

AN ANTHRO-APOLOGY FOR MANAGING THE INTERNATIONAL FLOW OF CULTURAL PROPERTY

*James A.R. Nafziger**

This is an apology in several senses: (1) it expresses regret for the stock that the author and others have at times put in the rather ineffective current framework for managing the international flow of cultural property; (2) it argues the need for a somewhat different approach while retaining the best features of the current framework; and (3) it is but a makeshift to help reconstruct the framework of international control. If law really is a process, not of rule juggling but of regulating and allocating values,¹ then it is time for a change.

I. THE CURRENT REGIME OF CONTROL

The legal framework today for managing the international movement of cultural property, though shabby, is quite modern. It consists essentially of four elements. Three of these are ostensibly cooperative: (1) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;² (2) limited bilateral and regional cooperation in exchanging, loaning, and regulating the traffic in cultural property; and (3) particularly in the case of the United States, prosecution by municipal authority, with supplemental reference to foreign legislation. The

* Professor of Law, Willamette University College of Law. Chairman, Law and the Arts Section, Association of American Law Schools.

1. Rogers, Foreword to Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 L. & POL'Y IN INT'L BUS. 932 (1973) [hereinafter cited as Note, *Cultural Property*].

2. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1971, 10 I.L.M. 289 (1971) [hereinafter cited as UNESCO Convention].

For a detailed discussion and analysis of the Convention and its background, see Gordon, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971); Note, *Cultural Property*, *supra* note 1. The United States Senate gave its advice and consent to the ratification of the Convention by a vote of 79-0 in 1972. Despite repeated attempts since then, the Congress appeared ready to adopt the necessary implementing legislation only in its 1982 Session (as of the time of publication). See The Cultural Property Implementation Act, § 1723, 97th Cong., 1st Sess. (1982). See generally *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97 (1976).

fourth element, a state practice of highly nationalistic export barriers, is non-cooperative.

Briefly, the UNESCO Convention creates multilateral control of the movement of cultural property while seeking to promote legitimate exchange and international cooperation in the inventory of cultural property. The Convention's most important features include the following: (1) a system of export certification;³ (2) an emergency measure permitting signatories to call upon one another to help control the flow of jeopardized property;⁴ (3) the return to parties of property stolen from museums, monuments, and other institutions;⁵ and (4) "consistent with national legislation,"⁶ the prevention of museums and similar institutions from acquiring illegally imported property. Contraband items are recoverable on demand by the country of origin, so long as it pays just compensation to innocent purchasers.⁷

Bilateral cooperation, such as that between the United States and Mexico, may provide for the extradition of persons suspected or convicted of violating the antiquities law of the requesting state.⁸ United States-Mexico cooperation is also documented in a rather unique treaty⁹ which is designed to protect designated cultural material from illegal export and to promote joint archeological activity and exchange of antiquities. The treaty provides a mechanism for recovery of stolen national art treasures by requiring each country's Attorney General to bring a civil action for the recovery and return to the other country of all property illegally imported from the other country.¹⁰ It covers pre-Columbian objects, religious art and artifacts of the colonial period, and documents from official archives up to 1920 that are "of outstanding importance" to the national patrimony.¹¹ A determination of what items are of "outstanding importance" depends on either agreement between the two governments or identification by a panel of qualified experts selected by the two governments.¹²

Examples of limited regional cooperation include agreements

3. Art. 6, 10 I.L.M. 289, 290-91 (1971).

4. Art. 9, *id.* at 291.

5. Art. 7(b)(i), *id.*

6. Art. 7(a), *id.*

7. Art. 7(b)(ii), *id.*

8. Treaty of Extradition, May 4, 1978, United States-Mexico, App. (21), T.I.A.S. No. 9656.

9. Treaty of Cooperation Providing for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22.1 U.S.T. 494, T.I.A.S. No. 7088.

10. *Id.* at art. III (3).

11. *Id.* at art. I (1) (a).

12. *Id.* at art. I (2).

among Western European states and among Inter-American states¹³ and customs controls, imposed by the United States in concert with Latin American nations, concerning pre-Columbian monumental or architectural sculptures or murals.¹⁴ Under the customs law, no listed pre-Columbian stone carvings and wall art from the Americas may enter the United States, unless accompanied by an export certificate from the country of origin.¹⁵ The list of protected items is prepared by the Secretary of the Treasury, after consultation with the Secretary of State.¹⁶ Any object brought to the United States in violation of the law is to be seized by federal authorities and returned, without compensation, to the owner or purchaser.¹⁷

The stimulus for new means of international cooperation during the 1960's and the early 1970's was both scientific and political. In the United States, concerned archeologists and art historians joined diplomats and international lawyers in responding to appeals from "art-rich" countries, particularly in Latin America.¹⁸

Despite these initiatives, the 1970's also brought a distressful expansion in the state practice of erecting highly nationalistic export barriers and restricting scientific access to archeological sites. Many countries have adopted laws that purport to accord ownership of all artifacts to the national patrimony, and typically to the State itself; and several countries may deny archaeological permits to nationals of target countries in retaliation against abuses of national antiquities laws by compatriots.¹⁹ Even when some "art-rich" countries have enlisted international cooperation to protect their heritage, they have nevertheless applied severe restrictions which ignore the interests of both science and importing countries.²⁰

13. *E.g.*, European Convention on the Protection of the Archeological Heritage, 1969, Europ. T.S. No. 66; Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations, June 16, 1976, I Proceedings of the General Assembly, 6th Reg. Sess. (1976), reprinted in 15 I.L.M. 1350 (1976).

14. Act on the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-2095 (1976) [hereinafter cited as Pre-Columbian Act].

15. *Id.* at § 2092 (a).

16. *Id.* at § 2091.

17. *Id.* at § 2093 (a).

18. Note, *Cultural Property*, *supra* note 1, at 957.

19. Compare earlier municipal controls summarized in Nafziger, Report on Municipal Legal Responses to the International Movement of National Art Treasures (to the American Society of International Law) (1969), with current controls summarized in B. BURNHAM, HANDBOOK OF NATIONAL LEGISLATION (1975) and L. DUBOFF, THE DESKBOOK OF ART LAW 1008-1071 (1977).

20. Mexican legislation provides a particularly important example of extremely restrictive legislation enacted even after other countries made good faith efforts to cooperate. Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas, 312 Diario Oficial [D.O.] 16 (1972). For an analysis of this legislation, see Comment, *New Legal Tools*

These restrictive practices may be regional. For example, Article Three of the San Salvador Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations²¹ adopts an extreme position by presuming that all exportation and importation of cultural property "shall be considered unlawful, except when the state owning it authorizes its exportation for purposes of promoting knowledge of national cultures."²² Just as alarming is Article Seven of the same Convention which provides that "[r]egulations on ownership of cultural property . . . shall be governed by domestic legislation." Depending on municipal choice-of-law rules, this provision might rule out the applicability of cooperative international law in certain circumstances.

Moreover, "art-rich" countries have pressed the United Nations General Assembly to adopt resolutions calling for the return of cultural

to Curb the Illicit Traffic in Pre-Columbian Antiquities, 12 COLUM. J. TRANSNAT'L L. 315 (1973). On the deficiencies of the legislation, especially in its contribution to the black market in Mexican antiquities, see Nafziger, *La regulación del movimiento internacional de bienes culturales entre Mexico y Los Estados Unidos*, 16 ANALES DE ANTROPOLOGIA 123 (1979).

21. Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations, *supra* note 13. The United States explained its objections to the Convention, as follows:

We believe the convention adopted by the Sixth General Assembly is too broad in scope and rigid in its enforcement provisions. It would effectively prohibit the import and export of an enormous range of cultural materials—without regard for their value or cultural importance—and place principal enforcement responsibility on the importing state. Under the terms of the convention, the importing state would be under the same obligation to use all legal means to obtain recovery, whether an item is an insignificant piece purchased by an unwitting tourist or a stolen museum treasure. We do not believe this type of total prohibition is either workable or wise. In our view, it would impose an administrative burden on regional customs services which no state can be expected to accept and would also encourage the continued growth of a black market. Moreover, at the same time we must recognize the importance of the exchange of cultural materials and the need to liberalize export controls to allow for greater movement of such items abroad under circumstances in which such movement does not jeopardize the cultural patrimony of the country of origin. Art treasures, from whatever era or culture form, are the heritage of mankind and should be shared with all those who appreciate them.

Portions of a note from Terrence A. Todman, Ass't Secretary for Inter-Am. Affairs, Dep't of State, to Ambassador Rodolfo Silva, Chairman of the Permanent Council of the O.A.S., Aug. 26, 1977, OEA/Ser. G., CP/INF. 1173/77, *reprinted in* DIG. U.S. PRACTICE INT'L L. at 880-81 (J. Boyd ed. 1979).

A. GERTZ MANERO, *LA DEFENSA JURÍDICA Y SOCIAL DEL PATRIMONIO CULTURAL* (1976) is a very useful reference book for those interested in the protection and international movement of Mexican antiquities and other cultural property. The author discusses Mexican laws, past and present, in their historical and philosophical contexts, and comments on the political dynamics involved. The book is mostly devoted to a comprehensive collection of Mexican legislation dealing with cultural property, from a 1523 decree of King Charles II of Spain to current legislation, regulations, and treaties to which Mexico is a party.

22. Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations, *supra* note 13, art. 3.

and artistic property to their countries of origin.²³ A serious issue is whether an "art rich" country may use these resolutions as a basis for refusing to return property stolen from another country but originally belonging to the national patrimony of the first country. Mexico and France have been involved in a dispute over the theft from the French National Library of a fifteenth century tonalamatl, which is a codex consisting of colored drawings used as a horoscope. It is undisputed that a Mexican national absconded with the codex to Mexico, and upon his arrest by Mexican authorities, turned it over to the Mexican government, which retained custody of it. The thief claimed that he had simply recovered stolen property from France, even though the codex appears to have been in France, after a series of legitimate transactions, since the nineteenth century. Such self-help measures, if endorsed by governments on the basis of United Nations resolutions or otherwise, pose a serious threat to the future of international cooperation in managing the flow of cultural property.²⁴

The result of this rampant nationalism has been to stimulate a flourishing black market in artifacts²⁵ and to foster hurried, clandestine, pilfering and destruction of artifacts. These acts are concealed from authorities by stealth and evidence a lack of concern for careful, scientific removal.²⁶ Nationalism has encouraged disrespect for laws that are overly restrictive and contributes to international tensions.²⁷ Nationalism has also generated a cottage industry in forgeries²⁸ and has polarized the contending factions in the dispute over appropriate regulation.²⁹ Worst of all, nationalism has eroded a foundation for human understanding by limiting the access of archeologists and the

23. For a description of the most recent of these resolutions, see 18 U.N. MONTHLY CHRON. at 68 (Mar. 1981).

24. Riding, *Between France and Mexico: A Cultural Crisis*, Int'l Herald Trib., Aug. 31, 1982, at 1, col. 5.

25. Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 715 (1974); N.Y. Times, Mar. 12, 1978, at 61, col. 1.

26. Christian Sci. Monitor, July 21, 1981, at 7, col. 4.

27. N.Y. Times, Feb. 23, 1981, at A3 (demands by Turkey for restitution of objects claimed to be in the United States, despite previous cooperation by United States nationals).

28. N.Y. Times, Feb. 10, 1978, at B9, col. 4; Christian Sci. Monitor, July 21, 1981, at 7, col. 4.

29. See N.Y. Times, Feb. 10, 1978, at B9, col. 4. For example, a museum official acknowledged the following: "I am against all buying of ancient art from dealers . . . If the objects are genuine, we're buying plundered art; if they are false, we're buying forgeries. And the public is paying for these forgeries or for these bribes to looters and public officials." *Id.* at col. 4.

A prominent dealer, however, opposed legislation to curb the importation of looted art altogether. *Id.* at col. 6.

A leading collector observed as follows: "As long as money buys something, you will never eliminate illicit digging. As long as antiquities bring a price, you will have forgeries." *Id.* at col. 5.

global public to foreign patrimonies.³⁰ This emerging threat to the shared values of cultural diffusion and the advancement of scientific knowledge has arisen from the restrictions which were provoked by the threat of promiscuous trafficking in artifacts and pillaging of archeology. The current regime may be creating more problems than it is resolving.

II. SIGNIFICANT VALUES

A decade of experience with relatively new controls over the international movement of cultural property demonstrates the inadequacy of the current framework. What is needed is a new regime that takes into consideration all values and not just that of protecting national patrimonies for the local public and for local access. In short, the global community should better reconcile the *demand* for artifacts with their *protection*³¹ by states of origin. Regarding the use of artifacts, the global community should develop international understanding and elicit a national conscience.³²

A fuller system of values would include the following: (1) the preservation of archeological evidence, particularly in an on-site context; (2) the association of art with its geographical-historical milieu; (3) the preservation of the national patrimony for reasons of awakening the national conscience, fostering community pride, socializing youth, enhancing local scholarship, and elevating national civilization; (4) the preservation of both individual *objets d'art* and, when significant, sets and collections of them; (5) the enhancement of an exporting or loaning state's foreign policy and the financial resources of its museums; (6) the enrichment of the importing state's civilization; (7) the promotion of international understanding through diffusion of art; (8) the respect for cultural diversity, acknowledgement of a global patrimony, and a shared heritage of significant art, as well as the elimination of parochialism; (9) the widest possible visibility and accessibility of significant objects; (10) the protection of significant objects, under the best possible circumstances, in both the country of origin and the importing country; (11) the encouragement of respect for the law and the mutual develop-

30. See, e.g., HARV. MAG. July-Aug. 1981, at 61, col. 1.

31. Comment, *Legal Approaches to the Trade in Stolen Antiquities*, 2 SYRACUSE J. INT'L L. & COM. 51, 62, 65 (1974). "[I]nternational action geared toward the promotion of the legitimate exchange of art objects would serve to decrease the illicit trade in cultural property." Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 565 (1982).

32. See, e.g., Preamble to UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage, UNESCO Doc. 17 c/107 (1972), reprinted in 11 I.L.M. 1367 (1972). Accord remarks of Leonard D. Duboff, *The International Protection of Cultural Property* (Seminar), Proceedings of the 71st Annual Meeting of the American Society of International Law 196 (1977).

ment of shared controls; (12) the enrichment of aesthetic and intellectual interests of individual collectors, museums, and museum viewers; and (13) restraints on the production of forgeries.³³

Obviously, these values are not consistent with one another nor can all of them ever be applied simultaneously. These values must be compared and reconciled, and choices have to be made about which values to adopt. The principal function of a new legal regime should be to provide a process for accommodating as many of the values as is possible in a given instance.

III. TOWARD A NEW FRAMEWORK OF MANAGEMENT

The present framework, however defective, has within it the clues, if not the means, for a better approach. The preamble to the UNESCO Convention does not speak in terms of national patrimonies. Rather, it speaks in terms of cultural property of international interest, whose proper protection and use demands international cooperation.³⁴ The first, if not foremost, provision of that preamble establishes "that the interchange of cultural property among nations for scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."³⁵ A later, but somewhat less prominent Convention³⁶ speaks even more explicitly and extensively in terms of "the world heritage of mankind," the "importance, for all the peoples of the world" of protective safeguards, and the "heritage of outstanding universal value."³⁷ The related UNESCO Recommendation³⁸ reiterates this perspective and reminds States of the need, even as a matter of regional development and national planning, for a protective policy "thought out and formulated in common"³⁹ and "likely to bring about a continuing (presumably harmonious) interaction among Member States."⁴⁰

Taken together, these considerations are based on the principle emerging in other spheres of international law of a "common heritage

33. See P. Bator, Memorandum Submitted by the Reporter to the Panel (of the American Society of International Law) on the International Movement of National Art Treasures 7-21 (1969).

34. UNESCO Convention, *supra* note 2, preamble.

35. *Id.*

36. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, UNESCO Doc. 17 c/106, *reprinted in* 11 I.L.M. 1358 (1972).

37. *Id.*, preamble.

38. UNESCO Recommendation, *supra* note 32, preamble.

39. *Id.*

40. *Id.*

of mankind."⁴¹ It is not farfetched, therefore, to view cultural geography in the same light of *lex ferenda* as the high seas, Antarctica, and outer space. Contrary to the shrill nationalism of the 1970's, the UNESCO documents quoted above explicitly identify most of the fundamental values listed earlier in this study, and imply all of them. Unfortunately, the regime established in the text of the documents primarily observes the protective values of the "art-source" countries. "The ultimate dream would be to persuade everyone that all art was world property, and ought to circulate as freely as books or films. But UNESCO realizes that we are a long way from the end of nationalism and its pride of possession."⁴²

What is needed is not so much new multilateral legislation as a recognition of all pertinent values in implementing and amending the UNESCO Conventions and Recommendation, and in creating an institutional apparatus, perhaps within UNESCO, for harmonizing the national interests and aspirations of state parties. In creating bilateral and regional instruments that take into account specific, local exigencies, and in applying international and foreign law, all values should again be recognized. A range of values should also be observed when developing international programs of protection and financial assistance, and in promoting cooperative programs within non-governmental institutions, such as the International Council of Museums, and among private museums.⁴³ Finally, a recognition of all values is necessary in order for states to relax excessively restrictive laws and retaliatory techniques that serve no one.

IV. THE CRITERION OF GENUINE SIGNIFICANCE

As the result of the archeological profession's re-orientation to meet the requirements of legal mandate and the ethics of its developing conservation philosophy, the interpretation of significance has become *the* focal point for archeological decision-making in the United States.⁴⁴

International lawyers need to take a cue from the archeological profession by anchoring a revised regime in the concept of "signifi-

41. See S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 52 (1978).

42. Renny, *Who owns those looted art treasures?*, *Christian Sci. Monitor*, July 6, 1976, at 39, col. 4.

43. See, e.g., Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 *DEN. J. INT'L L. & POL'Y* 231 (1972).

44. Lynott, *The Dynamics of Significance: An Example from Central Texas*, 45 *AM. ANTIQUITY* 117 (1980).

cance," in order to reconcile the national aspirations of "art-source" countries with the interests of the global community. Unfortunately, international lawyers, diplomats, and municipal judges have taken too little notice of the standard of genuine significance. Although the UNESCO documents and other controls do explicitly distinguish between important objects, for which the provision of protection is incumbent upon states, and other objects, for which it is not incumbent by implication, they defer largely to domestic determinations of "importance." Under the UNESCO Convention, the only standard is a vague one of importance rather than one of genuine significance.⁴⁵ Consequently, the criterion of significance under the UNESCO Convention is rather insignificant.

It is preposterous to argue that all objects should remain in their countries of origin, let alone that they should be restored or returned to them. Thus, for example, prophylactic controls by customs agents at the border are excessive; it is not as if a shortage of cultural property were always, even often, at issue. Many countries are storehouses of repetitive artifacts which are often undisplayed and disintegrating.⁴⁶ Where the repetition is insignificant, making these artifacts visible and accessible abroad would greatly assist in managing the flow of cultural property.⁴⁷

Schemes of triage, by which conservationists of art and archeology employ scarce resources to protect unstable objects,⁴⁸ offer a more explicit means of evaluating significance. For example, on the advice and consent of scientists and art historians, objects might be classified as follows:

1. those whose long-term retention by the country of origin is imperative;
2. those whose retention for medium-range research needs is important;
3. those whose short-term retention is necessary for documentation or temporary display; and
4. those which are expendable.

45. Delegations to the conference which drafted the UNESCO Convention argued that this was its greatest defect. Responses from Delegations to Draft Convention, UNESCO Doc. SHC/MD/5, Add. 2, at 2 (1970).

46. See, e.g., Remarks of André Emmerich, *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97; N.Y. Times, Mar. 12, 1978, at 61, col. 1; Mar. 8, 1981, at 48, col. 4 (closing of Royal Mummy Room in Egypt, at least partly because of bacterial decay of mummies and temperature and humidity problems).

47. S. WILLIAMS, *supra* note 41, at 110.

48. Bourque, Brooke, Kley & Morris, *Conservation in Archeology: Moving Toward Closer Cooperation*, 45 AM. ANTIQUITY 794, 797 (1980).

Objects falling within the first category might be unquestionably reserved to the national patrimony, while those in the second category might be presumably, but not necessarily, so reserved. Those in the third category might be temporarily, but not permanently, reserved to the national patrimony, while those in the fourth category might be made immediately available for export or, at the very least, for extended loan abroad.

V. A MODEL REGIME OF MANAGEMENT

A model regime of management would include strengthened bilateral and multilateral cooperation, but would exclude the often parochial features of antiquities legislation of some "art-rich" countries; the role of criminal prosecutions in the courts of "art-importing" countries would be minimized. Article Nine of the UNESCO Convention offers a safety net for countries *seriously* threatened by trafficking in cultural property. It provides as follows:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archeological or theological materials may call upon other State Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concerted measures, including the control of exports and imports and international commerce in specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.⁴⁹

Within the compass of Article Nine, bilateral agreements offer promise of protection.

Multilateral cooperation, within the framework of both the UNESCO Conventions and the UNESCO Recommendation on the Cultural and Natural Heritage,⁵⁰ might well include not only exchange and loan programs, but also financial assistance by "art-importing" countries to help explore, excavate, protect, conserve, and present the significant heritage of source countries, as a *quid pro quo* for exportation of less significant material. Such cooperation would view the national heritage more comprehensively, and would accommodate various values for some objects while accommodating other values for

49. UNESCO Convention, *supra* note 2, art. 9.

50. UNESCO Recommendation Concerning the Protection, at the National Level, of the Cultural and Natural Heritage, *supra* note 32; UNESCO Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 34.

other objects. Without such cooperation, an accommodation of values is handicapped by a focus on individual objects and transactions.

As to municipal controls, it might be argued that severe restrictions on the export of artifacts are justified by the principle of sovereignty and by the importance of artifacts to national development and national consciousness. Even if those justifications have merit in theory, they may be better served by sharing, rather than by clinging to, the national patrimony.⁵¹ Moreover, nationalism is a fragile foundation in some cases for claiming an identification between modern cultures and socio-political systems, and those of ages past.

The question of what culture or nation an object now belongs to is problematic: consider the cases, for example, of the Elgin Marbles, the Temple of Preah Vihear,⁵² or the acquisition by United States museums of the "pillage par droit d'argent" of medieval French and other European material.⁵³ The Israeli excavations in Old Jerusalem not only divide the Israeli nation,⁵⁴ but also expose conflicting claims by the international community, Jordan, and Palestinian citizens. It is a curious feature of the present regime of municipal enforcement that United States customs authorities may seize objects lacking export certification on importation at the border,⁵⁵ while other authorities ignore participation by United States nationals in archeological activity in questionable contexts, as in East Jerusalem, a zone which is ordinarily of the greatest strategic concern to the national interest.⁵⁶

Genuine significance, as determined by a relatively free market, is fortunately the crux of legislation in a few countries which regulate, without prohibition, the export of objects. For example, in the United Kingdom,⁵⁷ export controls over movable cultural property apply only

51. S. WILLIAMS, *supra* note 41, at 8.

52. Temple of Preah Vihear (Cambodia v. Thailand) 1962 I.C.J. 6 (dispute concerning sovereignty over archeological zone).

53. Deb. Parl. Senat., J.O. 180 (March 3, 1927) (Fr.); Act of July 23, 1927, J.O. (1927) (Fr.).

54. Indianapolis Star, Aug. 21, 1981, at 7, col. 1; Christian Sci. Monitor, Sept. 30, 1981, at 4, col. 1.

55. For provisions of customs seizures of pre-Columbian monumental art, *see* Pre-Columbian Act, *supra* note 14. For other art, *see* controversial action and pending case summarized in N.Y. Times, Sept. 1, 1981, at 1, col. 2. Of course, where normal entry papers are missing or defective, or where objects are not declared, United States customs law provides for confiscation and return of the object. 18 U.S.C. §§ 542, 545, 1001; 19 U.S.C. §§ 1453, 1497, 1584, 1592 (1976).

56. *See, e.g.*, Rosen, *A Volunteer Digs in Old Jerusalem*, N.Y. Times, Jan. 18, 1981, at X-1, col. 1.

57. Import, Export and Customs Powers (Defense) Act, 1939, 2 & 3 Geo. 6, ch. 69, and administrative regulations thereunder; Reviewing Comm. on the Export of Works of Art and the Dep't of Trade and Industry, Notice to Exporters (1972) [hereinafter cited as Notice to Exporters]. On monumental material, *see* Ancient Monuments Consolidation and Amendment Act, 1913, 3 & 4 Geo. 5, ch. 32, § 12; Ancient Monuments Act, 1931, 21 & 22

to works which are valued over £8000, are more than one hundred years old, and were imported into Britain at least fifty years previously.⁵⁸ The Board of Trade and Industry issues export licenses.⁵⁹ Licenses are refused only when the work is of genuine "national importance," and only if a public purchaser can be found at home.⁶⁰

In France, the Minister of Cultural Affairs, on recommendation of the Central Administration of National Museums, may embargo the exportation of significant objects.⁶¹ One must obtain licenses for all art objects which are over one hundred years old. Licenses must also be obtained for all paintings, sculptures, and other works of art except those which are worth less than the equivalent of approximately one hundred dollars, were created after 1920, or were created by an artist still living at the time of export.⁶² License applications are sent to the National Museum which refers them to an expert "conservateur," located at any of several central customs warehouses.⁶³ His inspection is designed to help the Minister of Cultural Affairs determine, administratively, whether the object may be exported.⁶⁴

The British and French laws seem to work well. They do, of course, rely on relatively well-endowed competition for objects and public financial support in the source countries. Such competition may be meager, even non-existent, in economically poor, but "art-rich", countries. Nevertheless, these countries could prudently trade their excessive restrictions for more functional antiquities laws premised on the criterion of genuine significance. In return, they would be entitled to receive financial assistance for the protection of cultural property, as well as cooperation by foreign police,⁶⁵ customs, judicial authorities, and the like.

Other cooperative arrangements merit attention. For example, a draft international agreement to copyright folklore was recommended recently by seventeen experts from UNESCO and the World Intellec-

Geo. 5, ch. 16, §§ 6-8; Historic Buildings and Ancient Monuments Act, 1953, 1 & 2 Eliz. 2, ch. 49, §§ 1-3.

58. Notice to Exporters, *supra* note 57, ¶ 14.

59. *Id.* ¶¶ 15, 17.

60. *Id.* ¶ 16.

61. Act of Dec. 31, 1913 (1914) Journal Officiel de la République Française [J.O.] 129, [1951] Recueil Périodique et Critique [D.P.] IV 153 (Fr.), reprinted in UNESCO, Index of National Legislations on the Protection of Cultural Heritage 18 (1969) (Fr.); Decree of Nov. 30, 1944, J.O. 1585, [1945] Recueil Sirey [S. Jur.] 1713 (Fr.).

62. Decree of Nov. 30, 1944, *supra* note 61.

63. *Id.*

64. Act of Dec. 31, 1913, *supra* note 61.

65. For a case study on problems of police enforcement, see Rostron, Smuggled!, Saturday Review, Mar. 31, 1979, at 25. For a summary of Interpol and its limitations, see Christian Sci. Monitor, Jan. 17, 1979, at B-12.

tual Property Organization.⁶⁶ The proposal, which defines folklore as the "totality of the traditional aesthetic heritage developed and maintained by a community," provides a means for documenting and protecting, for example, folktales, riddles, songs, dances, and craft.⁶⁷ Developing countries, concerned about the exploitation of their indigenous cultural property, first proposed the agreement.⁶⁸ Examples of exploitation include the free commercial use, without attribution, of Yoruba designs for Martex, Cannon, and Sears towels and sheets.⁶⁹ Under the proposal, copyright laws would ordinarily require manufacturers to provide information concerning why and how they wish to use the indigenous patterns. Applications are reviewed by some "competent authority" which would either approve or reject them.⁷⁰ Review of the draft continues.

Loans and exchanges of both objects and scholars, systematic publication of archeological and artistic discoveries and analyses, and preparation of national inventories, in some cases, offer an alternative to the sale of objects.⁷¹

Cooperative, rather than unrealistically restrictive, legislation within a framework of bilateral, regional, and multilateral accommodation, offers a promising alternative to the present regime for managing the international flow of cultural property. Four elements will be critical to the formation of such cooperation. They are as follows: (1) the criterion of genuine significance to distinguish between exportable and non-exportable objects under *both* municipal and international law; (2) the provision of substantial financial assistance, perhaps within the UNESCO structure for economically poor, but "art-rich" countries, to protect their most important patrimony and to retain some objects otherwise available for export; (3) expanded programs of loans and exchanges; and (4) a more liberal procedure for intelligently reconciling a plethora of often mutually conflicting values.

66. Christian Sci. Monitor, Nov. 5, 1981, at 3, col. 1.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Palmer, *Introduction to Symposium: Legal Aspects of the International Traffic in Stolen Art*, 4 SYRACUSE J. INT'L L. & COM. 51, 54 (1976).

