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The Recovery Of Cultural Artifacts: The Legacy Of Our Archaeological Heritage

I. THE UNIQUE NATURE OF CULTURAL PROPERTY

It is well recognized in international law that since art is part of the cultural history of all states, conventional property concepts do not automatically apply.¹ Perhaps because art is finite and because, once destroyed, it can never be recovered, special distinction is placed on cultural property.² The unique treatment of cultural property has led to numerous restrictions on the traditional rights of ownership, particularly legislation limiting unrestricted alienability of property.³ Many national statutes prohibit the removal of any object of "historical value or significance" without governmental consent.⁴ This type of statute is an implicit recognition of the unique nature of cultural property.⁵ The treatment of cultural property reflects its importance,⁶ and indicates that its preservation and display are the most significant factors to be considered when deciding upon its disposition.⁷ Despite the fact that international law has incorporated the need to avoid the loss of cultural property,⁸ the world still lives with the legacy of cultural property exploitation.⁹ Given this legacy of removal of cultural property, the international community must now reexamine that property's disposition.

¹ S.A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 52 (1978).

² *Dole v. Carter*, 444 F. Supp. 1065 (D.Kan.), *aff'd* 569 F.2d 1109 (10th Cir. 1977). This case dealt with the disposition of Hungary's Holy Crown of St. Stephen. The case was premised on the fact that the nearly thousand year old crown was of extraordinary historical and cultural significance to the people of Hungary.

³ Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 690 (1974).

⁴ Convention for the Protection of the World Cultural and National Heritage, Nov. 16, 1972, art. 4, 11 I.L.M. 1358, 1359 [hereinafter Convention for the Protection].

⁵ *Id.* at 1358.

⁶ There can be no doubt that over the past fifty years the world is a much smaller place, and that it is more acceptable to examine the relative importance of artifacts in relationship to the world, as opposed to a more limited national context.

⁷ European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 140.

⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1945, 249 U.N.T.S. 215, 240. [hereinafter Convention for the Protection of Cultural Property].

⁹ See *Attorney General of New Zealand v. Oritz*, 1 Q.B. 349 (1982), *appeal granted* 3 All E.R. 432 (1982), *aff'd* 2 All E.R. 93 (1983); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), *cert. denied* 444 U.S. 918 (1979); Act approved October 25, 1978, Pub.L. No. 95-517, 92 Stat. 1817.

This Note, through examination of both international agreements and the Schliemann incident, will focus primarily on the question of whether restitution of national cultural property should be permitted when it has been taken overseas at a point in a nation's history when it was subject to domination,¹⁰ colonialism,¹¹ or warfare.¹² This Note will further discuss the two major competing methods of resolving this dispute, incorporation¹³ and recovery,¹⁴ and will conclude that recovery must be permitted under circumstances that demonstrate there is significant doubt as to the validity of the original removal,¹⁵ and where recovery will not place the cultural property in danger.

II. THE DEFINITION AND IDENTIFICATION PROBLEM

A question that plagues the issue of the disposition of cultural property is the problem of defining and identifying the parties in a dispute. This involves determining whether a nation is art-rich or art-poor, and whether the property in dispute is normal property or cultural property.

A. *The Recovery of Cultural Artifacts: Art-Rich v. Art-Poor Nations*

Art-rich nations are defined as nations with great stores of discovered or undiscovered cultural property.¹⁶ Art-rich nations may also be characterized as underdeveloped¹⁷ and are nations that are usually subject¹⁸ to significant amounts of legal and illegal removal of cultural property. These countries have historically passed little legislative restrictions on the legal and illegal removal of cultural property.¹⁹ Mexico, Egypt, India, and Zaire are a few examples of art-rich nations,²⁰ as defined

¹⁰ Domination similar to the type that was used by the German and British governments through the use of "diplomatic immunity" or "powerful friends" from their respective governments. W. McDONALD, *PROGRESS INTO THE PAST: THE REDISCOVERY OF MYCENAEAN CIVILIZATION* 26-27 (1967).

¹¹ I L. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE — DISCOVERY AND EXCAVATION* 33 (1984) [hereinafter PROTT & O'KEEFE].

¹² An example of this is the German removal of French art after French capitulation in 1940, during World War II.

¹³ Nations which have acquired artifacts often wish to retain those artifacts.

¹⁴ Nations which have lost artifacts often wish to have those artifacts returned.

¹⁵ This position is stated in article 7 of the 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, 240. [hereinafter Prohibiting and Preventing Convention]. Further, one can note that "illegally removed" property is covered by article 7.

¹⁶ Prott, *International Control of Illicit Movement of Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 338 (1983).

¹⁷ Any nation that does have a significant amount of cultural property that is subject to the attempts of more developed nations to remove said cultural property.

¹⁸ In the past history of that art-rich nation or at the present time.

¹⁹ Prott, *supra* note 16, at 334.

²⁰ Other nations that can also be classified as art-rich and underdeveloped include Algeria,

above. On the other hand, art-poor nations are nations with a great desire to acquire art-rich nations' cultural property for display, study, preservation, rescue, and profit. The United States, Great Britain, and West Germany are examples of art-poor nations.²¹

Significant debate has taken place especially in the last ten years over the considerably changed relationship between art-rich and art-poor nations.²² This development is clearly apparent in the field of archaeology.²³ When the early archaeologists first examined cultural property "outside of the civilized world," they came into contact with cultures that had for many centuries been the custodians of our earliest recollections. These inquiries into our classical heritage left later generations with a mixed patrimony.²⁴ The first early adventures in archaeology swelled our knowledge of other peoples, cultures, and human development, and particularly in Europe and the United States, made a great educational impact on the general public.²⁵ The discoveries made about these earlier times in many cases resulted from mixed motivation.²⁶ Many of the art-poor states²⁷ embraced colonial attitudes,²⁸ and economic gain,²⁹ and utilized unsophisticated techniques³⁰ to remove what they could from socially, politically, and economically underdeveloped art-rich nations that possessed great stores of artifacts.³¹ At this point in archaeological history, cultural artifacts went to the nations best equipped to remove and care for them.³² Even today, "the wealth of individuals and nations such as the United States and western European countries has fostered such an economically rewarding market that clan-

Argentina, Brazil, Central African Republic, Cameroon, Dominican Republic, Libya, Niger, Nigeria, and Kampuchea.

²¹ It is important to note that the term art-poor does not mean a nation's dearth of cultural property. A nation such as the United States is endowed with a great deal of what could be termed world cultural property. The distinction lies in who is taking what from whom and under what conditions. The distinction of a nation as art-poor is a function of that nation's desire to acquire more cultural property than it possesses at any given time. In addition, the art-poor nation often has had the ability to remove cultural property from art-rich nations at will.

²² See, e.g., *Proceedings on the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means Of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, reprinted in 4 SYRACUSE J. INT'L L. & COM. 97 (1976) [hereinafter *Proceedings*].

²³ Archaeologists have historically been the individuals who discovered, studied and removed artifacts for art-poor nations.

²⁴ W. McDONALD, *supra* note 10, at 26.

²⁵ Prot, *supra* note 16, at 351.

²⁶ *Id.*

²⁷ H. MILLER, INTERNATIONAL LAW AND MARINE ARCHAEOLOGY 5 (1973).

²⁸ Prot, *supra* note 16, at 338.

²⁹ W. McDONALD, *supra* note 10, at 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

destine activity is encouraged.”³³ Today, as in the past, it is clear that the art-poor status of a nation is a function of its desire and ability to acquire cultural property from art-rich nations. By default, over the past two hundred years the economically wealthy but art-poor nations became the custodians of the world’s treasures of cultural heritage.³⁴

B. *Cultural Property v. Property*

The next question concerns what property is to be protected. The status and the definition of cultural property that is removed from underdeveloped nations has been the subject of extensive international legislative action³⁵ for the past century. The first international body to deal with the preservation of our global heritage with respect to national cultural property was the United Nations Educational Scientific and Cultural Organization (“UNESCO”).³⁶ The codification of an international consensus that advocated the protection of the world’s universal cultural legacy began in response to the extensive devastation of cultural property that occurred during World War II.³⁷ After the war, the international community (through UNESCO) recognized that the removal or destruction of a nation’s cultural property was harmful to the world’s as well as to the combatants’ cultural heritage.³⁸ The UNESCO convention addresses the question of the disposition and definition of cultural property from a global perspective.³⁹ The charter of the Convention strongly reflects the international community’s commitment to protecting the world’s common cultural heritage.⁴⁰ In an attempt to define cultural property in a global context, the charter states that “the wide diffusion of culture”⁴¹ is “a sacred duty which all the nations must fulfill.”⁴² The charter further states that to realize this duty, UNESCO will “maintain, increase and diffuse knowledge . . . by assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science”⁴³

The Convention for the Protection of Cultural Property in the Event of Armed Conflict⁴⁴ addresses itself specifically to the universal nature of

³³ H. MILLER, *supra* note 27.

³⁴ Prott, *supra* note 16, at 350.

³⁵ S.A. WILLIAMS, *supra* note 1, at 52.

³⁶ Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 Stat. 2495, T.I.A.S. No. 1580, at 4 U.N.T.S. 275, 276 [UNESCO Constitution].

³⁷ S.A. WILLIAMS, *supra* note 1, at 53.

³⁸ *Id.*

³⁹ Convention for the Protection of Cultural Property, *supra* note 8.

⁴⁰ UNESCO Constitution, *supra* note 36.

⁴¹ *Id.* at 276.

⁴² *Id.*

⁴³ *Id.* at 278.

⁴⁴ Convention for the Protection of Cultural Property, *supra* note 8.

cultural property.⁴⁵ The contracting parties to the Convention, which include many countries containing great stores of classical cultural property,⁴⁶ were convinced that the "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."⁴⁷ This conviction is based upon the knowledge that "each people makes its [own] contribution to the culture of the world."⁴⁸ The Convention defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people,"⁴⁹ and allows nations to designate items within their respective countries as cultural property.⁵⁰ While the Convention is limited by express terms regarding armed conflict, it embodies the customary international rule that cultural property which is part of humankind's common cultural heritage must be protected from destruction without regard to the nationalistic claims of any one country.⁵¹

III. THE SCHLIEMANN CASE

In order to illustrate the issues involved in the application of the art-rich, art-poor cultural property concepts, it is useful to refer to examples found in the late nineteenth century. From 1870-1894, some of the most important archaeological artifacts of the period were uncovered by the archaeologist and well-known scholar of Trojan history, Heinrich Schliemann.⁵² His personal quest lay in finding proof of the existence of ancient Troy mentioned in Homer's *Iliad*.⁵³ It is imperative to consider whether the artifacts taken during Schliemann's excavations are a part of the common cultural heritage of humankind,⁵⁴ for after Heinrich

⁴⁵ S.A. WILLIAMS, *supra* note 1, at 52.

⁴⁶ Convention for the Protection of Cultural Property, *supra* note 8.

⁴⁷ *Id.* at 240.

⁴⁸ *Id.*

⁴⁹ *Id.* at 242.

⁵⁰ *Id.* at 248. See also Note, *supra* note 3 "[i]t is in this sense that cultural property is universal in character. It demonstrates man's diversity and artistic nature. Such achievements of creation by man cannot be regarded as 'belonging' exclusively to any one nation. Cultural property is a medium through which the peoples of the world may gain intellectual exchange and thus they have a right to claim access to it." *Id.* at 689.

⁵¹ Convention for the Protection of Cultural Property, *supra* note 8.

⁵² K. SCHUCHHARDT, SCHLIEMANN'S EXCAVATIONS: AN ARCHAEOLOGICAL AND HISTORICAL STUDY 8 (E. Sellers trans. 1891).

⁵³ W. McDONALD, *supra* note 10, at 9.

⁵⁴ "In a transport of delight, Schliemann goes on and on with the inventory of 'the Treasure'—more cups and vases of precious metals, lances, daggers, axes, knives . . . packed into the largest silver vase, he records 'two splendid gold diadems . . . a fillet, and four beautiful gold ear-rings of most exquisite workmanship; upon these lay 56 gold ear-rings of exceedingly curious form and 8750 small gold rings, perforated prisms and dice, gold buttons, and similar jewels, which obviously belonged to other ornaments; then followed six gold bracelets, and on the top of all the two small gold goblets,' and the list goes on." *Id.* at 23.

Schliemann discovered the Trojan treasure he removed the artifacts from Turkey to Germany.⁵⁵ The treasure found by Schliemann is evidence of the origins of western man's earliest recorded cultural heritage.⁵⁶ Its find at Troy could also serve as proof of the Trojan War, an event which has profoundly affected western literature through Homer's *Iliad*.⁵⁷ After its removal, the treasure disappeared and the Turkish government has never been able to recover it.⁵⁸ According to the Convention, concern for the preservation of such important cultural artifacts as these transcends the claims of any single nation to such a world resource.⁵⁹ It is further argued that at the time of the excavation, the Turkish government was not well equipped to excavate, study, and care for the Schliemann "Treasure."⁶⁰

Cultural property worthy of being classified as part of our global patrimony must be "of great importance to the cultural heritage of every people."⁶¹ The Schliemann artifacts are considered by many scholars to be such property.⁶² The treasure satisfies the definition of cultural property in two respects. First, the artifacts are our only evidence of the literary Homeric age, and second, the artifacts hold cross-cultural importance for many people.⁶³ The Convention asserts that properly preserving and displaying these artifacts greatly furthers world interest in the protection of world cultural heritage.⁶⁴

The importance people place on protecting their heritage is amply demonstrated by the reception given Schliemann's Trojan discoveries. The ancient ruins of Troy were in total neglect for centuries as a result of a lack of archaeological expertise and motivation on the part of the Turkish government.⁶⁵ It was not until Schliemann arrived from Germany and began his archaeological studies that any attempt was made to re-

⁵⁵ *Id.* at 26.

⁵⁶ K. SCHUCHHARDT, *supra* note 52.

⁵⁷ The Trojan War was an historical event that took place at the height of the Aegean Civilization (ca. 3000-1000 B.C.) involving the pre-Hellenic Bronze Age culture of the Aegean area. The existence of this civilization is suggested in Greek legends, but was proved by the pioneering archaeological discoveries, beginning in 1870, of Heinrich Schliemann, who excavated Troy and Sir Arthur Evans who excavated Knossos in Crete.

⁵⁸ K. SCHUCHHARDT, *supra* note 52, at 26.

⁵⁹ Prohibiting and Preventing Convention, *supra* note 15.

⁶⁰ K. SCHUCHHARDT, *supra* note 52.

⁶¹ Convention for the Protection of Cultural Property, *supra* note 8, at 242.

⁶² Other artifacts similar in nature have been recognized by both the legal and the art worlds to be of significant cultural importance to the people in the region where the artifacts were found.

⁶³ The artifacts are cross-cultural in that they are evidence of a people that are part of the foundation of western civilization. This foundation is therefore of great importance to all Western or Western-influenced cultures.

⁶⁴ Prohibiting and Preventing Convention, *supra* note 15, at 234.

⁶⁵ W. McDONALD, *supra* note 10, at 17.

cover the Trojan works from oblivion.⁶⁶ The Turkish government recognized that Schliemann's interest in the excavations was partly motivated by an intention to ensure the protection, preservation, and display of these buried masterworks,⁶⁷ but they did not realize that his intentions were also influenced by greed, glory, and contempt for the modern cultural heritage of Turkey.⁶⁸ His actions are one example of the mixed patrimony of past archaeological exploration, the benefit of preservation and discovery, and the burden of removal and disregard for national controls.⁶⁹

International law explicitly recognizes that artifacts can achieve the status of being part of humankind's common heritage⁷⁰ and must be administered for the good and benefit of humankind.⁷¹ The pieces found in the Schliemann excavation must be preserved, protected, and relocated for the benefit of all people, not just to satisfy the nationalistic yearning of any one nation.⁷² The question is whether removal of artifacts is the only way to preserve protected artifacts for the benefit of all. Many nations now have the resources to care for artifacts that in the past would have been sent to Europe without hesitation.⁷³ On the other hand, parochial claims by nations may deny humankind's common cultural heritage in a brazen attempt to expropriate for itself that which cannot belong to any one nation, but which must be preserved for all by those capable of doing so.⁷⁴

During the period in which the artifacts were not in the possession of the government, Turkey failed to ratify the Convention.⁷⁵ By this lack of ratification, Turkey may have impliedly accepted the status quo, including the ownership of the lost artifacts, and now must treat the country of possession as the country of origin of the artifacts, provided the only international agreement to be used is UNESCO.⁷⁶ As a general rule, the Convention is intended to legitimize the status quo existing at

⁶⁶ *Id.*

⁶⁷ *Id.* at 27.

⁶⁸ *Id.* at 26.

⁶⁹ This is the primary dichotomy that any international organization must examine in defining humankind cultural heritage. In many real world events this problem is an issue of degree, how much protection the "civilized world" can provide versus how important it is to the underdeveloped nation to keep the artifacts.

⁷⁰ Convention for the Protection of Cultural Property, *supra* note 8, at 240.

⁷¹ *Id.*

⁷² UNESCO Convention, *supra* note 32, art. I.

⁷³ Egypt is an example of such a nation. Nationalism has aided this country in placing greater resources towards the protection of world cultural property.

⁷⁴ Prohibiting and Preventing Convention, *supra* note 15, at 234.

⁷⁵ *Id.* at 232.

⁷⁶ For a related view, compare *Proceedings*, *supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

the time it is ratified.⁷⁷ Artifacts such as those Schliemann discovered at Troy are now considered by many to be part of the cultural heritage of humankind.⁷⁸

IV. THE PROTECTION OF CULTURAL PROPERTY

A. *National Efforts*

As international efforts to protect the world's cultural heritage through international agreements were implemented,⁷⁹ and as the social and political development of art-rich⁸⁰ nations increased, these nations developed laws to protect what artifacts still remained within their respective borders.⁸¹ The new strict standards imposed by art-rich nations for the exportation of cultural property were often contrary to the interests of the nations, which had previously imported as many artifacts as possible.⁸² Development of "nationalism"⁸³ and national pride by the relic-rich states contributed to the development of legislation of an unprecedented severity.⁸⁴ "[T]hough criticized by many,"⁸⁵ these strict new laws were "a natural reaction to some of the more deplorable incidents of eighteenth and nineteenth century 'archaeology'."⁸⁶

B. *International Agreements*

The benefit to humankind which art-poor nations provide through the protection of endangered cultural property is supported by interna-

⁷⁷ Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L. L.J. 537, 545 (1971).

⁷⁸ Schliemann's very important contribution to the "cultural heritage of mankind" was to show that there had been a great and very unique civilization in the area around the Aegean Sea that predated classical civilization. This revelation, to Schliemann's delight, was now accepted by most scholars as evidence that Homer, the author of the *Iliad* was right.

⁷⁹ A series of conventions, treaties, and other international agreements have been formed since 1907.

⁸⁰ An art-rich nation includes any nation that has a significant archaeological or artistic endowment that is subject to less-endowed nations' past, present and future attempts to remove portions of that endowment.

⁸¹ PROTTS & O'KEEFE, *supra* note 11, at 33.

⁸² *Id.*

⁸³ These increased nationalistic feelings resulted in part from the urgent feelings of the country's people to protect their nation's cultural property, instead of leaving its disposition in the hands of foreign powers. Such nationalism was usually accompanied by an improved capability to protect cultural property from any type of destruction. An increased capability to protect cultural property did not always result, however. In Greece, for example, no artifact could be removed from the country without approval by Greek authorities, despite the fact that others nations such as Great Britain possessed the resources needed to protect artifacts from the destructive effects of neglect.

⁸⁴ PROTTS & O'KEEFE, *supra* note 11, at 33.

⁸⁵ O'Keefe, *Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level*, 10 SYRACUSE J. INT'L. L. & COM. 352, 357 (1983).

⁸⁶ PROTTS & O'KEEFE, *supra* note 11, at 33.

tional law.⁸⁷ International law strongly encourages the protection, preservation, and display of the world's common cultural heritage in nations which possess the resources to provide protection, as well as the development of facilities to study cultural artifacts placed in their care.⁸⁸ The transnational nature of cultural property is further evidenced in international law by regional agreements, which emphasize that cultural property comprising humankind's common cultural heritage is not the province of any one state.⁸⁹ The European Convention on Cultural Property believes that as a means of achieving the ideal of preserving a common heritage, each nation shall encourage "its national contribution to the common cultural heritage of Europe."⁹⁰ In this document, such diverse nations as Norway and Italy recognized that the Norsemen and the Roman legions were contributions to an overall common cultural heritage which transcends the claims of either nation.

Regional agreements establish that international law recognizes and requires that the global patrimony of humankind be treated as a possession of the entire world.⁹¹ The Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of The American Nations explicitly states that "there is a basic obligation to transmit to coming generations the legacy of their cultural heritage."⁹² Likewise, the European Convention on the Protection of the Archaeological Heritage affirms that "archaeological heritage is essential to a knowledge of the history of civilizations" and acknowledges the joint European responsibility to protect this precious heritage.⁹³ This protection is primarily accomplished by safeguarding and studying the cultural property in the custodial nation.

C. UNESCO

The definitive international Convention on the protection of humankind's common cultural heritage is the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.⁹⁴ Unlike other conventions which are concerned more with the transport of cultural

⁸⁷ The very creation of international protection for great pieces of cultural heritage is a reflection on the importance the international community places on a nation's cultural heritage. Many aspects of international law seek to preserve the custodianship of numerous art-poor nations.

⁸⁸ Prohibiting and Preventing Convention, *supra* note 15, at 238.

⁸⁹ *Id.* at 240.

⁹⁰ European Cultural Convention, *supra* note 7, at 140.

⁹¹ Prohibiting and Preventing Convention, *supra* note 15.

⁹² Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American States, June 16, 1976, 15 I.L.M. 1350.

⁹³ European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 78 U.N.T.S. 227.

⁹⁴ Convention for the Protection, *supra* note 4, at 1358.

property than with its preservation and display,⁹⁵ this Convention was intended to directly protect the world's cultural and natural heritage.⁹⁶ It embodies the basic premise of international law that we have discussed above regarding cultural property: "deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."⁹⁷ The Convention expressly states what international pronouncements on cultural property had already established: each of these pronouncements shows the importance for all peoples of safeguarding unique and irreplaceable property for its original owners.⁹⁸ However, this treatment of cultural property may place too little value on the wishes of nations that produced quality global heritage property.⁹⁹ International organizations such as UNESCO should focus on helping underdeveloped nations care for their cultural property, and not on dissolving traditional property law concepts.¹⁰⁰

The question of disposition of cultural property under the auspices of UNESCO is treated in light of the Convention's desire to preserve humankind's cultural heritage for the benefit of present and future generations.¹⁰¹ Therefore, the manner in which UNESCO addresses the redistribution of cultural property reflects its interest in providing a solution which meets the needs of the country from which the property originated, as well as the long-term needs of humankind's cultural heritage.¹⁰²

UNESCO explicitly recognizes that proper significance given to cultural property is demonstrated by a concern for its safekeeping.¹⁰³ Claims of ownership in this context are irrelevant, and pale before the primary goal of preserving the common cultural heritage of humankind for present and future generations.¹⁰⁴ The Convention states that a duty exists to ensure the "protection and transmission to future generations" of their cultural and natural heritage.¹⁰⁵ International law does not concern itself with which nation "owns" the property, but claims that the

⁹⁵ Prohibiting and Preventing Convention, *supra* note 15, at 234.

⁹⁶ *Id.*

⁹⁷ Convention for the Protection, *supra* note 4, at 1358.

⁹⁸ *Id.*

⁹⁹ As we have discussed, this is property which is of great importance to all cultures.

¹⁰⁰ This would mean that instead of advocating the maintenance of the status quo, international efforts should be directed toward preserving a nation's control for the benefit of future generations which live in and visit the nation of production.

¹⁰¹ UNESCO Convention, *supra* note 36.

¹⁰² *Id.*

¹⁰³ Convention for the Protection, *supra* note 4, at 1358.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1359.

property belongs to all people.¹⁰⁶ The emphasis is on the preservation and transmission of artifacts.¹⁰⁷ This notion of common or global ownership of artifacts with use and benefits to flow to all nations is a common theme in international law. Treaties governing space, for example, acknowledge that space belongs to no one country but is "the province of all mankind"¹⁰⁸ and shall be used "for the benefit of and in the interests of all countries."¹⁰⁹ Similarly, the sea bed and its resources have been declared to be the "the common heritage of mankind"¹¹⁰ and not subject to "appropriation by any means by [any] states or persons."¹¹¹ Moreover, natural resources are recognized as being held for the "benefit of present and future generations"¹¹² with the benefits being "shared by all mankind."¹¹³

IV. THE RECOVERY OR INCORPORATION OF ARTIFACTS

Once it has been determined that the Schliemann artifacts (or any other art works removed from the country of production) are an example of humankind's common cultural heritage,¹¹⁴ the next question is how that property can be returned to the country of production. An art-rich nation's claim for recovery of property that was removed without permission might still fail if it can be shown that the Schliemann treasure has become part of the cultural property of the nation where the treasure resides.¹¹⁵ This is the important question that incorporation presents. Any time we have a nation that was long ago deprived of its cultural heritage, the offending nation may have had time¹¹⁶ to incorporate the artifacts into its own national, cultural heritage.¹¹⁷

The question of the recovery of cultural property is in many cases made more complex by the passage of time.¹¹⁸ Many articles of cultural

¹⁰⁶ *Id.* at 1358.

¹⁰⁷ Prohibiting and Preventing Convention, *supra* note 15, at 234.

¹⁰⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

¹⁰⁹ *Id.*

¹¹⁰ G.A. Res. 2749, 25 U.N. GAOR supp. (No. 28) at 24, U.N. Doc. A/8028 (1970).

¹¹¹ *Id.*

¹¹² Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/Conf. 48/14/Rev. 1 (1972).

¹¹³ *Id.*

¹¹⁴ Prohibiting and Preventing Convention, *supra* note 15, art. 1.

¹¹⁵ For a related view, compare *Proceedings, supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

¹¹⁶ The amount of time that may be required for a nation to consider an artifact part of their national cultural heritage is a function of time and the importance of the article.

¹¹⁷ For a related view, compare *Proceedings, supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

¹¹⁸ S.A. WILLIAMS, *supra* note 1, at 12.

property were removed hundreds of years ago from art-rich nations while they were under foreign domination.¹¹⁹ Many nations dominated in the past now desire the return of artifacts removed long ago.¹²⁰ Today, nations which have lost artifacts¹²¹ of national cultural heritage when they were not in control of their internal policies¹²² wish to have those artifacts returned and are faced with the legal intricacies of the recovery provisions of UNESCO.¹²³ The laws of many art-rich nations permit such a surrender of cultural property.¹²⁴ Signatories to the UNESCO Convention on the Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property¹²⁵ which have ratified UNESCO in their national legislatures are bound to the rule of recovery of cultural property. The United States, for example, has adopted legislation¹²⁶ consistent with articles 6, 7, 8, and 13 of the UNESCO Convention.¹²⁷

A. *The Convention Applied*

An art-rich nation that has had an artifact of cultural heritage removed may obtain jurisdiction in force pursuant to article 7(b)(i),¹²⁸

¹¹⁹ "During the German campaigns of 1794 [by Napoleon] the most notable incidents were the removal of the marble pillars from the Hochminster and the Proserpine sarcophagus from one of the chapels in the cathedral of Aix-la-Chapelle. Rare collections of stained glass of around the sixteenth century were obtained in Cologne. Between 1806 and 1807 the castles of the North German princes were raided. Forty-eight paintings were taken from the famous gallery of Cassel. The Duke of Brunswick lost approximately seventy-eight paintings including some by artists such as Raphael, Titian, Rembrandt and Van Dyck. . . . According to statistics, Berlin and Potsdam lost 60 paintings, Cassel 299, Schwerin 209 and Vienna 250 alone from the Belvedere." *Id.* at 7-8.

¹²⁰ *Id.* at 12.

¹²¹ This was certainly the case in Africa, where the people were subject to the total domination of European nations.

Everywhere a variant of the same process was repeated. First, somewhere in the wilderness, would appear a handful of white men, bringing their inevitable treaties — sometimes printed forms. To get what they wanted, the Europeans commonly had to ascribe powers to the chief which by the customs of the tribe he did not possess — powers to convey sovereignty, sell land, or grant mining concessions. Thus the Africans were baffled at the outset by foreign legal conceptions This led to the widespread system of "indirect rule," by which colonial authorities acted through existing chiefs and tribal forms.

R. PALMER, *A HISTORY OF THE MODERN WORLD* 630 (1984).

¹²² PROTTE & O'KEEFE, *supra* note 11, at 33.

¹²³ Prohibiting and Preventing Convention, *supra* note 15, at 240.

¹²⁴ *Id.*

¹²⁵ *Id.* at note 15.

¹²⁶ For a related view, compare *Proceedings*, *supra* note 22, at 103 n.42 and accompanying text, comment by James A.R. Nafziger concerning the UNESCO convention and the United States six understandings.

¹²⁷ Prohibiting and Preventing Convention, *supra* note 15.

¹²⁸ Article 7 (b)(i) states that "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this

which prohibits the import of cultural property stolen from a museum in another state to a party to the Convention. The art-rich nation may likewise enforce legislation pursuant to article 7(b)(ii),¹²⁹ which provides for the return of any such stolen cultural property.¹³⁰ The principles embodied in this legislation are applicable to a great variety of recovery situations.¹³¹ This problem will most frequently arise when the artifacts were taken before ratification of the UNESCO convention.¹³² The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹³³ of which both art-poor and art-rich nations may be signatories, states in article 4 that property which belongs to the following categories forms part of the cultural heritage of each state: "cultural property found within the national territory¹³⁴ . . . [and] . . . cultural property acquired by archaeological, ethnological or national science missions, with the consent of the competent authorities in the country of origin of such Property."¹³⁵

The Schliemann artifacts from Troy fit squarely within both (b) and (c), thereby qualifying them as the cultural property of the art-rich nation and beyond any claims of the art-poor nation.¹³⁶ The Schliemann artifacts are presently located outside of Turkey.¹³⁷ In addition, it should be noted that at the time of the excavations, permission to exca-

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." *Id.* at 240.

¹²⁹ Article 7 (b)(ii) states that the States to this convention undertake

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 resulting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Request for recovery and return shall be made through diplomatic offices. The resulting 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.

Id. at 240.

¹³⁰ This was seen in the case of Andre Malraux, where Malraux was charged with stealing Khmer sculptures from the temple of Banteay Srei, in Cambodia. Malraux and his assistant were sentenced to prison in July, 1924; although the sentences were ultimately set aside on appeal, Malraux was never able to establish title to the sculptures.

K. MEYER, *THE PLUNDERED PAST* 142-43 (1977).

¹³¹ Prohibiting and Preventing Convention, *supra* note 15, at 240.

¹³² Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹³³ *Id.* at 240.

¹³⁴ *Id.* at 236.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ W. McDONALD, *supra* note 10, at 26.

vate was given by the Turkish government.¹³⁸ It would seem that action also fulfills the sole requirement of article 4(b)¹³⁹, as interpreted by other commentators.¹⁴⁰ However, an art-poor nation may not only claim possession, but may also claim that the Schliemann artifacts are reposing legally within its boundaries.¹⁴¹ This claim is thought to be substantiated by the art-poor nation's satisfaction of the two-fold test of legitimate cultural property set forth in article 4(c).¹⁴² First, the cultural property must be acquired by an archaeological mission and second, such an acquisition must be made with the consent of the competent authorities of the country of origin.¹⁴³ Whether both conditions are met in a case like the Schliemann artifacts rests on timing and history.¹⁴⁴ If one looks at the UNESCO Convention of 1970 as year one, then all acquisitions previously acquired are to be considered originating in the country in which they resided as of 1970. The artifacts acquired by a nation prior to 1970 would be eligible for incorporation under article 4.¹⁴⁵

In the celebrated case of the Elgin Marbles,¹⁴⁶ artifacts originally produced and discovered in Greece, which were later removed to England,¹⁴⁷ were stolen from the British National Museum and returned to Greece. Professor Nafziger states that "under Article 4 of the UNESCO Convention, the Marbles would clearly form a part of England's cultural heritage."¹⁴⁸ Likewise, the artifacts of Troy now clearly form a part of the cultural heritage of the country of possession. By signing and ratifying the UNESCO Convention, a nation is held to have accepted the status quo regarding ownership of lost artifacts; it must then promulgate legislation which effectively prohibits the import of the stolen piece¹⁴⁹ of

¹³⁸ The stealthy removal of the treasure and nearly all of the other finds from Turkey to Athens is not a happy story. But apart from the charges and counter-charges about broken agreements, one can point out that Schliemann was simply following accepted practice. In those days the fortunate discoverer of archaeological riches in the soil of 'underdeveloped' countries took it for granted that he would carry home the loot.

Id.

¹³⁹ Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁴⁰ For a related view, compare *Proceedings*, *supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

¹⁴¹ Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Timing is important in determining the country of origin. For example, under articles 4(b) and 4(c), an art-poor nation who illegally removed artifacts from an art-rich country at the time UNESCO was ratified, would be defined as the country of origin.

¹⁴⁵ Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁴⁶ S.A. WILLIAMS, *supra* note 1, at 9.

¹⁴⁷ *Id.* at 10-11.

¹⁴⁸ For a related view, compare *Proceedings*, *supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

¹⁴⁹ S.A. WILLIAMS, *supra* note 1, at 12.

the art-rich nation's cultural heritage into the art-poor nation's¹⁵⁰ inventories.

The "country of origin," as we have seen, is defined as that country wherein cultural property is found at the time of the UNESCO Convention.¹⁵¹ This is the generally accepted interpretation that is deemed consistent with the intent of the drafters of the convention.¹⁵² It is logical to say that many of the drafters did not intend otherwise, since to return all articles of cultural property to the country where they were first produced would require stripping the walls of the museums of the world and returning all works questionably acquired, such as works by Picasso and Dali to Spain, all works by Rembrandt to the Netherlands, and all works by Andy Warhol to the United States.¹⁵³ The drafters of the convention intended to maintain the status quo, rather than to require such a result.¹⁵⁴ Restitution in many cases would further upset the balance of artifacts between art-rich and art-poor nations.¹⁵⁵ The wholesale restitution of cultural property to the country of production would certainly deplete the supply of artifacts in art-poor nations and would therefore increase the value of and incentive for illicit transfer.¹⁵⁶ The mere existence of imbalance makes the illicit expropriation of art-rich nations' artifacts more profitable.¹⁵⁷

B. Frustration of Local Policy

The removal of artifacts by an art-poor nation, which complied with the art-rich nation's law for exportation of such goods causes the art-poor nation to have legal possession of the artifacts.¹⁵⁸ This would be the

¹⁵⁰ In the case of *Rosenberg v. Fischer* there was a claim for the restitution of works of art which had been seized by the German authorities occupying France, and later sold in Switzerland to the defendant. Under Swiss law the plaintiff was entitled to reclaim the property from the present possessor in good or bad faith, if he had been despoiled of the said property by a belligerent occupying the territory where it was situated, contrary to international law. The court held that restitution must be granted. 6 *Annuaire Suisse de Droit Int'l* 139 15 I.L.R. 467 (1948). *Id.* at 20.

¹⁵¹ For a related view, compare *Proceedings, supra* note 22, at 105, comment by James A.R. Nafziger concerning property protected under the UNESCO convention.

¹⁵² *Id.* at 106 (comment by James A.R. Nafziger concerning the Elgin Marbles).

¹⁵³ The crucial fact in the evaluation of when an artifact is eligible for recovery under article 7(b)(i),(ii) depends on the identification of the country of origin. This classification is defined as the country in possession of artifacts at the time of ratification as opposed to the country of production.

¹⁵⁴ For a related view, compare *Proceedings, supra* note 22, at 106, comment by James A.R. Nafziger concerning the Elgin Marbles.

¹⁵⁵ S.A. WILLIAMS, *supra* note 1, at 12.

¹⁵⁶ "The wealth of individuals and nations such as the United States and Western European countries has fostered such an economically rewarding market that clandestine activity is encouraged." H. MILLER, *supra* note 27, at 5.

¹⁵⁷ H. MILLER, *supra* note 27, at 5.

¹⁵⁸ An example is Turkey's desire to recover the Elgin Marbles: "England was at peace with Turkey, and it was through the intercourse of diplomatic relations that Lord Elgin obtained the

case even when the art-poor nation had, by today's standards, an unprecedented level of control over the governments of many underdeveloped art-rich countries.¹⁵⁹ At the time Schliemann removed the Troy treasure, England's ability to influence Turkish affairs of state was unprecedented by today's standards.¹⁶⁰ Alternatively, even if the export law was violated, such a law is a domestic penal law of art-rich nations that, it has been argued, cannot be enforced beyond their respective boundaries. As noted in the following:

If any country should have legislation prohibiting export of works of art . . . then that falls into the category of "public laws" which will not be enforced by the courts of the country to which it is exported or any other country: because it is an act done in exercise of sovereign authority which will not be enforced outside its own territory.¹⁶¹

Therefore, even if an art-poor nation were in violation of an art-rich nation's export law, that law has no extraterritorial effect, and therefore the artifacts in question would be considered incorporated by the art-poor nation.¹⁶² If such laws are considered to have extraterritorial effect, art-poor nations' incorporation of artifacts may still make recovery more difficult.¹⁶³

The bulk of the Schliemann artifacts, which included thousands of items, was acquired by Schliemann's archaeological efforts.¹⁶⁴ Schliemann was a well known classical scholar with an appreciation for antiquities.¹⁶⁵ As such, his efforts to preserve these items were character-

marbles for the Sultan." S.A. WILLIAMS, *supra* note 1, at 12. See also Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁵⁹ W. McDONALD, *supra* note 10, at 26.

¹⁶⁰ *Id.*

¹⁶¹ Attorney General of New Zealand v. Ortiz, 3 W.L.R. 570 (1983), 3 All. E.R. 432, 459 (1981). In this case the plaintiff government sought a court injunction restraining the sale of a series of wooden door panels carved by Maori craftsmen and an order affecting a forfeiture to the plaintiff of the panels. The government claimed that the panels had been removed from New Zealand in violation of its antiquities and customs laws. The two principal issues concerned whether, under New Zealand law, the Crown had become the owner of the carvings and was entitled to possession, and whether certain New Zealand laws could be enforced by an English court. The court first rejected the plaintiff's claims of forfeiture, holding that the government of New Zealand had not seized the property before it left the country, and that New Zealand and English law both required actual seizure in order to effect its forfeiture. Thus, the court concluded that "forfeiture" could not be automatic or implied, nor could it be effected extraterritorially. The court also concluded that it would not enforce the New Zealand forfeiture provisions regardless of whether they were labeled "penal" or "public."

¹⁶² See Prohibiting and Preventing Convention, *supra* note 15, at 236. Compare with *Proceedings*, *supra* note 22, at 106 (comment by James A.R. Nafziger concerning the Elgin Marbles).

¹⁶³ S.A. WILLIAMS, *supra* note 1.

¹⁶⁴ K. SCHUCHHARDT, *supra* note 52, at 5.

¹⁶⁵ *Id.* at 15.

ized as an archaeological mission, but contrary facts are now available.¹⁶⁶ The requirement of consent by competent authorities is also satisfied by Schliemann's acquisition.¹⁶⁷ The consent by the Turkish government¹⁶⁸ constituted the consent of the competent authority of the country of origin, but on this point there is also contrary evidence.¹⁶⁹

Prior to UNESCO, other forms of international agreements were used to help with pre-UNESCO incorporation problems.¹⁷⁰ If during an expedition in 1908, an art-poor nation discovered and removed artifacts from an art-rich nation, the treaty in force between the art-poor and art-rich nation could have been the Hague Convention on Laws and Customs of War on Land.¹⁷¹ The only provision of this treaty covering cultural property was limited to cultural property which was the property of "municipalities, that of institutions dedicated to religion, charity and education, the arts and science."¹⁷² Failure to specify the source of the artifacts that many art-poor nations acquired during the period before the ratification of UNESCO would have resulted in frustration for the art-rich nation that attempted to use the Hague Convention to recover their cultural property.¹⁷³ Today the artifacts would be considered to have been incorporated into the cultural heritage of the art-poor nation.¹⁷⁴ Therefore, the art-rich nation's challenge to the removal of artifacts originally produced in their respective nations depends on records and proof from a time in many art-rich nations' histories when such procedures may have been unheard of.¹⁷⁵

V. CONCLUSION: RECOVERY OR INCORPORATION

This struggle between the right of the art-poor nation to incorporation and the art-rich nation to recovery touches the very heart of the controversy between the developed and underdeveloped world.¹⁷⁶ This struggle begins with "Elginism."¹⁷⁷ As discussed above, the principle of

¹⁶⁶ "But the discovery of intrinsically valuable objects was clearly a major motivation for excavation all through the nineteenth century and earlier." W. McDONALD, *supra* note 10.

¹⁶⁷ *Id.* at 26.

¹⁶⁸ *Id.* at 27.

¹⁶⁹ Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁷⁰ Hague Convention on Laws and Customs of War on Land, 36 Stat. 2277, TS 539; 1 Bevans 631.

¹⁷¹ *Id.*

¹⁷² *Id.* art. 56; 1 Bevans 653.

¹⁷³ It is difficult to identify artifacts which were taken from a country when the nation had never seen the artifact; this also makes recovery almost impossible. W. McDONALD, *supra* note 10, at 27.

¹⁷⁴ Prohibiting and Preventing Convention, *supra* note 15, at 236.

¹⁷⁵ W. McDONALD, *supra* note 10, at 27.

¹⁷⁶ *Id.* at 26.

¹⁷⁷ "The term 'elginism' has become synonymous with the uprooting of ancient monuments

world against national cultural heritage is a question specific to the circumstance of any cultural property dispute.¹⁷⁸ The resolution between the forces of recovery and those of incorporation must serve both goals equally. The overemphasis of national cultural heritage may result in the isolation, or worse, the destruction of artifacts that should be removed and protected.¹⁷⁹ Conversely, the overemphasis on world cultural heritage may result in the extraction of important national cultural pieces to such a degree that cautious art-rich nations may unconditionally prohibit the removal of any artifacts.¹⁸⁰ Both principles, carried too far, have the same result: the deprivation in the entire world of the free exchange of a primary means of universal expression—art.¹⁸¹

Fortunately, the question of how to resolve this controversy is often clarified with the examination of a particular controversy. Our discussion adopts a different focus when we acknowledge that many artifacts have been taken from nations in their infancy, or in a state of turmoil. For under the veil of official sanction or scientific archaeology, many artifacts like Schliemann's were removed under circumstances inconsistent with UNESCO's goals.¹⁸² For this reason, recovery must be permitted under circumstances where there is significant doubt as to the competency of the authority granting permission.¹⁸³ This should be evaluated in light of the importance of the artifact at the time of removal, and at the present time. Archaeological missions of dubious scientific qualifications¹⁸⁴ which have removed artifacts should also be examined with a bias to recovery. Many of the art-rich nations of today have developed to such a state that it can no longer be argued that they are unable to provide for or protect important articles.¹⁸⁵ Today the underdeveloped nations of yesteryear are ready and willing to protect their own national cultural heritage, as well as their portion of the world's.

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piece by piece or in their entirety and then exporting them under the guise of legality. The transfer is effected by an official transaction with the country of origin." S.A. WILLIAMS, *supra* note 1, at 9.

¹⁷⁸ See K. MEYER, *supra* note 130, at 142-43.

¹⁷⁹ Prott, *supra* note 16, at 338-39.

¹⁸⁰ *Id.*

¹⁸¹ S.A. WILLIAMS, *supra* note 1, at 170.

¹⁸² W. McDONALD, *supra* note 10, at 26.

¹⁸³ It is stated that "illegally removed" property is covered by article 7 of the Convention on the Means of Prohibiting and Preventing, *supra* note 15, at 240.

¹⁸⁴ Using procedures like those set forth in article 9. *E.g., id.* at 242.

¹⁸⁵ *Id.*

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