

The International Theft and Illegal Export of Cultural Property

I. INTRODUCTION

Anyone who has climbed up the Athenian landscape to marvel at the ancient wonder of the Acropolis knows that the temptation to kneel down and grab a piece of the rubble for a keepsake is overwhelming.¹ It is human nature to desire the sole possession of rare items of historical worth and beauty; however, such aspirations often result in denying the rest of mankind the enrichment of such cultural objects.

"[C]reativity is impossible without a rich public domain. ... Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."² Cultural property envelops the essence and experience of a people or nation. Therefore, a concrete definition is difficult to ascertain.³ The value and extraordinary character of such property makes the ownership of such objects a topic of immense international debate.⁴

¹ See JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 42, 75 (2d ed. 1996) (for example Greece's campaign against the United Kingdom to recapture the Elgin Marbles. The Elgin Marbles made up part of the fifth-century frieze that decorated the Parthenon, located on the Athenian Acropolis. Lord Elgin removed the antiquity from the Athenian landscape 180 years ago, and there has been a hole in heart of the Greek people ever since). The debate also rages with the British Government claiming that if the marbles were returned to Athens they would be destroyed by the city's devastating air pollution. However, the Greek government counters this argument with the proposition of the construction of a special building to house the antiquity).

² JOSEPH L. SAX, *PLAYING DARTS WITH REMBRANDT* 3 (1999) citing *Vanna White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993).

³ For the purposes of this comment, the term "cultural property" will be used interchangeably with the words "art" and "antiquities."

⁴ See Sax, *supra* note 2, at 4, 5 ("Privatization" of cultural property occurs in different ways. A recent example arose out of the debate over the Dead Sea Scrolls. A small group of scholars kept the Dead Sea Scrolls from researchers and the public for forty years; it took a public outcry and the notice of the national press in order to finally gain shared access. See *id.* at 5. Although instances such as this appear inherently unjust, some credence must be given to the private collector of antiquities. The advent of public

The focus of this Note is to delve into how the international community is answering the demands for the recovery of stolen cultural property through the conventions. The three primary international conventions invoke the protection of cultural property include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁵ the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),⁶ and most recently, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).⁷ Part I of this Note explores the extent of and criminal incentive for the plunder of cultural property. Part II discusses the precursors of modern, international conventions that address the protection of cultural property, focusing in particular on the 1954 Hague Convention initiated to safeguard cultural property in times of war. Part III examines the breadth and criticisms of the 1970 UNESCO Convention, which promotes the retention of cultural property by the nations of origin. Part IV scrutinizes the effectiveness of the UNIDROIT Convention and provides a comparison of the 1970 UNESCO Convention to the initiatives of the UNIDROIT Convention. Part V will suggest additional measures to further the goals of recovering and safeguarding cultural property.

museums only occurred within the mid-eighteenth century, until then all virtually all art was collected and owned privately. Therefore, private collectors are greatly responsible for the preservation of much of the artistic heritage we celebrate today. For example, the marvel that is Stonehenge was part of a private country estate until the early 1900s).

⁵ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

⁶ See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Oct. 12 – Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

⁷ See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

II. THE MAGNITUDE OF AND INCENTIVE FOR THE THEFT OF CULTURAL PROPERTY

A. The Enticing Underworld of Art Theft

Theft of cultural property occurs in three circumstances. First, private theft from individuals and institutions; second, illegal export of works from countries that prohibit such national treasures from leaving its borders; and lastly, countries which have deemed any archeological item from a site or tomb to be state property, thereby constituting theft when excavated by an outsider.⁸

Art theft is in no sense a new phenomenon; such plundering has existed “as long as there has been art to be stolen.”⁹ Additionally, a relatively modern movement has arisen that involves “wholesale illicit expatriation of artwork from nations rich in cultural heritage to nations that are rich in economic terms.”¹⁰ The lust for art and antiquities has given rise to a rampant, international black market for the illicit exchange of these objects.

The black market trade in cultural property is an international phenomenon, realizing billions of dollars in earnings each year. The black market of cultural property is exceeded in profit only by drug

⁸ See Meghan A. Sherlock, Comment, *A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property*, 8 TUL. J. INT'L & COMP.L. 483, 485 (2000) (the private theft cases are the easiest of these to untangle. However, the law and ethical issues involving illegal export and archaeological theft are far more complicated and indistinct).

⁹ Tarquin Preziosi, Note, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 230 (1997) (The history of archaeology is abundant with records of pillaged graves and tombs). See also GREENFIELD, *supra* note 1, at 207 (grave robbing is still widespread today. The Mafia is rumored to be responsible for the wide network of tomb robbing in Italy. In 1989-90 it has been estimated that the number of tombs robbed in China exceeded 40,000).

¹⁰ Jennifer N. Lehman, Note, *The Continued Struggle With Stolen Cultural Property: The Hague Convention, The Unesco Convention, and the Unidroit Draft Convention*, 14 ARIZ. J. INT'L & COMP. LAW 527 (1997).

trafficking.¹¹ It also is believed that techniques are being taught and shared in underground art theft "schools."¹² In 1997, 14,733 items were reported stolen in Italy alone; this number represents a small portion of the two to six billion dollars annual profit that is realized from the illicit international trade of cultural property.¹³ The potential profit in art trade has inspired art smuggling endeavors from all portions of society, including members of organized crime,¹⁴ and even diplomats.¹⁵ Motives also stem from "the criminal to the political, including romantic art 'collection,' dishonest dealership, and ransom."¹⁶

B. Intricacies of the Black Market Trade of Cultural Objects

The ease and speed of accruing profit from the stolen pieces also facilitates the illicit trade. "Stolen art is easy to hide, smuggle and resell ... objects can be stolen, relocated, and resold long before information about the theft has been disseminated to all potential destinations."¹⁷ The lack of uniformity in national property laws are an art thief's greatest ally. To ensure good title for a stolen masterpiece, a thief sells it in a country that "favors bona fide purchasers over original owners."¹⁸ Unfortunately,

¹¹ See Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GW J. INT'L & ECON. 131 (2000); see also Jennifer Sultan, Comment, *Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork*, 18 J. INT'L. L. BUS. 759 (1998); see also Preziosi, *supra* note 9.

¹² See GREENFIELD, *supra* note 1, at 206.

¹³ See Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property With the Interests of Bona Fide Purchasers: Applying the Unidroit Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L.J. 118, 119 (1999).

¹⁴ See Sultan, *supra* note 11, at 769.

¹⁵ See GREENFIELD, *supra* note 1, at 208 ("Art smugglers are said to come from all walks of life but are often journalists, art brokers and even diplomats who can take advantage of the immunity from search given to diplomatic bags.").

¹⁶ GREENFIELD, *supra* note 1, at 206.

¹⁷ Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 PUGET SOUND L. REV. 631, 661 (2000).

¹⁸ Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 495 (1995) (Switzerland is particularly renowned for providing art thieves and dealers secure title on stolen art).

the international art market is replete with dealers and collectors who choose not to investigate or even inquire as to the origins of artwork that pass through or into their possession.¹⁹

The victims of art theft include museums, churches, dealers, and private collectors.²⁰ Churches are sadly the easiest targets for art theft. Many house extremely valuable and rare works and are without adequate security to prevent looting.²¹ The majority of museums also lack requisite security systems. Therefore, thefts are often not reported in order to avoid notoriety of the museum's vulnerability.²² Museums are also largely unable to afford insurance coverage for the treasures housed inside.²³ Private collectors will similarly not report burglaries for fear of putting art thieves on notice of the value and susceptibility of their collections and to avoid publicity that would serve to propel a certain piece further into the underground.²⁴ The consumer demand for cultural property has also prompted the destruction of archaeological sites.²⁵ This results in the loss of irretrievable historical information and antiquities.²⁶ Once a masterpiece or antique is pillaged from its lawful owner, the chance of recovery is only about ten percent.²⁷

¹⁹ See Phelan, *supra* note 17, at 658.

²⁰ See Conley, *supra* note 18, at 498.

²¹ See Sultan, *supra* note 11, at 768 ("In 1990 alone, 3,269 objects were taken from 562 churches in Italy.").

²² See Conley, *supra* note 18, at 498.

²³ See *id.*

²⁴ See Preziosi, *supra* note 9, at 231 (the private collector may also not wish to report a theft in order to avoid the government obtaining notice of their taxable art collection).

²⁵ See GREENFIELD, *supra* note 1, at 206 ("in Costa Rica alone as many as 95 percent of the known archaeological sites have been at least partially ruined by plunderers.").

²⁶ See Lawrence M. Kaye, *The Recovery of Stolen Cultural Property: A Practitioner's View - War Stories and Morality Tales*, 5 VILL. SPORTS & ENT. L. J. 5, 6 (1998) ("there are tales of smugglers dynamiting entire ancient cities to reach the specific items they want to market, and stories of the wanton mutilation of movable antiquities to make them more saleable.").

²⁷ See Laura McFarland-Taylor, Comment, *Tracking Stolen Artworks on the Internet: A New Standard For Due Diligence*, 16 J. MARSHALL J. COMPUTER & INFO. L.

III. MILITARY PRECURSORS TO THE INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF CULTURAL PROPERTY

The first international agreements addressing the protection of cultural property were born of the necessity to curb the devastation arising from armed conflicts. Throughout history, cultural property has continued to be a casualty of war. The spoils of conquest have long entailed the plundering of riches by the victors.²⁸ As far back as the ancient Greeks, interested parties have attempted to enact law to thwart this wartime activity.²⁹

A. The Lieber Code

Although it had long been encouraged as customary international law, wartime protection of cultural property was not codified until the Lieber Code of 1863. The Lieber Code was drafted in response to the U.S. Civil War by the well-known, international lawyer, Francis Lieber.³⁰ The Code provided that absent military necessity, cultural property must be secured from acts of war. The principles of this doctrine proved very influential and are considered "the legal ancestor of the Hague Conventions."³¹

937, 945 (1998); see also GREENFIELD, *supra* note 1, at 208 ("in India 3,000 thefts of antiquities were reported between 1977 and 1979, and only ten cases were solved.").

²⁸ See Brain Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, 510 (1996) (similar export accompanied the conquests of Alexander the Great, Napoleon, and Adolf Hitler).

²⁹ See Bengs, *supra* note 28, at 510 (Greek historian Polybius appealed for the safekeeping of cultural property).

³⁰ See Goldrich, *supra* note 13, at 125.

³¹ John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L & POL. 1, 3 (1998).

B. The 1954 Hague Convention

Following the widespread destruction and plunder of World War I and II,³² the international community realized the need for a doctrine addressing the protection of national treasures during times of conflict.³³ The 1954 Hague Convention viewed cultural property as the collective property of the human race. The Preamble states, “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution the culture of the world.”³⁴

Fifty-six nations participated in the 1954 Hague Convention in efforts to address the complexities of modern warfare.³⁵ The 1954 Hague Convention was the first to formulate and define the term “cultural property.”³⁶ The 1954 Hague Convention defines cultural property as “movable or immovable property of great importance to the cultural heritage of every people....”³⁷ The 1954 Hague Convention also describes specific items of cultural property and includes protection for the buildings in which they are housed.³⁸

The 1954 Hague Convention has been subject to criticism for the military exception provision in Article 4(2).³⁹ There are no standards to define what would effectively constitute a military necessity. The 1954 Hague Convention merely states that the obligatory protection of cultural property may be waived when “military necessity imperatively requires”⁴⁰

³² See GREENFIELD, *supra* note 1, at 201 (for instance, Adolf Hitler’s army looted vast amounts of art treasures for the “glory of the Third Reich.” Hitler planned to build a great museum in the Austrian City of Linz to house all of his newly acquired works of art. The amount of art recovered by the Allies at the end of the war rivaled that of any of the great collections in the major museums of the world).

³³ See Goldrich, *supra* note 13, at 132.

³⁴ Merryman, *supra* note 31, at 11 (citing 1954 Hague Convention, *supra* note 5, Preamble, 249 U.N.T.S. at 242).

³⁵ See Goldrich, *supra* note 13, at 133.

³⁶ See 1954 Hague Convention, *supra* note 5, at art. 1.

³⁷ 1954 Hague Convention, *supra* note 5, at art. 1(a).

³⁸ See 1954 Hague Convention, *supra* note 5, art. 1.

³⁹ See Goldrich, *supra* note 13, at 134.

⁴⁰ 1954 Hague Convention, *supra* note 5, art. 4(20), 249 U.N.T.S. at 242.

For the most part, the 1954 Hague Convention has been widely accepted.⁴¹ It is still the fundamental tool for protecting cultural property in wartime and continues to receive new accessions.⁴²

IV. THE 1970 UNESCO CONVENTION

Whereas the 1954 Hague Convention was drafted to protect cultural property only during military action, the 1970 UNESCO Convention convened to further the practice of universal preservation to include times of peace.⁴³ The 1970 UNESCO Convention provided a long overdue acknowledgment of the need for an all-encompassing agenda for the preservation of cultural property.

The 1970 UNESCO Convention aims to prevent the unlawful export and facilitate the return of cultural property to its nation of origin.⁴⁴ Parties to the 1970 UNESCO Convention may only import cultural property that has the certified permission to be exported from its source country.⁴⁵ Ninety-one countries have become party to the 1970 UNESCO Convention as of December 1999.⁴⁶

A. Cultural Nationalism versus Cultural Internationalism

Although the Preamble of the 1970 UNESCO Convention speaks of “the interchange of cultural property among nations,”⁴⁷ the convention clearly promotes a divergence from the cultural internationalism approach

⁴¹ See Lehman, *supra* note 10, at 532 (The United States has not ratified the Convention because it conflicts with the use of nuclear weapons).

⁴² See Goldrich, *supra* note 13, at 135.

⁴³ See Evangelos I. Gegas, Note & Comment, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 137 (1997).

⁴⁴ See 1970 UNESCO Convention, *supra* note 6, arts. 2, 3, 6, 7, 9, 10, 12, 13, 823 U.N.T.S. 231.

⁴⁵ See Bengs, *supra* note 28, at 524.

⁴⁶ See U.S. State Department, *Bureau of Educational and Cultural Affairs: International Cultural Property Protection*, at <http://e.usia.gov/education/culprop/intlaws.html> (last visited Mar. 14, 2002)

⁴⁷ 1970 UNESCO Convention, *supra* note 6. (Preamble).

of the 1954 Hague Convention by only advocating a premise of cultural nationalism.⁴⁸ Cultural internationalism “proponents view cultural property as a concept of common human culture, independent of a nation’s property rights or national jurisdiction over a given cultural object.”⁴⁹ Cultural internationalists argue that the art of the world belongs to all people of the world.

In contrast, cultural nationalism “centers on a highly nationalistic and aggressive attempt by countries rich in historical artifacts to retain and seek the return of cultural items over which they claim rightful ownership.”⁵⁰ Cultural nationalists argue that cultural property is most important to the people whose identity and history is linked to it, and this outweighs the scholastic agendas of those who view such items merely as objects.⁵¹ This argument is furthered by the fact that cramped Western museums are so inundated with artistic treasures that many such objects are left in storage where no one can benefit from or appreciate them.⁵²

A caveat when considering the effect of cultural nationalism is the likelihood that such strict regimes would place a strain on the flow of the legitimate art market, therefore, contributing to the demand and profitability of the black market trade.⁵³ Additionally, proponents of cultural internationalism contend that “wealthy nations” are better equipped to care for cultural property, insisting that its repatriation to the “underdeveloped country” of its origin could result in the items’ destruction.⁵⁴

⁴⁸ See Gegas, *supra* note 43, at 141, 142.

⁴⁹ *Id.* at 142.

⁵⁰ Hughes, *supra* note 11, at 131.

⁵¹ See GREENFIELD, *supra* note 1, at 297 (The arguments that great cultural items must be held onto in order to further scholastic understanding eventually lose their merit. As shown in England’s possession of the Egyptian Rosetta Stone, whose hieroglyphics have long been deciphered).

⁵² See GREENFIELD, *supra* note 1, at 298.

⁵³ See Hughes, *supra* note 11, at 132.

⁵⁴ Marilyn E. Phelan, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects Confirms A Separate Property Status For Cultural Treasures* 5 VILL. SPORTS & ENT. L.J. 31 (1998).

B. 1970 UNESCO Convention: Criticisms and Drawbacks

Despite the positive goals of the 1970 UNESCO Convention, it is criticized for favoring the agendas of the art-rich "source nations" devoted to retaining and reclaiming cultural property over the interests of "market nations" who desire the international trade of antiquities.⁵⁵ Consequently, the only major art-importing countries that have ratified the UNESCO Convention are the United States,⁵⁶ Canada, and Australia.⁵⁷ The major art-importing countries such as Germany, Japan, and the United Kingdom have yet to become signatories to the convention.⁵⁸

Article 1 of the 1970 UNESCO Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science...."⁵⁹ Article 1 also includes an extensive list of subcategories, which further identify items of cultural property.⁶⁰ Although the list of protected items appears exhaustive, there

⁵⁵ See Bengs, *supra* note 28, at 515.

⁵⁶ See *id.* at 523 ("Although the U.S. Senate ratified the UNESCO 1970 Convention in 1972, it took until 1983 for the U.S. Congress to pass legislation necessary to implement it."). See also Marilyn Phelan, *Cultural Property*, 34 INT'L LAW 697, 699 (2000) (Congress finally gave recognition to the fact that the U.S. had become a principal market for stolen cultural property, and also that this phenomena in some instances had a negative effect on the U.S. relations with close allies).

⁵⁷ See Hughes, *supra* note 11, at 137.

⁵⁸ See Goldrich, *supra* note 13, at 138.

⁵⁹ 1970 UNESCO Convention, *supra* note 6, art. 1, 823 U.N.T.S. 231.

⁶⁰ See *id.* (a. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; b. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists, and to events of national importance; c. products of archaeological excavations (including regular or clandestine) or of archaeological discoveries; d. elements of artistic or historical monuments or archaeological sites which have been dismembered; e. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; f. objects of ethnological interest; g. property of artistic interest, such as: i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); ii. original works of statutory art and sculpture in any material; iii. original engravings, prints and lithographs; iv. original artistic assemblages and montages in any material; rare manuscripts and incunabula, old books, documents and

is quagmire inherent in the application of Article 1 of the convention. The definition only bestows the protection of cultural property that has previously been “specifically designated”⁶¹ by the member state. Therefore, “undiscovered or unexcavated” items remain unprotected.⁶²

The 1970 UNESCO Convention states in Article 7 that challenges may only be instituted by the “State Party of Origin.” This limitation does not afford relief for the many claims held by individuals.⁶³ The convention does assert in Article 13(c) that state parties should provide for individual claims; however, it fails to suggest any framework to do so.⁶⁴ Thus, “the vast majority of commentators have stated unequivocally, that the UNESCO Convention does not provide for a private right of action.”⁶⁵

C. The Conflicting Property Right Ideologies of Civil Code Nations versus those of Common Law Nations

The 1970 UNESCO Convention is at odds in the realm of the legal contradictions between nations in recapturing cultural property. The traditional property law of many nations is problematic when applied to stolen cultural property. Choice of law in matters involving different countries is usually ruled by the doctrine of *lex locus situs*, which puts forth that the controlling law is that of the country where the exchange of the personal property takes place—but it may not always be clear.⁶⁶ Great

publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments).

⁶¹ 1970 UNESCO Convention, *supra* note 6, art. 1, 823 U.N.T.S. 231; *see also* Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, in *THE RECOVERY OF STOLEN ART* 205, 207 (Norman Palmer ed., 1998).

⁶² Goldrich, *supra* note 13, at 137, 138.

⁶³ *See* UNESCO Convention, *supra* note 6, art. 7(b) (ii), 823 U.N.T.S. 231.

⁶⁴ UNESCO Convention, *supra* note 6, art. 13(c), 823 U.N.T.S. 231.

⁶⁵ *See* Sultan, *supra* note 14, at 775.

⁶⁶ *See* Monique Oliver, Comment, *The Unidroit Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 *GOLDEN GATE U.L. REV.* 627, 637-8 (1996).

controversy arises when dealing with the conflicting approach to property law of common law and civil code nations.

In common law jurisdictions, such as the United States, the title of stolen property is maintained in the original owner regardless of whether a third party has purchased it in good faith.⁶⁷ The property law of civil code nations often provides absolute protection for bona-fide purchasers; therefore, the original owner loses title the moment a thief sells the stolen property to an unsuspecting purchaser.⁶⁸ Art thieves routinely relocate objects to civil code countries in order to sell them with good title.⁶⁹

The 1970 UNESCO Convention calls for a member state to repatriate cultural property of another state upon request.⁷⁰ If the property is returned, the requesting state is required to "pay just compensation to an innocent party or purchaser or to a person who has valid title to that property."⁷¹ This provision of the 1970 UNESCO Convention contradicts the property laws of the civil code and common law nations. In the civil code country of Italy, a bona fide purchaser is assured unblemished title.⁷² In other civil law jurisdictions such as France, Germany, and Switzerland, good title will be granted to an innocent third party after the brief statute of limitations has run.⁷³ Therefore, under the property laws of civil code nations, the bona fide purchaser has obtained good title and is under no legal obligation to return the property. Similarly, this proposition conflicts with the rule of common law nations in that it provides compensation to someone, who, under common law has never obtained good title.⁷⁴

D. Cumulative effects of the 1970 UNESCO Convention

Since 1970 there have been significant changes in the world's attitude towards the illicit trade in cultural property. First, the theft of cultural

⁶⁷ See *id.* at 637.

⁶⁸ See *id.*

⁶⁹ See Conley, *supra* note 18, at 495.

⁷⁰ 1970 UNESCO Convention *supra* note 6, art. 7(b)(ii), 823 U.N.T.S. 231.

⁷¹ *Id.*

⁷² See Gegas, *supra* note 43, at 149.

⁷³ See *id.*

⁷⁴ See 1970 UNESCO Convention *supra* note 6, art. 7(b)(ii), 823 U.N.T.S. 231.

property, which was traditionally viewed as a problem of poor countries, gained great momentum and began to ravage the treasures of wealthy nations.⁷⁵ The “art market” countries were forced to recognize the problem in light of the drastic losses incurred by churches, museums, and private collections.⁷⁶ Therefore, despite its flaws, the 1970 UNESCO Convention was successful in eliciting the recognition of many countries of the damage caused when cultural property is stolen. It also set the stage for advancement and future success of the Conventions and legal initiatives to follow.⁷⁷

V. THE 1995 UNIDROIT CONVENTION

At the beginning of the 1980s, UNESCO promoted the inception of a new convention to further address the urgent need to protect cultural property and to attempt to address the deficiencies of the 1970 UNESCO Convention.⁷⁸ The proposal of the UNIDROIT Convention was also launched in the hopes of obtaining support from the market nations that had not been signatories to the 1970 UNESCO Convention.⁷⁹ The UNIDROIT Convention attempts to establish a common ground for the interests of market nations and source nations.⁸⁰ The UNIDROIT Convention also seeks to provide a comprehensive guide to the ownership rights by assembling and revamping the array of existing laws regulating cultural property, thereby offering comprehensive laws in which one could refer to when buying or selling works of art.⁸¹ As of January 31,

⁷⁵ See Prott, *supra* note 61 at 208.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Goldrich, *supra* note 13, at 139.

⁷⁹ See Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL’Y 143, 149 (1998).

⁸⁰ See Bengs, *supra* note 28, at 515.

⁸¹ See Adina Kurjatko, *Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. INT’L L. & POL’Y 59, 76-7 (1999).

2001 thirty-four countries have become signatories of the UNIDROIT Convention.⁸²

A. UNIDROIT Convention's Departures From and Advances Over the 1970 UNESCO Convention

The UNIDROIT Convention's definition of cultural property is nearly identical to that of its predecessor. It even includes an Annex, which is an exact reproduction of the highly specific subcategories listed in Article 1 of the 1970 UNESCO Convention.⁸³ However, the advantage of the UNIDROIT Convention's definition of cultural property is that it is unlike the 1970 UNESCO Convention. It does not require that the items be "specifically designated" by the state.⁸⁴ Under the framework of the UNESCO Convention, if a church or museum fails to list a cultural object in its inventory they may not be able to reclaim it.⁸⁵ This dispensing of the formal registry requirement by the UNIDROIT Convention results in the protection of far more objects, including archaeological treasures that have yet to be uncovered.

Another improvement instituted by the UNIDROIT Convention is the expansion of eligible claimants to include private parties.⁸⁶ The language of Articles 3 and 4 describe participants as "claimants" where, as the 1970 UNESCO Convention only refers to the involvement of "State Parties."⁸⁷ The term "claimant" allows any individual to put forth a cause of action.⁸⁸

The UNIDROIT Convention also drastically departs from the 1970 UNESCO Convention in its approach to the repatriation of stolen cultural

⁸² See U.S. State Department, *Bureau of Educational and Cultural Affairs: International Cultural Property Protection*, at <http://e.usia.gov/education/culprop/intlaws.html> (last visited Mar. 14, 2001).

⁸³ Compare 1970 UNESCO Convention *supra* note 6, at art. 1 with UNIDROIT Convention, *supra* note 7, at art. 2.

⁸⁴ See 1970 UNESCO Convention *supra* note 6, art. 1; *cf.* UNIDROIT Convention, *supra* note 7, at art. 2.

⁸⁵ See Sultan, *supra* note 14, at 795.

⁸⁶ See *id.* at 791.

⁸⁷ Compare 1970 UNESCO Convention *supra* note 6 with UNIDROIT Convention, *supra* note 7, art. 3, 4.

⁸⁸ See Sultan, *supra* note 14, at 791.

property.⁸⁹ The 1970 UNESCO Convention provides that a state party “may” upon providing proper documentation and compensation “request” the return of any illegally exported or stolen property.⁹⁰ Article 1 of the UNIDROIT Convention simply states that the “possessor of a cultural object shall return it.”⁹¹

B. The UNIDROIT Convention and Restitution of Stolen Cultural Property and Illegally Exported Cultural Objects

Chapter II of the UNIDROIT Convention gives the convention’s expansive definition of what is to be considered “stolen” cultural property and addresses the overall scheme of restitution.⁹² The convention states in Article 3(2) that “a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen when consistent with the law of the State where the excavation took place.”⁹³ This serves to protect the archaeological sites of underdeveloped, art-rich nations.

1. The Rights of the Original Owner verses that the Bona Fide Purchaser

The declarations of the UNIDROIT Convention clearly favor the original owners over the good faith purchaser.⁹⁴ This contrasts with the law of civil code nations, which traditionally allows unvarnished title to the innocent bona fide purchaser of stolen property.⁹⁵ In an effort to gain the support of the civil law nations,⁹⁶ the UNIDROIT Convention sought to obtain some compromise between the conflicting ideologies.

⁸⁹ See Oliver, *supra* note 66, at 661.

⁹⁰ See 1970 UNESCO Convention *supra* note 6, at art. 7(b); see also Oliver, *supra* note 66, at 661.

⁹¹ UNIDROIT Convention, *supra* note 7, ch. II, art. 3(1).

⁹² See UNIDROIT Convention, *supra* note 7, at art. 3, 4.

⁹³ UNIDROIT Convention, *supra* note 7, at art. 3(2).

⁹⁴ See Sultan, *supra* note 14, at 791.

⁹⁵ See Kurjatko, *supra* note 81, at 78-9.

⁹⁶ See UNIDROIT Convention, *supra* note 7, at art. 4(1).

A state or individual who possesses a claim of restitution against another for the return of stolen cultural property under the UNIDROIT Convention need not present documentation of proof of ownership or authentication of the items designation as cultural property.⁹⁷ However, the claimant has a time limit of three years in which to bring forth the claim from the time in which the claimant realizes “the location of the cultural object and the identity of its possessor....”⁹⁸ Furthermore, no claims may be brought after fifty years have passed from the time of the theft.⁹⁹ However, there is no time limit imposed for cultural property, which is considered “an integral part” of a nation’s cultural property; these may include monuments, archaeological sites and items belonging to a public collection.¹⁰⁰ Here it appears the UNIDROIT Convention is bending somewhat to appease the civil code countries in the assurance that title to stolen cultural property can, in certain instances, vest in a bona fide purchaser.

2. The Due Diligence Requirement

The UNIDROIT Convention provides in Article 4 that when the possessor of a stolen cultural object is required to return that property, the possessor will be entitled to the “payment of fair and reasonable compensation....”¹⁰¹ However, the possessor may only obtain compensation if it is proven that (s)he “neither knew nor ought reasonably to have known the object was stolen,” and exercised due diligence in confirming that the object was not stolen.¹⁰²

⁹⁷ See Sultan, *supra* note 14, at 791.

⁹⁸ UNIDROIT Convention, *supra* note 7, at art. 3(3).

⁹⁹ See *id.* (however, UNIDROIT Convention Article 3(5) provides that any state may provide in its own law that the time limitation will be set at a period of seventy-five years instead of fifty. The seventy-five year time limit may also be applied to situations in which the cultural object was stolen from a “monument, archaeological site or public collection...” when the claimant state similarly adheres to the seventy five year standard).

¹⁰⁰ UNIDROIT Convention, *supra* note 7, at art. 3(4); see also Kurjatko, *supra* note 81, at 81-2.

¹⁰¹ UNIDROIT Convention, *supra* note 7, at art. 4(1).

¹⁰² *Id.*

Article 4 also provides guidance in determining whether the possessor adequately exercised the requisite due diligence.¹⁰³ Therefore, “even if the possessors are bona fide purchasers and are able to prove due diligence, they must return the stolen objects to their rightful owners.”¹⁰⁴ Although the convention provides for compensation of the bona fide purchaser after proof of due diligence, it does not clarify as to how national courts should arrive at a determination of “fair and reasonable compensation.”¹⁰⁵ This is an important concern in light of the often exorbitant prices paid by museums, dealers, and collectors for cultural property.¹⁰⁶ This has prompted lack of support from some market countries that envision this provision of the UNIDROIT Convention as resulting in the bankruptcy of innocent, international, art dealers.¹⁰⁷

3. Restitution Claims for Illegally Exported Cultural Objects Differ from Stolen Cultural Property

Chapter II of the UNIDROIT Convention also allows for a private law action for the restitution of stolen cultural property; however, in Chapter III the process for the restitution of illegally exported objects entails more of a public law scheme.¹⁰⁸ Under the UNIDROIT Convention the return of illegally exported property involves the recognition of another nation’s export laws.¹⁰⁹ This is contradictory to the law of many countries,

¹⁰³ See UNIDROIT Convention, *supra* note 7, ch. II, art. 4(4) (“regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.”).

¹⁰⁴ Kurjatko, *supra* note 81, at 79-80.

¹⁰⁵ Bengs, *supra* note 28, at 529.

¹⁰⁶ See *id.*

¹⁰⁷ See Sultan, *supra* note 14, at 793.

¹⁰⁸ See UNIDROIT Convention, *supra* note 7, at arts. 4 & 5; see also Bengs, *supra* note 28, at 532.

¹⁰⁹ See UNIDROIT Convention, *supra* note 7, at art. 5; see also Bengs, *supra* note 28, at 532.

including the United States, whose courts do not recognize foreign export laws as creating a cause of action.¹¹⁰

Moreover, chapter III of the UNIDROIT Convention falls into the realm of public law in that, requests for the return of illegally exported objects are dealt with at a state-to-state level, by one state appealing to the "court of other competent authority of another contracting State."¹¹¹ The inclusion of the word "request" in Article 5(1) of the convention falsely implies that a nation has a choice in returning a cultural object.¹¹² However, a nation is not limited to merely requesting the return of a cultural object. Article 5 declares that the court of the state addressed "shall order the return of an illegally exported cultural object," if the requesting State can establish that the removal of the object would impair one or more of the interests listed.¹¹³ The good faith possessor of an illegally exported object is also entitled to "fair and reasonable compensation...."¹¹⁴

C. Drawbacks and Benefits of the UNIDROIT Convention

1. The Lack of Retroactive Applications of the UNIDROIT Convention

A drawback to the UNIDROIT Convention is that it does not apply retroactively.¹¹⁵ The convention states in Article 10 that it applies only to cultural items stolen or illegally exported after the entry into force of the

¹¹⁰ See UNIDROIT Convention, *supra* note 7, at art. 5.

¹¹¹ *Id.*; see also Bengs, *supra* note 28, at 532.

¹¹² See UNIDROIT Convention, *supra* note 7, at art. 5(1). See Bengs *supra* note 28, at 533.

¹¹³ See UNIDROIT Convention, *supra* note 7, ch. III, art. 5(3). (interests are listed as follows; (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional of ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting state).

¹¹⁴ UNIDROIT Convention, *supra* note 7, at art. 6(1).

¹¹⁵ See UNIDROIT Convention, *supra* note 7, at art. 10(1), (2).

UNIDROIT Convention.¹¹⁶ Article 10 also states that the UNIDROIT Convention in no way condones any illegal transaction that had taken place before the convention's inception.¹¹⁷

Article 10 further provides that the UNIDROIT Convention's lack of retroactive force in no way confines any party from pursuing claims outside the framework of the convention. Therefore, the UNIDROIT Convention cannot provide any relief for the legions of petitions by states and individuals that predate the convention.¹¹⁸ This condition was most likely inserted in attempts to gain the most possible signatories by providing protection for the objectionable acts of countries and individuals in the past.

The main criticism of both UNESCO and UNIDROIT Conventions is that they in effect seek to overcompensate for the unlawful transfer of cultural property while simultaneously not suppressing the black market trade of these objects.¹¹⁹

2. Benefits of the UNIDROIT Convention

In comparing the three legal mechanisms, the UNIDROIT Convention provides the greatest hope for the recovery of cultural property.¹²⁰ As of January 31, 2001, twenty-two countries have signed the UNIDROIT Convention, eight have ratified and four have acceded to the convention.¹²¹ The United States has yet to become a party to the UNIDROIT Convention.

¹¹⁶ *See id.* at arts. 1, 2.

¹¹⁷ *See id.* at art. 10(3).

¹¹⁸ *See* Kurjatko, *supra* note 81, at 85.

¹¹⁹ *See* Hughes, *supra* note 11, at 137.

¹²⁰ *See* Sultan, *supra* note 14, at 797.

¹²¹ *See* The Official WebSite of The International Institute for the Unification of Private Law (UNIDROIT), at <http://www.unidroit.org> (last visited Mar. 18, 2002)

VI. CONCLUSION

A. The Influence of the 1970 UNESCO Convention and the UNIDROIT Convention

Despite strategic differences, the 1970 UNESCO Convention and UNIDROIT Convention cause the international community to take note and participate in the preservation of cultural heritage. The recent 1997 New York District Court decision in *United States v. An Antique Platter of Gold* displays how such policies have had an effect on art importing countries like the United States.¹²² The U.S. government sent shock waves through the New York art world when it intervened on Italy's behalf to return the \$1.2 million, ancient gold platter to the detriment of the American purchaser.¹²³ Currently the 1970 UNESCO Convention and the UNIDROIT Convention are working together in efforts to halt the illicit traffic of cultural property and increase state participation in the two conventions.¹²⁴

B. Possible Solutions to the Problems Regulating the Illicit Trade of Cultural Property

1. Developing Internationally Property Law Applying to Cultural Property

A possible remedy for dealing with the conflicting applications of civil law and common law is to encourage international recognition of a uniform law, which strictly governs the title transfer of cultural property.¹²⁵ This would solve the disunity of the differing laws of civil and common-law nations and at the same time lend a special distinction to

¹²² See Hughes, *supra* note 11, at 139; see also *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997).

¹²³ See Hughes, *supra* note 11, at 139-40 (the District ruled that the platter had been imported in violation of two U.S. laws. First, the customs forms for the gold platter contained material false statements of fact, and secondly it violated of National Stolen Property Act, which prohibits the importation of stolen property).

¹²⁴ See Prott, *supra* note 61, at 214, 215.

¹²⁵ See Kurjatko, *supra* note 81, at 86.

the ownership of art treasures. This would also serve to eliminate the thief from gaining good title for items by filtering them through civil law nations that favor the bona-fide purchaser.

2. Promoting More Adequate Measures to Protect the Cultural Property

The goal of realizing a unified system of policing illegally exported and stolen cultural property would be furthered by removing the burden from art importing countries thereby procuring greater participation from the "source nations."¹²⁶ The art source nations should enlist forms of regulation rather than restriction for the handling of cultural property.¹²⁷ Source nations must use its own resources to seek out and provide protection for its cultural artifacts. This action would defeat the arguments of the art importing nations of the inedible decay and destruction of the cultural property in its current surroundings.¹²⁸ If the source nations enlist protective measures for the preservation of their cultural heritage, the art importing nations would probably express more willingness to return cultural property.¹²⁹ Additionally, source nations should do more to enforce cultural property laws more effectively within its own perimeters, including greater controls at the borders.¹³⁰

3. Using the Internet: The Stolen Art Data Base

There is probably a no more effective way of sharing the information of the art world than the World Wide Web. A major issue in the traffic of cultural property is the sale of objects to bona-fide purchasers, particularly in civil law countries that secure the good title in the transfer. One obvious solution is for collectors and dealers to have access to an international database in order to check the title of artwork.

¹²⁶ See Hughes, *supra* note 11, at 150.

¹²⁷ See *id.* at 151.

¹²⁸ See *id.*

¹²⁹ See *id.* at 150.

¹³⁰ See *id.* at 151.

The Art Loss Register (ALR) was created in 1991 and has become the world's largest most extensive database of stolen art and antiques.¹³¹ ALR was created by a group-insurance companies and auction houses in the effort to expose and secure stolen pieces of art and antiques.¹³² Because a nominal fee is all that is needed to search the register, it is clearly of great assistance to the galleries and museums who use it regularly.¹³³ ALR provides statistics of stolen objects, art world news, recent recoveries, and also has a special section dealing with items lost in the holocaust.¹³⁴

4. The Need for World Wide Cooperation

Ever since Aphrodite granted Pygmalion's pleas to turn his beloved statue into flesh and blood, mankind has had a desperate love affair with artistic treasures.¹³⁵ Cultural property undoubtedly possesses immeasurable worth to mankind. The epidemic of stolen cultural property denies future generations the knowledge and benefit of experiencing their brilliance. "A sense of the fate of some objects is momentous for the community at large, and has certainly insinuated itself into the public consciousness. Who today does not think that we all have a stake in the preservation of Stonehenge, or of Leonardo's notebooks?"¹³⁶ Similarly, the pillaging of archaeological sites results in the loss of irretrievable, historical knowledge.

It is undeniable that cultural property is a non-renewable resource. Global cooperation is essential in order to develop harmonious

¹³¹ See Sultan, *supra* note 14, at 798.

¹³² See Preziosi, *supra* note 9, at 242, 243.

¹³³ See *id.*

¹³⁴ See The Art Loss Register, at www.artloss.com (last visited Apr. 16, 2002).

¹³⁵ See BERNARD EVSLIN, *HEROES GODS AND MONSTERS OF THE GREEK MYTHS* 205 (1975).

"You call her lifeless, but I say my blood went into her making. My bones shaped hers. My fingers loved her surfaces. I polished her with all my knowledge, all my wit. She has seen all my strength, all my weakness, she has watched me sleep, played with my dreams. We *are* wed, Aphrodite, in a fatal incomplete way. Please, dear goddess, give her to me."

Id.

¹³⁶ Sax, *supra* note 2, at 4.

international law to protect the world's cultural property for future generations.

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