

THE ILLICIT INTERNATIONAL TRADE  
IN CULTURAL PROPERTY: DOES THE UNIDROIT  
CONVENTION PROVIDE AN EFFECTIVE REMEDY FOR  
THE SHORTCOMINGS OF THE UNESCO CONVENTION?

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The story of the Sevso Treasure is the latest saga involving plundered antiquities<sup>1</sup> and other works of art<sup>2</sup> to find its way into the courtrooms of the United States,<sup>3</sup> where many of the

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<sup>1</sup> I treat the Treasure as falling within the category of plundered antiquities due to its age and its provenance, which is sketchy at best. See *Republic of Leb. v. Sotheby's*, 561 N.Y.S.2d 566, 567 (1990) (noting that the Treasure remained undiscovered for approximately 1,400 years, as well as the "absence of any confirmed 'find place'"). The New York Supreme Court's November 1993 decision in favor of the Marquess of Northampton resolved that the Treasure, a collection of silver objects, was not illegally excavated and exported from either Hungary or Croatia. See Patrick Boylan, *Treasure Trove with Strings Attached; As Long as its Origin is Unclear, the Sevso Silver Hoard is of Dubious Value, Says Patrick Boylan*, THE INDEPENDENT, Nov. 9, 1993, at 18. The New York State Court of Appeals recently refused to hear an appeal of the trial court's decision by Hungary and Croatia. See *Two Nations Lose Claim to Old Silver*, N.Y. TIMES, Sept. 23, 1994, at C18.

These decisions did not, however, put to rest the troubling issue of the Lebanese export certificates, which were denounced by the Republic of Lebanon as fake. See Boylan, *supra*, at 18. It was the problematic export license that caused the Getty Museum to refuse to consider purchasing the silver when it was offered to that institution in a private sale several years ago. See Sarah Jane Checkland & Andrew Pierce, *Sevso Silver: Peer's Win Leaves Rivals Smarting*, THE TIMES (London), Nov. 5, 1993, at 6; David D'Arcy, *British Lord Retains Ownership of Silver Antiquities*, (National Public Radio, morning edition, Nov. 11, 1993) (transcript # 1214-16), available in LEXIS, News Library, NPR File.

<sup>2</sup> This Comment will use the phrase "work of art" in its most general sense to refer to paintings, sculpture, manuscripts, and objects of any kind that have a value other than purely utilitarian and that are marketable. By contrast, the terms "cultural property" and "cultural objects" will be used in a more limited sense to refer to works of art that are considered part of a nation's cultural heritage, history, and/or ethnicity.

<sup>3</sup> See Jeremy Sugerman, Note, *A New Cultural Property Repose Act*, 22 GEO. WASH. J. INT'L L. & ECON. 671, 685 (1989) (describing the litany of cases on this subject).

title disputes that plague the art world are resolved.<sup>4</sup> At the center of this particular tale,<sup>5</sup> which has been compared by one commentator to *The Maltese Falcon*,<sup>6</sup> lies a magnificent silver platter more than two feet in diameter<sup>7</sup> depicting hunting and banquet scenes<sup>8</sup> and bearing the Latin inscription, "Let these, O Sevso, yours for many ages be, small vessels fit to serve your offspring worthily."<sup>9</sup> After much publicity<sup>10</sup> and a trial filled with unusual testimony, including that of a "gypsy trader from a Budapest market who claimed she kept her nail polish in one of the bowls,"<sup>11</sup> the collection of fourteen silver objects, which has an estimated value of \$100 million,<sup>12</sup> has been deemed by the Supreme

<sup>4</sup> See Stephen K. Urice, Remarks on Current Cases and Controversies Concerning International Repatriation or Return for ALI-ABA Course of Study on the Legal Problems of Museum Administration 5 (Mar. 20, 1991) (on file with author) (noting the large number of repatriation cases filed by source nations in U.S. courts despite the high costs of litigation).

<sup>5</sup> See Hugh Davies, *Marquess Wins Battle Over £50m Treasure*, DAILY TELEGRAPH, Nov. 5, 1993, at 1 (describing the outcome of and circumstances surrounding the litigation).

<sup>6</sup> See D'Arcy, *supra* note 1.

<sup>7</sup> See Davies, *supra* note 5, at 1.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.* It is based on this inscription that the collection of 14 silver objects has been dubbed the "Sevso Treasure." Carol Vogel, *Inside Art*, N.Y. TIMES, Sept. 24, 1993, at C5. Sevso is believed to have been a military commander in the Roman army. See Davies, *supra* note 5, at 1.

<sup>10</sup> A search conducted September 27, 1993 on LEXIS using the World Library and the Allwld File generated 57 stories on the Sevso Treasure. Understandably, many more articles appeared following the New York Supreme Court's decision in early November 1993.

<sup>11</sup> Checkland & Pierce, *supra* note 1, at 6. This specific testimony was offered by Hungary, which, along with Croatia, remained a claimant to the silver at the time of the trial. When the silver was transported to New York by Sotheby's in order to generate interest for the sale of the collection at auction, the Republic of Lebanon filed suit in New York court, claiming that the objects had been illegally excavated and exported from that nation. "[D]ue to the prohibitive costs of litigation," however, Lebanon withdrew from the suit on the first day of trial. *Id.* It is, of course, possible that Lebanon merely had been holding out in the hopes of settling on the eve of trial. The withdrawal of Lebanon left Hungary and Croatia to battle with Lord Northampton, who has spent approximately two million dollars defending his rights thus far. *Id.* Sotheby's also was one of the original defendants until the case against it was dismissed. *Id.* See also Vogel, *supra* note 9, at C5.

<sup>12</sup> Sotheby's pre-sale (the original sale was scheduled for the fall of 1990) estimate for the Treasure was \$70 million. See Republic of Leb., 561

Court of New York to belong to the Seventh Marquess of Northampton.<sup>13</sup>

## 1. INTRODUCTION

The case of the Sevso Treasure exemplifies many of the issues presented by the illicit international trade in art.<sup>14</sup> This illicit trade can be divided roughly into two distinct types of illegality. One involves the outright theft of works of art from their owners (whether they be private individuals, museums, galleries, or the State itself) and the subsequent transport of these stolen works across borders to countries in which the pieces are easily marketable (like the United States or England,<sup>15</sup> where many of the world's major auction

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N.Y.S.2d at 567. Currently, however, the Treasure's value has been estimated at nearly \$100 million. See Davies, *supra* note 5, at 1 (£50 million); D'Arcy, *supra* note 1 (\$100 million).

<sup>13</sup> At least one commentator knowledgeable about the art market has voiced the opinion that this litigation actually has resolved very little concerning the true ownership of the Sevso Treasure. Boylan, *supra* note 1, at 18. Boylan, who is Vice-President of the International Council of Museums ("ICOM") and chaired the committee which drafted ICOM's International Code of Professional Ethics, makes the point that despite the fact that the Sevso Treasure is of "museum quality" and theoretically is worth up to \$100 million, it is uncertain whether any institution can afford to assume the potential legal nightmare that comes with the collection. *Id.* As he notes, "few museums that could afford the hoard would contemplate buying it without knowing the truth about its discovery and subsequent history—none of which emerged in court." *Id.* As Boylan points out, "revealing the truth about the Sevso Treasure's origin would almost inevitably result in further legal action by the declared country of origin." *Id.* The triumph of Lord Northampton thus may be short-lived. If it is true, as Lord Northampton claims, that Christie's auction house has agreed to sell the silver, then we may soon know whether Boylan is correct. See Checkland & Pierce, *supra* note 1, at 6; Davies, *supra* note 5, at 1; D'Arcy, *supra* note 1.

Ironically, Lord Northampton began buying the silver pieces over a decade ago at the suggestion of the late Sir Peter Wilson, former Chairman of Sotheby's. It is believed that Wilson may at one time have worked as a Soviet spy, adding still more intrigue to the case of the Sevso Treasure. See Davies, *supra* note 5, at 1.

<sup>14</sup> Although Lord Northampton has triumphed for the time being, there remains a high probability that the Sevso Treasure was exported (and excavated, for that matter) illegally from a country like Lebanon. This issue remains undecided, however, due to the withdrawal of the Republic of Lebanon from the lawsuit. See *supra* notes 1 and 13 (describing the rationale for including the Sevso Treasure in the category of plundered art).

<sup>15</sup> See Judith Plouviez, *Letter: Better Protection for Archaeological Sites*,

houses have profitable outposts). The other involves the illegal export<sup>16</sup> of works of art, often classified by the country from which they have been taken as "cultural property." The removal of cultural property may be tantamount in some cases to cultural eradication, especially on a large scale such as is now occurring in the countries of the former Soviet Union.<sup>17</sup> Removal of cultural artifacts also has been a major problem for many years in Latin America<sup>18</sup> and other geographic areas famous for their archaeological sites.<sup>19</sup>

Although it is inherently difficult to calculate the magnitude of the illicit international trade in art,<sup>20</sup> the

THE INDEPENDENT, Feb. 1, 1993, at 18 (arguing, as Secretary of The British Archaeological Trust, for better protection of archaeological sites and noting that "[o]bjects looted from historic sites all over the world constantly pass through London's sale rooms—good for trade figures but bad for the national image.").

<sup>16</sup> It is important to recognize the difference between the concept of illegal export and outright theft. Although in certain situations, a country may wish to claim that illegally exported works of art are "stolen," this has not been the view traditionally espoused in U.S. jurisprudence. See *infra* note 55.

<sup>17</sup> See John Carvel, *Pillagers with an Eye for Profit Strip the Former Soviet Bloc of its Artistic Heritage as 'Cultural Cleansing' to Order Sweeps Over Central and Eastern Europe; John Carvel in Prague Reports on an Illicit Trade Filling Antique Shops in an Indifferent Western Europe*, THE GUARDIAN (London), Nov. 15, 1993, at 22 (quoting Jaroslav Zavadsky, head of the Czech police art squad, who estimates that "[s]ince 1990 . . . each year between 15,000 and 20,000 cultural items have been stolen in the Czech Republic and exported abroad," and Pavel Jiraseck of the Czech culture ministry who estimates that "another 15,000 to 20,000 cultural items were illegally smuggled out last year by people evading the law which requires an export licence for cultural property").

<sup>18</sup> See *infra* note 112, describing the plundering of Mayan artifacts from Guatemala.

<sup>19</sup> See, e.g., Norman Hammond, *Antiquities at Sotheby's are Looted, Says Professor*, THE TIMES (London), June 30, 1990, at 2; Alf Siewers, *Stolen Antiquities: Shadowy Network of Looters, Dealers*, CHRISTIAN SCI. MONITOR, July 21, 1981, at 7.

<sup>20</sup> See Stanley Meisler, *Art & Avarice; In the Cutthroat Art Trade, Museums and Collectors Battle Newly Protective Governments Over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989, (Magazine), at 8 (quoting Constance Lowenthal, Executive Director of the International Foundation for Art Research ("IFAR"), concerning the difficulty of measuring "illicit traffic").

The term "illicit trade" will be used in this Comment to refer both to the trade in stolen art works and to the trade in works that have been illegally exported (including illegal excavations) from their country of origin. The volume of illicit trade has escalated in recent years for a number of reasons. Chief among these has been the increase in value of many works of art,

consensus is that this illicit trade is worth billions of dollars per year,<sup>21</sup> second only to international drug trafficking in the amount of money involved.<sup>22</sup> It has persisted for decades<sup>23</sup> and shows no signs of abating in the near future,<sup>24</sup> particularly because prices in the art market remain

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especially antiquities (which present a special enforcement problem due to the large number of unexcavated sites around the world and the difficulty of preventing grave robbers and thieves from conducting their own "excavations" to increase the inventory of works available for sale on the world market).

Another reason for the growth in the volume of illicit trade is the practice of many art-rich countries, such as Mexico, of passing statutes vesting title in the State to all unexcavated objects and concurrently prohibiting all export of such "cultural property." See Mary McKenna, Comment, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 94 (1991) (noting that the "exponential increase in illegal trafficking in cultural property reflects not just a surge in activity among art thieves and smugglers, but an expanded concept of 'illicit trade'"). Some commentators believe that such all-encompassing title-vesting and embargo legislation merely serves to create a thriving black market in the cultural property sought to be protected. See, e.g., PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 42-43 (1983) ("The black market, in sum, is a product of scarcity. Buyers are willing to pay the 'cost' of conniving in illegal export because there is no alternative supply; if legal export were permitted, the illegal market would shrink."). Unfortunately, as Bator points out, "[e]mbargo, whether explicitly or administratively imposed [through the paucity of export certificates granted by the State], is the dominating philosophy of almost all the states rich in antiquities and archaeological materials. . . ." *Id.* at 39.

<sup>21</sup> See James Walsh, *It's a Steal: The World's Cultural Heritage is Being Looted by Thieves Who Often Have Ties to Organized Crime—and Even Get Help from the Art World*, TIME, Nov. 25, 1991, at 86, 87 (quoting Constance Lowenthal, Executive Director of IFAR: "[A]rt theft is a \$2 billion-a-year business" and a British magazine estimating the true value at six billion dollars a year); see also *Thieves Plunder Egypt's Tombs, Dealers Sell Treasures Worldwide*, Agence France Presse, Aug. 18, 1993, available in LEXIS, News Library, Wires File ("The worldwide market for all stolen art is estimated at three billion dollars annually and growing—which is second only to drug trafficking . . .").

<sup>22</sup> Alexander Stille, *Was This Statue Stolen?*, NAT'L L.J., Nov. 14, 1988, at 1 (noting that traffic in stolen or smuggled art is "second only to drugs in the world's black-market economy"). Computer theft now may fall somewhere in between the two, however. See Walsh, *supra* note 21, at 87; see also Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 909 & n.8 (1989) (citing Milton Esterow, *Confessions of an Art Cop*, ARTNEWS, May 1988, at 134).

<sup>23</sup> See BATOR, *supra* note 20, at 1-2.

<sup>24</sup> But see Peter Watson, *A Look Inside the Shadowy and Arcane World*

lucrative for the would-be sellers of plundered treasure.<sup>25</sup> There is no doubt that “[p]lundered treasures are in wide circulation. Looters, according to some estimates, steal a piece of art or memento of history from Italy [alone] every half-hour.”<sup>26</sup> The problems presented by the theft or plundering of cultural artifacts are magnified by the fact that the recovery rate for such works is extremely low.<sup>27</sup>

This Comment will discuss and critique two major international efforts aimed at curbing the trade in stolen and illegally exported works of art.<sup>28</sup> The first is the 1970 United

*of Art Theft; Why Do Thieves Steal Paintings Too Famous to Sell?*, S.F. EXAMINER, Nov. 28, 1993, at A20 (quoting Harold Smith, the head of Smith International Adjustors in New York City, who notes that thefts have declined since the 1980s). This assessment most likely has no bearing on the volume of illegal excavations and exportations of cultural property from art-rich nations, a phenomenon outside the scope of insurance claims for thefts of works of art.

<sup>25</sup> As one well-known commentator has written, the “theft of art treasures . . . [is] a growth industry fueled by the steep escalation in the price of art.” BATOR, *supra* note 20, at 17. See also Drum, *supra* note 22, at 909 (“Glittering prices . . . attract not only legitimate but also illicit trade.”); Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1067-68 (1991) (noting that the rise in prices has “fueled the trafficking of stolen art and artifacts”).

This escalation in the prices paid for works of art was especially well-publicized following many of the sales held by auction houses such as Sotheby's and Christie's beginning in the late 1980s. For example, Van Gogh's *Iris*es sold for an astonishing \$53.9 million in 1987. Suzanne Muchnic, *Price Shatters Old Mark by More than \$10 Million: Van Gogh Painting 'Iris' Brings Record \$53.9 Million*, L.A. TIMES, Nov. 12, 1987, § 1, at 27. In May 1990, Van Gogh's *Portrait of Dr. Gachet* broke that earlier record and sold for \$82.5 million, becoming “the most expensive work of art ever sold at auction.” Rebecca Freligh, *Auction House Chief Knows Value of Things*, PLAIN DEALER (Cleveland), Aug. 24, 1993, at 2C.

<sup>26</sup> See Meisler, *supra* note 20, at 10.

<sup>27</sup> According to IFAR, 80-90% of stolen works of art are never recovered or returned to their rightful owners. Florence Squassi Swanstrom, *Professional Art Thieves—Who and Why?*, IFAR REP. AND ART LOSS REG., June 1993, at 5; see also Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 18 n.4 (1993) (“According to recent estimates, worldwide art thefts trebled in 1991, while recovery rates fell from 22% to only 5%.”).

<sup>28</sup> This Comment is premised upon the theory that the illicit international trade in works of art is problematic and that there should be some means of reducing it while still promoting the legitimate flow of works of art through the world market. Plunder and looting, however, occasionally have proved advantageous (e.g., for the physical preservation of the objects

Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>29</sup> The second is the draft International Institute for the Unification of Private Law ("UNIDROIT")<sup>30</sup> Convention on the International Return of Stolen or Illegally Exported Cultural Objects.<sup>31</sup> Both

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themselves). See, e.g., John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 848 n.59 (1986) (noting that "illegal excavations may reveal important works that would otherwise remain hidden; smuggling may save works that would otherwise be destroyed through covetous neglect; the laws prohibiting export may be senselessly overinclusive"). One example of this phenomenon is the "transfer" of the Elgin Marbles from the Acropolis in Athens to the British Museum in London. Had the sculptures remained *in situ*, the heavy smog of metropolitan Athens likely would have caused a significant amount of irreparable damage. *Id.* at 846.

<sup>29</sup> UNESCO 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. 231 (1972) [hereinafter UNESCO Convention], reprinted in 1 THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS 357 (UNESCO 1984) [hereinafter UNESCO COMPENDIUM]. This compendium reproduces the text and includes an analysis of much of the national and international legislation promulgated in the effort to protect movable cultural property, which is defined here to include "products of archaeological excavations, pictures, statues, sculptures, books, ancient and modern works of art, [and] scientific collections. . . ." *Id.* at 15.

<sup>30</sup> UNIDROIT is "an organization of 50 nations dedicated to harmonizing the laws of different countries." Constance Lowenthal, *Unidroit Draft Convention: New Agreement Proposed for Stolen or Illegally Exported Cultural Objects*, IFAR REP., Aug.-Sept. 1991, at 5 (providing a detailed background on the development of the draft Convention and its goals).

<sup>31</sup> Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects [hereinafter UNIDROIT Convention]. See Appendix, containing the text of the most recent draft of the UNIDROIT Convention.

It appears that UNESCO originally commissioned UNIDROIT in 1984 to examine the possibility of replacing Article 7(b), the portion of the 1970 Convention which discusses private law measures. See Richard Crewdson, *Putting Life into a Cultural Property Convention—UNIDROIT: Still Some Way to Go*, 17 INT'L LEGAL PRACTITIONER 45 (1992). As a result, the draft UNIDROIT Convention should be viewed as a response to the flaws of its predecessor. It is, however, based on many of the same principles guiding UNESCO, including an overriding interest in the preservation of the world's cultural property.

The author wishes to thank Stephen K. Urice for providing access to his files on the UNIDROIT Convention, including copies of the various drafts and related correspondence. To my knowledge, these materials are not yet

conventions are examples of a growing worldwide realization that protection of works of art is necessary on an international level:

In many countries protective measures were triggered off by a continuous exodus of works of art; in a number of countries, such as China, Turkey, Greece or Italy, archeological works of art, taken out of the country, resulted from wild and unscientific digs . . . . One of the major aims of the Unesco [sic] Convention from 1970 is to put a stop to this pilfering of national cultural heritage.<sup>32</sup>

Section 2 of this Comment discusses the UNESCO Convention generally. Section 2.1 identifies the more significant shortcomings of the UNESCO Convention. Section 2.2 discusses the role of the United States in changing the original language of the draft UNESCO Convention. Section 3 examines the implementation of the UNESCO Convention domestically through the Convention on Cultural Property Implementation Act and suggests that this statute actually undermines certain protections contained in the UNESCO Convention. Section 4 discusses the draft UNIDROIT Convention and evaluates its likely effectiveness in addressing the shortcomings of the UNESCO Convention. This Comment concludes by first noting that the UNESCO Convention has not and will not be effective on its own in protecting works of art from illegal trafficking.<sup>33</sup> Although reform of some kind

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publicly available due to the unofficial nature of the documents. *But see* Lyndel V. Prott, *The Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 41 INT'L & COMP. L.Q. 160, 168 (1992) (appendix includes text of draft convention Study LXX - Doc. 19 dated August 1990). All other UNIDROIT documents, including previous drafts of the Convention, are on file with the author.

<sup>32</sup> Hans Koenig, *Freedom of Collectors to Sell or Give Away All or Part of Their Collections*, in INTERNATIONAL ART TRADE AND LAW 157, 163 (Martine Briat & Judith A. Freedberg eds., 1991).

<sup>33</sup> See Lowenthal, *supra* note 30, at 6 (noting that the UNESCO Convention "has been a disappointment to observers who hoped it would reduce the trade in smuggled and plundered antiquities"); Urice, *supra* note 4, at 7 (noting that "for a variety of reasons, the [UNESCO] Convention . . . [has] had little noticeable effect on the illicit trade in the very properties the treaty was meant to protect").



clearly is necessary,<sup>34</sup> this Comment nevertheless predicts that the draft UNIDROIT Convention itself will achieve only limited success in curbing the illicit trade in works of art, even in the unlikely event that it is ratified and implemented by the major art-importing and art-exporting states.<sup>35</sup>

## 2. THE UNESCO CONVENTION

The UNESCO Convention represents an effort to use the channels of public international law to curb the illicit trade in art. Under the UNESCO Convention, each contracting state

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<sup>34</sup> See Linda F. Pinkerton, former Secretary and Trust Counsel, The J. Paul Getty Trust, Remarks on UNIDROIT Treaty for ALI-ABA Course of Study on the Legal Problems of Museum Administration 1 (Mar. 20, 1991) (on file with author) (“The participants in the UNIDROIT meetings which produced this treaty worked from the premise that the UNESCO Convention of 1970 . . . fails to provide an adequate system for recovery of stolen and illegally exported objects.”).

<sup>35</sup> The fourth—and probably final—negotiation session for the UNIDROIT Convention was held September 29-October 8, 1993 in Rome. Based on current projections, the Convention most likely will be ready for ratification in late 1995 at a diplomatic conference, although it appeared at first that ratification might occur by the end of 1994. See Letter from Linda F. Pinkerton, former Secretary and Trust Counsel, The J. Paul Getty Trust, to Stephen K. Urice, Director, The Rosenbach Museum and Library, (Oct. 21, 1993) (on file with author) (“There will be a diplomatic conference in late 1994 from which the final text of the . . . [Convention] will emerge . . .”). It is almost certain, however, that implementing legislation will need to be passed in the United States before the provisions of the Convention can be considered effective. If the 12-year delay between adoption of the UNESCO Convention and passage of implementing legislation in the United States is any indication of a pattern, then it could be well into the 21st century before the UNIDROIT Convention is in force, at least in the United States. See Memorandum from Harold S. Burman, Executive Director, Advisory Committee on Private International Law, Department of State, Office of the Legal Adviser re: Request for Comments on the Revised Draft UNIDROIT Convention on the International Protection of Cultural Property; U.S. Positions for the Fourth UNIDROIT Meeting 1 (Aug. 26, 1993) (on file with author), which notes:

If the diplomatic conference were to produce a final treaty text, it would then be up to each individual country to determine whether to seek ratification. Ratification by the United States is likely to be conditioned on enactment by Congress of implementing legislation, as was the case with U.S. ratification of the 1970 UNESCO Convention.

*Id.*

itself is responsible for enforcing the provisions of the Convention through its own government.<sup>36</sup>

### 2.1. Shortcomings of the UNESCO Convention

Commentators have observed that "[t]he UNESCO Convention has been criticized because of its cumbersome procedures, because it has not been effective in protecting the cultural property of its member countries, and because it can never be fully effective, since the vast majority of the art-importing countries are not signatories to it."<sup>37</sup> Generally, the UNESCO Convention is viewed as a weak piece of legislation without the "teeth" to prevent the widespread plundering and looting of valuable works of art around the world or to punish individuals caught violating its terms.

As indicated above, one of the major reasons the UNESCO Convention failed to provide an adequate enforcement mechanism is the fact that significant art-importing nations are not signatories.<sup>38</sup> Currently, of the seventy-three<sup>39</sup> total signatories to the UNESCO Convention, the United States is the only significant art-market nation to have accepted and implemented it.<sup>40</sup> The remainder of the signatories to the UNESCO Convention are countries rich in cultural property

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<sup>36</sup> See UNESCO COMPENDIUM, *supra* note 29, at 22 ("Each State that is a party to the [UNESCO] Convention is responsible for the regulation of such transactions [involving cultural property] and for deciding whether they are licit or illicit."); see also Crewdson, *supra* note 31, at 45 (noting that the UNESCO Convention was "essentially a public law measure requiring substantial state resources to administer, involving legislation, education, [and] certification of exports").

<sup>37</sup> RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 158 (1992 Update).

<sup>38</sup> See Patricia Hambrecht, Comments on Draft UNIDROIT Convention on the Return of Stolen and Illegally Exported Cultural Objects for meeting of the Secretary of State's Advisory Committee on Private International Law 2 (Oct. 16, 1992) (on file with author) ("[M]ost of [the members of the United States delegation to UNIDROIT] believe that [the UNESCO Convention] has been a failure—in large part because nearly all of the European art-importing countries failed to ratify it because of difficulties in implementation.").

<sup>39</sup> See Robert Adams, *Smithsonian Horizons*, SMITHSONIAN, July 1993, at 10.

<sup>40</sup> See *id.* Neither France, England, Japan, nor any of the other major art-importing states has signed the UNESCO Convention or indicated a willingness to abide by its provisions.

that stand to lose a great deal as a result of the illicit international trade in art.

The art-market countries, which generally have refused to sign the Convention,<sup>41</sup> probably were influenced by the importance of the art trade to their economies. In this regard, the persuasive effect of arguments voiced by art dealers and other members of the trade<sup>42</sup> that signing the UNESCO Convention would merely deflect profitable business to another non-signatory nation should not be underestimated.<sup>43</sup>

Without the presence of some international source of law binding the art-market nations, however, art-exporting countries have little chance of combatting the problem of the illicit trade in works of art.<sup>44</sup> This imbalance in the nature of the countries bound by the provisions of the UNESCO Convention is not its only weakness, however.

### 2.1.1. Textual Weaknesses

Although the UNESCO Convention consists of a total of twenty-six articles, most of these provisions are mere rhetoric<sup>45</sup> and thus impose no real requirements on

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<sup>41</sup> See *id.*

<sup>42</sup> See Geoffrey Lewis, *International Issues Concerning Museum Collections*, in *INTERNATIONAL ART TRADE AND LAW: INTERNATIONAL SALES OF WORKS OF ART* III 73, 76 (Martine Briat & Judith A. Freedberg eds., 1991) (“[I]t is widely believed among curators that there is a strong lobby from the art trade against the 1970 [UNESCO] Convention.”).

<sup>43</sup> See William Grimes, *The Antiquities Boom—Who Pays the Price?*, N.Y. TIMES, July 16, 1989, § 6 (Magazine), at 17, 24 (quoting art dealer André Emmerich: “It all goes to Geneva now. Don’t kid yourself. The market continues, but not here.”).

<sup>44</sup> The problem is further magnified by the confusing array of different national laws regarding cultural property. As one commentator has noted:

All of the major art importing countries—and exporting countries as well—have what has been called an “international hodgepodge of laws [that] can be a tremendous advantage to people who wish to move and sell stolen art”; few if any penalties are in practice attached to its acquisition. Prevaingly, the developed countries continue to tolerate, and sometimes even celebrate, commerce in the cultural patrimony of less-wealthy nations. And the seemingly insatiable demand is such that the countries suffering the greatest losses cannot by themselves bring to an end this source of international discord.

Adams, *supra* note 39, at 10.

<sup>45</sup> See generally BATOR, *supra* note 20, at 100-03 (examining the

signatories.<sup>46</sup> Typical of such well-meaning but impotent provisions is Article 2,<sup>47</sup> which essentially sets forth the principle that illicit trade in cultural property is undesirable,<sup>48</sup> that it deprives source countries of their cultural heritage<sup>49</sup> and rightful property,<sup>50</sup> and that international cooperation is an effective means of controlling the problem.<sup>51</sup> The article goes on to note ambiguously<sup>52</sup> that the states signing the Convention will oppose illicit import, export, and other types of transactions "with the means at their disposal."<sup>53</sup> This last phrase is particularly ironic. It could have had a positive impact if the wealthy art-market nations of the world had signed the Convention, as these countries possess the "means" (i.e., money, influence, etc.) to combat the problem. Instead, it is the victims of the plunder who are being urged to help themselves, while the rest of the world looks on, unable to help or simply uninterested in the problem.

## 2.2. *The Role of the United States*

In addition to the fact that a number of its provisions are ambiguous and that it contains a number of articles without real substance, the weaknesses of the UNESCO Convention also may be attributed, at least in part, to the actions of the U.S. delegation,<sup>54</sup> which played a crucial role in the deletion of the provision in Article 7 of the original UNESCO

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rhetorical nature of various articles).

<sup>46</sup> *Id.*

<sup>47</sup> UNESCO Convention, *supra* note 29, art. 2, 823 U.N.T.S. at 236.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* art. 2(2) ("To this end, the States Parties [to the UNESCO Convention] undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.").

<sup>53</sup> *Id.*

<sup>54</sup> It is likely that the U.S. delegation was responding to the same type of lobbying and other persuasive efforts of the U.S. art community that was evident during the battle to pass implementing legislation in Congress. *See infra* notes 77-85 and accompanying text.

Convention covering illegally exported cultural property.<sup>55</sup> As it originally stood, the Secretariat Draft<sup>56</sup> of the UNESCO Convention<sup>57</sup> would have obligated signatory nations—a category in which the United States clearly wished to be included<sup>58</sup>—to respect and enforce the export laws of other

<sup>55</sup> Illegal exportation should be distinguished from illegal importation. The legality of the former is judged by the laws of the country of export, whereas the legality of the latter is judged by the laws of the importing country. The general rule—true in the United States, England, France, Germany, and Switzerland, among other places—is that illegal export does not by itself bar legal importation:

The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.

BATOR, *supra* note 20, at 11.

On occasion, this general rule has been qualified. See *infra* section 3.2 regarding import restrictions and emergency bans under the U.S. implementing legislation; see also *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). Both cases involved the application of the National Stolen Property Act, 18 U.S.C. § 2314 (1970 & Supp. 1993) [hereinafter NSPA], which applies to the interstate or foreign commerce of any stolen goods valued at \$5,000 or more. *McClain*, 545 F.2d at 992. In order to be convicted under the NSPA, the defendants must have had knowledge (i.e., scienter) that they were dealing in goods that were “stolen, converted or taken by fraud.” *Id.* (quoting NSPA).

Although the original conviction of the *McClain* defendants in district court was reversed due to the vagueness of the Mexican statute regarding state ownership, the case left open the possibility that foreign laws could be used in a U.S. court to convict individuals involved in art trafficking. In order for such a conviction to occur, however, it must be clear that: 1) the objects come from the state in question, and 2) an unambiguous declaration of state ownership has been made via statute. *McClain*, 545 F.2d at 993, 997. Without both of these elements present, a U.S. court will refuse to convict. Cf. *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom.*, *Government of Peru v. Wendt*, No. 90-55521, 1991 U.S. App. LEXIS 10385 (9th Cir. May 6, 1991) (noting, inter alia, that Peru failed to show that the artifacts had originated in modern-day Peru).

<sup>56</sup> BATOR, *supra* note 20, at 52 & n.94 (using the term Secretariat Draft to denote the original version of the UNESCO Convention and noting that the Secretariat Draft is printed in MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY, UNESCO Doc. SHC/MD/5, Annex III (1970)).

<sup>57</sup> See *id.* at 94-100 (describing in some detail the legislative history and drafting process of the UNESCO Convention).

<sup>58</sup> See 3 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE 727 (1989) (“[T]he changing political composition of all the

nations.<sup>59</sup> This policy would have contradicted long-established norms of U.S. and other art-importing countries' law in this area.<sup>60</sup> Inclusion of this provision would have meant that a U.S. federal court faced with a claim by a foreign nation for repatriation, for instance, would have been forced to conclude that any object considered to have been illegally exported from the source country be returned. This would have been the case even if importation into the United States was in full compliance with applicable domestic laws and the possessor bought the work in good faith.

Such a provision has been called a "blank check" rule<sup>61</sup> because it essentially gives art-exporting countries *carte blanche* to enact whatever type of export laws they wish,<sup>62</sup> which may lead to their blocking export of objects that may or may not be culturally significant. The blank check rule allows exporting nations to override other countries' (particularly importing countries)<sup>63</sup> judgments about what types of cultural property should remain *in situ* in order to preserve their national heritage. Such a policy also opens up the very real danger of unnecessarily choking the legal market<sup>64</sup> for works of art, creating strong incentives for illegal excavations, exportations, and export licenses<sup>65</sup> and contributing to the development of a thriving black market.<sup>66</sup>

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international organizations in the late 1960s motivated [the U.S.] government to seek better relations with a number of developing States . . . .").

<sup>59</sup> See BATOR, *supra* note 20, at 95. Bator notes:

[The Secretariat Draft's] central provisions (in article 7) required every country party to the Convention (a) to prohibit the export of any item of 'cultural property' unless accompanied by an export certificate; and (b) to prohibit the importation of any item of 'cultural property' not 'accompanied' by such a certificate—that is, which was illegally exported.

*Id.* (emphasis omitted).

<sup>60</sup> See *supra* note 55.

<sup>61</sup> BATOR, *supra* note 20, at 52.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 53.

<sup>65</sup> *Id.* at 54.

<sup>66</sup> This conclusion is based on the assumption that, given complete control over export policy, most, if not all, art-rich nations will enact total embargoes in an effort to preserve their vanishing cultural heritage. As

This aspect of the Secretariat Draft would have been a major—and, as it turned out, an unacceptable<sup>67</sup>—change in U.S. policy regarding cultural property. Interestingly, this change in the language of Article 7 has done nothing to stem the controversy surrounding the issue of recognition of foreign export laws:

At the heart of recent debates about the international traffic in art has been the demand of the art-exporting countries that the United States (and other art-importing countries) abandon the general rule and bar the import of all art objects whose export was itself not legally authorized. The demand is based on the claim that the responsibility for the ineffectiveness of export controls rests with the art-importing countries, which subvert these controls by allowing the import of illegally exported art . . . .<sup>68</sup>

With regard to illegally exported works of art, the final version of Article 7<sup>69</sup> obligates States Parties to the

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Bator points out, such embargo policies actually are counterproductive, as they lead generally to a well-developed black market system in which cultural property leaves the source country in spite of its export laws. See BATOR, *supra* note 20, at 41-43 (section entitled “*The ineffectiveness of embargo: Ten easy lessons on how to create a black market.*”).

<sup>67</sup> *Id.* at 96. Both the museum community and art dealers believed that such a restriction on the art trade would put museums and other buyers in too vulnerable a position and would virtually dry up the market in the United States. See also PROTTE & O’KEEFE, *supra* note 58, at 745-46 (noting that the U.S. delegation succeeded in inserting an amendment to the provision which limited its coverage to state-run museums); Grimes, *supra* note 43, at 24 (quoting André Emmerich).

<sup>68</sup> BATOR, *supra* note 20, at 51-52.

<sup>69</sup> Article 7, which is one of the two most important articles in the UNESCO Convention (the other being Article 9) provides as follows:

The States Parties to this Convention undertake:

- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;

- (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or

Convention to "prevent museums<sup>70</sup> and similar institutions"<sup>71</sup> from acquiring works of art that fall within the definition of cultural property in Article 1<sup>72</sup> and that have been illegally exported after the effective date of the Convention<sup>73</sup> in the states concerned,<sup>74</sup> *but only to the extent that national legislation would impose the same obligation.*<sup>75</sup> It is this final qualifying phrase which renders the article moot in the United States, where it is possible to import something

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similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

UNESCO Convention, *supra* note 29, art. 7, 823 U.N.T.S. at 240.

<sup>70</sup> *Id.* art. 7(a). Bator has noted that this provision is the result of a compromise in the drafting process and that, based on the legislative history, the only types of museums covered would be those whose policies are controlled by the federal government. *See* BATOR, *supra* note 20, at 103-04. *See also* McKenna, *supra* note 20, at 116 n.158 ("Only publicly owned museums are within the scope of the CPIA at all.") (citation omitted) (emphasis omitted).

<sup>71</sup> UNESCO Convention, *supra* note 29, art. 7(a), 823 U.N.T.S. at 240. It is not exactly clear what is meant by the term "institution" here. Given the restrictive interpretation of the type of museums covered, it is hard to imagine what other institutions would qualify.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Note that this limitation provides an instant "out" for the United States unless and until legislation is passed that changes the general rule. *See supra* note 55, noting that generally, an object's illegal exportation does not by itself bar legal importation.



legally regardless of whether the item has been legally exported from its country of origin.<sup>76</sup>

### 3. THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT

In addition to the significant actions taken by the U.S. delegation regarding the text of the UNESCO Convention itself, U.S. implementation of the UNESCO Convention<sup>77</sup> has further diluted its potential beneficial impact on the illicit international trade in art. The causes for this weakening of the provisions of the Convention are no mystery. Following the ratification of the UNESCO Convention in 1972 by the Senate,<sup>78</sup> there ensued a decade-long battle in Congress between those who favored protection (e.g., art historians<sup>79</sup>

<sup>76</sup> See *supra* note 55.

<sup>77</sup> International agreements, such as the UNESCO Convention, which are non-self-executing, require implementing legislation before they come into effect in the United States. See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 569 (6th ed. 1992). The necessity for implementing legislation is described as follows:

[I]f treaties contain provisions affecting rights and duties of persons or bodies under the jurisdiction of the contracting states, each contracting state is bound to take such steps as are necessary, according to its internal law, to ensure that their rights and duties are consistent with the requirements of the treaty.

1 OPPENHEIM'S *INTERNATIONAL LAW* § 622 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

<sup>78</sup> BATOR, *supra* note 20, at 94. Although the "original draft [UNESCO] Convention included a provision prohibiting reservations . . . [t]he Special Committee of Governmental Experts in 1970, in deciding to make reservations possible, clearly accepted the view that there would be varying degrees of implementation." VON GLAHN, *supra* note 77, at 568. It is not unusual for a reservation to change the text of a treaty: "Reservations are changes or amendments inserted into a treaty by one party as an implied or specified condition of ratification." *Id.* at 776.

The Senate gave its advice and consent to the ratification of the UNESCO Convention on August 11, 1972, subject to one reservation and six understandings regarding the implementation and interpretation of the Convention. See 118 CONG. REC. 27,924-25 (1972). The reservation specifies that "[t]he United States reserves the right to determine whether or not to impose export controls over cultural property." *Id.* at 27,925. The Senate discussed Articles 7 and 9 of the Convention only during its deliberations, thereby placing narrow limits on the coverage of the implementing legislation to be enacted in the future. PROT & O'KEEFE, *supra* note 58, at 781.

<sup>79</sup> Irvin Molotsky, *Bill to Curtail Stolen-Art Trade is Near Passage*, N.Y.

and archaeologists<sup>80</sup>) and those who did not (e.g., art dealers<sup>81</sup>). The resulting watered-down version of the UNESCO Convention embodied in the U.S. implementing legislation therefore can be explained by the necessity of having to compromise in order to enact the statute at all, let alone in the most effective form possible.

The twelve-year delay between the adoption of the UNESCO Convention in late 1970<sup>82</sup> and the passage of the Convention on Cultural Property Implementation Act ("the Act")<sup>83</sup> by Congress at the beginning of 1983 provides conclusive evidence of the strength and influence of the art lobby in the United States.<sup>84</sup> This influence is further

TIMES, Dec. 20, 1982, at C14 ("Since 1970, the main proponents of the convention have been archeological, historical and anthropological associations concerned over the flight of the poor countries' patrimony to the West and concerned also over the destruction of the historical record that occurs when ancient sites are pillaged.").

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* ("Opposition has come from many art dealers, exporters and collectors, and from some museums."); Margot Slade & Wayne Biddle, *Ideas and Trends: Breakthrough on Stolen Artifacts*, N.Y. TIMES, Dec. 26, 1982, at E14 ("Dealers' fears of lost business and the sentiment of art historians hoping to protect the patrimony of disadvantaged nations kept the legislation stuck for a decade.").

<sup>82</sup> The UNESCO Convention was adopted November 14, 1970. *See* 823 U.N.T.S. at 231.

<sup>83</sup> 19 U.S.C. §§ 2601-2613 (1988 & Supp. 1994). The Act is the result of 12 years of prolonged negotiation and compromise among politicians, art dealers, museums, et al., following the adoption of the UNESCO Convention. It essentially implements Articles 7 and 9 of the UNESCO Convention, but it is not retroactive in effect and, therefore, only covers those items stolen after April 12, 1983, which is the effective date of the Act.

<sup>84</sup> *See* George Lardner, Jr., *The Pillaging of Global Art Treasures*, WASH. POST, May 18, 1977, at A1, A8 (quoting a statement by Edward H. Merrin, a well-known New York City art dealer, to the House Ways and Means Trade Subcommittee: "With the passage of this law, the entire flow of art will be to the European collecting countries, Japan and the Arab oil states."); *see also* Molotsky, *supra* note 79, at E14 ("[D]ealers, through their allies in Congress, effectively blocked legislation implementing the treaty for the last 10 years."); Slade & Biddle, *supra* note 81, at E14 (noting the delay caused by the concerns of art dealers, private collectors, and some museums).

Ironically, it was Merrin who paid the highest price to date, \$2.09 million, for a classical antiquity at auction at Sotheby's in December 1988. The piece was a marble Cycladic head that had been purchased only 25 years earlier by a Swiss couple for a mere \$12,000. Grimes, *supra* note 43, at 17. Merrin was funded through a partnership agreement with Asher B. Edelman, a "freewheeling corporate raider." *Id.* The transaction created a

demonstrated by the weaknesses inherent in the U.S. implementing legislation, which actually “implements” only two of the most important articles of the UNESCO Convention, Articles 7 and 9.<sup>85</sup>

### 3.1. Implementing Article 7 of the UNESCO Convention

As noted above,<sup>86</sup> Article 7 of the UNESCO Convention already had been weakened by eliminating the obligation of importing states to return works that were illegally exported. Despite this basic limitation on the effectiveness of the UNESCO Convention, it nevertheless is worth examining § 2606 of the Act,<sup>87</sup> the portion of the statute enacting Article 7 of the UNESCO Convention. Section 2606 requires that

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sense of foreboding for those concerned about the ramifications of such investment agreements on the illicit international trade in antiquities:

For archaeologists, the crack of the auctioneer’s hammer sounded an alarm. They have been at war with the marketplace for 25 years, but the entry of corporate investors brings a new intensity to the conflict. Archaeologists fear that dirt will fly everywhere from Peru to Iran as picks, shovels and bulldozers go to work digging for treasure—and destroying sites. Artifacts, no matter how beautiful, cannot tell a story unless they are properly excavated.

*Id.* at 18. The fear caused by Merrin’s purchase appears to be well-founded, particularly as

[t]here can be no doubt about the close connection between the international trade in art and the looting of archaeological sites. Looting occurs because antiquities bring a spiraling price on the marketplace; the market is primarily international; a vast supply of looted antiquities flows abroad from the archaeologically rich countries.

BATOR, *supra* note 20, at 25. Bator goes on to indicate that looting and plundering of archaeological sites is particularly difficult to prevent via legislation or the creation of a legal market for such goods. This is so because there is an insufficient number of trained experts available to supervise work at each of the many unexcavated sites around the world and to ensure the preservation of the important cultural and historical information derived by keeping objects within their original contexts. Since the market “sets a higher price on art masterpieces than on the acquisition of archaeological knowledge,” nothing short of physical protection will effectively keep thieves from looting archaeological sites and, given the sheer number of sites worldwide, the cost of deterrence is simply too great for any of the source countries to bear. *Id.* at 26.

<sup>85</sup> See *supra* note 78.

<sup>86</sup> See *supra* notes 54-68 and accompanying text.

<sup>87</sup> 19 U.S.C. § 2606 (1988 & Supp. 1994).

importers obtain an export certificate or other documentation<sup>88</sup> from states of origin indicating that works of art falling within the rather narrow definition of "archaeological or ethnological material"<sup>89</sup> have been exported legally from the state.<sup>90</sup> If such a certificate or other "satisfactory evidence"<sup>91</sup> is unavailable at the time of entry into the United States,<sup>92</sup> the customs officer involved shall refuse to release the works of art from custody until the certificate or other evidence of legal export is provided.<sup>93</sup> Due to the limited scope of § 2606, however, the impediment created by the certificate requirement has not been significant.

### 3.2. *Implementing Article 9 of the UNESCO Convention*

Due to the moot quality of Article 7 in the United States, the most important article of the UNESCO Convention arguably is Article 9. Article 9 provides an avenue for States Parties to the UNESCO Convention to request assistance from one another when their cultural heritage is severely threatened.<sup>94</sup> These requests may be made only by countries

<sup>88</sup> *Id.* § 2606(a).

<sup>89</sup> *Id.* The term is defined at the beginning of the Act. See 19 U.S.C. § 2601(2) (Supp. 1994). In particular, it is worth noting that the scope of objects covered by the Act is much narrower than that envisioned by the language of Article 7 of the UNESCO Convention. Article 7 refers simply to "cultural property," which is broadly defined in Article 1. UNESCO Convention, *supra* note 29, art. 1, 823 U.N.T.S. at 234-36. In contrast, the Act states that only objects which are at least 250 years old will qualify as material of "archaeological interest" subject to the import restrictions in § 2606. See 19 U.S.C. § 2601(2) (Supp. 1994).

<sup>90</sup> *Id.* § 2606(a).

<sup>91</sup> *Id.* § 2606(b)(2). The phrase "satisfactory evidence" is defined later in the section. See § 2606(c).

<sup>92</sup> *Id.* § 2606(b).

<sup>93</sup> *Id.*

<sup>94</sup> Article 9 provides as follows:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States 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 concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent

that also are signatories to the UNESCO Convention. Additionally, "[t]he countries applying for help have to supply specific evidence of pillaging"<sup>95</sup> in order to obtain assistance from the United States.

As codified in the Act at §§ 2602-2604,<sup>96</sup> a State Party may petition the United States under Article 9 of the UNESCO Convention<sup>97</sup> for an agreement, either bilateral<sup>98</sup> or multilateral,<sup>99</sup> to apply import restrictions on "archaeological or ethnological material . . . the pillage of which is creating the jeopardy to the cultural patrimony of the State Party. . . ."<sup>100</sup> Such a request must be accompanied by a written statement of the facts describing the problem and the reasons for the request for assistance.<sup>101</sup> Any agreement entered into pursuant to § 2602 may not last longer than five years<sup>102</sup> but the President<sup>103</sup> may extend the agreement for additional five-year periods<sup>104</sup> if the circumstances warranting the restrictions still exist<sup>105</sup> and there is no cause for suspension of the agreement.<sup>106</sup> Although it is preferable not to enter into any such agreement without the concurrent implementation of similar import restrictions by other art-importing nations,<sup>107</sup> the President may do so if he or she determines that it still would be beneficial.<sup>108</sup>

irremediable injury to the cultural heritage of the requesting State. UNESCO Convention, *supra* note 29, art. 9, 823 U.N.T.S. at 242.

<sup>95</sup> Stille, *supra* note 22, at 1.

<sup>96</sup> 19 U.S.C. §§ 2602-2604 (1983).

<sup>97</sup> *Id.* § 2602(a)(1).

<sup>98</sup> *Id.* § 2602(a)(2)(A).

<sup>99</sup> *Id.* § 2602(a)(2)(B).

<sup>100</sup> *Id.* § 2602(a)(2)(A).

<sup>101</sup> *Id.* § 2602(a)(3).

<sup>102</sup> *Id.* § 2602(b).

<sup>103</sup> Note that many of the responsibilities conferred on the President under the Act have been "delegated to the Director of the United States Information Agency, acting in consultation with the Secretary of State and the Secretary of the Treasury . . ." Exec. Order No. 12,555, 51 Fed. Reg. 8475 (1986), *reprinted in* 19 U.S.C.A. § 2602 at 257-58 (Supp. 1994).

<sup>104</sup> 19 U.S.C. § 2602(e) (1983).

<sup>105</sup> *Id.* § 2602(e)(1).

<sup>106</sup> *Id.* § 2602(e)(2). *See id.* § 2602(d) (regarding the conditions under which agreements are suspended).

<sup>107</sup> *Id.* § 2602(c)(1).

<sup>108</sup> *Id.* § 2602(c)(2).

In addition to the agreements provided for in § 2602 above, outright bans on the importation of specific types of cultural property may be implemented pursuant to § 2603.<sup>109</sup> In order for this to occur, an "emergency condition"<sup>110</sup> must exist.<sup>111</sup> Although this provision has been used in the past decade,<sup>112</sup> it has been criticized for its complexity and undue bureaucratic requirements.<sup>113</sup> In addition, such emergency import bans do nothing to protect cultural property not threatened by the existence of an "emergency condition."

#### 4. THE PROMISE OF THE UNIDROIT CONVENTION

It is apparent that the UNESCO Convention has not curtailed successfully the illicit trafficking in cultural property, either in the United States or elsewhere. Moreover,

[i]t . . . [has] offered nothing to those who were trying to tackle the huge problem of illicit international trade in cultural objects stolen from individuals and its attempts to control illegal export took no account of the

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<sup>109</sup> *Id.* § 2603. Although § 2603 itself does not explicitly mention bans, they effectively would result under § 2606 since any State Party claiming the existence of an emergency condition warranting import restrictions will not issue export licenses for such material. Without the necessary license or other evidence sufficient to demonstrate legal exportation, all designated cultural property will be seized by the Customs Service upon entry into the United States. See generally 19 U.S.C. § 2606 and *supra* notes 86-93 and accompanying text (discussing the requirements under § 2606).

<sup>110</sup> 19 U.S.C. § 2603(a) (1983).

<sup>111</sup> *Id.* § 2603(b).

<sup>112</sup> It appears to have been used a total of three times. See William H. Honan, *U.S. Returns Stolen Ancient Textiles to Bolivia*, N.Y. TIMES, Sept. 27, 1992, § 1, at 23. For example, in 1991, following a boom in the market for Mayan objects, the United States acted to ban the further importation of ancient Maya artifacts from Guatemala pursuant to the provisions of the Act. See, e.g., Norman Hammond, *U.S. Acts to Halt Plunder of Guatemala's History*, THE TIMES (London), May 6, 1991, at 17 (discussing one instance in which the provision has been used); Stanley Meisler, *U.S. Bans Importing of Mayan Artifacts; Archeology: Action Taken to Preserve the Famed Peten Region of Guatemala, One of the Richest and Most Plundered Sites*, L.A. TIMES, Apr. 26, 1991, at A26 ("Americans are the most avid collectors of Mayan and other artifacts and works of art [from Guatemala]. U.S. officials implied that they hoped the legal prohibition would embarrass American museums and private collectors enough to dry up the market.").

<sup>113</sup> See *Black Market Flourishes Despite Law on Art Relics*, CHI. TRIB., Nov. 28, 1985, at 14D.

very wide difference in views as to what cultural property should be allowed to circulate freely in international markets.<sup>114</sup>

Many commentators feel that the draft UNIDROIT Convention presents an innovative and workable mechanism for controlling the illicit international trade in art.<sup>115</sup> If the UNIDROIT Convention is ratified, the most likely result for contracting states<sup>116</sup> will be that the motley assortment of laws currently governing ownership rights in cultural property will be preempted<sup>117</sup> and substantially harmonized in a

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<sup>114</sup> Crewdson, *supra* note 31, at 45.

<sup>115</sup> See, e.g., LERNER & BRESLER, *supra* note 37, at 160 ("The draft UNIDROIT Convention is an original approach that attempts to balance the conflicting interests of art-exporting and art-importing countries with respect to the protection of cultural property."). See also Claudia Fox, Comment, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 232, 266-67 (1993) (stating, inter alia, that the Convention "would significantly deter illicit art trade without damaging free trade in art").

<sup>116</sup> For the purposes of this Comment, the term "contracting state" refers to any nation that has ratified or otherwise accepted a convention.

<sup>117</sup> As it stands now, the draft UNIDROIT Convention makes no explicit statement regarding preemption of national laws. Nonetheless, Article 10 cryptically provides that: "Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of a stolen or unlawfully [removed] [exported] cultural object than provided for by this Convention." See UNIDROIT Convention, *supra* note 31, art. 10. Article 10 seems to allow a court in a contracting state with a longer statute of limitations, for example, to choose to apply its own limitations period in lieu of the one specified in the Convention for that particular set of circumstances. A lack of uniformity in the law may lead plaintiffs to forum shop in order to locate a jurisdiction more amenable to their claim. Patricia Hambrecht, General Counsel and Senior Vice President of Christie, Manson & Woods International, Inc. (the U.S. subsidiary of the international auction house), has indicated that this would be an unfortunate by-product of the UNIDROIT Convention. She has stated:

[T]he Convention raises a host of troubling jurisdictional points. For example, the chilling effect on commercial transactions would be enormous if an American bidder at auction thought he was potentially subject to the foreign laws of a foreign country that he had never even visited, much less conducted business in, by purchasing a work of art at our Park Avenue galleries. Any international treaty must preempt more restrictive laws of a particular Contracting State or else the UNIDROIT Convention's laudable goal of uniformity will be defeated and prospective plaintiffs will be encouraged to forum shop.

single source.<sup>118</sup> Collectors, gallery owners, curators, and other affected parties could then consult this single source, the UNIDROIT Convention, to determine the legality and prudence of certain transactions under consideration.

The key to any future success of the final version of the UNIDROIT Convention ultimately will be to maintain a balance between the different interests of art-exporting and art-importing nations.<sup>119</sup> Without the support of countries with divergent interests, the UNIDROIT Convention will match the UNESCO Convention's ineffectiveness, becoming irrelevant as the plundering of cultural property continues throughout the world.

#### 4.1. Background

In contrast to the UNESCO Convention, the draft UNIDROIT Convention approaches the problem of the illicit trade in cultural objects from the perspective of private international law.<sup>120</sup> The UNIDROIT Convention effectively

Hambrecht, *supra* note 38, at 3 (emphasis omitted).

<sup>118</sup> Note, however, that this would only be true for claims filed under the UNIDROIT Convention. See Memorandum from Harold S. Burman, Executive Director, Office of the Legal Adviser, State Department, to Advisory Committee on Private International Law on the Status and Issues in the Draft UNIDROIT Convention on International Return of Cultural Property (June 3, 1994) [hereinafter 1994 Burman Memorandum] (on file with author) at 4 (stating that "[r]ecoverey actions for stolen property in the U.S. would presumably proceed wherever possible under existing State law rather than the Convention, since a plaintiff would not be required to provide compensation under State law even if BFP [bona fide possessor] status could be established, unless title had effectively passed").

<sup>119</sup> See UNIDROIT Study LXX - Doc. 23, Committee of Governmental Experts on the International Protection of Cultural Property, Report on the First Session 1-2 (May 6-10, 1991) [hereinafter Report on UNIDROIT First Session] (on file with author). The objective was described as follows:

The real challenge facing the committee [of experts] was to strike an acceptable balance between the interests of the countries of origin of cultural objects and those of the importing countries and between countries advocating the development of the art trade and those following a restrictive policy of cultural nationalism aimed at the retention of cultural property in the country of origin.

*Id.*

<sup>120</sup> The term "private law" is defined as follows:

That portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations. As used in contradistinction to public law, the term



will endow claimants—foreign nations<sup>121</sup> and other dispossessed owners—with certain rights. These claimants may in turn invoke these rights when they believe that they have been wronged and wish to seek redress under the terms of the UNIDROIT Convention. Since the provisions of the UNIDROIT Convention do not restrict the definition of “owner” to public institutions as in the UNESCO Convention,<sup>122</sup> claimants, including private individuals, would be permitted to bring a cause of action in a court located in the country in

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*means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.*

BLACK'S LAW DICTIONARY 1196 (6th ed. 1990) (emphasis added). For a discussion of ownership of cultural property by the state itself, see *supra* note 20. When this is the case, under private law—such as that contemplated by the draft UNIDROIT Convention—the State is treated just like any other claimant.

<sup>121</sup> The consistent reference to countries as “owners” derives from the fact that many of the works of art that travel in the illicit trade belong to the state. This ownership may stem from the public nature of the monument or museum from which the works are taken, but increasingly (within the past 20 years or so), art-rich nations in the Mediterranean, Middle East, and Central and South America have passed statutes vesting title to any unexcavated items in the state so that items “discovered” by looters are deemed to belong to the state. This explains, in part, the reason for the language used in the UNESCO Convention in Article 7(b)(i) regarding the type of cultural property covered by the Convention. See also *supra* note 20.

<sup>122</sup> UNESCO Convention, *supra* note 29, art. 7(b)(i), 823 U.N.T.S. at 240. Article 7(b)(i) of the UNESCO Convention makes clear that only works of art fitting into the definition of “cultural property” set forth in Article 1 that have been “stolen from a museum or a religious or secular public monument or similar institution” are covered by the Convention. *Id.*

As noted by Bator, this limitation in the coverage of the UNESCO Convention means that the “acquisition policies of nongovernmental museums [are] subject only to moral persuasion.” BATOR, *supra* note 20, at 104. But see Boylan, *supra* note 1, at 20 (“[V]irtually every major museum in the world, and more than 8,500 individual directors, curators and other museum professionals, have voluntarily bound themselves to work only within the International Code of Professional Ethics of the International Council of Museums [“ICOM”], and most have their own internal ethical and acquisition codes.”). Boylan, who is the Vice-President of ICOM and chaired the committee which drafted its International Code of Professional Ethics, suggests that despite the apparent weakness of the UNESCO Convention, museums essentially have established their own internal enforcement systems requiring due diligence in the acquisitions arena. This code of ethics, however, has no effect on the actions of private collectors, gallery owners, and dealers.

which the items being sought are currently located. For example, if the works of art are in the possession of a museum in the United States, the claimant may bring suit in state or federal court under the draft UNIDROIT Convention in order to seek enforcement of the rights created by the draft UNIDROIT Convention in that forum.<sup>123</sup> Unlike the enforcement mechanisms provided for in the United States under the Convention on Cultural Property Implementation Act, which vests enforcement power in government agencies such as the Customs Office,<sup>124</sup> the UNIDROIT Convention essentially puts the courts—or other competent authorities—in charge of resolving disputes over cultural property.

As both the title of the draft UNIDROIT Convention and the text of Article 1<sup>125</sup> demonstrate, the Convention covers

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<sup>123</sup> See LERNER & BRESLER, *supra* note 37, at 159. According to the most recent draft of the UNIDROIT Convention, Article 9 of Chapter IV, which covers claims and actions, states in relevant part:

- (1) Without prejudice to the rules concerning jurisdiction in force in the Contracting States, the claimant may in all cases bring a claim under this Convention before the courts or competent authorities of the Contracting State where the cultural object is located.
- (2) The parties may also agree to submit the dispute to another jurisdiction or to arbitration.

UNIDROIT Convention, *supra* note 31, art. 9.

<sup>124</sup> 19 U.S.C. § 2613. Section 2613 provides as follows:

In the customs territory of the United States, and in the Virgin Islands, the provisions of this chapter *shall be enforced by appropriate customs officers*. In any other territory or area within the United States, but not within such customs territory or the Virgin Islands, such provisions shall be enforced by such persons as may be designated by the President.

*Id.* (emphasis added).

In 1986 President Reagan delegated all the significant functions conferred on him by the Convention on Cultural Property Implementation Act to the U.S. Information Agency, the Department of State, and the Department of the Treasury (of which the Customs Service is a part), depending on the specific function concerned. Such delegation to several different branches of the government can only make enforcement of the Act's provisions even more inefficient. See Exec. Order No. 12,555, *supra* note 103, § 2602 (stating in pertinent part that the Secretary of the Interior is designated to carry out the enforcement functions found in § 2613 of the Act); see also Customs Directive No. 5230-15 (Apr. 18, 1991) (describing the applicable statutes and the procedures whereby cultural property is seized or confiscated).

<sup>125</sup> UNIDROIT Convention, *supra* note 31, art. 1. Article 1 provides as follows:

only objects that have been transported across national boundaries.<sup>126</sup> As for the definition of “cultural objects,” Article 2 specifies that they must be of importance “for archaeology, prehistory, history, literature, art or science”<sup>127</sup> and refers the reader to Article 1 of the UNESCO Convention for a list of examples.<sup>128</sup> This method of definition provides guidance to the court or other competent authority<sup>129</sup> presented with a claim, but it also leaves it to that body’s discretion to determine whether an object is of the requisite importance.<sup>130</sup> As it stands now, the draft UNIDROIT Convention does not contain an explicit provision concerning non-retroactivity. It is logical to assume, however, that once

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- This Convention applies to claims of an international character for*
- (a) the restitution of stolen cultural objects removed from the territory of a Contracting State;
  - (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance.

*Id.* (emphasis added).

<sup>126</sup> Note that this was a point discussed—and subsequently decided—at the first negotiating session held in Rome on May 6-10, 1991. See Report on UNIDROIT First Session, *supra* note 119, at 2. See also UNIDROIT Study LXX - Doc. 48, Committee of Governmental Experts on the International Protection of Cultural Property, Report on the Fourth Session 5 (Sept. 29 - Oct. 8, 1993) [hereinafter Report on UNIDROIT Fourth Session] (on file with author) (“Pursuant to the decision taken at the second session of the committee of experts, the text of Article 1 of the preliminary draft provides that the Convention covers only international situations.”).

<sup>127</sup> UNIDROIT Convention, *supra* note 31, art. 2.

<sup>128</sup> *Id.*

<sup>129</sup> See *id.* art. 9(1) (noting that a “claimant may in all cases bring a claim or request under this Convention before the courts or competent authorities of the Contracting State where the cultural object is located”).

<sup>130</sup> See Report on UNIDROIT First Session, *supra* note 119, at 10-11. The discretion left to the adjudicatory body has been described as follows:

[W]hen drafting the present text the study group had been conscious of the fact that unlike the 1970 [UNESCO] Convention, the provisions of which were mainly of a public law character addressed to States, the instrument under preparation in Unidroit [sic] was one which would be applied and interpreted essentially by judges and that its scope of application should therefore be determined in as clear and simple a manner as possible.

*Id.* See also Crewdson, *supra* note 31, at 47 (“[W]hat is and what is not a cultural object will be a matter of judicial decision.”).

it has been ratified and implemented, the Convention will be applied only prospectively.<sup>131</sup>

#### 4.2. *Stolen Cultural Objects*

Chapter II of the draft UNIDROIT Convention covers the restitution of stolen cultural artifacts.<sup>132</sup> Article 3(2), one of several significant and innovative provisions, provides that illegally excavated items<sup>133</sup> or those that are excavated legally but are illegally retained<sup>134</sup> (e.g., by the excavator rather than by the rightful owner, which in many instances will be the State) "shall be deemed to have been stolen."<sup>135</sup> Like all other stolen cultural objects, these must be returned.<sup>136</sup>

It is important to note that for civil law countries that ratify the Convention, this aspect of Chapter II is revolutionary, as it "reverses the general civil law presumption prevalent in continental Europe that a bona fide purchaser of a stolen cultural object acquires good title."<sup>137</sup> In this regard, the UNIDROIT Convention also requires possessors to exercise due diligence when acquiring objects in order to qualify for reasonable compensation upon the return of stolen objects.<sup>138</sup> With respect to the level of compensation

<sup>131</sup> See 1994 Burman Memorandum, *supra* note 118, at 3 (noting the general rule that treaties "can only be applied prospectively unless states agree otherwise" and that the "U.S. made it clear that we would regardless apply a strict non-retroactivity rule through implementing legislation").

<sup>132</sup> UNIDROIT Convention, *supra* note 31, arts. 3-4 (Chapter II is entitled Restitution of Stolen Cultural Objects).

<sup>133</sup> *Id.* art. 3(2).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* art. 3(1) ("The possessor of a cultural object which has been stolen shall return it."). *But see* 1994 Burman Memorandum, *supra* note 118, at 3 (stating that "equating illegal excavation with theft in the first part of the convention covering 'stolen' property raises legal problems that need to be dealt with").

<sup>137</sup> Crewdson, *supra* note 31, at 46.

<sup>138</sup> UNIDROIT Convention, *supra* note 31, art. 4(1). *But see* Report on UNIDROIT Fourth Session, *supra* note 126, at 21 (noting that "[t]he number of cases in which compensation would have to be paid would . . . be limited . . . [because] [i]n practice there would be very few possessors who would be able to prove that they had satisfied all the requirements of due diligence when acquiring a stolen object"). In the event that a claimant is unable to

required, the “[a]bsence of a treaty standard will leave that for courts or authorities in the country where the claim is filed to resolve.”<sup>139</sup>

This requirement of due diligence, though not described in detail in the draft UNIDROIT Convention,<sup>140</sup> undoubtedly will impede the market in stolen works of art. Once this provision of the Convention goes into effect, well-informed individuals and institutions will no longer acquire works hastily and secretly due to the potential future liability in the event of a title dispute.<sup>141</sup> Museums and other institutional purchasers likely will be held to a higher standard of care than individuals with fewer resources available to them.<sup>142</sup>

Article 4(3) also is important since it will be an effective means of preventing the “laundering” of stolen cultural objects through gifts or bequests to otherwise innocent parties.<sup>143</sup> It provides that a “possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.”<sup>144</sup> This focus on acquisition by gift or bequest will have special significance for

pay “reasonable compensation” for an object that has been stolen or illegally exported from it, it may very well be possible for a third party to provide the funds necessary for such payment. UNIDROIT Study LXX - Doc. 39, Committee of Governmental Experts on the International Protection of Cultural Property, Report on the Third Session 22 (Feb. 22-26, 1993) (on file with author) (noting “a consensus that the Convention did not require the owner itself to pay compensation, and that in no way was [the language of Article 4(1)] . . . intended to exclude a system of sponsorship or any other method of paying the compensation”).

<sup>139</sup> 1994 Burman Memorandum, *supra* note 118, at 3. It is worth noting that compensation may vary greatly depending on the standard used. *See id.* (“Compensation can range from full market value in a developed country, to acquisition cost, to ‘value’ determined in the country of origin which could have high social or ethnological value, but much lower market value, especially if the market in that country is restricted.”).

<sup>140</sup> UNIDROIT Convention, *supra* note 31, art. 4(2).

<sup>141</sup> *See* Report on UNIDROIT Fourth Session, *supra* note 126, at 21 (stating that “the *raison d’être* of Article 4 was to penalise those who acquired cultural objects without making serious enquiries into their provenance”).

<sup>142</sup> Article 4 indicates that “regard shall be had to the circumstances of the acquisition, including the character of the parties and the price paid. . . .” *Id.* art. 4(2).

<sup>143</sup> *Id.* art. 4(3).

<sup>144</sup> *Id.* This language appears in the same form in Article 8(5) with respect to illegally exported cultural objects. *Id.* art. 8(5).

museums and other charitable organizations that receive numerous gifts and bequests of works of art, for they will be in the same position as the original possessor with regard to the application of Articles 3 and 4. They therefore will need to exercise particular care in determining the provenance of gifts and bequests as well as purchases of works of art. Essentially, this

“imputed knowledge” rule charges a gratuitous possessor . . . with the knowledge of its donor. The practical import would be to deny compensation to a museum or purchaser required to return an object, even if it could show that it exercised reasonable diligence, if the donor is shown to have had knowledge of illegality of the transfer.<sup>145</sup>

#### 4.3. *Illegally Exported Cultural Objects*

Chapter III of the draft UNIDROIT Convention, which covers the return of illegally exported cultural objects,<sup>146</sup> contains perhaps the most controversial of the Convention's provisions.<sup>147</sup> A direct reaction to the evisceration of the original version of Article 7 of the UNESCO Convention regarding illegally exported cultural property,<sup>148</sup> the current draft UNIDROIT Convention explicitly provides for the return of such objects under conditions set forth in Article 5.<sup>149</sup> Even when those conditions have been met, however, a court may refuse to return a cultural object if it determines that that object “has a closer connection with the culture of the State addressed,”<sup>150</sup> or if the object was previously “unlawfully removed from the State addressed.”<sup>151</sup> In addition, the possessor may be entitled to compensation for the

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<sup>145</sup> 1994 Burman Memorandum, *supra* note 118, at 3.

<sup>146</sup> UNIDROIT Convention, *supra* note 31, arts. 5-8 (Chapter III, entitled Return of Illegally Exported Cultural Objects, is comprised of Articles 5 through 8).

<sup>147</sup> See Crowdsen, *supra* note 31, at 47 (“Chapter III which deals with the return of illegally exported cultural objects ran into problems from the start of the [drafting] . . . sessions.”).

<sup>148</sup> See *supra* notes 54-68 and accompanying text.

<sup>149</sup> UNIDROIT Convention, *supra* note 31, art. 5.

<sup>150</sup> *Id.* art. 6(1)(a).

<sup>151</sup> *Id.* art. 6(1)(b).

return of an illegally exported object if it meets the requirements of Article 8 at the time of the acquisition.<sup>152</sup> Inclusion of Article 5 or similar language in the final draft of the UNIDROIT Convention undoubtedly will create impediments to its ratification and implementation in the United States,<sup>153</sup> which was instrumental in changing the language of the original Article 7 in the UNESCO Convention.<sup>154</sup>

## 5. CONCLUSION

Whether or not the draft UNIDROIT Convention is ratified, the illicit international trade in art undoubtedly will continue. The provisions of the current draft, if enacted in a majority of states, will do a great deal to hinder this trade, but there simply is too much money at stake for thieves and smugglers (as well as art dealers and auction houses) and too little money available for enforcement to eradicate the illicit international trade in art completely. Thus, "so long as there is a world market for beautiful archaeological objects, a substantial amount of looting will persist no matter what regulatory system is installed, because total prevention would entail unacceptable costs."<sup>155</sup> Such strong and highly remunerative market forces<sup>156</sup> seem almost certain to prevail over even the most well-drafted statutes and treaties. Nonetheless, the draft UNIDROIT Convention is a step in the right direction, as it promises to remedy many of the weaknesses of the UNESCO

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<sup>152</sup> See *id.* art. 8(1) (noting that the possessor must have been without actual or constructive knowledge at the time of acquisition in order to qualify for compensation).

<sup>153</sup> It is likely that other art-market nations, none of which ratified the UNESCO Convention, would also refuse to ratify the UNIDROIT Convention with such a provision in the text.

<sup>154</sup> See *supra* notes 54-68 and accompanying text.

<sup>155</sup> BATOR, *supra* note 20, at 49.

<sup>156</sup> The importance of the market should not be underestimated in this area. Plundering and looting do not occur simply because people around the world appreciate objects of beauty. They occur because there is a vast supply of such works of art, a continuous demand, and *tremendous profits to be made in such transactions*. See UNESCO COMPENDIUM, *supra* note 29, at 21. ("[T]he problem of the illicit circulation of cultural property is essentially a consequence of the existence of a market based upon the law of supply and demand. It is practically impossible to prevent all frauds and illicit exports.")

Convention. The draft UNIDROIT Convention provides a glimmer of hope for increased regulation of a market that has become a virtual free-for-all. In the ongoing battle against the illicit international trade in cultural property, each small success counts toward the final goal of preserving the world's cultural property and respecting rights of ownership.



## APPENDIX

**DRAFT UNIDROIT CONVENTION ON THE  
INTERNATIONAL RETURN OF STOLEN  
OR ILLEGALLY EXPORTED CULTURAL OBJECTS**  
as resulted from the fourth session of the Unidroit  
committee of governmental experts on the international  
protection of cultural property  
(Rome, 29 September - 8 October 1993)

**CHAPTER I - SCOPE OF APPLICATION AND  
DEFINITION**

**ARTICLE 1**

This Convention applies to claims of an international character for

(a) the restitution of stolen cultural objects removed from the territory of a Contracting State;

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance.

**ARTICLE 2**

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

## CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

### ARTICLE 3

(1) The possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, an object which has been unlawfully excavated or lawfully excavated and unlawfully retained shall be deemed to have been stolen.

(3) Any claim for restitution shall be brought within a period of [one] [three] year[s] from the time when the claimant knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the time of the theft.

(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State [shall not be subject to prescription] [shall be brought within a time limit of [75] years].

[ For the purposes of this paragraph, a "public collection" consists of a collection of inventoried cultural objects, which is accessible to the public on a [substantial and] regular basis, and is the property of

- (i) a Contracting State [or local or regional authority],
- (ii) an institution substantially financed by a Contracting State [or local or regional authority],
- (iii) a non profit institution which is recognised by a Contracting State [or local or regional authority] (for example by way of tax exemption) as being of [national] [public] [particular] importance, or

- (iv) a religious institution. ]

#### ARTICLE 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled at the time of restitution to payment by the claimant of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

(2) In determining whether the possessor exercised due diligence, regard shall be had to the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained.

(3) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

### CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

#### ARTICLE 5

(1) A Contracting State may request the court or other competent authority of another Contracting State acting under Article 9 to order the return of a cultural object which has

(a) been removed from the territory of the requesting State contrary to its law regulating the export of cultural objects because of their cultural significance;

(b) been temporarily exported from the territory of the requesting State under a permit, for purposes such as

exhibition, research or restoration, and not returned in accordance with the terms of that permit [ , or

(c) been taken from a site contrary to the laws of the requesting State applicable to the excavation of cultural objects and removed from that State ] .

(2) The court or other competent authority of the State addressed shall order the return of the object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests

- (a) the physical preservation of the object or of its context,
- (b) the integrity of a complex object,
- (c) the preservation of information of, for example, a scientific or historical character,
- (d) the use of the object by a living culture, or establishes that the object is of outstanding cultural importance for the requesting State.

(3) Any request made under paragraph 1 shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 and 2 have been met.

(4) Any request for return shall be brought within a period of [one] [three] year[s] from the time when the requesting State knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the date of the export.

## ARTICLE 6

(1) When the requirements of Article 5, paragraph 2 have been satisfied, the court or other competent authority

of the State addressed may only refuse to order the return of a cultural object where

- (a) the object has a closer connection with the culture of the State addressed [ , or
- (b) the object, prior to its unlawful removal from the territory of the requesting State, was unlawfully removed from the State addressed].

(2) The provisions of sub-paragraph (a) of the preceding paragraph shall not apply in the case of objects referred to in Article 5, paragraph 1(b).

#### ARTICLE 7

(1) The provisions of Article 5, paragraph 1 shall not apply where the export of the cultural object is no longer illegal at the time at which the return is requested.

(2) Neither shall they apply where

- (a) the object was exported during the lifetime of the person who created it [or within a period of [five] years following the death of that person]; or
- (b) the creator is not known, if the object was less than [twenty] years old at the time of export [ ; except where the object was made by a member of an indigenous community for use by that community ].

#### ARTICLE 8

(1) The possessor of a cultural object removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance shall be entitled, at the time of the return of the object, to payment by the requesting State of fair and reasonable compensation, provided that the

possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been unlawfully removed.

[ (2) Where a Contracting State has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been illegally exported. ]

(3) Instead of requiring compensation, and in agreement with the requesting State, the possessor may, when returning the object to that State, decide

- (a) to retain ownership of the object; or
- (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees.

(4) The cost of returning the object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

## CHAPTER IV - CLAIMS AND ACTIONS

### ARTICLE 9

(1) Without prejudice to the rules concerning jurisdiction in force in Contracting States, the claimant may in all cases bring a claim or request under this Convention before the courts or other competent authorities of the Contracting State where the cultural object is located.

(2) The parties may also agree to submit the dispute to another jurisdiction or to arbitration.

(3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

## CHAPTER V - FINAL PROVISIONS

### ARTICLE 10

Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of a stolen or illegally exported cultural object than provided for by this Convention.