laws of other nations and those of the United States are mutually recognized, subject to requirements of the CPIA.<sup>226</sup> Perpetrators may be fined or imprisoned for

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219. *Id.* at 671.

220. “Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, *knowing* the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.” 18 U.S.C. § 2314 (2000) (emphasis added).

221. *See McClain I*, 545 F.2d at 995.

222. *See Borodkin, supra* note 93, at 411 (explaining that in the black market art trade, information can be a liability that sellers must conceal to avoid legal penalties).

223. Jodi Patt, Comment, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1213 (2002).

224. 16 U.S.C. §§ 431–433 (2000).

225. *See id.* §§ 431–433(m).

226. *See* 19 U.S.C. §§ 2601–2613 (2000).

excavating, appropriating, injuring, or destroying any historic or prehistoric ruin or monument or any object of antiquity on lands owned or controlled by the federal government.<sup>227</sup> However, application of penalties under the act has been limited because of the restricted application to property owned by the federal government and the imprecise definition of the “antiquities” subset of cultural property.<sup>228</sup>

Chapter 11 of Title 19 of the U.S. Code, adopted in 1972, provides that no pre-Columbian monumental or architectural sculpture or mural may be imported into the United States unless the government of the originating country issues a certificate that the artifact’s exportation from that country did not violate any of its domestic laws.<sup>229</sup> As defined in 19 U.S.C. § 2095(3), a pre-Columbian monumental or architectural sculpture or mural is any stone carving or wall art, or any fragment or part thereof, that is the product of the pre-Columbian Indian cultures of Mexico, Central America, South America, or the Caribbean Islands.<sup>230</sup> However, “[p]rocedures available under the act can be extremely expensive and time consuming.”<sup>231</sup> Moreover, the act covers objects imported from all Latin American countries, each of which may have acted differently to protect their cultural heritage; some declare national ownership and others merely enact stringent export restrictions.<sup>232</sup> Additionally, the act’s only penalty provides that the objects be forfeited.<sup>233</sup> This absence of criminal or other civil liability detracts from the deterrence effect of the act.

### 3. *Common Law Replevin*

Foreign nations may seek the recovery of stolen property against any possessor, regardless of whether or not he is a good

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227. 16 U.S.C. § 433. Permits for excavation are issued only to reputable scientific or historical institutions. *Id.* § 432.

228. *See id.* § 433; *see also* 19 U.S.C. § 2601.

229. 19 U.S.C. § 2092(a) (2000).

230. 19 U.S.C. § 2095(3).

231. Phelan, *supra* note 169, at 96 (citing *United States v. McClain (McClain II)*, 593 F.2d 658, 664–65 (5th Cir. 1979)).

232. *See McClain II*, 593 F.2d 658, 664–65 (5th Cir. 1979).

233. 19 U.S.C. § 2093(a).

faith purchaser, by filing common law replevin actions in U.S. courts.<sup>234</sup> *Menzel v. List* exemplifies the common law rule that a thief conveys no title against the true owner.<sup>235</sup> The court in *O'Keefe v. Snyder* likewise recognized that a thief conveys no title but also remained concerned with protecting a good faith purchaser for value when an owner slumbers on his rights.<sup>236</sup> The court held that the statute of limitations on a suit to recover stolen paintings would begin to run when the true owner knew or reasonably should have known of his cause of action and the identity of the possessor.<sup>237</sup> In New York, the statute of limitations begins to run only when the rightful owner asserts a claim to the property and the possessor refuses to return it.<sup>238</sup>

The general rule is also codified in the Uniform Commercial Code (UCC). Because stolen or illegally exported cultural property is personal property, the various state enactments of the UCC govern their sale and purchase.<sup>239</sup> Section 2-403(1) of the UCC provides that a buyer acquires all the title that the seller had power to transfer.<sup>240</sup> However, under common law, even an innocent buyer does not generally obtain title from a thief; generally, a person cannot convey what she does not have.<sup>241</sup>

Arguing that the statute of limitations has expired may defend against an action for replevin.<sup>242</sup> The statute of limitations balances the interests of the purchaser with those of the owner by preventing the success of old claims that are, with time, ever more difficult to prove. The statute of limitations

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234. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 820 (1966), *rev'd*, 246 N.E.2d 742 (N.Y. 1969); *O'Keefe v. Snyder*, 416 A.2d 862, 862 (N.J. 1980).

235. *Menzel*, 267 N.Y.S.2d at 819.

236. *O'Keefe*, 416 A.2d at 867 (recognizing that a thief could not transfer good title to others regardless of their good faith and ignorance of the theft).

237. *Id.* at 872.

238. See *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1136 (2d Cir. 1991).

239. See U.C.C. § 2-403 (2005).

240. *Id.*

241. See, e.g., *A. Benjamini, Inc. v. Dickson*, 2 S.W.3d 611, 613 (1999).

242. See, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991); see *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1385–86 (S.D. Ind. 1989) (noting strong public policy in favor of statutes of limitations).

typically tolls upon theft.<sup>243</sup> This, however, creates a loophole by which thieves may secure title to stolen property by hiding the loot until the expiration of the statute of limitations.<sup>244</sup> In response, courts have employed additional doctrines to avoid this.<sup>245</sup> For example, the demand and refusal rule prevents a statute of limitations from running until the original owner has demanded return of the property and the purchaser has refused to do so.<sup>246</sup> Conceptually, the purchaser is not considered in wrongful possession until he refuses the demand for return of the property. This does not mean, however, that the original owner may rest on his rights. He must make demand without unreasonable delay or forfeit the protection of the demand and refusal doctrine.<sup>247</sup> The corollary rule of discovery and due diligence provides that the statute of limitations begins to run when the original owner knows or should have known the location of the stolen property.<sup>248</sup> This further tempers the demand and refusal rule by shifting to the plaintiff the burden of proving that he exercised due diligence in tracking down the stolen property.<sup>249</sup> The practical effect of the rule is to increase litigation costs by turning the exercise of due diligence into a fact issue that must be determined on an ad hoc basis.<sup>250</sup>

The common law notion that thieves convey no title is contrary to the law of most civil law nations wherein bona fide purchasers may gain legal title after a certain amount of time or have absolute protection.<sup>251</sup> Consequently, stolen art often detours through such civil law nations as Switzerland to clear

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243. See, e.g., *Sporn v. MCA Records, Inc.*, 448 N.E.2d 1324, 1327 (N.Y. 1983).

244. See *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 849 (E.D.N.Y. 1981).

245. See *O'Keeffe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980).

246. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 809 (1966), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).

247. *DeWeerth v. Baldinger*, 836 F.2d 103, 107 (2d Cir. 1987).

248. *Autocephalous*, 717 F. Supp. at 1388.

249. See *O'Keeffe*, 416 A.2d at 872.

250. See *id.* at 873.

251. See Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 637 (1996).

its title before moving into the legitimate art market.<sup>252</sup> At best, the international patchwork of legal concepts of ownership “emasculates the export controls and cultural property laws of source nations rendering them meaningless.”<sup>253</sup> At worst, the lack of uniformity promotes a race to the bottom where nations attract sellers, buyers, and middlemen with liberal ownership laws in order to secure the economic benefits of becoming a major art market.

### C. Proposals

Proposals range from the creation of a legal market<sup>254</sup> to the establishment of regulatory schemes that distinguish between cultural patrimony and cultural property.<sup>255</sup> Although a comprehensive discussion of such proposals is beyond the scope of this Comment, the following recommendations typify a cultural nationalist focus on prevention, which remains the ideal to which many policies aspire.

#### 1. *Economic Incentives and Preventing Entry to the Black Market*

Because the greatest damage to cultural property occurs in the context of the illegal excavation of archaeological sites and national monuments, the most effective protective policies must begin with preventing theft at the source. For example, economic incentives have been called for to encourage individuals to report the discovery of artifacts.<sup>256</sup>

In an attempt to mitigate the looting epidemic, the Italian

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252. Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 495 (1995).

253. Park, *supra* note 85, at 938.

254. Spiegler & Kaye, *supra* note 66, at 130 (criticizing the legal market proposal as “not only disingenuous [but] downright dangerous” because it ignores the reality that demand for uniquely valuable items will continue to drive looting and illegal excavation).

255. James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 84–85 (2001) (explaining that cultural patrimony “suggests a level of importance greater than that of cultural property” and thus requires heightened protection) (italics omitted).

256. Robin H. Villanueva, Note, *Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities*, 29 GEO. WASH. J. INT'L L. & ECON. 547, 575 (1995). However, criminal penalties may actually deter people from reporting discoveries. See Bator, *supra* note 25, at 318.

government hired known grave robbers to dig at sites of interest to archaeologists.<sup>257</sup> In exchange for legitimate employment, the former looters agreed to give the discoveries to archaeologists.<sup>258</sup> Just as corporations have hired “good hackers” to develop protection against cyber-infiltration,<sup>259</sup> Italy found the former looters to be more effective at protecting the sites from other tomb raiders because they knew intimately the tricks of the trade.<sup>260</sup>

In October of 1992, the Chinese government held its first public auction of ancient artifacts.<sup>261</sup> By entering the legitimate market, the government hoped to capture some of the revenue that would otherwise go to auction houses or the black market.<sup>262</sup> The success of the venture was limited by the general mediocrity of available items and unsophisticated professional services.<sup>263</sup> The unenthusiastic response of dealers and collectors to the pilot auction does not signal the per se inefficacy of this method of obviating the black market; it means only that a successful auction must include some high quality artifacts.<sup>264</sup>

Cultural tourism has also been suggested as a means of providing long-term benefit to those who report the discovery of archaeological sites.<sup>265</sup> Theoretically, the local population would benefit from the increase in cultural tourist traffic;<sup>266</sup> however, opening art to tourism sometimes leads to its destruction.<sup>267</sup>

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257. See John H. Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 233, 242 (Leonard D. DuBoff ed., 1975) [hereinafter *The Protection of Artistic National Patrimony*].

258. *Id.*

259. James Riley, *Temporary Visa Jobs Coming . . . and Going*, WEEKEND AUSTRALIAN, Mar. 5, 2005, at 4.

260. *The Protection of Artistic National Patrimony*, *supra* note 257.

261. *Let Another Hundred Flowers Bloom, Even If Some Are Weeds*, ECONOMIST, Oct. 17, 1992, at 99.

262. *Id.*

263. *Id.*

264. Borodkin, *supra* note 93, at 414.

265. LYNDEL PROTT & PATRICK J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 19 (1984).

266. *Id.*

267. See Bator, *supra* note 25, at 300 (noting that the cave paintings of Lascaux had to be closed off to prevent deterioration from tourist traffic).

## 2. *International Art Funds*

Since 1978, UNESCO has discussed establishing a special fund to facilitate the return of stolen or illegally exported cultural property to source nations.<sup>268</sup> The fund would be established by voluntary contributions from states and private entities.<sup>269</sup> Priority financing would be given to the training and the strengthening of museum systems and would not be applied to legal costs or compensation of bona fide purchasers.<sup>270</sup> Variations on the idea of an international fund include state contribution to the fund in proportion to each country's gross national product and releasing objects excavated or conserved via the fund's resources for sale on the open market.<sup>271</sup> Still others have recommended that source nations with similar interests promptly establish their own organization directly.<sup>272</sup> Another option is for proponents of cultural internationalism to put their money where their mouths are and establish, in cooperation with source nations, an international fund dedicated to the protection of cultural property from theft and entropy.

## V. CONCLUSION

The focus on deterrence is a major flaw in all the foregoing international agreements, statutes, and common law. Unfortunately, the deterrent effect of a law in a nation far-removed from the site of the original theft and destruction is slight. "Middlemen and dealers, who receive a vastly larger share of the profits from stolen art, are rarely prosecuted for their crimes."<sup>273</sup> Looters are sometimes made into examples, but the allure of the plunder to impoverished citizens proves difficult to resist.<sup>274</sup>

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268. See General Conference of the U.N. Educ., Sci. and Cultural Org. [UNESCO], *Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation on Its Activities*, U.N. Doc. 30 C/REP 14 (Sept. 28, 1999).

269. *Id.*

270. *Id.*; see also *id.*, annex I, Recommendation No. 6, at 4.

271. Spiegler & Kaye, *supra* note 66, at 131.

272. *Id.*

273. Beech, *supra* note 17, at 58.

274. *Id.*

And yet, stronger enforcement mechanisms have not led to a decrease in illegal activity—just as in the illegal drugs and arms markets—and in the cases of pillaging from cultural monuments or archaeological sites, discovered or not, even when restitution is successful, irreparable aesthetic and scientific damage has been done.<sup>275</sup> The transaction costs of litigating repatriation disputes may be better used in funding increased protective schemes.<sup>276</sup>

Given that it appears impossible to completely deter theft of cultural property and its entry into the black market, laws should make it as easy as possible for rightful owners and source nations to recover their property. This preference should be tempered only upon a showing of a substantial threat of physical harm to the property, which would require permitting the object to remain in its current location. This balances the interests of a sovereign nation in controlling its cultural resources for preserving and promoting its national identity with the interests of the world at large in preserving and disseminating significant artwork to a global audience. To contribute to these latter goals, source nations should attempt to regulate and screen the export of cultural property instead of banning it.<sup>277</sup> Outright prohibition merely fuels the black market.<sup>278</sup>

Until there is a cohesive body of international law governing art trade and a supranational entity empowered to resolve disputes and penalize uncooperative nations, no amount of persuasion, agreements to agree, or appeals to cultural nationalism will prevail upon a nation to cooperate in returning stolen cultural property if it is not in its economic and political interests. An effective cultural internationalist framework cannot be implemented either until such a time.

No international agreement may significantly impact the

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275. See, e.g., Bator, *supra* note 25, at 311–12. The recent losses in Iraq are especially tragic because of the importance of unique artifacts from the ‘cradle of civilization’ to all subsequent ancient history. See also Crossette, *supra* note 39, at 1.

276. See Bator, *supra* note 25, at 311 (discussing the inadequacy of resources dedicated to providing physical security).

277. See *id.* at 292 (“Looting . . . is made virtually inevitable by the fact that . . . there is no financial incentive for legal excavation and disposition of these finds.”).

278. *Two Ways of Thinking*, *supra* note 5, at 847–48.

problem of illegal art trade unless it is widely accepted by both source and market nations. Consequently, the success of such an agreement depends on the finesse with which it balances the interests of art-importing and art-exporting nations, private and public concerns, and cultural internationalism and cultural nationalism. Conversely, “if everybody—on both sides of the issue—hates it so much, then maybe, just maybe, it will work.”<sup>279</sup> Theoretically, a document that reflects with reasonable equality the interests of both types of countries would be largely successful. However, the inherent disparity in bargaining power between most source and market nations tips the scales in favor of the latter at the long-term expense of the former.<sup>280</sup> Tailored presumptions in favor of source nations would thus help correct this imbalance of bargaining power. Although the playing field may never be level and black market demand never eliminated, in the meantime, the interests of source nations and market nations, private collectors and museums, and cultural nationalists and internationalists are as well-served as can be expected by the on-going, semi-cooperative, and semi-adversarial process by which international agreements and national laws are debated, drafted, promulgated, and criticized, so let’s go to work.<sup>281</sup>

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279. Spiegler & Kaye, *supra* note 66, at 128 (noting the vociferous objections of both source and market nations to the UNIDROIT Convention).

280. See Samuel Sidibé, *Fighting Pillage: National Efforts and International Cooperation*, in *ILLICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE* 25, 25 (Harris Leyten ed., 1995) (“Cultural resources of poor countries are exported to rich countries. There are no examples of the contrary.”).

281. *RESERVOIR DOGS* (Dog Eat Dog Productions Inc. 1992).

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