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Securing the Future of Our Past: Current Efforts to Protect Cultural Property

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Securing the Future of Our Past: Current Efforts to Protect Cultural Property

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I. INTRODUCTION

The pervasive problem of theft and illicit trading in cultural art, artifacts and antiquities rages on despite growing appreciation for the irreplaceable value of such cultural property¹ and the numerous national and international efforts to preserve and protect these objects that are so integral to our maintenance of human history and cultural identity.² The recent prolific boom in the illicit art trade is partially attributable to the economic prosperity of the 1980s, which helped create a new consumer group of nouveau-riche business executives, drug dealers needing to launder drug money, and millionaire investors disappointed by the stock market.³ Another factor is the inability of nations to agree on a uniform set of legal principles to regulate art trafficking; thus, elusive thieves and smugglers are able to manipulate their way through the unsynchronized legal fingers of

1. See M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 436 (1994) (explaining that, unlike most natural resources, archeological resources are not renewable). Note that Vernon's article addressed the protection of non-moveable, culturally significant sites as opposed to moveable cultural property, however the note relied heavily on principles and theories founded in the controversies of moveable cultural property protection. See also International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, *opened for signature* June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT] (noting in the appendix of the convention that

"[t]he states parties to the convention are deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal and indigenous or other communities, and also to the heritage of all peoples, and in particular by pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information.").

Id.

2. See Vernon, *supra* note 1, at 26 (stating that as recognition of the importance of cultural property increases worldwide, numerous agreements, treaties, and conventions have come into existence to encourage the protection, preservation, and sharing of the world's common cultural heritage); see also Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 64, 76 (1993) (giving a historical overview of all positive laws enacted in the United States for the purpose of promoting cultural property preservation); see *infra* notes 47-163 and accompanying text (discussing the historical development of international treaties and U.S. domestic law); see also John Henry Merryman, *The Public Interest In Cultural Property*, 77 CAL. L. REV. 339 (1989) [hereinafter Merryman, *The Public Interest*] (explaining that a great deal of public, corporate and individual time, effort and money are spent finding, preserving, studying, exhibiting, interpreting and enjoying cultural objects).

3. See Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985 (1995) (citing *The Frenzied Art Market*, WORLD PRESS REV., Feb. 1989, at 48). Because it is so financially rewarding, and object recovery and arrests are so few, illegal trade in cultural property is an attractive business for criminals. *Id.* See also Jonathan Kandell, *Bare Ruined Choirs: A Western Hunger for Gothic Madonnas and Renaissance Angels Has Fueled the Sacking of Eastern European Churches—and Limited Attempts to Save Them*, L.A. TIMES, Aug. 14, 1994, at 10 (explaining that the rise in religious artifact theft from the churches in Czechoslovakia is due to the fall of Communism which opened up the country's borders, making smuggling easy and giving collectors and dealers in the West access to long unavailable artworks). In 1994, the Ministry of Culture of the Czech Republic estimates that 50,000 objects worth more than US\$100 million have been smuggled abroad since 1990, and the recovery rate is estimated to be eight or nine percent. *Id.*

multiple countries.⁴ We are a world divided into two polar opposite spheres: source nations like Mexico, Egypt, and Greece that are rich in cultural artifacts in excess of internal demand and vigorously oppose the export of cultural objects and want strict laws calling for absolute and mandatory return of illegally exported cultural property; and affluent market nations like Germany, Japan and the United States that have the financial resources to consume these high priced artifacts in excess of supply and seek to promote free trade in art and generally oppose strict repatriation policies.⁵ An additional aggravation to our efforts to prevent illegal cultural property trade is the inability to reconcile competing legal views as to who should prevail as the true owner of stolen artifacts: countries or individuals of origin versus subsequent bona fide purchasers.⁶ Common law countries such as the United States seek to return artwork to states of provenance and original owners, holding fast to the general rule that title cannot pass through theft.⁷ However civil law countries including those of Europe protect the bona fide purchaser in an effort to encourage free commerce and avoid uncertainty in commercial transactions.⁸

4. Claudia Fox, *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, 251-53 (1993) (explaining that each country has its own set of social and legal values preventing international cooperation).

5. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) [hereinafter Merryman, *Two Ways*]. Some nations, including Japan, the United States, Italy and Canada, possess their own significant repositories sources of cultural artifacts in high demand, but also import artifacts from other, less affluent nations. *Id.*; see also Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995) (criticizing the common usage of such terms as "source," "host," "market," "art-rich," and "art-poor" because they are inadequate descriptions that lead to several conceptual biases). For instance, they result in "political branding," which portrays collector nations as colonist-conquerors and source nations as exploited victims. *Id.* Furthermore, "art-rich" implies that a nation owns undiscovered artifacts in its territorial ground, and there is a continued debate on whether a sovereign government should be able to claim title to a generic unidentified body of artifacts. *Id.* Repatriation is defined as the return of cultural objects to nations of origin. Merryman, *Two Ways*, at 844. A nation is considered of origin when its populace includes the cultural descendants of the creators of the cultural objects or when its territory includes original sites from which the cultural objects were last removed. *Id.*

6. Fox, *supra* note 4, at 254-55. Bona fide purchaser is defined as one who pays valuable consideration for property without notice of outstanding rights of others and acts in good faith. BLACK'S LAW DICTIONARY 177 (6th ed. 1990).

7. Fox, *supra* note 4, at 254-55; see also Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOWARD L.J. 17, 21-27 (1993) (noting that common law jurisdictions such as the United Kingdom and the United States follow the principle *nemo dat quod non habet*, meaning no one may give better title than he has, thus no one who receives title through a thief may defeat the ownership claims of the rightful owner in an action for replevin (citing Boris Kozolchyk, *Transfer of Personal Property by a Non-Owner: Its Future in Light of Its Past*, 61 TUL. L. REV. 1453, 1462 (1987) and 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 113 (2d ed. 1987)).

8. Fox, *supra* note 4, at 254-55; see also Collin, *supra* note 7, at 21-27 (discussing the differences between common and civil laws (citing Boris Kozolchyk, *Transfer of Personal Property by a Non-Owner: Its Future in Light of Its Past*, 61 TUL. L. REV. 1453, 1462 (1987) and 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS, 113 (2d ed. 1987)).

Despite all the efforts to promote international cooperation in controlling the international trade in stolen or illegally exported cultural property, this underground industry is one of the most prolific and lucrative, second only to drug trafficking.⁹ Is the world community losing the battle of protecting our heritage for the education, inspiration and enjoyment of future generations? Whatever the legal and social differences, humankind collectively shares a common cultural heritage, and the efforts to inhibit the illicit art trade should be engaged in by all nations since the significance of cultural property is such that the entire world has an interest in its protection and preservation.¹⁰

From historical experience, it is evident that the current efforts to curb the illicit art trade implemented in isolation or in combination are unlikely to be the panacea to the illicit art trade that plagues our ability to protect a cultural legacy for future generations.¹¹ We are no longer looking to the horizon; tomorrow is today, and there is an imperative need to establish infrastructure and design innovative approaches that will network private and public sectors to systematically address the problem before an underground industry leaves us with rubble rather than irreplaceable treasures from our past.¹²

This comment summarizes the different theoretical solutions, some of which are incorporated in current U.S. domestic law and multilateral treaties, as to what appears to be an impasse in the fight against illicit trade in cultural property.¹³ In an effort to put the various enforcement strategies into perspective, Part II outlines the multiple definitions of cultural property and the different value treatment given by national legal systems to cultural property preservation.¹⁴ Part III surveys the three multilateral treaties that maintain the greatest participation by nation states including: the 1954 Hague Convention for the Protection of

9. John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1181 (1989); see Fox, *supra* note 4 (citing Kate Dourian, *Art Theft to be Major Problem When Borders Come Down in 1992*, Reuter Libr. Rep., Sept. 16, 1991, available in LEXIS, Nexis Library, OMNI File, which estimates that the worldwide illegal art trade generates between US\$860 million and US\$2.6 billion annually); see also Ricardo Elia, *Ricardo Elia Responds*, ARCHAEOLOGY, May/June 1993, at 1, 17 (stating that almost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came (quoting Thomas Hoving's memoir, MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART (1993)); Robert J. White, *Illegal Traffic in Antiquities Robs a Country's National Heritage*, STAR TRIBUNE, Metro Edition, Sept. 26, 1993, at 23A (comparing the futility of drug wars to that of illicit trading of antiquities which gets less attention because there are fewer art buyers who are more adept at avoiding publicity than drug users)).

10. Vemon, *supra* note 1, at 436 (citing John H. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U.J. INT'L L. & POL. 757, 759 (1983)); see Merryman, *Two Ways*, *supra* note 5, at 55-59 (proposing two views as to who holds interest in cultural property—cultural internationalism is one view that finds damage to cultural property belonging to any people means damage to the cultural heritage of all humankind).

11. See *infra* notes 164-225 and accompanying text (discussing current efforts to stem the illicit art trade and the need for a multifarious regulatory scheme).

12. See *id.*

13. See *id.*

14. See *infra* notes 20-29 and accompanying text.

Cultural Property in the Event of Armed Conflict; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970; and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects that is currently open for signature in Rome, Italy until June 24, 1996.¹⁵ In addition to analyzing the UNIDROIT Convention, Part III also discusses the United States' participation in that Convention.¹⁶ Part IV examines claims for the return or repatriation of cultural property brought in U.S. courts and illustrates the judicial approach toward regulating theft and illegal antiquities trading as well as general enforcement policies under current U.S. and international laws.¹⁷ Part V discusses several practical as well as theoretical solutions to the illegal art trade epidemic, including current national and international enforcement procedures.¹⁸ Finally, Part VI proposes a more holistic approach to stemming the illicit art trade, recognizing that the various legal, social and economic enforcement and preservation tactics in practice or theory share an organic or functional relationship requiring combined implementation in order to control theft and illegal exportation of cultural property.¹⁹

II. BACKGROUND

A. Defining Cultural Property

The numerous and varied definitions given to cultural property contribute to the lack of uniformity in cultural property protection laws.²⁰ A traditional definition of cultural property might be limited to the obvious art, artifacts and antiquities. Today, however, it may include: historic or architecturally significant buildings and other nonmoveable structures; ruins and sunken ships; artificial landscapes and ecological areas; religious objects and sites; and contemporary

15. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 (1956) [hereinafter Hague Convention]; the 1970 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, 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention]; UNIDROIT, *supra* note 1. See *infra* notes 47-108 and accompanying text (discussing these international multilateral agreements).

16. See *infra* notes 66-108 and accompanying text.

17. See *infra* notes 109-63 and accompanying text.

18. See *infra* notes 164-225 and accompanying text.

19. See *infra* notes 213-25 and accompanying text.

20. Borodkin, *supra* note 5, at 379 (explaining that national and international laws seem to confine their definition of protectable artifacts based on their age, scholarly importance, or uniqueness to their national histories). Synonyms for cultural property include the terms "cultural patrimony" and "antiquities," which are often used interchangeably despite their subtly different political implications. *Id.* "Cultural patrimony" implies that an artifact is so significant to a particular society that it is considered an inalienable birthright of its descendants. *Id.*

objects from native and indigenous peoples.²¹ The U.S. Archaeological Resources Protection Act defines cultural property as any material remains of past human life or activities that are of archaeological interest and at least 100 years of age.²² However, according to some anthropologists, an object of antiquity could include something that was made just yesterday if it related to long standing religious or social tradition.²³ The UNESCO Convention²⁴ defines cultural property as rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; property relating to history, including the history of science and technology and military and social history; products of archaeological excavations; elements of artistic or historical monuments or archaeological sites which have been dismembered; antiquities more than 100 years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest; rare manuscripts, old books, documents and publications of special interest; postage, revenue and similar stamps; archives, including sound, photographic and cinematographic archives; articles of furniture more than 100 years old; and old musical instruments.²⁵

The drafters of the UNIDROIT Convention recognized the danger of an exhaustive definition that might exclude objects worthy of protection and therefore broadened the scope of the definition of cultural property.²⁶ The UNIDROIT Convention's definition includes those objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to the Convention.²⁷

For the purpose of this comment, the broader definition of cultural property will be used, but limited to moveable objects that are subject to trade rather than immoveable historic buildings and structures. Furthermore, the international art

21. See *infra* notes 26-27 and accompanying text (discussing the UNIDROIT Convention's preference for a broader, comprehensive definition of cultural property).

22. U.S. Archaeological Resources Protection Act, 93 Stat. 721 (1979) (codified at 16 U.S.C. 470aa-70mm (1988)).

23. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (quoting a professor of anthropology who testified in the case). The requirement that an object be old before it is regarded as an object of historical, cultural significance has been abandoned by the UNIDROIT Convention since art and artifacts created in modern day contribute to the cultural property that nations seek to protect from pillage and exportation. UNIDROIT, *supra* note 1. For instance, the United States passed legislation directed at protecting Indian reservations and objects created for current use in religious and social rituals by Native Americans. Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001-13 (Supp. III 1991).

24. UNESCO is an abbreviation for the United Nations Education, Scientific, and Cultural Organization. UNESCO, *supra* note 15.

25. *Id.*

26. UNIDROIT, *supra* note 1; see also *About the UNIDROIT Conference, Paper by Marina Schneider, UNIDROIT Research Officer*, delivered at London Conference on Art Theft, Nov. 1995, p. 1 (copy on file with *The Transnational Lawyer*) [hereinafter Schneider, *About the UNIDROIT Conference*].

27. UNIDROIT, *supra* note 1; see also Schneider, *About the UNIDROIT Conference, supra* note 26, at 1 (explaining that this list is simply a reproduction of the categories listed in the UNESCO Convention).

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community distinguishes between stolen cultural property and that which is illegally exported.²⁸ This comment addresses theft and illegal trade generally, as two distinct parts of the whole illicit trade problem.²⁹

B. Different Perspectives on Cultural Property Preservation

The importance of leaving behind a legacy to be valued and conserved for present and future generations is generally recognized.³⁰ These nonrenewable historical resources engender a nation's quality of life, economy, and cultural environment.³¹ Cultural property plays an integral role in characterizing and expressing the shared identity and essence of a community, a people and a nation.³²

28. Fox, *supra* note 4, at 234 (criticizing the Fifth Circuit Court of Appeals decision in *United States v. McLain* which eroded the critical distinction between "stolen" and "illegally exported" property, a distinction which is usually made in international agreements including the UNESCO Convention and the UNIDROIT Convention). In *United States v. McLain*, the court upheld a conviction for conspiring to receive and transport unregistered pre-Columbian artifacts through interstate commerce, concluding that under the National Stolen Property Act, where a nation's law clearly declares national ownership of art objects, an item illegally exported in contravention of such a law would be considered stolen. See *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), *rev'd*, 593 F.2d 658 (5th Cir. 1979); National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1976) [hereinafter NSPA]. Article 3 paragraph 2 of the UNIDROIT Convention provides that for the purposes of the Convention, "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the state where the excavation took place." UNIDROIT, *supra* note 1, art. 3, para. 2. The authors of the UNIDROIT Convention abandoned an illustrative definition of theft including "conversion, fraud, international misappropriation of lost property or any other culpable act assimilated thereto," and adopted a narrower definition. In so doing, the authors allow contracting states to extend the application of the Convention to other wrongful acts, hoping that those contracting states will adopt rules even more favorable to the restitution and return of stolen cultural objects. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5. Furthermore, UNIDROIT Article 4(1) requires subsequent bona fide purchasers to prove that they exercised due diligence when acquiring cultural objects and is deemed appropriate in respect to stolen objects; however, the same requirement does not appear in Article 6(1) governing illegally exported goods since a large number of delegations considered that the stigma attaching to theft ought not to be transposed to illegally exported cultural objects. *Id.* at 13-14.

29. UNESCO, *supra* note 15; see Merryman, *Two Ways*, *supra* note 5 (explaining that the UNESCO Convention gives the term "illicit" an expansive meaning as any trade in cultural property that is "effected contrary to the provisions adopted under this Convention by the States Parties thereto").

30. See Merryman, *The Public Interest*, *supra* note 2, at 347 (expounding that cultural objects are the basis of cultural memory, and people take great pains to collect and preserve these objects because we have the instinctive desire to remember and to be remembered, and to forestall the silence that remains after the destruction of culture); see also Thalia Griffiths, *Artifact Looters Cut Down Hopes of Researching Ancient Mali*, THE WASHINGTON POST, Jan. 2, 1995, at A18 (quoting Samual Sidibe, director of Mali's national museum, who is most upset by the irreparable destruction of historical sites now considered useless to archaeologists who rely on those sites to reconstruct history and learn about ancient civilizations from which we came).

31. Phelan, *supra* note 2, at 76 (quoting the reasons given by the State of Florida, which has joined other states in the U.S., for enacting its own preservation law, Fla. Stat. Ann. 267.061 (1)(a) (West 1991)).

32. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1181, 1182-83 (1985) [hereinafter Merryman, *Elgin Marbles*] (recounting the passionate pleas made by Melina Mercouri, the Greek Minister of Culture, requesting the return of sculptures and building portions of the Parthenon that were taken by Thomas Bruce, 7th Earl of Elgin, who later sold them to the British Museum where they are now displayed

Cultural property tells people who they are and where they come from.³³ In helping to preserve the identity of specific cultures, our treasures from the past help the world preserve texture and diversity.³⁴

Beyond these generally accepted concepts of the importance of cultural property, however, divergent ideologies on the value and purpose of cultural property exist.³⁵

1. Cultural Nationalism

Two ways of thinking about cultural property may be referred to as “cultural nationalism” and “cultural internationalism.”³⁶ Cultural nationalism is the dominant view, espoused by most market nations perhaps with the exception of the United States and Switzerland.³⁷ Cultural nationalism or cultural patrimony appears to be rooted in the principle of state sovereignty which recognizes a state’s right to exercise control or govern those activities, people or objects within its territorial boundaries.³⁸ Thus, ownership of cultural property is a right held by the government of the territory in which such property was found.³⁹ To the cultural nationalist, it is strictly the province of that nation to control the protection and access to cultural property within its territorial borders.⁴⁰ From this perspective, one views cultural property as part of a national cultural heritage; one that gives nations as opposed to humankind a special interest, implies the attribution of national character to objects independently of their location or ownership, and legitimizes national export controls and demands for the “repatriation” of property.⁴¹

and known as “The Elgin Marbles”).

33. *Id.* at 1183; see Vernon, *supra* note 1, at 445 (describing cultural property as “the testimony of the creative genius and history of peoples [and] a basic element of their identity”).

34. Merryman, *Elgin Marbles*, *supra* note 32, at 1182-83.

35. See generally Merryman, *Two Ways*, *supra* note 5, at 845-46.

36. *Id.*; see Douglas N. Thomason, *Rolling Back History: The UN General Assembly and the Right to Cultural Property*, 22 CASE W. RES. J. INT’L L. 47 (1990).

37. Merryman, *Two Ways*, *supra* note 5, at 845-46.

38. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* (1995) (explaining the origin and development of the principle of state sovereignty).

39. Merryman, *Two Ways*, *supra* note 5, at 845-46.

40. *Id.*

41. *Id.* (defining “repatriation” as the return of cultural objects to nations of origin or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites from which they were last removed).

2. Cultural Internationalism

Distinct from cultural nationalism is cultural internationalism which views cultural property as components of a common human culture, whatever their place of origin or present location, independent of property rights or national jurisdiction.⁴² Under this perspective, interest in cultural property lies with all nations and all people collectively; any damage to cultural property, irrespective of its point of origin, results in damage to the cultural heritage of all humankind, as each people makes its contribution to the culture of the world.⁴³ The cultural internationalist views cultural nationalism or patrimony as allowing the selfish hoarding of cultural property, limiting or eliminating access to its cultural property by world scholars, scientists and the general populace, creating cultural impoverishment of humankind as a whole.⁴⁴ Since the cultural internationalist believes that cultural property belongs to everyone, whenever its existence is threatened, it is entitled to protection by any external entity capable of effective intervention.⁴⁵ Thus the cultural internationalist believes that sovereign claims of states are subordinate to the human interest in common global history.⁴⁶

III. INTERNATIONAL CULTURAL PROPERTY PROTECTION

A. Multilateral Agreements

The frequency of cultural property theft continues to increase at a significant rate throughout the world, and much of this activity is sponsored by private collectors, galleries and museums who engage in the acquisition and trade of such stolen goods.⁴⁷ In response to the magnitude of the illicit art trade that continues to flourish despite individualized national efforts to curb the illegal movement of cultural property between states, a handful of international multilateral treaties have been created and adopted by almost all source nations and relatively few market nations.

42. Merryman, *Two Ways*, *supra* note 5, at 832.

43. *Id.* at 836; see Vernon, *supra* note 1, at 445-48 (proclaiming that cultural rights are considered human rights, not territorial rights, as evidenced by their inclusion in the United Nations Covenants on Human Rights). Recognizing that cultural property belongs to all of humankind, cultural internationalism finds that such objects are most valuable for their contributions to the understanding of a universal human culture. *Id.*

44. Merryman, *Two Ways*, *supra* note 5, at 845-52 (criticizing the cultural nationalist perspective because it deprives the world access to valuable cultural and historical information by studying the unique objects left behind by past civilizations).

45. See generally Vernon, *supra* note 1 (proposing that there is a need for a new international norm, the doctrine of international right of conditional intervention).

46. *Id.*

47. Collin, *supra* note 7, at 18; see Kandell, *supra* note 3 (claiming that all of Eastern Europe is being depredated by thieves operating on orders from Western collectors and dealers).

1. *The 1954 Hague Convention*

The Hague Convention was the first significant international agreement dedicated solely to the protection of cultural property.⁴⁸ It primarily focuses on protection during wartime and prohibits the destruction of cultural property during periods of armed conflict and belligerent occupation, whether international or civil in nature.⁴⁹ More impressively, its Preamble provides a rationale for the international protection of cultural property stating it is "convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all humankind, since each people makes its contribution to the culture of the world."⁵⁰

The approach taken by the Hague Convention is premised upon the cultural internationalist view.⁵¹ As the first international convention to deal solely with the protection of cultural property, the Hague Convention limits that protection to times of war.⁵² Furthermore, it imposes a responsibility upon each of its participating nations to take all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit a breach of the convention by damaging cultural property absent any justifiable military necessity.⁵³

2. *The 1970 UNESCO Convention*

The UNESCO Convention focuses on private conduct during peacetime thus complements the Hague Convention by protecting cultural property beyond periods of war.⁵⁴ This Convention takes a more moderate approach to the regulation of the problem of illegal cultural property trade.⁵⁵

48. Hague, *supra* note 15; see Phelan, *supra* note 2, at 94; see also Merryman, *Two Ways*, *supra* note 5, at 836.

49. Hague, *supra* note 15; see Phelan, *supra* note 2, at 94.

50. Hague, *supra* note 15; see Merryman, *Two Ways*, *supra* note 5, at 836 (noting that the convention recognized the preservation of the cultural heritage as of great importance for all peoples of the world and that it is important that this heritage receive international protection).

51. Merryman, *Two Ways*, *supra* note 5, at 832-49. The European Cultural Convention, drafted by the European Community shortly after the development of the Hague Convention, also espouses the belief of common heritage in cultural property; European Cultural Convention, Dec. 19, 1954, art. I, 218 U.N.T.S. 139 (1955); Vernon, *supra* note 1, at 461.

52. Hague, *supra* note 15.

53. *Id.*; see Merryman, *Two Ways*, *supra* note 5, at 836-37.

54. UNESCO, *supra* note 15; see Phelan, *supra* note 2, at 63.

55. See Monroe Leigh, *Decisions of Foreign Courts: United Kingdom: Cultural property—territorial theory of sovereignty—seizure as a prerequisite to forfeiture—unenforceability of foreign public laws*, 77 AM. J. INT'L L. 631, 634 (1983) (discussing the case of Attorney-General of New Zealand v. Ortiz, which involved a claim for the recovery of a rare Maori wood carving illegally exported from New Zealand and ultimately sold to a private party in the United Kingdom); see generally UNESCO, *supra* note 15.

The approach taken by the UNESCO Convention is premised on the cultural nationalist perspective.⁵⁶ The UNESCO Convention imposes upon its parties the obligation to take steps to ensure the protection of their own cultural property by setting up appropriate agencies, enacting laws and regulations, listing works of major cultural importance, supervising excavations, and establishing educational and promotional programs.⁵⁷

In understanding that the Hague Convention espouses the cultural internationalist perspective and the UNESCO Convention follows the cultural nationalist approach, one can readily understand the different methods each convention takes in remedying or preventing the undesirable destruction and loss of valuable cultural property.⁵⁸ Following the cultural internationalist approach, the Hague Convention places the primary interest of cultural property in the global collective.⁵⁹ Thus, under the Hague Convention, each individual person, regardless of nationality, must avoid irreparable losses by refraining from destroying property, unless, during times of war, military needs necessitate such destruction.⁶⁰ On the other hand, following the cultural nationalist approach, the UNESCO Convention, placing the primary interest of cultural property in individual nations, seeks to control the removal of cultural property from the jurisdiction of one nation to another and provides repatriation as a remedy.⁶¹

Approximately fifty nations, including the United States, were significantly involved in the drafting process of the UNESCO Convention.⁶² Unfortunately, of the market states, only the United States, Canada and Australia, have become parties to the UNESCO Convention.⁶³ This lack of market state participation has caused much dissatisfaction with this Convention, a situation that prompted the recent development of the UNIDROIT convention.⁶⁴ In the 1980s, UNESCO

56. See Merryman, *Two Ways*, *supra* note 5, at 845-46; see also UNESCO, *supra* note 15 (emphasizing in its Preamble and throughout that the interests of states in the "national cultural heritage," thus supporting the retention of cultural property by source nations).

57. UNESCO, *supra* note 15, arts. 5, 23 and 14.

58. Merryman, *Two Ways*, *supra* note 5, 832-49.

59. *Id.*

60. *Id.*

61. *Id.*

62. UNESCO, *supra* note 15; see Leigh, *supra* note 55, at 634. To its discredit, the United States took eleven years before enacting domestic legislation implementing the UNESCO Convention, the 1983 Convention on Cultural Property Implementation Act, 19 U.S.C.A. §§ 2601-2613 (Supp. V. 1981) [hereinafter CPIA]; see *infra* notes 119-21 and accompanying text (describing the Cultural Property Implementation Act).

63. Market states provide fertile markets encouraging the most abundant activity in illegal trade of stolen objects. UNIDROIT, *supra* note 1; Introductory Note by Harold S. Burman, *supra* note 5 and accompanying text (defining market nations or states as those with the financial affluence to consume costly imported artifacts including the United States, most western European countries, and Japan).

64. UNIDROIT, *supra* note 1 (explaining in its Introductory Note that the dissatisfaction with the impotency of the UNESCO Convention was expressed by recommendations published by UNESCO itself including the problematic discrepancies of laws). The United States attributed the failure of other market states to join that Convention as a contributing factor to its lack of efficacy. *Id.*; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 1 (explaining that the UNESCO law has been largely ignored due to the lack of

asked UNIDROIT, which specializes in private law unification, to undertake preparation of a second treaty that might bring the remaining market states, principally those in Western Europe and Japan, into the treaty regime.⁶⁵

3. *The 1995 UNIDROIT Convention*

The most recent development in the international effort to combat illicit trade of cultural property is the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which was adopted by a conference of over seventy participating countries on June 24, 1995 and remains open for signature in Rome, Italy until June 30, 1996.⁶⁶ The purpose of the UNIDROIT Convention is to harmonize and coordinate the conflicting private law of states and groups of states and to prepare a set of uniform rules to be adopted by these various states.⁶⁷ The Convention set out to accomplish two tasks: first, to deal with the technical problems resulting from different national rules and to draw upon the progress that has been permitted by the evolution of ideas; and second, to contribute to the fight against the increase in the illicit traffic in cultural objects and to show how the national character of the protection of cultural heritage may be adapted to or accompanied by the growth of solidarity between states.⁶⁸

An important drawback of the UNESCO Convention is that its protection is limited to objects stolen from a museum or from a religious or secular public monument or similar institution in the requesting state, and documented as under ownership of that institution.⁶⁹ This conditional protection leaves a private owner without recourse if the state has not "designated"⁷⁰ the object or if the state did not wish to take action.⁷¹ The UNIDROIT Convention⁷² does not require such a

participation by market states with the exception of three notable market nations, the U.S., Australia, and Canada).

65. UNIDROIT, *supra* note 1, Introduction Note by Harold S. Buman; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 1.

66. UNIDROIT, *supra* note 1, Introduction Note by Harold S. Buman.

67. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 2.

68. *Id.* at 2-3.

69. UNESCO, *supra* note 15; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 2.

70. The term designated means that the nation of origin has affirmatively identified and included a particular cultural object or type of cultural object in its protective legislation implementing the UNESCO Convention. See Merryman, *Two Ways*, *supra* note 5, at 844-45 (criticizing the UNESCO Convention's provision which gives nations the power to define "illicit" as they please simply by including certain cultural property in its own domestic legislation).

71. UNIDROIT, *supra* note 1, art. 2; see Schneider *About the UNIDROIT Conference*, *supra* note 26, at 4.

72. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 1-2 (explaining that unlike UNIDROIT, the UNESCO Convention essentially operates through the medium of public international law and of administrative law). The private law aspects of the problem are dealt with principally by Article 7(b)(ii) which places the obligation upon party states to take the appropriate steps in enacting domestic laws to implement the Convention. *Id.* These domestic laws are to seek the recovery and return of a cultural object to the state of origin against just compensation in the event that the object is found in the hands of a person who

designation by the state.⁷³ Therefore, cultural objects stolen from private homes or any kind of private collections that are neither registered with, nor designated by, the state, and do not originate from traditional communities, can be claimed by the original owners.⁷⁴

A more critical role of UNIDROIT is to address the divergent legal views surrounding Article 7(b)(ii) of the UNESCO Convention⁷⁵ and reconcile the conflict between civil law and common law in dealing with the recognition of ownership and legal rights after the transfer of possession of cultural property.⁷⁶ The dilemma stems from the existence of two equally legitimate interests: that of the original owner who has been dispossessed of a cultural object by theft, and that of a purchaser in good faith of the same object.⁷⁷ The common law, which is followed by the United States, protects the rights of the original owner, mandating the return of such object without compensating the loss of the subsequent bona fide purchaser.⁷⁸ However, the civil law, which is followed by European nations, favors the rights of a subsequent bona fide purchaser who is awarded with title, forever depriving the original owner of title.⁷⁹

The states negotiating the UNIDROIT Convention sought a compromise between the competing interests by focusing on the ultimate goal, to determine which rule would be the most effective in discouraging illicit trade.⁸⁰ Unlike the UNESCO Convention, the UNIDROIT agreement mandates the return of illegally exported objects to the country of origin as well as the return of stolen property whose export may or may not have been illegal.⁸¹ Thus, the UNIDROIT Convention establishes a preference for providing protection to the dispossessed owner as opposed to the current possessor.⁸² This is a very important departure

has acquired in good faith or who has valid title to it. *Id.*

73. See *id.* at 4 (explaining that one of the significant contributions of the UNIDROIT Convention was to broaden the UNESCO Convention's enumerated definition of cultural property).

74. UNIDROIT, *supra* note 1, art. 2; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 14.

75. UNESCO, *supra* note 15, art. 7.

76. UNIDROIT, *supra* note 1, arts. 3, 4 and 5; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 2, 4-16.

77. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5 (explaining that neither claimed owner should be penalized, but at the same time it is not possible to fully protect both of them); see Collin, *supra* note 7, at 21-33.

78. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5; see Collin, *supra* note 7, at 21-33.

79. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5; see Collin, *supra* note 7, at 21-33.

80. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 2, 5; see Fox, *supra* note 4.

81. The basic philosophy underlying the UNIDROIT Convention is clearly announced in Article 3(1) which simply states that "[t]he possessor of a cultural object shall return it." UNIDROIT, *supra* note 1, art. 3; see also Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5.

82. UNIDROIT, *supra* note 1; see Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5. The Convention broadly defines "possessor" to include any person against whom a claim for restitution of an object should be brought, keeping in mind that the aim of the Convention is to facilitate the return of cultural objects. UNIDROIT, *supra* note 1.

from the civil law which traditionally provides liberal protection to the good faith purchaser for value.⁸³

Another point of controversy during the preparation of the UNIDROIT Convention was the time limitation period for the bringing of an action for the return of stolen cultural property and the time from which that period should begin to run.⁸⁴ Sensitive to those delegations that argued against any limitation period because it would inevitably legitimize antiquities illegally obtained, the UNIDROIT Convention struck a compromise with those delegations that warned against a potential freeze in the legitimate art trade by establishing three limitation periods.⁸⁵ The first is a short period of three years that begins to run at the time when the claimant knows the location of the cultural object and the identity of its possessor.⁸⁶ The second is a maximum period of fifty years from the time of theft.⁸⁷ The third is an exception whereby no time period limitation is established for those objects which lie at the very heart of each state's cultural heritage, namely those objects belonging to public collections,⁸⁸ which enjoy a special legal status in their countries.⁸⁹ This exception also covers cultural objects forming an

83. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5.

84. *Id.* at 6-7; UNIDROIT, *supra* note 1.

85. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 7; *see Fox, supra* note 4, at 257-60; UNIDROIT, *supra* note 1, art. 3, paras. 3-8.

86. UNIDROIT, *supra* note 1, art. 3, paras. 3, 4; *see Schneider, About the UNIDROIT Conference, supra* note 26, at 7; *see also Fox, supra* note 4, at 257-60. This first time period limitation is also known as the discovery rule, an equitable doctrine which finds that the limitation period does not begin to accrue until the original owner knows or should know of the elements of a claim for stolen cultural property. A rightful owner who has not made attempts to discover the name of the current possessor or the location of the property in a reasonably diligent manner will not have the benefit of an extended statutory period in which to file a claim. *See Collin, supra* note 7, at 25 (explaining different judicial treatment in common law countries with statutory time periods under which victims of theft may sue and recover their property).

87. UNIDROIT, *supra* note 1, art. 3, para. 3; *see Schneider, About the UNIDROIT Conference, supra* note 26, at 7; *see also Fox, supra* note 4, at 257-60.

88. In paragraph 7 of Article 3 of the UNIDROIT Convention, "public collection" is defined as "a group of inventoried or otherwise identified cultural objects owned by (a) a Contracting State; (b) a regional or local authority of a Contracting State; (c) a religious institution in a Contracting State, or (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest."

UNIDROIT, *supra* note 1, art. 3, para. 7. *See Schneider, About the UNIDROIT Conference, supra* note 26, at 7.

89. Schneider, *About the UNIDROIT Conference, supra* note 26, at 7; *see also Fox, supra* note 4, at 257-60 (explaining that Article 3(4) provides a separate rule for restitution in regard to public collections, granting an extension of time for bringing a claim to seventy-five years). The United States is opposed to this special rule which grants additional rights to governmentally funded institutions that hold cultural property, preferring to broaden protection for private collections instead, an approach resisted by Western European Countries. *See Fox, supra* note 4, at 257-60 (citing Request for Comments on the Revised Draft UNIDROIT Convention on the International Protection of Cultural Property: U.S. Positions for the Fourth UNIDROIT Meeting, from Harold S. Burman, Office of the Legal Adviser, Department of State (Aug. 26, 1993)). UNIDROIT, *supra* note 1, art. 3, para. 8. This U.S. opposition is understandable since, unlike most other countries, the United States has developed a system whereby over ninety percent of identified collections are created and held by private non-profit entities (primarily museums and research institutions) rather than by

integral part of an identified monument or an archaeological site.⁹⁰ Additionally, upon the insistence of a number of states, the UNIDROIT Convention extends the time period benefit to claims for the restitution of sacred or communally important cultural objects belonging to and used by a tribal or indigenous community in a contracting state as part of that community's traditional or ritual use.⁹¹

As mentioned earlier, the UNIDROIT Convention's preference of the original owner over the bona fide purchaser imposed a critical departure from the fundamental doctrine of the civil law.⁹² As a concession to civil-law delegations,⁹³ Article 4 provides the payment of fair and reasonable compensation to good faith purchasers for value who can prove that they exercised due diligence⁹⁴ in determining the provenance of a particular antiquity.⁹⁵ Thus, where Article 3 is a departure from the civil law in its favorable treatment of original owners, Article 4 is a departure from the common law because it provides for compulsory compensation to bona fide purchasers of a stolen or illegally exported cultural object.⁹⁶

government controlled or financed institutions. *Id.* Introductory Note by Harold S. Burman.

90. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 7; see Fox, *supra* note 4, at 257-60; UNIDROIT, *supra* note 1, art. para. 8.

91. See Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 7; UNIDROIT, *supra* note 1, art. 3, para. 8.

92. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5.

93. *Id.* at 2-8. Most common law states who had traditionally protected the bona fide purchaser after a very short period of time recognized that their treatment facilitated the laundering of illegally acquired cultural objects into the legitimate art trade and therefore were willing to change their law. However, some felt that an abandonment of such a fundamental concept might involve constitutional problems and that it would be both politically and philosophically difficult to foster such a drastic change unless some provision was made for the payment of compensation. *Id.*

94. The Convention recognized that the normal degree of diligence expected in a normal commercial transaction was insufficient for the purchase of cultural objects. Thus, Article 4 paragraph 4 provides some factors in determining whether the possessor exercised due diligence, thereby entitling it to compensation. It states that "regard shall be had to all 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, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances." UNIDROIT, *supra* note 1, art. 4, para. 4; see Schneider, *About the UNIDROIT Conference*, *supra* note 26 at 9-10.

95. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 8 (acknowledging that the question of good faith becomes decisive and is strictly limited to those purchasers who made careful efforts to avoid acquiring stolen cultural property); see Fox, *supra* note 4; UNIDROIT, *supra* note 1.

96. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 5, 8 (acknowledging that the common law does not provide the bona fide purchaser with compensation). The delegates to the UNIDROIT Convention emphasized that common law nations which currently compel the return of stolen objects without providing compensation are not requested to amend their rules to do so. *Id.* The United States has one such legal system that compels return without compensation. See *infra* notes 125-61 and accompanying text (reviewing U.S. case law where courts have ordered purchasers in good faith to return cultural objects).

This provision for compensation produced another controversy as to who should have to compensate the innocent purchaser.⁹⁷ Originally, Article 4 stated that it was for the claimant or original owner to pay the compensation due to the good faith purchaser for value.⁹⁸ However, source nations urged that this would result in two victims, the innocent purchaser and the dispossessed original owner, who would both suffer by the illegal act of a third person.⁹⁹

Some delegates to the UNIDROIT Convention proposed that compensation should be paid by the seller in bad faith or by an insurance company.¹⁰⁰ In a last minute effort to ensure the success of the diplomatic Conference, Article 4 paragraph 2 now provides that without prejudice to the bona fide purchaser's right to compensation, reasonable efforts shall be made to have any transferor, which could include the looter, smuggler, middleman or dealer, pay the compensation due to the dispossessed innocent purchaser, as long as such action is consistent with the law of the state in which the claim is brought.¹⁰¹ In so doing, the UNIDROIT Convention places the initial financial burden upon any wrongdoer before imposing such burden on the original owner who regains possession of a claimed artifact.¹⁰² Finally, it should be noted that cases in which compensation is payable to the possessor will be rare and probably the exception rather than the rule since the Convention's emphasis is always on the mandatory return of stolen or illegally traded cultural property with the ultimate protection afforded the dispossessed original owner.¹⁰³

Lastly, the UNIDROIT Convention takes different approaches to the treatment of cultural objects that are stolen and those that are illegally exported.¹⁰⁴ While Article 3 announces the bald principle that "[t]he possessor of a cultural object which has been stolen *shall* return it," Article 5 paragraph 1 steers a different course in regard to illegally exported cultural objects by providing that "[a] Contracting State *may* request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported

97. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 9; *see* UNIDROIT, *supra* note 1, art. 4. Although compensating the bona fide purchaser of a stolen cultural object is new to the United States, the underlying equitable principle is consistent with recent developments in U.S. case law. *See also* Fox, *supra* note 4, at 260 (explaining that U.S. courts shift the burden of investigation to the purchasers who must establish diligent efforts in discovering provenance of cultural objects prior to acquisition).

98. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 9.

99. *Id.*; UNIDROIT, *supra* note 1, art. 4.

100. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 9.

101. UNIDROIT, *supra* note 1, art. 4, para. 2.

102. *Id.* para. 3. Paragraph 3 adds that "[p]ayment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person." *Id.* *See* Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 9, 10.

103. *Id.* (explaining that the use of the word "including" in Article 4 paragraph 4 demonstrates the Convention's intent to put the highest of burdens on the subsequent bona fide purchaser).

104. UNIDROIT, *supra* note 1, arts. 3, 5; *see supra* note 28 and accompanying text (explaining that the international community distinguishes between stolen cultural property and that which is illegally exported).

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from the territory of a requesting State.”¹⁰⁵ The significance of this latter provision is that it reflects an awareness and acknowledgment by the UNIDROIT Convention states of international solidarity and the cultural internationalist view of cultural property, possibly showing the beginnings of an evolution in legal thinking away from the cultural nationalist view.¹⁰⁶ What remains to be seen is the extent to which states will recognize foreign claims of repatriation and return such cultural property at the demand of original owners or states of provenance. Although the United States has not ratified the UNIDROIT Convention,¹⁰⁷ U.S. courts apparently are taking the initiative in recognizing claims of repatriation and ordering the return of stolen or illegally exported cultural property.¹⁰⁸

IV. U.S. CULTURAL PROPERTY PROTECTION

A. Brief History of U.S. Cultural Property Protection

Although the United States is credited as a nation that values human rights interests and cultural plurality at the forefront of its contemporary social policy, it has been slow to recognize the importance of protecting its own national cultural heritage.¹⁰⁹ Despite its notoriety as a market nation with affluent collectors

105. *Id.* Similar to the earlier international and regional treaties, the Convention delegates contemplated that cultural objects may be temporarily exported from the territory of the requesting state for exhibition, research or restoration purposes under a permit issued according to its law regulating export, and may not be subsequently returned in a manner required under the permit; thus those objects may constitute illegally exported objects. Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 11, 12.

106. *See supra* notes 36-46 and accompanying text (discussing the two views of cultural property, cultural nationalism and internationalism); *see also* Schneider, *About the UNIDROIT Conference*, *supra* note 26, at 11.

107. UNIDROIT, *supra* note 1, Introductory Note by Harold S. Burman (explaining that the United States abstained from voting on the final approval of the UNIDROIT Convention).

108. *See infra* notes 125-61 and accompanying text (demonstrating that U.S. case law appears to already be following the principles adopted in the UNIDROIT Convention, most importantly, compelling returns of claimed cultural property).

109. Phelan, *supra* note 2 (stating that the United States has been remiss in its efforts to preserve cultural property until recent federal and state legislation that aims to protect cultural treasures); *see* Merryman, *Two Ways*, *supra* note 5, at 850-51 (noting that the United States freely permits the export of cultural property from its own territory); *see also* Merryman, *The Public Interest*, *supra* note 2, at 351. *But see* Archaeological Resources Protection Act, *supra* note 22, 470aa(b). Archaeological Resources Protection Act passed in 1979 to secure for the present and future benefit of the American people, archaeological resources and sites located on public and Indian lands. The Act prohibits the excavation, removal, damage, or alteration of any archaeological resource found on public or Indian land. *Id.* at 470ee(b). The Act prohibits the sale, purchase, transport, exchange or receipt of any archaeological resources removed without permission from public or Indian land. *Id.* at 470ee(a). Any exchange of resources removed from Indian lands is subject to the approval of the Indian tribe which has jurisdiction over the land. *Id.* at 470dd; *see* The Antiquities Act of 1906, even earlier legislation which was passed in response to vandalism at the Casa Grande ruins in Arizona and represented an attempt to preserve Mount Vernon in Virginia. Ch. 3060, 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)); *see generally* Phelan, *supra* note 2 (tracing the history of U.S. legislation designed to identify and preserve our own national cultural heritage).

whose insatiable appetites for cultural objects contribute to the illicit cultural property trade,¹¹⁰ it is the most strongly committed of all market nations, both in declaration and action, to the enforcement of other nations' retentive policies.¹¹¹ This is more evident through U.S. judicial opinions than legislative responses, since the most recent notable U.S. cases appear to favor the rights of the original owner to those of the bona fide purchaser.¹¹² However, our more recent federal legislation reflects the changing trend in U.S. policy to restrict importation of cultural property in response to retentive policies of other nations.¹¹³

1. Legislation

In 1972, the United States adopted the Pre-Columbian Art Act which prohibits the importation of any monument or structure¹¹⁴ from pre-Columbian Indian cultures of Mexico, Central America, South America or the Caribbean Islands without a certificate from the government of the country of origin

110. See generally Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982) (reporting that stolen artifacts have been found in some of the most reputable museums in the United States, including Museum of Fine Art in Boston and the Metropolitan Museum of Art in New York).

111. See Merryman, *Two Ways*, *supra* note 5, at 850-51 (providing examples of U.S. support of foreign retentive laws through bilateral treaties, executive agreements and legislation, including criminal prosecution of smugglers, all in an effort to control the importation of cultural property); see also Merryman, *The Public Interest*, *supra* note 2, at 351 (noting the United States' treatment of cultural property protection is a paradox because most cultural property may be freely exported but the United States does not attempt to retain it); cf. Kandell, *supra* note 3 (illustrating three instances where Eastern European authorities made exceptional efforts to halt smuggling efforts, then recover and return stolen artifacts. In July 1994, police in Bucharest, Romania recovered 200 artifacts stolen from the Budapest Jewish Museum; in 1993, officials in the Czech Republic intercepted a Russian icon and painting collection en route to Vienna; and in November 1992, German police recovered eight Renaissance paintings that had been stolen from the Weimar Museum in the former East Germany); see *Latin American and Caribbean News, News in Brief*, FACTS ON FILE WORLD NEWS DIGEST, Dec. 21, 1992, at 952, G3 (reporting that in September 1992, the United States returned 48 ancient sacred textiles stolen from the Coroma Indians of Bolivia, ending four years of threatened lawsuits and delivering a strong warning against illegal trade in Latin American antiquities).

112. See *infra* notes 125-61 and accompanying text (discussing U.S. case law); see also Phelan, *supra* note 2, at 95 (noting that the United States has only two statutes regulating or prohibiting the importation of artifacts, the Pre-Columbian Art Act and the Convention on Cultural Property Implementation Act, which was passed to implement the UNESCO Convention).

113. See *infra* notes 114-24 and accompanying text (discussing U.S. legislation); see also Merryman, *Two Ways*, *supra* note 5, at 851-52 (noting that since 1970, the United States has gradually introduced various restrictions on the importation of cultural property, indicative of its general direction towards supporting cultural nationalism); but see Phelan, *supra* note 2, at 98 (finding that a motivating factor behind one such legislation, the Convention on Cultural Property Implementation Act, was Congress' recognition that the United States had become a principle market for stolen or illegally exported artifacts which, in some cases, severely strained the United States' relations with the countries of origin).

114. Pre-Columbian Art Act of 1972, Pub. L. No. 92-587, 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)). The cultural property protected includes any stone carving, sculpture, wall art, mural or any fragment or part thereof. *Id.* What is sought to be protected is any immovable monument or architectural structure or mural that is subject to the export control of the country of origin. *Id.* § 2092(a).

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verifying that such exportation did not violate that country's domestic laws.¹¹⁵ If such cultural property is imported into the United States in violation of the laws of the country of origin, it is to be seized and is subject to forfeiture under U.S. customs law.¹¹⁶ Once such property is seized and stored, the importer is given ninety days to produce a certificate or evidence that it was lawfully exported from its country of origin.¹¹⁷ If the importer fails to do so, any such sculpture or mural will be forfeited to the United States; and if the country of origin provides a request in writing, the sculpture or mural will be returned to that country.¹¹⁸

Although the United States ratified the UNESCO Convention in 1972, U.S. Congress did not enact implementing legislation until ten years later.¹¹⁹ In 1983, Congress enacted the Convention on Cultural Property Implementation Act which provides the President the authority to enter into bilateral agreements with any nation participating in the UNESCO Convention when such nation requests the United States to restrict importation of designated archaeological or ethnological objects exported from that nation.¹²⁰ Import restrictions under this Act provide that no designated archaeological or ethnological material exported from the requesting nation of origin could be imported into the United States unless the requesting nation issued a certificate that exportation was not in violation of its laws.¹²¹

A second federal law is the National Stolen Property Act (NSPA), a potent legislative tool that makes it a federal crime to illegally import cultural property into the United States and which the courts have used to enforce foreign repatriation claims of stolen cultural property imported into this country.¹²² The NSPA makes it a felony to knowingly sell or receive stolen goods in interstate or foreign commerce, plus imposes a fine of as much as US\$10,000 and imprisonment for up to ten years.¹²³ If a foreign country asserts legal title to artifacts originating

115. *Id.*

116. *Id.* § 2093.

117. *Id.*

118. *Id.*

119. CPIA, *supra* note 62; see Merryman, *Two Ways*, *supra* note 5 (attributing the ten year delay to a feature of the 1970 UNESCO Convention called a "blank check" whereby nations of origin are allowed to define "illicit" as they please. Thus, if Guatemala adopted legislation that prohibited the export of all pre-Columbian artifacts, then the export of any pre-Columbian object from that country would automatically be considered illicit under the UNESCO Convention). *Id.*

120. *Id.*

121. *Id.*

122. NSPA, *supra* note 28. This U.S. statute provides punishment for the transportation of stolen property in interstate or foreign commerce. *Id.*; but see Borodkin, *supra* note 5, at 395 (proclaiming that the NSPA requirement that claimants prove artifacts in question were excavated illegally is an onerous burden too difficult to meet, and thus virtually eliminates the usefulness of the NSPA in antiquities prosecutions).

123. *Id.*

from within its boundaries, U.S. courts may apply the NSPA to the illegal importation of such artifacts.¹²⁴

2. Case Law

In addition to developing U.S. law and policy which increasingly recognizes the importance of international cultural property protection, U.S. courts have consistently respected foreign laws and requests for repatriation, compelling even bona fide purchasers to return stolen cultural property.¹²⁵

Decided cases are not numerous, and there are currently no U.S. Supreme Court cases involving international claims for repatriation of cultural property.¹²⁶ The following are noteworthy cases that involve controversial legal issues such as statutory time periods, bona fide purchaser protection, growth and certainty in the legitimate art market, and criminal provisions as well as civil remedies available under U.S. law.

Relying on the NSPA,¹²⁷ the U.S. District Court for the Central District of California, in *United States v. Hollinshead*,¹²⁸ convicted an artifact dealer for smuggling from a Mayan ruin in Guatemala via Belize a pre-Columbian stele known as Machaquila Stele 2.¹²⁹ On appeal, the art dealer argued that the district court erroneously instructed the jury that there is a presumption that the defendant had knowledge of the law of Guatemala which characterizes the stele as stolen property.¹³⁰ The Ninth Circuit Court of Appeals upheld the conviction, finding

124. *Id.* When a foreign government has enacted its own legislation vesting within itself the ownership of cultural property, and such object is illegally exported from that foreign country, such object will be deemed stolen under the NSPA. *See* Phelan, *supra* note 2, at 96-97 (explaining the meaning of stolen demonstrated in *United States v. McClain*).

125. *See* *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *see also* Collin, *supra* note 7, at 19-40 (recognizing that American courts have exercised their judicial powers liberally to maintain claims of original owners in recovering property, and have focused on the trafficking problem rather than mere business convenience as evidenced by recent well-publicized cases resulting in the return of much stolen art to original owners).

126. *See supra* note 125 and *infra* notes 127-61 and accompanying text (outlining well-known cases that have come before U.S. courts).

127. NSPA, *supra* note 122; *see supra* notes 123-24 and accompanying text (describing the NSPA).

128. 495 F.2d 1154 (9th Cir. 1974).

129. *Id.* The art dealer, Hollinshead, was one of two defendants convicted of conspiracy to transport stolen property in interstate commerce and of causing the transportation of stolen property in interstate commerce in violation of the National Stolen Property Act. NSPA, *supra* note 122.

130. *Hollinshead*, 495 F.2d at 1155. The district court judge defined the word "stolen" as used in the National Stolen Property Act. "Stolen means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership." NSPA, *supra* note 122.

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that although it must be proven that the defendant knew that the stele was stolen, it was not necessary to prove he knew the law of the country of origin.¹³¹

In *United States v. McClain*,¹³² the Fifth Circuit Court of Appeals held that individuals dealing in foreign cultural property illegally exported from its country of origin may be prosecuted under federal criminal law, the NSPA,¹³³ if the country of origin has enacted a legislative declaration of national ownership prior to the date the object was exported.¹³⁴ As with *United States v. Hollinshead*, the significance of this case was to demonstrate the enforcement power of the NSPA which made the importation of stolen artifacts a felony offense carrying a fine of as much as US\$10,000 and imprisonment for up to ten years.¹³⁵ Thus, the NSPA offers an effective deterrent to participation in the illicit art trade.¹³⁶

*Kunstsammlungen Zu Weimar v. Elicofon*¹³⁷ involved two Albrecht Durer portraits stolen from a German castle during World War II and discovered years later in the possession of a New York art dealer.¹³⁸ Although the dealer argued that he bought the paintings in good faith and that under German law this conferred good title on him, the court applied the common law principle that title to stolen property could not be laundered by means of a bona fide purchase.¹³⁹ Thus, the court determined that New York law should govern because of the State's dominant interest in controlling the commercial standards by which

131. *Hollinshead*, 495 F.2d at 1155-56 (noting that there was overwhelming evidence in both conduct and admissions that the defendant knew it was unlawful under Guatemalan law to remove the stele, and that it had been stolen).

132. 495 F.2d 1154 (9th Cir. 1974).

133. NSPA, *supra* note 122, *see supra* notes 122-24 and accompanying text for discussion about the Act.

134. *McClain*, 495 F.2d 1154. The court relied on the National Stolen Property Act to convict art dealers who paid peasants to smuggle pre-Colombian pots and other artifacts out of Mexico, and then later sold those objects in Texas. *Id.* The court found that ownership of the antiquities had vested in the Mexican government and that the objects were stolen within the meaning of the National Stolen Property Act. *Id.* Note, however, that the case against the defendants in *McClain* was ultimately dismissed because the Fifth Circuit Court of Appeals found that Mexico's definition of state property was too vague to apply against a U.S. citizen; thus, its application would violate his due process rights under the U.S. Constitution. *Id.*

135. NSPA, *supra* note 28; *see Phelan, supra* note 2, at 97-98 (discussing the impact of this case on illicit importation of cultural property in the United States because it provides criminal in addition to civil remedies).

136. *See Leigh, supra* note 55, at 634 (noting that the *McClain* decision has become a serious concern to the American community of museums, art dealers and private collectors); *see generally* Collin, *supra* note 7 (advocating that both civil and criminal laws should be imposed in the effort to combat theft and trafficking art, although the deterrent effect is difficult to measure).

137. 678 F.2d 1150 (2d Cir. 1982).

138. *Id.*

139. *Id.*

business and trade is conducted within the State.¹⁴⁰ The art dealer was ultimately ordered to return the paintings to East Germany.¹⁴¹

A more recent case brought to the highest court in New York, often proclaimed to be the art market capital of the world,¹⁴² was *Solomon R. Guggenheim Foundation v. Lubell*¹⁴³ where the plaintiff sought to recover a US\$200,000 Chagall painting believed to have been stolen by one of its employees in the late 1960s then later sold to the defendants by a well-known New York gallery in 1967.¹⁴⁴ In determining when the State's three year statutory time limitation begins to accrue, the court rejected the discovery rule and adopted the demand and refusal rule that finds a cause of action for replevin against the good faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it.¹⁴⁵ Under the demand and refusal rule, the true owner receives the most liberal protection against even the shortest statutory time periods, while the innocent bona fide purchaser, burdened with proving that the property was not stolen, faces the harshest results regardless of the length of time of possession.¹⁴⁶

*DeWeerth v. Baldinger*¹⁴⁷ involved the theft of a Monet painting valued in excess of US\$500,000 from a private castle in Southern Germany during World War II that was ultimately sold to defendant Baldinger by a well-known New

140. *Id.*; see also Collin, *supra* note 7, at 24 (recognizing that the court applied a well-established rule of private international law, the *lex locus situs* rule which provides that the validity of personal property transfers are to be governed by the law of the country where the property is situated at the time of the transfer). Collin also notes that the *lex locus situs* rule is subject to several exceptions including goods in transit; purchases not in good faith; foreign law that is contrary to the public policy of the forum court, and goods subject to the laws of succession or bankruptcy. *Id.* at 22-23.

141. Elicofon, 678 F.2d 1150.

142. Ashton Hawkins, et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 51 (1995) [hereinafter Hawkins et. al., *A Tale of Two Innocents*]; see *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991) (admitting that the court's adoption of the demand and refusal rule in measuring the accrual of the statute of limitations and its decision in favor of the plaintiff was influenced by the fact that New York enjoys a worldwide reputation as a preeminent cultural center).

143. 569 N.E.2d 426 (N.Y. 1991)

144. *Id.*

145. *Id.* at 429-30 (acknowledging that New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of the good faith purchaser for value).

146. See *Lubell*, 569 N.E.2d at 431-32 (providing, however, that the defendant good faith purchaser may assert a laches defense against the true owner who has not exercised reasonable diligence in locating the stolen property); but see Hawkins et. al., *A Tale of Two Innocents*, *supra* note 142 at 51 (criticizing the court's failure to balance the rights of the two innocent parties and deducing that the demand and refusal rule results in no statute of limitations for the recovery of stolen property and perpetual risk of a claim of recovery by a former owner).

147. 836 F.2d 103 (2d Cir. 1987).

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York art dealer.¹⁴⁸ The district court determined that the true and original owner had made a diligent effort to locate the painting that was stolen in 1946, even though she had not filed suit until 1981.¹⁴⁹ The appellate court, however, held in favor of the bona fide purchaser because it found the original owner's investigations were minimal and her failure to take advantage of special wartime mechanisms set up to locate art lost during World War II, among other things, amounted to inexcusable delay.¹⁵⁰ The court thus found her claim was barred by the applicable statute of limitations.¹⁵¹

*Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*¹⁵² involved an incident where a Greek Orthodox church was vandalized during the Turkish occupation of Cyprus in 1978 and valuable mosaics were removed.¹⁵³ Ten years later, after the mosaics resurfaced in an Indiana art gallery, the church brought a replevin action in U.S. court.¹⁵⁴ The defendant art dealer moved for summary judgment on the basis that the six year Indiana statute of limitations had run.¹⁵⁵ The district court denied this motion on the ground that the equitable doctrine of fraudulent concealment tolled the running of the statutory time period until the church discovered or through reasonable diligence should have discovered the location of the mosaics.¹⁵⁶ The Court of Appeals affirmed, observing that in a replevin action for concealed works of art, a plaintiff cannot be said to have discovered his cause of action until he learns enough facts to form

148. DeWeerth, 836 F.2d 103 (presenting facts that DeWeerth did make diligent efforts to locate the painting from 1946 to 1957 by filing a report with the military government after the war; sending a photograph of the Monet to a medieval painting expert in order to investigate the painting's whereabouts; and finally, sent a list of her stolen art works to the West German federal bureau of investigation).

149. *Id.* (noting that the plaintiff was sixty-seven years of age when she discontinued her effort to locate the painting in 1957 and eighty-three when she filed suit in 1981; and that published registries to assist in locating the painting were not generally circulated; and that the plaintiff as original owner lacked the resources, knowledge and experience to carry on an effective search for an extended period of time).

150. *Id.* (noting that plaintiff DeWeerth failed to publish her loss in museum, gallery and collector listings of lost artworks and she failed to consult records used by art historians to locate the missing artwork). Apparent from the Second Circuit Appellate Court's opinion, had it found the plaintiff had made a diligent effort to locate her stolen paintings, the court would have compelled the bona fide purchaser to return the painting to its original owner even though she had possessed it for thirty years. *Id.*

151. *Id.*

152. 717 F. Supp. 1374 (S.D. Ind. 1989).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* The court concluded that as long as the plaintiff is duly diligent, the inability to discover the possessor of the stolen mosaics invokes the doctrine of fraudulent concealment and tolls the running of the statute of limitations for replevin purposes. *Id.* The principle that limitation periods do not accrue until the plaintiff knows or should know of the elements of a claim is known as the discovery rule. See generally Collin, *supra* note 7, at 25-27 (examining the application of the doctrines of discovery, fraudulent concealment and equitable estoppel in replevin actions for stolen cultural property). Under this rule, a rightful owner who has not made a reasonably diligent effort to discover the name of the current possessor or location of objects sought will not have the benefit of an extended statutory period in which to file a claim. *Id.*

its basis, which must include the fact that the works are being held by another and the works' location.¹⁵⁷

More recently, the Republic of Turkey has brought an action in the U.S. District Court of Massachusetts seeking the recovery of nearly two thousand ancient Greek and Lycian silver coins unearthed in Turkey in 1984.¹⁵⁸ The complaint alleged that the coins were illegally removed from Turkey by persons other than the defendants and that the defendants eventually purchased them with knowledge of their illegal character.¹⁵⁹ The court accepted Turkey's claim that it suffers an ongoing injury caused by its lack of possession of a part of its cultural heritage and determined the loss of the coins is sufficient to sustain a cause of action.¹⁶⁰ Additionally, the court relied on the Seventh Circuit's analysis in *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.* to find that Massachusetts' three year statute of limitations for replevin actions did not bar this action. Such claims were subject to the discovery rule under which a cause of action based on "inherently unknowable" facts begins to accrue only when the injured knows, or in the exercise of reasonable diligence should have known, of the facts giving rise to the cause of action.¹⁶¹

In review of the foregoing synopsis of legislation and case law, promising signs emerge that the United States is recognizing the problem of illicit trading

157. *Autocephalous*, 717 F. Supp. at 1388; see *O'Keefe v. Snyder*, 83 N.J. 478, 416 A.2d 862, 870, which held that artist Georgia O'Keefe's ability to benefit from the delayed rule of accrual under the discovery doctrine in her replevin action for her paintings stolen thirty years earlier depended on whether or not she exercised reasonable diligence in locating the paintings.

158. *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992).

159. *Id.* at 64-67. The complaint further alleges that the defendants and the people who smuggled the coins out of Turkey are engaged in the business of importing stolen property into the United States and selling the property for profit in violation of the National Stolen Property Act. *Id.*; NSPA, *supra* note 28.

160. *Republic of Turkey*, 797 F. Supp. 64. Turkey asserts claims against the defendants for equitable replevin, conversion, constructive trust, and for violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (1995); NSPA *supra* note 28; the National Stolen Property Act, 18 U.S.C. §§2314-15 (1995); the Travel Act, 19 U.S.C. § 1952 (1995); and the money laundering provisions of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 1957 (1995).

161. *Republic of Turkey*, 797 F. Supp. at 69-70. The court gave Turkey's complaint a highly deferential reading, accepting the well-pleaded facts therein as true, that the defendants caused the smugglers to keep their activities in secrecy, that the defendants falsely represented the country of origin of the coins in customs documents, and that the defendants withheld from publishing any information about the coins for several years after acquiring them. *Id.* at 67. The alleged facts that defendants planned to hide the existence or provenance of the coins, if taken as true, were enough for a jury to find that information as to the location or possessor of the stolen coins was inherently unknowable to Turkey for purposes of tolling the statute of limitations under either the discovery rule or the doctrine of fraudulent concealment. *Id.* at 70. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, where the New York Appellate Division determined that the New York statute of limitations did not begin to run until demand for a return of the property was made and refused. The court found in the absence of a demand for property, there can be no cause of action against a bona fide purchaser; and absent a cause of action, the statute of limitation does not begin to accrue. *Id.* Note that this approach to the tolling of the statute of limitations is in accord with the standard adopted in the 1995 UNIDROIT Convention. See *supra* notes 84-91 and accompanying text (discussing the UNIDROIT Convention's three time limitations).

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in cultural property.¹⁶² However, stolen and illegally traded cultural property continues to be imported into the United States at an alarming rate, and it is yet to be seen what role the United States will choose to perform in the international effort to stem illegal trading in cultural property.¹⁶³

V. CURRENT AND PROPOSED EFFORTS TO STEM THE ILLICIT TRADE OF CULTURAL PROPERTY

One of the most alarming effects of the theft of and illegal trading in cultural objects is the destruction and loss of irreplaceable archaeological information that occurs from looting in search of antiquities.¹⁶⁴ In search of a few marketable objects, thieves ransack and obliterate archaeological sites, forever precluding any future study or search for historical data that provides insight into lost civilizations and contextual meaning for objects found at the site.¹⁶⁵ The illegal art market is sustained by the fact that most source nations are poor, developing countries with little or no resources available for the protection, conservation and security of artifacts.¹⁶⁶ To compound the problem of limited financial resources, professional antiquities traffickers are extremely well-organized and well-funded.¹⁶⁷ As a result, professional art traffickers easily elude weak enforcement agencies.¹⁶⁸ Furthermore, many of these enforcement agencies are plagued with

162. See *supra* notes 109-13 (acknowledging the United States' earnest approach to the problem of illegal cultural property trade).

163. See *supra* note 107 and accompanying text (noting that the United States abstained from voting in the approval of the UNIDROIT Convention).

164. See Borodkin, *supra* note 5, at 382 (citing Clemency Coggins, *Archaeology and the Art Market*, 175 *SCIENCE* 263 (1972)).

165. See *id.*; see also Borodkin, *supra* note 5, at 399-400 (noting that although courts can restore stolen artifacts to their owners, they cannot replace lost archaeological information once an artifact has been dismembered, defaced or removed from its context).

166. *Id.* at 384.

167. See William Keeling & Michael Holman, *Survey of Nigeria*, *FIN. TIMES*, Mar. 16, 1992, at XII [hereinafter Keeling & Holman, *Survey of Nigeria*] (explaining that the battle against the illicit art trade is one against internationally financed speculators and dealers who are well connected with police and security systems); see also Borodkin, *supra* note 5, at 385 (illustrating that there are professional smuggling syndicates throughout Europe, and that the line dividing criminal activity on one hand and shrewd business dealing on the other is obscured in the international art world); Collin, *supra* note 7, at 19-21 (illustrating sophisticated trafficking schemes by those who possess the financial resources and contacts to operate illegal art trade transnationally). Professional smugglers are not the only culprits who plunder archaeological sites; poor peasants and other natives willingly seize the opportunity to make money offered by unscrupulous art dealers and collectors who pay handsome prices for their foraging services. See Sharman Stein, *Asian Countries Sue to Get Back Stolen Treasures; Antiquities Show Up in Collections*, *THE TIMES-PICAYUNE*, Jan. 8, 1995, at A2 (stating that many people in Southeast Asian countries are active participants in the theft and illegal trade of cultural property); see also Griffiths, *supra* note 30 (finding that dealers employ peasants to forage historical sites for artifacts, and that these peasants have always scratched in the dirt hoping to find such treasures in order to make some money); White, *supra* note 9 (noting that it is not so surprising that impoverished Peruvians stole valuable artifacts that eventually appeared on the black market).

168. Borodkin, *supra* note 5.

less than honorable officials who accept bribes in exchange for their assistance in moving stolen artifacts across national borders.¹⁶⁹

Enforcement efforts are further challenged by the ease with which stolen or illegally exported artifacts can be purged of their illegal taint in countries that serve as laundering nations to art thieves and traders.¹⁷⁰ Moveable cultural objects are easy to conceal,¹⁷¹ so art thieves, middlemen or other perpetrators transport stolen artifacts to a country with liberal bona fide purchaser laws and short statutory time periods, then stash these stolen goods in private buildings, homes or even bank vaults and await the statutory time to run. When the statutory clock has run, the cultural objects emerge onto the art market scene, cleansed of their illegal character. Once these artifacts arrive on the market scene, the art auction system operates to obscure their origins, while establishing sales records that can imitate provenance.¹⁷² Art dealers rush away from auction houses with their acquisitions then discreetly sell them to clients and collectors who wish to avoid taxes associated with such transfers and protect their identities.¹⁷³

An accurate and comprehensive means of documentation or recordation of valuable antiquities is integral to the regulation of the movement of those objects.¹⁷⁴ For example, in determining whether a possessor is a bona fide purchaser thus entitled to compensation for the return of artifacts, both the UNIDROIT Convention and U.S. courts take into account whether or not those

169. See Mary Battiata, *E. Europe's Art Heritage Being Ravaged by Thieves; Western Collectors Said to Buy Stolen Items*, WASH. POST, Feb. 27, 1992, at A1 (reporting that the Polish customs office fired 160 customs officers for taking bribes from smugglers of stolen religious treasures); see also Borodkin, *supra* note 5, at 393-94 (showing that guards employed to protect archaeological sites and customs officials in artifact-rich countries are underpaid and easily bribed).

170. Collin, *supra* note 7, at 18-34 (investigating the role of private international law in the trade of stolen art). Collin details the legitimization process whereby stolen art is smuggled out of its country of origin then taken to a country in Western Europe such as Switzerland with liberal bona fide purchaser laws. Once the property is inside such a jurisdiction, it remains for the prescribed short time period under a statute of limitations until it can be purged of its tainted title then sold for value. Such transfers produce receipts or bills of sale, which provide access to the legitimate marketplaces such as auction houses that require documentation of good title. *Id.*

171. See *id.* at 20 (noting that cultural objects are easily hidden and easily transported).

172. See generally Borodkin, *supra* note 5, at 385-86 (highlighting the art market and auction processes which have traditionally been shrouded in secrecy in an effort to guard dealer sources and clients in order to corner certain markets, and in the interest of protecting the identities of sellers, dealers and buyers).

173. See *id.* at 386-87; see also Kandell, *supra* note 3 (demonstrating the anonymity of the black market art trade where thieves currently serving prison sentences said they never knew the name of the collector they were operating under, dealing with an intermediary instead who used an alias and vanished as soon as he realized arrests had been made).

174. See *id.* (recognizing that thieves steer clear of artworks prominent enough to appear in international registries or catalogues, and concentrate on less traceable objects). Registries serve to detect stolen works and help deter thieves, and the resale value of stolen works is likely to fall as the registry detection system grows and becomes more effective. See Nick Nuttall, *Computer Listing Aims to Tighten Net on Art Thieves*, THE TIMES, Jan. 16, 1991 (Home news section) (citing Julian Radcliffe, Chairman of the International Art Loss Register). It is much more difficult for original owners to succeed in their replevin claims when the artwork in question is undocumented. Stein, *supra* note 167.

possessors exercised due diligence by consulting any available registries of stolen cultural property to ascertain the provenance of those objects prior to purchase.¹⁷⁵ There are several large databases and registries maintained today,¹⁷⁶ but they contain only a handful of the world's antiquities and other cultural objects, and access to them may prove unweildy.¹⁷⁷ The question remains as to how many and which registries purchasers must resort to in order to be deemed to have exercised due diligence.¹⁷⁸ Ideally, there would be one complete and authoritative registry.¹⁷⁹ Although seriously needed, there are practical obstacles to the development and maintenance of such a registry including the funding, networking and personnel required to create and maintain such a tracking system.¹⁸⁰

A. Legal Framework for Protection

1. National Protection and Site Management

At the heart of cultural nationalist perspective lies the principle that source nations as countries of origin have the superior rights and interest in retaining, protecting and preserving artifacts and antiquities because those objects represent their cultural heritage.¹⁸¹ Primarily subjective, appreciation for certain artifacts

175. See UNIDROIT, *supra* note 1, art. 4 (requiring that the possessor exercise due diligence when acquiring a cultural object and listing the consultation of "any reasonably accessible register of stolen cultural objects" as a supplementary precaution which the possessor is required to take in order to be entitled to compensation); see also *supra* notes 147-51 and accompanying text (discussing U.S. case law where courts allocated to defendant possessors the burden of proving they exercised due diligence in ensuring imported objects were not stolen by consulting antiquities registries).

176. Nuttall, *supra* note 174 (reporting on two such computer databases). In January 1991, the International Art Loss Register was established for the purpose of logging descriptions and pictures of missing works on a computer base. A dealer, auction house, insurance company or private individual wanting to discover if an art work offered for sale is stolen sends a description and photograph by fax or over the telephone, which is then checked against the register by staff in London and New York. *Id.*

177. See *id.* (noting that the International Art Loss Register allows direct access to only the police and staff, and that this new register contains details of 6,000 stolen items, while its older competitor, Lasernet Theft Line, contains only 3,000); see also *Africa 'Losing Its Culture' To Gangs of Art Smugglers; International, EVENING STANDARD*, Jan. 12, 1995, at 21 [hereinafter *Africa Losing Its Culture*] (recognizing that a catalog of artworks stolen from Africa is a limited resource listing only those objects taken from museums and not those taken from archaeological sites or smuggled abroad after being purchased in the marketplace).

178. See *supra* notes 147-51 and accompanying text (showing that U.S. courts have not expressly indicated how many or which registries defendant possessors must examine in order to be deemed a bona fide purchaser who exercised due diligence investigating the provenance of objects they seek to purchase).

179. See Nuttall, *supra* note 174 (noting that both International Art Loss Register and Lasetnet Theft Line representatives accept that, ideally, there should be only one data base for optimum efficiency, and that the two firms are rumored to be discussing a merger).

180. *Africa 'Losing Its Culture'*, *supra* note 177 (noting that Africa's economic and political problems inhibit that country's ability compile thorough inventories of even those objects in museums along with other measures necessary to fight the illegal trading of its cultural property).

181. See *supra* notes 36-41 and accompanying text (discussing cultural nationalism).

begins and often remains regional or site specific,¹⁸² and although there is evidence that people in general care about cultural property preservation,¹⁸³ it is very difficult to find a collective attachment to all cultural objects.¹⁸⁴ What is perceived as culturally valuable, and by whom, varies with time and place.¹⁸⁵ This seems an obvious phenomenon; thus, enforcement efforts advanced by nations of origin would appear to flow naturally and perhaps more efficiently than a global enforcement scheme.¹⁸⁶ National efforts to protect archaeological finds can be provided by both on-site management and monitoring as well as legal controls on exportation.¹⁸⁷

182. Merryman, *The Public Interest*, *supra* note 2, at 342-43 (exploring the universality of appreciation for cultural objects); *see* Kandell, *supra* note 3 (stating that old, traditional families tend to have a strong emotional bond with their castles, and the feeling is that they will do a better job than the government in protecting their properties). An aristocratic family from Prague was forced into exile by both the Nazis and Communists, and in anticipation of reclaiming nine castles in their homeland, the family has taken the initiative to seek out foundation funds to convert several of the estates into art museums and classical music centers. *Id.*; *but see* White, *supra* note 9 (predicting a surge in appreciation and demand for antiquities from the ancient Moche civilization of Peru since such artifacts began appearing on the black markets in 1987, forever plucking that culture from obscurity).

183. Merryman, *The Public Interest*, *supra* note 2, at 342-43 (noting that despite cultural variations, people in most places care about objects that evoke their own and other people's cultures, and that objects valued by people of one culture may be valued by those in others who respond to the object's human component, even though they are not drawn to its specific cultural value).

184. *Id.* at 342 (observing, among other examples, that while many Americans care about the Liberty Bell, most foreigners do not); *but see* James Nold Jr., *Shiki Buton What's Going On? Third World Wonders*, *THE COURIER-JOURNAL*, May 11, 1991, at 4S (finding that there is a growing trend toward mass appreciation of foreign products and the demand for cultural products has moved into the mainstream pop culture markets triggered by several trends including: commercialism; increased education, awareness and appreciation for multiculturalism; and an exotic appeal of anything international).

185. Merryman, *The Public Interest*, *supra* note 2, at 342.

186. *See* Lee Siew Hua, *Saving Asia's Ancient Monuments*, *THE STRAITS TIMES* (Singapore), Jan. 29, 1995, at 1, 5 (declaring that national governments should promulgate and enforce laws that prohibit the encroachment, destruction or looting of cultural property (quoting former Thai premier Dr. Anand Panyarachun during his keynote speech at The Future of Asia's Past conference)); *but see* Merryman, *Two Ways*, *supra* note 5, at 853 (arguing that the basis and validity of cultural nationalism relies on a system of international law in which the state is the principal player; therefore this approach is flawed because the world is in a constant state of political change, and with it the existence and viability of the state). Unfortunately, many valuable, irreplaceable antiquities are left to rot or destroyed within states of origin since most source nations are economically poor and lack the resources or knowledge necessary for proper preservation of archaeological sites and antiquities. *Id.* Furthermore, selfish hoarding by states of origin deprives the rest of the world of distribution and access to cultural property necessary for the cultural appreciation and enrichment of humankind. *Id.* at 845-52. For an exemplary model of national regulatory efforts, *see* Kandell, *supra* note 3 (noting that the Czech Republic has embarked on an aggressive campaign to stop the stealing and smuggling of its national treasures by appointing eight full time art theft investigators; establishing a national police force art squad instructed in art history and identification tactics; installing electronic devices in major museums, castles and churches; and establishing software programs to catalogue artworks and identify stolen objects).

187. *See* White, *supra* note 9 (noting that national leaders recognize that in addition to protecting a national heritage at its source, it is equally important to illegalize unauthorized exportation of cultural property); *cf.* Keeling & Holman, *Survey of Nigeria*, *supra* note 167 (finding that, in addition to legal enforcement schemes, a government's announcement of its policy toward the value of the nation's heritage is essential, as is the public's confidence in the sincerity of that policy announcement).

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However, cultural preservationists harshly criticize the lack of care afforded by many Third World governments that idly stand by as historic ruins are ravaged by locals and foreigners who break off friezes, cornices and statues from historic buildings and steal cultural treasures found at archaeological ruins.¹⁸⁸ Since many source nations are Third World countries, struggling economies are the greatest hurdle in establishing effective national preservation and regulation schemes.¹⁸⁹ Source nations are compassionate about preserving their cultural heritage,¹⁹⁰ but the omnipresence of poverty eclipses governmental concern for cultural property protection.¹⁹¹

2. International Regulation and Enforcement

The underlying principle of the cultural internationalist perspective, antithetical to that of cultural patrimony, is the idea that interest in cultural property, regardless of its source, is collectively held by all humankind.¹⁹² Thus, the need for a global protection and enforcement scheme is indubitable, if not crucial, to the curbing the illicit artifact trade.¹⁹³ Indeed, the inherent nature of art theft and illicit trafficking is international with the trade itself relying on activities and transactions between the various source and market nations. Obviously, repatriation of stolen or unlawfully exported cultural property to the country of

188. *See Laws Fail to Cover Trade; Steep Rise in Antiques Smuggling*, SOUTH CHINA MORNING POST, Sept. 23, 1994, at 7 (quoting a customs official who said there are no laws in Hong Kong to control the importation or exportation of antiquities unless a particular object has been reported stolen and a search for that object is in place). Archaeologists and antiquities experts lament that the failure of states to conduct proper excavations in an orderly manner, documenting what objects came from where, results in the permanent loss of history, and it would be better if found objects were left underground. Stein, *supra* note 167.

189. Battiatà, *supra* note 169 (quoting Daniela Vokolkova of Czechoslovakia's Ministry of Culture who laments that funds necessary to stop the looting of Bohemia are limited, asking, "[h]ow can we spend money on alarms for buildings when we have no money for health and education?").

190. *See* Stein, *supra* note 167 (finding that source countries are beginning to gain a nationalist awareness of antiquities that embrace their cultural heritage).

191. Griffiths, *supra* note 30 (noting that Modern Mali of Africa's Niger River seeks to stem the flow of artifact smuggling but rural poverty is hampering its efforts, and quoting Boubacar Diaby, head of Mali's cultural mission, who said, "[n]ational heritage is rather an abstract concept if you haven't got any money.").

192. *See supra* notes 42-46 and accompanying text (discussing cultural internationalism).

193. *See generally* Merryman, *The Public Interest*, *supra* note 2 (discussing public interest in historic and cultural preservation). The mere existence of historic preservation laws and those regulating archaeological excavations, elaborate legislative schemes controlling the export and import of cultural property in most nations, public agencies and arts ministries, as well as international conventions and other multinational efforts are demonstrative of a world-wide interest in cultural property protection. *Id.* at 343. *See generally* Vernon, *supra* note 1 (supporting an international right of intervention, a global protective regime with limited intervention by an official international agency or body); *see also* Keeling and Holman, *Survey of Nigeria*, *supra* note 167 (finding art smugglers are aided by the failure of some countries to sign multilateral agreements such as the UNESCO Convention and thus crippling efforts to establish a global regulatory scheme).

provenance is a fundamental remedy that must not only be officially recognized but implemented by governments of receiving nations.¹⁹⁴

B. Social Framework for Protection

The international marketplace for art, artifacts, and antiquities is a billion dollar market fueled by high demand.¹⁹⁵ A substantial portion of this business involves the transfer of stolen cultural property largely facilitated by private collectors or dealers who redistribute these goods to the legitimate marketplace.¹⁹⁶ As principal players, these private collectors and dealers hold a pivotal key to significantly curbing the continued plundering and pilferage of irreplaceable cultural property.¹⁹⁷ There are encouraging signs that suggest the private sector is voluntarily undertaking reforms.¹⁹⁸

1. Self-Regulation and Moral Ethic

In addition to a frontal attack with national or international legal regimes is that the practice of collecting cultural objects could be made socially un-

194. Cf. Merryman, *Two Ways*, *supra* note 5, at 845-52 (criticizing retentive cultural nationalism policies as destructive due to covetous neglect and generally espousing the cultural internationalist perspective as a more sound view, equating it to the universality and permanence of human rights).

195. See Collin, *supra* note 7 (referring to US\$3.2 billion in annual reported sales of Christie's and Sotheby's, two leading art auction houses in the international marketplace); see also Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud: Corruption in the World of Art and Antiquities*, CRIM. JUST., Summer 1993, at 16, 17 (giving estimations by various authorities that the illicit art trade in 1993 totaled between three and six billion dollars); see also *Laws Fail to Cover Trade*, *supra* note 188 (stating that, in 1994, the value of smuggled Chinese antiques seized at the border was four times more than that confiscated in 1993, and the total value of seized goods within the first months reached US\$44 million. Such statistics indicate that the high demand for Chinese antiques fuels their illegal trade).

196. Collin, *supra* note 7, at 18; see Merryman, *Two Ways*, *supra* note 5, at 848 (noting that art dealers are commonly blamed for knowingly dealing in illegally obtained cultural objects, and allegedly planning and funding illegal excavations and smuggling). The defendants in *United States v. McClain* were art dealers who admitted to establishing a range of contacts with legitimate museums and dealers to whom they could sell smuggled artifacts. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), *rev'd*, 593 F.2d 658 (5th Cir. 1979).

197. Stein, *supra* note 167 (reporting that an art dealer recognized a stolen Buddhist statue in a Sotheby's auction catalog and reported it to the U.S. government, which impounded the statue effectively terminating its sale).

198. Collin, *supra* note 7, at 41; see Stein, *supra* note 167 (reporting that in January 1995, an art dealer who purchased a priceless ancient Buddhist sculpture that was stolen from an 11th-century Burmese temple has yielded to the demand by Myanmar, as Burma is officially known, for its return). Another voluntary return included the Metropolitan Museum of Art's decision in 1993 to return more than 200 gold, silver and bronze objects from the 6th century B.C. to the Turkish government. *Id.* In 1988, the Art Institute of Chicago returned to Thailand an ancient Hindu statue that belonged to the Khmer Dynasty temple. *Id.*

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acceptable.¹⁹⁹ Based on the escalating popularity and demand for antiquities and other cultural objects, however, this ideal may be too far into the future and therefore too late in protecting irreplaceable cultural treasures.²⁰⁰ Yet, presently in the antiquities collecting industry, there may be some indication that buying or possessing stolen or illegally traded cultural objects is becoming quite contemptuous and can render a black mark on a professional's reputation.²⁰¹ For instance, an art dealer voluntarily returned an ancient Buddhist statue to Myanmar, even though he paid US\$18,000 for the statue, in an effort to protect his reputation as a bona fide, legitimate art dealer.²⁰² Although current national and international laws surrounding private cultural property transactions do not provide an ethical approach to antiquities smuggling, moral or ethical principles such as self-restraint or intra-industry regulation could be implemented by and among dealers, collectors and museums as yet another frontal attack on the illegal trade.²⁰³ Art dealers and especially public or private institutions such as museums engaged in legitimate acquisitions of antiquities are in an advantageous position to detect stolen or illegally acquired art when it surfaces in the marketplace, and research the provenance of such objects when they are contacted to appraise or authenticate such objects.²⁰⁴ Therefore, it would be sensible to recognize intra-industry regulation and self-restraint as an additional strategy toward the illegal art trade problem.²⁰⁵

199. Lee Siew Hua, *supra* note 186 (accrediting Mr. Priya Kraikrish, president of the Siam Society who told a conference of many serious collectors, "Would it not be possible for us to refrain from collecting antiquities? With the touch of a button, we can call up the glory of a civilization without being branded an accomplice to its destruction."); see White, *supra* note 9 (imploping people in the United States to support the campaign to stop the depletion of cultural patrimony of other countries by fostering a climate of disdain toward art dealers and collectors).

200. See generally Nold Jr., *supra* note 184 (reporting on the growing preoccupation with buying foreign cultural products, both originals and replicas, by the masses in mainstream popular culture).

201. See Stein, *supra* note 167 (quoting the 1995 predictions of Amy Page, editor of *Art & Auction Magazine*, that there will be heated controversies over the ethics, legalities and policy issues surrounding the traffic in national art treasures).

202. See *id.* (quoting the art dealer's attorney who explained his client does not want to be accused of stealing antiquities and hopes that the Union of Myanmar will confer a letter of commendation for doing what is morally right).

203. Robin Morris Collin, *The Law and Ethics of Trading Cultural Property*, EUROPEAN CULTURAL HERITAGE NEWSLETTER ON RESEARCH, at 5. Collin explains that ethical values of self-restraint are compatible with current collection policies which emphasize sharing, long term loans, travelling exhibitions and the use of authenticated replicas as economical and efficient alternatives to acquisitions by public arts institutions. *Id.*

204. Collin, *supra* note 7, at 30.

205. For a promising example of such efforts within the art and antiquities industry, see Africa 'Losing Its Culture,' *supra* note 177 (recognizing a Paris-based coalition of museum directors, International Council of Museums, which hopes to drive international opinion toward a global crackdown on illicit art trading and has published a catalog of art and antiquities stolen from African museums entitled LOOTING IN AFRICA: 100 MISSING OBJECTS).

C. Economic Framework for Conservation

A supplement to both legal and social approaches to regulation may be economic strategies. One such strategy would be to reduce economic incentives for looting archaeological sites and smuggling cultural objects.²⁰⁶

1. Cultural Tourism and Conservation

Comporting with the view that cultural property belongs to all of humankind and that we are enriched by our experiences and exposure to the many diverse cultures that make up the human fabric, nation states could consider utilizing their cultural resources for the benefit of humankind while at the same time protecting and preserving those resources by establishing comprehensive cultural tourism schemes.²⁰⁷ Cultural property possesses economic value because it attracts viewers and is good for the tourist industry.²⁰⁸ People travel throughout Europe, Asia, the entire world to visit sites, buildings, museums, ruins—all to enjoy the wealth of cultural property that source nations possess.²⁰⁹

After seven years of ownership dispute and many years of negotiations over the Queen Charlotte Islands, the government of Canada and the Haida, an aboriginal nation, took an innovative step toward preserving this popular wilderness area covered with aboriginal wooden artifacts for all people to enjoy by establishing a scheme whereby they jointly managed and protect this area.²¹⁰

206. See generally Borodkin, *supra* note 5, at 407-416 (proclaiming that legal approaches to stem illegal trading in cultural objects are inadequate and proposing a state auction model controlled by national governments as a preventive measure to preserve archaeologically significant sites prior to discovery).

207. For a success story in conservation by tourism, see Lee Siew Hua, *supra* note 186 (covering the grand stepped pyramid of the Borobudur in Indonesia which totes up to two million visitors a year); see also *Hidden African Art Uncovered*, CHARLESTON DAILY MAIL, Dec. 18, 1995, at 07A (reporting that 250 of the world's finest African art was taken out of secret storage for a first time ever blockbuster exhibit which has attracted a constant stream of 250,000 visitors to the Tervuren Museum in Belgium, and as a result, the museum is enjoying international recognition long overdue). Since the museum was receiving US\$11 million per year in public funding from its government, the exhibit, "Hidden Treasures of the Tervuren Museum," was seen as a gift to society that made such monetary support possible. *Id.* Thanks to government support, the Tervuren Museum has been renovated from a poorly lit, stodgy institution to a state-of-the-art climatized facility with all the revenue-generating operations of a modern museum including a cafeteria and gift shop for visitors. The government has taken notice of this success and has set aside additional funds to continue restoration. *Id.*

208. Merryman, *The Public Interest*, *supra* note 2, at 354-55 (proclaiming that cultural property is a resource like any other national resource, and could be developed, managed, and exploited).

209. See *id.* (adding that promotional travel literature distributed by chambers of commerce, national and local tourist offices, hoteliers, etc., enticing potential travelers with the pleasure of ruins, the glory of churches and temples, the charm of old buildings and monuments).

210. Glenn Bohn; Vansun, *Wilderness Archipelago Under Joint Watch by Haida*, OTTAWA, THE VANCOUVER SUN, Oct. 22, 1993, at B7 (describing the creation of a neutral governing board comprised of both Canadian and Haida representatives that will together provide for long-term, high standard protection for the archipelago as one of the world's great natural and cultural treasures, and with a goal of establishing a wilderness preserve).

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Even though both parties give the land two different names and legal designations,²¹¹ this collaborative effort marks a progressive step toward thinking about preservation through tourism.²¹²

VI. CONCLUSION

The matter of illegal trading in and recovery of cultural property is just one facet of relations between market and source, or developed and developing, countries. It requires attention by the international community.²¹³ Another facet of these relations is the conservation of biological diversity which shares many of the same issues surrounding cultural property preservation.²¹⁴ Therefore, the initial efforts made by the international community in the area of biological diversity may provide valuable insights to those efforts made in cultural property preservation.²¹⁵

Many of the challenges faced in the effort to constrain illicit trade of cultural objects are similar to those confronting the global effort to curb the destruction and regulate the transfer of biological resources.²¹⁶ Countries that are rich in biological resources are often developing countries that lack the financial, technological and informational resources, and lack the access thereto, necessary to develop and maintain an effective program of conservation and sustainable use of biological diversity.²¹⁷ Both cultural property and biological resources are facing depletion at an alarming rate.²¹⁸ Additionally, both cultural property and biological resources carry intrinsic, scientific, educational, cultural, and aesthetic values of common concern to humankind.²¹⁹ As such, access to and sharing of

211. *Id.* To the Canadian government, the disputed land formerly known as South Moresby is subject to the Crown and serves as a national reserve called the Gwaii Haanas. To the Haida, the land and waters belong to its people and is called The Place of Wonder, Gwaii Haanas Heritage Site. *Id.*

212. In the summer of 1993, the islands were visited by 1,500 tourists who came by boat, float plane or helicopter. *Id.*

213. See *supra* note 10.

214. See Merryman, *The Public Interest*, *supra* note 2 at 342 (discussing the affinity between cultural objects and the natural environment). Merryman also recognizes that antiquities and artifacts are manmade objects where environmental resources are nature-made. *Id.* Another difference is that cultural objects are nonrenewable resources where biological resources are often renewable indicating that cultural property preservation is equally important to that of biological resources. See Vernon, *supra* note 1; see generally The United Nations Convention on Biological Diversity, June 5, 1992, the Preamble, 31 I.L.M. 818 (1992) [hereinafter Convention on Biological Diversity].

215. Convention on Biological Diversity, *supra* note 214.

216. *Id.*

217. *Id.* This dilemma exists in the cultural property context as well. See *supra* notes 165-166; see also *supra* note 1 at 452-53 (illustrating the destruction of cultural property by countries of origin including Iraq and Jordan and the need for an international right of intervention since source nations are poor developing countries unable to preserve their cultural resources).

218. See *supra* notes 1 and 164.

219. Convention on Biological Diversity, *supra* note 214, Preamble.

these resources in a conservative and rational manner is integral to the welfare and benefit of present and future generations.²²⁰

The international community widely recognizes the immediate need for effective efforts to stem the irreparable destruction of fragile ecosystems and disappearing biological resources²²¹ and under the 1992 United Nations Convention on Biological Diversity (Convention on Biological Diversity), it has taken a distinctive, multifaceted approach that requires international, regional, and local cooperation within and among countries, as well as participation by both governmental and private sectors in the resource preservation effort.²²²

The Convention on Biological Diversity seeks to encourage efficient global and regional resource use and management by fostering "equity and fairness" by a voluntary redistribution of financial, technological and informational resources from developed nations to developing nations.²²³ In exchange for this support, developed nations are granted access to biological resources often located within territories of developing nations, upon agreed terms and subject to the provisions of the Convention on Biological Diversity.²²⁴

While the Convention acknowledges that states have the sovereign right to exploit their own resources, it also imposes the responsibility on each state to manage those resources in a sustainable manner for the benefit of all human kind by adopting legislation to effectuate the objectives of the Convention on Biological Diversity; to bear accountability for any consequences arising from the activities of their own nationals or private corporations abroad; and to accommodate the special needs of developing countries by providing financial, technological, informational and other resource support.²²⁵

A similar cooperative exchange of resources and support may be another approach taken toward the preservation of and access to *cultural* property.²²⁶ This approach acknowledges the territorial sovereignty of individual nations, yet grants

220. *Id.* (acknowledging that conservation and sustainable use of biological diversity is critical to meeting the food, health and other needs of the world population).

221. *Id.*, Introductory Note and art. 1. On June 5, 1992, 157 countries signed the United Nations Convention on Biological Diversity which seeks to ensure effective international action to curb the destruction of biological species, habitats and ecosystems. *Id.*

222. *Id.* Preamble, arts. 5, 6, 8, 9 and 10.

223. *Id.* arts. 1, 8 (m), 9 (e), 16, 17, 18, 20. The Convention on Biological Diversity imposes the same obligations to provide access, preserve and sustainably use biological diversity upon both developed and developing countries, however, developed countries, to the extent they are able to, are required to provide financial resources, special knowledge, new technological developments, and other support to developing countries so that they will be able to fulfill their obligations under this convention. *Id.*

224. *Id.* art. 15. The Convention on Biological Diversity emphasizes that access to resources is subject to states' sovereign rights over their own biological resources. *Id.* at Preamble.

225. *See generally id.*

226. In fact, a similar but much more simplified approach currently does take place in the context of the international exchange of exhibits of art, antiquities and other cultural treasures. Collin, *supra* note 203, at 5 (stating that museums are beginning to emphasize sharing rather than acquiring cultural objects and authenticated replicas).

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access to cultural resources originating within national boundaries, thus striking a compromise between the competing cultural nationalist and cultural internationalist views.²²⁷ It also provides for the financial and other support resources to artifact-rich nations which are often poor, underdeveloped countries that do not have the ability to properly preserve their national treasures.²²⁸ Furthermore, it fosters cooperation and exchange between nations which may serve to strengthen international relations.²²⁹

Although there is yet to be an international approach to the problem of illegal trading in and preservation of cultural property similarly comprehensive as that created in the Convention on Biological Diversity, there are numerous practices, many of which are implemented today in various forms and combinations, that seek to bridle the illicit art trade which is spinning out of control.²³⁰ To see one enforcement or regulatory scheme as paramount to another is detrimental to the ultimate achievement of effectively reducing incidents of theft and illegal exportation of such valuable, irreplaceable cultural property.²³¹ A multifarious approach would be ideal, one that incorporates a network of political, social and economic schemes implemented at both national and international levels.²³² Legal and social policies should be the product of multinational consensus so that consistency and uniformity in the law are achieved, which is the primary goal of the UNIDROIT Convention,²³³ but the development of infrastructure necessary to implement these laws should be effectuated by the individual states who play a vital role in the realization of that international consensus.²³⁴ Indeed many nationalist regulatory schemes such as border controls, import and export laws, and site monitoring, additionally serve to fulfill internationalist goals as well.²³⁵

227. See *supra* notes 36-46 and accompanying text (discussing both cultural nationalist and internationalist perspectives).

228. See *supra* note 166.

229. Convention on Biological Diversity, *supra* note 214, Preamble.

230. See *supra* notes 3, 9, 164-69 and accompanying text (demonstrating that theft and illegal trading of cultural property is increasing at an alarming rate).

231. See Keeling & Holman, *Survey of Nigeria*, *supra* note 167 (emphasizing that precious and irreplaceable artifacts can only be protected for the future by a multi-level approach, namely that the government must sincerely espouse a policy that values cultural heritage; the citizenry must respect and trust that policy; government funding for regulation and preservation must be secured; and the international community must recognize the need to protect all cultural products).

232. *Id.*

233. See *supra* notes 6-8, 66-68, 75-106 and accompanying text (identifying the problems manifest in differing legal systems that have prevented effective regulation of the antiquities trade and the UNIDROIT Convention's aim to harmonize conflicting cultural property protection laws).

234. See *supra* notes 181-91, 214 and accompanying text (discussing the need for policies, laws and funding by national governments).

235. See Lee Siew Hua, *supra* note 186 (stating that success stories emerge only when legislation or preservation policies are matched with the force of national will). Indonesia and many Asian countries have embarked on a full-fledged mission to save their ancient monuments through legal protection, community action, sustainable management, private and public sector funding, and tourism. *Id.*

The cultural internationalist perspective is indispensable because it fosters the idea that the appreciation and value of all cultural property regardless of origin or present location is universal and in so doing it provides for a more meaningful, enduring indoctrination of the importance of preserving the common cultural heritage.²³⁶ Yet, without nationalistic efforts to fund, control and preserve, cultural internationalism is subordinated to mere theory.²³⁷ Nationalist enforcement policies can be effective in preserving irreplaceable objects and protecting archaeological sites from irreparable harm because they are pragmatic and manageable efforts²³⁸ that are more consistent with current international relations.²³⁹ Nationalist regulatory schemes may also enhance global access to a common cultural heritage through such devices as tourism, exhibit sharing and legitimate exportation,²⁴⁰ whereby people from around the world have the opportunity to experience well-preserved and properly cared for relics from the past.²⁴¹

Thus, cultural nationalism and internationalism are not mutually exclusive but rather complementary to one another; both serving to prevent the disappearance of our historical and cultural evidence in both the immediate and distant future.²⁴² While maintaining an appreciation that cultural property really does belong to one humankind collective, practitioners must also understand the world in which they operate, one that is driven by nationalist prerogatives and the principle of state

236. See *supra* notes 42-46 and accompanying text (supporting the premise of cultural internationalism).

237. See *supra* notes 36-46 and accompanying text (discussing cultural nationalism and cultural internationalism theories).

238. See *supra* notes 186, 207-08 and accompanying text (giving examples of efforts presently implemented by nations that realize the value of their cultural heritage and seek to preserve it by combatting looters and smugglers, thus evidencing that such efforts are possible).

239. See *supra* note 37 and accompanying text (stating that cultural nationalism is the dominant view today).

240. Lee Siew Hua, *supra* note 186 (showing that an archaeological company in Borobudur was established to boost cultural tourism and resulting revenue goes back to the central government).

241. In the alternative, sharing cultural identity and realizing a financial return can also be accomplished by exportation. See Nold Jr., *supra* note 184 (explaining that artifact replicas are being handcrafted by workers in Third World countries, then sold in the mainstream American mass marketplace, and contrary to most exploitation practices, there are some not-for-profit organizations who redirect sale proceeds back into that Third World community to fund worthwhile projects). An example of such beneficial activity can be seen through the efforts of Citizens in Solidarity with the People of Central America which imports Guatemalan clothing, decorative items and other crafts then sells them at festivals and church events. The profits are used to help build a medical clinic on the Guatemalan coast. *Id.*

242. See generally Merryman, *The Public Interest*, *supra* note 2, at 350-51 (stating that cultural property lends itself to a variety of political uses including effectively instilling a sense of national identity and pride). Merryman continues to demonstrate the use of cultural heritage as propaganda in nation building efforts despite the relatively late appearance of the nation-state as a major player in world affairs. *Id.* He ponders that if ever there is a Greek politician who could procure the return of the Elgin Marbles to Greece, that politician would be an immediate and enduring national hero. *Id.*; see also Lee Siew Hua, *supra* note 186 (quoting Cambodia's Minister of Culture and Fine Arts, Michael Tranet, who said that a revived cultural heritage has a vital role in reinforcing a sense of national identity and in building up the confidence in the Cambodian nation as a mature society ready to deal with the world).

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sovereignty, which, albeit recent, is nonetheless an observed precept in international law.

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