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Rolling Back History: The United Nations General Assembly and the Right to Cultural Property

*Douglas N. Thomason**

I. INTRODUCTION

Cultural property can be defined in a number of ways. Indeed, in recent decades the definition of culture itself has been the subject of serious academic dispute. For the purposes of this Article, the broad UNESCO definition of cultural property will be used. Under this definition cultural property includes all objects, both man-made and natural, which are of archaeological, historical, artistic, scientific, or technical interest.¹ In short, it consists of those things that museums consider worthy of being acquired, preserved, and presented to the public.

The deceptively simple question, "who owns these objects," can only be examined by analyzing the two basic doctrines which have evolved in this field. The highly politicized collision between these doctrines, "national cultural patrimony" (generally embraced by the Third World and the communist states) and "the common heritage of mankind" (generally embraced by the prosperous, art importing nations), has produced the existing international law on the subject. This debate has been motivated by heated nationalism on one hand and by supercilious condescension on the other, as well as by a fair minded concern over the preservation of the cultural heritage and how it should best be distributed.

In its purest form, the concept of national cultural patrimony views cultural objects produced within a state² or first discovered within a state³ as belonging to that state. There are two principles underlying this view. The first and most important is the special relationship between a people and its cultural artifacts. The second involves notions of state sovereignty. If these objects were not transferred in a legal manner, how

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¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, UNESCO, art. 1, 27 U.S.T. 37, T.I.A.S. No. 8226, 823 U.N.T.S. 231, 234 [hereinafter 1970 UNESCO Convention].

² For example, art produced by nationals.

³ For example, paleontological finds or objects from extinct cultures.

could they belong to another state or to persons within another state? What constitutes "legal transfer" is a subject of great controversy and will arise frequently in this article. For example, objects removed during colonial rule or in violation of export restraints of the state of origin are often viewed as legal transfers by the possessory state.

The alternative theory is that of the common heritage of mankind. Under this view, the highest virtues of an international art regime are the preservation and presentation of artifacts since they are, collectively, the record of the species. Overriding any national claim, then, is the necessity of an excellent museum infrastructure to protect, study, and present the objects to the public.

The critical point of divergence between "common heritage" and "national patrimony" is in the belief advanced by advocates of the former that this property is valuable, most importantly, in its contributions to understanding universal human culture. In this view, the claim of the states of origin that cultural property is of primary importance to them in understanding their own cultures and histories becomes secondary to the human interest in its common history.

In theory, these two positions could stand independently of each other. In fact, as will be seen in the evolution of General Assembly resolutions, the two have gradually merged since the central doctrine of neither can be dismissed.

This Article traces the evolution of General Assembly resolutions on the return of cultural property. As we will see, the changes that have occurred reflect a trend toward compromise. The initially dominant notion of national patrimony has slowly given way to an implicit acknowledgement of the legitimacy of the doctrine of common heritage of mankind.

II. THE EARLY FOCUS ON COLONIALISM

In 1970 UNESCO adopted a Convention⁴ ("Convention" or "UNESCO Convention") dealing exclusively with controlling the growing illicit international art trade. It addressed the problem of the illegal export of art after 1970 and the return to the state of origin of that art. While this was viewed as progress by the art-rich states which were victims of pillaging, the Convention did not confront other problems in the international distribution of cultural property. These were the issues of artifacts removed during colonial or foreign rule, pieces transferred under other questionable circumstances, and the illicit art trade antecedent to the 1970 Convention.

As a result of these omissions, Zaire proposed a resolution in 1973

⁴ 1970 UNESCO Convention, *supra* note 1.

to the United Nations General Assembly concerning cultural property. The resulting resolution⁵ included an innovative demand for the retroactive restitution and return of cultural property to the states of origin. It focused primarily, although not exclusively, on regaining artifacts lost "as a result of colonial or foreign occupation."⁶

This distinct focus of the resolution on colonialism is accompanied by a statement placing the burden of cost on the possessory state. Operative paragraph 1 states: "*Affirms* that the prompt restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts and documents by another country, without charge, is calculated to strengthen international cooperation inasmuch as it constitutes just reparation for damage done."⁷

This is in sharp contrast to the 1970 UNESCO Convention, which placed the financial burden of restitution on the state of origin:

The States Parties to this Convention undertake:

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- (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the . . . [requesting] State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. . . . The . . . [requesting] Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.⁸

This contrast is a manifestation of a deeper political division. The 1970 UNESCO Convention resulted from bargaining between the devel-

⁵ G.A. Res. 3187, 28 U.N. GAOR Supp. (No. 30) at 9, U.N. Doc. A/9030 (1973) [hereinafter 1973 Resolution].

⁶ *Id.* at 9 (operative para. 2). The word "colonial" appears four times in the resolution: "*Recalling* the Declaration on the Granting of Independence to Colonial Countries and peoples,

. . . .
Deploring the wholesale removal, virtually without payment, of *objets d'art* from one country to another, frequently as a result of colonial or foreign occupation;

. . . .
Recognizes the special obligations in this connexion of those countries which had access to such valuable objects only as a result of colonial or foreign occupation;

Calls upon all the States concerned to prohibit the expropriation of works of art from Territories still under colonial or alien domination; . . . "

Id. at 9 (preambular paras. 2, 8 and operative paras. 2, 3).

⁷ *Id.* at 9.

⁸ 1970 UNESCO Convention, *supra* note 1, art. 7(b)(ii), 823 U.N.T.S. at 240.

oped and the developing states. It attempted to stem the flood of smuggled cultural patrimony toward the developed states. In negotiating and concluding a binding instrument, the developing states were forced to abandon their position that cultural property be returned without charge.

In the United Nations General Assembly, the developing world with its built-in majority did not need the cooperation of the developed world to pass a resolution. Therefore, it was able to place emphasis on colonialism as the core of the problem and to insist that the possessory states pay the cost of restoring cultural property to the states of origin. For example, two of the four explicit references to colonialism in the 1973 Resolution were in the original draft proposed by Zaire.⁹ The other two were added later in an amendment by the Byelorussian Soviet Socialist Republic ("Byelorussia").¹⁰

The crucial role of colonialism in depleting the cultural resources of Africa explains Zaire's focus. As President Mobutu told the General Assembly:

During the colonial period we suffered not only from colonialism, slavery, economic exploitation, but also and above all from the barbarous systematic pillaging of all our works of art. In this way the rich countries appropriated our best, our unique works of art, and we are therefore poor not only economically but also culturally.

. . . .

What I am telling you is fundamental, because every rich country, even if it does not possess all the masterpieces of its best artists, has at least the bulk of them. Thus, Italy has those of Michelangelo; France, Renoir That is why I would also ask this General Assembly to adopt a resolution requesting the rich Powers which possess works of art of the poor countries to restore some of them so that we can teach our children and our grandchildren the history of their countries.¹¹

In the General Assembly debates Byelorussia, after complimenting Zaire for introducing the resolution, placed similar emphasis on colonialism. The Byelorussian representative stated, "In this particular case we are talking about the return of art to countries that have been victims of colonialist exploitation or plunder."¹² In fact, the entire statement focused on colonialism to the exclusion of illicit trade. Byelorussia then

⁹ Compare 1973 Resolution, *supra* note 5 with Zaire: *Request for the Inclusion of an Additional Item in the Agenda of the Twenty-Eighth Session*, 28 U.N. GAOR Annexes (Agenda Item 110) at 2, U.N. Doc. A/9199 (1973) (includes an explanatory memorandum as well as the text of the draft resolution) [hereinafter *Zaire: Agenda Request*].

¹⁰ *Byelorussian Soviet Socialist Republic: Amendments to Draft Resolution A/L. 717*, 28 U.N. GAOR Annexes (Agenda Item 110) at 3, U.N. Doc. A/L. 721 (1973) [hereinafter *Byelorussian Amendments*].

¹¹ 28 U.N. GAOR (2140th plen. mtg.) paras. 176-78, U.N. Doc. A/PV. 2140 and Corr. 1 (1973).

¹² 28 U.N. GAOR (2205th plen. mtg.) para. 89, U.N. Doc. A/PV. 2205 (1973).

proposed the addition of two more direct references to colonialism in the resolution. First it requested that the preamble include a reference to the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹³ Then it stated that “[t]he operative part of the resolution should have included a provision forbidding the colonialists to remove items of cultural value from territories still under colonial domination.”¹⁴

In addition, Byelorussia proposed amendments to indict colonialism as the exclusive culprit in the expropriation of cultural patrimony. Byelorussia wanted to go much further than Zaire and criticized Zaire for failing to place blame stating: “Nor is there any indication in the preamble to the resolution as to who bears the responsibility for imperialist colonialist plunder, including the plundering of works of art.”¹⁵

At this point it is instructive to trace the development of one paragraph of the 1973 Resolution. The paragraph in the original draft resolution read as follows: “*Deploring* the wholesale removal, virtually without payment, of objects d’art from the poor countries to the rich countries, *frequently* as the result of colonial occupation.”¹⁶

Byelorussia objected to the qualification of “colonial” and suggested the statement be amended to read: “*Deploring* the wholesale removal, virtually without payment, of objects d’art from former colonial countries and Territories as a result of colonial domination.”¹⁷

Byelorussia, then, wanted to drop the word “frequently,” thereby leaving colonialism as the sole cause of cultural takings. Five days later, before debate had begun, Byelorussia itself dropped this suggestion¹⁸ accepted “frequently” as a modifier in recognition of the position articulated by Greece and Panama.

The problem of removal of cultural property from its country of origin was viewed very differently by the many states whose cultural property had been taken through illicit trade rather than colonialism. Among these states were the Latin American nations and Greece. Greece called for recognition that the problem was multifaceted:

[T]he Greek delegation recognizes the special nature of the rights of countries that have been despoiled of their cultural treasures as a result

¹³ *Id.* para. 93.

¹⁴ *Id.*

¹⁵ *Id.* para. 94.

¹⁶ *Zaire: Agenda Request, supra* note 9, at 2 (Draft Resolution, operative para. 6) (emphasis added).

¹⁷ *Byelorussian Amendments, supra* note 10.

¹⁸ Compare *Byelorussian Amendments, supra* note 10, with *Byelorussian Soviet Socialist Republic: Revised Amendments to Draft Resolution A/L. 717/Rev. 1*, 28 U.N. GAOR Annexes (Agenda Item 110) at 3, U.N. Doc. A/L. 721/REV. 1 (1973) [hereinafter *Byelorussian Revised Amendments*]. For the sequence of these events, see Byelorussia’s statement, 28 U.N. GAOR (2205th plen. mtg.), *supra* note 12, para. 97.

of colonial occupation; but we consider that the very purpose of the draft resolution—that is, the encouragement of international co-operation—would not be usefully served if we were to limit ourselves exclusively to cases involving colonialism and foreign occupation. Indeed, a State, even after liberation, sometimes does not possess the necessary personnel, equipment or technology to supervise everything that is going on within its territory or its territorial sea in respect of illegal exportation or clandestine excavation. It would therefore be unfair to exclude this possibility from the context of the problem with which we are dealing.¹⁹

Panama's representative, reflecting the prevalent Latin American view, spoke in support of the Greek perspective and in opposition to the Byelorussian perspective:

[W]e object to one part of this draft resolution, which indicates that many countries have been subjected to this type of plunder solely as a result of colonial occupation. Many countries, of course, without having been under colonial occupation, have also been despoiled of their artistic and cultural treasures.

Operative paragraph 2 of the draft resolution recognizes the special obligations in this connexion of these countries which had access to such objects only as a result of colonial occupation. I repeat that my delegation wishes to stress the fact that, though it is true that colonial occupation was the cause of many artistic and cultural treasures being taken from their place of origin to distant countries, it is no less true that for other reasons, and not necessarily colonial occupation, artistic treasures were also taken from countries.

The amendments to operative paragraphs 2 and 3 submitted by Byelorussia deal with the same aspect of colonial occupation and refer to alien occupation. This morning, the representative of Greece quite correctly pointed out that many countries—and I must stress that: many countries—had been the victims of plunder and pillage of their archaeological, artistic and historical treasures, and, as I have already said, it was not always because of colonial occupation. In many other cases, it was due to unscrupulous traffickers and the ignorance and collusion of native settlers who, out of greed or naivete, contributed to the clandestine removal from their country of artistic and cultural treasures that are truly irreplaceable.

My own country has suffered, as have many others in Latin America, from this type of pillage. Pre-Colombian art of incalculable value has appeared in foreign museums and private collections as a result of the systematic pillaging of our heritage. We contend that that part of our cultural and historical heritage should be restored to our country.²⁰

¹⁹ 28 U.N. GAOR (2205th plen. mtg.), *supra* note 12, para. 113.

²⁰ 28 U.N. GAOR (2206th plen. mtg.) paras. 2-5, U.N. Doc. A/PV. 2206 (1973).

The resolution as passed by the General Assembly retained the word "frequently." Its final form read as follows: "*Deploring* the wholesale removal, virtually without payment, of *objets d'art* from one country to another, *frequently* as a result of colonial or foreign occupation."²¹

Two indirect references to colonialism were also proposed by Zaire in the original draft and passed by the Assembly in its final resolution:

Considering the conclusions of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers from 5 to 9 September 1973, particularly paragraph 18 of the Political Declaration,

Noting with interest the work of the third Congress of the International Association of Art Critics held at Kinshasa-N'Sélé, Zaire, from 14 to 17 September 1973.²²

Paragraph 18 of the Political Declaration of the Fourth Conference of Non-Aligned Countries stated:

It is also a question of establishing a genuine independence by eliminating foreign monopolies and assuming control over their national resources and exploiting them for the benefit of their peoples. The peoples of the non-aligned countries wish to safeguard their own personality, to revive and enrich their cultural heritage, and to promote in all fields their authenticity which had been seriously alienated by colonialism.²³

The intent behind the reference to the Congress of the International Association of Art Critics was indicated by Zaire in introducing the issue to the General Assembly:

On 12 September 1973, addressing the third Congress of the International Association of Art Critics at Kinshasa-N'Sélé, Zaire, President Mobutu Sese Seko Kuku Ngbendu Wa Za Banga said: "Our artistic heritage has been systematically pillaged," and he went on: "All of the pictures used to illustrate aspects of our artistic heritage in the book entitled 'L'art de l'Afrique noire au pays du fleuve Zaïre', all of them, I repeat, are of works now in other countries.

The case of Zaire is not an exception. The same situation is common, not to say general, in Latin America, Asia and particularly in Africa, as a result of the evil consequences of a ravaging colonization.

There is no question here of confusing such situations with cultural exchanges, which, like the acquisition of works of art by public or private collectors, are in essence enriching—consolidating the art and culture of a country by contact with others. It is above all a question

²¹ 1973 Resolution, *supra* note 5, at 9 (preambular para. 8) (emphasis added).

²² 1973 Resolution, *supra* note 5, at 9 (preambular paras. 3-4) (footnote omitted).

²³ U.N. Doc. A/9330 and Corr. 1, para. 18 (1973) (letter of transmittal and documents of the 4th Conference of Non-Aligned Countries).

of degree and circumstances. Frequently in the case of plundering connected with colonization it is the sword rather than the free consent of the people that has justified the removal.²⁴

A further elaboration on the meaning of the statement regarding the Art Critics Congress was given by Zaire:

[R]eference is made to the Third Congress of the International Association of Art Critics held in September 1973 in Kinshasa. At the end of its work the Congress adopted a resolution comprising eight points, the first of which deplores the fact that African countries, in particular Zaire, were relieved of a good portion of their cultural heritage and lost a good part of their traditional cultural works.²⁵

Although the word "colonialism" was not used here by the delegate, this was the historical circumstance under which Zaire and most of black Africa were "relieved of a good portion of their cultural [property]."²⁶

There are several other significant differences between the original draft and the final resolution. First, the paragraphs condemning the removal and demanding the return of cultural property to the state of origin used polarizing language in the original draft. The expropriation of art is described as being from "the poor countries to the rich countries,"²⁷ and restitution is demanded "to a developing country . . . by a developed country."²⁸ This language is softened to describe the removal of art "from one country to another"²⁹ and demand restitution "to a country . . . by another country."³⁰ By not casting the problem in terms of relative economic development, the issue of restitution of cultural property is more clearly established.

Another change was to expand the list of cultural objects to be "promptly" restored. The original draft covered "works of art, monuments and museum pieces."³¹ As amended, it added manuscripts³² and documents³³ to the list, the latter in response to Latin American requests.³⁴

²⁴ *Zaire: Agenda Request*, *supra* note 9, at 1 (Explanatory Memorandum, paras. 3-5).

²⁵ 28 U.N. GAOR (2205th plen. mtg.), *supra* note 12, para. 82. It is worth noting that the sponsors of the 1973 resolution are all African states. See *Burundi, Chad, Congo, Guinea, Mali, Mauritania, Niger, Senegal, Uganda, United Republic of Tanzania, Zaire and Zambia: Revised Draft Resolution*, 28 U.N. GAOR Annexes (Agenda Item 110) at 2, U.N. Doc. A/L. 717/REV. 1 AND ADD. 1 (1973) [hereinafter *Revised Draft Resolution*].

²⁶ *Id.*

²⁷ *Zaire: Agenda Request*, *supra* note 9, at 2 (Draft Resolution, preambular para. 6).

²⁸ *Id.* at 2 (Draft Resolution, operative para. 1).

²⁹ 1973 Resolution, *supra* note 5, at 9 (preambular para. 8).

³⁰ *Id.* at 9 (operative para. 1).

³¹ *Zaire: Agenda Request*, *supra* note 9, at 2 (Draft Resolution, operative para. 1).

³² *Revised Draft Resolution*, *supra* note 25, at 3 (operative para. 1).

³³ 1973 Resolution, *supra* note 5, at 9 (operative para. 1).

³⁴ 28 U.N. GAOR (2206th plen. mtg.), *supra* note 20, para. 11.

Finally, Zaire injected an acknowledgement of the 1970 UNESCO Convention.³⁵ For the first time, the resolution contained a reference to the loss of cultural property through illicit trade. This had two effects. First it eased tensions on the issue between ex-colonial powers and ex-colonies by referring to the current problem of smuggling. Second, in doing so, it included states such as Greece and the Latin American states in its scope.

Greece, in fact, endorsed the inclusion of a reference to the UNESCO Convention in the resolution. In doing so, it mentioned several aspects it found admirable. First, the Convention calls upon states to draw up inventories of cultural property, the loss of which would impoverish the national cultural heritage. Second, it calls for export certificates to indicate the approval of the government for export of an item. Finally, restitution is demanded of cultural property stolen after the entry into force of the Convention.

While approving this legally binding covenant on restitution, Greece took the opportunity to refer to weaknesses in the UNESCO Convention.³⁶ The Convention applies only to stolen articles, Greece complained, and restitution of the articles is to be financed by the state of origin. Also, that fact that, under its provisions, only objects removed after the entry into force of the Convention are to be returned, presented another weakness. Herein, then, lay the need for the General Assembly Resolution on restitution.³⁷

The original draft resolution and Byelorussian amendments were affected by concerns of Latin American countries and Greece. As a result, single-minded concern with colonialism was eased and issues of illicit trade were introduced.

III. THE SHIFT AWAY FROM COLONIALISM

After 1973, three basic trends can be found in the General Assembly resolutions on the return of cultural property. First, the references to colonial expropriation are rapidly dropped in favor of declarations concerning the return and restitution of cultural property generally. Second, there is a moderation in the tone of the resolutions; harsh, blunt words are eliminated in favor of more temperate ones. Finally, and most importantly, the notion of national cultural patrimony which was prevalent throughout the developing world in 1973 comes to co-exist with the concept of common heritage of mankind.

³⁵ 1973 Resolution, *supra* note 5, at 9 (preambular para. 5).

³⁶ See 28 U.N. GAOR (2205th plen. mtg.), *supra* note 12, para. 109.

³⁷ See *id.* paras. 106-113.

The 1975 Resolution³⁸ differs from the 1973 Resolution in several ways. It notes the steps taken by certain states to return cultural property to the states of origin.³⁹ In introducing the resolution, Zaire mentioned that the appeal for restitution had been heeded by only a few states and that therefore the sponsors should repeat the appeal.⁴⁰

The 1975 Resolution, in addition to recalling the 1970 UNESCO Convention, invites member states to ratify the Convention.⁴¹ This new paragraph is virtually identical to one in the resolution adopted by the UNESCO General Conference earlier that year.⁴² This additional endorsement of the Convention indicates a further move away from the idea that colonialism is the exclusive cause of the misappropriation of cultural property. It evinces a desire to arrest the contemporary illicit trade in art.

In addition, the most strongly worded paragraph condemning colonialism⁴³ is dropped from the 1975 Resolution. This further demonstrates the shift in focus of the Assembly's concern from colonialism toward illicit traffic.

Two other direct references to colonialism are omitted. Both of these alterations concern cultural property and foreign occupation of a state. First, in the paragraph concerned with the special obligation of possessory states toward states of origin they once occupied, the phrase "only as a result of colonial or foreign occupation"⁴⁴ becomes "either through particular claims or on other pretexts, as a result of their rule over or their occupation of a foreign territory."⁴⁵ While colonial relations are certainly included in the amended language, the direct reference is gone.

There are two noteworthy changes in the paragraph concerning art in areas still under foreign control. One involves the third deletion of a direct reference to colonialism. In the 1973 Resolution the words "colonial or alien" are used.⁴⁶ Thus, the paragraph is aimed at situations of colonial or military occupation. In the 1975 Resolution those words are

³⁸ G.A. Res. 3391, 30 U.N. GAOR Supp. (No. 34) at 4, U.N. Doc. A/10034 (1975) [hereinafter 1975 Resolution].

³⁹ *Id.* at 4 (preambular para. 6).

⁴⁰ 30 U.N. GAOR (2410th plen. mtg.) para. 28, U.N. Doc. A/PV. 2410 (1975).

⁴¹ 1975 Resolution, *supra* note 38, at 5 (operative para. 4).

⁴² *Report of the Director General of UNESCO to the General Assembly of the United Nations of the Activities of UNESCO Relating to the Restitution of Works of Art to Countries Victims of Expropriation*, U.N. Doc. A/10224 Annex I at 1 (1975) [hereinafter 1975 UNESCO Report].

⁴³ "Deploiring the wholesale removal, virtually without payment, of *objets d'art* from one country to another, frequently as a result of colonial or foreign occupation." 1973 Resolution, *supra* note 5, at 9 (preambular para. 8).

⁴⁴ *Id.* at 9 (operative para. 2).

⁴⁵ 1975 Resolution, *supra* note 38, at 5 (operative para. 2).

⁴⁶ 1973 Resolution, *supra* note 5, at 9 (operative para. 3).

deleted, and the reference is simply to "Territories under their domination."⁴⁷ Obviously, this rubric includes colonial relationships. But dropping the word "colonial" has two effects. First, it is less divisive politically since it does not point the finger so directly at particular states. Although colonialism reappears in subsequent resolutions in this context, its elimination here is a symptom of a shifting focus, a move away from a concern with colonialism to a more general view of the problems of depletion of cultural property and restitution.

The other modification concerns what occupying states are asked to do. In 1973 they were asked to "prohibit the expropriation of works of art."⁴⁸ In 1975 they are requested to "protect and safeguard the works of art."⁴⁹ These are very different requests. In the former, the appeal is an effort to eliminate thievery, whether clothed in the guise of colonial legality or through illicit trade. The latter is a broader request. The dominant state is being asked to care for the cultural property as well as to see that it is not removed.

Another change was made by adding an operative paragraph to the 1975 Resolution reiterating the need for restitution and its role in improving international understanding:

Calls upon those States concerned which have not already done so to proceed to the restitution of *objets d'art*, monuments, museum pieces, manuscripts and documents to their countries of origin, such restitution being calculated to strengthen international understanding and cooperation.⁵⁰

A similar preambular paragraph is present in the 1973 Resolution⁵¹ and is repeated in the 1975 Resolution.⁵² But this reiteration stresses the relationship between restitution and international cooperation. The desirability of restitution is cast not in terms of simple justice, but rather in terms of international harmony. The resolution says that "restitution . . . [is] calculated to strengthen international understanding and co-operation."⁵³ The sponsors meant that return is itself an act of international understanding and cooperation. Also, they make the claim, often elaborated in General Assembly debate, that by furthering a people's understanding of its own culture, one is furthering that people's ability to understand and empathize with others.

Already the deletion of three direct invocations of colonialism has been noted. Two more references, both indirect, were also deleted from

⁴⁷ 1975 Resolution, *supra* note 38, at 5 (operative para. 3).

⁴⁸ 1973 Resolution, *supra* note 5, at 9 (operative para. 3).

⁴⁹ 1975 Resolution, *supra* note 38, at 5 (operative para. 3).

⁵⁰ *Id.* at 5 (operative para. 6).

⁵¹ See 1973 Resolution, *supra* note 5, at 9 (preambular para. 7).

⁵² 1975 Resolution, *supra* note 38, at 5 (preambular para. 8).

⁵³ *Id.* at 5 (operative para. 6).

the preamble to the 1973 Resolution.⁵⁴ They alluded to a Political Declaration of the Non-Aligned Countries and to the International Association of Art Critics Conference held in Zaire. As was seen earlier, these invocations referred to impassioned Third World statements. Their absence is further evidence of the sponsors's desire to rid the resolution of its focus on colonialism. In sum, five references, both direct and indirect, have been eliminated. Only one, the preambular statement "*Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples*" remains.⁵⁵

At the time of the 1975 session UNESCO was beginning to more broadly address the issues of return and restitution. To that end, the Director-General announced plans to form a committee of experts. The General Assembly endorsed this and expressed hope that the committee would develop new measures.⁵⁶ The desires of some states were expressed by Poland, which indicated its hope that a new convention would be produced by the committee.⁵⁷

Finally, in the 1975 Resolution, the words "which are tokens of its authenticity" were added with regard to the cultural heritage of a people.⁵⁸ This wording helps distinguish cultural property from other property claims. In this view, these objects represent a culture in a manner so elemental that they should *never* be alienated. This lends breadth to the claims of the states of origin for restitution, because no matter how the property was lost, whether through colonialism, military occupation, the illicit market or even a seemingly *bona fide* transaction, the property remains morally that of the state of origin, since it is resonant of that people as a people. Viewed in this way, as the material manifestation of the consciousness of a culture or a people, cultural property is not transferable. Therefore, any concentrated attention on *how* cultural property left the state of origin is merely disruptive and tends to obscure a powerful moral claim.

A year later, in the 1976 Resolution,⁵⁹ the last direct reference to colonialism, the preambular paragraph on the Declaration on the Granting of Independence to Colonial Countries and Peoples, was deleted.⁶⁰

⁵⁴ 1973 Resolution, *supra* note 5, at 9 (preambular paras. 3, 4).

⁵⁵ *Id.* at 9 (preambular para. 2); 1975 Resolution, *supra* note 38, at 4 (preambular para. 2).

⁵⁶ 1975 UNESCO Report, *supra* note 42; 1975 Resolution, *supra* note 38, at 5 (operative para. 5).

⁵⁷ 30 U.N. GAOR (2410th plen. mtg.), *supra* note 40, para. 82.

⁵⁸ "Stressing that the cultural heritage of a people conditions the flowering of its artistic values and its over-all development, which are tokens of its authenticity." 1975 Resolution, *supra* note 38, at 5 (preambular para. 7).

⁵⁹ G.A. Res. 31/40, 31 U.N. GAOR Supp. (No. 39) at 96, U.N. Doc. A/31/39 (1976) [hereinafter 1976 Resolution].

⁶⁰ Compare 1975 Resolution, *supra* note 38, at 4 (preambular para. 2) and 1973 Resolution, *supra* note 5, at 9 (preambular para. 2) with 1976 Resolution, *supra* note 59.

However, two other references, one direct and one indirect, are inserted.

In the new paragraph referring directly to colonialism,⁶¹ a new demand is made on the international community. In its previous forms, this paragraph called upon the colonial or foreign occupiers to recognize and act on their special obligation regarding the cultural property of the occupied state.⁶² In the 1976 Resolution, however, the international community generally is called upon to take steps to prevent all illicit trade in art *especially* from areas under colonial or foreign domination.⁶³ Once again, the General Assembly moves from an emotional indictment of colonialism to a more practical effort to stem the illicit flow of cultural property from the states of origin. The colonial relationship is stressed because colonized countries are particularly vulnerable to expropriation through illicit trade. The move from exhorting colonizing states to prevent expropriation to exhorting states generally is a recognition of two realities. One is that illicit trade can never be controlled exclusively from the state of origin. Second, the General Assembly was recognizing that colonial powers were not the most sympathetic to Third World concerns. For these reasons, a call on the international community as a whole is much more effective than singling out the colonial powers. The shift in emphasis from colonial depletion to illicit trade is completed here where the new direct reference to colonialism actually is part of a call on all states, especially art-importing states, to deter smuggling.

The indirect reference to colonialism is in the paragraph noting certain resolutions passed by the Fifth Conference of Non-Aligned Countries held at Colombo in 1976.⁶⁴ In the text of these resolutions calling for the restitution of cultural property, there are no references to colonialism.⁶⁵ However, in an explanatory note by Libya, appended to the resolutions, there is a bitter and intense attack on colonialism. Libya uses such language as "plundered," "stolen," and "looted" while repeatedly indicting colonialism as the villain.⁶⁶

Standing in contrast to the Libyan view is the suddenly milder tone of the 1976 Resolution. In the core paragraph calling on states to restore cultural property, the key phrases expressing legal wrongdoing on the part of the states in possession of the artifacts are removed. This new conciliation is expressed in two ways. The words "prompt," "without

⁶¹ 1976 Resolution, *supra* note 59, at 97 (operative para. 2).

⁶² See 1975 Resolution, *supra* note 38, at 5 (operative para. 2); 1973 Resolution, *supra* note 5, at 9 (operative para. 2).

⁶³ 1976 Resolution, *supra* note 59, at 97 (operative para. 2).

⁶⁴ *Id.* at 97 (preambular para. 2).

⁶⁵ *Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries*, U.N. Doc. A/31/197 Annex IV (1976) [hereinafter *Non-Aligned Countries Documents*].

⁶⁶ *Id.* at 2.

charge" and "just reparation for damage done" are dropped.⁶⁷ In addition, the reason for compelling restitution is changed from a legal demand, "as just reparation for damage done,"⁶⁸ to a suggestion that it would be mutually beneficial. "[Restitution] constitutes a step forward towards [sic] the strengthening of international co-operation and the preservation and future development of cultural values."⁶⁹

The resolutions passed by the Non-Aligned Countries at Colombo have a slightly more insistent tone. Both of them ask states in possession of cultural property "to restore them promptly to their countries of origin."⁷⁰

The Director General of UNESCO in his report to the General Assembly in 1976, stated: "[A]ll cultural property forms part of the world's cultural heritage and . . . each State has a responsibility in this regard not only towards its own nationals, but also towards the international community as a whole."⁷¹ This emphasis on the notion of common heritage of mankind explains the emergence of certain themes, beginning in the General Assembly debates of 1976.

IV. THE COMMON HERITAGE DOCTRINE INFLUENCES THE DEBATE

One of the ideas which is innately bound up with the view of cultural property as the common heritage of mankind is that of exchange. If it is important that Iraq, for example, allow its national patrimony to travel for exhibition in other states, in return for which it is allowed to exhibit the other states' patrimony, this suggests that the development of national identity is not the only important function of the artifacts, but also exposure to the common achievements of mankind.

In his report of 1976, the Director General specifically mentioned the beneficial effects of exchange. He did this in a context emphasizing the common heritage of mankind:

Measures prohibiting and restricting such transfers in order to protect cultural works have, at UNESCO's prompting, been supplemented by further measures designed to encourage and promote international exchanges between States or legal institutions, in view of the fact that all cultural property forms part of the world's cultural heritage⁷²

⁶⁷ Compare 1973 Resolution, *supra* note 5, at 9 (operative para. 1) and 1975 Resolution, *supra* note 38, at 5 (operative para. 1) with 1976 Resolution, *supra* note 59.

⁶⁸ 1975 Resolution, *supra* note 38, at 5 (operative para. 1); 1973 Resolution, *supra* note 5, at 9 (operative para. 1).

⁶⁹ 1976 Resolution, *supra* note 59, at 97 (operative para. 3).

⁷⁰ *Non-Aligned Countries Documents*, *supra* note 65 (Resolution No. 17, operative para. 3 and Resolution No. 24, operative para. 2).

⁷¹ *Preservation and Further Development of Cultural Values: Report of the Director-General of UNESCO* U.N. Doc. A/31/111 Annex, para. 61 (1976).

⁷² *Id.*

Statements such as those of Mexico and India in the General Assembly debates are representative of many and are indicative of the acceptance of the international community, including the Third World, of the UNESCO position on exchanges. The Mexican representative stated:

The affirmation of national identity in the present-day world must not lead to self-centered isolation; on the contrary, it must lead to interdependence which should be reflected in exchanges that would be beneficial to all sectors of the international community, for although States were primarily concerned with the welfare of their peoples, their solidarity with other countries should lead to international co-operation.⁷³

The Indian representative stated: "Just as it was necessary to preserve and develop national cultural values corresponding to the indigenous cultural heritage, it was also necessary to promote cultural exchange between different countries and peoples."⁷⁴

UNESCO sees cultural exchange and the concept of common heritage of mankind as inextricably interrelated. It enunciated this view in the recommendation adopted at the 19th General Conference at Nairobi in 1976:

Considering that a systematic policy of exchanges among cultural institutions, by which each would part with its surplus items in return for objects that it lacked, would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages.

. . . .

Bearing in mind that all cultural property forms part of the common cultural heritage of mankind and that every State has a responsibility in this respect, not only towards its own nationals but also towards the international community as a whole, Member States should adopt within the sphere of their competence, the following measures to develop the circulation of cultural property among cultural institutions in different countries in co-operation with regional and local authorities as may be required.⁷⁵

Other purposes of exchanges include a better distribution of cultural property and a reduction in prices for smuggled art, results that are desirable especially for the developing world.⁷⁶ The exchanges expose the public to the artifacts, satisfying some of the appetite of the international

⁷³ U.N. Doc. A/C.3/31/SR. 22, para. 2 (1976).

⁷⁴ U.N. Doc. A/C.3/31/SR. 25, para. 15 (1976).

⁷⁵ UNESCO, *Recommendation Concerning the International Exchange of Cultural Property*, Nov. 26, 1976 at 4 (preambular para. 9, operative para. 2).

⁷⁶ See *A Brief History of the Creation by UNESCO of an Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation*, 31(1)MUSEUM 59 (1979) [hereinafter *Intergovernmental Committee History*].

art market and alleviating the pressure that raises the price of the objects on the illicit market. With the lower prices, the lure that induces illegal art transfers is reduced. Also, museums will be less desperate to acquire types of art that they are able to show periodically in visiting exhibitions.

As previously stated, one of the reasons given by UNESCO for art exchange is to equalize access. This policy of striving toward equal access is central to the legitimacy of the doctrine of common heritage of mankind. For if the central truth about history and culture is that it belongs to everyone, to deny access to large groups of people is to fundamentally undermine the legitimacy of the doctrine. The principle of common heritage is embraced by the developed states which possess the bulk of the world's cultural property. Unless access is created for the citizens of developing states, through restitution or exchanges, the developed world is left open to the charge of hypocrisy. As Jamaica pointed out, "Gross inequities still exist[] from one country to another with respect to access to cultural property."⁷⁷

Restitution is one method of striving to equalize the access of the peoples of the world to cultural property. Obviously, the return of the national patrimony to the state of origin is difficult to achieve if the developing states are required to pay high prices in the inflated art market. Along with this practical problem is the moral and legal difficulty posed by requiring a state to pay for artifacts which, in its view, rightfully belong to it in the first place. Upper Volta expressed this reservation as it announced its endorsement of the resolution on restitution:

[The representative of Upper Volta] said that his delegation agreed in principle with the draft resolution However, his delegation repeated once again that it regarded as inequitable article 7 of the Convention on the Means of Prohibiting and Preventing the illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by UNESCO, referred to in paragraph 1 of the draft resolution. He therefore joined the many delegations which had maintained that when restitution was made, the financial consequences should be borne to the least extent possible by the countries to which restitution was made since, in general, they were countries which had been robbed of their cultural property. With that reservation, he would support the draft resolution.⁷⁸

In the same debate the United States used the notion of international cultural exchanges as part of the common heritage concept, to argue against the restitution of *all* cultural property, however removed, to the state of origin:

[The U.S. delegate] pointed out that the UNESCO meeting of experts

⁷⁷ U.N. Doc. A/C.3/31/SR. 20, para. 32 (1976).

⁷⁸ U.N. Doc. A/C.3/31/SR. 27, para. 5 (1976).

in Venice in March and April 1976 had recognized that cultural property was a powerful means of understanding other civilizations and, therefore, the claims for restitution or return of cultural property did not aim at the recovery of the totality of cultural property in question since that would be contrary to the purposes of international cultural exchanges and, consequently, against the interests of all people. At that meeting, the experts had also stated that the application of the principle of return should be determined in each specific case by means of bilateral negotiations.⁷⁹

Here, then, the United States was promoting two ideas. First, conflicting with the belief that cultural property belongs exclusively to the state of origin, is the suggestion that that state should have only a representative collection. This suggestion would ensure that the people of the state of origin are not cut off from their cultural history, but denies the moral claim that all cultural property is fundamentally national patrimony and belongs by right to the state of origin.

The idea of representative collections, presented here by the United States, is an early manifestation of a developing tendency for the doctrines of common heritage of mankind and national patrimony to merge. An acknowledgment of the legitimacy of national patrimony is implicit in the recommendation that the state of origin should have a representative, and therefore complete and well-preserved, collection. The underlying thought is that cultural artifacts have a particular and greater meaning to the people in the state of origin than to others because the artifacts embody their particular culture.

But common heritage is recognized here also. The state of origin has a right to only a representative collection because of the legitimate interest the rest of humanity has in the property as part of its heritage. As will be seen, there is an inexorable intellectual and pragmatic pressure which merges these doctrines. It is only in their original, simple forms that they are contradictory.

The other idea promoted here by the United States is the desirability of bilateral negotiations. The United States has bilateral treaties with Mexico⁸⁰ and Peru⁸¹ and is invoking this method to prevent the creation of an international legal order concerning restitution and art trade. It is concerned that any such order would be too restrictive on the international art market.

⁷⁹ *Id.* para. 7.

⁸⁰ Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088.

⁸¹ Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sept. 15, 1981, United States-Peru, 33 U.S.T. 1608, T.I.A.S. No. 10136.

In 1977 the General Assembly adopted a resolution⁸² identical to that of 1976, except for two minor additions. In the first of these, the UNESCO Director-General's report is noted. In introducing the resolution, Rwanda approvingly pointed out two features of his report:

We are pleased to note the positive action undertaken by the Director-General of UNESCO, in particular the establishment of a Committee of Experts entrusted with the consideration of the principal legal and technical questions in this regard [M]y delegation also welcomes the recommendation, adopted by the UNESCO General Conference held at Nairobi in October and November 1976, whereby member States are invited to encourage international exchanges of cultural property . . . thus facilitating the making of donations and long-term loans of cultural property that would permit the establishment in the countries of origin of representative collections of their cultural heritage.⁸³

At its meeting in Venice in 1976, the Committee of Experts made a number of significant suggestions which are enumerated in the report of the UNESCO Director-General.⁸⁴ In doing so, he indicated his intention to give them effect in the coming year.

First, an Intergovernmental Committee was to be created. It would develop methods of "facilitating bilateral negotiations for the restitution or return of cultural property . . . lost . . . as a result of colonial or foreign occupation."⁸⁵ Also, another Committee of Experts was to be formed to define the "terms of reference" and organization and methods of this Intergovernmental Committee.⁸⁶ In addition, the Director-General would appeal to member states to educate people through the mass media about the importance of the return of cultural property.⁸⁷

The International Council of Museums ("ICOM") would be given the authority to establish standards of care for cultural property returned or restored to its country of origin. Also, the Director-General asked ICOM to assist states which lacked "representative" collections to create such collections and to aid in bilateral negotiations to that end.⁸⁸ ICOM responded by agreeing to "contribute to the restitution or return of the *most significant objects* to their countries of origin."⁸⁹ Accordingly, ICOM formed an *ad hoc* committee to:

⁸² G.A. Res. 32/18, 32 U.N. GAOR Supp. (No. 45) at 22, U.N. Doc. A/32/45 (1977) [hereinafter 1977 Resolution].

⁸³ 32 U.N. GAOR (65th plen. mtg.) para. 3, U.N. Doc. A/32/PV. 65 (1977).

⁸⁴ *Restitution of Works of Art to Countries Victims of Expropriation: Report of the Director-General of UNESCO*, U.N. Doc. A/32/203 Annex I (1977) [hereinafter 1977 UNESCO Report].

⁸⁵ *Id.* at Annex I, para. 6(a).

⁸⁶ *Id.*

⁸⁷ *Id.* at Annex I, para. 6(b).

⁸⁸ *Id.* at Annex I, para. 8.

⁸⁹ *Id.* at Annex I, para. 8 (emphasis added).

- (a) Draw up a code of ethics for the restitution of such objects;
- (b) Gather information on those countries which seem to have been largely stripped of their cultural heritage;
- (c) Gather documentation on cultural objects;
- (d) Study the agreements concluded between the various countries, in particular their terms of reference and procedures;
- (e) Study, with the assistance of the national committees concerned, all the technical aspects of the restitution of cultural property;
- (f) Advise UNESCO on the role which its intergovernmental committee might play in the restitution or return of cultural property and on its working methods;
- (g) Propose to UNESCO practical measures to assist Member States in the conservation and enhancement of returned objects.⁹⁰

Two aspects of the Director-General's report are especially noteworthy. First, the word "representative" is used in his appeal to ICOM. He did not ask for aid in the wholesale restitution of cultural property, but rather in the formation of representative collections. In doing so, he implicitly acknowledged the legitimacy of the presence of some art outside of the state of origin. The General Assembly of ICOM also did this when they decided to assist in the return of the "most significant objects" to the countries of origin. This phrase reflects the same belief in the right of states to representative collections of their national patrimony.

The idea of representative collections is heavily influenced by the common heritage of mankind doctrine. Here, as in the recommendation on exchanges, it can be seen that the concepts of common heritage of mankind and national patrimony are not mutually exclusive, but tend to converge. Either notion, left on its own, uninfluenced by the other, is practically and conceptually incoherent. Is it sensible to argue that all art ever produced in France should be returned to France? This claim is a dangerously misguided one because there *is* an international culture. French painting, for example, is a part of the American cultural heritage. The same is true of the human community's relationship to archaeological remains found around the world. Once it is accepted that the international community has an interest in the various national patrimonies, the doctrine of national patrimony becomes restricted.

The concept of common heritage of mankind is fatally flawed also if there is no allowance for the particular importance of national cultures to their own peoples. The practical effect of rejecting the notion of national patrimony is to accept the status quo wherein the bulk of the cultural heritage of mankind increasingly is located in a few developed states. If one accepts the doctrine of common heritage of mankind, then the human community has the right to equal access to it. Clearly, this is not

⁹⁰ *Id.*

the case when the cultural heritage is concentrated in such cities as New York, London, and Paris.

Second, the Director-General's report is replete with recommendations that begin to appear in General Assembly resolutions. Among these are the formation of the intergovernmental committee, an emphasis on bilateral agreements, a request that states use the mass communication media to educate their peoples about restitution, and, through ICOM, the creation of standards for museum infrastructures. Since then, UNESCO has provided the General Assembly with leadership on the issue of the return and restitution of cultural property.

The second of the two additions to the 1977 Resolution emphasized UNESCO's activities:

Decides to remain seized of the question and to include in the provisional agenda of the thirty-fourth session an item entitled "Restitution of works of art to countries victims of expropriation", in order to review the progress achieved and, in particular, the action taken in this regard by the United Nations Educational Scientific and Cultural Organization.⁹¹

The two additions to the 1977 Resolution reflect the same reality. The first, taking note of the United Nations Secretary-General's report transmitting the UNESCO Director General's report, focuses attention on the issues of exchange and the work of the Committee of Experts. The second anticipates the progress to be overseen by UNESCO. These two additions manifest a propensity, for the first time since resolutions were passed on the subject, for the General Assembly to look to UNESCO to implement restitution.

In the 1977 General Assembly debates, Iraq made several statements reflecting the influence of ICOM and UNESCO. The Iraqi delegation asked for the return of certain cultural property, stating that "[it had] in its possession a list of the *most significant* Iraqi works of art in various museums located very far from the country where those works of art originated."⁹² In using the phrase, "most significant," Iraq echoed ICOM's wording, thereby demanding restitution of a representative collection, not of all Iraqi national patrimony.

In the same speech, Iraq recognized the doctrine of common heritage of mankind as a valid one, and, therefore, one affecting the notion of national patrimony:

We are the first to realize that the works of art and precious monuments that various civilizations have bequeathed to us are the most important heritage of mankind as a whole. Nevertheless, they are, above all, the property of the people of Iraq; they are an integral part

⁹¹ 1977 Resolution, *supra* note 82, at 22 (operative para. 4).

⁹² 32 U.N. GAOR (65th plen. mtg.), *supra* note 83, para. 15 (emphasis added).

of their national heritage and their spiritual and national identity.⁹³

Iraq is noting the co-existence of the two doctrines.

Iraq then, in an argument later made by others, points to the existence of fine Iraqi museums and argues that the assertion of developed states that only they can care properly for cultural items is false:

We have heard some representatives state that the developing countries are incapable of safeguarding, preserving and protecting these works of art. We reject that argument, which is based on an unwillingness to recognize the competence of the experts in this field in the developing countries. A single visit to the various monuments and museums in Iraq would serve to refute the letter and spirit of that argument.⁹⁴

In the same debate, Malta made the same claim, terming the expressed concern over museum quality by the developed states a "pretext."

In its bilateral contacts, my Government faced arguments which we consider strange, to say the least. The pretexts for non-restoration offered by the Governments concerned were, first, that, if such restoration were to take place, their museums would be denuded and, secondly, that the treasures themselves would be lost to the public. We consider these arguments as specious and, therefore, not valid. To the first we reply: you cannot furnish your house with somebody else's furniture and then claim denudation if that somebody else asks for its return. To the second we say: the public that needs most to look on the treasures of the past is the one to whom that past belongs, and we in Malta fortunately have adequate museums fully staffed with experts in their own fields where these treasures could be housed and displayed for the enjoyment of all, including the ever increasing number of visitors that come to our shores.⁹⁵

Malta also argued that the possession of the national patrimony of a formerly colonized state represented a last vestige of colonialism.

Many countries with a colonial past will find, if only they take enough interest, that their citizens can spend their time most profitably abroad in visiting museums where they can see displayed *objets d'art*, monuments, museum pieces, artifacts, manuscripts and other documents which should be displayed in the museums of their own countries. One effect of colonialism was that while the colonial Power did its best to impose its own culture on the colony and its people, at the same time, it expropriated from the colonial country many of its artistic treasures, thus impoverishing in that country the cultural history which is the very warp and woof of its . . . [people's life]. While [we

⁹³ *Id.*

⁹⁴ *Id.* para. 17.

⁹⁵ *Id.* para. 32.

are] grateful that, after expropriation, those treasures were preserved rather than destroyed, we must express concern at the fact that their restoration to their rightful owners has long been overdue. To my delegation, this should have been part of the decolonization process itself.⁹⁶

V. AN INCREASED ROLE FOR UNESCO

In the 1978 Resolution⁹⁷ two major trends are evinced. First, the last references to colonialism, both implicit and explicit, are dropped. The other major trend in the resolution is a further heightening of the focus on UNESCO and its efforts. In its ten paragraphs, excluding the pro forma opening one recalling previous General Assembly resolutions, seven refer directly to UNESCO or its creations: the Committee of Experts, the Intergovernmental Committee, and the 1970 Convention on the Illicit Transfer of Cultural Property.⁹⁸ A closer look at some of these paragraphs may indicate the significance of this additional focus on UNESCO.

In both the preamble and the operative section, the General Assembly endorses the creation by UNESCO of the Intergovernmental Committee for the return of cultural property.⁹⁹ This committee was formed by UNESCO to facilitate bilateral and multilateral negotiations and cooperation to develop representative collections in states whose cultural patrimony has been dispersed. It is an ongoing committee with other functions such as disseminating information, helping states to develop museum infrastructures, promoting international loans of cultural property and giving guidance to UNESCO in this area.¹⁰⁰

The General Assembly's enthusiasm over the Intergovernmental Committee's program is noteworthy in that the predominant notions are influenced by both the common heritage and national patrimony doctrines. This is true of the ideas of representative collections, loans, and the development of museum infrastructures. The General Assembly's enthusiasm reflects its acceptance of both doctrines in a non-contradictory manner. That is, states have a particular interest in cultural property emanating from their own people and territory. At the same time, the international community has an interest in all cultural property as

⁹⁶ *Id.* para. 29.

⁹⁷ G.A. Res. 33/50, 33 U.N. GAOR Supp. (No. 45) at 142, U.N. Doc. A/33/45 (1978) [hereinafter 1978 Resolution].

⁹⁸ *Id.* at 142 (preambular paras. 2-4; operative paras. 1-3, 5).

⁹⁹ *Id.* at 142 (preambular para. 3, operative para. 2).

¹⁰⁰ *Intergovernmental Committee History*, *supra* note 76, at 61. The Committee's responsibilities are spelled out in article 4 of its statutes. See *Restitution of Works of Art to Countries Victims of Expropriation: Report of the Director-General of UNESCO*, U.N. Doc. A/34/529 Annex at 9 (1979) [hereinafter 1979 UNESCO Report].

part of the human experience and not separated from the rest of mankind.

Another acknowledgement of UNESCO activity in the 1978 Resolution is a reference to the Committee of Experts established by UNESCO which met at Dakar, Senegal, earlier in 1978.¹⁰¹ The most important result of the Dakar meeting was the development of the mandate and working methods of the Intergovernmental Committee. In developing these statutes the Committee of Experts articulated certain principles which it recommended govern the international order regarding cultural property.

One such principle is that objects of fundamental importance to the spiritual or cultural heritage of a people should be returned or restored to the country of origin. However, this principle is balanced by obligations placed upon the state of origin. This burden is termed "the primacy of the object." This means that the state to which the artifact is returned should see to the physical safety and preservation of the object, ensure that it is made available to the general public, and pass laws so that the object cannot legally be exported again.¹⁰²

The ICOM principles, produced at the request of the Director General of UNESCO, were the basis for the discussions at Dakar. These principles placed constraints on the states of origin. They are obliged to care for the object adequately. But what if they don't? Does the possessory state have the right not to return the property if the museum infrastructure of the state of origin is inadequate? Under the ICOM principles, this circumstance does not justify a refusal to return the objects. Rather, the international community is urged to help the state of origin develop such a system:

In no case should an object restituted or returned be subject to conservation conditions that do not meet international standards. While this fundamental principle could not justify a refusal to retribute property, it would, in many cases, necessitate the training of specialized personnel and the setting up of adequate facilities with, if need be, international assistance.¹⁰³

The discussions at Dakar, as reported by the UNESCO Director-General, also explored the ostensibly insurmountable barrier to restitution created by many legal systems. In general, public collections are protected by laws governing the transfer of ownership. In some states

¹⁰¹ 1978 Resolution, *supra* note 97, at 142 (preamble para. 4).

¹⁰² *Intergovernmental Committee History*, *supra* note 76, at 60. The discussion at Dakar was based upon the ICOM principles formulated at the request of the Director-General of UNESCO. See *Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages* 31(1) MUSEUM 62, 63-64 (1979) [hereinafter *Study*].

¹⁰³ *Study*, *supra* note 102, at 64.

such a transfer requires a legislative act. Cultural property in private institutions or owned by individuals poses a more difficult problem since in many states private property rights are fundamental and guaranteed by law or even the constitution.¹⁰⁴

The Director-General suggests that these barriers are primarily legal in nature. But these obstacles would seem to be largely political. All Western states, certainly the countries where private property enjoys the greatest protection, limit the rights of private property where those rights conflict with the public interest. The doctrines of public trust and eminent domain are examples of this. Where the interests of the general public or of the state are such that the owner's use of the property must be limited¹⁰⁵ or the property expropriated by the state¹⁰⁶ the rights to private property are severely limited. Given the political will, states with doctrines like public trust and eminent domain should be able to limit private property rights to cultural property in order to return artifacts of fundamental importance to the state of origin, promote the foreign relations of the possessory state and generally improve the international climate.

But whether these barriers are essentially legal or political is, as a practical matter, irrelevant. The fact remains that under the current regime there are substantial barriers to the general return of cultural property. The Director-General recommends two methods of circumventing the need for actual legal restitution. The first of these is long-term loans. Through this method the object can be placed in the state of origin for public viewing. The loan can be renewed indefinitely without encountering the legal difficulties of restitution.¹⁰⁷

Long-term loans do not meet the psychological requirements of a state with a dispersed heritage, however. If the ownership of a people's cultural patrimony by a foreign state is an intrusion into their sovereignty, loaning them objects which they feel they own does not eliminate this intrusion. While this does make the cultural property available for the people of the state of origin to see, one can well imagine their chagrin as they explain to their children that these objects fundamental to their culture have been lent to them by, for example, a former colonial ruler. In such a case it would remain, indeed, a last vestige of colonialism.

The other method of effecting return recommended by the Director-General is that of preemptive purchase. Under their domestic laws, many states have the power to purchase any cultural property being sold

¹⁰⁴ *Preservation and Further Development of Cultural Values: Report of the Director-General of UNESCO*, U.N. Doc. A/33/157, para. 67 (1978) [hereinafter *1978 UNESCO Report*].

¹⁰⁵ For example, the owner of beachfront property.

¹⁰⁶ For example, a home forcibly purchased by the government so that a highway can go through.

¹⁰⁷ *1978 UNESCO Report*, *supra* note 104.

within their territory. These states have the preemptive right of first purchase at a fair market price "which subrogates them *de jure* from the rights of the last purchaser, subject to his being compensated."¹⁰⁸ The Director-General proposed, as a result of the discussions at Dakar, that through bilateral agreements these preemptive rights could be exercised by the possessory state on behalf of the country of origin seeking restitution.

Another new feature of the 1978 Resolution is a request that states return cultural property through any possible means with an emphasis on bilateral arrangements: "*Invites* Member States to take all possible steps for the restitution and return of cultural and artistic property, including manuscripts and documents, through, *inter alia*, the establishment of bilateral arrangements; . . ."¹⁰⁹ Fortunately, the resolution deviates from what the Director-General of UNESCO said in his report. The request that "all possible steps" be taken and that bilateral agreements are, *inter alia*, one of many means to be used, distinguishes it from the UNESCO report.

The Director-General's report stated: "Because of the extreme diversity of cases of restitution or return, it was considered difficult to suggest specific and systematic guidelines since practically each case was one of a kind, and solutions would have to be found through bilateral negotiations."¹¹⁰ The Director-General's statement that the cases vary so much that no guidelines can be set is a dangerous one. If there are no general principles of international law to guide the behavior of states with regard to cultural property, then there are no norms to press possessory states to return it. The Director-General states that it is necessary to proceed on a case by case basis and that, therefore, bilateral arrangements are the only means of returning cultural property.

It is true that cultural property departs the state of origin in a variety of ways. But if the Director-General's position is not merely a practical one, that bilateral agreements are the most likely way to have property returned, but rather a theoretical one, he is ignoring fundamental principles of international law on cultural property which, while not necessarily currently effective, can be made effective. An example of this is the notion that property central to a culture or people cannot be alienated by any means. If this doctrine is accepted, then all such property should be returned since "legal" removal violates this principle.

In the 1978 debates, there is nothing to explain the make-up of the resolution, but a statement by Ecuador reflects the growing awareness of Third World states that a strict notion of national patrimony is ill-fitted

¹⁰⁸ *Id.*

¹⁰⁹ 1978 Resolution, *supra* note 97, at 142 (operative para. 4).

¹¹⁰ U.N. Doc. A/33/157, *supra* note 104, para. 66.

to the realities of cultural life because cultures are not autonomous, but rather, are constantly influencing each other:

The tremendous artistic wealth of the colonial period in this country was a fine example of the mingling of cultures and peoples throughout the course of history. The temples of Quito had been built with stones from Inca ruins, by Andean Indian workers taught by Spanish or Flemish Monks, in the baroque style prevalent at that time in Spain. Spanish art and architecture had themselves borne the traces of Arabic and even Persian influences.¹¹¹

As Ecuador suggests, an interest in one's national patrimony cannot generally be limited to those objects produced within one's own state.

Another statement, this one by Panama, points to the return of cultural property to former colonies as a necessary step in the completion of decolonization and the full independence and self-awareness of the former colony:

Colonialism, however, had, out of ignorance or avarice, destroyed the cultural heritage of many peoples in all its manifestations, breaking up communities and enslaving the conquered peoples to such a point that they had lost all cultural identity. What the ravages of "civilization" had not destroyed had been carried off to distant lands to fill museums, and private galleries [and] collections.

With the advent of decolonization and the birth of a new international consciousness, each country was seeking to rediscover its roots and interpret its history. Countries which, under the influence of foreign cultural and aesthetic values, had buried their own identity were now reacknowledging their own origins and reconstructing their cultural heritage.¹¹²

VI. THE RIGHT TO A REPRESENTATIVE COLLECTION

In the 1979 Resolution,¹¹³ the idea of "representative" collections is mentioned for the first time: "Aware of the importance attached by the countries of origin to the *return* of cultural property which is of fundamental spiritual and cultural value to them, so that they may constitute collections *representative* of their cultural heritage."¹¹⁴ This demonstrates the influence of UNESCO on the General Assembly since UNESCO had long recommended the formation of representative collections in the countries of origin.¹¹⁵ In fact, this paragraph was taken ver-

¹¹¹ 33 U.N. GAOR C.3 (71st mtg.) para. 13, U.N. Doc. A/C.3/33/SR. 71 (1978).

¹¹² *Id.* paras. 17-18.

¹¹³ G.A. Res. 34/64, 34 U.N. GAOR Supp. (No. 46) at 18, U.N. Doc. A/34/36 (1979) [hereinafter 1979 Resolution].

¹¹⁴ *Id.* at 18 (preambular para. 3) (emphasis added).

¹¹⁵ 32 U.N. GAOR (65th plen. mtg.), *supra* note 83. For a discussion of the concept of representative collections see the text following note 73.

batim from a resolution passed earlier that year by the General Conference of UNESCO.¹¹⁶ The adoption of the principle of "representative" collections further reflects the waning in the influence of a strict national patrimony doctrine in the General Assembly.

In the General Assembly debates, Iraq approvingly quotes the Director-General of UNESCO on the importance of representative collections.¹¹⁷ Byelorussia also states its support for the creation of representative collections:

My delegation takes satisfaction that the [UNESCO] General Conference approved the statutes of [the Intergovernmental] Committee. . . . [T]he Committee will encourage the research and studies necessary for the drafting of programmes which will permit the rapid establishment of representative collections in those countries whose cultural heritage has been destroyed.¹¹⁸

In Belgium's statement, the connection between this policy and the merging of the doctrines of common heritage and national patrimony can be seen. The policy of representative collections emerges from the combination of these two doctrines. Belgium does not argue that this is true, but by placing an expression merging common heritage with national patrimony immediately before an acknowledgment of the validity of representative collections, Belgium indicates such a relationship:

Works of art speak a universal language, but they have special meaning for the peoples of the regions that have produced them. Belgium, from which so much cultural property has gone over the centuries, appreciates the desire of young nations to have collections representative of their cultural heritage.¹¹⁹

In the debates Iraq makes several statements recognizing the common heritage of mankind and placing it as a legitimate doctrine beside national patrimony:

Some of those reasons stem from Iraq's deepest national roots and form part of the very essence of our history and our cultural heritage, while others flow from what forms the common heritage of man and of universal civilization. . . .

. . . .

We are second to none in our awareness that the works of art and the precious legacy of those civilizations [Sumerian, Akkadian, Babylonian, Assyrian] are in the forefront of the heritage of civilization and form an indivisible whole.¹²⁰

¹¹⁶ 1979 UNESCO Report, *supra* note 100, at Annex I at 7 (1979).

¹¹⁷ 34 U.N. GAOR (51st plen. mtg.) para. 86, U.N. Doc. A/34/PV. 51 (1979).

¹¹⁸ *Id.* para. 112.

¹¹⁹ *Id.* para. 73.

¹²⁰ *Id.* paras. 78-80.

Democratic Kampuchea also made a statement espousing the doctrine of common heritage of mankind:

[The Angkor] monuments . . . constitute a unique architectural group [Visitors] have quite rightly regarded them as part of the cultural and artistic heritage of the human race.

These treasures and masterpieces of our people, of our 2,000-year-old civilization [are the] artistic and cultural heritage of the whole human race¹²¹

The 1979 Resolution's endorsement of representative collections asks for the "return" of "cultural property which is of fundamental spiritual value,"¹²² not the "return or restitution." Return, unlike restitution, includes property legally removed. Where the goal of the country of origin is the reconstitution of a representative collection of a dispersed heritage, how the artifacts left the country is unimportant. Therefore, the broader term "return" is used so that disputes as to the legality or illegality of the object's removal are irrelevant. Restitution of all illegally removed property is still demanded.

Another important addition to the 1979 Resolution is an expression of support for the plea of the Director-General of UNESCO: "*Supporting* the solemn appeal launched on 7 June 1978 by the Director-General of the United Nations Educational, Scientific and Cultural Organization for the return to those who created it of an irreplaceable cultural heritage."¹²³ For the second time "return" rather than "return or restitution" is requested. The return requested is of "irreplaceable cultural heritage," a demand consistent with the notion of representative collections since only the most valuable artifacts are being sought.

The Director-General's plea begins with references to past pillaging and to the current illicit traffic in art. He appeals: 1) to UNESCO states to conclude bilateral agreements to return cultural property, to promote long-term loans and to ratify the UNESCO Convention; 2) to the information media to arouse public opinion; 3) to cultural organizations to promote stricter codes of ethics; 4) for museums and other institutions to return the "most important" cultural property to states of origin; 5) to museums to share similar objects with countries of origin who are without such an object; 6) for art experts to promote understanding of the importance of seeing art in its natural setting; 7) for those responsible for preserving and restoring art works to aid in the return of works to the country of origin and to assist in preserving and displaying them; 8) to historians and educators to instill the value that, if possible, it is always better to right a wrong; 9) to artists themselves to acknowledge that part

¹²¹ *Id.* paras. 96-98.

¹²² 1979 Resolution, *supra* note 113 at 18 (preamble para. 3).

¹²³ *Id.*

of a nation's identity exists in its imagination and creativity.¹²⁴

Certain statements in the plea of Director-General M'Bow are worthy of emphasis. He points out that cultural property can become fundamental to the possessory state and therefore be part of the cultural heritage of that second state as well as of the state of origin: "[C]ertain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed."¹²⁵ This acknowledgment of the complexities innate to the concept of cultural patrimony is a further step away from a strict national patrimony view.

M'Bow also acknowledges, again, that cultural property is necessarily both a part of a national patrimony and the common heritage of mankind. In doing so he reiterates a position UNESCO has advocated for some time: "They know, of course, that art is for the world and are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone."¹²⁶ He then calls for the return to the state of origin of a representative collection, and this call undoubtedly inspired the Assembly request: "These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish."¹²⁷ Further, he also encourages bilateral agreements for the return of cultural property to the state of origin. Support for this idea also appears in the General Assembly resolution.¹²⁸

Finally, the Director-General calls directly on those in the information media to inform the public of the importance of the return and restitution of cultural property.¹²⁹ The subject of the use of the media for this purpose was the core of two paragraphs in the 1979 Resolution. In the first, member states are asked to encourage the mass media to increase the public awareness of these issues.¹³⁰ In the next, the Secretary-General is asked to associate the United Nations with UNESCO activities regarding cultural property and to mobilize its information media for that purpose.¹³¹

In the 1979 General Assembly debates, the United States made

¹²⁴ M'Bow, *A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, 31(1) MUSEUM 58 (1979).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 1979 Resolution, *supra* note 113, at 18 (operative para. 3).

¹²⁹ M'Bow, *supra* note 124, at 58.

¹³⁰ 1979 Resolution, *supra* note 113, at 18 (operative para. 6).

¹³¹ *Id.* at 18 (operative para. 7).

some of its usual points: it stated "that the United States judicial system offers redress to individuals or nations alleging that their property has been stolen and is located within the United States;" it indicated its support for bilateral arrangements; it reaffirmed its support for the 1970 UNESCO Convention.¹³²

The United States then indicated its support for UNESCO and United Nations efforts to promote the understanding of issues surrounding cultural property through the media. But it rejected the idea of doing this itself: "We are troubled by a call for governmental interference with mass media, especially in an area where an international organization is already taking constructive action."¹³³ It then allied itself with the proposition that issues of return and restitution are so complex, so differentiated in their detail, that they must be approached on a case by case basis and that no general guidelines can be drawn: "We do not believe that the disposition of all art objects, some of which belong to more than one nation or even to the entire international community, can be predetermined by a general pronouncement."¹³⁴ Such a suggestion was made by UNESCO Director-General M'Bow based on the ICOM report.¹³⁵

VII. UNESCO DEVELOPS AN INTERNATIONAL FRAMEWORK

Two aspects of the 1980 Resolution¹³⁶ are particularly noteworthy. First, there is an additional increase in references to UNESCO and entities related to UNESCO. This accompanies a virtually complete adoption by the General Assembly of UNESCO principles.

Of the six preambular paragraphs in the Resolution, other than the first pro forma one recalling previous resolutions, all allude to UNESCO, entities created by UNESCO or principles advanced by it. One reiterates support for the UNESCO Convention of 1970.¹³⁷ Another acknowledges the report of the Director-General of UNESCO.¹³⁸ A third expresses support for the plea of the Director-General.¹³⁹

In addition, the resolution urges the formation of representative collections, an idea advanced by UNESCO.¹⁴⁰ Also, the resolution quoted a recommendation of the first meeting of the Intergovernmental Committee created by UNESCO: "*Deeply concerned* at the persistence of the

¹³² 34 U.N. GAOR (82d plen. mtg.) at 1521, U.N. Doc. A/34/PV. 82 (1979).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *supra* text accompanying notes 102-110.

¹³⁶ G.A. Res. 35/128, 35 U.N. GAOR Supp. (No. 48) at 184, U.N. Doc. A/35/48 (1980) [hereinafter 1980 Resolution].

¹³⁷ *Id.* at 184 (preambular para. 2).

¹³⁸ *Id.* at 184 (preambular para. 3).

¹³⁹ *Id.* at 184 (preambular para. 7).

¹⁴⁰ *Id.* at 184 (preambular para. 4).

illicit traffic in cultural property, which continues to impoverish the cultural heritage of all peoples."¹⁴¹ The only change from the Committee's language was to substitute "peoples" for "nations."¹⁴²

Of the ten operative paragraphs in the 1980 Resolution, eight refer directly to UNESCO, entities created by UNESCO or principles advanced by UNESCO. The first commends UNESCO for the work it has done with regard to the return or restitution of cultural property.¹⁴³ The second urges UNESCO to intensify its efforts in this area and asks member states to cooperate.¹⁴⁴ The third invites states to draw up inventories in cooperation with UNESCO.¹⁴⁵ The fourth reference to UNESCO is in the form of an appeal to states to cooperate with the Intergovernmental Committee created by UNESCO by forming bilateral agreements to return cultural property.¹⁴⁶ The fifth asks, more urgently than before, that states accede "without delay" to the 1970 UNESCO Convention.¹⁴⁷ The sixth asks the Secretary-General, in cooperation with UNESCO, to mobilize international opinion, particularly through the use of United Nations media, to promote the return of cultural property.¹⁴⁸ The seventh expresses the hope that the second World Conference on Cultural Policies, a meeting convened by UNESCO and whose report was to be printed directly in the Director-General's report of 1983, would devote considerable attention to issues of cultural property.¹⁴⁹ The eighth deals with the next report the Secretary-General is to submit in collaboration with the Director-General of UNESCO.¹⁵⁰

In addition, member states are again asked to encourage their mass media to improve public understanding of the importance of the return of cultural property. This idea springs from the Director General's desire that various media be used for this purpose and thus represents another endorsement of UNESCO's policies.¹⁵¹

A second aspect of the resolution is an increased emphasis on the problem of current illicit transfer of cultural property. The 1970 Convention is invoked twice, once in a new preambular paragraph and once in the operative section.¹⁵² The latter places greater urgency than previously on states acceding to the Convention, asking that they do so "with-

¹⁴¹ 1980 Resolution, *supra* note 136, at 184 (preambular para. 6).

¹⁴² 36 U.N. GAOR (Agenda Item 21) at 1, U.N. Doc. A/36/651 (1981).

¹⁴³ 1980 Resolution, *supra* note 136, at 185 (operative para. 1).

¹⁴⁴ *Id.* at 185 (operative para. 2).

¹⁴⁵ *Id.* at 185 (operative para. 3).

¹⁴⁶ *Id.* at 185 (operative para. 5).

¹⁴⁷ *Id.* at 185 (operative para. 6).

¹⁴⁸ *Id.* at 185 (operative para. 8).

¹⁴⁹ *Id.* at 185 (operative para. 9).

¹⁵⁰ *Id.* at 185 (operative para. 10).

¹⁵¹ *Id.* at 185 (operative para. 7).

¹⁵² *Id.* at 184-5 (preambular para. 2, operative para. 6).

out delay."¹⁵³

Two other references to the problem of illicit trade were added to the resolution. One is the aforementioned paragraph taken from the Intergovernmental Committee: "*Deeply concerned* at the persistence of the illicit traffic in cultural property, which continues to impoverish the cultural heritage of all peoples."¹⁵⁴ And the other: "*Appeals* to all States to take adequate measures to prohibit and prevent the illicit import, export and transfer of cultural property."¹⁵⁵

Shortly before the 1980 Session, UNESCO had charged ICOM with the formulation of principles to govern an international system regarding cultural property including its return or restitution to the state of origin and had created the Intergovernmental Committee. UNESCO was advising the General Assembly which was, by and large, adopting its recommendations. Therefore, the aspirations of the majority of the General Assembly for the return of cultural property were being addressed by the international system in the form of UNESCO and its advisory bodies.

But the problems involved with illicit trade, addressed by UNESCO in the 1970 Convention, were still an issue of great concern to the General Assembly. Because of the success in creating the 1970 Convention, further policy formulations in this area ceased. But the problems were not solved since only about one-third of the members of the United Nations had signed and ratified the Convention. So the great interest of much of the General Assembly in illicit trade is expressed in the proliferation of statements concerning it in its resolutions. The failure to acquire the desired level of support for the Convention is reflected in a statement by the Director-General of UNESCO:

The [UNESCO] secretariat has continued its efforts to extend the application of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in November 1970. Despite those efforts and the repeated urging of the General Conference during its sessions, only 46 member States had ratified or accepted it as of 31 March 1980 (eight of them during the period under review).¹⁵⁶

Another new recommendation in the 1980 Resolution is that member states draw up inventories of cultural property in cooperation with UNESCO.¹⁵⁷ This idea, as with virtually all ideas gaining currency in the General Assembly resolutions, was adopted from UNESCO after

¹⁵³ *Id.* at 185 (operative para. 6).

¹⁵⁴ *Id.* at 184 (preambular para. 6).

¹⁵⁵ *Id.* at 185 (operative para. 4).

¹⁵⁶ *Preservation and Further Development of Cultural Values: Report of the Director-General of UNESCO*, U.N. Doc. A/35/349 (1980).

¹⁵⁷ 1980 Resolution, *supra* note 136, at 185 (operative para. 3).

having been recommended to UNESCO by ICOM. ICOM, in its study, gave three reasons for creating inventories of the cultural property of a state located both within its borders and elsewhere. Such an inventory makes the return of cultural property from other states more likely, it makes its illegal export more difficult, and it renders "the coherence of reconstituted heritage" possible, that is, a representative collection.¹⁵⁸

In 1980 the General Assembly again calls on states to take the necessary steps to return or restitute cultural property. It again emphasizes bilateral agreements as a method of doing this. But in this resolution, states are asked to make bilateral agreements in cooperation with the Intergovernmental Committee, a change further emphasizing UNESCO's role.¹⁵⁹

The concept of cultural property as the common heritage of mankind had, as of the debates of 1980, gained such ascendancy that states requesting the return of cultural property did so casting their claims in terms of the common heritage doctrine. Greece provides a good example of this:

Cultural property situated in the places where for centuries they had been intertwined with history and tradition, constituted the heritage of mankind. The international community must contribute to the return of illegally transferred cultural property to their places of origin.¹⁶⁰

Also in the debate, Belgium, which was in the process of helping Zaire to reconstitute its cultural heritage, expressed its support for inventory creation as called for in the Resolution: "The Belgian delegation also supported the invitation contained in draft resolution A/C.3/35/L. 33 to draw up inventories of cultural property."¹⁶¹

In the same debate, the United States reiterated its opposition to the suggestion that states involve themselves with the media, even for an ostensibly worthy purpose. It also expressed its opposition to the return or restitution of cultural property taken before 1970, which it referred to as "rolling back history":

... [T]he United States did not agree with paragraph 7 of draft resolution A/C.3/35/L. 33 as it could be interpreted as an invitation to Governments to involve themselves with the affairs of the mass information media. The United States supported the principle of returning cultural property under the terms of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It opposed any effort to require Governments to return such property that went beyond the terms of

¹⁵⁸ *Study, supra* note 102, at 63.

¹⁵⁹ 1980 Resolution, *supra* note 136, at 185 (operative para. 5).

¹⁶⁰ 35 U.N. GAOR C.3 (45th mtg.) para. 73, U.N. Doc. A/C.3/35/SR. 45 (1980).

¹⁶¹ 35 U.N. GAOR C.3 (46th mtg.) para. 33, U.N. Doc. A/C.3/35/SR. 46 (1980).

the UNESCO Convention, which did not require restitution with respect to works of art that had entered a country before the date of entry into force of the Convention in that country.

Finally, the United States was somewhat disturbed at the reference to previous resolutions that appeared to be aimed at rolling back history. The experts from developed and developing countries who had been meeting since 1976 under the auspices of UNESCO had recognized that it would not be practical to go back in history to claim property rights.¹⁶²

VIII. THE DOCTRINES MERGE

In the 1981 Resolution,¹⁶³ a new statement is added stressing the importance of a people's cultural heritage to its artistic values as well as to its general development: "*Emphasizing* that the cultural heritage of a people conditions the present and future flowering of its artistic values and its over-all development."¹⁶⁴ The connection posited here between a state's self-awareness through the possession and understanding of its own culture, and its general development, including economic, is made many times in the General Assembly debates. Among these statements are several by Zaire, the country which introduced the resolution:

The works of art, manuscripts, documents, archives and other cultural or artistic treasures are precisely these values of culture to which each people attaches great importance. The cultural heritage of a people conditions in the present and in the future the flourishing of its artistic values and its integral development

Development conceived of as a global process of change in structures to satisfy the essential needs of the people must have a basis, a point of departure. This basis is to be found in the distillation of values, in the inventory of the heritage of values, which makes it possible to define a strategy for development. It is an effective method of struggle against wretchedness, poverty, underdevelopment, alienation and dependence.

. . . .
 . . . In the past, our culture was denied, and therefore everything was denied to us and we were ripe for colonization. Today it is with development in mind that we must tackle the problems of education, of art, of culture, of science, of technology. We must study and teach our children the contribution of culture, of education, of art to development—that is to say, the conditions they must fulfill in order to take part in our development efforts.¹⁶⁵

¹⁶² 35 U.N. GAOR C.3 (50th mtg.) para. 46, U.N. Doc. A/C.3/35/SR. 50 (1980).

¹⁶³ G.A. Res. 36/64, 36 U.N. GAOR Supp. (No. 51) at 19, U.N. Doc. A/36/51 (1981) [hereinafter 1981 Resolution].

¹⁶⁴ *Id.* at 19 (preamble para. 3).

¹⁶⁵ 36 U.N. GAOR (74th plen. mtg.) paras. 9-13, U.N. Doc. A/36/PV. 74 (1981).

Since the General Assembly debates of 1978, states had been emphasizing the preeminent importance of an adequate museum infrastructure in the states of origin. Interestingly, most of these statements were made by Third World countries. This is an expression of the adoption by many Third World states of the ICOM principles, which were promulgated by UNESCO and reflect the doctrine of the common heritage of mankind. Panama stated in 1978: "That appeal also applied in cases where underdeveloped nations had allowed cultural treasures to leave their country because they had neither the human resources nor the technical facilities to look after those treasures for themselves. Once they were able to do so, their property should be returned."¹⁶⁶

The clear implication of this statement is that if the state of origin is not able to care properly for the cultural object, for example lacking an adequate museum infrastructure, then the property should not yet be returned. A similar inference can be drawn from Ecuador's assertion in 1979 that with the creation of quality museum infrastructures, the validity of the claim of the states of origin to their cultural property becomes incontrovertible:

[N]ow . . . that we have established museums, classifications, catalogues and regulations in our countries to defend the artistic heritage of each nation, it is necessary for us to adopt new attitudes and establish a new international order concerning the possession, restitution and elimination of the plunder of works of artistic value throughout the world.¹⁶⁷

In the next session, Senegal placed similar emphasis on the crucial importance of adequate facilities to care for the objects: "States must make the necessary efforts to establish an infrastructure to receive the works of art if the transfer of such works was to be really effective."¹⁶⁸

A similar but much stronger assertion was made later in the same session by Madagascar: "States that sought the restitution of cultural property had the obligation to establish an infrastructure capable of receiving such property in the context of a specific national cultural policy."¹⁶⁹

In 1981, Ecuador took a slightly different tack on demanding the restoration of cultural property, by focusing on the successful creation of adequate museum systems:

During the last two centuries the argument was adduced that cultural objects, the works of art of remote peoples or ancient civilizations, were better cared for when catalogued and displayed in the museums

¹⁶⁶ 33 U.N. GAOR C.3 (71st mtg.), *supra* note 111, para. 19.

¹⁶⁷ 34 U.N. GAOR (51st plen. mtg.), *supra* note 117, para. 60.

¹⁶⁸ 35 U.N. GAOR C.3 (39th mtg.) para. 6, U.N. Doc. A/C.3/35/SR. 39 (1980).

¹⁶⁹ 35 U.N. GAOR C.3 (41st mtg.) para. 29, U.N. Doc. A/C.3/35/SR. 41 (1980).

of the large industrial centers of the world, and that in their countries of origin there were no museums, experts or appropriate legislation. That situation, whether fictitious or real, does not exist now. The establishment of museums with modern techniques in our countries, the training of experts in research, cataloguing and restoration, and the national interest in our indigenous cultural values are characteristic of a universal movement clearly demonstrated in the developing countries. Therefore, the time has come to return or restore works of art to their countries or origin.¹⁷⁰

As a result of the attitudes reflected in the previous statements, the development of museum infrastructures was a dominant theme in the 1981 Resolution. The notion is mentioned four separate times.¹⁷¹ These paragraphs express approval of the continuing efforts of UNESCO to develop infrastructures, call upon the United Nations Development Programme, member states, and regional organizations to assist states to develop museum infrastructures and applaud member states for creating museum systems, as well as urging them to strengthen them.

Another new theme expressed repeatedly in 1981 is that of the return of archives to the countries of origin. Archives were not mentioned in the original draft¹⁷² but were inserted into the final resolution and were emphasized in the debates preceding its adoption by the General Assembly. Iraq approached the issue in a legalistic manner:

In this context the International Law Commission, which is a subsidiary organ of the United Nations entrusted with the codification and the progressive development of international law, formulated a set of legal articles on the succession of States with regard to State archives. . . . What is interesting to us in those articles is that the International Law Commission has invoked resolutions adopted within the framework of UNESCO, deriving from those resolutions a number of legal principles under which archives would be . . . [restituted], including archives of historical value.¹⁷³

Algeria took a slightly different approach, arguing that archives are a type of cultural property essential to the state of origin whose absence has both spiritual and material effects:

We know that, while maintaining their very specific nature, archives, particularly historical ones, are an integral part of this cultural property, an essential part of the heritage of all national groups. We know too that archives are property that enriches those that share it; by promoting a better knowledge of the past they contribute to better understanding for the future.

¹⁷⁰ 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, para. 38.

¹⁷¹ 1981 Resolution, *supra* note 163, at 17-18 (preamble para. 6, operative paras. 3, 8, 9).

¹⁷² 36 U.N. GAOR Annexes (Agenda Item 21) at 1, U.N. Doc. A/36/L. 22 (1981).

¹⁷³ 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, para. 63.

But we must be clear. The recovery of its archives is, for a newly independent State, the recovery of a part of itself, after the momentary eclipse during the colonial night. It is an aspect of its liberation from the chains of past history. It is for each people one of the most valuable means of regaining its spiritual and material well-being. Archives are a part of the collective memory. They also serve considerable practical interests through their use scientifically for the administration of the territory and for socio-economic and cultural development planning of every kind.¹⁷⁴

The word "archives" was inserted twice into the 1981 Resolution, once in the preamble and once in the operative section.¹⁷⁵ The second of these paragraphs deserves special scrutiny:

"Reaffirms that the restitution to a country of its *objets d'art*, monuments, museum pieces, archives, manuscripts, documents and any other cultural or artistic treasures contributes to the strengthening of international co-operation and to the preservation and flowering of universal cultural values through fruitful co-operation between developed and developing countries."¹⁷⁶

The phrase "through fruitful cooperation between developed and developing countries"¹⁷⁷ indicates the division of the world into the industrialized and developing states. This division exists both in the economic and political realms. Implicit in the suggested cooperation between these two groups of states are demands that the developed states help the less developed states to reconstitute their heritage and help to provide them with the capability of preserving it. This cooperation also implies an acceptance of certain international standards with regard to cultural property by the developing states. These norms were discussed earlier in this article.

The reference to "the preservation and flowering of universal cultural values,"¹⁷⁸ is in the context of restitution. Since restitution is to the state of origin, how are "universal cultural values" affected? Once again, we find both the doctrines of national patrimony and common heritage in play. As long as a people is severed from its own cultural history, it is crippled both artistically and materially, in the national patrimony view. When the cultural property of a people is reconstituted, that people's creative abilities are strengthened and the product of their work enriches the entire world. So the common heritage of mankind benefits by the return of national patrimony.

A third request that records regarding the developing states be made

¹⁷⁴ 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, paras. 82-83.

¹⁷⁵ 1981 Resolution, *supra* note 163, at 19 (preambular para. 7, operative para. 2).

¹⁷⁶ *Id.* at 19 (operative para. 2).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

available to them is made in the 1981 Resolution.¹⁷⁹ This appeal for the reports of archaeologists and explorers from the developed world is closely analogous to that for the return of archives.

An interesting paragraph which first appeared in the previous resolution reappears: "*Deeply concerned* at the persistence of the illicit traffic in cultural property, which continues to impoverish the cultural heritage of all peoples."¹⁸⁰ This is a statement expressive of the common heritage doctrine. It says that the illicit traffic impoverishing some states impoverishes, in fact, all states. Ecuador, in the debates, makes this point: "This is the only way of stopping the plunder of and unlawful traffic in cultural property, which affects our peoples and the universal heritage of mankind."¹⁸¹

Later in the same debate Ecuador expressed its acceptance of both doctrines, common heritage and national patrimony: "We welcome . . . the restitution of cultural property to the countries of origin . . . and the Committee on the Cultural Heritage of the World, which has declared the city of Quito and the Galapagos Islands of Ecuador to be of universal value and the heritage of mankind . . ."¹⁸² Columbia also implicitly acknowledged its support for both doctrines:

We are also convinced that these national treasures should be shared with other countries. That is why we take this opportunity to offer the United Nations our most valuable jewel, as the cultural heritage of mankind—Cartagena de Indias, the most beautiful walled port of the new world. We hope that it will be included, after the necessary formalities, in the list of those priceless monuments which should be admired and loved by all of the peoples of the world.¹⁸³

Ecuador and Columbia both allude to the World Heritage Treaty.¹⁸⁴ This UNESCO sponsored Convention established a list of unmovable cultural and natural property that is part of the world heritage of mankind. The Convention assigned primary responsibility for preserving the property to the state within whose territory it is located. It assigned secondary duties to other states to aid in the protection of the property. Clearly, this Convention reflects a convergence of both doctrines, common heritage and national patrimony.

Iraq acknowledged that the two principles exist side by side: "Despite the fact that we perceive cultural objects as the legacy of human civilization, we know at the same time that above all they belong to their

¹⁷⁹ *Id.* at 20 (operative para. 12).

¹⁸⁰ *Id.* at 19 (preambular para. 8).

¹⁸¹ 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, para. 50.

¹⁸² *Id.* para. 53.

¹⁸³ *Id.* para. 117.

¹⁸⁴ UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, 1037 U.N.T.S. 151.

country of origin and cannot be separated from the national and spiritual heritage of that country.”¹⁸⁵ Algeria said essentially the same thing:

To satisfy the legitimate and profound concern of countries plundered of the fundamental elements of their cultural heritage, our common duty here is to seek a consensus on the ways and means by which to implement the equitable principle of the return and restitution of cultural property to the countries of origin

The increased interest shown by UNESCO in the right of peoples to recover such property, the testimony to their own genius and cultural values, expresses an international awareness of this major dimension of the preservation and development of the universal cultural heritage.

. . . .

The question of the recovery of cultural property falls within this context, for it is in the awareness of their special nature that peoples find the best catalyst for their development and, beyond that, for the development of the cultural heritage common to all mankind.¹⁸⁶

Kampuchea made the same point, in strengthening national cultures, the common heritage of mankind is also strengthened: “Just as a writer can reach the universal only by remaining profoundly personal, so a people cannot make its contribution to world culture unless it is deeply imbued with a profound sense of its own culture.”¹⁸⁷ And later, “Indeed, the monuments of the Khmer civilization are an integral part of the cultural heritage of mankind, but, above all, they represent the soul and the memory of our people, the eternal symbols of our identity and our national personality.”¹⁸⁸ Also,

[i]t is to that end that the people of Kampuchea continues its multifaceted struggle, a struggle for the survival of its nation, its civilization and its national identity, a struggle which, with the support and solidarity of all peoples and countries that cherish peace and justice, plays a part equally in preserving the cultural heritage of mankind.¹⁸⁹

Egypt also acknowledged the two views: “Egypt, because of its ancient cultural heritage, handed down through many millennia, is very concerned about this question because of its deep interest in protecting the heritage and its appreciation of the importance of preserving it for the benefit of all mankind.”¹⁹⁰

Another recurrent suggestion in the 1981 Resolution is the preparation of inventories. Their importance is mentioned three times in the

¹⁸⁵ 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, para. 61.

¹⁸⁶ *Id.* paras. 72-73, 87.

¹⁸⁷ *Id.* para. 95.

¹⁸⁸ *Id.* para. 96.

¹⁸⁹ *Id.* para. 97.

¹⁹⁰ *Id.* para. 120.

resolution. UNESCO and the Intergovernmental Committee are commended for helping states to prepare inventories of movable cultural property; States are invited to draw up inventories of their cultural property in cooperation with UNESCO; and public and private museums and collectors are asked to help the states of origin in cooperation with UNESCO to inventory these collections. Particular emphasis is placed on returning artifacts or making them available to the states of origin and creating an inventory of items kept in the storehouses of museums and private collections.¹⁹¹

Ecuador, for example, had repeatedly stressed its agitation at the presence of items of its national patrimony in the vaults and cellars of the museums of the developed world. It made statements to this effect in the General Assembly debates in 1978, 1979, and 1981.¹⁹²

At times the numbers of such objects in the vaults of those museums are so great that out of a hundred of them they can only exhibit one or two because of lack of space. It would appear to be obvious, easy and just and it would extol their scientific stature, if those museums were to add moral prestige by returning some pieces to the museums of the country of origin.¹⁹³

There is one final addition in the 1981 Resolution worthy of our attention. It places greater emphasis on the responsibility of states to deter illicit art trade through their domestic institutions. It undoubtedly was included in the resolution as a result of the recommendations in the report of the Intergovernmental Committee.¹⁹⁴ The Committee specifically recommended the use of customs and courts for this purpose. This idea was appended to an already existing paragraph from the previous resolution which:

Invites Member States to take adequate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property, and to put an end to the illicit trafficking in priceless *objets d'art* and museum pieces by all necessary measures within each country's jurisdiction with the full cooperation of courts and customs authorities.¹⁹⁵

In 1983, a new statement was added to the resolution delineating the importance of inventories. The goals of both doctrines, national patrimony and common heritage of mankind, are used to explain the impor-

¹⁹¹ 1981 Resolution, *supra* note 163, at 19 (operative paras. 3, 6-7).

¹⁹² 33 U.N. GAOR C.3 (71st mtg.) para. 11, U.N. Doc. A/C.3/33/SR. 71 (1978); 34 U.N. GAOR (51st plen. mtg.), *supra* note 117, para. 58-69; 36 U.N. GAOR (74th plen. mtg.), *supra* note 165, para. 45-49.

¹⁹³ 34 U.N. GAOR (51st plen. mtg.) *supra* note 117, para. 65.

¹⁹⁴ 36 U.N. GAOR (Agenda Item 21), *supra* note 142, at 12 (1981).

¹⁹⁵ 1981 Resolution, *supra* note 163, at 19 (operative para. 5).

tance of inventories: “*Reaffirming* the importance of inventories as an essential tool for the understanding and protection of cultural property [common heritage] and for the identification of dispersed heritage [national patrimony] and as a contribution to the advancement of scientific and artistic knowledge [common heritage] and intercultural communication.”¹⁹⁶

The Report of the Director-General of UNESCO to the General Assembly in 1983 stressed the importance of, and described the progress made in, inventory creation.¹⁹⁷ This undoubtedly influenced the authors of the resolution.

To the previous resolutions’ statement that illicit traffic impoverishes the cultural heritage of all peoples, a new phrase focusing concern on “clandestine excavations” is added.¹⁹⁸ This was in response to a recommendation of the Intergovernmental Committee in its third session.¹⁹⁹

Two paragraphs from earlier resolutions about the Intergovernmental Committee are repeated. The first commends its activities along with those of UNESCO while the second appeals to states to cooperate closely with the Committee.²⁰⁰

In the debates preceding the readoption of these paragraphs, Colombia sums up the laudable activities of the two entities. The language used by Colombia is virtually identical to that in the Resolution:

UNESCO and the Intergovernmental Committee . . . have achieved admirable results that are quite rightly commended in the draft resolution, by promoting bilateral negotiations for the restitution of cultural property, the preparation of inventories of movable cultural property, the development of infrastructures for the protection of the latter, the reduction of illicit traffic in cultural property and the effective dissemination of information to the public. This is a fundamental element in the draft resolution, since the work carried out by the above-mentioned bodies has been of vital importance and has had far-reaching repercussions.²⁰¹

The progress made in the return of cultural property to the states of origin is noted twice in the 1983 Resolution.²⁰² The first notes “with satisfaction” the steps taken by “some countries” towards the restitution

¹⁹⁶ G.A. Res. 38/34, 38 U.N. GAOR Supp. (No. 47) at 24 (preambular para. 6), U.N. Doc. A/38/47 (1983) [hereinafter 1983 Resolution].

¹⁹⁷ *Report of the Director-General of the United Nations Educational, Scientific and Cultural Organization on the Return or Restitution of Cultural Property*, 38 U.N. GAOR Annex at 3-5, 11-12, U.N. Doc. A/38/456 (1983) [hereinafter 1983 UNESCO Report].

¹⁹⁸ 1983 Resolution, *supra* note 196, at 25 (preambular para. 7).

¹⁹⁹ 1983 UNESCO Report, *supra* note 197, at 13 (para. 22).

²⁰⁰ 1983 Resolution, *supra* note 196, at 25 (operative paras. 1, 5).

²⁰¹ 38 U.N. GAOR (71st plen. mtg.) para. 130, U.N. Doc. A/38/PV. 71 (1983).

²⁰² 1983 Resolution, *supra* note 196, at 24-25 (preambular para. 5, operative para. 1).

of cultural property to the states of origin. The second is summarized by Colombia in the statement quoted above. 'The inclusion of these two paragraphs for the second time indicates the General Assembly's acknowledgement of progress noted in the reports of the Director General of UNESCO and the Intergovernmental Committee at its third session, and the Final Report of the World Conference on Cultural Policies at Mexico City.²⁰³ These reports cite such examples as the beginning of bilateral negotiations between Sri Lanka and various European states, the return to Ecuador by an Italian court of 12,000 illegally exported archaeological objects, and the return to Iraq by Harvard and the Oriental Institute of Chicago of hundreds of cuneiform tablets.

That these were the examples contemplated by the General Assembly when it passed the resolution is demonstrated in a speech made by Kampuchea in the debates of that session:

[T]hanks to the perseverance of the United Nations and UNESCO, . . . efforts have just led to a successful conclusion in the matter of the major art collection from Ecuador, comprising 12,000 archaeological items exported illegally to Italy, which have just been restored to the Republic of Ecuador by decision of the Court in Turin in January 1983. The return to Iraq of a large number of cuneiform tablets from the Semitic Museum at Harvard University and the Oriental Institute of Chicago is another act of justice which can only be a source of satisfaction to all of us.²⁰⁴

A new paragraph was injected into the 1983 Resolution concerning cultural property recovered from the sea-bed.²⁰⁵ Zaire described this paragraph in introducing the draft resolution in the debate: "It also invites Member States engaged in seeking the recovery of cultural and artistic treasures from the sea-bed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures."²⁰⁶

The need for addressing this new concern was explained by Colombia in the debate:

Similarly the draft resolution, referring to the advances in submarine archeology that have taken place in recent years, seeks to open the way for States that have historical and cultural links with such treasures on the sea-bed to join in the relevant work of exploration and research. We have already had considerable success in this sphere, and we are at a juncture where if we can find the right method of establishing conditions acceptable to all parties, these cultural riches can be preserved by

²⁰³ 1983 UNESCO Report, *supra* note 197, at 2-3, 10-11, 22-23.

²⁰⁴ 38 U.N. GAOR (71st plen. mtg.), *supra* note 201, para. 146.

²⁰⁵ 1983 Resolution, *supra* note 196, at 25 (operative para. 4).

²⁰⁶ 38 U.N. GAOR (71st plen. mtg.), *supra* note 201, para. 119.

the States concerned, instead of being the object of illicit pilfering by clandestine treasure-hunters.²⁰⁷

A CONSOLIDATED VISION: NATIONAL PATRIMONY AND COMMON HERITAGE

The resolution mentions twice the World Conference on Cultural Policies held at Mexico City in July and August 1982.²⁰⁸ The first reference expresses satisfaction at the emphasis of the Conference on the return and restitution of cultural property. The second deserves a closer look.

The language of that second paragraph comes from the Mexico City Conference which is here quoted by the Intergovernmental Committee:

The Committee fully endorses the view expressed at the World Conference on Cultural Policies that "the return of cultural property to its country of origin should be accompanied by the training of key personnel and technicians and the provision of the necessary facilities for the satisfactory conservation and presentation of the property restored. . . ."²⁰⁹

As we have seen, this is not a new idea. What it says is that the infrastructure necessary for the proper care and presentation of the artifacts *should* be present when they are returned. It is worth noting that the resolution does not say "must." This is undoubtedly to ensure that the possessory state not use the absence of such a capability in the state of origin as a justification for refusing to return the property.

What it does say is that the state of origin should, if it does not already have an adequate museum system, develop one. And if it cannot on its own, the possessory state should help it to create one as it returns the property.

At the Mexico City Conference a burden is placed on the states of origin to prevent the dispersal of their own cultural property: "*Expressing the hope* that Governments will undertake in future to avoid any unjustified dispersion of the cultural heritage and will take more practical steps to defend and recover anything that constitutes an irreplaceable element of their own cultural background"²¹⁰ A link between this burden and the necessity of adequate museum systems is indicated by Colombia in the General Assembly debates:

The draft resolution indicates that restitution must be accompanied by the training of technical personnel and the necessary facilities

²⁰⁷ *Id.* para. 131.

²⁰⁸ 1983 Resolution, *supra* note 196, at 25 (operative paras. 7-8).

²⁰⁹ 1983 UNESCO Report, *supra* note 197, at 12.

²¹⁰ *Id.* at 19.

for the satisfactory conservation and presentation of the property restored, in accordance with the resolutions of the 1982 World Conference on Cultural Policies, held in Mexico. It is important to stress that the lack of such personnel and facilities is a prime cause of the disappearance of cultural property.²¹¹

Also expressed in the Mexico City Conference's Final Report was an endorsement of the principle enunciated by ICOM that cultural property fundamental to a people is inalienable: "[T]he policy of restitution and return is based on the idea that certain objects belong to the inalienable and imprescriptible heritage of a nation. It is thus indispensable that the country of origin ensure complete legal protection for the returned objects."²¹² This doctrine was echoed at the Conference: "[T]he right to ownership and disposal of this property is a legitimate and inalienable right of its owners, which cannot be subject to any prescription, and that the infringement of this right by appropriation or usurpation can in no way entail any right to ownership, possession or disposal."²¹³ The implications of the notion that cultural property of fundamental importance to a people is inalienable are immense and were discussed earlier in this article.

In the 1983 debates, Colombia and Kampuchea made statements indicating their acceptance of the idea that national patrimony is also part of the common heritage of mankind. First Colombia:

It is to be hoped that when these examples of movable cultural property have been restored to their places of origin a significant step will have been taken towards the integration of the world's cultural heritage, which is the property of all.

....

... The corollary of . . . restitution must and most certainly will be reinforcement of *free access* to cultural property *for other countries*, together with adequate measures for the free and protected circulation of cultural property.²¹⁴

Then Kampuchea:

All of these monuments are evidence of the creative power of man and thereby constitute one of the cultural heritages of humanity. It is natural and legitimate that everyone, in particular those involved in world culture, should be concerned by the fate of the Angkor monuments.

....

... Prince Norodom Sihanouk . . . stated: "The monuments of

²¹¹ 38 U.N. GAOR (71st plen. mtg.), *supra* note 201, para. 134.

²¹² *Study, supra* note 102, para. 19.

²¹³ 1983 *UNESCO Report, supra* note 197, at 21.

²¹⁴ 38 U.N. GAOR (71st plen. mtg.), *supra* note 201, paras. 129-132 (emphasis added).

Angkor are not just the heritage of the people of Kampuchea but are also the heritage of all mankind."²¹⁵

In contrast to these statements are those of Syria and the United Kingdom. Syria, on the one extreme, takes a view of restitution which illustrates where an unmodified acceptance of the national patrimony doctrine leads:

We should like also to recall and maintain the right to request the return of the cultural properties shipped out of Syrian territory, our museums and historical sites throughout the country during the period of the Mandate, and in earlier times from the third millennium before Christ up to the fifteenth century.²¹⁶

At the other extreme is the United Kingdom which takes a purely common heritage view to justify its refusal to return cultural property:

The United Kingdom cannot accept the principle that cultural property which over the years has been acquired freely and legitimately should be returned to other countries.

. . . [T]he great international collections of works of art constitute a unique international resource for the benefit both of the public and of scholars.

. . . [I]tems in British museums belong to those museums and, provided that they were legitimately acquired, there are no grounds on which my Government can order their return.²¹⁷

The 1985 Resolution includes three new paragraphs all of which had been recommended by the fourth session of the Intergovernmental Committee²¹⁸ and all of which deal with illicit trade. It noted that more states had become parties to the 1970 UNESCO Convention,²¹⁹ recommended that states develop domestic laws protecting cultural property²²⁰ and welcomed the increase in states parties to the 1970 Convention.²²¹

The General Assembly dropped a phrase commending UNESCO and the Committee for helping states to develop infrastructures to protect movable cultural property.²²² However, a much stronger operative paragraph on the same subject was left in.²²³ Also, the debates of that

²¹⁵ *Id.* paras. 149, 162.

²¹⁶ *Id.* para. 173.

²¹⁷ *Id.* paras. 175-177.

²¹⁸ *Report of the Director-General of the United Nations Educational, Scientific and Cultural Organization on the Return or Restitution of Cultural Property*, U.N. Doc. A/40/344 at 10 (paras. 13, 17) (1985).

²¹⁹ G.A. Res. 40/19, 40 U.N. GAOR Supp. (No. 53), at 22 (preambular para. 4), U.N. Doc. A/40/53 (1985) [hereinafter 1985 Resolution].

²²⁰ *Id.* at 22 (operative para. 3).

²²¹ *Id.* at 22 (operative para. 9).

²²² *Id.* at 22 (operative para. 1).

²²³ *Id.* at 23 (operative para. 8).

session reflect no discussion of this except for an enthusiastic statement by Ecuador regarding such development.²²⁴

Probably the most interesting exchange of this debate involves an expression of frustration by Iraq at the lack of progress on the return of cultural property and the allegation that the United Nations was making "no real effort:"

[W]e must say that, regrettably, no real progress has been made and no genuine response has been elicited on the return of that property to its original owners. We also regret the fact that no effective measures have been taken and no real effort has been made by the United Nations in this extremely important and vital field.²²⁵

Peru differed markedly: "There can be no doubt that some progress has been made and this can be attributed basically to the efforts of the United Nations and the resolutions adopted."²²⁶

In the 1987 Resolution,²²⁷ the General Assembly continued the trend of adopting UNESCO and Intergovernmental Committee policies. All three new paragraphs are taken essentially verbatim from the recommendations of the Intergovernmental Committee's fifth session, and illicit trade is their primary concern. The Committee and the resolution request Member States to study requiring that excavation permits for archaeologists and paleontologists include documentation of every object recovered.²²⁸ They recommend that States ensure museum inventories include stored items as well as those on display.²²⁹ They request that states parties to the 1970 Convention keep the proper United Nations agencies informed of domestic measures taken to implement it.²³⁰

Egypt's statement in the debate reveals the complete acceptance by the General Assembly of the Intergovernmental Committee's, and therefore UNESCO's, leadership and expertise in the field: "The draft resolution before us is an updated version of the previous one, taking into consideration the recommendations of the fifth session of the Intergovernmental Committee, held in Paris from 27 to 30 April 1987."²³¹ The influence of the Committee on the Assembly is further shown by the presence in this resolution of five paragraphs concerned specifically with

²²⁴ 40 U.N. GAOR (87th plen. mtg.), at 82, U.N. Doc. A/40/PV. 87 (provisional document).

²²⁵ *Id.* at 72-73.

²²⁶ *Id.* at 94-95.

²²⁷ G.A. Res. 42/7, 42 U.N. GAOR Supp. (No. 49), U.N. Doc. A/42/49 (1987) [hereinafter 1987 Resolution].

²²⁸ *Id.* at 19 (operative para. 4); U.N. Doc. A/42/533 at 10.

²²⁹ 1987 Resolution, *supra* note 227, at 19 (operative para. 6); U.N. Doc. A/42/533 at 10.

²³⁰ 1987 Resolution, *supra* note 227, at 19 (operative para. 10); U.N. Doc. A/42/533, at 10.

²³¹ 42 U.N. GAOR (47th plen. mtg.), at 11, U.N. Doc. A/42/PV. 47 (1987) (provisional document).

inventories, a constant refrain of the Committee's.²³²

The resolutions of 1985 and 1987 drop, between them, two paragraphs more broadly concerned with infrastructures, thus leaving none. We noted above the first such deletion.²³³ The text of the debates, along with the increased focus on inventories, a part of infrastructure, demonstrate that the need for museum infrastructures is not being rejected but is merely being recast in other terms.

However, we reiterate the urgent need for UNESCO to study, independently of any other action, the establishment of groups of experts which would at all levels advise our countries in respect of the identification, codification, protection and exhibition of our cultural treasures. [Statement by the representative of Columbia].

.....
The Government of Greece is continuing its effort for their recovery, efforts that include the launching of a project, now at a well advanced stage, to house the Parthenon marbles. [Statement by the representative of Greece].²³⁴

VII.

In its 1979 study ICOM made a radical claim concerning the legal status of dispersed cultural property:

The reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived thereof, is now considered to be an ethical principle recognized and affirmed by the major international organizations. This principle will soon become an element of *jus cogens* of international relations.²³⁵

The major art-importing states oppose this. Their argument is centered on a definitional problem: what is an object of "major importance for the cultural identity and history of countries?" What is of central importance to a culture is debatable. Also, as UNESCO acknowledged, objects can become culturally important to a second state as England argues the Elgin Marbles have become to England, inspiring, for instance, much of Keats' poetry. The same can be said for the influence of Italian paintings hanging in the Louvre on French painters.

So, they argue, this idea of "objects which are of major importance for a cultural identity" is not as clear a concept as, say, *pacta sunt servanda*, or a ban on slavery or genocide. This indefiniteness is fatal to any

²³² 1987 Resolution, *supra* note 227, at 19 (preambular para. 6, operative paras. 1, 4, 5, 6).

²³³ 1985 Resolution, *supra* note 219, at 22 (operative paragraph 1). *See also* text accompanying note 222.

²³⁴ 42 U.N. GAOR (47th plen. mtg.), *supra* note 231, at 16, 22.

²³⁵ *Study*, *supra* note 102, para. 38.

thought of restitution becoming a *jus cogens* unless or until it becomes more clearly delineated.

The reality, however, is that the dispersal of the cultural property of many developing states has been so total that to reject outright the principles underlying their claims for the return of a representative collection is to sanction their severance from their own history. Indeed, states not so completely denuded of their heritage, but deprived of objects embodying central aspects of their cultural history, have an equally valid claim.

In addition, the increasing appetite of the developed world for art and artifacts and the corresponding increase in their financial value has induced an almost inexorable drain on the remaining cultural patrimony of the developing world. This pillage is as complete and as destructive as that of war or colonial occupation. This situation coupled with the heightened historical awareness of the Third World has led to the General Assembly Resolutions of the past fifteen years.

X. CONCLUSION

The issues surrounding the right to cultural heritage are formed from the interweavings of two conceptual threads: the common heritage of mankind and national patrimony. How these two notions are viewed, how they are finally weighted after the political dialogue, determines the nature and scope of the right to cultural property.

The doctrine of national patrimony derives its strength and appeal from notions of state sovereignty and the belief that there exists a unique relationship between a people and the artifacts that represent its cultural heritage. It allows states whose cultural heritage has been dispersed to reclaim artifacts located in other states. Without this doctrine, there would be no legal principle to prevent the movement of all cultural property to the developed states.

While it is true that human cultures are interrelated and rarely develop in isolation, they are also independent and unique. Because of this, a people's familiarity with its own cultural heritage has a profound effect upon its contemporary artistic activity. It is also emblematic of the sovereignty of newly independent states that they possess the bulk of the masterpieces of their own civilizations. Finally, the doctrine of national patrimony encourages the location of artifacts in their original sites, the context of which enhances the appreciation of the viewer.

In its pure form, the doctrine of national patrimony has glaring weaknesses. If all national patrimony belongs in the state of origin and is inalienable, then artifacts of the world's civilizations would never, except on loan, leave their state of origin. For example, no Egyptian art would be located in any of the world's museums outside of Egypt. This would

effectively cut off the bulk of humanity from exposure to that great civilization.

Also, an unadulterated view of national patrimony produces no duty on the state of origin to preserve the object. Stemming in part from principles of state sovereignty this doctrine is resistant to duties imposed on countries from without. In this view, the artifacts belong to that state to do with as it wishes.

The doctrine of common heritage of mankind derives from two precepts. First, that art speaks to humanity as a whole as much as to peoples of the state in which it was produced. Second, that cultures are not autonomous but rather represent the product of the interplay of many civilizations on each other. The central imperative of this theory is that artifacts should be located where they will best be cared for.

There are several desirable results of this theory. It allows art to travel and be seen in many locations throughout the world. It creates a duty to care for the property, to preserve it and present it to the public.

But, in its pure form, as with national patrimony, the common heritage doctrine has devastating consequences. It permits the complete removal of cultural heritage from the state of origin thus severing that people from the physical record of its culture. Under a common heritage regime, the distribution of cultural property was controlled in the past by political power and is controlled in the present by money. Clearly, there is no element in this doctrine to encourage the location of art at its original situs.

The history of General Assembly Resolutions that we have traced reflects the tension between these two doctrines. The earlier resolutions were almost entirely driven by a belief in national patrimony. In the ensuing resolutions there is a constant movement towards principles allied with a common heritage perspective.

The calls for creation of museum infrastructures in the Third World, the acceptance of the principle of "representative collections," the endorsement of bilateral long-term exchanges, all represent, as we have seen, a fusion of the once divergent principles of common heritage and national patrimony.

The first General Assembly resolution on the return and restitution of cultural property was motivated in part by frustration at UNESCO's limited activity in this area. After that resolution, UNESCO created the Intergovernmental Committee which developed principles and policies concerning return and restitution which were conveyed to the General Assembly. The Committee also facilitated bilateral agreements. Increasingly, the General Assembly resolutions reflected UNESCO's recommendations. This influence, along with international political reality, moved the resolutions towards their current compromise position.

The protection of man's cultural heritage can be accomplished only through international cooperation. To the degree that this cooperation can be entered into absent unreasonable nationalism and parochialism, the effort will be so much more successful. We must insure that the remains of the past are protected and made accessible to all, especially those whose histories they particularly reflect, so we better understand what moves us and who we are.