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Comments

UNDERGROUND DEBATES: THE FUNDAMENTAL DIFFERENCES OF OPINION THAT THWART UNESCO'S PROGRESS IN FIGHTING THE ILLICIT TRADE IN CULTURAL PROPERTY*

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INTRODUCTION

On a balmy morning in April 2003 looters descend on Iraq's National Museum in Baghdad.¹ The four U.S. military tanks that had been guarding the building days before are gone now—a few guards and museum employees remain to defend a billion dollar collection of ancient art at the heart of a city in chaos.² Sensing their weakness, thieves gather—men, women, children, and the elderly from nearby slums.³ Soon they unite, some armed, and demand entrance to the museum.⁴ The guards and the curators are forced to surrender and watch helplessly as the looters steal eighty percent of the museum's treasures⁵—life-size reliefs⁶ dating from the ninth century B.C., exquisitely carved ivory furniture from ancient palaces, tablets displaying the

¹ Jonathan Steele, *Museum's Treasures Left to the Mercy of Looters, U.S. Generals Reject Plea to Protect Priceless Artefacts from Vandals*, THE GUARDIAN, Apr. 14, 2003, at <http://www.guardian.co.uk/Iraq/Story/0,2763,936330,00.html> (last visited Feb. 19, 2005).

² *Id.*

³ *See id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* A relief is a work of art featuring the “projection of figures or forms from a flat background, as in sculpture, or the apparent projection of such shapes in a painting or drawing.” Dictionary.com, at <http://dictionary.reference.com/search?q=relief> (last visited Feb. 18, 2005).

world's earliest examples of mathematics, detailed tile work from medieval mosques, priceless Korans, jewelry, textiles, and coins—170,000 items in all.⁷ Two days later, the thieves are gone, and museum employees are left to sift through the bits of stone and glass that cover the floor, searching for anything left behind.⁸

Ten years ago, construction workers in Akhmim, Egypt strike a tombstone-shaped slab of limestone while working on a building site.⁹ Researchers will later discover that the four-by-two-foot relief, inscribed with hieroglyphics and the image of Osiris,¹⁰ is a funeral stele¹¹ over 2300 years old.¹² Instead of turning the stele over to the Egyptian government,¹³ the builders sell the stele to smugglers, at which point this priceless artifact is spirited on a strange and dangerous journey—from the soil of Akhmim, to storage facilities in Cairo and Zurich, to a gallery in Geneva,¹⁴ to an antiquities show in Paris, and eventually to

⁷ See Suzanne Muchnic, *War Turns Heads Toward Middle East*, L.A. TIMES, Dec. 21, 2003, at E54.

⁸ Steele, *supra* note 1.

⁹ Barry Meier & Martin Gottlieb, *An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. TIMES, Feb. 23, 2004, at A1 (reporting that the limestone funeral stele was excavated by laborers in Akhmim, Egypt, in 1994).

¹⁰ Osiris is known as “[t]he ancient Egyptian god whose annual death and resurrection personified the self-renewing vitality and fertility of nature.” Dictionary.com, at <http://dictionary.reference.com/search?q=Osiris> (last visited Feb. 18, 2005).

¹¹ A “stele” is “[a]n upright stone or slab with an inscribed or sculptured surface, used as a monument or as a commemorative tablet in the face of a building.” Dictionary.com, at <http://dictionary.reference.com/search?q=stele> (last visited Feb. 18, 2005).

¹² Meier & Gottlieb, *supra* note 9, at A12.

¹³ As of 1983, any newly discovered object belongs to the nation of Egypt. Law of Protection of Antiquities, No. 117 (Egypt) [hereinafter Law No. 117]. National patrimony laws will be discussed in detail in Part II.A.5.

¹⁴ Meier & Gottlieb, *supra* note 9, at A12. The gallery, known as Phoenix Ancient Art, was a thriving business that had sold pieces to museums such as the Metropolitan in New York, major collectors like financier Michael Steinhardt and fashion designer Bill Blass, and other dealers in Europe and America including Frederick Schultz. *Id.* Schultz was convicted in 2002 of smuggling Egyptian art. *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004).

a buyer in Manhattan.¹⁵ Five years later, authorities find the stele in the expansive foyer of a wealthy developer's Fifth Avenue apartment.¹⁶

How do these things happen? Actually, they happen all the time. Every day priceless art and artifacts are stolen from archaeological sites, tombs, storage facilities, and museums around the world.¹⁷ These objects embark on mysterious and perilous journeys, often not to be seen again for decades or even centuries.¹⁸ Many find their way into the hands of dealers, auction houses, and private citizens in the United States, France, and other nations with wealthy buyers.¹⁹ Relatively few are intercepted by customs officials

¹⁵ Meier & Gottlieb, *supra* note 9, at A12 (describing the path of the stele out of Africa, through Europe, and into the United States).

¹⁶ *Id.* at A1.

¹⁷ *Id.*

¹⁸ One such story of two paintings' amazing journey from Germany to Brooklyn made the front page of *The New York Times* in 1966 and was the subject of a U.S. court battle in the 1980s. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982). In 1943, to protect two Albrecht Durer paintings from Allied bombs, officials moved them from a German museum in Weimar to a nearby castle. *Id.* at 1155. Mysteriously, around the time American troops withdrew from the region in 1945, the paintings went missing. *Id.* at 1155-56. A year later, an American ex-serviceman showed up on Mr. Elicofon's door step, offering to sell the paintings that he allegedly bought during his term in Germany. *Id.* at 1156. Elicofon purchased the paintings for a mere \$450 and displayed them in his Brooklyn home where they hung quietly for the next twenty years. *Id.* Elicofon finally discovered the true identity and value of the paintings when a friend informed him that they were listed in a catalog of German art treasures stolen during World War II. *Id.* at 1155-56.

¹⁹ Richard McGill Murphy, *A Corrupt Culture*, NEW LEADER, Feb. 23, 1998, at 15 (reporting that "30 to 40 percent of the world's available antiquities pass through the sale rooms [of auction houses] in New York and London. Roughly 90 percent of these pieces are of unknown provenance, meaning they were almost certainly stolen, smuggled or both."); PERNILLE ASKERUD & ETIENNE CLÉMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY: A RESOURCE HANDBOOK FOR THE IMPLEMENTATION OF THE 1970 UNESCO CONVENTION 14 (1997), available at <http://unesdoc.unesco.org/images/0011/001187/118783eo.pdf> (last visited Feb. 18, 2005) [hereinafter UNESCO Handbook] (stating that "items of cultural property move in great quantity from developing countries to the international art market in the rich countries of the West which acts as a magnet to the flow of both licit and illicit trade").

or returned to their rightful owners.²⁰ This is the illicit trade in cultural property—a five billion dollar annual industry,²¹ orchestrated not by men, women and children from the slums looking to make a quick buck, but by a set of highly experienced professional smugglers who make millions at the world's expense.²²

The solutions to the illicit trade problem are numerous: registries, border controls, export restrictions, etc. Primarily, these solutions aim to cure the security breakdowns that facilitate theft and inhibit recovery. Indeed, these solutions are critical. Often ignored are the underlying limitations of these solutions, which are based, in large part, on ideological differences within the international community.²³ This Comment examines the deeper issues which prevent the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”)²⁴ from effectively implementing these solutions.²⁵

²⁰ Sunanda K. Datta-Ray, *Asians Share Blame for Loss of Art Treasures*, THE STRAITS TIMES, Mar. 2, 2004, at <http://straitstimes.asia1.com.sg/commentary/story/0,4386,237962-1078264740,00.html> (reporting that the 300,000 lost antiquities registered annually represent only a tiny fraction of the total).

²¹ Martin Sullivan, *The Next Deterrent: Laws with Muscle*, WASH. POST, Apr. 27, 2003, at B3, available at <http://www.washingtonpost.com/ac2/wp-dyn/A39954-2003Apr25?language=printer> (last visited Feb. 18, 2005) (reporting that the U.S. State Department recently estimated that the black market trade in cultural property amounts to five billion dollars annually, a large portion traceable to organized crime).

²² See Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 1008 n.271 (2001) (stating that “[t]heft and vandalism of art, despite their often tremendously costly and devastating effects, usually do not demand the degree of sophistication that characterizes white collar crime; however, the subsequent resale or laundering of stolen art, a major element of white collar art crime, is complex and sophisticated.”).

²³ See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 842 (1986) (coining the now widely used terms “cultural nationalism” and “cultural internationalism” to describe the two divergent views on issues of cultural property).

²⁴ UNESCO is a specialized U.N. agency that was created on November 16, 1945 to “promote[] international co-operation among its 190 Member States and six

Over thirty years have passed since the completion of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").²⁶ The Convention calls for Member States to take a variety of specific actions to curb the illicit trade of cultural property.²⁷ Very few States have undertaken these actions. The illicit trade has increased since the 1970 UNESCO Convention,²⁸ and situations like the looting of Iraq's national museum and Egypt's campaign for cultural restitution continue to disrupt foreign relations. UNESCO appears stumped as to how to garner greater support from wealthy buying nations and bring the solutions to fruition.²⁹

Associate Members in the fields of education, science, culture and communication." UNESCO.org, *About UNESCO*, at http://portal.unesco.org/en/ev.phpURL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 18, 2005).

²⁵ While this Comment refers to "the" solutions to the illicit trade in cultural property, it focuses on the primary solutions proposed in the relevant international conventions (registries, certification, crime prevention, etc.) and other sources (leasing, licit market, etc.).

²⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 (entered into force Apr. 24, 1972) [hereinafter UNESCO Convention of 1970]. According to UNESCO, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was "the first international legal instrument to tackle [illicit trade] issues . . ." UNESCO.org, *The Fight Against Illicit Trafficking in Cultural Goods*, at http://portal.unesco.org/culture/en/ev.phpURL_ID=1534&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 18, 2005) [hereinafter *The Fight Against Illicit Trafficking in Cultural Goods*].

²⁷ UNESCO Convention of 1970, *supra* note 26, arts. 5-6 (Articles 5 and 6 of the 1970 UNESCO Convention require States to draft laws, establish registries, promote museums, oversee excavations, establish and promote uniform ethical standards among dealers, stimulate interest and knowledge of cultural property, publicize thefts, and institute export certification systems).

²⁸ *The Fight Against Illicit Trafficking in Cultural Goods*, *supra* note 26 (noting the positive impact of the 1970 UNESCO Convention on the art market but admitting that the illicit trade continues to thrive and grow).

²⁹ Brenna Adler, *The International Art Auction Industry: Has Competition Tarnished Its Finish?*, 23 NW. J. INT'L L. & BUS. 433, 460 (2003) (stating that "the [1995] UNIDROIT Convention came about when, acknowledging UNESCO's feeble impact on international art regulation, UNESCO approached UNIDROIT

"A house divided against itself cannot stand."³⁰ UNESCO will never realize these solutions unless it gains the cooperation and respect of market³¹ and source nations.³² Recognizing the differences in ideology between these market and source nations is key to formulating a mutually agreeable treaty. Furthermore, even without a treaty, UNESCO must separate those solutions worth pursuing from those it should abandon. Taking some decisive steps might do more for the cause than creating another list of theoretical goals or polite recommendations, regardless of which nations endorse the resulting instrument. UNESCO must move beyond the cultural nationalist trend, which impedes progress and fosters dispute, to pursue cultural internationalist solutions.³³

(International Institute for the Unification of Private Law) to create a second international treaty that sought to, 'reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects [could] be sought'). At this time, only two market nations (China and Italy) have signed the 1995 UNIDROIT Convention. International Institute for the Unification of Private Law (UNIDROIT), *Status Report*, at <http://www.unidroit.org/english/implement/i-95.htm> (last visited Feb. 18, 2005).

³⁰ President Abraham Lincoln, Address when Accepting the Republican Nomination for Senate from Illinois (June, 1858), *available at* <http://www.nationalcenter.org/HouseDivided.html> (last visited Feb. 18, 2005).

³¹ Merryman, *supra* note 23, at 832 (examples of market nations include: France, the United Kingdom, Italy, Germany, Japan, China, the Scandinavian nations, Switzerland and the United States); John Henry Merryman, *A Licit International Trade in Cultural Objects*, in THINKING ABOUT ELGINS MARBLES, CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 209-211 (2000).

³² Many scholars have expressed a general reluctance to using the terms "source" and "market." See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 n.50 (1995) (criticizing the common usage of these terms as they are inadequate descriptions that lead to several conceptual biases); see also Merryman, *supra* note 31, at 124 n.4 (noting that some nations such as the United States possess significant supplies of native American cultural property and also heavily import art). To be clear, the terms "market" and "source" are not meant to imply guilt or evoke sympathy, but rather to express an economic reality; source nations possess a very valuable, inadequately protected, and highly desirable commodity that market nations demand, for various social and economic reasons.

³³ See discussion of cultural nationalism and cultural internationalism *infra* Part II.A.2.

Part I of this Comment provides background on the illicit trade in cultural property, outlining the problem, the players, and the effects. Part II dissects the relevant international law, focusing on three conventions: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Through these treaties, the Comment tracks the evolution from cultural internationalist ideals to the current prevailing cultural nationalist view. Part III outlines the goals of these laws, i.e., the values to consider when evaluating the appropriateness of the solutions. Part IV describes various solutions to the problem of illicit trade. Under each solution, the Comment explains the nature of the solution, discusses the issues and limitations surrounding the solution, and concludes by weighing the values outlined in Part III and analyzing whether (and if so, how) UNESCO should proceed with implementation. Part V tests the proposals for their offensive and defensive usefulness, using the Iraqi art crisis and Egypt's campaign for cultural restitution as test cases.

I. BACKGROUND

A. *The Problem*

The black market trade of art and artifacts is a pressing international problem. Behind illegal drug trafficking, illicit trafficking in cultural property is the second most lucrative underground market.³⁴ Some claim that

³⁴ CHARTER OF COURMAYEUR, June 25-27, 1992, available at http://www.unesco.org/culture/laws/courmayeur/html_eng/page1.shtml (last updated Aug. 23, 2001) [hereinafter CHARTER] (stating that "[n]ot many people seemed to know . . . that [illicit trade in cultural property] ranked second in volume to illicit

practically “every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came.”³⁵

Although illicit trade has been going on for literally thousands of years,³⁶ it took several startling events in the 1960s and 1970s to bring this reality to the modern world’s attention. Many credit a 1969 journal article by Dr. Clemency Coggins with opening the discussion.³⁷ Entitled “Illicit Traffic of Pre-Colombian Antiquities,” the article uncovered the illegal and damaging practice of chopping-up Mayan reliefs of irreplaceable artistic and scientific value for export.³⁸ More shocking still was the disquieting fact that Dr. Coggins “traced a substantial portion of this stolen and mutilated art from the jungles of Central America into some of America’s most respectable museums.”³⁹ A few months after *Art Journal* published the article, Italian authorities began investigating the Boston Museum of Fine Arts for its questionable purchase of a Raphael portrait.⁴⁰ Soon, the Metropolitan Museum of Art was also under

drug traffic” and linking illicit trade in cultural property with other transnational crimes, such as the illicit trade in drugs and arms).

³⁵ Ricardo Elia, *Ricardo Elia Responds*, 46 *ARCHAEOLOGY*, May-Dec. 1993, at 17 (quoting from THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* (1993)); see also Murphy, *supra* note 19, at 15.

³⁶ Guy Brown, *Antique Capitalism*, *BUS. TODAY* (Egypt), Sept. 2002, at 77-78 (reporting that “[l]ong before Napoleon’s times, Ancient Egyptian artifacts were looted, smuggled out of the country, and defaced” and stating that “[t]here have been tomb raiders for as long as there have been tombs to loot”).

³⁷ Paul M. Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 277 (1982) (noting that “[t]he publication of Dr. Coggins’s article represents an important milestone in the recent history of concern about illegal trade in art treasures”).

³⁸ Clemency Coggins, *Illicit Traffic of Pre-Colombian Antiquities*, 29 *ART J.* 94 (1969).

³⁹ Bator, *supra* note 37, at 279. Interestingly, the editors of the journal refused to allow Dr. Coggins to publish the names of the buyers with the lists of stolen art. *Id.* at 280 n.8. She finally published the information independently a year later. *Id.*

⁴⁰ *Id.* at 280 n.11. The museum’s curator bought the portrait in Italy from an art dealer with several criminal convictions for smuggling art. *Id.* The curator’s failure to declare the painting to U.S. customs officials served as the basis for its seizure and return to Italy. *Id.*

investigation for its acquisition of a Greek vase called the Calyx.⁴¹ The world could no longer ignore the problem, and the United States and other market nations came under increasing pressure to aid helpless source nations in protecting against the theft and destruction of their cultural heritage.⁴²

In the spring of 1970, fifty nations⁴³ convened to draft an international convention on the “means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property.”⁴⁴ The resulting Convention was adopted in November of that year.⁴⁵ Although market nations were relatively slow to ratify, the 1970 UNESCO Convention currently has 107 signatories, among them several major market nations.⁴⁶

B. The Players

Despite the best efforts of UNESCO and other international organizations, the illicit trade in cultural property is thriving.⁴⁷ Source countries simply do not have the resources to combat the problem and take the steps proposed in the 1970 UNESCO Convention.⁴⁸ Cultural property leaks out of these source countries like water from

⁴¹ *Id.* at 280 n.12. Unlike in the case of the Raphael portrait, Italian authorities were unable to prove what they suspected—that the Calyx was illegally excavated from an Etruscan tomb in 1971 and sold to the American seller living in Rome. *Id.*

⁴² *Id.* at 280-82.

⁴³ UNESCO Handbook, *supra* note 19, at 3.

⁴⁴ UNESCO Convention of 1970, *supra* note 26.

⁴⁵ *Id.*

⁴⁶ The major market nations that have ratified or accepted the 1970 UNESCO Convention include: Italy (1978), the United States (1983), China (1989), France (1997), the United Kingdom (2002), Japan (2002), and Switzerland (2003). Germany has not yet signed. A complete list of the 107 parties to the 1970 UNESCO Convention can be found at UNESCO.org, *Legal Instruments*, at <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (last visited May 11, 2005).

⁴⁷ UNESCO Handbook, *supra* note 19, at 10.

⁴⁸ *Id.* at 9.

a sieve, with security break downs at every point of passage. Impoverished citizens of art-rich countries are on a perpetual hunt for treasures throughout vast national territories.⁴⁹ Tourists pick up whatever they can find to bring back as souvenirs.⁵⁰ “[S]emi-professional bands of robbers who are knowledgeable about sites and excavation techniques” organize secret digs in remote locations.⁵¹ The governments of these countries cannot stay abreast of the discoveries, let alone the smuggling.⁵² The guards and border agents are inexperienced, underpaid, and easily swayed by the bribes of wealthy thieves.⁵³

More devastating still is the fact that often the key players in this ring of thieves are individuals and organizations entrusted with the protection and preservation of our international treasures. In early 2003, Karim Abu Shanab, right-hand man to Zawi Hawass, the current Secretary General of Egypt’s Supreme Council for Antiquities (“SCA”) was arrested for accepting a bribe to help smuggle artifacts out of the country.⁵⁴ “[F]ormer Prime Minister [of Greece] Constantine Mitsotakis and his deputy

⁴⁹ Borodkin, *supra* note 32, at 406 (stating that “there are strong incentives for citizens in artifact-rich countries to remove artifacts illegally” including using the artifacts as a source of income and avoiding government interference with land development); Johnathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 486 (1988) (defining “subsistence looting” as looting motivated by poverty); Meier & Gottlieb, *supra* note 9, at A12 (quoting an Egyptian blacksmith Mamdouh al-Qaoud as saying: “[e]veryone digs for antiquities in the mountains They feel it is their birthright to inherit these antiquities from their great ancestors.”).

⁵⁰ *The Fight Against Illicit Trafficking in Cultural Goods*, *supra* note 26.

⁵¹ Borodkin, *supra* note 32, at 406.

⁵² See UNESCO Handbook, *supra* note 19, at 10 (noting that archaeological sites are prime targets for thieves since these undiscovered objects have not yet been cataloged and are, therefore, easier to trade); Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT’L LAW. 235, 259 (1996) (stating that most source nations are poor, developing countries, easily out-resourced by well-funded and well-organized professional smugglers).

⁵³ Forbes, *supra* note 52, at 259-60.

⁵⁴ Alex Ionides, *Stirring Up the Past*, EGYPT TODAY, Sept. 11, 2003, at 67, available at 2003 WL 60480649.

police chief were implicated in a scheme to cooperate with an international syndicate of antiquities smugglers.⁵⁵ One of the most recent illicit art trade cases in the United States involved the trial of Fredrick Schultz,⁵⁶ a leading Manhattan art dealer and former President of the National Association of Dealers in Ancient, Oriental, and Primitive Art.⁵⁷ Auction houses have also been implicated in laundering stolen antiquities.⁵⁸ In 1990, Lebanon, Croatia, and Hungary sued Sotheby's Auction House, each claiming ownership of a collection of late-Roman silver.⁵⁹ One of the items involved in the *Schultz* case, a relief from the Temple of Isis, ended up in Christie's New York auction catalog.⁶⁰

Museums are not immune from this dishonorable behavior. Some of the most high profile pieces of allegedly stolen artifacts currently reside in prominent museums. The Rosetta Stone,⁶¹ the Bust of Nefertiti,⁶² and the Head of

⁵⁵ Borodkin, *supra* note 32, at 393.

⁵⁶ *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004) (holding that "the [National Stolen Property Act] applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law"); see Laura McFarland-Taylor, Comment, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. MARSHALL J. COMPUTER & INFO. L. 937, 946 (1998) (stating that "New York is considered by many to be the center of the art world and as such, its courts decisions in these matters are closely watched").

⁵⁷ Ironically, Schultz was a key spokesman in the campaign to clean up the art industry. Meier & Gottlieb, *supra* note 9, at A12. Urging dealers to avoid even the appearance of impropriety, he once wrote: "[a]llways use a customs agent when importing objects Be careful who your suppliers are, and stress to them the importance that stolen things not be circulated." *Id.*

⁵⁸ Borodkin, *supra* note 32, at 385-86 (discussing ways that the art auction system contributes to the perpetuation of art fraud).

⁵⁹ *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566, 567 (App. Div. 1990) (finding insufficient evidence to establish illegality and awarding the \$70 million worth of silver to possessor, Lord Northampton); see generally David D'Arcy, *Shadow of the Sevso Treasure*, VANITY FAIR, Oct. 1993, at 151.

⁶⁰ Mike Toner, *Egypt Reclaims Stolen Heritage*, ATLANTA J. CONST., May 3, 2003, at A5.

⁶¹ Ionides, *supra* note 54, at 70.

⁶² *Id.* at 69. Egypt's Secretary-General for the Supreme Council for Antiquities, Zahi Hawass, says "the only [pre-UNESCO 1970] piece we absolutely must get back is the Nefertiti bust, because it left Egypt completely illegally. They covered it with

King Amenhotep III⁶³ are currently displayed in the British Museum, the Berlin-Charlottenburg Museum, and the Louvre respectively.⁶⁴ The British Museum alone has over seven million contested pieces,⁶⁵ the most famous of which are the Parthenon Marbles (or "The Elgin Marbles").⁶⁶ The debate surrounding the Elgin Marbles involves complex factual and legal determinations.⁶⁷ Greece argues they were taken illegally or at least immorally and should be returned.⁶⁸ The British Museum insists that they were legally acquired and in fact saved from the damage that the original remaining structures have suffered over the years.⁶⁹ Although museums today are vehement in asserting that they conduct thorough investigations regarding the provenance of newly acquired pieces and subscribe to a strict code of ethics,⁷⁰ some remain skeptical.

mud and deceived Egypt at the time." *Id.*

⁶³ See *id.* Hawass "considers the cutting of reliefs to be a destructive act" and, therefore, not subject to UNESCO's 1970 effective date. *Id.*

⁶⁴ Hawass claims that the Bust of Nefertiti was covered with mud and smuggled out of Egypt in 1912 by German archaeologists. *Id.* Director of the Berlin Museum Dietrich Wildung insists that the bust was given to the German mission as part of a valid partitioning agreement and legally exported. *Id.* at 69-70. Hawass has also requested the Head of King Amenhotep III from the Louvre and the Rosetta Stone from the British Museum. *Id.*

⁶⁵ Mike Toner, *Coveting Thy Neighbor's Past*, ATLANTA J. CONST., Nov. 7, 1999, at Q4.

⁶⁶ *Id.* From 1801 to 1812, the seventh Earl of Elgin removed a variety of sculptures and architectural details from the site of the Parthenon in Athens, Greece. Merryman, *supra* note 31, at 224-25. He sold the pieces to the British Museum in 1816, where they are currently on display. *Id.* at 224. The Greek Minister of Culture formally requested the Marbles be returned in 1983. *Id.* The request was officially denied by the British Government in 1984. *Id.* at 225. The debate continues today.

⁶⁷ See Merryman, *supra* note 31, at 26.

⁶⁸ *Id.* at 25. Greek Minister of Culture, Melina Mercouri, urged Britain to return the Marbles, saying, "[t]his is our history, this is our soul You must understand us. You must love us. We have fought with you in the second war. Give them back and we will be proud of you. Give them back and they will be in good hands." *Id.*

⁶⁹ See *id.*

⁷⁰ Created in 1946, the International Council of Museums ("ICOM") is a non-governmental organization consisting of museum professionals from 120 countries. UNESCO Handbook, *supra* note 19, at 40. ICOM promotes a professional code of ethics. ICOM Code of Professional Ethics, in UNESCO Handbook, *supra* note 19,

The *New York Times* quoted Associate Professor of Archaeology and frequent critic of the antiquities industry, Ricardo J. Elia, as saying: “[p]eople think that there is an illicit market and a legitimate market [i]n fact, it is the same.”⁷¹

Museums are not only market participants but also victims of theft.⁷² “The Scream” by Edward Munch was stolen from the National Gallery in Oslo, Norway in 1994.⁷³ In the 1960s, the Guggenheim Museum in New York noticed that a Chagall oil painting was “not where it should be.”⁷⁴ The painting was subsequently displayed openly in a prominent New York gallery and sold to an innocent buyer.⁷⁵ Other victims include churches, archeological sites, storage facilities, and private owners.

These objects are washed of their illicit stain through a complex laundering process. Once smugglers get past the border, either by bribing an agent or disguising the object as a knockoff, they carry their prize to a country with liberal bona fide purchaser laws and short statutory time periods.⁷⁶ The smugglers hold the objects in homes, bank vaults, or storage facilities and wait for the statute of

Reference Document No. 9, at 63. The Code was adopted unanimously by the 15th General Assembly of ICOM, which met on November 4, 1986. *Id.*

⁷¹ Meier & Gottlieb, *supra* note 9, at A1 (quoting Ricardo J. Elia, Associate Professor of Archaeology at Boston University).

⁷² See UNESCO Handbook, *supra* note 19, at 14 (noting that “[m]useums are often reluctant to report thefts, for reasons ranging from fears that donors may stop donating to them to fears that the insurance premiums on their collections will increase”). The Guggenheim did not report the 1960 theft of a Mark Chagall oil painting for fear that it would drive the piece further underground and point out breaches in security. *Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428 (1991).

⁷³ Katy Kelly & Maria Puente, *Art Theft Angst: The Search for “The Scream,”* USA TODAY, Feb. 15, 1994, at 2A. In 2004, another version of the Scream was stolen from the Munch Museum in Oslo in 2004. CNN.com, *Norway Hunts for Stolen “Scream.”*

⁷⁴ *Guggenheim Found.*, 569 N.E.2d at 428.

⁷⁵ Despite the delay in request for return, the court ordered the good faith purchaser to return it to the Museum. *Id.*

⁷⁶ Forbes, *supra* note 52, at 260.

limitations to run.⁷⁷ They then sell the objects to auction houses where the artifacts are bought by dealers.⁷⁸ During the auction process, the objects acquire papers or histories that appear to legitimize their provenance.⁷⁹ From the dealers, the objects are sold to private individuals or museums.⁸⁰ With the amount of times the objects change hands, discovery usually takes years. And with every year that passes, it becomes increasingly difficult for the original owner to prove ownership.⁸¹

Factors such as war and foreign occupation exacerbate the situation as security is stretched thin and objects are exposed to regimes without cultural solidarity or respect.⁸² As symbols of a culture, religion, or form of government, objects of artistic, religious, and national significance are often targets.⁸³ Many of the most contentious disputes

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* For example, in the case of the stele of Pasenkhons, the gallery owners in Geneva asked a scholar, Massimo Patane of the University of Geneva, to translate the hieroglyphics on the three steles and write a scholarly paper about them, which was published in a German journal. Meier & Gottlieb, *supra* note 9, at A13. This Article, together with advertisements in antiquities magazines, gave the appearance of legality and helped sell the stele. *Id.* According to the *New York Times*, "archaeologists are divided over the propriety of such articles, with some arguing that they can give unprovenanced artifacts a sheen of legitimacy." *Id.*

⁸⁰ Forbes, *supra* note 52, at 260.

⁸¹ If the object was illegally excavated, then a State must show that the object was excavated under a valid national patrimony law in order to prevail on a recovery claim in most countries. See generally *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977) (holding that a declaration of national ownership, combined with a restriction on exportation without consent of the owner, is necessary before illegal exportation of an article can be considered theft and the exported article can be considered "stolen" within the meaning of the National Stolen Property Act).

⁸² UNESCO Handbook, *supra* note 19, at 10; see Steele, *supra* note 1 (reporting that "[i]n the turbulence and popular uprisings after the previous Gulf war about 4,000 objects went missing from local museums."); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990) (involving mosaics stolen from the Church by the Turkish military during its occupation of the Republic of Cyprus, and refusing to give effect to a Turkish nationalization decree, which claimed to divest the Church of title to the mosaics because the government was as-yet unrecognized by the United States).

⁸³ In March 2001, the Taliban destroyed a pair of giant, 2000 year-old Buddhas carved into a sandstone cliff in Bamiyan near Kabul. Jingle Davis, *Afghanistan's*

involve cultural property taken as spoils of war.⁸⁴ For example, UNESCO established special committees to facilitate recovery of art stolen by the Nazi regime in World War II.⁸⁵ Sadly, victims have an even harder time proving ownership when the property is recovered because the papers are often lost in the chaos of war.⁸⁶

C. *The Effects*

The effect of illicit trade on the objects themselves is staggering. To smuggle them out undetected, some artifacts are literally cut into pieces or deliberately defaced to conceal their value.⁸⁷ Smugglers destroy human remains, break-up artifacts, melt-down ancient coins, behead statutes, and chisel reliefs from tombs. In addition to the

Art: Beauty in Peril; If Treasures Remain, They're at Risk From U.S. Bombing, Theft, Taliban, ATLANTA J. CONST., Nov. 11, 2001, at L1. As the tallest standing Buddha in the world, the relief "ranked among the world's greatest art and historic treasures, on par with the pyramids of Egypt . . ." *Id.* (quoting art historian John Huntington of Ohio State University). While the loss of these Bamiyanese Buddha was an international tragedy, the incident carried added significance for Buddhists in light of the religious importance their religion places on three-dimensional representations of their gods. Ironically, the Taliban extremists destroyed the Buddhas in the name of their religion, claiming that the *Qur'an*, Islam's holy book, prohibits the depiction of human or animal figures. *Id.* The decision to bomb the World Trade Center in New York City was no doubt influenced by the desire to strike at a symbol of U.S. capitalism.

⁸⁴ The Republic of Korea is working with France to resolve the matter of the Oenggak Archives, which were taken by the French Navy from Korea in 1866. UNESCO, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Secretariat Report, 12th Sess. at 2, CLT-2003/CONF.204/2 (2003), available at <http://unesdoc.unesco.org/images/0012/001295/129554e.pdf> [hereinafter 12th Session Report].

⁸⁵ *Id.* at 4 (noting the continuing efforts of the committee for "the Settlement of Disputes concerning Cultural Heritage Displaced during the Second World War . . .").

⁸⁶ UNESCO Handbook, *supra* note 19, at 10-11.

⁸⁷ Bator, *supra* note 37, at 278 (reporting that stelae can be as tall as forty feet and as heavy as five tons and are thus routinely "sawed, hacked, split apart with crowbars, or simply smashed into moveable pieces—before they are ready for the art market.").

physical integrity of the objects, valuable contextual information is destroyed in this process.⁸⁸ The layperson would be surprised at what archaeologists can learn from the changes in soil color or the position of a skeleton.⁸⁹ Ignorant or indifferent, looters trample over these invaluable clues.

The illicit trade of cultural property has other far-reaching effects. The trade disrupts the delicate economy of source nations, forcing them to spend millions on protecting their treasures and resulting in the loss of valuable sources of revenue each time an object is lost.⁹⁰ The public as a whole loses the ability to enjoy the objects in their natural state.⁹¹ Scholars lose the ability to study and learn.⁹² Furthermore, the epidemic puts a strain on international relations between countries—in the form of disputes over cultural restitution⁹³ or general frustration toward a nation

⁸⁸ Borodkin, *supra* note 32, at 383.

⁸⁹ For example, by examining the placement of objects around the Ötzi mummy and conducting DNA analysis researchers were able to hypothesize about the last moment of his life. John Roach, *Deciphering the Origin, Travels of "Iceman,"* NATIONAL GEOGRAPHIC NEWS, Oct. 30, 2003, at http://news.nationalgeographic.com/news/2003/10/1030_031030_icemanorigins.html (last visited Apr. 2, 2005). Although early research suggested Ötzi died of starvation, scientists now believe Ötzi was murdered. *Id.* By analyzing the DNA on the clothing, knives, bows, and arrows preserved in the ice around him, researchers think "Ötzi was shot in the back by an arrow during a violent scuffle with at least two other people. The wound ultimately killed him, but not before he was able to scurry up the mountain in a futile attempt at escape." *Id.*

⁹⁰ Brown, *supra* note 36 (noting the economic value of cultural property in terms of tourism and ticket sales to museums and archeological sites).

⁹¹ UNESCO Convention of 1970, *supra* note 26, pmbl. (stating that "cultural property constitutes one of the basic elements of civilization . . . and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting . . .").

⁹² For example, the inscriptions on stelae are the primary source of historical knowledge of the Maya culture. Bator, *supra* note 37, at 279. However, in the artistic realm, they are valued less than the pictorial carvings and are often the parts that are cut off during the process of "thinning" the piece into moveable chunks. *Id.*

⁹³ The two cases pending before the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation include (1) the dispute between Great

that fails to pursue or punish offenders residing within its borders.⁹⁴

The political factors that inhibit progress are as damaging as the trade itself. Unlike the war on drugs, the war on the illicit trade of cultural property lacks a unified front. Unlike the illicit international trade of other valuables, like cars, the illicit (and licit) international trade of cultural property evokes unique ethical issues and sparks passionate debates. Market and source nations have diametrically opposed beliefs regarding the very nature of cultural property—where it belongs, who it belongs to, and whether it can ever be legally traded. These philosophical differences lead to tension and prevent solutions.

Over the past fifty years, these tensions have manifested a lack of unity and resulted in a lack of progress. Despite several multilateral treaties on the subject of cultural property, not one treaty has garnered the support of all the major market nations. The more specific the provisions, and thus more helpful the treaty, the less support it receives. The more general, and thus less likely to yield substantive solutions, the more nations willing to sign. Even the substantive provisions that survive the drafting process are, for economic or political reasons, seldom carried out. Clearly, the laws need to change and in ways that respect the underlying tensions between market and source nations.

Britain and Greece over the Parthenon Marbles and (2) the dispute between Germany and Turkey over the Bogazkoy Sphinx. 12th Session Report, *supra* note 84, at 1-2.

⁹⁴ See UNESCO Convention of 1970, *supra* note 26, pmb. (asserting illicit import, export, and transfer is an “obstacle to . . . understanding between nations which . . . is part of Unesco’s mission to promote . . .”).

II. UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION

A. *The Law*

1. *An Overview*

UNESCO is a branch of the United Nations whose mission is to promote “international co-operation among its 191 Member States”⁹⁵ and six Associate Members in the fields of education, science, culture and communication.”⁹⁶ UNESCO was formed after the Second World War in response to the Nazi’s destruction of national and religious monuments and government expropriation of masterworks owned by Jewish collectors.⁹⁷ Today, the organization is the world’s most comprehensive and well-equipped group tackling issues related to the destruction and theft of cultural property.

UNESCO’s main conventions in the field of antiquities are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁹⁸ the

⁹⁵ UNESCO.org, *List of Member States*, available at http://erc.unesco.org/cp/MSList_alpha.asp?lg=E (last visited May 11, 2005).

⁹⁶ UNESCO.org, *About UNESCO*, at http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 26, 2005).

⁹⁷ *See id.*

⁹⁸ 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]. “The Convention was adopted together with the Protocol which prohibits the export of cultural property from occupied territory and requires the return of such property to the territory of the State from which it was removed.” UNESCO.org, *Protection of Cultural Property in the Event of Armed Conflict*, at http://www.unesco.org/culture/legalprotection/war/html_eng/index_en.shtml (last visited Feb. 18, 2005). “The Protocol also expressly forbids the appropriation of cultural property as war reparation.” *Id.* The Second Protocol, adopted March 26, 1999,

further elaborates the provisions of the Convention relating to respect for cultural property and the conduct of hostilities, thereby providing greater protection than before. Thus it creates a new category of enhanced protection for cultural heritage that is particularly important for humankind, enjoys proper legal protection at national level, and is not used

1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,⁹⁹ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹⁰⁰ These conventions collectively establish the international definition of cultural property, the importance of preserving and protecting cultural property, and the commitment of the Member States to act in accordance with the principles and goals laid out in the conventions. The ways in which these conventions seek to protect cultural property, however, are quite different.

2. *Cultural Nationalism vs. Cultural Internationalism*

In studying these agreements, it is helpful to realize the trend from a cultural internationalist position to the cultural nationalist view which predominates today.¹⁰¹ This shift is apparent in the language of the conventions.¹⁰² This movement symbolizes a change in global thinking and, therefore, will substantially impact any future agreements. Furthermore, these two approaches to cultural property

for military purposes. It also specifies the sanctions to be imposed for serious violations of cultural property and defines the conditions in which individual criminal responsibility shall apply. Finally, it establishes a twelve-member Intergovernmental Committee to oversee the implementation of the Convention and the Second Protocol.

Id.

⁹⁹ UNESCO Convention of 1970, *supra* note 26.

¹⁰⁰ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, available at <http://www.unidroit.org/english/conventions/c-cult.htm> (last visited Feb. 18, 2005) [hereinafter UNIDROIT Convention of 1995].

¹⁰¹ Merryman, *supra* note 23, at 850 (noting that since the 1970s and 1980s, the debate about cultural property has become one-sided—the nationalist position embodied in the 1970 UNESCO Convention is confidently represented while the internationalist position represented in the 1954 Hague Convention has no prominent voice).

¹⁰² The 1954 Hague Convention seeks to protect “the cultural heritage of all mankind” 1954 Hague Convention, *supra* note 98. The 1970 UNESCO Convention speaks of “each country’s cultural property.” UNESCO Convention of 1970, *supra* note 26, art. 2.

will affect any effort to implement the solutions and have the potential to cause further discord between market and source nations. While it seems like the right, or at least the politically correct, way of thinking about cultural property, cultural nationalism may be an excuse for source nations to retain and recover otherwise unattainable cultural property.¹⁰³ The international community should reassess the merits of the cultural nationalist position to ensure it serves the needs of society as a whole.

Cultural nationalism is the view that cultural property is a part of the cultural heritage of the nation in which it is found or the nation which contains the cultural descendents of its creator.¹⁰⁴ The theory focuses on the special relationship between an object and a culture.¹⁰⁵ The theory is rooted in the principle of State sovereignty, "which recognizes a state's right to exercise control or govern those activities, people or objects within its territorial boundaries."¹⁰⁶ Cultural nationalists believe in keeping cultural property within the territory of the nation of origin.¹⁰⁷ As the primary suppliers of cultural property, source nations favor this theory because it legitimizes their efforts to limit exportation and justifies their claims of national ownership.¹⁰⁸

¹⁰³ See Merryman, *supra* note 31, at 88.

¹⁰⁴ Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 147 (2003); Merryman, *supra* note 23, at 846.

¹⁰⁵ Merryman, *supra* note 31, at 53 (stating that "[i]n its truest and best sense, cultural nationalism is based on the relation between cultural property and cultural definition.").

¹⁰⁶ Forbes, *supra* note 52, at 242.

¹⁰⁷ Jowers, *supra* note 104, at 147; see Merryman, *supra* note 23, at 844 (stating that while the term "retention" is rarely used—couched instead in terms of "protection"—the focus of the cultural nationalist is "protection against removal").

¹⁰⁸ Jowers, *supra* note 104, at 147-48; Merryman, *supra* note 31, at 88 (noting that the danger of the 1970 UNESCO Convention's "exclusive emphasis on nationalism will further legitimize questionable nationalist policies while stifling cultural internationalism.").

In contrast, cultural internationalism regards cultural property as the collective cultural heritage of all people.¹⁰⁹ A cultural internationalist places the rights of the common global interest in cultural property over the rights of any particular nation.¹¹⁰ Logically, market nations should adopt this theory. If cultural property belongs to the general public, then no nation has a right to exclude another nation or its citizens from buying and exporting cultural property. The movement, however, among many market nations has been toward cultural nationalism.¹¹¹

3. 1954 Hague Convention

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention") was the first multilateral international agreement dedicated solely to the protection of cultural property.¹¹² Drafted in recognition of the destruction of cultural property during World War II, the Convention focuses on the preservation of cultural property during armed conflict and military occupation.¹¹³ The Convention elicits a commitment by each member nation to take appropriate measures in safeguarding cultural property within its territory as well as within the territory of other parties.¹¹⁴ In consideration of these goals, warring parties are urged to avoid seeking refuge near cultural property in times of conflict, unless necessary.¹¹⁵ Parties are prohibited

¹⁰⁹ Jowers, *supra* note 104, at 147.

¹¹⁰ *Id.*

¹¹¹ Merryman, *supra* note 31, at 88 (stating that "the tide runs strongly against the forces of cultural internationalism" in the United States). The United States did not ratify the culturally international 1954 Hague Convention, but ratified the 1970 UNESCO Convention. *Id.* The United States has also signed several bilateral agreements with countries like Mexico, Peru, and Guatemala, in support of retentive national policies. *Id.*

¹¹² Merryman, *supra* note 23, at 836; Forbes, *supra* note 52, at 244.

¹¹³ See 1954 Hague Convention, *supra* note 98, pmbl.

¹¹⁴ *Id.* arts. 3-4.

¹¹⁵ *Id.* art. 4. The military necessity exception was strongly debated at the

from, and undertake to prevent, theft and vandalism.¹¹⁶ Parties are further ordered to refrain from any act of aggression toward cultural property.¹¹⁷ The 1954 Hague Convention has received widespread support among all nations and currently has 105 signatories.¹¹⁸

Although the 1954 Hague Convention has no direct application to the protection of cultural property during peacetime or the prevention of illicit trade, it established key concepts incorporated in later treaties on these topics. First, it expressed a global interest in cultural property and indicated an international desire to protect and preserve such items for their economic and social value. Second, the 1954 Hague Convention introduced a notion of collective and individual responsibility. Nations are obligated to safeguard cultural property within their own borders and refrain at all times from injuring the cultural property of their international neighbors.¹¹⁹ Another principle to emerge from the 1954 Hague Convention was the idea that “jurisdiction to try offenses against cultural property is not limited to the government of the offender.”¹²⁰ The provisions of this treaty exemplify a cultural internationalist way of thinking.¹²¹

conference that produced the Hague Convention of 1954. Merryman, *supra* note 23, at 839. The fear behind this addition was eloquently expressed by General Eisenhower in a statement to the Allied forces on December 29, 1943: “[T]he phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.” *Id.* at 838.

¹¹⁶ 1954 Hague Convention, *supra* note 98, art. 4.

¹¹⁷ *Id.*

¹¹⁸ UNESCO.org, *Protection of Cultural Property in the Event of Armed Conflict*, at http://www.unesco.org/culture/legalprotection/war/html_eng/100.shtml (last visited Feb. 26, 2005).

¹¹⁹ 1954 Hague Convention, *supra* note 98, art. 4.

¹²⁰ Merryman, *supra* note 23, at 842. However, this last characteristic does not apply to the peacetime traffic of cultural property. *Id.*

¹²¹ *Id.*

4. *The 1970 UNESCO Convention*

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property is the most significant agreement on the subject of stolen and illegally imported cultural property to date. The depth of the protection afforded under the 1970 UNESCO Convention goes beyond the 1954 Hague Convention, as it protects cultural property during peacetime. Furthermore, the 1970 UNESCO Convention has more market nation signatories than its counterpart, the 1995 UNIDROIT Convention.¹²²

The 1970 UNESCO Convention imposes an obligation upon parties to protect all cultural property “against the dangers of theft, clandestine excavation, and illicit export.”¹²³ In the spirit of fulfilling these obligations, parties are required to take definitive actions including: drafting laws and regulations; establishing a national inventory of protected property; promoting scientific and technical institutions; organizing supervision of archaeological excavations; promulgating rules of ethics for dealers, curators and collectors; stimulating education, interest, and respect for cultural property; and giving appropriate publicity to the disappearance of any items.¹²⁴ Another measure mentioned in the Convention is the creation of a certification program, whereby a certificate of permission would accompany each legally exported item.¹²⁵ Export of items without such a certificate would be prohibited.¹²⁶

¹²² One-hundred and seven compared to thirty. UNIDROIT.org (International Institute for the Unification of Private Law), *Status Report*, at <http://www.unidroit.org/english/implement/i-95.htm> (last visited May 11, 2005); UNESCO.org, List of Member States, available at <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E>.

¹²³ UNESCO Convention of 1970, *supra* note 26, pmb1.

¹²⁴ *Id.* art. 5.

¹²⁵ *Id.* art. 6.

¹²⁶ *Id.*

The 1970 UNESCO Convention marks the beginning of the trend away from cultural internationalism and toward cultural nationalism. The Preamble to the 1954 Hague Convention mentions “the cultural heritage of all mankind,”¹²⁷ whereas the 1970 UNESCO Convention uses the term “national cultural heritage.”¹²⁸ The 1970 UNESCO Convention indirectly endorses nationalization laws¹²⁹ and directly supports export regulations.¹³⁰ It repeatedly mentions the effect exportation has on the “impoverishment of the cultural heritage of the countries of origin” and orders market nations to enforce the export controls of source nations.¹³¹

One of the most controversial, and the most culturally nationalist, provisions of the 1970 UNESCO Convention is the so-called “blank check” provision. Article 3 defines “illicit” as any trade in cultural property that is “effected contrary to the provisions adopted under this Convention by the States Parties thereto”¹³² Article 13 orders each State to undertake “to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”¹³³ Reading these two provisions together, an object exported in violation of a nation’s export laws will automatically be considered “illicit” under the Convention. This has been dubbed the “blank check” provision because it allows source nations to define “illicit” as they please.¹³⁴ The result is an obligation

¹²⁷ 1954 Hague Convention, *supra* note 98, pmbl.

¹²⁸ UNESCO Convention of 1970, *supra* note 26, art. 5.

¹²⁹ Merryman, *supra* note 23, at 844 (proposing an alternative reading to the words of the Preamble to justify national retention of cultural property).

¹³⁰ UNESCO Convention of 1970, *supra* note 26, art. 5.

¹³¹ *Id.*

¹³² *Id.* art. 3.

¹³³ *Id.* art. 13(d).

¹³⁴ Merryman, *supra* note 23, at 844-45.

by Member States to enforce the export laws of foreign nations (no matter how arbitrarily drawn).¹³⁵

Obviously, enforcing the edicts of foreign nations is not a practice many nations are apt to adopt, especially when such edicts have the potential to contradict their constitutional guarantees and harm them economically and politically. Some have blamed this "blank check" provision for the lack of market nation support and the ten-year delay in implementing legislation from the United States.¹³⁶ This provision is a strong indication of the trend toward cultural nationalism.¹³⁷

5. *The 1995 UNIDROIT Convention*

In 1995, at the request of UNESCO, the International Institute for the Unification of Private Law ("UNIDROIT") drafted a convention to harmonize the conflicting municipal laws of UNESCO members ("1995 UNIDROIT Convention").¹³⁸ The conflicts that arose from the 1970 UNESCO Convention centered around property rights, statutes of limitations, and the "blank check" provision.¹³⁹ To its credit, as well as its political detriment, UNIDROIT drafted clear provisions in these three respects.

¹³⁵ *Id.*

¹³⁶ *Id.* at 845; see Convention on the Cultural Property Act of 1983, 19 U.S.C.A. §§ 2602-2606 (1999).

¹³⁷ The one throwback to the cultural internationalist position in the 1970 UNESCO Convention is found in the Preamble which reads, "[c]onsidering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations" UNESCO Convention of 1970, *supra* note 26, pmbl. (emphasis omitted). However, Merryman notes that "[t]he rest of the Convention, including the Preamble, provides unqualified support for retentive cultural nationalism." Merryman, *supra* note 23, at 850.

¹³⁸ Forbes, *supra* note 52, at 246.

¹³⁹ *Id.* at 247-51.

First, the 1995 UNIDROIT Convention undertook the difficult task of settling the dispute over controversial Article 7 (b)(ii) of the 1970 UNESCO Convention.¹⁴⁰ Due to the fundamental differences in legal philosophy between civil and common law nations, setting out specific rules regarding the rights of bona fide purchasers and owners required significant compromise on both sides.¹⁴¹ Identifying the ultimate goal as discouraging illicit trade,¹⁴² the 1995 UNIDROIT Convention tends to favor the original owner over the bona fide purchaser, contrary to civil law theory.¹⁴³ However, the Convention provides for compensation for value to diligent purchasers, which is a departure from the common law tradition.¹⁴⁴ The 1995 UNIDROIT Convention also settled the statute of limitations issue by establishing three separate periods for bringing recovery and restitution claims.¹⁴⁵ Under Article 3, the statute of limitations is three years from the date of discovery of the object's location but never longer than fifty years from the time of theft.¹⁴⁶ The Convention, however, waives the fifty-year time cap on the cultural restitution of "a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection"¹⁴⁷ This definition, of course, includes the pieces that are the center of the most heated disputes.¹⁴⁸ Conceding a bit to market nations, the Convention goes on to provide a Member State the option to declare a claim

¹⁴⁰ *Id.* at 247.

¹⁴¹ *Id.*

¹⁴² Marina Schneider, *Explanatory Report on the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, REVUE DE DROIT UNIFORME: UNIFORM LAW REVIEW 199 (1993).

¹⁴³ Forbes, *supra* note 52, at 248-49.

¹⁴⁴ *Id.* at 249.

¹⁴⁵ UNIDROIT Convention of 1995, *supra* note 100, art. 3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Greece would certainly argue that Elgin's Marbles "form an integral part of an identified monument," namely the Parthenon. Egypt could argue that the Rosetta Stone and The Bust of Nefertiti belong to a public collection. The law would also give Egypt the right to recover the many reliefs cut from tomb walls.

regarding this special cultural property subject to a time limitation of seventy-five years or longer through national legislation.¹⁴⁹

In respect to the controversy surrounding the “blank check” provision, the 1995 UNIDROIT Convention quietly furthers the cultural nationalist position. The drafters were mindful of what they called the “two defensible positions, on the one hand that of countries desirous of limiting the removal of cultural objects from their territory [i.e. source nations] and on the other that of those which favour a more liberal attitude to the international movement of such objects [i.e. market nations].”¹⁵⁰ The drafters acknowledge the need to balance these two positions but admit to adopting a system which favors the rights of the nation of origin to request restitution in certain cases and the power to declare exportation of objects of cultural heritage ipso facto illegal.¹⁵¹

Interestingly, the 1995 UNIDROIT Convention draws a distinction between theft and illicit export. In a document prepared by UNIDROIT research officer, Marina Schneider, regarding the background to the convention, she states that “the two situations can be divided as an object can be stolen and then legally exported or can be illegally exported by its owner.”¹⁵² Only when two conditions (stolen and illegally exported) are fulfilled may a claim be brought under chapters two and three of the Convention.¹⁵³ In this respect, the Convention seems to tip its hat to the market nations by acknowledging the potential for a licit commercial market in cultural property or at least refusing to declare all illegally exported objects stolen.

¹⁴⁹ UNIDROIT Convention of 1995, *supra* note 100, art. 3 (also providing that any State who exercises this right and enacts legislation creating a seventy-five year or longer time limitation is subject to their own limitation when making a claim for restitution from another Member State).

¹⁵⁰ Schneider, *supra* note 142.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

This obvious, but seldom stated fact (that stolen and illegally exported are two separate concepts), is also evident when comparing Article 3 with Article 5. Article 3 baldly states “[the] possessor of a cultural object which has been stolen shall return it,” whereas, Article 5 says “[a] Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of a requesting State.”¹⁵⁴ However, outside of the conversation surrounding the reason for this semantic difference, the reality is that the convention seeks to curb theft *and* illicit export (as defined by the laws of the nation of origin).

Nevertheless, most market nations will not enforce foreign claims based on laws which make it illegal to export an otherwise legally obtained object of cultural property.¹⁵⁵ These market nations require the source nation to pass a national patrimony law which declares cultural objects property of the State.¹⁵⁶ The clearest statement of this principle in regard to the United States is found in *United States v. McClain*.¹⁵⁷ The Court stated that “it is not a violation of law to import” an item “simply because [it] has been illegally exported from another country.”¹⁵⁸ The

¹⁵⁴ *Id.*

¹⁵⁵ Merryman, *supra* note 31, at 129.

¹⁵⁶ *Id.*

¹⁵⁷ *United States v. McClain*, 545 F.2d 988, 1000-01 (5th. Cir. 1977) (holding that a declaration of national ownership combined with a restriction on exportation without consent of the owner is “necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen’, within the meaning of the National Stolen Property Act.”); *see also* Gov’t of Peru v. Johnson, 720 F. Supp. 810, 813 (1989) (noting that Peru could not claim ownership of pre-Colombian artifacts which were brought to the United States before 1929, as the earliest statutes concerning government ownership of such artifacts were effected in 1929); *United States v. Schultz*, 333 F.3d 393, 399 (2003) (upholding a conviction based on the National Stolen Property Act and a valid national patrimony law).

¹⁵⁸ *McClain*, 545 F.2d at 996 (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in ART LAW, DOMESTIC AND INTERNATIONAL 295, 300 (Leonard D. Daboff ed., 1975)) (stating that “Professor Bator correctly states the law applicable to violations of export laws”). The Court in *Schulz* noted that some effort had been taken in the Senate to amend the NSPA to overrule *McClain*; however, the Court decided that *McClain* was still good law and

National Stolen Property Act ("NSPA") of the United States prohibits the importation of "stolen" goods, but the taking must satisfy the meaning of "stolen" (narrowly interpreted by the courts to include only those objects taken in violation of a valid patrimony law) within the NSPA before it amounts to an illegal act.¹⁵⁹

The 1970 UNESCO Convention artfully avoided the issue by declaring only objects taken from museums or similar institutions as "stolen."¹⁶⁰ All other objects otherwise legally or illegally obtained are not considered "stolen" and, therefore, are not protected.¹⁶¹ The 1995 UNIDROIT Convention, on the other hand, indirectly codifies the market nation rule ("stolen" if valid patrimony law). Article 3 states, "[f]or the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the

was not overruled by the adoption of the CPIA (implementing legislation for the 1970 UNESCO Convention). *Schultz*, 333 F.3d at 408.

¹⁵⁹ *McClain*, 545 F.2d at 988-89 (acknowledging that certain pre-Colombian artifacts were exported from Mexico by defendants in contravention to that country's law but remanding the case to determine whether the objects in question were imported in violation of federal law and, therefore, classified as "stolen" within the meaning of the Act).

¹⁶⁰ Merryman, *supra* note 31, at 132. Under the 1970 UNESCO Convention, the States are to take necessary measures to recover and return objects "stolen from a museum or a religious or secular public monument or similar institution . . . provided that such property is documented as appertaining to the inventory of that institution." UNESCO Convention of 1970, *supra* note 26, art. 7(b)(i). This provision left out objects stolen from private collections, institutions, and excavation sites. See *id.* The 1995 UNIDROIT Convention provides for the protection of all form of cultural property, public and private. See UNIDROIT Convention of 1995, *supra* note 100; see also Karen Sanig, *Chainsaw Massacre*, TIMES (London), Feb. 1, 2000, at Law 5 (discussing the UNESCO requirement that an object be classified as "cultural heritage" in order to qualify for protection and stating that "under UNIDROIT all forms of cultural objects are recognized, private or public."). Some credit this difference for the lack of market nations support for the UNIDROIT Convention of 1995 whose auction houses and dealers preferred the more narrow protection provided by the 1970 UNESCO Convention. Adler, *supra* note 29, at 461 (accusing Britain of being particularly solicitous to the interests of its two great auction houses—Sotheby's and Christie's).

¹⁶¹ Merryman, *supra* note 31, at 132.

excavation took place.”¹⁶² This suggests that as long as a nation has a patrimony statute any newly discovered object exported will be considered “stolen.”

One of the most telling shifts toward cultural nationalism is the emphasis the 1995 UNIDROIT Convention places on cultural restitution. The preamble states “that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States”¹⁶³ Whereas the 1970 UNESCO Convention contained a few general provisions regarding procedures surrounding requests for return,¹⁶⁴ the 1995 UNIDROIT Convention makes recovery and restitution one of its primary goals.

The repatriation¹⁶⁵ movement started long before the 1995 UNIDROIT Convention. In 1973, the United Nations General Assembly passed a series of resolutions calling for the restitution of cultural property to countries of origin.¹⁶⁶ In 1978, UNESCO set up the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (“Committee for Cultural Restitution”).¹⁶⁷ In accordance with Article 4 of the Statutes of the Committee, the Committee is responsible for “facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin”¹⁶⁸ The Committee

¹⁶² UNIDROIT Convention of 1995, *supra* note 100, art. 3(2).

¹⁶³ *Id.* pmbl.

¹⁶⁴ See UNESCO Convention of 1970, *supra* note 26, arts. 2, 15.

¹⁶⁵ Repatriation is defined as “the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed.)” Merryman, *supra* note 23, at 845.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Statutes of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of

produces bi-annual reports regarding the recent activities “undertaken by UNESCO Member States . . . aimed at curbing illicit trafficking” and acts as a mediator between countries engaged in restitution disputes.¹⁶⁹ In 1983, the Council of Europe Parliamentary Assembly adopted a Resolution on Return of Works of Art.¹⁷⁰

Then, in 1992, the Charter of Courmayeur (“Charter”) was adopted at the Workshop organized by the Crime Prevention and Criminal Justice Branch at the United Nations Office at Vienna, its International Scientific and Professional Advisory Council (“ISPAC”) and UNESCO.¹⁷¹ The preamble to the Charter contemplates the drafting of the 1995 UNIDROIT Convention.¹⁷² The Charter offers a variety of suggestions for a “model treaty” to assist “Member States interested in negotiating and drawing bilateral agreements”¹⁷³ The Charter continually refers to “items belonging to the cultural patrimony of nations” and states that “cultural patrimony is a crucial component of the identity and self-understanding of a people.”¹⁷⁴ In some of the most culturally nationalist terms employed in an international edict thus far, the Charter states, “developed countries should be respectful of the cultural heritage of developing countries, and should provide full co-

Illicit Appropriation, in UNESCO Handbook, *supra* note 19, Reference Doc. No. 23, at 142.

¹⁶⁹ Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation on its Activities, UNESCO, 31st Sess., at 1, Doc. 31 C/REP/16 (Aug. 9, 2001), available at <http://www.parthenonuk.com/articles/unesco.pdf> (last visited Feb. 18, 2005).

¹⁷⁰ Merryman, *supra* note 23, at 845; see Text Adopted by the Assembly, EUR. PARL. ASS'N., 35th Sess., Res. No. 808 (Oct. 3, 1983), available at <http://assembly.coe.int/Documents/AdoptedText/tA83/eres808.htm> (last visited Feb. 18, 2005).

¹⁷¹ CHARTER, *supra* note 34.

stopped

¹⁷² See *id.* pmb1.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Compare this statement with the 1954 Hague reference to the “cultural heritage of all mankind.” 1954 Hague Convention, *supra* note 98.

operation to the victims of illicit trade with cultural objects, thereby dispelling any misunderstanding and placing themselves above any suspicion of possible complicity or complacency.”¹⁷⁵

In a way these movements are a “logical extension”¹⁷⁶ of the ideology underlying the 1970 UNESCO Convention and carried on by the 1995 UNIDROIT Convention—the idea that cultural property belongs *to* and belongs *in* the country of origin. No matter how long ago an item was taken (especially an item of particular cultural significance) or where the item is now (whether it be in a prominent museum or a private collection), the item should be surrendered to the government controlling the territory in which it was originally excavated or created.¹⁷⁷ This evokes an image of the director of UNESCO waving a wand and all the world’s treasures flying through the air—reshuffling—a massive pile of masks, coins, and carvings landing in the coffers of the Nigerian government—stacks of reliefs, mummies, and sculptures crammed into Zawi Hawass’s office at the SCA in Egypt. The important question is whether that is the ideal situation or whether the international community is moving down the wrong road.¹⁷⁸

III. THE VALUES AND GOALS

The current international law on the illicit trade of cultural property is focused toward three primary goals: preservation and protection, visibility and accessibility, and crime prevention.¹⁷⁹ All the provisions of the various

¹⁷⁵ CHARTER, *supra* note 34, § I (XIII).

¹⁷⁶ Merryman, *supra* note 23, at 845.

¹⁷⁷ *Id.*

¹⁷⁸ Bator, *supra* note 37, at 306 (stating “[a]lthough important values are served by an international order that allows and encourages each country to retain a rich and representative collection of its own art, it would be a disaster if all art stayed at home, if one could see Mexican art only in Mexico, French art only in France.”).

¹⁷⁹ See Merryman, *supra* note 31, at 112-20. Merryman classifies the primary

conventions discussed above can be seen as a means to these various ends. These can be viewed as values informing the law or goals that the law should strive to promote.

Preservation and protection should constitute the primary focus of international law surrounding the trade in cultural property.¹⁸⁰ The very purpose behind the three conventions seems to support this position. Intuitively, preservation and protection are paramount as the relevancy of these laws depends on the continued existence of cultural objects.¹⁸¹ Furthermore, recognizing the artistic, economic, scientific, and cultural value of these objects logically leads to a desire to protect and preserve them for ourselves and future generations. Preservation and protection are superior to visibility and accessibility because preservation and protection cannot be postponed.¹⁸²

Aside from physical preservation, contextual information should also be preserved. This information leads to a better understanding of the item's cultural property. Scientists and historians are able to classify the origin, use, and type of the artifact by studying the contextual clues that surround these objects. This process expands the collective knowledge of society and arguably increases the interest and beauty of the piece.¹⁸³

considerations as: preservation, truth and access. *Id.* at 112. By "truth" he means the importance of assessing the authenticity of an object of cultural property. *Id.* at 115. As this article focuses on illicit trade and not counterfeit, ensuring authenticity is not included as a goal or value.

¹⁸⁰ *Id.* at 57 (discussing three considerations for allocating Elgin's Marbles: preservation, integrity, and distribution and contending that "[p]reservation takes priority for obvious reasons").

¹⁸¹ *Id.* at 112 (stating that "[t]he essential ingredient of any cultural property policy is that the object itself be physically preserved.").

¹⁸² Bator, *supra* note 37, at 299 (stating that "[i]f art is destroyed or mutilated, it is gone forever. But visibility and accessibility can be postponed.").

¹⁸³ Another added benefit of documenting archaeological sites is that it preserves invaluable information that can be used to prove legal ownership when an object is stolen. Merryman, *supra* note 31, at 113 n.73. For example, in *United States v. Hollinshed*, the government was able to prove that Hollinshed removed a stele

Visibility and accessibility are closely related secondary values as “[p]resumably, we preserve art so that it can be seen and known and studied, so that it can exercise its power over us, so that it can add to our store of knowledge.”¹⁸⁴ The value of cultural property depends on its ability to affect an intellectual and emotional impression on the viewer.¹⁸⁵ Periodically, preservation and accessibility conflict.¹⁸⁶ A stele, for example, could be accessed by allowing visitors to tour inside the tomb, however, this might destroy the contextual integrity of the surrounding environment.¹⁸⁷ Sealing the tomb, on the other hand, cuts off all access and visibility to the stele, and allows for the possibility that the tomb walls will collapse from erosion or the limestone will naturally deteriorate. The solution is seldom obvious in these difficult cases. The best the law can do is appreciate these issues and seek to promote the greatest good for the greatest number.

Finally, preventing illegal activity, although not traditionally considered a value, should be a goal of any law related to the illicit trade of cultural property. Preventing illegal activity is more than a means to the end of

from a Mayan temple in Guatemala by relying on a photograph taken by an archeologist that showed the stele intact *after* the enactment of Guatemala's national patrimony law. See 495 F.2d 1154 (1974). Furthermore, detailed documentation is pivotal in cases of natural deterioration, where the linguistic or pictorial record may outlive the object or site.

¹⁸⁴ Bator, *supra* note 37, at 299.

¹⁸⁵ Ironically, when we display cultural property as a way of honoring and appreciating our ancestors, we are often violating their wishes that the objects remain buried. MERRYMAN, *supra* note 31, at 112. Nowhere is this more poignant than in the case of ancient tombs and mummies. See *id.*

¹⁸⁶ Not only can the values conflict, but the interests of different individuals can conflict regarding these values. For instance, the interests of scholars and the public can conflict over the issue of accessibility. For over forty years, a small group of scholars kept the Dead Sea Scrolls under lock and key and refused to allow the public or even other scholars to view these important documents. JOSEPH SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 5 (1999). The scrolls were finally released after the issue gained national press attention and resulted in a public outcry. *Id.*

¹⁸⁷ At its present load of 3000 tourists per day, Tut's tomb will be ruined in a decade unless something is done. Brown, *supra* note 36.

preservation or visibility. Crime prevention is distinct from the other values. Even though a Picasso might be better cared for and more widely seen in the Metropolitan as opposed to on an individual's living room wall,¹⁸⁸ this would not justify the Museum's curator breaking into his house to steal the painting.¹⁸⁹ Despite the earlier discussion involving the definition of the term illicit, generally illegality is not a relative concept. Depriving an owner of rightful possession (regardless of how one acquires rightful possession) is wrong and, owners should be afforded the full protection of domestic and international law. As crime prevention is valuable as an end in itself, it should be included among the core values.

National retention, on the other hand, is not a value. At best national retention is a means to the final end of preservation. A critic might classify national retention as selfish hoarding by nations with abundant supplies of cultural property.¹⁹⁰ Occasionally, keeping an object in its original location is necessary to maintain its physical and spatial integrity.¹⁹¹ In these cases, national retention fosters preservation. Some art objects, however, can be relocated without the risk of physical damage or loss of contextual information. Preservation cannot justify national retention of these objects. This is not meant as a critique on the validity of national retention; it merely illustrates that national retention is separate from preservation. For this reason, national retention should be viewed as a possible solution, not a core value.

¹⁸⁸ One of the last important works in Picasso's blue period has been in a Swedish business man's living room for the last forty years; no living scholar has ever laid eyes on it. SAX, *supra* note 186, at 64.

¹⁸⁹ Of course, if the individual was slowly destroying the Picasso, that might be a different story. This is why preservation is superior to crime prevention as well.

¹⁹⁰ Merryman, *supra* note 31, at 150-52 (discussing what he calls "destructive retention").

¹⁹¹ Merryman, *supra* note 23, at 852 (noting that no one would propose removing monumental sculptures from Mayan sites where physical damage or loss of artistic integrity or cultural information would probably result).

IV. THE SOLUTIONS AND DEBATES

This Part conducts a realistic examination of the solutions to the problems addressed in Part I. Understanding the economic, political, and practical limitations to these solutions is the first step in formulating a plan for their implementation. The solutions are gathered from the conventions discussed in Part II, meetings by international organizations, UNESCO projects, and scholarly publications. The solutions are international and national in scope, defensive and offensive in type. Some are focused more toward source nations and others more toward market nations. Under each solution heading the Comment will summarize the solution and the problem to which it is addressed. The Comment will then outline the arguments for and against the solution. Weighing the strength of each argument in light of the goals addressed in Part III, the Comment will come to a conclusion as to which side is stronger and espouse a position as to what substantive action UNESCO should take—which solutions to pursue, which to abandon, and which to relegate to the individual States.

A. *International Action*¹⁹²

1. *Registry*¹⁹³

Imagine your car is stolen and you go to the police. They ask you to describe the make and model. You do not know. They ask you the license plate number, but you cannot

¹⁹² Each of the solutions in this section calls for the international community to act collectively; however, each could also be part of an individual nation's plan of action. In fact, the conventions urge States to undertake some of these solutions themselves. For the reasons mentioned in this section, these solutions require unified international organization and implementation as opposed to leaving them under the control of the individual States.

¹⁹³ Sometimes also called inventory or catalog. See generally UNESCO Handbook, *supra* note 19, at 26.

remember and you have no records. Basically, all you can tell them is that the car had four doors and it was blue. Without an international registry, the information you gave to the local police is approximately the same amount of information Interpol has to work with in recovering a stolen painting or artifact.¹⁹⁴

There exists an undeniable need for an international registry.¹⁹⁵ There are two types of registries contemplated in international law. One is a list of all significant cultural property known to exist within a nation. Another is a list of all items known to have been stolen. The international conventions which mention registries urge nations to establish the former, more extensive, and ultimately more helpful theft prevention and recovery registry.¹⁹⁶

The Crime Prevention and Criminal Justice Branch at the United Nations believes that “[d]etailed and extensive information concerning the cultural patrimony of every nation is of the foremost importance.”¹⁹⁷ Article 5 of the 1970 UNESCO Convention states: “States Parties to this Convention undertake . . . establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.”¹⁹⁸

¹⁹⁴ See *id.* at 27 (reporting that despite the large number of cultural property illegally exported from Africa each year, only twelve notices of stolen African art could be issued from January 1992 to October 1994 due to the lack of sufficient inventory information).

¹⁹⁵ This Comment focuses on registries as means to preventing theft and aiding recovery. Inventories might also be helpful, even without the treat of theft, in preserving valuable contextual information that will be lost unless recorded. Bator, *supra* note 37, at 301. Registries also “enhance awareness of cultural property and form a basis for further research . . .” UNESCO Handbook, *supra* note 19, at 26.

¹⁹⁶ See UNESCO Convention of 1970, *supra* note 26, art. 5(b).

¹⁹⁷ CHARTER, *supra* note 34, § I (III).

¹⁹⁸ UNESCO Convention of 1970, *supra* note 26, art. 5. UNESCO Handbook states “the importance and usefulness of establishing extensive and detailed documentation of objects which are considered cultural property can . . . not be overemphasized.” UNESCO Handbook, *supra* note 19, at 23.

The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage requires State Parties to “submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage”¹⁹⁹

Although these treaties stress the importance of registries, they relegate the responsibility for their creation and maintenance to the individual nations. In an attempt to solve the problem of inconsistency, UNESCO endorses a project called “Object-ID.”²⁰⁰ Sponsored in part by the Getty Information Institute, Object-ID is a set of uniform cataloging standards.²⁰¹ The checklist includes taking a photograph of each object, recording categories of identifying information (including the type of object, the material composition, the measurements, any identifiable markings or distinguishing features, the title, the subject, the date or period, and the maker), and writing a short description containing any additional information.²⁰² Object-ID is one of many attempts by public and private institutions to create a standardized system of documentation.²⁰³ No model has yet been accepted as an international standard.²⁰⁴ While uniform standards would ensure a certain level of consistency regarding criteria for cataloging the pieces, these standards may not address the financing and technology needs of source nations. Furthermore, unless all national information is compiled onto one registry at one location, law enforcement officials

¹⁹⁹ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 11, 1037 U.N.T.S. 152, available at http://whc.unesco.org/world_he.htm (last visited Feb. 18, 2005).

²⁰⁰ 12th Session Report, *supra* note 84.

²⁰¹ Council for the Prevention of Art Theft, *About Object-ID*, at <http://www.object-id.com/about.html> (last visited Feb. 25, 2005).

²⁰² Council for the Prevention of Art Theft, *Object-Id Checklist*, at http://www.object-id.com/checklist/check_eng.html (last visited Feb. 25, 2005).

²⁰³ See Council for the Prevention of Art Theft, *supra* note 201. For more examples of cataloging standards drafted by organizations such as CIDOC, ICOM, and INTERPOL, see UNESCO Handbook, *supra* note 19, at 25-27.

²⁰⁴ UNESCO Handbook, *supra* note 19, at 25.

will be forced to consult hundreds of lists each time they run a check.

An international registry would be uniform, secure, and more readily accessible. No nation currently has a registry of the scope contemplated in the treaties; however, there are several large databases, and hundreds of smaller sites, that contain information on lost or stolen antiquities.²⁰⁵ Each of these databases contains only a handful of items and accessing them is difficult.²⁰⁶ Furthermore, registries of items not currently lost or stolen are needed to combat future illicit trading.²⁰⁷ Some individual museums have registries of their collections; however, as was the case with the Iraq National Museum, the registries themselves are often destroyed in the looting.²⁰⁸ A centralized international electronic database would solve these problems.²⁰⁹

²⁰⁵ McFarland-Taylor, *supra* note 56, at 963 (listing Interpol, the FBI, Scotland Yard, and the Art Theft Report Form as large databases among "literally hundreds of sites on the Internet concerned with stolen artworks"). "INTERPOL has a database for stolen cultural property exclusively for the national police of its Member States." UNESCO Handbook, *supra* note 19, at 44. "Several countries have developed their own databases of stolen objects, among others Belgium, Canada, the Czech Republic, France, Germany, Italy, United Kingdom, and the United States." *Id.* The International Foundation for Art Research ("IFAR") is a private foundation in New York with a database that "includes stolen property from all over the world" and is "part of the London based ART LOSS REGISTER." *Id.* The Art Loss Register is a private database that services customers such as insurance companies and private collectors, and is funded by subscription fees. *Id.* at 44-45. The U.S. State Department maintains a database with stolen cultural property from Bolivia, Cyprus, El Salvador, Guatemala, Italy, Mali, Nicaragua, and Peru. U.S. State Dep't, *About the Image Database*, at <http://exchanges.state.gov/culprop/databas1.html> (last visited Feb. 25, 2005).

²⁰⁶ See UNESCO Handbook, *supra* note 19, at 44-45.

²⁰⁷ But see Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2461-62 (1994) (arguing that registering all art, not just stolen art, would be economically and practically impossible).

²⁰⁸ Richard Zettler, *The Next Step: Reconstruct Records*, WASH. POST, Apr. 27, 2003, at B3, available at <http://www.washingtonpost.com/ac2/wp-dyn/A39954-2003Apr25?language=printer> (last visited Feb. 26, 2005).

²⁰⁹ The ideal database would contain a detailed description of the object and a digital picture. See CHARTER, *supra* note 34, art. I (noting that registries should contain "a description of each item adequate for its identification and a photographic reproduction of it"). The Charter of Courmayeur "adopted a series of

An international registry would assist good faith purchasers and true owners.²¹⁰ Whether a good faith purchaser consulted a registry is one of the factors taken into account in determining due diligence by U.S. courts²¹¹ and under the 1995 UNIDROIT Convention.²¹² Unfortunately, many of the current registries are only accessible to law enforcement officials.²¹³ Under U.S. law, true owners are also required to exercise due diligence in reporting stolen art.²¹⁴ Due to inconsistent decisions regarding the meaning of due diligence, this standard is difficult to satisfy.²¹⁵ A comprehensive and publicly

recommendations that, among other[s], emphasizes the need for close co-operation between emerging initiatives in the private and public sectors" UNESCO Handbook, *supra* note 19, at 45.

²¹⁰ See *Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (holding that the reasonable diligence of both the purchaser and the true owner should be taken into consideration by the court in a laches defense).

²¹¹ *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F.2d 278, 288-90 (7th Cir. 1990) (holding that Plaintiffs exercised due diligence even though they did not contact all available registries).

²¹² Schneider, *supra* note 142; UNESCO, International Code of Ethics for Dealers in Cultural Property, *Why a Code?*, at http://www.unesco.org/culture/legalprotection/committee/html_eng/ethics2.shtml (last visited Feb. 25, 2005) (listing "whether the possessor consulted any reasonably accessible register of stolen cultural objects" as indications of due diligence within the meaning of the 1995 UNIDROIT Convention); see UNIDROIT Convention of 1995, *supra* note 100, art. 4(1) ("The possessor of a stolen cultural object required to return it shall be entitled . . . to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.") (emphasis added).

²¹³ The Art Loss Register is open to police and staff only. See generally Nick Nutall, *Computer Listing Aims to Tighten Net of Art Thieves*, THE TIMES, Jan. 16, 1991.

²¹⁴ *O'Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980) (stating that "[t]he focus of the inquiry . . . [will be] whether the owner has acted with due diligence in pursuing his or her personal property").

²¹⁵ See *McFarland-Taylor*, *supra* note 56, at 952 (stating that "[t]he excuse the court used in *Guggenheim*, which essentially forgave the plaintiff their obligations of due diligence in relation to the statute of limitations, is too uncertain . . . while what constituted due diligence in *Autocephalous* may be too arduous for many"). The court in *Autocephalous Greek Church*, for example, urged the prudent buyer to "take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like." *Autocephalous*

accessible international registry would allow a collector interested in purchasing a piece of art or an artifact to conduct a simple and reliable online check instead of the extensive investigations under the current system, which sometimes lead even innocent purchasers to buy stolen goods.²¹⁶ The subjective due diligence analysis for true owners could be replaced with an objective one-step inquiry into whether the owners registered the item as stolen with the international database.

The primary limitation to creating an international registry is money. Poor countries cannot afford to create their own registries, and the United Nations cannot afford to create registries for them. Interpol, charged with the task of recovering stolen property, lacks the resources to catalogue all the pieces, public and private, that are currently legitimately held in each country, or to keep up with new discoveries. The Charter of Courmayeur suggests urging wealthy countries to donate funds and provide technical assistance to poorer nations;²¹⁷ however, without an economic incentive such suggestions are unrealistic.

Another limitation is the lack of control over private institutions and dealers. It would be difficult to force these parties to comply with an effort to catalogue all cultural property. Dealers and auction houses that make questionable acquisitions and enjoy the current system of scattered control would be particularly difficult to

Greek-Orthodox Church, 917 F.2d. at 294. At the same time the court held that the Church's failure to report the theft to Interpol or IFAR was not fatal. *Id.* at 289-90.

²¹⁶ See *Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

²¹⁷ The Charter adopted a recommendation for the United Nations "in collaboration with UNESCO and in co-operation with relevant international agencies and organizations" to "formulate specific country projects," including helping poorer nations establish databases. CHARTER, *supra* note 34, art. II(III). These projects are to be "submitted to potential donor countries for the purpose of funding." *Id.*

convince.²¹⁸ Nonetheless, UNESCO and others recognized the importance of participation by private institutions.²¹⁹

One way to solve the money problem would be to introduce free market principles.²²⁰ UNESCO could hire a private company, such as Microsoft, to create a software system. An ideal system would allow each country to enter their data into a uniform spread sheet and download pictures. Each nation's information would then be added to the lists of other nations, sorted by category, and shared on an open network. As an incentive for creating this software, UNESCO could permit the company to license the program to member nations.

UNESCO would pay the company to maintain the website and oversee any technical issues with compiling and sorting the data. Each country would be responsible for entering the information regarding their cultural property into the spreadsheet. These tasks could be assigned to an archaeologist: in exchange for a license to conduct digs, the licensee would be required to catalogue all finds. Museum staffs could oversee the data entry regarding the pieces under their control. By introducing free market principles, UNESCO would eliminate the primary task of creating and managing the database. The relative simplicity of creating this system and the number of potential licensees would provide ample incentive for a technology company to compete for a bid and charge reasonable fees. This system would allow each nation to focus on the actual manpower necessary to enter the information into the program. By delegating the brunt of this task to museums and archaeologists, the governments of source countries like

²¹⁸ Meier & Gottlieb, *supra* note 9, at A12 (quoting one dealer who handled the stele, Bernard Blondeel, as saying, "Perhaps if you ask too many questions, too many things will disappear.").

²¹⁹ CHARTER, *supra* note 34, art II.

²²⁰ The Charter mentions the "emerging initiatives in the private and public sector that are developing data bases about stolen cultural property." *Id.* However, throughout the Charter the task of cataloguing non-stolen objects is left to the individual nations with the help of UNESCO and other nations. *See id.*

Egypt could probably afford to catalogue the remaining cultural property in national warehouses.

UNESCO might encourage private dealers and auction houses to join the effort by expanding the Code of Ethics project they completed a few years ago.²²¹ Currently, a dealer that signs the Code of Ethics receives a special designation allowing him to hold himself out as a reputable establishment and, in theory, increases his clientele and the price he can charge for authentic and legitimately obtained pieces.²²² UNESCO could easily add the requirement that these dealers and auction houses participate in the registry. This would make the designation much more meaningful and corroborate their claims of ethical behavior. Good faith purchasers would also benefit from this added protection.

UNESCO and each nation should expend the most resources and undertake the highest commitment to creating an international registry, as it is the single most important tool in fighting the illicit art trade.

2. *Competitive Licit Market*

The demand for cultural property has increased in recent years.²²³ Some attribute the rise in the market to the economic prosperity of the 1980s, "which helped create a new consumer group of nouveau-riche business executives, drug dealers needing to launder drug money, and millionaire investors disappointed by the stock market."²²⁴ This increase in demand results in higher prices. This money could go to the source nations to support their

²²¹ For more information on UNESCO, International Code of Ethics for Dealers in Cultural Property, see <http://www.unesco.org/culture> (last visited Feb. 26, 2005).

²²² The Art Loss Registry automatically searches the catalogues of the Sotheby's, Christies', and Phillips auction houses. Bibas, *supra* note 207, at 2463. The database does not search any smaller auction houses and has no way of searching the inventory not listed in the catalogue. *Id.*

²²³ Forbes, *supra* note 52, at 236.

²²⁴ *Id.*

preservation and protection efforts, allowing them to expand and train their police force, construct new museums to display the objects currently in storage, and create valuable registries.²²⁵ Instead, source nations focus on limiting, not expanding trade,²²⁶ allowing the smugglers to line their pockets.

One fundamental, perhaps defining, difference between cultural nationalism and cultural internationalism is the idea of fostering a licit market. Cultural nationalists believe that cultural property can never be the subject of legitimate trade. Some argue that cultural nationalism has “superficial appeal” in this regard, meaning it seems logical at first glance.²²⁷ A Greek vase is discovered in Greece—where else could it belong but in Greece? There is something inherently Greek about this vase even if it were put in the Metropolitan Museum. But does the vase belong to or in Greece any more than it belongs to the United States or in the Met? Does the fact that it was created by a Greek, hundreds of years ago in Greece, inexorably link it to the modern government of Greece or the Greek citizenry? The cultural nationalist would say yes.

This position might make more sense if cultures, rather than nations (with arbitrarily defined borders and changing leadership regimes), claimed ownership of their own cultural property. This is not, of course, how international or national laws work. The international legal world is dominated by the concept of sovereign power. And so nations step in for cultures (as less than perfect substitutes) to claim the cultural property within their national borders.

Acknowledging that a culture or religious group has a unique claim to an object as descendants of its creator, does not, however, destroy the potential for a licit commercial

²²⁵ See Brown, *supra* note 36 (urging source nations to leverage their cultural property to pay for preservation and restoration).

²²⁶ Merryman, *supra* note 31, at 122-23.

²²⁷ *Id.* at 133.

market in cultural property. Even a cultural nationalist might agree that some objects of less cultural significance could be traded, if the values of preservation and accessibility were maintained.

While UNESCO acknowledges the benefit of *exchange*, it does not explicitly endorse *trade* in cultural property. The 1970 UNESCO Convention states: "[T]he interchange of cultural property among nations for scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and insures mutual respect and appreciation among nations"²²⁸ The 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property encourages nations to consider exchanging or loaning duplicate items to foreign institutions: "[A] systematic policy of exchange 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."²²⁹

While encouraging exchange might seem like a cultural internationalist position, it is completely consistent with other UNESCO provisions and recommendations which sanction the cultural nationalist ideals of national ownership and national retention.

²²⁸ UNESCO Convention of 1970, *supra* note 26, pmbl.

²²⁹ 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property, in UNESCO Handbook, *supra* note 19, Reference Doc. No. 5, at 33-34.

Considering that many cultural institutions, whatever financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and that some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries

Id. at 33.

Nevertheless, UNESCO periodically hints at the possibility of licit trade of cultural property. The 1970 UNESCO Convention proposes a certification system, whereby a certificate would “accompany all items of cultural property exported in accordance with the regulations.”²³⁰ Of course, acknowledging that cultural property may be legally exported is not the same as acknowledging that it may be legally traded.²³¹ The 1970 UNESCO Convention includes “cultural property which has been the subject of a freely agreed exchange” and “cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property” within the definition of cultural heritage of a State.²³² However, at the same time the Convention acknowledges the “indefeasible right of each State . . . to classify and declare certain cultural property as inalienable”²³³ The Charter, arguably the most cultural nationalist document drafted by UNESCO, says “cultural patrimony is a crucial component of the identity and self-understanding of a people.”²³⁴ However, the Charter does not assert that *all* items of cultural property are items of cultural patrimony. In addition, the Charter mentions regulations for legal export of cultural objects.²³⁵ Finally, the very fact that the prohibited activity is consistently dubbed “illicit” trade suggests that not all trade in cultural property is illegal.²³⁶ Nonetheless, the 1970 UNESCO

²³⁰ UNESCO Convention of 1970, *supra* note 26, art. 6(a).

²³¹ Cultural property would have to be exported to go on traveling exhibition or to be loaned to a foreign museum. While this would affect the objects’ location, it would not affect ownership.

²³² UNESCO Convention of 1970, *supra* note 26, art. 4(d)-(e).

²³³ UNESCO Convention of 1970, *supra* note 26, art. 13(d).

²³⁴ CHARTER, *supra* note 34, art. I.

²³⁵ CHARTER, *supra* note 34, art. I. The Charter also states that “[g]overnments are urged to consider the introduction of new legislation, as needed, that would criminalize the illicit export and import of cultural objects.” *Id.* art. I(VI) (emphasis added). This provision could be read as permitting broad nationalization laws if the country considers them necessary.

²³⁶ The relevant UNESCO conventions refer to illicit trade—no convention restricts trade in a general sense.

Convention never once mentions any trade other than illicit trade. Despite UNESCO's reluctance to clearly and openly embrace the strict cultural nationalist position and declare an end to the legal trade in cultural property, there are unmistakable signs that UNESCO is leaning that way.

Although UNESCO allows for the theoretical possibility of trade, its actions are inconsistent with maintaining a licit market in cultural property. The UNESCO Handbook for Implementing the 1970 Convention defines illicit traffic as (1) "trade which is de facto illegal" or (2) "trade that from an ethical point of view should not take place."²³⁷ Depending on who is doing the interpretation, this definition could include all property exported after a national patrimony law (i.e., illegally) and all property exported prior to such a law (i.e., unethically exported according to cultural nationalists). In light of this definition of "illicit traffic," licit traffic would be (1) trade which is not illegal or (2) trade which is not morally or ethically wrong (even if legal). UNESCO leaves issues of restitution and ownership up to the subjective determination of each nation by defining "illicit" in terms of morality as opposed to law. In light of the different views of source and market nations regarding the morality of trading cultural property, this definition will invariably lead to strife, not solutions.

With UNESCO's support, most source nations have enacted export control laws and national patrimony laws to protect their cultural heritage. Typical export controls prohibit exportation of all discovered and undiscovered cultural property.²³⁸ National patrimony laws declare all newly discovered (and sometimes public and privately held) cultural objects property of the State. Together, these laws establish an absolute ban on exporting antiquities (no matter how small or how many duplicates exist in national

²³⁷ UNESCO Handbook, *supra* note 19, preface.

²³⁸ Egypt, for example, has export laws which prohibit private owners from exporting their own items of cultural property without permission from the state (and permission is never granted). Law No. 117, *supra* note 13.

storage). These laws do not draw a distinction between cultural patrimony and cultural property—everything stays.

Aside from the intangible cultural link argument, one rationale for eliminating exportation is the apparent benefit that comes from keeping cultural property in its nation of origin so that its “true value can be appreciated . . . in relation to the fullest possible information regarding its origin, history and traditional setting.”²³⁹ Some argue that nationalization laws are necessary to prevent destruction of knowledge because unauthorized excavations and other forms of looting destroy valuable archeological and ethological information—information which could be preserved by skilled archeologists. Presuming that cultural patrimony laws were the only way to stop unauthorized excavations (which they are not), we must also ask whether these laws are promoting the other core values.

Eliminating trade over items of cultural property does not further the values of preservation or accessibility. In *Two Ways of Thinking About Cultural Property*, John Merryman discusses the concept of “destructive retention[ism].”²⁴⁰ He explains that sometimes source nations retain objects which they are unable to properly preserve or display.²⁴¹ He contends that in some situations moving an endangered item would be preferable to allowing it to be harmed or destroyed.²⁴² According to Merryman, cultural nationalists believe that “the destruction of national cultural property

²³⁹ UNESCO Convention of 1970, *supra* note 26, pmb1.

²⁴⁰ Merryman, *supra* note 23, at 846.

²⁴¹ *Id.* at 846. Peru retains works that it does not adequately preserve or display. *Id.* Egypt has hundreds of warehouses containing artifacts that have never been studied. Brown, *supra* note 36. Proponents of “British ownership of the Elgin Marbles frequently point out that those fragments of the Parthenon are better preserved than their counterparts at the Acropolis, due to air pollution in Athens.” Borodkin, *supra* note 32, at 409.

²⁴² Merryman, *supra* note 23, at 846 (stating that “[i]f endangered works were moved to some other nation, they might be better preserved, studied and displayed and more widely viewed and enjoyed.”).

through inadequate care is regrettable, but might be preferable to its 'loss' through export."²⁴³

Furthermore, national patrimony laws and other measures to prevent cultural property from leaving the country or being privately owned provide a disincentive for archaeologists to conduct digs. The old system of partitioning²⁴⁴ is no more. Although the prestige associated with a significant find might be enough to motivate an individual archeologist, the institutions and museums that fund the excavations would have little incentive to invest in such endeavors.²⁴⁵ This does not foster the goal of accessibility and visibility. It also conflicts with preservation, as objects can be destroyed and information can be lost if left buried for too long.

Curbing the licit trade also might hinder the goal of crime prevention. Some argue that the more the legitimate market is restricted the larger the black market becomes.²⁴⁶ Indigenous populations that rely on finding and selling cultural property would be deprived of their income base. With no incentive to declare their finds to the government, they would sell them to smugglers. The only solution is to compensate finders at a level that competes with the black market. Employing locals to help in excavation efforts provides them with an economic incentive to participate in legitimate endeavors, with the added bonus of fostering appreciation and pride in their own cultural heritage.²⁴⁷

²⁴³ *Id.*

²⁴⁴ Partitioning was the system of dividing discovered antiquities between foreign archeologists and the country of origin.

²⁴⁵ The British Museum is currently funding seven digs in Egypt. Brown, *supra* note 36.

²⁴⁶ *Id.*

²⁴⁷ See Roach, *supra* note 89. For example:

Vanderbilt University, the National Geographic Society, and the humanitarian organization Counterpoint International point to their collaborative sustainable tourism and development project in Cancuén as a working solution. The project helps local villagers near Mayan ruins reap the economic benefits of these archaeological discoveries, giving them a stake in preserving the ancient sites. . . . [In addition,] David Freidel, an

One way for source nations to raise the money to pay finders competitive prices for significant cultural patrimony is to free up the licit market for less significant cultural property.

UNESCO should stop towing the line and acknowledge that strict national retention only hurts the source nations' cause. UNESCO should issue recommendations encouraging source nations to sell duplicate items to foreign museums and wealthy citizens. Supporting the old system of partitioning finds would encourage public and private institutions to invest in excavation and preservation efforts. UNESCO should discourage national patrimony statutes which divest current and future possessors of all property rights. UNESCO should instead promote a system of government reimbursement, whereby source nations pay finders competitive prices for newly discovered cultural property. Source nations could also extend offers to purchase previously discovered, privately held cultural property from its citizens. This government reimbursement system would allow source nations to retain a large amount of cultural property. Source nations could then sort the objects, maintain a representative sample and hold on to the most culturally significant pieces, and sell the duplicates on the open market.

By encouraging source nations to become market participants, UNESCO could further all three core values. The objects would be housed in institutions with the resources and the motivation to preserve and protect them. Each nation would possess a more representative sample of cultural objects, expanding knowledge and increasing

archaeologist at Southern Methodist University in Dallas, Texas, said the ability to gain the trust of the local villagers, as Demarest did at Cancuén, is vital for the long term protection of these ancient Mayan sites and that Demarest's success bodes well for the future. "It shows the possibility that archaeologists and local people and government officials together can make headway against the catastrophic destruction of Petén," he said.

Id.

visibility. Furthermore, the licit market would finally compete with the illicit market and inevitably decrease illegal activity.

3. *Leasing as an Alternative to Selling*

For those nations resistant to the idea of total alienation, a leasing system could be a viable option. Potential objects for lease would not only include duplicates but also unique items of cultural property that cannot be properly preserved or displayed in their country of origin. Source nations could allow museums or other institutions to display certain pieces for a fee, while retaining ownership rights. By leveraging their already vast stores of cultural property, source nations would have a source of income to devote to preservation and protection of discovered and undiscovered antiquities within their territory.²⁴⁸ They would also have prominent museums caring for these items at no expense to them. The displays would increase interest in the region and could lead to tourism dollars. Furthermore, leasing could “take the wind out of smugglers’ sails.”²⁴⁹ If museums and private institutions could lease cultural objects, theoretically the desire to buy from smugglers would decrease. From an economic standpoint, increasing supply will decrease prices, which will make art theft less lucrative and, therefore, less appealing to criminals.

Source nations have already experienced the benefit of traveling exhibits which could be easily adapted to short-term leasing programs. Egypt, for example, raised \$13 million for its national budget by conducting a traveling exhibition called “Quest.”²⁵⁰ The thirteen-city U.S. tour opened in June 2002 at the National Gallery of Art in

²⁴⁸ Brown, *supra* note 36.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

Washington D.C. and included 115 artifacts.²⁵¹ Although traveling exhibits can be widely profitable, the overhead of such operations can be staggering.²⁵² The organizers of Quest²⁵³ purchased \$429 million in insurance coverage, which amounted to huge premiums.²⁵⁴ In addition, there is a risk of damaging the objects each time they are transported and set-up.²⁵⁵ To this end, the trucks transporting the objects are cushioned and environmentally controlled, and set-up takes between two and five weeks per stop-over.²⁵⁶ Allowing the museums to keep the objects for an extended period of time could greatly decrease these incidental costs.

Leasing programs, it seems, would foster all the core values—preservation, protection, accessibility, visibility, and crime prevention.²⁵⁷ The British Museum already leases pieces from its collection to other institutions.²⁵⁸ After Quest, Sweden and Panama expressed interest in leasing Egyptian antiquities.²⁵⁹ Some have suggested that the leasing program could be extended to corporations and wealthy individuals. What “high-flying multinational[] wouldn’t be interested in displaying a sculpture of Osiris in their corporate headquarters?”²⁶⁰ As long as lessees could guarantee the security of the objects, leasing programs

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ These organizers did not include the Egyptian Government, which took its cut in a \$13 million lump sum upfront fee. *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* (“With a sufficiently rigorous system, some of Egypt’s artifacts could be displayed in other countries, at higher standards than presently found in Egypt, freeing up resources at home for other pressing antiquities concerns and provided a new source of foreign exchange.”).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

would allow these pieces to be better cared for and more widely viewed.²⁶¹

Despite the success of these exhibits and the international interest in making them more long term, source nations are generally opposed to the leasing idea.²⁶² Critics oppose introducing a commercial approach to cultural preservation.²⁶³ They do not believe that giving away their property (even temporarily) is a viable alternative to their economic problems.²⁶⁴ In addition, they may want to keep the objects at home to force tourists to visit their countries.²⁶⁵ Primarily, source nations are reluctant to admit that cultural property can be the object of *any* type of commercial exchange. Once they condone leasing, the argument for selling would be easier. These nations want to keep the value (at least the potential value) of cultural property within their own territories. Furthermore, a firm anti-commercial position supports the potential repatriation claims of source nations. Many countries would like to recover objects illegally exported many years before their nationalization laws. Holding on to the intangible culture-object link position, they can make an argument that these objects should be given back despite the statute of limitations.

Currently, UNESCO has not taken a position on the idea of leasing cultural property. UNESCO has recommended exchange of duplicate items, but has not addressed long-term leasing of unique items. To this end, UNESCO should encourage source nations to consider leasing as a less permanent alternative to selling. UNESCO should assure source nations that introducing market principles into their cultural property system will not affect their restitution efforts.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

B. National Action

1. Bilateral Treaties

UNESCO continuously encourages bilateral treaties. Bilateral treaties can focus on crime prevention—treaties that enforce export laws of other countries in regard to specific groups of cultural objects. Under the Convention on Cultural Property Implementing Act of 1983 (“CPIA”),²⁶⁶ the United States has entered into several such treaties.²⁶⁷ Bilateral treaties can also focus on recovery and restitution—treaties that negotiate settlement agreements between requesting and requested nations. In 1990, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders drafted a “Model Treaty for Bilateral Cooperation” with both crime prevention and recovery in mind.²⁶⁸

Bilateral treaties are valuable instruments, but difficult to facilitate. As an alternative to costly and embarrassing legal battles, they should be encouraged. They are often more substantive than multilateral treaties and more binding. One of the Committee for Cultural Restitution’s main tasks is helping nations negotiate bilateral treaties. The Committee has had some success. However, some believe that legal negotiation is pointless, as the return of objects, particularly significant objects the subject of years old dispute (think Elgin Marbles), will result from political,

²⁶⁶ 19 U.S.C. §§ 2602-2606 (2004).

²⁶⁷ U.S. State Dep’t, International Cultural Property Protection, *Overview*, at <http://exchanges.state.gov/culprop/overview.html> (last visited Feb. 25, 2005). The United States has entered into bilateral agreements restricting exportation of cultural property from Peru, Bolivia, Cambodia, Cyprus, El Salvador, Italy, Mali, Nicaragua, Mexico, and Guatemala. *Id.* For more information, see U.S. State Dep’t, International Cultural Property Protection, *Chart of Current and Expired Export Restrictions Under the Convention on Cultural Property Implementation Act*, at <http://exchanges.state.gov/culprop/chart.html> (last visited Feb. 25, 2005).

²⁶⁸ U.N. Model Treaty for Bilateral Cooperation for the Prevention of Crimes that Infringe on the Cultural Heritage of People in the Form of Movable Property, in UNESCO Handbook, *supra* note 19, Reference Doc. No. 7, at 49.

not legal, compromise.²⁶⁹ In light of the cultural nationalist trend, market nations might be reluctant to enter into bilateral agreements restricting importation, for fear that these concessions will harden into customary international law. In the United States, for example, the CPIA allows a foreign nation to request the placement of import restrictions on certain cultural items that are at risk of illegal importation.²⁷⁰

UNESCO should continue to encourage bilateral agreements, but should realize that progress will be slow in this area. As with judicial settlement, it works best when everyone knows the law and their place. UNESCO should focus on other solutions, and bilateral agreements involving prevention and cultural restitution will naturally follow.

2. Certification

One promising counter to the lack of adequate export control is to adopt systems of national certification. Certification could encompass two procedures. First, it could involve assigning every art item a document authenticating its provenance and owner. The system would work much like the title system to track ownership of cars or land. Persons with newly discovered items would apply for certificates, which could then be filed with UNESCO or the appropriate national office, with changes in ownership recorded. In the alternative, the certification system could focus more on documentation of exports rather than ownership. This method would prohibit exportation of any items of cultural property without a permission slip from the exporting nation. This system would work best if

²⁶⁹ Symposium, Panel Discussion, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT'L L. 313, 314 (2001) [hereinafter Panel Discussion]. Professor James Cuno remarked that, if Elgin's Marbles are going to be returned, "it [is] going to be on the basis of politics," as "[r]epatriation is based, not out of favor, but out of interest." *Id.*

²⁷⁰ 19 U.S.C. §§ 2602-2606.

accompanied by a corresponding commitment by market nations to impose regulations which prohibit importation without a permission slip. Such an export permission slip system is suggested in the 1970 UNESCO Convention²⁷¹ and the 1995 UNIDROIT Convention.²⁷²

National certification of cultural property would aid border agents. Once an item was identified as a genuine antiquity without a valid permission slip, customs officials would immediately confiscate the item and inform the authorities. If the title-based certificate system were in place, the authorities could ask the possessor for a certificate of ownership. This system would eliminate any subjective determinations by the officials. No slip, no export, no ownership. The system would also protect good faith purchasers. Under the current system, illegally acquired cultural property is taken to regions with lax or nonexistent anti-theft laws and anti-import laws. Professional smugglers then forge export papers and falsify the provenance in order to create a false "history" to increase its value and avoid detection. Unfortunately, this forgery is astonishingly simple and effective. Schulz and his co-conspirator Parry created a fake collection—the "Thomas Alcock Collection"—to launder their stolen antiquities.²⁷³ Discovering such crimes is incredibly difficult. How do you discover objects quietly taken from indigenous villagers or prove that an eighty-year-old collection does not exist?²⁷⁴ If every legitimate artifact and piece of art were certified by an international board, the illegally obtained

²⁷¹ UNESCO Convention of 1970, *supra* note 26, art. 6.

²⁷² UNIDROIT Convention of 1995, *supra* note 100, art. 17. See Schneider, *supra* note 142 (noting that registry does nothing to protect objects stolen from clandestine excavations—due diligence in these cases to include any documentation required by "any specific legislations of the state of origin which might for example indicate the need for export authorization to be secured").

²⁷³ Meier & Gottlieb, *supra* note 9, at A12.

²⁷⁴ Parry & Schultz bought the objects from villagers and passed them off as part of an eighty-year-old British collection. Meier & Gottlieb, *supra* note 9, at A12-13.

pieces would be rendered virtually immovable and detection would be substantially easier.

Unfortunately, there are practical and economic limitations to any certification system. Nations, especially source nations where certification would be most helpful, lack the necessary human and technological resources. A title-based certification system would be a financial and logistical nightmare. It might be possible to require public institutions to file for certificates of ownership, but nations would have to convince private owners that the certification system was for their own protection and not a means of discovering the location of valuable cultural property for State expropriation. An export certification system, while more feasible, would face additional obstacles. Smugglers could forge these permission slips, especially permission slips inspected by one other than the issuing authority. Furthermore, smugglers often disguise cultural property of real value as cheap bazaar knock-offs (which of course would not require permission slips to be exported). Border officials would still need a certain level of skill to detect a genuine article amidst a sea of fakes.

In light of these limitations, but considering the potential value of such a system, UNESCO should continue to encourage States to work individually on national certification procedures. This solution would work hand-in-hand with inventory creation. While documenting each item for the registry (according to the international standard), it would be feasible to assign each object a certificate of authenticity that would include a description of the piece and the name of its legal owner.²⁷⁵ Nations with the money and technology could also enter this information into a database accessible to customs officials. When an

²⁷⁵ 12th Session Report, *supra* note 84, at 7. According to a member of the UNESCO Secretariat, the idea of creating a uniform export certificate, which would serve as a standard model for cultural property in all countries, was discussed at the February 2002 meeting of the World Customs Organization Enforcement Committee. *Id.*

item is questioned, customs officials could then check the export permission slip or the certificate of ownership against the database's records, cutting down on the problem of forged documentation.

3. *Crime Prevention*

A more direct solution to the illicit trade problem is to update crime prevention techniques in exporting and importing countries. Source nations need specially trained and better paid security guards at excavation sites, storage facilities, and museums. Both source and market nations need to tighten their borders and arm their customs officials with a basic knowledge of cultural property, particularly of their region, so they can distinguish a bazaar knock-off from a genuine antiquity.²⁷⁶ Some have suggested stationing an archaeologist or an art historian at customs.²⁷⁷ These solutions are obvious but difficult without registries, certification systems, and the economic resources to implement them.²⁷⁸

By introducing market principles to the cultural property system, UNESCO could bolster national and international crime prevention. As previously discussed, hiring a private company to create and maintain an international registry is the best way to see that this crucial law enforcement tool is realized. If UNESCO encourages source nations to sell or lease their cultural property and these nations submit, they will receive a steady income to pay for better customs and homeland security systems.

²⁷⁶ UNESCO Handbook, *supra* note 19, at 21 (suggesting special training programs for police and customs officers). Some countries, such as China, have instituted such training programs and their officials are able to distinguish between objects which may be legally exported and those which may not. *Id.*

²⁷⁷ *Id.* (noting that this type of human resource development lends itself well to external project support).

²⁷⁸ *Id.* at 20-26.

4. *National Legislation*

National legislation is another mechanism for controlling illicit trade. Typically, source nations enact two kinds of statutes: export laws and nationalization (a.k.a. national patrimony) statutes.²⁷⁹ Export laws prohibit exportation of some or all items of cultural property discovered and undiscovered within the nation's borders.²⁸⁰ Nationalization statutes, on the other hand, declare all cultural objects within a territory property of the State.²⁸¹ The government may claim ownership of only undiscovered items—"all newly discovered items of cultural property belong to the State"—or the government may claim ownership of all discovered and undiscovered public and privately held cultural property. These laws usually allow private owners to keep their property but expose them to some restrictions on alienation such as a prohibition on exportation.

In the name of judicial expediency, nations would be advised to have both types of law. In the United States, and several other market nations, an illegally exported item will not necessarily be returned if found within its borders unless the country of origin has a valid patrimony law.²⁸² However, whether these export controls are ultimately desirable is the subject of some debate.²⁸³

The justification for export controls falls within two categories: protectionist and retentionist.²⁸⁴ Protectionism is the idea that objects should remain in a country to

²⁷⁹ Borodkin, *supra* note 32, at 391.

²⁸⁰ See UNESCO, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (Lyndel V. Prott & P.J. O'Keefe eds., 1988) (summarizing the export laws of 162 countries).

²⁸¹ LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE 190, 191 (1984). Under Peruvian law, "all archeological sites belong to the state." Gov't of Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Ca. 1989).

²⁸² See generally *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

²⁸³ Merryman, *supra* note 31, at 186 (discussing the arguments for and against export controls).

²⁸⁴ *Id.*

“protect and promote object-related and context-related values.”²⁸⁵ This rationale supports the core values of protection (of the object and the contextual information) and in some ways accessibility (as preserving the object and context leads to greater dissimilation of information and knowledge).²⁸⁶ Insofar as export controls are the only or best way of promoting these values, they are desirable. Tomb reliefs, for example, fit within this category of objects. These cultural objects must remain in the country of origin (usually on the tomb walls) to preserve their physical and spatial integrity and to lead to the greatest understanding and study.

The retentionist rationale is different. Unlike protectionism, the retentionist argument does not center around preservation but rather the sovereign right of the country of origin to keep its cultural property. The rationale for retention centers around two cultural nationalist beliefs: (1) “cultural objects bear a special relation to a particular nation or culture” and (2) “that the relation would be significantly impaired by removing the object from the national territory.”²⁸⁷ The first proposition is undeniable. The second is debatable. In fact, cultural internationalists strongly disagree.

Retentionism, the desire to keep objects not for their protection but to maintain the object-culture relationship, is inconsistent with the core values of protection and preservation, visibility and accessibility, and crime prevention. Cultural nationalists ignore the fact that often cultural objects can be better protected and preserved by institutions outside of the country of origin. They also ignore economic realities. Source nations want to encourage foreign museums and their experts to conduct excavations, but they are against selling or even leasing the

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 186-87.

²⁸⁷ *Id.* at 190.

finds. These practices are inconsistent. Without an economic incentive to disclose the finds to the source nation, the temptation to illegally export increases. The British Museum currently has five ongoing excavations in Egypt.²⁸⁸ Zawi Hawass, director of SCA, laments “[o]ne of the problems is that museums around the world were encouraging people to excavate late in the evening when they were not being watched, and to then smuggle the findings out of Egypt.”²⁸⁹ It is not surprising that museums encourage smuggling when the economic incentive to conduct these digs dwindles as a result of export restrictions and national patrimony laws which declare all discoveries property of the State.

Short of discouraging all national patrimony laws, UNESCO should discourage those laws motivated purely by the desire to retain instead of the desire to protect. Cultural patrimony laws are appropriate when transfer would affect the physical or spatial integrity of a cultural object. Certain objects (like tombs and massive carvings) should necessarily be owned by the State and be prohibited from exportation. Cultural patrimony laws might also be appropriate for objects with particular cultural significance. Of course, the inherent subjectivity in interpreting any phrase such as “particular cultural significance” could disguise a purely retentionist policy. UNESCO should articulate the legitimate from the illegitimate motivation when encouraging nations to implement national legislation.

5. *Judicial Accommodation*

Judicial accommodation encompasses a variety of actions, including patience toward requesting governments, fostering alternative dispute resolution mechanisms, and

²⁸⁸ Ionides, *supra* note 54, at 68.

²⁸⁹ *Id.*

legal burden shifting. These suggestions are a result of complaints by source nations that pursuing their cultural property in Western and European courts is too expensive and too difficult. In some cases, the cost of going to trial is more than the value of the disputed item.²⁹⁰ Voluntary cooperation and private settlements are always preferable to lengthy trials. However, current owners (even those who have reason to suspect the court will order the object returned) often times prefer to take their chances. In this vein, market nations have been asked to relax certain legal rules in recognition of "the difficulties facing the authorities of the requesting countries."²⁹¹

It is unclear what the "greater flexibility and understanding" proposed in the Charter would entail.²⁹² No doubt it is incredibly difficult for source nations to prove that a newly discovered item was excavated from their soil.²⁹³ They have to rely on expert archeologists to testify that an object originated from a certain region.²⁹⁴ The court has a particularly thorny decision to make when more than one country in the same region claims ownership.²⁹⁵

Some have suggested that the legal burden should be shifted against the current owner and in favor of the requesting nation. In *The Economics of Antiquities Looting*

²⁹⁰ CHARTER, *supra* note 34, art. I.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 810 (C.D. Ca. 1989) (striking down Peru's contention that it was the legal owner of artifacts seized by the U.S. Customs Service from an American citizen and holding that Peru was not entitled to the artifacts because it was "uncertain in what country artifacts were found, when they were found, whether they were in private possession in Peru more than one year after official registry book was opened, and extent of Peru's claim of ownership as part of its domestic law . . .").

²⁹⁴ Borodkin, *supra* note 32, at 403 (noting that this in turn leads to secondary issues of qualification of the expert and citing *Greece v. Michael Ward* where the strategy of the lawyer was to challenge the credibility of the Greek state archaeologist scheduled to testify for the plaintiff).

²⁹⁵ *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566, 566-69 (1990) (involving three nations claiming ancient silver; the court could not decide, so it awarded to the current possessor).

and a Proposed Legal Alternative, Lisa Borodkin suggests that “[a] better rule would place the burden on the purchaser to show that an artifact was legally excavated and exported with the consent of the nation of origin.”²⁹⁶ While burden shifting is a common practice (at least in the United States) to level the legal playing field, in this instance it has the flavor of “guilty until proven innocent.” This standard might be appropriate when all source nations establish certification programs and registries. Currently, however, cultural property can be legally acquired and exported from many source nations without a certificate. Why should an individual who has purchased a marble Buddha from Sotheby’s be forced to prove that the Buddha was found before a nationalization law, sold to a dealer, and bought by the auction house? More importantly, without a certification program or a registry, how *could* an individual make this showing? The accusing party must carry the burden in the current system, regardless of its difficulty.

Instead of encouraging market nations to relax their legal standards, UNESCO should encourage all nations to adopt uniform international rules for the restitution of cultural property. In this regard, the 1995 UNIDROIT Convention was on the right path. Most nations believe in establishing some statute of limitations;²⁹⁷ settling on an appropriate period is a job for UNESCO. The three periods in the 1995 UNIDROIT Convention are appropriate; however, the subjective determination of whether an art item qualifies for the longer period may lead to disputes. UNESCO should remove the option of extending the period for “a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection,” as this encourages source nations to request the return of items taken hundreds of years ago.²⁹⁸ UNESCO

²⁹⁶ Borodkin, *supra* note 32, at 403.

²⁹⁷ Brown, *supra* note 36. Some source nations, Egypt for one, oppose all statutes of limitations. *Id.*

²⁹⁸ UNIDROIT Convention of 1995, *supra* note 100, art. 3.

should focus more on preventing future crimes, where it has the greatest potential impact, rather than encouraging source nations to engage in massive restitution campaigns, which involve impossible factual and legal determinations.

6. *Restitution Campaigns*

Restitution is perhaps the most controversial of all the reactive solutions.²⁹⁹ Restitution is the return of cultural property to its country of origin.³⁰⁰ Source nations utilize restitution requests as a means of recovering cultural property discovered in the possession of other parties. Some countries, like Egypt, pursue massive restitution campaigns, attempting to track down cultural property stolen or illegally exported throughout history.³⁰¹ These requests for restitution are marked with a sense of entitlement and result in an unwillingness to compromise on both sides.

All three conventions provide for cultural restitution. The First Protocol to the 1954 Hague Convention provides that cultural property taken during war “shall be returned . . . at the end of hostilities.”³⁰² Article 2 of the 1970 UNESCO Convention urges State Parties to “undertake to oppose [illicit import, export, and transfer] . . . by helping to make the necessary reparations.”³⁰³ The 1995 UNIDROIT Convention is the most restitution-centered of the three. Its Preamble says it is “intended to facilitate the restitution and return of cultural objects” by “establishing common, minimal legal rules” regarding the requesting process,

²⁹⁹ Reactive solutions are those solutions which focus on settling disputes after the theft or exportation has occurred. Proactive solutions, on the other hand, center on theft and export prevention.

³⁰⁰ See generally UNIDROIT Convention of 1995, *supra* note 100, pmb1.

³⁰¹ Brown, *supra* note 36.

³⁰² 1954 Hague Convention, *supra* note 98, First Protocol.

³⁰³ UNESCO Convention of 1970, *supra* note 26, art. 2(2).

compensation, and statutory time periods.³⁰⁴ In 1986, the UNESCO Committee for Cultural Restitution drafted a "Standard Form Concerning Requests for Return or Restitution."³⁰⁵ The Committee negotiates bilateral agreements and offers opinions;³⁰⁶ however, the Committee does not have the power to issue legally binding decisions. The only resort for a requesting country disappointed with bilateral negotiation is to sue in court.

An interesting discussion of the pros and cons of cultural restitution took place at a panel discussion during the Cultural Property Rights Symposium at the University of Connecticut in Fall 2000.³⁰⁷ In discussing the two sides to the debate surrounding the return of the Parthenon Marbles, the panel highlighted the many key issues in restitution debates. The British Museum argues that they have cared for, restored, and displayed the Marbles, which would have been destroyed by air pollution if left in Athens.³⁰⁸ Returning the Marbles to Greece might not further the values of preservation and visibility. Greece accuses the Museum of harming the Marbles during cleaning and insists that, as part of the Parthenon, they belong in Greece.³⁰⁹ Allowing them to stay in Britain encourages illegal importation and destroys the spatial integrity of the objects. Granted, historical context and spatial integrity should be preserved, but scholars argue that if the Marbles are returned to Greece, they would be at

³⁰⁴ UNIDROIT Convention of 1995, *supra* note 100, pmbi.

³⁰⁵ UNESCO Standard Form Concerning Requests for Return or Restitution, in UNESCO Handbook, *supra* note 19, Reference Doc. No. 22, at 127.

³⁰⁶ Statutes of the [UNESCO] Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, in UNESCO Handbook, *supra* note 19, Reference Doc. 23, at 142.

³⁰⁷ Panel Discussion, *supra* note 269.

³⁰⁸ *Id.* at 314.

³⁰⁹ *Id.*

best placed in a museum with a view of the Parthenon.³¹⁰
This raises an interesting question:

[I]s proximity to the Parthenon a greater contribution to human knowledge than their being in the British Museum in proximity to other examples of ancient works of art, and not only examples of ancient works of art in the Mediterranean region but from Asia as well, so that one might get a sense of a kind of comparative relationship over distances at a certain time[?]³¹¹

As is the case with many requested objects, the alleged date of export of the Marbles was long before the Conventions and, therefore, does not fall within their protective guard. In these difficult cases, the parties are left to legal and political negotiations that continue year after year. This process wastes valuable resources and leads to unnecessary international tension. For these reasons, UNESCO countries should explore alternatives to strict restitution.

7. *Leasing as an Alternative to Restitution*

One alternative to total restitution is to allow market nations to lease cultural property. These leases could be long or short term. In certain situations, a long term lease would act similar to an equitable remedy.³¹² In exchange for keeping an object, the museum would pay the country of origin a fair rental price. These systems have experienced some success. "In January 2002, France and Nigeria reached an agreement that recognized Nigeria's ownership

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Like an equitable remedy in nuisance law where a landowner pays to continue operating his nuisance, one is paying for the right to continue the conduct which would otherwise be considered illegal.

of the sculptures in question.”³¹³ In exchange for this recognition, Nigeria “agreed to permit the objects to remain in the permanent collection of the Quai Branly Museum for a (renewable) period of 25 years.”³¹⁴

This solution could benefit market and source nations. It would allow market nations to keep the cultural objects which they are so reluctant to give up, while at the same time paying the country of origin for their loss.

This proposal is subject to much of the same criticisms as leasing as an alternative to selling.³¹⁵ Source nations must recognize leasing as a “better than nothing” option. Under international law, objects illegally exported before 1972 are difficult if not impossible to recover.³¹⁶ Leasing under the circumstances would be less costly than pursuing the items in court. Of course, source nations could argue that involuntary leasing is not leasing at all. They may also resist on the ground that this reinforces bad behavior or makes them look weak.

Nonetheless, UNESCO, and particularly the Committee for Cultural Restitution, should urge nations to at least consider leasing as a possible alternative to complete restitution. It is unlikely that current controversies over pieces such as the Elgin Marbles, the Rosetta Stone, and the Bust of Nefertitti will be resolved using the conventional procedures of request and return.³¹⁷ The requesting and requested countries have been locked in debate for years. None of the current conventions help since they do not apply retroactively and these items were exported many years ago. Leasing makes sense in these cases. In exchange for dropping the charges against the United Kingdom, Greece could grant the United Kingdom a

³¹³ 12th Session Report, *supra* note 84, at 2.

³¹⁴ *Id.* This agreement was negotiated with the help of ICOM. *Id.*

³¹⁵ See *supra* Part IV.A.3.

³¹⁶ See generally UNESCO Handbook, *supra* note 19, at 52 (the 1970 UNESCO Convention entered into force in 1972).

³¹⁷ Panel Discussion, *supra* note 270, at 314.

permanent lease in the Elgin Marbles. Forging a more amicable relationship in this regard could lead to further gestures of goodwill.

8. *Voluntary Cooperation*

Voluntary return without compensation is another possible, if extremely rare, alternative to costly court battles. For example, in October 2003, the Carlos Museum at Emory University voluntarily returned a mummy believed to be the remains of Pharaoh Ramesses I.³¹⁸ The mummy, looted from an Egyptian tomb over 150 years ago, lay unnoticed in a Canadian museum until the Carlos Museum purchased the entire collection in 1999, at which time the Carlos Museum realized its value.³¹⁹ Peter Lacovara, curator of the Carlos, explained that the mummy was given back as sign of goodwill and as a “reminder of the great cultural debt all the world owes to the Middle East.”³²⁰ Of course, under the 1970 UNESCO Convention, to which the United States and Egypt are parties, the Carlos Museum was under no obligation to return the mummy because it was stolen before 1972.³²¹ Egypt would have had to sue. Given that Egypt only nationalized its cultural property in 1983, their chances of winning would have been questionable.³²² If the United States was a party to

³¹⁸ Mike Toner, *Emory Museum Sends Mummy Home to Egypt*, ATLANTA J. CONST., Oct. 25, 2003, at D1. Another example of voluntary return occurred in December 2002 when Buddhist Master Sheng Yen returned an ancient stone Buddha to Chinese authorities. The head was stolen from China in 1997 and was purchased by a Chinese business man who donated it to the religious institution. 12th Session Report, *supra* note 84, at 3.

³¹⁹ Toner, *supra* note 322.

³²⁰ *Id.*

³²¹ See UNESCO Convention of 1970, *supra* note 26; see also DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 33 (2001) (stating that “international agreements are normally assumed to have only prospective effect. Retroactivity of treaty provisions is disfavored, so if the parties intend that a rule is to be applied to events occurring before the agreement is signed, they should so indicate”).

³²² Brown, *supra* note 36. Although Egyptian king, Mohammed Ali, banned the export of antiquities in 1853, Egypt did not declare newly discovered antiquities to

UNIDROIT, Egypt would have had to offer just compensation for the good-faith purchase.

Clearly, voluntary cooperation saves both sides from expensive and embarrassing court battles. In addition, as in this case, such generosity can forge bonds between nations and foreign institutions and encourage future collaboration.³²³

Of course, convincing a nation or an institution to establish a consistent policy of voluntary cooperation would be impossible and undesirable. While returning the mummy may have seemed like the "right thing to do"³²⁴ for the Carlos Museum, suggesting that every museum should honor such a request for repatriation with the same unbridled surrender is unrealistic and possibly ill-advised. The Carlos Museum paid a large sum of money to the Canadian museum for the Egyptian treasures. As with any property of such value, the requesting party should be expected to offer convincing proof of ownership, particularly after such a long discovery period. Not surprisingly, in an interview with the local paper after the incident, the director of the Carlos Museum, Bonnie Speed, chose her words carefully to protect the rest of the collection, stating that "repatriation is a very complex issue, and we decide what to do on a case-by-case basis."³²⁵

UNESCO should continue to support voluntary cooperation,³²⁶ realizing that parties generally act with their

be property of the State until 1983. *Id.*; see Law No. 117, *supra* note 13. A nationalization statute is necessary to establish an object as "stolen" within the meaning of the National Stolen Property Act (NSPA). See generally 18 U.S.C. § 2315 (2004); *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977).

³²³ Toner, *supra* note 322 (discussing potential traveling exhibits and opportunities to engage in digs).

³²⁴ *Id.*

³²⁵ *Id.* Interestingly, the Carlos Museum later returned four limestone reliefs as part of their "continued commitment to the preservation of Egypt's antiquities." Ionides, *supra* note 54, at 69 (quoting Allison Dixon, coordinator of public relations at the Carlos Museum).

³²⁶ ICOM is charged with facilitating bilateral agreements and voluntary

own best interests in mind. If UNESCO were able to establish an international standard for determining when an artifact is deemed stolen, like the national standard in the United States and the United Kingdom,³²⁷ then requesting and requested parties could more accurately determine the legal strengths of their position. When both sides know their rights, non-judicial settlement becomes a more attractive alternative. Not only is the threat of legal action a motivating factor, embarrassment has a surprisingly powerful effect. Imagine displaying an object in your national museum that was illicitly obtained according to clear internationally recognized and UNESCO-published rules.

V. CASE STUDIES

A. *Iraq*

The invasion and looting of Iraq's National Museum in Baghdad was an international tragedy. Janice Yellin, a professor of art history and an expert in Egyptian civilization at Babson College, said "I can say with certainty that nothing of this scope has happened in Egypt. Not even the pillaging of Egyptian antiquities . . . compares with the scope of the destruction that has just occurred in Iraq."³²⁸ Some items have been recovered, but most remain somewhere on the black market. These items are destined to surface in market nations.

On October 7, 2003, Interpol and UNESCO signed an amendment to their Cooperation Agreement of 1999. Under the amendment, Interpol has agreed to step up its

exchanges. The Role of ICOM, at <http://icom.museum/> (last visited Apr. 8, 2005).

³²⁷ Panel Discussion, *supra* note 270. The general rule in the United States and the United Kingdom is that an object is considered stolen if it was discovered and exported after the enactment of a valid patrimony statute.

³²⁸ Dennis B. Roddy, *Why Destroy One's Culture*, PITTSBURGH POST-GAZETTE, Apr. 20, 2003, at A1.

efforts in the fight against illicit traffic in Iraqi cultural property. Interpol will continue to produce and update a CD-Rom on stolen objects with the help of information by UNESCO regarding stolen Iraqi pieces.³²⁹

Thanks to digital imaging, it is much easier now to get pictures of looted objects into the hands of customs inspectors and other law enforcers so that they know what to look for. Images of artifacts looted from the Baghdad Museum are already posted on the International Cultural Property Protection website of the State Department.³³⁰ Unfortunately, these databases contain a very small percentage of the 170,000 items lost in the looting.

An international registry is crucial in preventing this from happening again. Although the Museum kept detailed inventories, these lists were destroyed during the looting.³³¹ If a comprehensive international inventory had existed, a description and picture of the items (certainly the most valuable items) would have been stored on the database. Furthermore, if Iraq and market nations implemented a national certification system, these items could be more easily recognized when they are eventually smuggled out of Iraq and into market nations.

UNESCO should draft at least one convention that promotes export and import restrictions on purely stolen items. By taking the focus off cultural restitution and national retention and narrowing the scope of the agreements to deal with theft, UNESCO would have more success garnering the support of resistant market nations. Currently, there are market countries (Germany and some

³²⁹ Press Release, Unescopress, No. 2003-44 (Oct. 7, 2003) (stating that UNESCO and Interpol reinforce cooperation in fight against traffic in Iraqi cultural goods).

³³⁰ Sullivan, *supra* note 21. The website can be found at <http://exchanges.state.gov/culprop/> (last visited Mar. 1, 2005).

³³¹ Richard Zettler, *The Next Step: Reconstruct Records*, WASH. POST, Apr. 27, 2003, at B3, available at <http://www.washingtonpost.com/ac2/wp-dyn/A39954-2003Apr25?language=printer> (last visited Feb. 26, 2005).

Scandinavian nations)³³² that have not signed the conventions. These nations are ripe for the importation of Iraq's stolen works. Many pieces will be smuggled across State lines and lost forever unless countries act together to recover the objects and prevent them from being bought and hidden away.

B. Egypt

Since Zawi Hawass took over as Director of Egypt's Supreme Council of Antiquities in 2002, cultural property issues have moved to the forefront of Egyptian foreign policy. In the past two years, Hawass has sparked controversy with his campaign for massive cultural restitution. Some of the items Hawass has requested be returned to Egypt include: the Rosetta Stone from the British Museum in London, the Bust of Nefertitti in the Berlin Museum, and the Head of King Amenhotep III from the Louvre. Hawass has received responses that are at best uncooperative. Hawass has also threatened to take legal action against seven American museums that he claims are holding at least ten stolen reliefs.³³³

Ironically, Egyptians have raided tombs for thousands of years and "for centuries, Egypt was so disinterested in its own heritage that virtually all archaeology in the country was done by Western institutions—with artifacts dispensed in return for political favors."³³⁴ What has sparked Egypt's shift in priorities? Egypt has discovered the value of cultural property—both economic and cultural. It has

³³² Sullivan, *supra* note 21.

³³³ Toner, *supra* note 60. Officials at one of the museums, the Virginia Museum of Fine Arts in Richmond, say they are baffled by the accusation. *Id.* Cathy Morris, associate director of the museum, says, "We bought the relief from a private gallery in New York in 1963, and it was documented in his collection as far back as 1944. If it really was stolen, we'd cooperate, but we can't just send it back because they want it." *Id.*

³³⁴ *Id.*

begun to appreciate the importance of preserving these artifacts as part of its national history as well as its national income.

The problem is that the current international law is not clear on the subject of cultural restitution, so countries like Egypt do not understand their rights or obligations. This has led to a state of misunderstanding and has fostered combative behavior. Egypt is left frustrated, filled with self-entitlement and anger. It worries that backing down would amount to acceptance. Meanwhile, the countries under attack feel threatened and indignant. They fear that giving in, even periodically, might establish an unfavorable and binding international rule of strict cultural restitution.

Hawass's stubborn resistance to market principles and his strong cultural nationalist views may gain him more enemies than allies. He maintains that "[a]ntiquities cannot be sold. It is not good to establish talk of money against antiquities. Of course foreign museums are wonderful."³³⁵ But "[e]ven if you are a poor man, you cannot sell a child."³³⁶ Some controversial objects of his campaign are reliefs "cut from the tomb[s]."³³⁷ Hawass has asked for all reliefs that have been removed over the last two centuries to be returned to Egypt. They "are in museums everywhere."³³⁸ Hawass considers the cutting of reliefs a destructive act and believes they should not be subject to the 1972 effective date of 1970 UNESCO Convention.³³⁹ In this vein, he wants the head of King Amenhotep III back from the Louvre.³⁴⁰ He also believes that the British Museum is obliged to return the Rosetta Stone due to its substantial cultural significance.³⁴¹ Under the 1995

³³⁵ Brown, *supra* note 36 (quoting Hawass).

³³⁶ *Id.*

³³⁷ Ionides, *supra* note 54, at 69.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

UNIDROIT Convention, items that form “an integral part of . . . a public collection” are not subject to the absolute fifty-year cap.³⁴²

By promoting cultural internationalist ideals, UNESCO can protect the treasures of Egypt for all people and loosen the knots of international tension that Hawass has tightened. UNESCO should encourage source nations like Egypt to focus on protecting and preserving their vast stores of cultural property, rather than allocating scarce resources to recover items taken hundreds of years ago and safely housed in foreign museums. UNESCO should look forward, by preventing the ongoing illicit trade, rather than looking backward by stressing cultural restitution of objects allegedly illegally exported many years ago.

CONCLUSION

And these Nazis are ready to swap splendid Italian masters for acres of German pictures, because they want to make manifest on the walls of their Führermuseum the past of their race, and so give substance to the present of their race, and provide some assurance of the future of their race.³⁴³

We don't need earphones to enjoy art for art's sake—we like to hear a story . . . painted by a priest for his forbidden lover,³⁴⁴ stolen by Napoleon from a church to adore his palace,³⁴⁵ frozen in a glacier for 5000 years after being

³⁴² UNIDROIT Convention of 1995, *supra* note 100, art. 3(4).

³⁴³ Merryman, *supra* note 31, at 106 (quoting ROBERTSON DAVIES, *WHAT'S BRED IN THE BONE* 335 (Penguin Group 1985)).

³⁴⁴ Fra Fillipo Lippi, the celebrated Florentine painter, had a scandalous love affair with a nun, Lucrezia Buti. Biography of Fra Fillipo Lippi, at <http://www.wga.hu/frames-e.html?bio/l/lippi/filippo/biograph.html> (May 11, 2005).

³⁴⁵ The four horse statues atop the Basilica di San Marco, in Italy, were originally stolen from Venice by Constantinople, then stolen by Napoleon and brought to Paris, when finally returned to Venice (copies of these horses still top the Arc du Louvre in

stabbed and starved.³⁴⁶ Art tells us who we are and where we have been. It assures us that our ancestors were just like us—they loved, they stole, they suffered. And at the same time it allows us a comfortable distance by showing us how far we have come. It validates us as rulers of the world—the story of humankind recorded on canvas, stone, and steel for thousands of years—improving, creating, and enduring.

It is no wonder that the demand for art and artifacts increases with each passing year. Nor is it a surprise that these objects incite passionate debate regarding their protection and retention. On the two sides of this debate are market and source nations. The fundamental ideological differences between them prevent unified efforts to stop the destructive, ongoing illicit trade.

Market nations tend to advocate capitalist principles, such as free trade and private property. Their solutions focus on curbing the theft, not necessarily the trade. These nations are torn between enforcing foreign export laws and keeping their citizens (including museums, auction houses, dealers, and art collectors) satisfied.

Source nations are gripped by the memories of colonialism and are wary of the trend toward cultural globalization. They fear slowly losing their treasures to developed Western and European nations, preferring to keep a pre-Colombian bowl over a Britney Spears CD. Cultural heritage is more important to source nations because it represents such a large portion of their limited resources.

Paris), at <http://www.worldtrippersaol.com/italy/1020313.htm> (last visited Mar. 9, 2004).

³⁴⁶ Rossella Lorenzi, *Iceman's Mummy Gets a New Home*, DISCOVERY NEWS, Dec. 3, 2003 (reporting that after studying his body, scientists now believe Ötzi the Iceman died a painful death following a violent hand-to-hand encounter), at <http://dsc.discovery.com/news/briefs/20031201/iceman.html>.

Compromise on both sides is the only solution to these problems. Any move too far in one direction should be avoided, as it alienates support and fails to respect the opposing side. Unfortunately, according to some, the debate has become too one-sided.³⁴⁷ The pendulum has swung toward the cultural nationalist position and shows no sign of coming back. Statements by UNESCO urging market nations to cooperate in the name of “dispelling any misunderstanding and placing themselves above any suspicion of possible complicity or complacency,” may do more to incite resistance than to encourage respect.³⁴⁸ Market nations, such as the United States, have prosecuted thieves and looters of cultural property even before the 1954 Hague Convention. These nations struggle to enforce the mandates of the conventions while staying true to their constitutions and market ideals. In encouraging respect and cooperation, UNESCO would do well to keep suggestions neutral and remember that source nations are under a similar obligation. Instead of moving further toward cultural nationalism, UNESCO must draft broadly acceptable provisions that effectuate the interests of market and source nations alike.

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³⁴⁷ Merryman, *supra* note 31, at 87-91.

³⁴⁸ CHARTER, *supra* note 34, art. I.

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