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# **An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)**

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## INTRODUCTION

Part One of this Article examined the broad contours of archaeology: what constitutes the discipline and why it is important; the emergence of archaeological ethics; and the competing concerns of archaeologists, collectors of artifacts, and other stakeholders, most notably cultural groups. Part One explored the field of underwater archaeology, comparing and contrasting it with land-based archaeology. The first part of the Article went into some depth in fleshing out the relevant factors of concern when cultural groups lay claim to ownership rights in archaeological artifacts, including special concerns with respect to human remains, the Native American Graves Protection and Repatriation Act (“NAGPRA”) and, finally, contemporary archaeological codes of ethics.

Part Two of the Article looks more closely at the looting of archaeological sites and the sale of looted artifacts on the black market. The Article examines how looting destroys not only cultural sites but also the heritage of cultural groups and considers the related problem of lack of provenance of looted artifacts. This half of the Article uses Napoleon’s looting of archaeological sites during the invasion of Egypt in 1800 as a case study and discusses the evolution of international law with respect to the taking of wartime “booty,” culminating in the Hague Convention of 1954 and the UNESCO Convention of 1970, which specifically protect cultural property. Part Two also challenges a claim made by the noted law professor John Merryman that the Hague and UNESCO Conventions express two irreconcilable ways of defining and treating cultural property, arguing instead that the Conventions both support an internationalist approach to developing global standards for the treatment of such property. Finally, this part of the Article addresses the repatriation of looted artifacts through diplomacy, private negotiation and litigation, and proposes a model for international settlement of cultural property disputes.

## X. THE VICIOUS CYCLE OF CULTURAL PROPERTY LOOTING AND THE BLACK MARKET

*A. The Nature of the Problem of Looting*

For many years, indeed for centuries, priceless and beautiful archaeological objects excavated from historical sites have been smuggled abroad and sold to museums and other collectors. Substantial portions of the collections of the

world's great museums are the product of looting during time of war<sup>395</sup> or colonial occupation, such as the Napoleonic occupation of Egypt and Britain's colonial period in India.<sup>396</sup> However, the looting of cultural property occurs in two diverse contexts. The first involves seizure of cultural property during war, military occupation or colonial rule. Under such circumstances, property is taken as "booty," through spoliation or plunder, or it is transferred pursuant to capitulation agreements that are often coerced by the victor. The second involves looting during times of peace when there is relative stability and autonomy among nations and cultural groups. This second context involves the unlawful and clandestine excavation of antiquities without permission from countries of origin and the subsequent smuggling and selling to collectors of cultural property via the international market.

The age-old practice of taking "booty" — the forcible removal of artifacts for profit, personal aggrandizement, as trophies, or to demoralize the enemy — has persisted through modern times despite being a violation of international law.<sup>397</sup> In times of peace, many looted artifacts traverse the path from looter to smuggler, dealer, collector, and finally, perhaps, to a public institution. In the 19th century, for example, the Wetherhill brothers profited by outfitting major museums, such as the large number of artifacts they sold to the American Museum of Natural History in New York.<sup>398</sup> The majority of antiquities in private collections were taken from source nations without documentation and often without export permits. These antiquities were likely derived through clandestine excavation encouraged and supported by an international network of dealers.<sup>399</sup> European museums are filled with artifacts looted from other countries and European governments have long been reluctant to repatriate these

<sup>395</sup> See John Marks, *How Did All That Art End Up In Museums?*, U.S. NEWS & WORLD REP., June 8, 1998, at 38.

<sup>396</sup> See Vivek K. Hatti, *Note: India's Right to Reclaim Cultural and Art Treasures from Britain Under International Law*, 32 GEO. WASH. J. INT'L L. & ECON. 465, 466 (2000).

<sup>397</sup> See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (signed but not ratified by United States) [hereinafter 1954 Hague Convention]. A number of the Hague Convention's provisions pertain directly to art: article 46 forbids the confiscation of private property; article 47 forbids pillage; Article 56 specifically forbids "[a]ll seizure of . . . works of art." *Id.* See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986), for commentaries on the Hague Convention. See also Stanislaw E. Nahlik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1082 (1976); and see Stanislaw E. Nahlik, *On Some Deficiencies on the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict*, 44 ANNUAIRE DE L'A.A.A. 100, 105 (1974).

<sup>398</sup> See Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 ENVTL. L. & LITIG. 47, 51 (1987) (noting that Wetherhill brothers systematically looted 182 cliff dwellings).

<sup>399</sup> See Richard I. Ford, *Ethics and the Museum Archaeologist*, in ETHICS AND VALUES IN ARCHAEOLOGY 141 (Ernestene L. Green, ed. 1984).

objects.<sup>400</sup>

In recent years, there has been a considerable increase in the unlawful looting, plunder, illicit excavation and smuggling of artifacts from artifact-rich nations by individuals for their personal collections or to sell to artifact-hungry collectors and museums. In Afghanistan, for example, illicit excavation of sites is increasing, and in Pakistan a large volume of ancient coins, manuscripts and statues have been looted and marketed.<sup>401</sup> In Iraq, there is increasing concern about the looting and smuggling of antiquities.<sup>402</sup> When looters stormed the Baghdad Museum of Antiquities shortly after the downfall of Saddam Hussein, they were likely motivated to seize cultural artifacts rather than to destroy objects culturally important to their own heritage or to engage in “cultural cleansing.” These looters took objects that could be readily sold to dealers or smuggled out of the country to collectors abroad. In addition to looting for commercial gain, humans throughout history have deliberately destroyed religious or other culturally important artifacts for the purpose of obliterating the cultural heritage of enemies, perceived and real.<sup>403</sup>

The movement for the repatriation of looted cultural property has become increasingly vocal in recent decades.<sup>404</sup> In response, many leading museums in Europe and America have issued a statement declaring that their “diverse and multifaceted” collections serve the people of all nations and should not be compromised for the sake of the interests of one group of people.<sup>405</sup> There are three general arguments made by those who oppose the repatriation of artifacts to the rightful owner or owners: (1) the rights of claimants have been abrogated by the passage of time or the group from which the property originated no longer exists so whatever claim may have once existed no longer does; (2) the artifacts were obtained lawfully or were seized in time of war under the standards of the time and restitution need not be made now just because standards have changed; and (3) other values and interests should prevail over the repatriation claim.<sup>406</sup> There are various ethical and legal objections to the

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<sup>400</sup> See Frank Bruni, *An Obelisk is Going Home: A Bolt of Lightning Helped*, N.Y. TIMES, Dec. 9, 2003, at A4.

<sup>401</sup> See Andrew Lawler, *Afghani Restoration Lags: Looting Proceeds Apace*, SCI., Sept. 26, 2003, at 1825.

<sup>402</sup> See Andrew Lawler, *Good and Bad News from Iraq*, SCI., Sept. 26, 2003, at 1825.

<sup>403</sup> See, e.g., Neil Brodie, *Introduction to ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY* 6 (Neil Brodie & Kathryn Walker Tubb eds., 2002) (discussing destruction by Taliban of two largest Buddha statues in world).

<sup>404</sup> See Janna Thompson, *Cultural Property, Restitution and Value*, 20 J. OF APPLIED PHIL., 251 (2003).

<sup>405</sup> See *id.*

<sup>406</sup> One argument in this vein emphasizes that artifacts ought to remain in museums outside of their countries of origin so they can be properly curated and displayed and be more accessible to

looting of antiquities. These objections drive the persistent urging by advocates of the right to restitution of cultural property. The following sections address these concerns.

### 1. Destruction of Cultural Heritage

The looting of antiquities destroys important aspects of the cultural heritage of source nations. This is particularly the case when a looted item is a significant or unique piece of cultural property. Many pieces of cultural property are not fungible in the traditional sense as they are one of a kind and can not be replaced. As discussed in Part One, Section III, *supra*, cultural property is usually bound up with the very identity of the group laying claim to it, for it is closely associated with that cultural group's traditions. The loss of an artifact of cultural property creates a significant gap in the source group's collective sense of identity. Moreover, cultural property is intergenerational; its meaning is associated with a particular group's identity and practices as passed down from one generation to the next.

### 2. Destruction of Archaeological Sites

Illegal excavation of cultural property tends to be destructive and often results in significant damage to archaeological sites and artifacts as well as the loss of potentially valuable cultural knowledge. Archaeological sites are often abused by looters employing amateur techniques; the contextual setting of the materials at a particular site, along with valuable information about the human past, is therefore destroyed or lost. Finders of artifacts often loot sites completely, destroying irreplaceable archaeological data. The deliberate, hasty and clandestine removal of archaeological objects not only leads to the loss of information about the past and the destruction of certain cultural groups' sense of historic identity but is also contrary to the international public interest and may very well violate antiquities laws. One archaeologist describes the irreparable harm as follows:

Once a site has been worked over by looters in order to remove a few salable objects, the fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the position of a skeleton — all of these sources of fugitive information are ignored and obliterated by archaeological looters.<sup>407</sup>

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scholars and the public. This argument suggests that repatriation would result in the mistreatment, rapid erosion or destruction of artifacts. *See id.* at 252.

<sup>407</sup> Clemency Coggins, *Archaeology and the Art Market*, *SCI.*, Jan. 21, 1972, at 263.

Much of the destruction of archaeological sites occurs at the hands of locals engaging in subsistence looting. These looters, trapped in the abyss of poverty, find this to be one of the only available and viable ways of making money. But such looters end up undermining their own cultural heritage. Subsistence looting is analogous to the poaching of animals or illegal timber extraction — but while those resources are renewable, archaeological artifacts are not. As one writer of a letter to the editor of the *New York Times* stated: “We deplore all destruction *in situ*, most of it caused by the indifference of the very people whose past is involved.”<sup>408</sup>

During the Great Depression in the United States, there was widespread subsistence looting of prehistoric sites. In Arkansas, for instance, many “pot-hunters” found that selling pots and stone tools for cash was sometimes the only way to make enough money to buy food.<sup>409</sup> The overwhelming majority of the beautiful pieces of art in stone and clay that were unearthed from prehistoric sites in the Mississippi and Ohio River valleys were funerary objects placed with the dead.<sup>410</sup> A *National Geographic* article from 1989 entitled *Who Owns the Past?* described the desecration of over 650 Native American graves on the Slack farm in Kentucky. Graves were unearthed and precious belongings placed in the graves to accompany the deceased to the afterworld were taken and sold; the bones of the dead were left strewn about the farm. This particular episode of looting illustrates a troubling fact: those who illegally excavate artifacts often must strip them of as much contextual information as possible in order to sanitize their entry into the marketplace.<sup>411</sup> When looting occurs, the most important loss is often the loss of an entire body of contextual evidence that illuminates particular segments of history.

Losing information about the origin of antiquities not only harms the study of archaeology, but makes it more difficult for rightful owners to assert claims of title once their stolen artifacts are located. A regime that encouraged parties to conduct transactions openly and to preserve information concerning the movement of artifacts would benefit those who favor freer trade in antiquities as well as those who want to establish national rights to particular artifacts.<sup>412</sup>

There is no readily apparent remedy for alleviating the causes or effects of subsistence looting. In order to deter subsistence looters, governments would

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<sup>408</sup> Bernard V. Bothmer, *Letter to the Editor*, *N.Y. TIMES*, Oct. 19, 1982, at A30.

<sup>409</sup> *See id.*

<sup>410</sup> *See id.*

<sup>411</sup> Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 *COLUM. L. REV.* 377, 411 (1995).

<sup>412</sup> Coggins, *supra* note 407, at 263; *see also* Borodkin, *supra* note 411, at 411.



need to pay them more than they currently receive on the black market and also exonerate them with respect to any laws they have violated. This seems implausible — perhaps impossible. Governments are not inclined to waive application of umbrella anti-looting statutes<sup>413</sup> as this would likely result in an increase in unlawful looting by looters expecting to receive amnesty. Additionally, smugglers could simply offer looters “counter-offers” worth more than the deals proffered by governments. The Egyptian government has developed one attempt at creating financial incentives for looters to turn over artifacts. This reward program is designed to encourage people to turn over antiquities that they may find accidentally while digging foundations and so forth. The maximum amount of the reward is £3000, which is not very much but may exceed the value of many objects on the black market.<sup>414</sup>

### 3. Violation of the Intent of the Deceased

Looting of human remains and funerary artifacts violates the intentions of the deceased, as discussed in Part One, Section IV, D, *supra*. Objects buried with the dead were intended to stay in perpetuity with the dead; the sale of such objects is an affront to the legal and moral principles associated with the right of sepulture.

### 4. Violation of Umbrella Retention Laws

Looting of archaeological sites occurs in violation of the umbrella retention statutes of source nations. These laws, discussed in Section XVI, *infra*, generally provide that the government owns all antiquities as of the effective date of the law, even if the artifacts have not been discovered and are not yet excavated.<sup>415</sup> Retention statutes make ownership and export of such artifacts illegal. Some commentators argue that these laws — variously referred to as “retention statutes,” “nationalization laws,” “patrimony laws” or “expropriation laws” — are at least partially responsible for fueling the black market in antiquities as people are increasingly driven to loot and export because their government prohibits private ownership of archaeological resources. It is clearly the case that, in spite of the adoption of umbrella retention laws, looting and pillaging of cultural heritage continues.<sup>416</sup> Many commentators have

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<sup>413</sup> See *infra*, Section XVII, for a discussion of umbrella retention laws, also known as patrimony laws, which nationalize archaeological artifacts.

<sup>414</sup> See Mohamed Saleh, *Lost & Found: A Cairo Exhibit of Recovered Art Treasures*, KMT A MOD. J. OF ANCIENT EGYPT, Summer 1999, at 18, 24.

<sup>415</sup> See BONNIE BURNHAM, THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS 35-6 (1974).

<sup>416</sup> See discussion *infra*, Section XVII.

suggested that the thriving black market in cultural artifacts is surpassed only by the international trade in drugs.<sup>417</sup>

### *B. The Nature of the Problem of the Black Market*

The illicit trade in antiquities can be correlated with the plundering, ransacking, looting and destruction of archaeological sites.<sup>418</sup> Looting tends to fuel a thriving black market in antiquities. It is not clear which came first but as early as the mid-nineteenth century, commentators were documenting harmful effects of the illicit trade on antiquities.<sup>419</sup> There appears to be a vicious cycle, in which the appetite of collectors fuels the black market, which in turn fuels illegal excavations and looting.

Even if only one surreptitiously looted object is brought to the museum for validation, its discovery and recovery probably was preceded by hundreds of shovelfuls of broken vessels, midden fill, burials, and architectural debris. If museum curators and academic archaeologists would cease this practice, the cautious small-time buyer who accounts for the purchase of the bulk of these imports might be more skeptical when archaeologists explain their refusal and desist in this practice.<sup>420</sup>

Apart from semi-professional bands of looters who share knowledge about sites and excavation techniques, some looters, as noted above, are simply motivated by poverty and engage in "subsistence looting." It is often quite easy to break into archaeological sites that are under the protection of security guards. Such guards are notoriously underpaid<sup>421</sup> and corruption at all levels of enforcement makes it all the more difficult to protect cultural sites.<sup>422</sup> In many countries, guards as well as customs officials are easily bribed.<sup>423</sup> The black market is also fuelled by museums that "hoard" artifacts, refusing to release for sale objects that lay idly in basements and are thus easily taken.<sup>424</sup> Few if any sites are truly safe from the attentions of archaeological looters; there must be an ever-increasing range of artifacts to satisfy the burgeoning market of private and

<sup>417</sup> See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1182 (1989).

<sup>418</sup> See A. HENRY RHIND, *THEBES: ITS TOMBS AND THEIR TENANTS* (1862) (describing nineteenth-century European appetite for Egyptian relics and effects on condition of sites).

<sup>419</sup> Coggins, *supra* note 407.

<sup>420</sup> Ford, *supra* note 399.

<sup>421</sup> For example, security guards at the eight thousand historic sites in Egypt earn approximately fifty dollars per month. See Deborah Pugh et al., *The Greed That Is Tearing History Out By Its Roots*, *GUARDIAN*, June 13, 1992, at 13.

<sup>422</sup> See LEONARD D. DUBOFF & SALLY H. CAPLAN, *THE DESKBOOK OF ART LAW B-13* (1993).

<sup>423</sup> See Borodkin, *supra* note 411, at 393.

<sup>424</sup> See discussion *infra*, Section XVII.C.2.

institutional collectors who regard objects of archaeology as works of art, investment opportunities and prestigious “trophies.” There is a terrible asymmetry to the whole affair. Generally speaking, the source or “supply” countries whose cultural artifacts are under serious threat of plunder are in the developing world, including India, Egypt and Afghanistan, while the “demand” countries where smuggled items end up are concentrated in Europe and North America.

### 1. Black Market Artifacts Lack Provenance

The problem of antiquities looted from archaeological sites is worldwide in scope.<sup>425</sup> Looted antiquities appear without provenance documentation on the international art market and in private and museum collections.<sup>426</sup> While many commentators thought that umbrella retention statutes would help deter black market sales, approximately 85-90% of antiquities that appear in auction house catalogs do not have information concerning provenance.<sup>427</sup> When a museum purchases an antiquity of undocumented provenance it effectively aids and abets the black market. Moreover, museums that do not exercise sufficient due diligence in acquiring antiquities are breaching their public and fiduciary duties.<sup>428</sup> But in order to persuade finders to report the discovery of new antiquities to the proper government authorities, there must be an appropriate economic incentive. Although the idea of simply outlawing the trade in antiquities has an appeal because of its categorical and sweeping nature, empirical evidence demonstrates that such laws alone do not provide a satisfactory deterrence to the smuggling of antiquities.<sup>429</sup>

### 2. How Black Market Artifacts Garner “Provenance”: Looting Eludes Detection

It is difficult to detect looted antiquities precisely because they have no history in a museum nor do they appear in any excavation inventories prior to

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<sup>425</sup> See, e.g., Christopher Chippendale & David W.J. Gill, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601 (1993) (concluding that approximately 90% of known Cycladic figurines dating from 3rd millennium B.C. and coming from Cycladic Islands of Aegean Sea do not have known provenance); see also Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 446 (2003).

<sup>426</sup> See Gerstenblith, *supra* note 425, at 453.

<sup>427</sup> See, e.g., Mike Toner, *Past in Peril: America the Looted*, ATLANTA J. & CONST., Feb. 13, 2000, at 1C (describing looting in United States and resulting loss of context for archaeology as well as increasing prices for Native American artifacts on international art market).

<sup>428</sup> See Borodkin, *supra* note 411, at 412.

<sup>429</sup> *Id.*

showing up in the marketplace. “Obviously, if an antiquity has been secretly excavated and smuggled, the date of its export is unlikely to be revealed.”<sup>430</sup> If an object is removed from a country before the effective date of that country’s patrimony law — and some such laws are of relatively recent vintage — then without evidence of when the object was removed from the source country, the government will not be able to prove its case. Additionally, as discussed in Sections XIX and XX, *infra*, even when an object can be identified as having come from a specific source, claims of ownership by the source state are subject to incredible legal hurdles.

Looted material often changes hands several times until acquired by an institutional or private collector; the details of illicit origin are thus effectively laundered.<sup>431</sup> Such objects, sold without original provenance, eventually may acquire a new and authoritative provenance once listed in exhibition or sales catalogs or discussed in scholarly papers.<sup>432</sup> Given the reality that many ultimate purchasers, such as museums, acquired looted objects in good faith at some point in the past or under norms and legal circumstances that made such transactions permissible, there are significant legal and factual burdens to surmount in any effort to dispossess such purchasers of these artifacts.

The problems of looting and smuggling are exacerbated by the laws of countries such as Switzerland, where stolen property can effectively be given clean title in the hands of a bona fide purchaser — that is, one who is unaware that the object was stolen. Swiss law provides that purchasers of stolen property acquire title superior to the original owner if the property was purchased in good faith.<sup>433</sup> In order for a court to conclude that a purchaser did not acquire property in good faith, the court must find either that the purchaser actually knew that the seller lacked title or that an honest and careful purchaser in the particular circumstances would have had doubts with respect to the capacity of the seller to transfer property rights.<sup>434</sup> Swiss law thus presumes that a purchaser has acted in good faith.<sup>435</sup> A plaintiff seeking to recover looted property from someone who claims to be a bona fide purchaser carries the burden of proof.<sup>436</sup> And according to the Swiss Civil Code, the statute of limitations for a true owner of stolen art to make a claim is five years. It is thus legal to “park” a stolen item in a bank vault for five years and then sell it to a

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<sup>430</sup> See Brodie, *supra* note 403, at 2.

<sup>431</sup> See *id.*

<sup>432</sup> See Borodkin, *supra* note 411, at 378.

<sup>433</sup> See, e.g., *Autocephalous Greek-Orthodox Church v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989).

<sup>434</sup> See *id.*

<sup>435</sup> See *id.*

<sup>436</sup> See *id.*

purchaser who, in turn, gains superior title to that of the true owner.<sup>437</sup> In other words, a purchaser of an antiquity from a “dealer” who is unable to provide any record of provenance, and where the acquisition circumstances are uncertain, can obtain an object and then launder it so that the source government will have no legal basis for demanding its return.

## XI. THE RAPE OF EGYPT

### *A. The General Problem, Past and Present*

Egypt, the land that gave birth to some of the most sublime arts of humankind, has perhaps suffered more destructive plundering of its cultural property than any other nation. Many thousands of objects have been removed from Egypt over the centuries — particularly in the 18th, 19th and 20th — including mummies, statues, frescoes, figurines, monuments, tools and papyri. Some of the most commonly known objects include two 200-ton obelisks, one of which now stands in Central Park, New York, and the other in the Place de la Concorde in Paris. A third obelisk, known as Cleopatra’s Needle, originally adorned the approach to the Temple of the Sun at On. It now sits on the Victoria Embankment in London. And Egypt continues to be a target of looting today.<sup>438</sup>

The destruction in countries like Egypt is catastrophic. As I know from my own experience of working in the field there and talking to my colleagues in Egypt, Egypt is not alone but it is probably uniquely rich in antiquities. Massive destruction is being done to archaeological sites in Egypt on a daily basis. Objects are finding their way out through various laundering systems. Some find their way to the United Kingdom. We have to play our part in countering this.<sup>439</sup>

This view is echoed by the ambassador of Egypt to Britain, who says: “The illegal trade, export and smuggling of Egyptian antiquities for sale abroad are causing substantial and irrevocable damage to Egypt’s cultural heritage.”<sup>440</sup>

Looting of Egyptian cultural property goes back to the tomb robbing of

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<sup>437</sup> See Michele Kunitz, *Comment: Switzerland & the International Trade in Art & Antiquities*, 21 *Nw. J. INT’L L. & BUS.* 519, 534 (2001).

<sup>438</sup> In 23 B.C., during the reign of Augustus, Cleopatra’s Needle was moved to Alexandria. See JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 136 (1989). In 1821, the Turkish Viceroy Mehemet Ali gave Cleopatra’s Needle to King George IV, although the obelisk did not arrive in England until 1878. *Id.*

<sup>439</sup> David Gill & Christopher Chippendale, *The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry*, 11 *INT’L J. OF CULTURAL PROP.* 50, 53 (2002) (quoting Vivian Davies, keeper of Egyptian antiquities at British Museum).

<sup>440</sup> *Id.* (quoting memorandum from ambassador of Arab Republic of Egypt).

ancient times. Because it was customary to bury kings and noblemen with their costliest possessions, the first of the living to profit from the dead were the workmen who entombed them. Many ancient papyri record legal proceedings against the violators of tombs. An official investigation from 1130 B.C. states:

There are tombs and sepulchres in which rested the blessed ones of old, the women and the people of the land on the west of the city: it was found that the thieves had broken into all of them, that they had pulled out from their coffins and sarcophagi their occupants, thrown out upon the desert, and that they had stolen their articles of furniture which had been given them together with the gold, the silver, and the ornaments which were in their coffins.<sup>441</sup>

Several thousand years ago, the tools employed in tomb-robbing were limited to simple digging implements and probing rods. The tools used today include bulldozers, mechanized drills, dynamite, metal detectors and power saws. Modern looters have at their disposal all-terrain vehicles and helicopters; to probe the deep sea, they use remotely operated submersibles. When something is illegally excavated from an unknown site, it may be nearly impossible to prove that it was “stolen” or exported, especially so with respect to any state umbrella retention laws that may only apply to objects taken after certain dates.

#### *B. A Case Study: The Napoleonic Occupation*

A great many artifacts were looted during Napoleon’s Egyptian campaign. This section uses the Napoleonic invasion and occupation as a case study to analyze the legal and ethical arguments under international law for the return of cultural property looted from Egypt by Napoleon’s army, much of which was eventually ceded by Napoleon to Britain. Though there have been significant developments in the modern repatriation movement favoring the return of cultural property to nations of origin, none of these developments has been applied to the return of items taken during the distant past by an occupying power.<sup>442</sup>

Three issues of importance emerge from the following analysis: first, whether the invasion of Egypt by Napoleon was a just war based on then prevailing principles of international law; second, whether the law of war at the time entitled Napoleon to take war booty in the form of objects of Egyptian cultural

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<sup>441</sup> PETER FRANCE, *THE RAPE OF EGYPT: HOW THE EUROPEANS STRIPPED EGYPT OF ITS HERITAGE* 33 (1991) (quoting from unattributed official investigation from 1130 B.C.).

<sup>442</sup> A separate case could be made for the repatriation of artifacts looted from India during British colonial rule from the mid-eighteenth century until 1947. During that time, many objects that constitute cultural property were taken from India and are currently housed in British collections and museums. See Hatti, *supra* note 396.

heritage; and third, whether the law of war entitled Britain to subsequently seize such items from the French or whether Britain was required under international law to repatriate the objects to Egypt. Section XX, C, *infra*, discusses whether the modern Egyptian state has a valid claim against Britain for the repatriation of these objects based on the retroactive application of modern customary international law.

In 1798, a 29-year old Napoleon persuaded his government to approve an invasion of the Middle East to cut Britain's shipping lanes to India. The French expedition to Egypt was designed to dislocate British trade in the region and to threaten British interests in India.<sup>443</sup> France was also motivated by a desire to seize control of Egypt as a colony, partially to compensate for losses to Britain in North America.<sup>444</sup> The publicly stated purpose of the expedition was humanitarian intervention — to free Egypt from oppressive Ottoman rule.<sup>445</sup> Napoleon proclaimed that he was the liberator of the Egyptians from their oppressors, that the coming of the French was the will of Allah, that a new era of prosperity and justice was about to dawn, and that local religions and customs would be respected and self-government restored to the Egyptians.<sup>446</sup> At the time, Egypt had been a province under Ottoman occupation for several hundred years. In some important ways, Ottoman rule bore lightly. The Egyptians survived ongoing corruption in government, including frequent intrigues and rivalries among Turkish "Mameluke beys," the mercenaries who had misruled the country for centuries, each continually trying to undermine the other. For all the corruption, the ruling Turkish-speaking Ottomans, although they shared a religion with the Muslim Egyptians, never implanted their own language in Egypt. The Egyptian people thus always regarded the Ottomans as aliens and only a few Egyptians ever assimilated themselves into or adopted Ottoman ways. Once in Egypt, Napoleon easily destroyed a Mameluke army at the battle of the Pyramids on July 21, 1798, and entered Cairo. The flight of the Mamelukes created a political vacuum which Napoleon filled by setting up a military government combined with a form of indirect rule. Divans (councils) were created in the larger towns of French-occupied Egypt.<sup>447</sup>

The future Emperor also brought with him 165 French scientists, scholars and artists to immediately establish, in imitation of the Institut National du Paris, the Institut d'Egypt, which would serve as a center for the study of the antiquities, languages, agriculture and medicine of Egypt as well as a propaganda tool to

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<sup>443</sup> See DONALD MALCOLM REID, *WHOSE PHARAOSHS?* 31 (Am. Univ. in Cairo Press 2002).

<sup>444</sup> See CAPTAIN JOSEPH-MARIE MOIRET, *MEMOIRS OF NAPOLEON'S EGYPTIAN EXPEDITION 1798-1801*, at 13 (Rosemary Brindle trans., 2001).

<sup>445</sup> See *id.* at 15.

<sup>446</sup> See *id.* at 18.

<sup>447</sup> *Napoleon I*, in 8 *ENCYCLOPEDIA BRITANNICA* 65 (1973).

win the respect and trust of the country's leaders. One of the first papers presented at the Institut d'Egypt was by the geologist Dolomieu, who discussed proposals for the "selection, conservation and transportation of ancient monuments" from Egypt to France.<sup>448</sup> Napoleon put Dolomieu in charge of selecting all the ancient monuments the French might procure. Dolomieu's paper followed precedents already established by Napoleon, who had systematically looted art treasures from other countries during the Napoleonic Wars, including Italy (even the Vatican was looted), Germany and Russia.<sup>449</sup> Formal treaties drawn up by Napoleon forced these vanquished states to give up significant cultural objects. For example, the treaties of Milan and Campo Formio in 1797 resulted in the seizure of the famous bronze horses and winged lion from St. Mark's, Venice.<sup>450</sup> The truce signed by the Pope contained a clause promising five hundred manuscripts from the Vatican as well as one hundred pictures and busts.<sup>451</sup> In fact, the "final haul" included every manuscript in the Vatican dated before 900 A.D.<sup>452</sup> These treasures were to be housed in the Louvre, which, in 1803, was renamed the "Musée Napoléon" and was to become the largest museum in Europe.<sup>453</sup> Due to emerging principles of international law that considered the seizure of trophy art illegal, France sought to characterize its trophy art not as war booty but as bona fide acquisitions.<sup>454</sup> The art seized from Italy during 1796 to 1797, for instance, was designated as war compensation or incorporated into armistice conventions and peace treaties as compensation and contributions.<sup>455</sup>

During the Napoleonic period, the French believed they were entitled to possess the cultural property of other nations. Almost all of the great French artists of the day signed a petition in support of Napoleon's looting of art

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<sup>448</sup> See FRANCE, *supra* note 441, at 19.

<sup>449</sup> See Dorothy Mackay Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437, 446 (1945).

<sup>450</sup> Later, after the French were forced to return these and other objects, workmen proceeded to remove the winged lion from a fountain in the Esplanade des Invalides, and dropped it, breaking it into thousands of pieces, to which a mob of agitated Parisians cheered. See *id.* at 446.

<sup>451</sup> See *id.* at 440.

<sup>452</sup> See *id.* at 441-46. More plunder of the Vatican was subsequently coerced in the Treaty of Tolentino in February, 1797, so that "[i]n the Vatican, everything was opened up and personal choices of valuable jewels sent to Napoleon and the directors, while gold and silver medallions were sent to be melted down." *Id.* at 446. After Napoleon abdicated in 1814, arrangements were made for the return of many of the Vatican items. *Id.*

<sup>453</sup> See Stephen Wilske, *International Law and the Spoils of War: To the Victor the Right of Spoils?*, 3 UCLA J. INT'L L. & FOREIGN AFF. 223, 245 (1998).

<sup>454</sup> See Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755, 758 (1987); See *infra* Section XIV.C, for more information on the emergence of principles of international law.

<sup>455</sup> See Wilske, *supra* note 453, at 245.



treasures, stating:

The Romans, once an uncultivated people, became civilized by transplanting to Rome the works of conquered Greece.... [T]he French people... naturally endowed with exquisite sensitivity, will... by seeing the models from antiquity, train its feeling and its critical sense.... The French Republic, by its strength and superiority of its enlightenment and its artists, is the only country in the world which can give a safe home to these masterpieces. All other Nations must come to borrow from our art, as they once imitated our frivolity.<sup>456</sup>

And as a French general wrote in 1799:

[S]tatues which the French have taken from the degenerate Roman Catholic to adorn the museum of Paris, and to distinguish by the most noble of trophies, the triumph of liberty over tyranny, and of philosophy over superstition. Real conquests are those made in behalf of the arts, the sciences and taste, and they are the only ones capable of consoling for the misfortune of being compelled to undertake them from other motives.<sup>457</sup>

Napoleon felt that he was “liberating” art from other European collections so that it could have a secure home in the new National Museum in the Louvre, which would be propelled into the civilized world’s center of art and antiquities.<sup>458</sup> It seemed only reasonable that the nation called on by destiny to reveal the true significance of Egypt should have her museums enriched by its monuments. The Napoleonic plunder of artifacts was not a mere incidence of war, done to demoralize the vanquished, but an official policy to fill the Louvre with stolen art. The looting of Egypt was justified on the grounds that the artifacts would otherwise lay in waste and neglect. For example, Baron Dominique Vivant Denon, who later became director of the Louvre, said: “Is it not rather the decrepitude of that part of the world most anciently inhabited? May it not have been the abuses of human industry that have reduced it to this state?”<sup>459</sup> Whatever its philosophical underpinnings, Napoleon’s looting of art occurred on a grander scale than at any time since the Roman Empire.

One notable discovery in July of 1799 was the Rosetta Stone, found in the small village of Rashid (known to the Europeans as Rosetta) in the Nile Delta. The Rosetta Stone was a fragment from a large stela written in Egyptian, in both

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<sup>456</sup> Quynn, *supra* note 449, at 438-39.

<sup>457</sup> Quynn, *supra* note 449, at 439 (quoting FRANCOIS R.J. DE POMMERUL, *CAMPAIGN OF GENERAL BUONAPARTE IN ITALY* 52-53 (Edinburgh, 1799)).

<sup>458</sup> See PROCTOR PATTERSON JONES, *NAPOLEON: AN INTIMATE ACCOUNT OF THE YEARS OF SUPREMACY 1800-1814*, at 257 (1992).

<sup>459</sup> FRANCE, *supra* note 441, at 16.

hieroglyphic and demotic scripts, and Greek, and issued at Memphis on March 27, 296 B.C. by the Egyptian priesthood in honor of Ptolemy V on the anniversary of his succession. When “discovered” by the French at the end of the 18th Century, the stone was sent to Cairo and placed in the Institut d’Egypt, whose members fell excitedly upon it and made copies for distribution to other European scholars. The Rosetta stone is famous because it provided the key to the translation of the ancient Egyptian scripts.<sup>460</sup>

Only a month into his occupation of Egypt, Napoleon experienced a series of reversals. Under General Nelson, the British sunk much of the French fleet on August 1, 1798. Napoleon managed to return to France on August 22, 1799, to attend to the shaky political situation in Paris and to see about getting reinforcements. At that point, the French scholars moved their collection of antiquities, including the Rosetta Stone, to Alexandria. Napoleon’s scholars made the best of the situation, and feverishly set out to explore, measure, draw and describe everything in their path. Eighteen months of desultory fighting ensued. Sir Ralph Abercromby conducted a successful naval blockade of the remainder of the French fleet on March 8, 1801, following which a combined force of British and Turkish troops forced the French to agree on harsh terms in a Treaty of Capitulation (Alexandria) in the spring of 1801. Members of the Institut tried to escape from Egypt with as much as they could, but were turned back by British ships. Under the terms of the treaty, much of the looted Egyptian material became the property of the British crown. The Rosetta Stone, together with the Institut’s other archaeological trophies, were forfeited to the government of King George III by the terms of the treaty.<sup>461</sup>

Thus, the British army claimed the Rosetta Stone and other artifacts looted by the French as prizes of battle. Edward Daniel Clarke, a civilian who accompanied an advance guard of British troops, was to insure that the French did not send any Egyptian antiquities back to France.<sup>462</sup> Another British civilian, William Richard Hamilton, an agent for Lord Elgin, the British ambassador to Constantinople who, as discussed in Section XIX, E, *infra*, was responsible for seizing the Elgin Marbles, had orders to seize the French collections of Egyptian antiquities. “Working together, Clarke and Hamilton succeeded in stealing from the French a great many antiquities — including a great green sarcophagus hidden by the French in a hospital ship — that the French had stolen from the Egyptians.”<sup>463</sup> The Rosetta Stone, along with all the other captured artifacts, eventually came to rest in the British Museum. The

<sup>460</sup> *Id.* at 24.

<sup>461</sup> *Id.* at 25-26.

<sup>462</sup> See JOHN DAVID WORTHAM, *THE GENESIS OF BRITISH EGYPTOLOGY 1549-1906*, at 50 (1971).

<sup>463</sup> *Id.*

large volume of artifacts required major additions to the museum<sup>464</sup> and the British seizure of French spoils launched a century or more of Anglo-French Egyptological rivalry.<sup>465</sup> The enormous sarcophagus of Nectanebo II of the 30th dynasty (360-43 B.C.), along with many other artifacts, were placed in temporary structures on the grounds of the British Museum as the floors of Montagu House, in which the museum was then housed, were not strong enough to bear the weight.<sup>466</sup> Parliament soon authorized construction of a new gallery to house the Egyptian artifacts.<sup>467</sup> Meanwhile, from 1809 to 1828, the French worked on an extensive account of their plunder, culminating in a 19-volume work entitled *Description de l'Égypte*, which contained so many plates that 400 engravers were employed on the job. After the Napoleonic looting of Egypt, other Egyptian antiquities were looted and ended up in the British Museum. For example, many objects were obtained in free-wheeling fashion by Giovanni Battista Belzoni (1778-1823), who persisted in schemes to bribe Egyptian officials to allow removal of cultural property, including: the colossal head and arm of a king now thought to be Amenophis III, which was brought from the Temple of Mut at Karnak; two large seated statues of Amenophis III from his mortuary temple, now destroyed, behind the Colossi of Memnon; a large bust in limestone and two massive heads in quartzite also from this mortuary temple; three life-size wooden figures of kings from the royal tombs in the Valley of the Kings; and largest of all, the enormous seated statue of Ramesses II, from his mortuary temple at Thebes.<sup>468</sup>

After Napoleon's defeat at Waterloo and abdication at Fontainebleau in 1814, there was no mention in the armistice agreements for the restoration of the treasures that had been looted from European countries. At the negotiations for the Treaty of Paris in 1815, France attempted to include a clause allowing the retention of looted European property.<sup>469</sup> The Duke of Wellington, speaking for the Allies, objected to the proposal, saying that the systematic looting of art by a conquering army violated principles of justice and the rules of modern warfare. The Duke argued that all works of art should be restored to their respective owners. In turn, the French charged the English with the ulterior motive of not wanting the Louvre to surpass the British Museum in the world of art, and they

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<sup>464</sup> *Id.* at 51.

<sup>465</sup> See REID, *supra* note 443.

<sup>466</sup> See MARJORIE CAYGILL, TREASURES OF THE BRITISH MUSEUM 51-52 (1985).

<sup>467</sup> *See id.*

<sup>468</sup> *See id.* at 58-63.

<sup>469</sup> See Note: *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 694 (1974): "Implicit in this decision is the recognition of the concept of cultural heritage as a principle that will negate the transfer of art treasures to a victorious foe under threat of force, even when that transfer is outwardly legitimized by treaty." See also Quynn, *supra* note 449, at 447.

accused William Hamilton, a delegate from Britain, of trying to ruin the Louvre.<sup>470</sup>

It did seem that the British were hypocrites, for they had acquired most of Napoleon's Egyptian booty pursuant to the Treaty of Capitulation at Alexandria. These items were outside the purview of the 1815 Treaty of Paris and the British had no intention of repatriating these artifacts to Egypt. Moreover, William Hamilton had been Lord Elgin's secretary and had supervised the removal of the Parthenon marbles in 1802.<sup>471</sup> Additionally, in 1801, Hamilton had caught the French trying to clandestinely smuggle the Rosetta Stone out of Egypt after they had capitulated. After this, Hamilton made sure the Stone was kept as part of Britain's booty. The first Treaty of Paris, May 30, 1814, permitted France to retain nearly all of the works of art that had been taken as spoils of war, with the understanding that private agreements for restitution would be made with Louis XVIII.<sup>472</sup> The second Treaty of Paris, signed on November 20, 1815, was more stringent with respect to France: both confiscated art and art acquired pursuant to coerced treaty were subject to repatriation. This pertained to all of the art taken in connection with Napoleon's European campaigns.<sup>473</sup>

The subject of restitution was formalized under the peace treaty of the Congress of Vienna of 1815, in spite of the fierce opposition by and consternation of the French.<sup>474</sup> The Congress of Vienna required France to restore works of art to the country of origin, but did not pertain to the Egyptian artifacts that had been ceded to the British.<sup>475</sup> It was already an established principle of international law that transfers of cultural property by coerced treaties were not valid transfers.<sup>476</sup> This view was best expressed in a letter dated September 11, 1815, by the British Representative to the Congress of Vienna, Viscount Castlereagh, in which he described the French plundering as "contrary to every principle of justice and the usages of modern warfare."<sup>477</sup> Since 1648, almost all peace treaties contained some provision concerning restitution.<sup>478</sup> The fact that the treaty failed to provide for restitution of the

<sup>470</sup> See Quynn, *supra* note 449, at 447-48.

<sup>471</sup> *Id.* at 449.

<sup>472</sup> See *id.* at 453-56.

<sup>473</sup> See *id.*

<sup>474</sup> See Patrick J. Boylan, *The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium*, in *ILLCIT ANTIQUITIES*, *supra* note 403, at 44.

<sup>475</sup> See Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property*, 42 A.F. L. REV. 277, 284 (1997).

<sup>476</sup> See Wilske, *supra* note 453, at 246.

<sup>477</sup> *Id.* (quoting British Foreign Secretary, Viscount Castlereagh); see also Lakshmikanth Rao Penna, *Shelter from the Storm: Protection of Cultural Property During Armed Conflict*, in *DEVELOPMENTS IN INTERNATIONAL HUMANITARIAN LAW* 258 (Maley ed. 1997).

<sup>478</sup> See Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1082.

Egyptian cultural property to Egypt was a glaring omission. The outcome of the Congress of Vienna, requiring that France return plundered European art, suggests a policy shift away from the idea that “to the victor goes the spoils.”<sup>479</sup> International law had come to recognize that the seizure of trophies of art in pursuit of war should be outlawed. The Allies, except for Russia, agreed that all European art objects should be returned to their original owners. It appears that the Tsar declined to support this provision because he had secretly purchased from Napoleon’s family a number of valuable paintings for the Hermitage, including the valuable Vatican cameo of Ptolemy and Arsinoe, and he did not want these items restored to their original owners.<sup>480</sup>

The retrieval of stolen art from France by the European capitals was somewhat disjointed and sporadic.<sup>481</sup> During this period, representatives of foreign governments boldly removed paintings and other objects from the Louvre on their own, and were sometimes aided by British troops. Many articles were damaged when initially seized and deteriorated further in Paris as a result of shoddy “restoration” efforts by conservators at the Louvre.<sup>482</sup> Efforts at repatriation were hampered because many objects were considered too cumbersome and expensive to remove. Other confiscated items were not even at the Louvre but were dispersed throughout France and even outside France. For example, only thirty of 200 hundred paintings taken from Belgium were in Paris. The director of the Louvre, Baron Dominique Vivant Denon (who, as mentioned above, accompanied Napoleon to Egypt and made copious sketches), used every possible trick to deter owners from reclaiming property.<sup>483</sup> Some looted items were secretly kept by the Empress Josephine; after her death, her heirs sold many important pieces to Tsar Alexander, who was pleased to add to the materials he had previously bought from Napoleon. These items still adorn the Hermitage today.<sup>484</sup> Many other important objects were sold by the French government before repatriation was ordered. These pieces became part of the collections of museums in Munich, Prussia, St. Petersburg and elsewhere.<sup>485</sup>

The following section elaborates on the notion that prevailing principles of international law during the French Revolution made Napoleon’s invasion of Egypt an unjust war. Even if it were considered a just war, the seizure of “trophies of war” violated principles of international law as then construed.

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<sup>479</sup> See Andrea Cuning, *The Safeguarding of Cultural Property in Time of War*, 11 TULSA J. COMP. & INT’L L. 211, 213 (2003).

<sup>480</sup> See Quynn, *supra* note 449, at 451-52.

<sup>481</sup> See *id.* at 453-56.

<sup>482</sup> See *id.* at 456.

<sup>483</sup> See *id.* at 458.

<sup>484</sup> See *id.* at 459-60.

<sup>485</sup> See *id.* at 460.

Accordingly, a case could be made that, despite the passage of time, the British ought to repatriate the Egyptian war booty taken by Napoleon and ceded to the British, based on *then*-prevailing principles of international law. Section XX, C, *infra*, argues that subsequent developments in international law pertaining to war booty, which provide unambiguous protections for cultural property in time of war, may well have retroactive application and further bolster a claim for the repatriation of cultural property seized during the Napoleonic occupation of Egypt. In developing this argument, the Article will first examine the history of war booty in international law, revealing a general sense that even in ancient times the taking of war booty was disfavored; this sentiment started to garner increasing force by the time of the French Revolution and gradually became entrenched as a principle of customary international law.

## XII. THE LAW OF WAR REGARDING PROTECTION OF CULTURAL PROPERTY AND TAKING OF "WAR BOOTY"

Napoleon's actions raise a crucial question: under what conditions may military victors properly remove cultural property from a vanquished nation or a subjected people? This section of the Article surveys the development of international law with respect to "war booty" in an effort to determine whether Napoleon's looting of Egypt was lawful at the time. Could it ever have been acceptable to seize artifacts from a vanquished nation? If so, under what circumstances was this permissible? When and how did the taking of war trophies, even in a just war, become condemned rather than accepted? This section answers these questions.

### A. Historical Overview

Art and war are not often thought of as being related. Yet historically, war has been perhaps the single most important factor in the looting and destruction of cultural artifacts. A nation's artistic heritage often reflects its cultural ideology. Sometimes the capture of important works of art is a political goal in the war. Under international law, plunder and looting were once seen as among the rights of invaders. From ancient times, success in war contemplated not only the subjugation of the conquered people but also the wholesale destruction of that population's religious and political centers. There is also a psychological dimension to plundering an enemy's cultural heritage. By seizing great works of art from the vanquished, one demoralizes the enemy and "capture[s] the soul or mystical identity of its royal or urban owner. That magical *mana* or life spirit contained in art is now seen as belonging to a nation."<sup>486</sup>

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<sup>486</sup> Albert E. Elsen, *Why Do We Care About Art?*, HASTINGS L.J. 951, 952 (1976).

[I]f art gives an aura of prestige to a city or a dynasty, rival cities or rival dynasties, which set out to conquer and humble them, will seek also to destroy their “myth” by depriving them of this aura and appropriating it to themselves, like cannibals who, by devouring parts of their enemies, think to acquire their mana, the intangible source of their strength.<sup>487</sup>

Finally, the sale of looted artifacts serves a practical function, since the sale of booty can help to underwrite the conflict.<sup>488</sup> As was the case with Napoleon’s and Hitler’s looting of artifacts, the capture of booty often helps the victor to stock new museums at home. Napoleon’s intention to propel the Louvre into the world’s center of art and antiquities was a fact of the time.<sup>489</sup>

One of the earliest references supporting the righteousness of taking wartime booty comes from the Old Testament:

When you draw near a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it to your hand you shall put all its males to the sword, but the women, and the little ones, and the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord your God has given you. Thus you shall do to all the cities which are very far from you.<sup>490</sup>

The concept of war booty, allowing belligerents to confiscate or destroy enemy property, whether public or private, was further developed by the ancient Romans.<sup>491</sup> The doctrine was that the spoils of war belonged to the victors. Cicero expressed the view that “trophies of war” can be kept as part of a victor’s compensation for the war. Even earlier, King Xerxes of Persia seemed to follow this war code by destroying a one-thousand year old Babylonian religious and cultural center.

At the end of this successful campaign, Nebuchadnezzar’s fortifications and ziggurat were demolished. Babylon’s great estates carved, looted, and ravaged. As a supreme insult, an eighteen foot statue of the god Bel-Marduk, built almost of solid gold, was taken and melted into bullion. Babylon’s theocratic monarchy was destroyed and the city lost its last

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<sup>487</sup> H. TREVOR-ROPER, *THE PLUNDER OF THE ARTS IN THE SEVENTEENTH CENTURY* 7-8 (1970).

<sup>488</sup> See Brodie, *supra* note 403, at 7.

<sup>489</sup> See Kastenber, *supra* note 475, at 284.

<sup>490</sup> *Deuteronomy* 20:10.

<sup>491</sup> See M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT’L L. & COM. 281, 287 n.18 (1983).

vestige of independence.<sup>492</sup>

In ancient Greece, it was customary for the victor to seize the vanquished's artwork and put it on display at home as a sign of victory.<sup>493</sup> In particular, images of gods were seized to humiliate the enemy and secure the gods' strength for the victor state.<sup>494</sup> At the same time, there was a movement afoot among the ancient Greeks to advance a war policy of protecting cultural sites. This line of thought ended up influencing subsequent European history.<sup>495</sup> The Greek historian Herodotus (484-430 B.C.) chastised King Xerxes for campaigns in which he plundered Greek and Egyptian religious and political centers.<sup>496</sup> The historian Polybius of 3rd century B.C. Greece was perhaps the first commentator who called for the protection of a nation's cultural property from seizure by belligerents.<sup>497</sup> However, these critiques did not develop into any consistent pattern of protection until modern times.

There are also instances of repatriation of cultural property lost by defeated nations. For example, a group of figurines known as the Tyrannicides were looted from Athens by the Persians in 480 B.C. only to be returned by Alexander the Great after he defeated the Persians in 331 B.C. Alexander sought to protect, if not restore, cultural properties in his campaigns. For example, when he conquered Babylon, he revitalized its historic and religious center, which had been devastated by Persian rule.<sup>498</sup> However, from the fall of Rome through the Renaissance, while the idea that cultural property ought to be protected in time of war was expressed by philosophers and theorists it was seldom evidenced in the conduct of armed conflicts.<sup>499</sup> In the fourth Crusade, the Crusaders sacked the city of Constantinople and looted the great church, Hagia Sophia, dismantling ornaments, implements and everything else from the splendor of its interior, and distributed the materials among themselves.

#### *B. What Law Should Apply in Evaluating the Napoleonic Occupation of Egypt?*

As mentioned above, the Congress of Vienna required the French to cede art trophies looted from European capitals. Not included in this, however, were the

<sup>492</sup> HERODOTUS, *THE PERSIAN WARS* ch. 7, ¶ 7.8 (Francis Godolphin trans., Modern Library College ed. 1942).

<sup>493</sup> See Wilske, *supra* note 453, at 242.

<sup>494</sup> See *id.*

<sup>495</sup> See Kastenber, *supra* note 475, at 282.

<sup>496</sup> See HERODOTUS, *supra* note 492.

<sup>497</sup> See Merryman, *supra* note 397, at 833 n.7.

<sup>498</sup> See A.B. BOSWORTH, *CONQUEST AND EMPIRE: THE REIGN OF ALEXANDER THE GREAT* 87 (1993).

<sup>499</sup> See Kastenber, *supra* note 475, at 282.



Egyptian artifacts that the British had taken from Napoleon's forces. The armistice and peace treaty following the defeat of Napoleon required that the Egyptian artifacts be ceded to the British. However, since restitution was required of the artifacts seized by Napoleon from Europe, it is odd that the Egyptian antiquities were not included in the repatriation agreement. The British simply refused to repatriate the Egyptian antiquities that they had acquired from Napoleon. The treatment of cultural property under the law of war and conquest is important in determining the present legal status of Egyptian cultural property held in Britain. This section examines the law of war and conquest in effect at the time of the French Revolution to determine the legal methods of acquiring cultural property located in a conquered territory. The Article seeks to show that the Napoleonic occupation of Egypt was not a just war under the prevailing principles of the day. Moreover, at that time in history, the right of a victor to seize wartime booty was of dubious validity under the law of war. Therefore, the seizure of Egypt's cultural property can not be justified.

The threshold question is what body of international law<sup>500</sup> should be applied to evaluate whether a legitimate claim exists for the return of Egypt's cultural property seized during Napoleon's occupation of Egypt? It is a general principle of international law that if a dispute arises between states, the grievance should "not be judged upon the basis of practices and procedures which have since developed only gradually."<sup>501</sup> In other words, a grievance that occurred centuries ago should be evaluated on the basis of the applicable law of nations prevalent at that time.<sup>502</sup> Based on the laws then in effect, it seems clear that Napoleon did not engage in a just war and, under principles of international law then prevailing, the victor has no right to war booty. Even if it could be deemed a just war, Napoleon's occupation did not constitute a "conquest" that, under some views, might have entitled the conqueror to capture the cultural public property of Egypt. Let us first explore this devil's advocate view, that Napoleon's invasion of Egypt was arguably a just war.

### 1. Napoleon's Occupation of Egypt Seen As Just

Some might argue that the war, or the aggression that established the Napoleonic occupation in Egypt, was just based on the European conception of

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<sup>500</sup> The term "international law" is used here as a matter of convenience. It appears that the term was just emerging as parlance in the European states at the time. The English Utilitarian, Jeremy Bentham, apparently first employed the term in 1780. See C.J. Chacko, *International Law in India, Ancient India (pt. I)*, 1 INDIAN J. INT'L L. 184 (1960).

<sup>501</sup> *Right of Passage Over Indian Territory (Port. v. India)*, 1960 I.C.J. 6, at 37 (Apr. 12), cited in Hatti, *supra* note 396, at 481 n.144.

<sup>502</sup> See Hatti, *supra* note 396, at 482.

the law of nations then in effect. "The sense of the time was that European powers, in their dealings with one another, were bound by a code of conduct that did not apply when dealing with such political entities as 'Oriental kingdoms, Islamic emirates, or African chieftancies.'"<sup>503</sup> European powers at the time believed that territories "not in the possession of a Christian prince" were subject to acquisition either by discovery and occupation under the theory of *territorium nullius*, by right of conquest, or by cession of sovereignty to the European power through a treaty with the "non-Christian political community" and its sovereign.<sup>504</sup> Under this formulation, the law of nations among European states could be suspended with respect to Napoleon's incursion into Egypt.

Under the European interpretation of international law, the right of conquest was a permissible way of acquiring sovereignty over another state, thereby extinguishing the conquered state's sovereignty and status as an international legal entity.<sup>505</sup> Sovereignty, or having the attributes of an international legal entity, is defined as having the capacity to make treaties and agreements under international law, the capacity to make claims for breaches of international law, and the enjoyment of privileges and immunities from national jurisdiction.<sup>506</sup> States are the principle expression of international legal status.<sup>507</sup> States, in addition to having the capacity to engage in relations with other states, have a defined territory and population under the control of the state government.<sup>508</sup>

The right of conquest was the right of a conqueror to acquire sovereignty over a conquered territory and its people.<sup>509</sup> The only legal requirement was that the conquered territory be in the "effective possession" of the conqueror.<sup>510</sup> Effective possession could occur in three ways. First, military conquest could be followed by the complete extinction of the political existence of the conquered state — a doctrine known as *bellatio*.<sup>511</sup> Second, the conquered territory could be conveyed to the conqueror by a treaty of cession, providing that the defeated state remained in existence.<sup>512</sup> Third, the defeated state could acquiesce to the conquest of part of its territory by failing to attempt to recapture it.<sup>513</sup> However, even in the mid-eighteenth century, the law of war held that

<sup>503</sup> See *id.* (quoting HEDLEY BULL, *THE ANARCHICAL SOCIETY* 33 (1977)).

<sup>504</sup> SHARON KORMAN, *THE RIGHT OF CONQUEST* 42-43 (1996).

<sup>505</sup> See *id.* at 43-44.

<sup>506</sup> See LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 228 (2d ed. 1987).

<sup>507</sup> See *id.*

<sup>508</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987), reprinted in HENKIN, *supra* note 506, at 229.

<sup>509</sup> See KORMAN, *supra* note 504, at 8.

<sup>510</sup> See *id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 9.

<sup>513</sup> *Id.*

even if a conqueror acquired full sovereignty over the conquered state, rights over the conquered territory were neither absolute nor unlimited.<sup>514</sup>

The leading international law commentator of the period, Emeric de Vattel, tried to clarify the lawful aims of warfare.<sup>515</sup> He stated in his 1758 commentary, *The Law of Nations*, that the conqueror was permitted to take possession only of public property of the conquered state.<sup>516</sup> “The conqueror takes possession of the property of the State and leaves that of individuals untouched. The citizens suffer only indirectly by the war; conquest merely brings them a change of sovereigns.”<sup>517</sup> Thus, there is the view, at least expressed by Vattel, that if a conquest of another state has occurred, the conqueror has the right to take war booty consisting only of public property. Under this view, one might argue that Napoleon acted permissibly as a conqueror in taking the various objects of cultural property that ended up in the British Museum. However, as discussed below, Vattel also wrote that cultural property in the form of works of art, temples, tombs and the like ought to be protected from the ravages of war. Vattel thus distinguishes general public property from property in the nature of art and artifacts, which carries a special status of protection. One might still argue that what Vattel meant by protection of cultural property was merely protection from destruction, but that any type of public property, including but not limited to cultural property, may nonetheless be seized as war booty. In this sense, Vattel’s only point is that objects of cultural property should not be military targets.

It should be noted that Napoleon did not conquer Egypt but simply occupied it. Indeed, it was barely even an occupation in that the British quickly routed Napoleon. While it is true that Egypt was invaded with great force and was temporarily possessed by Napoleon’s army, the possession was far from secure. The mere fact of military occupation “does not confer title, nor extinguish a nation.”<sup>518</sup> “[S]o long as a people do not accept a military conquest; so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though flouted, restricted, and sent into exile, still persists.”<sup>519</sup> It appears that under international law applicable at the time, Egypt can not be said to have forfeited its status as a province of the Mamelukes. It is therefore questionable whether Napoleon’s army — or, for that matter, Britain’s forces — was in effective possession of Egypt so as to

<sup>514</sup> *Id.* at 31.

<sup>515</sup> See Graham, *supra* note 454, at 757.

<sup>516</sup> See Hatti, *supra* note 396, at 477.

<sup>517</sup> EMERIC DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* bk. 3, ch. 13, § 200 (J. Chitty ed., 1844) (1758).

<sup>518</sup> *Menzel v. List*, 267 N.Y.S.2d 804, 816 (1966) (citing 35 Am. J. Int’l. L. 666, 667 (1941)).

<sup>519</sup> *Id.*

have ousted Ottoman rule and forced a transfer of sovereignty. Arguably, neither the French nor the British ever acquired territorial sovereignty over Egypt. There was no announcement of annexation. The government of the Mamelukes remained to govern the state institutions of Egypt. No one was removed from power. There was no capitulation agreement or capture or surrender of Egyptian rulers — no treaty arrangement allowing the French or British to maintain a protecting force in Egypt. At most, Egypt was a territory under abbreviated occupation of the French and then the British.

## 2. Napoleon's Occupation of Egypt Seen As Unjust

The position of the European powers at the time of Napoleon that the general principles of the law of war did not apply to non-Christian states was an arbitrary custom that itself was a breach of international law. This position never gained currency in the legal analysis of the law of war with respect to war booty. Seventeenth and eighteenth century commentators drew a distinction between just and unjust war but made no distinction with respect to whether the opponent was a Christian or non-Christian state. This legal framework was crucial for evaluating whether wartime booty ought to be repatriated after the war. If a conqueror seized an enemy's property but did not have a justified right to wage war, the conqueror was obliged to return it. "The war prize acquired during an unjust war cannot be legalised even after a long period of time, as the right of prescription does not apply in the case of things that have been looted or taken by force. Even those who obtained property in good faith from a winner of an unjust war cannot become the owner of it by acquisitive prescription."<sup>520</sup> On this same subject, Hugo Grotius said:

If the reason for the war is unjust, all activities resulting from this war are unjust because of their intrinsic injustice.... The obligation of restitution lies with the persons who perpetrated the war, either by starting it, being rulers themselves, or by giving advice to rulers. This obligation extends to all wrongdoings that usually result from war.... A person who did not do any wrong or did it without guilt, and holds an object that has been taken by someone else in an unjust war, is obliged to give it back, because, according to the law of nature, no just reason exists for another person to be deprived of the object; he has not agreed to this or deserved such punishment, nor is there a need to fulfill any obligation.<sup>521</sup>

The attitude of the international community towards pillage of enemy

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<sup>520</sup> WOJCIECH A. KOWALSKI, *ART TREASURES AND WAR* 6 (1998).

<sup>521</sup> 3 HUGO GROTIUS, *DE JURE BELLI ET PACIS LIBRI TRES* 192-94 (W. Wherwell trans., Cambridge ed. 1853) (1646).

property, whether public or private, progressed to such an extent that in the 18th century, “[i]t thus came as a shock when the French, in the course of the Napoleonic wars, systematically pillaged the most valuable works of art wherever they went to enrich the newly-created Musee Napoleon or the Louvre.”<sup>522</sup> At the time of Napoleon, a just war could not be predicated on the pretext of the wish to govern others against their will, or the desire for imperialistic expansion.<sup>523</sup> Rather, a just war required that there be a serious grievance suffered by the party making war, and a refusal of redress by the other side. Vattel wrote in his 1758 commentary: “Whoever, without justificatory reasons, undertakes a war merely from motives of advantage, acts without any right, and his war is unjust.”<sup>524</sup> Vattel continues: “[T]he foundation, or cause of every just war is injury, either already done or threatened. The justificatory reasons for war show that an injury has been received, or so far threatened as to authorize a prevention of it by arms.”<sup>525</sup> And finally: “[A] nation taking arms when it has received no injury, nor is threatened with any, makes an unjust war.”<sup>526</sup> In his commentary, Vattel also discussed an emerging rule concerning the conduct of belligerents engaged in conflict on foreign soil, which prohibited wanton destruction and pillage of cultural property.<sup>527</sup> Vattel believed that works of art which “do honour to human society” should be spared from the ravages of war, and temples, tombs, public buildings, and “all works of a remarkable beauty” should be preserved to the extent possible,<sup>528</sup> stating: “[f]or whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society.”<sup>529</sup>

This principle, as expressed by Vattel, meant that a nation at war was under an obligation to preserve the enemy’s cultural property subject only to the rules of military necessity.<sup>530</sup> This is substantially the same doctrine that was codified in the 1954 Hague Convention<sup>531</sup> and this principle gained international acceptance after Napoleon’s capitulation. In the 1815 Convention, “nations allied against Napoleon ordered the return of cultural property, either taken by France through force or acquired by it through treaty, to the countries of

<sup>522</sup> Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1071.

<sup>523</sup> GROTIUS, *supra* note 521, bk. 2, ch. 22, §§ 5, 13.

<sup>524</sup> DE VATTEL, *supra* note 517, bk. 3, ch. 3, § 33.

<sup>525</sup> *See id.* bk. 2, ch.22, § 26.

<sup>526</sup> *See id.* bk. 2, ch. 3, § 27.

<sup>527</sup> *See id.* bk. 3, ch. 9, § 165.

<sup>528</sup> *Id.* bk. 3, ch. 9, § 168.

<sup>529</sup> *Id.*

<sup>530</sup> “For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy’s strength — such as temples, tombs, public buildings, and all works of remarkable beauty.” *Id.*

<sup>531</sup> Graham, *supra* note 454, at 757 (referring to 1954 Hague Convention, *supra* note 397).

origin.”<sup>532</sup>

Even before Vattel’s commentary, by the turn of the seventeenth century, the legal ground for the right of booty in a just war was being discredited. For example, John Locke criticized the old paradigm as follows:

[H]e that by Conquest has a right over a Man’s Person to destroy him if he pleases, has thereby a right over his Estate to possess and enjoy it. For it is the brutal force the Aggressor has used, that gives his Adversary a right to take away his Life, and destroy him if he pleases, as a noxious Creature; but this damage sustained that alone gives him Title to another Man’s Goods: For though I may kill a Thief that sets on me in the Highway, yet I may not (which seems less) take away his Money and let him go; this would be Robbery on my side. His force, and the state of War he put himself in, made him forfeit his Life, but gave me no Title to his Goods. The right then of Conquest extends only to the Lives of those who joined in the War, but not to their Estates, but only in order to make reparation for the damages received, and the Charges of the War, and that too with reservation of the right of the innocent Wife and Children.<sup>533</sup>

A good argument can also be made that the Treaty of Capitulation of 1801, in which the vanquished French surrendered and acquiesced to Britain’s demands, does not justify Britain’s retention of the artifacts. “Even an unconditional surrender does not release victors from their obligations under international law.... Not even Napoleon’s acquisition of cultural property, which was contracted in peace treaties, was recognized by the international community.”<sup>534</sup> Thus, by the time of Napoleon’s occupation of Egypt, customary international law had already undergone a transformation. The Treaty of Westphalia in 1648 provided for partial restoration of displaced cultural property to the estates of the Holy Roman Empire.<sup>535</sup> “Other treaties from both the 17th and 18th centuries showed an increasing willingness to provide for the return or exchange of cultural property (notably archives) between former belligerents.”<sup>536</sup> Before Napoleon arrived on the scene, Frederic II of Prussia had twice occupied Dresden and Russian, and Austrian armies had twice occupied Berlin without taking artifacts from their famous museums.<sup>537</sup> Clearly, by the time of the Napoleonic period, the right of spoils was no longer recognized as a valid means

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<sup>532</sup> Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR, WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 34 (Elizabeth Simpson ed., 1997).

<sup>533</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 309-10 (London, 1698).

<sup>534</sup> Wilske, *supra* note 453, at 263.

<sup>535</sup> *Id.* at 242.

<sup>536</sup> Graham, *supra* note 454, at 757.

<sup>537</sup> See Wilske, *supra* note 453, at 246.

of acquiring property even in the context of a just war.<sup>538</sup>

To review, a few things seem clear from this analysis of the development of international law as applied to Napoleon's invasion of Egypt. First, the military occupation was an act of aggression that did not constitute a just war. Second, under then-prevailing notions of wartime booty, France had no right to the antiquities it took. And third, Britain had no right to require France to cede those properties to Britain but instead should have insured that the items be repatriated to Egypt.

### XIII. A PARADIGM SHIFT IN THE LAW OF WAR REGARDING THE PROTECTION OF CULTURAL PROPERTY AND THE TAKING OF "WAR BOOTY" GAINED MOMENTUM THROUGHOUT THE NINETEENTH AND TWENTIETH CENTURIES

#### *A. The Prohibitions on "Art Trophies" in the War of 1812 and the Lieber Code*

A prize case arising from the War of 1812 seemed to endorse a paradigm shift away from what had been the ancient understanding of the rights of booty and prize-taking in war. The British Navy captured a ship, the *Marquis de Somereuils*, which contained works of art belonging to the Philadelphia Museum of Art. The British claimed the vessel and her cargo as prize in accordance with customary maritime law and brought a proceeding to adjudicate the prize in the Vice Admiralty Court sitting in Nova Scotia. In an historic precedent, the court held that the objects of artistic value on the ship were part of the common heritage of all mankind and hence were exempt from the law of prize. The court ordered that the works of art be returned to the museum and the order was carried out after the cessation of hostilities.<sup>539</sup> The holding in the case stated: "The arts and sciences are amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection."<sup>540</sup> A few decades later, in an 1836 piece by international law commentator Henry Wheaton, the principle behind the holding in the Case of the Vessel *Marquis de Somereules* was restated. Wheaton wrote that it was part of customary international law that "[m]onuments of art, and repositories of science, are exempted from the general operations of war."<sup>541</sup> According to Wheaton, this custom applied even where there was absolute and unqualified conquest of an enemy's country.<sup>542</sup>

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<sup>538</sup> *Id.*

<sup>539</sup> See Bassiouni, *supra* note 491, at 288 n.19 (citing Case of the Vessel *Marquis de Somereules*, 1812 *Stewarts Vice-Admiralty Reports* 482).

<sup>540</sup> J.B. MOORE, 7 *A DIGEST OF INTERNATIONAL LAW* 460 (1906).

<sup>541</sup> HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW*, pt. 4, ch. 11, at 5 (1836).

<sup>542</sup> *See id.*

Later in the nineteenth century, President Lincoln commissioned a war code drafted by Francis Lieber, a professor at the University of South Carolina until he resigned at the onset of the American Civil War because of his Union sympathies. The Lieber Code was first published in April of 1863.<sup>543</sup> Lieber later became a professor at Columbia University. The Lieber Code still forms the core of United States military law. The Lieber Code explicitly protected cultural property from seizure or destruction. Professor Lieber made it clear that the safety of classical works of art, museums, scientific collections and libraries was to be secured from destruction in time of war. Article 36 of the Code said: "In no case shall [cultural property belonging to a hostile nation] be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured."<sup>544</sup> Article 44 of the Code further declared that the unauthorized destruction or damage of property was "prohibited under penalty of death or other severe penalty adequate for the gravity of the offense."<sup>545</sup> The Lieber Code protections were substantially incorporated into the drafting of the Declaration of Brussels of 1874<sup>546</sup> and also into the Oxford Code of 1880, drawn up at a conference of the Institute of International Law.<sup>547</sup> However, neither of these treaties was ratified by a sufficient number of states to become binding in customary international law.<sup>548</sup>

*B. The Prohibitions on "Art Trophies" in the Twentieth Century Through World War II*

In spite of the failure of states to bind themselves to the principles of the Lieber Code, the Declaration of Brussels and the Oxford Code, it appears that by the end of the 19th century, the notion that cultural property deserved some measure of protection became established in customary international law.<sup>549</sup> By the close of the 19th century there was an international movement to reduce the destructiveness of war and the illegality of taking wartime booty became more firmly rooted as a principle of international law. This culminated first in the

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<sup>543</sup> Instructions for the Government of Armies of the United States in the Field General Order No. 100, Adjutant General's Office, Department of the Army, Apr. 24, 1863 (Lieber code), 2 F. LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE, INCLUDING LECTURES ON THE CONSTITUTION OF THE UNITED STATES AND OTHER WRITINGS 246 (1881).

<sup>544</sup> *Id.* art. 36.

<sup>545</sup> *Id.* art. 44.

<sup>546</sup> Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels), adopted by the Conference of Brussels, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219; *see also* Bassiouni, *supra* note 491, at 290.

<sup>547</sup> *See* Boylan, *supra* note 474, at 47.

<sup>548</sup> *See id.*

<sup>549</sup> *See* Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1072.



Hague Convention of 1899.<sup>550</sup> Then, a 1907 international conference convened by the United States and Russia in The Hague and attended by 44 sovereign states resulted in a series of interrelated treaties relating to the laws and customs of war. The 1899 and 1907 Hague Conventions produced a codified international law of warfare. Similar provisions in both Conventions prohibited invading armies from engaging in pillage, looting or confiscation of private property, and required invaders to respect the laws of conquered territories.<sup>551</sup>

The Regulations annexed to the Fourth Hague Convention of 1907<sup>552</sup> extended the protection of cultural monuments and institutions in time of war further than any of the nineteenth century codes.<sup>553</sup> Article 27 stated that it is forbidden to destroy or capture enemy property except when such destruction or expropriation is required by military necessity. “[A]ll necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments... provided that they are not being used at the time for military purposes.” Article 28 stated that the “pillage of a town or place, even when taken by assault [i.e., by storm], is prohibited.” Article 56 tracked the Lieber Code in reiterating that the “property of municipalities, that of institutions dedicated to religion, charity and education, the arts and the sciences, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to institutions of this character, historic monuments, works of art or science, is prohibited, and should be made the subject of legal proceedings.”<sup>554</sup>

World War I tested the Hague Conventions. Many regions that contained rich historic and cultural monuments were affected by widespread combat, including Basra, Baghdad, Palestine, the Sinai, France, Macedonia, Turkey, Britain, China, the Pacific, and central and eastern Europe. There was substantial bombing of cultural properties and looting of museums and cathedrals, which triggered international outrage.<sup>555</sup> As a result, in the 1920s and 1930s, the

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<sup>550</sup> Hague Convention Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949 [hereinafter 1899 Hague Convention].

<sup>551</sup> See *id.* art. 43.

<sup>552</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 [hereinafter 1907 Hague Convention].

<sup>553</sup> See Boylan, *supra* note 474, at 48; see also Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, art. 5, 36 Stat. 2351, 3 Martens Nouveau Recueil (ser. 3) 604. This Convention, also enacted at The Hague in 1907, protects cultural property by requiring that all necessary precautions be taken to spare historic monuments and edifices devoted to worship, art, science and charity. Although never formally adopted, the Hague Rules of Air Warfare reiterate that historic documents and other cultural institutions should be spared from bombing during hostilities. *Id.*

<sup>554</sup> 1907 Hague Convention, *supra* note 552, art. 56.

<sup>555</sup> Despite the application of the 1907 Hague Convention, World War I witnessed extensive violation of Hague’s provisions with bombardments of cathedrals such as that at Rheims as well as

United States moved to protect historic sites from destruction by initiating an international agreement known as the Roerich Pact.<sup>556</sup> This was the first international convention entirely devoted to the protection of cultural property but today has been superseded by other conventions.<sup>557</sup> The Roerich Pact was limited in extent and application but did embody the basic principles that were emerging in customary international law with respect to cultural properties.

During World War II, the conduct of the Allied forces in Europe was generally guided by field commanders who respected the notion of cultural preservation. For example, on December 29, 1943, General Eisenhower gave clear directions for the preservation of cultural property in Italy.<sup>558</sup> Nonetheless, during the Italian Campaign, Allied generals felt it necessary to level one of the

other historic monuments, museums and library collections such as that at Louvain. These were sometimes justified on the basis of "military necessity." The argument was that unless high structures such as cathedrals or medieval town hall towers were targeted, the enemy could use the buildings as observation points or for directing or launching attacks. See Boylan, *supra* note 474, at 49. The Germans conducted substantial looting of artifacts in France in World War I and earlier in the Franco-Prussian War of 1870. Return of these artifacts was among a number of specific reparations conditions of the 1919 Treaty of Versailles. Several Articles of the Treaty of Versailles pertained to the restoration, replacement or payment of reparations for cultural and artistic objects. Article 245 stated: "Within six months after the coming into force of the present Treaty, the German Government must restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by German authorities in the course of the war of 1870-1871 and during this last war, in accordance with a list which will be communicated to it by the French Government." Treaty of Peace with Germany, June 28, 1919, 11 Martens Nouveau Recueil (ser. 3) 323, 55 For. Rel. (Paris Peace Conference XIII) 740, 743, 2 Bevans 43. Turkey was also guilty of substantial looting during World War I. The Treaty of Sevres ordered Turkey to restore all seized trophies, archives, historical souvenirs or works of art taken prior to October, 1914. Article 422 of the treaty required the return of all objects of religious, archaeological, historical or artistic interest taken prior to August, 1914. However, the Sevres Treaty never went into effect. See The Treaty of Peace Between the Allied and Associated Powers and Turkey pt. VII (Treaty of Sèvres), art. 422, Aug. 10, 1920, reprinted in 15 Am. J. Intl. L. 179, 179-81 (Supp. 1921).

<sup>556</sup> The Inter-American Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 290 [hereinafter Roerich Pact].

<sup>557</sup> See Merryman, *supra* note 397, at 835.

<sup>558</sup> Eisenhower's instructions stated: "Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments as far as war allows. If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference." DEPARTMENT OF STATE AND FOREIGN AFFAIRS, AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT 48 (1946). This Report describes the work of the cited Commission, created in 1943, as well as the field operations of the Monuments, Fine Arts, and Archives Section (MFA&A) and the overall treatment of cultural property during and after hostilities in World War II. *Id.*

oldest and most revered sites in Europe, the medieval monastery at Monte Cassino, which was believed to be used as an observation post.<sup>559</sup> The monastic buildings, library, picture gallery and other structures were completely destroyed. In retrospect, it is generally agreed that this was not militarily necessary<sup>560</sup> as there were no German troops in the monastery but only observation posts and other defensive positions in the mountain around the abbey. The Monte Cassino destruction was by no means an isolated event but it came to symbolize the need for greater protections of cultural properties in wartime. World War II brought the largest systematic plundering of cultural property since Napoleon in the form of Hitler's Third Reich, which seized cultural property despite the Hague Conventions of 1899 and 1907 and other international agreements. The *Einsatzstab der Dienststellen des Reichleiters Rosenberg* was the Reich department established to gather *objects d'art* from all over Europe for "protection."<sup>561</sup>

### *C. The Movement to Prohibit "War Trophies" Following the Nazi Plunders*

Following World War II, there was an accelerated movement to provide effective international legal protection of historic and cultural property. During the war, the Nazis unscrupulously looted enormous quantities of works of art without regard for legitimate ownership.<sup>562</sup> The Nazi plunder of cultural property was condemned by a joint declaration signed by seventeen nations and the French National Committee and published simultaneously in London, Moscow and Washington on January 5, 1943.<sup>563</sup> This declaration became a springboard for efforts of restitution against the German pillage soon after the war.<sup>564</sup> Such efforts were partially successful in finding and returning looted property to the rightful owners.<sup>565</sup>

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<sup>559</sup> See M. BLUMENSON, U.S. ARMY IN WORLD WAR II, SALERNO TO CASSINO 395-418 (1969).

<sup>560</sup> See Merryman, *supra* note 397, at 839.

<sup>561</sup> Through a program of confiscation that started in December of 1941, 69,619 homes in Western Europe were plundered, including 38,000 in Paris alone. Most were Jewish homes. 26,984 railroad cars were needed to transport the looted objects to Germany. A list of 21,902 confiscated pieces was compiled as of July 14, 1944, including famous paintings and museum pieces. *United States v. Goering*, 6 F.R.D. 69, 157 (1946). The program was designed to plunder museums and libraries, confiscate art treasures and collections, and pillage private houses. *Id.* Four thousand post-impressionist works deemed "degenerate" by the Nazis were destroyed when the barn in which they were housed was needed to store grain. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 144 (1977).

<sup>562</sup> See Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1076.

<sup>563</sup> See Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory, 8 DEP'T ST. BULL., 21-22 (1943).

<sup>564</sup> See Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1076.

<sup>565</sup> See *id.*

The London Charter of August 8, 1945,<sup>566</sup> which established the Nuremberg Tribunal, stated that “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity” was a war crime punishable by the Tribunal.<sup>567</sup> Thus, the Nuremberg Tribunal made it a principle of international law that the confiscation, destruction or damage of cultural property constitutes a war crime. Two of Hitler’s top men were tried as war criminals before the Nuremberg International Military Tribunal for pillage of works of art, among other charges.<sup>568</sup> The Nazi pillaging was also found to violate Article 56 of the 1907 Hague Convention (IV), along with other provisions of international law.<sup>569</sup> The Nuremberg doctrine was confirmed in the Fourth Geneva Convention of August 12, 1949, “Relative to the Protection of Civilian Persons in Time of War.”<sup>570</sup> The Geneva Convention makes certain violations a “grave breach,” i.e., war crimes, although it does not reiterate some of the more detailed and explicit language of the 1907 Hague Convention. Article 147 designates the wanton destruction and appropriation of property during war as a “grave breach” of the Convention.<sup>571</sup>

The 1977 Protocols I<sup>572</sup> and II,<sup>573</sup> “Additional to the 1949 Geneva Conventions,” have provisions that apply to the protection of cultural property although these appear to be in the nature of reaffirming principles that had become customary international law rather than breaking new ground. Article 48 of Protocol I, for example, reiterates the customary principle of international law that combatants must distinguish between civilian objects and military targets.<sup>574</sup> Article 53 of Protocol I prohibits acts of hostility against historic monuments, works of art, and places of worship.<sup>575</sup> Both of these principles had

<sup>566</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

<sup>567</sup> See *id.* art. 6(b).

<sup>568</sup> See 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS 279-82, 288-91, 293-98 (1949).

<sup>569</sup> *United States v. Goering*, 6 F.R.D. 69, 157 (1946).

<sup>570</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Feb. 2, 1956) [hereinafter 1949 Geneva Convention].

<sup>571</sup> *Id.* art. 147.

<sup>572</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I].

<sup>573</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 [hereinafter, Protocol II].

<sup>574</sup> Protocol I, *supra* note 572, art. 48.

<sup>575</sup> *Id.* art. 53.

been well established in the Fourth Hague Convention of 1907<sup>576</sup> and as principles of customary international law by the Nuremberg Tribunal, as noted above.

In recent years, the International Criminal Court (“ICC”) has also codified the foregoing principles. Article 8 of the Rome Statute, the document establishing the ICC, defines “war crimes” as “grave breaches” of the Geneva Conventions of August 1949. With respect to cultural property, sub-section 2(b)(ix) declares a war crime “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments.”

It has long been the policy of the United States “that the desire for souvenirs in a combat theater not blemish the conduct of combat operations or result in the mistreatment of enemy personnel, the dishonoring of the dead, distraction from the conduct of operations, or other unbecoming activities.”<sup>577</sup> The Secretary of Defense has issued regulations prescribing the handling of battlefield objects. When forces of the United States in a theater of operations find property that deemed abandoned, it must be turned over to appropriate United States or allied military personnel.<sup>578</sup> It is prohibited for a member of the armed forces to “take from a theater of operations as a souvenir an object formerly in possession of the enemy” except in accordance with the Secretary of Defense’s regulations.<sup>579</sup>

The protection of cultural property during armed conflict and prohibitions against the seizure of “trophies of war” is something that has emerged at least since the time of Vattel’s commentaries in 1758. The modern rule, really hardly different that what Vattel argued for back then, that if booty is taken, it must be returned and cannot be used as part of a general wartime compensation package, was definitely codified in the 1954 Hague Convention, discussed below.

#### XIV. THE HAGUE CONVENTION OF 1954

The first international agreement to directly protect art and other cultural objects from wartime pillage was crafted as a reaction to the unparalleled damage caused by the plundering and bombing of artwork, first by the Nazis and then by the allies, during World War II.<sup>580</sup> The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (“Hague

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<sup>576</sup> See 1907 Hague Convention, *supra* note 552.

<sup>577</sup> 10 U.S.C. § 2579(a) (2004).

<sup>578</sup> 10 U.S.C. § 2579(b)(2) (2004).

<sup>579</sup> *Id.*

<sup>580</sup> See LYNN H. NICHOLAS, *THE RAPE OF EUROPA* (1994), for a thorough treatment of looting during World War II; see also Barbara Hoffman, *The Spoils of War*, *ARCHAEOLOGY*, Nov.-Dec. 1993, at 37.

Convention”) is unquestionably the most widely recognized international document to attain a truly effective and comprehensive protection of cultural property during hostilities. The Hague Convention was the culmination of the development of an international law of war governing cultural property that began with the Vattel commentaries and was later echoed in the Lieber Code. The 1954 Convention expanded on the 1907 Convention by taking into consideration the events of World Wars I and II and by incorporating provisions of the 1949 Geneva Conventions.<sup>581</sup>

The Hague Convention is notable for its effort to preserve artifacts in their original sites and to prevent their removal or destruction by hostile military action.<sup>582</sup> The Hague Convention requires signatory states to: refrain from wartime looting and destruction of art objects except in cases of military necessity;<sup>583</sup> avoid using cultural property to shelter military equipment or forces; abstain from destroying cultural property during acts of reprisal; and allow “competent authorities” to enter war zones to ensure that cultural property is being preserved. The treaty also establishes a blue-and-white shield to be used to identify cultural property,<sup>584</sup> and establishes an “International Register of Cultural Property Under Special Protection.”<sup>585</sup> The scope of protection for cultural property was greatly expanded by the Hague Convention because it explicitly provides for application of its provisions not just in the event of an international armed conflict but also in cases of “any other armed conflict” between the parties,<sup>586</sup> “partial or total occupation” of a territory,<sup>587</sup> and even

<sup>581</sup> See the Hague Convention and commentaries, *supra* note 397.

<sup>582</sup> Article 14 of the 1954 Hague Convention prohibits the seizure of cultural property as prizes or trophies of war. 1954 Hague Convention, *supra* note 397, art. 14. It was promulgated in direct response to German military looting during World War II. See Kastenberg, *supra* note 475, at 293.

<sup>583</sup> The military necessity exception is divided into two categories. For cultural property under general protection of the Convention, the obligations of the parties “may be waived only in cases where military necessity imperatively requires such a waive.” 1954 Hague Convention, *supra* note 397, art. 4. A separate provision pertains to objects under special protection, which includes objects of “very great importance” as well as immovable objects, such as “centres containing monuments” and refuges intended to shelter movable cultural property if they are “situated at an adequate distance from a large industrial centre or from any important military objective” and “are not used for military purpose.” *Id.* art. 8, ¶ 1. With respect to objects granted this special protection, the military necessity exception is stated as follows: “[I]mmunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.” *Id.* art. 11, ¶ 2.

<sup>584</sup> *Id.* art. 16, ¶ 1.

<sup>585</sup> *Id.* art. 8, ¶ 6.

<sup>586</sup> *Id.* art. 18 ¶ 1.

<sup>587</sup> *Id.* art. 18, ¶ 2.

conflicts “not of an international character.”<sup>588</sup> Thus, the Convention applies to armed conflicts of all possible kinds.

There are many who argue that there should be no “military necessity” exception in any international protocols with respect to cultural property and that the prohibitions against attacking cultural property should be absolute in all circumstances.<sup>589</sup> On the other hand, in an international convention such as Hague of 1954, to which national states are parties, a concession allowing an exception in cases of military necessity may be unavoidable in order to garner the support of certain powerful nations. The United States and the United Kingdom have not ratified the Hague Convention, partly out of concern that it is too restrictive and significantly extends customary international law.<sup>590</sup>

One of the main differences between the 1907 and 1954 Hague Conventions, and arguably an example of the extension of international law, is the latter’s definition and use of the term “cultural property.” For the first time in an international treaty, the 1954 Convention did away with the traditional distinction between public and private property and afforded special protected legal status to all cultural property. The 1907 Hague Convention distinguished between public and private property and, while it only provided protection for private property, the 1907 Convention deemed institutions dedicated to religion, charity, education, the arts and the sciences as having private property interests, even if they were state-owned.<sup>591</sup>

Although the United States did not become a party to the 1954 Hague Convention, it ironically has taken more steps to comply with the Convention than most state parties.<sup>592</sup> The United States Army maintains civil affairs units detachments performing the functions mandated by the World War II Monuments, Fine Arts and Archives Section.<sup>593</sup> Each of the United States military branches incorporates training on the protection of cultural property into its law of war manuals<sup>594</sup> and a joint service directive specifies that objects of art or of historical value may not be seized as “war trophies.”<sup>595</sup> In armed conflicts before promulgation of the Convention, the United States issued strict

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<sup>588</sup> *Id.* art. 19, ¶ 1.

<sup>589</sup> *See, e.g.,* Boylan, *supra* note 474, at 70.

<sup>590</sup> *See* Cuning, *supra* note 479, at 220.

<sup>591</sup> *See id.* at 223.

<sup>592</sup> *See* HAYS PARKS, PROTECTION OF CULTURAL PROPERTY FROM THE EFFECTS OF WAR, IN THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER, AND ACCESS 3-1 (Marilyn Phelan ed., 1998).

<sup>593</sup> *See id.* at 3-23.

<sup>594</sup> *See id.*

<sup>595</sup> *See id.* (citing Army Regulation 608-4, O.P.N.A.V.I.N.S.T. 3460.7A, Air Force Regulation 125-13, and Marine Corps Order 5800.6A (Aug. 28, 1969)).

instructions for the protection of cultural property.<sup>596</sup> And the Hague Convention was invoked in both the 1991 and 2003 Iraqi wars in the context of protecting cultural property.<sup>597</sup> During the Desert Storm campaign in 1991, the United States claimed that the Iraqis had used cultural property within their control as a “shield” to protect military targets from attack.

A classic example is the positioning of two MIG-21 fighter aircraft at the entrance of the ancient city of Ur. Although the laws of war permitted their attack, and although each could have been destroyed utilizing precision-guided munitions, US commanders recognized that the aircraft for all intents and purposes were incapable of military operations from their position, and elected against their attack for fear of collateral damage to the monuments.<sup>598</sup>

The 2001 invasion of Afghanistan by coalition forces also demonstrated that armed forces adhere somewhat meticulously to the letter and spirit of wartime conventions protecting cultural property.

Still, the 1954 Hague Convention has often proved ineffective in preventing the intentional destruction of artifacts. During the long period of conflicts between the Soviets and Afghanistan, the Kabul Museum was virtually emptied. Certain items are still being sought.<sup>599</sup> During the Iran-Iraq War, many ancient monuments in Iran were deliberately destroyed. And during Iraq’s brief invasion of Kuwait in 1991, the Iraqi army nearly emptied the Kuwait Museum,<sup>600</sup> many of its treasures are still missing.<sup>601</sup> Iraq ratified the 1954 Convention<sup>602</sup> yet many truckloads of Kuwaiti art were carted back to Baghdad as trophies and the interiors of the Kuwait National Museum and the Museum of

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<sup>596</sup> See *id.* at 3-23.

<sup>597</sup> See David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 371-77 (1993) (discussing 1954 Hague Convention’s application to grievances against government of Iraq); see also John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 FLA. J. INT’L L. 481, 493-94 (2003).

<sup>598</sup> Patrick J. Boylan, *Review of the Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention of 1954)*, UNESCO, at 201-06, U.N. Doc. CLT.93/WS/12 (1993), available at <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf> (quoting U.S. Department of Defense statement to Congress, Jan. 19, 1993) (last visited Jan. 1, 2005).

<sup>599</sup> See Lawrence M. Kaye, *Looted Art: What Can and Should be Done*, 20 CARDOZA L. REV. 657, 669 (1998); see also *Afghani Restoration Lags: Looting Proceeds Apace*, SCI., July 4, 2003, at 25 (quoting Omar Khan Masudi, director of National Museum in Kabul, who said “[r]econstruction is going very, very slowly” and noted that of 70,000 objects stolen, only 416 had been recovered by the museum).

<sup>600</sup> See Kaye, *supra* note 599, at 665.

<sup>601</sup> See *id.* at 669.

<sup>602</sup> See Cuning, *supra* note 479, at 228.



Islamic Art in Kuwait were burned, in clear violation of the Hague Convention. Since the 1954 Hague Convention is largely self-enforcing, there was no way for the international community to directly remedy the Iraqi violations. Article 28 obliges signatory states to prosecute and impose sanctions upon those who commit or order a breach of the Convention. However, there is no procedure to force a nation to take such measures or to comply with the Convention itself.<sup>603</sup> Despite this deficiency, the Convention enjoys widespread international support and is largely reflective of customary international law.<sup>604</sup> Iraq has argued that it did not loot the Kuwaiti objects but was acting in compliance with the Hague Convention by “safeguarding” the objects from damage in accordance with Article 5 of the Convention.<sup>605</sup> It should be noted that under pressure from the United Nations and the international community, Iraq eventually returned some of the Kuwaiti artifacts.<sup>606</sup>

There are other examples, however, of Hague Convention failures. In 1993, a rocket destroyed the collection of Central Asian artifacts in the Kabul Museum. In 1998, the Hague Convention failed to prevent the Taliban’s “war on false idols” in Afghanistan in which the Taliban destroyed countless objects deemed offensive to Islam, including the two largest Buddhas in the world, one 175-feet high and the other 120-feet, both 1,500 years old and carved into cliffs.<sup>607</sup> In Cambodia, military factions engaged in the plunder of Khmer temples and monuments, so that in Angkor Wat, only eighteen Buddha statues survive out of the original 1000, with widespread reports of sales of looted statues on the black market.<sup>608</sup> The Hague Convention was unable to prevent and is unable to remedy these losses. Nor could the Convention prevent the Iraqis from looting and destroying Iraqi artifacts during the 2002 American-led invasion of Iraq. While the Hague Convention provides a solid legal framework for challenging nations that have violated its principles, in all of the cases just mentioned, much of the damage is irreversible and irreparable.<sup>609</sup>

The 1954 Hague Convention was reaffirmed in Article 53 of the 1977 Additional Protocols to the Geneva Conventions of 1949, which recognize that

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<sup>603</sup> See *id.*

<sup>604</sup> See Kastenberg, *supra* note 475, at 302.

<sup>605</sup> See Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM-VLA J.L. & ARTS 49 (1999).

<sup>606</sup> See Cunning, *supra* note 479, at 230.

<sup>607</sup> See Brodie, *supra* note 403, at 6; see also Barry Bearak, *Afghan Says Destruction of Buddhas is Complete*, N.Y. TIMES, Mar. 12, 2001, at A4.

<sup>608</sup> See Brodie, *supra* note 403, at 6-7.

<sup>609</sup> See Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT’L L. 1 (1998); see also Meyer, *supra* note 597, at 349.

historic monuments, archaeological sites, and other artwork are considered the property of all mankind, rather than of a single state.<sup>610</sup> In 1999, an additional protocol was adopted to supplement the Hague Convention. This protocol has four purposes: (1) clarify the definition of “military necessity”; (2) create an “enhanced protection” category for objects of cultural heritage that are of the greatest importance to humanity; (3) establish stricter sanctions for serious violations against cultural property; and (4) establish an Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict.<sup>611</sup>

There is some question as to whether the Hague Convention is effective in dealing with the destruction of cultural heritage artifacts within the context of *religious* conflicts, however deliberate the attacks may be. Had the Hague Convention been in effect during the Crusades, the Protestant revolution, or the religious wars of the sixteenth and seventeenth centuries, the destruction that occurred during those events would have been exempt from the Convention’s provisions. The great majority of those losses were not due to war, collateral damage, or acts of ignorance or lack of care, but rather to direct and intentional attacks on cultural heritage in the context of internal religious and ethnic strife. Modern examples of this phenomenon have occurred in the former Yugoslavia, partitioned Cyprus, Afghanistan and elsewhere. The Hague Convention could be enhanced to provide specific mechanisms for dispute settlement and enforcement. While the ICC has already asserted jurisdiction over such matters because it considers the plunder of cultural property to be a war crime under customary international law,<sup>612</sup> the Convention could specifically provide for a jurisdictional link with the International Criminal Court (“ICC”) and require that contracting parties submit to its jurisdiction.

## XV. PROTECTION OF CULTURAL PROPERTY IN TIMES OF PEACE: THE UNESCO CONVENTION

### A. Substantive Provisions of the UNESCO Convention

The 1954 Hague Convention applies to the international trafficking of unlawfully seized cultural property during war as well as after the termination of

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<sup>610</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, June 8, 1977, art. 37(1), 1125 U.N.T.S. 3 [hereinafter Additional Protocol 1].

<sup>611</sup> See Jan Hladik, *Diplomatic Conference on the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15-26, 1999)*, 8 INT’L J. CULTURAL PROP. 526 (1999).

<sup>612</sup> See Cuning, *supra* note 479, at 237.

the conflict. Thus, by extension, the Convention applies to peacetime conduct which derives from conduct or events that originated during wartime. Beyond this one exception, however, the Convention's scope pertains strictly to conduct in time of war. As discussed in Section XIX, C, *infra*, some critics believe that the looting and pillage of cultural property in time of peace, such as may occur in guerilla warfare, terrorist attacks, civil war or religious strife, ought to be a crime against humanity, perhaps addressed as some kind of human rights violation. The international community recognizes an array of human rights, the violation of which constitute international crimes. Human rights are often connected to economic rights, property rights and environmental rights.<sup>613</sup>

There are a number of other international treaties, conventions and agreements, as well as many laws specific to sovereign states, pertaining to the protection of cultural property outside the context of war. Perhaps the most important multilateral treaty to protect cultural property in time of peace is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention").<sup>614</sup> The United States<sup>615</sup> and Canada<sup>616</sup> joined the UNESCO Convention years ago and in March, 2001, the United Kingdom joined,<sup>617</sup> thereby enhancing the prospects for international cooperation in enforcement of the treaty. The UNESCO Convention defines "cultural property" broadly.<sup>618</sup> It makes illegal the import, export, or transfer of title to cultural property in a manner contrary to its provisions.<sup>619</sup> Parties to the

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<sup>613</sup> See Bassiouni, *supra* note 491, at 312; see also John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claim Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL'Y 133 (2001/2002).

<sup>614</sup> UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention].

<sup>615</sup> The United States adopted the UNESCO Convention on August 11, 1972. 118 CONG. REC. 13, 378-79 (daily ed. Aug. 11, 1972); see also 19 U.S.C. §§ 2601-2613 (1988).

<sup>616</sup> See Cultural Property Export and Import Act, ch. 50, § 31(2), 1974-1976 S.C. 16 (1975) (Can.). See generally Ian C. Clark & Lewis E. Levy, *National Legislation to Encourage International Cooperation: The Cultural Property Export and Import Act of Canada*, in THE CHALLENGE TO OUR CULTURAL HISTORY: WHY PRESERVE THE PAST? 213 (Yudhishtir R. Isar ed., 1986).

<sup>617</sup> *The Secretariat Report of the 12th Sess., UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin*, UNESCO, 12th Sess., art. 3(18), U.N. Doc. CLT-2003/CONF.204/2 (2003).

<sup>618</sup> The UNESCO Convention recognizes 11 broad categories of cultural property, including: "objects of paleontological interest"; "property relating to history"; "products of archaeological excavations"; "elements of artistic or historical monuments"; "antiquities more than one hundred years old"; "objects of ethnological interest"; "property of artistic interest"; "documents and publications of special interest"; "postage, revenue and similar stamp"; "archives"; and "articles of furniture more than one hundred years old." UNESCO Convention, *supra* note 614, art. 1.

<sup>619</sup> UNESCO Convention, *supra* note 614, art. 3.

Convention agree to: (1) prevent the transfer of ownership and illicit movement of cultural property; (2) insure the earliest possible restitution of property to rightful owners; (3) admit actions for recovery of cultural property brought by or on behalf of aggrieved parties; and (4) recognize the indefeasible right of each state to declare certain cultural property inalienable and not susceptible to exportation.<sup>620</sup>

Only when a state party determines that an item of property qualifies as cultural property is that property subject to the protections of the UNESCO Convention. Articles 6 and 7 provide for export and import controls.<sup>621</sup> Article 6 mandates that cultural property be subject to an export certification<sup>622</sup> and prohibits the exportation of such objects without certification.<sup>623</sup> Article 7(b)(i) prohibits signatory states from importing cultural property that has been stolen from museums, religious or secular public monuments, or similar institutions.<sup>624</sup> Article 7(b)(ii) allows a party seeking recovery and return of illegally exported cultural property to make a demand through diplomatic channels by providing documentation to establish its claim.<sup>625</sup> The claimant state must pay just compensation to an innocent purchaser who has "valid title"<sup>626</sup> and bear all other expenses incident to return of the property. Article 5 of the UNESCO Convention provides for the establishment by signatory states of one or more "national services"<sup>627</sup> to conduct a "national inventory of protected property."<sup>628</sup> Article 10 directs states to require antique dealers to maintain a record of the origin of each item of cultural property, the name and address of its supplier, a description and the price of each item sold, and to inform purchasers of relevant export prohibitions.<sup>629</sup> Another provision of the Convention provides that a state party whose cultural patrimony is threatened by pillage of its archaeological or ethnological materials may call upon other states parties to help prevent such injury.<sup>630</sup>

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<sup>620</sup> *Id.*

<sup>621</sup> *Id.* arts. 6, 7.

<sup>622</sup> Article 6(a) requires state parties "[t]o introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations." *Id.* art. 6(a).

<sup>623</sup> *Id.* art. 7(b)(i).

<sup>624</sup> *Id.*

<sup>625</sup> *Id.* art. 7(b)(ii).

<sup>626</sup> *Id.*

<sup>627</sup> *Id.* art. 5.

<sup>628</sup> The Convention describes the material to be included in the national inventory as "important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage." *Id.* art. 5(b).

<sup>629</sup> *Id.* art. 10.

<sup>630</sup> *Id.* art. 9.

The UNESCO Convention authorizes nations to enter into agreements to enforce one another's cultural property laws. The Convention has little by way of enforcement protocols, although signatory states are required to enact implementing legislation, as discussed in Section XV, B, *infra*. The Convention provides for a kind of nonbinding arbitration. "At the request of at least two State Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them."<sup>631</sup> The Convention provides for the imposition of penalties or administrative sanctions for violations of articles 6(b) or 7(b), but otherwise generally provides only for the parties to oppose practices prohibited by the Convention "within the means at their disposal."<sup>632</sup>

The UNESCO Convention sets forth three mechanisms by which illicit traffic in cultural property may be controlled. First, states are to implement legislation to provide for legal enforcement of its provisions as appropriate for each country, including the development of legislation to protect each country's cultural heritage, to prevent the illicit export and transfer of cultural property and to establish ethical principles to guide transactions in cultural property.<sup>633</sup> Second, consistent with national legislation, states are to prevent the import and acquisition of cultural property illegally exported from other countries.<sup>634</sup> That means that aggrieved states may pursue claims for illegally exported antiquities in foreign jurisdictions and may expect that foreign courts of other member nations will enforce the national antiquities laws of other signatories. Third, states are to prohibit the export of cultural property from their territory unless accompanied by an export certificate.<sup>635</sup> A duty is imposed, consistent with the laws of each state, to admit actions for recovery brought by the rightful owners of cultural property.<sup>636</sup>

The UNESCO Convention was supplemented by the 1972 Convention on the Protection of the World Cultural and Natural Heritage (the "World Heritage Convention").<sup>637</sup> This convention developed a system of international cooperation and assistance designed to support the signatory states in their efforts to identify and conserve objects of cultural and natural heritage.<sup>638</sup> States are called upon to establish national services to protect, conserve and exhibit

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<sup>631</sup> *Id.* art. 17, ¶ 5.

<sup>632</sup> *Id.* art. 2(2).

<sup>633</sup> *Id.* art. 5(a), (e).

<sup>634</sup> *Id.* art. 7.

<sup>635</sup> *Id.* art. 6.

<sup>636</sup> *Id.* art. 13(c).

<sup>637</sup> Convention on the Protection of the World Cultural and Natural Heritage, U.N. Doc. A/CONF.48/PC.11/Add., at 3, 15 (1972) [hereinafter World Heritage Convention].

<sup>638</sup> *Id.* art. 7.

cultural property,<sup>639</sup> and to take appropriate legal, scientific, technical, administrative and financial measures for the identification, protection, conservation and rehabilitation of cultural heritage.<sup>640</sup>

*B. Implementation of the UNESCO Convention in the United States*

Nations that have become signatories to the UNESCO Convention are required to enact implementing legislation to assist foreign nations attempting to recover looted cultural artifacts by providing the enforcement mechanisms of a foreign statute. In 1983, the United States enacted the Convention on Cultural Property Implementation Act ("CPIA").<sup>641</sup> The Act empowers the U.S. State Department to accept requests from countries seeking to place import restrictions on archaeological artifacts that have been looted from abroad. The Act establishes the Cultural Property Advisory Committee, which is to determine whether requesting countries' cultural patrimony is in jeopardy before ruling on the merits of requests to restrict importation of objects.<sup>642</sup> According to Harvard Law professor Paul Bator, who was a principal author of the Act, it is "perfectly clear that the power to place import controls on art was seen as an extreme and dangerous step to be used only in cases of great necessity.... There really has to be some specific showing that illegal export is destructive to some important category of art."<sup>643</sup> Under the law, an object must be "the product of a tribal or non-industrial society" and "important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people."<sup>644</sup> The CPIA explicitly recognizes the concept and the value of communal property rights and fosters its protection, but only for foreign cultural entities.<sup>645</sup>

The CPIA primarily addresses the question of import controls and, in Section 2607, prohibits the importation into the United States of any "cultural property documented as appertaining to the inventory of a museum or religious or secular

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<sup>639</sup> *Id.* art. 5(b).

<sup>640</sup> *Id.* art. 5(d).

<sup>641</sup> 19 U.S.C. §§ 2601-2613 (1988).

<sup>642</sup> See James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 86 (2001).

<sup>643</sup> Leonard D. Duboff et al., *Proceedings of the Panel on the United States Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97, 132 (1976) (quoting Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN L. REV. 275, 305 (1982)).

<sup>644</sup> 19 U.S.C. § 2601(2)(C)(ii) (1988).

<sup>645</sup> 19 U.S.C. § 2601.

public monument or similar institution in any State Party which is stolen from such institution.”<sup>646</sup> The policy under the Act is clear. We should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution. This is particularly true where this sort of property is “important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.”<sup>647</sup>

The Act authorizes the President to enter into agreements with other nations to apply import restrictions on archaeological or ethnological material from nations that request such cooperation from the United States. States that have restricted the export of certain cultural properties may request that the United States disallow the importation of these objects unless they are accompanied by an export license issued by the country of origin. The President may impose import restrictions upon a determination that: (1) the cultural patrimony of the requesting nation is in jeopardy from the pillage of archaeological or ethnological materials of that nation, despite protections taken by that nation to protect such materials; (2) the import restrictions are necessary and would be effective in dealing with the problem; and (3) the measures are in the “general interest of the international community.”<sup>648</sup> The CPIA was not intended to affect or modify any federal or state laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce.<sup>649</sup> It is important to note that many commentators think the CPIA not capable of stopping the pillage of cultural patrimony because the Act to some extent limits the effect of the UNESCO Convention by requiring an independent United States investigation and determination of the gravity of allegedly illicit traffic before action is taken under the Convention.<sup>650</sup>

### *C. The Impact of the UNESCO Convention*

The UNESCO Convention provides a strong moral impetus for nations and museums to prevent the unlawful trade in antiquities. UNESCO appears to have been effective in facilitating fruitful dialog, establishing the concept of cultural

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<sup>646</sup> 19 U.S.C. § 2607 (1988).

<sup>647</sup> 19 U.S.C. § 2601(2)(C)(ii)(II).

<sup>648</sup> 19 U.S.C. § 2602(a)(1)(A)-(D) (2003).

<sup>649</sup> S. REP. NO. 97-564, at 33 (1982).

<sup>650</sup> See, e.g., Leah A. Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 COLUM.-VLA J.L. & ARTS 423, 442 (1988) (claiming law unduly accommodates art lobby's interests); see also Earle A. Partington & Yves-Louis Sage, *The American Response to the Recovery of Illegally Exported Art: Should the American Courts Look to Civil Law?*, 12 COLUM.-VLA J.L. & ARTS 395, 397 (1988) (arguing United States failed to implement legislation favorable to artifact-rich nations and failed to aid in arresting illicit art traffickers).

identity, creating a new awareness among cultural groups regarding the rediscovery and rescue of their cultural history, and inspiring bilateral arrangements between states and institutions resulting in the physical return of objects. With respect to the laws of state parties, since the Convention is not retroactive, if it can not be shown that an object was stolen and illegally exported after the Convention entered into force for both the exporting and importing states, the Convention can not be applied. That the Convention is not retroactive also means that it does not cover any of the historic cases of removal of cultural property. However, as noted in Section XIX, C, *infra*, emerging international legal principles may, in some instances, allow for retroactive application of cultural property law. Moreover, the diplomatic efforts of the Intergovernmental Committee extend to cases such as the Parthenon Marbles which substantially predate the Convention.

With the establishment of the UNESCO Convention, the international trade in cultural property is receiving sustained legal attention. In the resulting dialog, “stolen” and “illegally exported” cultural property have emerged as key categories. The UNESCO Convention has impacted the policies of major museums, which for many years acted to underwrite the trade in illicit artifacts by buying objects of dubious provenance on the open market and acquiring such objects as gifts from private collections.<sup>651</sup> Museums are at the forefront of public policy-making in terms of what should and should not be acquired, preserved and exhibited for the edification of the larger community. Museums are in agreement that they have a duty to refrain from knowingly acquiring or exhibiting artifacts which have been stolen, illegally exported from their countries of origin, or illegally salvaged or removed from commercially exploited archaeological or historic sites, in accordance with the principles set forth in the UNESCO Convention. For example, Section 3.2 of the 1986 International Council of Museums (“ICOM”) Code of Professional Ethics states:

A museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing body and responsible officer are satisfied that the museum can acquire a valid title to the specimen or object in question and that in particular it has not been acquired in, or exported from, its country of origin and/or any intermediate country in which it may have been legally owned (including the museum’s own country), in violation of that country’s laws....

In addition to the safeguards set out above, a museum should not acquire objects by any means where the governing body or responsible officer has reasonable cause to believe that their recovery involved the unauthorised,

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<sup>651</sup> See Brodie, *supra* note 403, at 18.



unscientific or intentional destruction or damage of ancient monuments, archaeological or geological sites, or natural habitats, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.<sup>652</sup>

*D. Objections To and Critiques of Some Inadequacies of the UNESCO Convention*

There are certain flaws with the UNESCO Convention. This can no doubt be said of any agreement which is the product of diverse positions and interests that must garner a high degree of international support. While the UNESCO Convention is the most comprehensive attempt by the international community to respond to cultural property disputes, it is limited in scope and in practice. First, as noted above, the Convention is generally regarded as not being retroactive, so that it does not apply to cultural property that was stolen before its effective date<sup>653</sup> and the Convention pertains only to disputes between states that are parties to the Convention. Second, the UNESCO Convention only provides for the return of cultural property upon payment of just compensation.<sup>654</sup> This provision effectively inhibits third world nations from signing the Convention because they may be unable to pay for art objects that rightfully belong to them.<sup>655</sup> Third, the UNESCO Convention allows source nations to prohibit *all* export of cultural property, that is, to enact strict embargo laws. Such protectionist laws often have precisely the opposite effect. While the UNESCO Convention seeks to encourage extensive reductions in illicit traffic of cultural property, it often fails. Export and retention laws of source nations frequently spawn *more* illegal traffic, suggesting that more controls can actually exacerbate black market sales.<sup>656</sup>

Another limitation of the Convention is that it is under-inclusive with respect to certain classes of protected cultural property. Article 6 of the Convention requires that state parties prohibit the *export* of cultural property that is not accompanied by an export certificate. However, the Convention requires only that state parties prohibit the *import* of cultural property that is stolen, originated from a museum, public monument or similar institution, and was documented as

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<sup>652</sup> See also International Council of Museums, *Code of Ethics for Museums* § 3.2 (1986), available at [http://icom.museum/ethics\\_rev\\_engl.html](http://icom.museum/ethics_rev_engl.html) (last visited Jan. 1, 2005).

<sup>653</sup> Although there is nothing explicit in the language of the Convention concerning this point, it is generally understood that the Convention is not retroactive. See Bator, *supra* note 643, at 378-79 (arguing that article 15 implies that Convention follows general rule that application is prospective only).

<sup>654</sup> UNESCO Convention, *supra* note 614, art. 7(b)(ii).

<sup>655</sup> See Moustakas, *supra* note 417, at 1219 n.164.

<sup>656</sup> See Merryman, *supra* note 397, at 848.

inventory of a museum, monument or similar institution.<sup>657</sup> Thus, state parties are under no obligation to recover and return cultural property even when it has been stolen and exported illegally if the property was not documented in the inventory of the museum, monument or institution from which it was looted. Also not protected are items looted from locations other than established museums, public monuments or similar institutions — such as from newly discovered archaeological sites. And it is not clear whether established archaeological sites are considered museums, public monuments or similar institutions under article 7(b)(i). Also, the Convention does not protect items stolen from private collections, even though such items may be significant to the cultural heritage of the country of origin.

Had the UNESCO Convention been in effect at the time of Napoleon's occupation of Egypt, it is doubtful that it would have helped to protect the antiquities looted from Egypt. There are three main reasons for this. First, the property was not "stolen" in a legal sense but rather was acquired as war booty pursuant to a claim of rights by a victor against a captive state (even though, as mentioned above, international law at the time seemed to reject the so-called rights of victors to trophies of war). At any rate, the Ottoman officials of Egypt did not resist the seizures in any significant way and the looted materials were effectively "laundered" by the Treaty of Capitulation of 1801 when they were ceded to the British. Second, many of the items were not taken from museums or public monuments. Third, it is doubtful whether any of the items were documented as inventory of any monuments or institutions.

#### *E. The UNIDROIT Convention*

In the 1980s, UNESCO asked the International Institute for the Unification of Private Law ("UNIDROIT") to draft a second convention modeled on the UNESCO Convention that would be acceptable to market states that had not ratified the UNESCO Convention.<sup>658</sup> While the UNIDROIT Convention expands rights upon which return of cultural property can be sought,<sup>659</sup> it also addresses the British objections to the earlier UNESCO Convention. The UNIDROIT Convention includes a time limit for claims brought by a source nation for the return of stolen objects, requiring that claims be brought "within a period of three years from the time the claimant knew of the location of the

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<sup>657</sup> UNESCO Convention, *supra* note 614, art. 7(b)(i).

<sup>658</sup> See Harold S. Burman, *Introductory Note* to International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, art. 3, 34 I.L.M. 1322, 1322 (1995) [hereinafter UNIDROIT Convention].

<sup>659</sup> The UNIDROIT Convention includes some private causes of action and expands the scope of objects covered. *Id.*

cultural object and the identity of the possessor, and in any case within a period of fifty years.”<sup>660</sup> Additionally, the UNIDROIT Convention places the burden of proof on the claimant state.<sup>661</sup> The claimant state must first prove a violation of its laws “regulating the export of cultural objects for the purpose of protecting its cultural heritage.”<sup>662</sup> The claimant state must then prove that the removal of the cultural object significantly impairs the state or community interests listed in the Convention<sup>663</sup> or that the object is otherwise of significant cultural importance.<sup>664</sup>

The UNIDROIT Convention advocates market inalienability based on the “importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation... with the objective of improving the preservation and protection of the cultural heritage in the interest of all.”<sup>665</sup> Both UNESCO and UNIDROIT recognize the rights of nations to forbid the export of cultural properties.<sup>666</sup> Signatory nations agree that trade in cultural objects exported contrary to the laws of nations of origin is illegal; signatory nations also pledge to facilitate the return of such objects and prevent their further importation.<sup>667</sup>

## XVI. LAWS THAT NATIONALIZE ARCHAEOLOGICAL ARTIFACTS AND IMPOSE EXPORT RESTRICTIONS

### A. *Foreign Patrimony Laws*

There are expropriation laws in place today that did not exist at the time of Napoleon’s plunder of Egyptian antiquities. In order to combat looting of archaeological sites and to advance policies supporting the retention of cultural property, many nations have enacted “umbrella” retention laws that declare archaeological materials to be national property. These laws nationalize the ownership of all archaeological sites and materials, even when such materials

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<sup>660</sup> *Id.* art. 3, at 1331; *see also* art. 5, at 1333.

<sup>661</sup> *See* Burman, *supra* note 658, at 1323-24.

<sup>662</sup> UNIDROIT Convention, *supra* note 658, art. 1(b), at 1331.

<sup>663</sup> Article 5(3) of the UNIDROIT Convention requires a requesting party to establish that the removal of an object from its territory has significantly impaired one or more of the following interests: the physical preservation of the object or its context; the integrity of a complex object; the preservation of scientific or historical information; or the traditional or ritual use of the object by a tribal or indigenous community. *Id.* art. 5(3), at 1333.

<sup>664</sup> *See id.*

<sup>665</sup> UNIDROIT Convention, *supra* note 658, at 1330.

<sup>666</sup> *See* UNESCO Convention, *supra* note 614, at 244.

<sup>667</sup> *See id.* at 236.

are in the ground and undiscovered. Under these statutes, the state owns all unexcavated cultural property outright; would-be purchasers can not obtain good title. If the property has been excavated, the state has the right to reclaim title in common law replevin actions.<sup>668</sup> These statutes also often encourage the placement of such items in museums, or government archives, and prohibit individuals from selling or retaining cultural property for private collections.

Such laws vary throughout the world but all are of modern vintage; Egypt adopted its patrimony laws in 1951,<sup>669</sup> France in 1913,<sup>670</sup> India in 1904,<sup>671</sup> and Iraq in 1936.<sup>672</sup> Article 44 of Italy's patrimony statute of June 1, 1939 provides that an archaeological item is presumed to belong to the state unless its possessor can show private ownership prior to 1902.<sup>673</sup> Peru and Greece have had nationalization laws somewhat longer. Since 1822, Peru has provided legal protection for pre-Columbian artifacts.<sup>674</sup> In 1834, Greece adopted a generalized expropriation law to protect antiquities and monuments, stating that "all objects of antiquity in Greece, as the productions of the ancestors of the Hellenic people, are regarded as the common national possession of all Hellenes."<sup>675</sup> The patrimony law of Greece was expanded in 1932.<sup>676</sup> Another country with somewhat longer-standing patrimony law is Mexico, which has declared that "[a]ll movable and immovable archaeological monuments are the inalienable and imprescriptible property of the Nation."<sup>677</sup>

There are two types of state expropriation, one in which the state maintains

<sup>668</sup> See Johnathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466 (1988).

<sup>669</sup> See BURNHAM, *supra* note 415, at 70, for details on Protection of Antiquities, law no. 215, Oct. 31, 1951, and revisions, law no. 529 of 1953 and law no. 24 of 1965.

<sup>670</sup> See *id.* at 73, for details on Law of Dec. 1913 on Historical Monuments, amended by laws of 31 Dec. 1921, 23 July 1927, 25 Feb. 1943, and 24 May 1951, and the Decree of 19 Oct. 1971.

<sup>671</sup> See *id.* at 89, for details on the Ancient Monuments Preservations Act of 1904 and Ancient Monuments and Archaeological Sites and Remains Act of 1958.

<sup>672</sup> See *id.* at 93, for details on the Antiquities Law no. 59 of 1936.

<sup>673</sup> See *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999) (citing Article 44 of Italy's patrimony law).

<sup>674</sup> See Borodkin, *supra* note 411, at 395 n.124; see also *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

<sup>675</sup> I. MCBRYDE, *Introduction to WHO OWNS THE PAST* 5 (I. McBryde ed., 1985) (quoting from law passed by Greek government in 1834).

<sup>676</sup> See BURNHAM, *supra* note 415, at 83, for details on the Antiquities Law no. 5351 of Aug. 24 1932.

<sup>677</sup> Mexico had enacted a law in 1897 that stopped short of outright nationalization of artifacts but declared "archaeological monuments" to be "the property of Nation" and stated that no one could "remove them . . . without express authorization of Executive of the Union." See *United States v. McClain*, 545 F.2d 988, 997 (5th Cir. 1997) (quoting Article 1 of Mexico's Law on Archaeological Monuments, May 11, 1897). The law covered a broad range of Mexican antiquities, codices, idols, amulets and other movable objects. See *id.*

the right to expropriate any cultural property on a case-by-case basis, and a second more stringent type, in which the state is deemed the owner of all antiquities not previously in private hands as of the effective date of the law. Generally, these more stringent laws pertain to archaeological objects and ruins of fortifications, indigenous temples and cemeteries, or other edifices constructed during a specified period. The laws of many countries require that accidentally discovered artifacts must be immediately reported to government officials.<sup>678</sup> Protected artifacts may also include paintings, sculptures, carved objects, coins, metalwork, ceramics, works of craftsmanship, ancient manuscripts, and generally any object that has artistic or historic value. Objects classified as artistic patrimony, whether in public or private possession, and objects that are as yet unexcavated or unknown, are deemed protected by the state from all alteration. The objects, once recovered, are to be registered on an official inventory.

In addition to umbrella expropriation statutes, almost all nations have laws restricting or prohibiting the exportation of archaeological objects.<sup>679</sup> Egypt passed an export ban in 1835, when the first great wave of European archaeologists swept through the Nile Valley. The ordinance made it unlawful to export antiquities and ordered the fruits of all future excavations to be deposited with the national museum in Cairo.<sup>680</sup> In practice, the law remained ineffective until the mid-nineteenth century.<sup>681</sup> Export controls became common in most countries towards the beginning of the twentieth century.<sup>682</sup> As of 1989, over 141 countries had some form of regulation pertaining to the export of antiquities, primarily in the form of prohibitions or licensing requirements.<sup>683</sup>

Great Britain's export licensing law requires that applications for export of artifacts be reviewed by the Board of Trade pursuant to criteria recommended by the Waverly Committee.<sup>684</sup> The Waverly Committee promulgated the following criteria for determining whether an artifact may be granted an export license:

<sup>678</sup> Immediate notification of authorities is required by a number of nations, including: Brunei, Cambodia, Chile, China, Costa Rica, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Egypt, France, Germany, Ghana, Gibraltar, and Greece. See BURNHAM, *supra* note 415, at 35-36. In Bahrain, discovery of antiquities must be reported within 48 hours and landowners are barred from acquiring objects and from conducting further excavations. See BURNHAM, *supra* note 415, at 35-36, for a discussion of the Bahrain Antiquities Ordinance, Notice No. 2.1970.

<sup>679</sup> See Borodkin, *supra* note 411, at 391.

<sup>680</sup> See FRANCE, *supra* note 441, at 94-96.

<sup>681</sup> See *id.* at 124.

<sup>682</sup> UNESCO, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (Lyndel V. Prott & P.J. O'Keefe eds., 1988) (describing export laws of 162 countries).

<sup>683</sup> See UNESCO, *supra* note 682, at 452.

<sup>684</sup> See Borodkin, *supra* note 411, at 392.

“(i) Is the object so closely connected with our history and national life that its departure would be a misfortune? (ii) Is it of outstanding aesthetic importance? (iii) Is it of outstanding significance for the study of some particular branch of art, learning or history?”<sup>685</sup> If the Board decides that an object meets the criteria of cultural significance, that object may not be exported for six months, during which time a domestic purchaser may make a reasonable offer to buy the object for a British collection. If no such offer is made, an export license will then be granted.<sup>686</sup>

### B. *Patrimony Laws of the United States*

The United States is unusual in that it has few laws protecting its cultural property and those that it has are limited to “historically, architecturally, or archaeologically significant objects on land... owned, controlled or acquired by the federal government.”<sup>687</sup> There is no national expropriation statute. Under the Native American Graves Protection and Repatriation Act (“NAGPRA”), for example, title to cultural objects discovered on tribal lands or on government property vests with the tribe on whose tribal land the object was discovered or with the tribe that has the closest affiliation with the object, not in the United States government.<sup>688</sup> Yet within these limitations, the United States has been a leader in promoting national laws to protect cultural property.<sup>689</sup> The first national law protecting antiquities on federal lands was the Antiquities Act of 1906,<sup>690</sup> which authorized the President to establish national monuments to protect sites on public land, prohibits looting and vandalism of sites, and requires a permit to excavate sites on public land. The law authorized the President to set aside as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” located on lands owned or controlled by the federal government (including Indian tribal

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<sup>685</sup> See UNESCO, *supra* note 682, at 484 (quoting Board of Trade regulation).

<sup>686</sup> See *id.* at 484-85.

<sup>687</sup> See Cuno, *supra* note 642, at 85 n.8.

<sup>688</sup> See *id.*

<sup>689</sup> The first United States law in this area was the American Antiquities Act of 1906, 16 U.S.C. § 433 (1910) (protecting national treasures). Later laws included: The Historic Sites Act of 1935, 16 U.S.C. §§ 462-67 (1937) (preserving historic sites, buildings, and objects of national significance); The National Historic Preservation Act of 1966, 16 U.S.C. § 470 (a)-(w)(6) (1967) (expanding protection of sites and objects of historical significance); The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1980) (protecting Native American cultural property); The Archaeological Resources Protection Act, 16 U.S.C. § 470(aa)-(LL) (1979) (superseding American Antiquities Act by legally defining archaeological terms and adding criminal sanctions for offenders of law); The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (1990) (expanding protections for Native American gravesites).

<sup>690</sup> Ch. 3060, 34 Stat. 255 *codified at* 16 U.S.C. §§ 431-433m.

land, forest reserves, and military reservations)<sup>691</sup> and penalized the destruction, damage, excavation, appropriation or injury of any historic or prehistoric ruin, monument or object of antiquity.<sup>692</sup> However, the Act suffered from years of lax enforcement and relatively minor penalties and was held unconstitutional in 1974.<sup>693</sup> In 1979, Congress enacted the Archaeological Resources Protection Act ("ARPA").<sup>694</sup> This law, while dealing with the protection of all archaeological and historic sites on federal land, did not actually amend the act of American Antiquities Act of 1906 but did serve to strengthen the power of federal agencies and provided for increased fines and jail time for offenders. ARPA makes it illegal to take artifacts from a site in violation of state laws and to sell them in interstate commerce.

### *C. Criticisms of Umbrella Nationalization Laws*

#### 1. Lack of Enforcement, Bribery and the Risk of Exacerbating the Black Market

Umbrella nationalization laws that prohibit unauthorized excavation, removal, and sale of antiquities are susceptible to spotty enforcement and bribery<sup>695</sup> and often have the counter-productive effect of exacerbating the antiquities trade on the black market.<sup>696</sup> The problem is that by curtailing the legal supply of artifacts from source nations, demand for cultural property must be satisfied on the black market. As long as looters can sell their wares, there is an incentive to loot, even if looters must sell their finds at prices below fair market value.<sup>697</sup> The black market in antiquities inevitably results in the damaging looting of sites and the mistreatment of objects and thus the destruction of archaeological context and knowledge. One of the greatest tragedies of looting is that unauthorized excavations, conducted haphazardly, result in the destruction of archaeological data available from sites themselves. Moreover, when patrimony laws are violated, it is often not cost effective for source nations to litigate for

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<sup>691</sup> 16 U.S.C. § 431.

<sup>692</sup> *Id.* § 433.

<sup>693</sup> See *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974). There was a paucity of prosecutions under the Antiquities Act. The *Diaz* court found the Antiquities Act unconstitutional, holding that the law failed to define such basic terms as "ruin," "monument" and "object of antiquity" and thus violated the due process rights of defendants by failing to provide people of ordinary intelligence a reasonable opportunity to know what was prohibited. *Id.* at 115.

<sup>694</sup> 16 U.S.C §§ 470aa-470mm.

<sup>695</sup> See John H. Merryman, *The Retention of Cultural Property*, 21 U.C. Davis L. Rev. 477, 509-12 (1988).

<sup>696</sup> See Borodkin, *supra* note 411, at 410-11.

<sup>697</sup> See *id.*

the return of antiquities. Many artifact-rich places are in developing countries that lack sufficient funds to protect archaeological sites or go after looters abroad.<sup>698</sup> Even if artifacts can be recovered from looters, their archaeological value is often degraded or lost since the materials have been removed from their contextual settings, their origins, and have often been crudely unearthed, dismembered or defaced.

For private landowners, national patrimony laws can actually create an incentive to remove artifacts discovered by accident and dispose of them through black market smuggling networks, rather than report the finds and jeopardize attracting governmental interest in their property. Landowners who discover antiquities on their private property may be reluctant to report such finds because this will invite unwelcome attention from the authorities and possibly disrupt the landowners' property interests. For example, a landowner who discovers artifacts while preparing to lay the foundation for a new development may be concerned that if the artifacts are reported to the government, construction will be suspended while the authorities visit the site and prepare a report. There may be additional time lost waiting for a final determination about whether the site is important enough to be preserved. At this point, the landowner may be worried about having to make revisions to the development and may decide that it is cheaper and easier to break the law and sell the artifacts on the black market. Exacerbating this troubling incentive, compensation for the landowner may be unavailable under the country's patrimony laws. Even if compensation is available, it will generally not compare favorably with the black market value of the artifact.

## 2. The Problem of Hoarding

Quite a different criticism of retention statutes and other restrictions on the export of antiquities from source countries is that in some circumstances these laws can result in the over-retention of antiquities. This suggests that patrimony laws can create a kind of cultural hegemony and nationalism, rather than help to enhance or preserve a nation's history. Hoarding often involves antiquities that are more than adequately represented in national museums. These items can not be exported, except through smuggling. Professor John Merryman has written about this phenomenon.

[S]ome source nations have accumulated substantial stocks of redundant cultural objects that are merely warehoused, perhaps deteriorating without adequate care, possibly not even inventoried, with no prospect that they will ever be studied, published, or displayed. Hoarding of this kind

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<sup>698</sup> See *id.* at 384.



damages objects and destroys information. It also further restricts the supply of antiquities to the legitimate market, thus inflating prices and strengthening the black market.<sup>699</sup>

Professor Merryman has also argued that hoarding serves no legitimate purpose.

[W]hile not necessarily damaging to the articles retained,... [hoarding]... serves no discernible domestic purpose other than asserting the right to keep them. Thus, multiple examples of artifacts of earlier civilizations reportedly are retained by some nations although such works are more than adequately represented in domestic museums and collections and are merely warehoused, uncatalogued, uninventoried and unavailable for display or for study by domestic or foreign scholars. Foreign museums that lack examples of such objects would willingly acquire, study and display (and conserve) them. Foreign dealers and collectors would gladly buy them.<sup>700</sup>

There is some merit in the suggestion that artifact-rich governments should enter the free market and make available collector-quality, authentic, documented and legally exportable artifacts at state auctions.<sup>701</sup> The over-retention of antiquities seems wrongheaded in light of the significant benefits to foreign museums and collectors that might acquire them, and the revenues that selling of warehoused items might bring. As Professor Merryman has noted, these objects could be better protected if retention policies were modified so that the objects could be sold through the market or traded with or loaned to foreign museums that are in a better position to care for and display them.<sup>702</sup> The appetite for legal antiquities in the marketplace might be nourished and black market trading reduced if public institutions in source nations engaging in hoarding were to release some of the reputedly large supplies of marketable antiquities they now hold in storage. In some cases, legislation would be needed to implement this effort.

This process need not entail legally divesting countries of their national treasures. It is possible to envision arrangements in which museums would part with redundant objects that have already been examined by archaeologists or that are not of great importance to the nation's cultural heritage. Of course, archaeologists will tend to claim that there is no such thing as a true duplicate, that each archaeological artifact has unique, intrinsic importance. Nonetheless,

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<sup>699</sup> John Henry Merryman, *Cultural Property Ethics*, 7 INT'L J. OF CULTURAL PROP. 21, (1998).

<sup>700</sup> Merryman, *supra* note 397, at 847.

<sup>701</sup> See Borodkin, *supra* note 411, at 412.

<sup>702</sup> See Merryman, *supra* note 397, at 849.

governments that have engaged in hoarding may find that it makes sense to sell their less important pieces, which would otherwise remain indefinitely in storage, and which collectors across the globe would gladly purchase. Private collectors, museums, historical societies, and others have an intrinsic interest in collecting, preserving, studying and displaying antiquities. Dealers, auction houses and private parties have an instrumental interest in making a profit in the lawful marketing of such objects.

If hoarding governments implement such plans, it will not only help to eliminate the black market but will also increase the value of the legally transferred antiquities because objects with established provenance customarily carry greater market value than similar items with dubious credentials, and the imprimatur of the government would all but eliminate questions of proper title and provenance.<sup>703</sup> The promotion of reliable provenance and the free movement of cultural property are in the spirit of the 1970 UNESCO Convention, which expresses in the Preamble 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 insures mutual respect and appreciation among nations.”<sup>704</sup> In addition, the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property contains the following language:

[T]he circulation of cultural property... is a powerful means of promoting mutual understanding and appreciation among nations... [A] systematic policy of exchanges... 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.<sup>705</sup>

The emphasis in the UNESCO instruments is on the “exchange” or “circulation” of cultural property, the idea being that the appropriate level of movement of cultural property can be achieved through exchanges between museums rather than through the marketing of cultural property.<sup>706</sup> But

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<sup>703</sup> See Borodkin, *supra* note 411, at 413.

<sup>704</sup> UNESCO Convention, *supra* note 614, pmbl.

<sup>705</sup> UNESCO Recommendation Concerning International Exchange of Cultural Property, Nov. 26, 1976, pmbl, available at [http://www.unesco.org/culture/laws/exchange/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/exchange/html_eng/page1.shtml) (last visited Jan. 1, 2005).

<sup>706</sup> The 1976 UNESCO Recommendation “invites Member States to develop the lawful circulation of exhibits among museums and other cultural institutions in various countries through exchanges or loans or, in the case of items possessed by a nation in many copies, through definitive assignment.” *Id.* However, the Recommendation disapproves of trafficking in cultural property, stating that “the international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.” *Id.* The Recommendation thus encourages exchanges,

government supported sales of warehoused artifacts would enhance the reliability of provenance in the materials and would appear to be very much in keeping with the spirit of the Preamble's further statement that "cultural property constitutes one of the basic elements of civilization and national culture... [and, as such] its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."<sup>707</sup> Carefully monitored government auctions could generate substantial revenues for artifact-rich nations. Such monies could go to conserve existing state art collections and to preserve and police important sites.

Of course, such a proposal is not without problems. Some archaeologists oppose any kind of free market in museum pieces and archaeological artifacts because these resources are finite and may be lost forever if their divestiture is unchecked.<sup>708</sup> Moreover, many archaeologists argue against the breakup of excavated collections on the grounds that there is no such thing as a "duplicate" object in archaeology, and each object is unique. A large number of very similar or nearly the same objects may help archaeologists understand how such items were made, determining whether there was a standardized methodology in, for example, the manufacture of ceramics during a given period or whether there was some sort of ceramic variation within a community or between local communities. Redundancies may also aid in stylistic and scientific analysis of objects.<sup>709</sup> A truly thorough approach may not be possible if "duplicates" are sold to collectors. That said, and considering all of the issues related to hoarding, there does appear to be a strain of archaeological extremism that is stridently opposed to marketing of antiquities under any circumstances. It is unlikely, however, that this position will ever garner significant public support.

Once a government that has engaged in hoarding decides to sell some objects, there is the problem of deciding which objects are "duplicates" or otherwise suitable for sale and for satisfying the demands of the market (and thus will hopefully reduce looting). If representative samples of given categories are to be withheld from the marketplace, exactly how much retention should occur in each category? One example of a government-sponsored auction occurred in China in 1992.<sup>710</sup> Critics complained that the government failed to provide any

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loans and gifts of cultural property among and between museums and institutions, while discouraging private trafficking in cultural property.

<sup>707</sup> UNESCO Convention, *supra* note 614, at 232.

<sup>708</sup> See John Henry Merryman, *Archaeologists Are Not Helping*, 55 THE ART NEWSPAPER 26 (Jan. 1996), reprinted in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 280 (John Henry Merryman ed., 2000).

<sup>709</sup> See Brodie, *supra* note 403, at 10-11.

<sup>710</sup> See Tuyet Nguyet & John Cairns, '92 Beijing International Auction and China Treasures '92 Shanghai, ARTS OF ASIA, Jan.-Feb. 1993, at 55.

museum-quality pieces and that the collection was, on the whole, disappointing.<sup>711</sup>

Many commentators argue that the huge appetite for antiquities among private collectors is the principal factor fueling the looting and destruction of sites, and that the presence or absence of export controls is of rather less significance.<sup>712</sup> From this perspective, the locus of concern should be to reward and encourage the preservation of undisturbed archaeological sites. Figuring out how to effectively promote preservation of undisturbed sites is problematic. However, one method that has been proposed is offering tax credits to landowners as an incentive for them to preserve archaeological sites.<sup>713</sup> In addition, governments of artifact-rich nations should consider giving bonuses to customs inspectors who catch smugglers exporting antiquities. This might help eliminate corruption at customs checkpoints. Also, with the governments' cooperation in a free market of certain artifacts, archaeologists would have an easier time tracking down the whereabouts of such objects for future study.

#### XVII. A REFUTATION OF JOHN MERRYMAN'S ARGUMENT THAT HAGUE AND UNESCO EXPRESS TWO CONTRASTING WAYS OF CONSIDERING CULTURAL PROPERTY

There appears to be a dichotomy in the definition of cultural property in international instruments. The preamble to the 1954 Hague Convention states that signatories are "convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of mankind, since each people makes its contribution to the culture of the world."<sup>714</sup> This seems to express the view that damage to cultural property impacts the "cultural heritage of all mankind," independent of property rights related to national boundaries. The language also suggests a *res communis* or universalist approach to cultural artifacts, in which such property belongs to the whole world. In apparent contrast, the UNESCO Convention is seen by some as defining cultural property as part of the national heritage of each individual country. This approach may be referred to as "cultural nationalism,"<sup>715</sup> as it embraces the idea that national character is impressed upon cultural artifacts and confers a special interest in

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<sup>711</sup> See Borodkin, *supra* note 411, at 414.

<sup>712</sup> See Karen D. Vitelli, *An Archaeologist's Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES, *supra* note 708, at 240; see also Edward Dwyer, *Critical Comments on the Draft Principles to Govern a Licit International Traffic in Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES, *supra* note 708, at 232.

<sup>713</sup> See Vitelli, *supra* note 712, at 240.

<sup>714</sup> 1954 Hague Convention, *supra* note 397.

<sup>715</sup> See Merryman, *supra* note 397.

nations of origin.

The principle expressed in the Hague Convention that cultural property belongs to the whole world thus appears to contradict the UNESCO principle viewing cultural property as uniquely associated with a particular national identity. John Henry Merryman has argued that this brings into focus an irreconcilable conflict over how to treat cultural property.<sup>716</sup> Professor Merryman notes that the Hague Convention regards cultural property as the universal heritage of the human civilization (“cultural internationalism”), and that the UNESCO Convention regards cultural property as the product of a particular cultural group (“cultural nationalism”).<sup>717</sup> Cultural internationalism justifies the international circulation of antiquities as serving legitimate public interests because art objects can function as cultural ambassadors, informing the world of the unique heritage of other nations.<sup>718</sup> This position may erode some of the moral arguments supporting the return of such property to origin states. According to Professor Merryman, the internationalist approach supports the view that collecting antiquities is a legitimate and economically important feature of a free market, a means of insuring the proper conservation and display of archaeological objects for a wide range of viewers. Those who take this position argue that trade in cultural objects promotes international comity by “remov[ing] mutual suspicion among peoples[,]... replacing it with mutual understanding and respect.”<sup>719</sup>

On the other hand, Professor Merryman notes that the UNESCO Convention justifies export controls, repatriation of looted cultural property, and umbrella nationalization statutes (“expropriation” or “vesting” laws). Most nations that are rich sources of cultural artifacts have laws to prevent or restrict the export of cultural objects.<sup>720</sup> The UNESCO Convention approach supports archaeologists and others who regard the sale of excavated objects as unethical and see collectors as the “real looters.”<sup>721</sup> The UNESCO Convention also suggests that objects of cultural heritage should not be objects of private trade<sup>722</sup> and views the repatriation of all archaeological artifacts as a moral imperative.<sup>723</sup>

Professor Merryman argues that these two approaches to cultural property, the

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<sup>716</sup> See *id.*

<sup>717</sup> See *id.* at 845-56.

<sup>718</sup> See *id.* at 845-50.

<sup>719</sup> Epko O. Eyo, *A Threat to National Art Treasures: The Illicit Traffic in Stolen Art*, in *THE CHALLENGE TO OUR CULTURAL HERITAGE: WHY PRESERVE THE PAST?*, *supra* note 614, at 203.

<sup>720</sup> See Merryman, *supra* note 397, at 832.

<sup>721</sup> Richard J. Elia, *Book: A Seductive and Troubling Work*, *ARCHAEOLOGY*, Jan./Feb. 1993, at 64, 69.

<sup>722</sup> See Borodkin, *supra* note 411, at 409.

<sup>723</sup> See, e.g., GREENFIELD, *supra* note 438, at 252-53; see also Greenfield, *supra* note 532.

internationalist and the nationalist, are necessarily in conflict with one another as they express divergent philosophies with respect to the international trade of cultural property. Merryman claims that the contrasting approaches in Hague and UNESCO represent two irreconcilable ways of thinking about cultural property and thus can not reinforce common values guiding the overall treatment of cultural property. However, Merryman's analysis is flawed.

First, the two Conventions pertain to entirely distinct subject matter. It is wrong to suggest, as Merryman does, that the Hague Convention and UNESCO represent two different approaches to the same subject matter. The Hague Convention applies to the destruction, pillage and plunder of cultural property by armed forces in time of war, as well as to the post war policies and practices of occupying forces with regard to cultural property. The Hague Convention seeks to acknowledge that the whole world has an interest in the protection of cultural property from the acts of belligerents in time of war. The Convention thus expresses the principle that monuments and other cultural objects are unlawful targets. The locus of concern is the behavior of belligerents in time of war, a subject intrinsic to international law and hence of concern to the whole world. In time of war, the looting or destruction of cultural objects is of particular international concern, as are other elements of combat. Wars impact the whole world; the international community has an interest in insuring that combatants follow certain norms in time of war. The international community takes a special interest in the prevention of war, the control of the circumstances of war, and the prosecution and punishment of those who commit war crimes. It has long been the special province of international law to address such issues as torture, pillage, intentional destruction of cultural monuments, the environmental impact of the deployment of weapons, the protection of civilians, hospitals and houses of religious worship, the treatment of prisoners of war, and so on. The Hague principle is a deontological acknowledgement that there are certain things that human beings should never do to certain types of cultural property in time of war, unless justified by military necessity.

The UNESCO Convention, rather than representing a purely "nationalist" view, merely addresses a different internationalist topic — private as opposed to military conduct with respect to the international trade in stolen and illegally exported cultural objects. Just because UNESCO does not address wartime looting does not mean that it is nationalist. UNESCO's international purpose is to focus on the proprietary interests of property and how the illegal exportation of stolen property as an ongoing international problem may be suppressed. Merryman's notion that the Hague Convention supports an exclusively "internationalist" approach to cultural property while the protection of cultural property under the UNESCO Convention is "nationalist" in focus is simply wrong. Both Conventions represent an "internationalist" approach to cultural

property as they appeal to the world community to focus on common concerns.

All nations have a concern for the protection of their cultural property from illegal exportation. All nations likewise have a concern for the protection of their own cultural monuments from the acts of belligerents in time of war. Both of these interests take the form of state rights of autonomy. In order for rights of autonomy to be effective, nations must share responsibility for enforcement. The spheres of concern represented by Hague and UNESCO are international; each requires agreement among multiple states to deter illegal exports and prevent the destruction of cultural property in time of war. These interests are also international in scope because neither can be meaningfully protected without cooperation among states, each of which will have a self-interested compliance motivation. The autonomy of each state thus requires consistency in cooperation. States simply can not enforce their own autonomy interests in these areas without some sort of established form of collective action. The provisions of the Hague Convention are “internationalist” in that the obligation of refraining from hostility towards cultural property is imposed equally on *both* parties to a conflict.<sup>724</sup> Protective measures are to be taken by the state in whose territory an object of cultural property is situated “against the foreseeable effects of an armed conflict,”<sup>725</sup> and the opposing state has the general obligation to “respect” cultural property and to not direct “any act of hostility” towards the enemy’s cultural property.<sup>726</sup> The Hague and UNESCO Conventions are thus both international legal instruments that guide nations toward the only real solution to what may be termed the cultural property “Prisoners Dilemma”; Hague and UNESCO attempt to facilitate the best possible outcome for all parties. It is wrong to suggest that solely “nationalist” interests are at stake with regards to the looting or stealing of artifacts within a nation. The entire international community has a common interest in protecting cultural property.

It is worth reflecting that outrage would extend far beyond the ranks of the “heritocracy” should French nationalist “owners” re-bury the Cro-Magnon remains or overpaint Lascaux, if Ethiopians cremated “Lucy”, or the pyramids became a stone quarry and the Taj Mahal was razed to build apartments.<sup>727</sup>

Each state has the sovereign right to regulate the limited resources within its borders; indeed, an argument can be made that there is an affirmative duty to do

<sup>724</sup> See Nahlik, *Protection of Cultural Property*, *supra* note 397, at 1081.

<sup>725</sup> 1954 Hague Convention, *supra* note 397, art. 3.

<sup>726</sup> *Id.* art. 4.

<sup>727</sup> D.J. Mulvaney, *Past Regained, Future Lost: the Kow Swamp Pleistocene Burials*, 65 *ANTIQUITY* 246, 18 (March, 1991), cited by Geoffrey Scarre, *Archaeology and Respect for the Dead*, 20 *J. APPLIED PHIL.* 239, n.5 (2003).

so under the “public trust” doctrine. Most nations have attempted to curb the outflow of art with export restrictions coupled with broad declarations of national ownership of certain artifacts.<sup>728</sup> From a practical standpoint, however, source nations need to be able to rely on international cooperation to insure that looted items will not be smuggled and sold abroad. It is of international concern that the property rights of source nations be enforced in countries to which objects have been illegally exported, by way of litigation in foreign courts or intervention by foreign custom services. The Hague approach is “protective” while the UNESCO approach is “retentive.”<sup>729</sup> As Professor Merryman concedes, these notions are part of a web that aims to be protective in both war and peace, so that the two notions “reinforce each other.”<sup>730</sup> The supposedly divergent aims of Hague and UNESCO are in fact mutually supporting interests. Merryman’s argument seems to suggest the simple fact that nations agree that cultural property should be protected from the ravages of war somehow leads to the international trafficking of such property during times of war and peace. It is hard to see a logical connection between the premise — that military combatants ought to protect objects of cultural property from military actions (with the exception of military necessity) in time of war — and the conclusion — that cultural property is fair game for international marketing. The conclusion simply does not follow from the premise.

#### XVIII. RECOVERY OF LOOTED PROPERTY BY LEGAL PROCEEDINGS ABROAD

Once looted antiquities enter the black market, the matter of recovery takes on a more complex dimension. Source nations, hampered in providing protection for artifacts in the field, may want to recover looted artifacts abroad. To do so, source nations must face legal hurdles that are often insurmountable. Most nations will not enforce the penal judgments of other countries<sup>731</sup> “unless a convention [that they have ratified] specifically establishes the duty.”<sup>732</sup> In the absence of a clear peacetime understanding of penal judgment enforcement agreements, the enforcement of such judgments will be questionable and efforts to prevent, suppress and control the international trafficking of illicitly obtained cultural artifacts will be thwarted.

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<sup>728</sup> *United States v. McClain*, 545 F.2d 988, 911 n.1 (5th Cir. 1997).

<sup>729</sup> *See Merryman*, *supra* note 397, at 846.

<sup>730</sup> *See id.*

<sup>731</sup> *See The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). *But see Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975); Von Mehren, *Enforcement of Foreign Penal Judgments in the United States*, 17 VA. J. INT’L L. 401 (1977).

<sup>732</sup> *See BASSIOUNI*, *supra* note 491, at 318.



*A. Criminal Prosecution in the United States for Foreign Looting*

Smugglers of antiquities nationalized by a foreign nation are subject to criminal prosecution in the United States. The National Stolen Property Act (“NSPA”) has been interpreted to apply in cases involving the knowing selling or receiving of property illegally excavated in violation of a foreign country’s expropriation laws.<sup>733</sup> If a foreign nation declares itself the owner of antiquities illegally taken from its territory, United States courts will recognize this national ownership under the NSPA;<sup>734</sup> the NSPA has been held to apply to the illegal exportation of artifacts declared by a foreign government to be the property of that nation.<sup>735</sup>

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise... which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken... [s]hall be fined under this title or imprisoned not more than ten years, or both.<sup>736</sup>

The smuggling of such antiquities into the United States also makes them subject to forfeiture under either the NSPA<sup>737</sup> or the U.S. Customs statute<sup>738</sup> and the antiquities may additionally be subject to a civil replevin action brought by the country of origin.<sup>739</sup> The Customs Service may seize and return artifacts pursuant to federal laws on smuggling.<sup>740</sup> Other laws provide additional material-specific protections. The Pre-Columbian Art Act of 1972 requires

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<sup>733</sup> 18 U.S.C. § 2315. See *McClain*, 545 F.2d at 966; see also *United States v. Schultz*, 333 F.3d 393 (2nd Cir. 2003).

<sup>734</sup> See *McClain*, 545 F.2d at 966-97.

<sup>735</sup> See *id.*

<sup>736</sup> 18 U.S.C. § 2315.

<sup>737</sup> 18 U.S.C. §§ 2314-2315.

<sup>738</sup> 19 U.S.C. § 1595a. The Customs statute permits the seizure and forfeiture of any goods brought into the United States “contrary to law,” prohibiting import of cultural objects that have been stolen from museums, churches or other public collections as well as import of antiquities and ethnographic objects that are subject to restrictions under the Convention on Cultural Property Implementation Act. 19 U.S.C. § 2601-2613.

<sup>739</sup> See *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff’d sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (recognizing validity of *McClain* doctrine to support replevin action but holding that claimant had failed to establish that antiquities in question originated in Peru); *Lebanon v. Sotheby’s*, 167 A.D.2d 142, 143-144 (N.Y. App. Div. 1990); *Croatia v. Tr. Of the Marquess of Northampton 1987 Settlement*, 203 A.D.2d 167 (N.Y. App. Div. 1994) (holding that claimant was unable to establish source of antiquities in dispute); *Turkey v. OKS Partners*, 797 F. Supp. 64 (S.D.N.Y. 1990) (holding that Turkish vesting law supported Turkish government’s claims for replevin, conversion and right to possession of hoard of ancient coins).

<sup>740</sup> See 18 U.S.C. § 2 (2003) (addressing “abetting”); § 371 (“conspiracy”); § 542 (“importation by false statement”); § 545 (“smuggling”); § 1001 (“false statements to United States agency”).

importers of pre-Columbian monumental or architectural sculptures, murals or fragments to present proof of legal exportation from the country of origin.<sup>741</sup> In the absence of such documentation, the items will be seized by the Customs Service and held until the country of origin requests their return.<sup>742</sup>

In *United States v. McClain*<sup>743</sup> (“McClain I”), the defendants were convicted under the NSPA<sup>744</sup> for conspiring to transport and receive through interstate commerce in the United States certain pre-Columbian artifacts that had been illegally excavated in violation of Mexico’s retention law. At issue was an 1897 Mexican law that declared immovable monuments to be the property of the Mexican government.<sup>745</sup> The trial spurred the filing of numerous amicus curiae briefs in the court of appeals urging reversal; private collectors and museums were concerned about being branded as receivers of stolen property in a variety of other contexts involving the kind of property at issue in the case. The court of appeals reversed and remanded, ruling that the 1897 law did not in fact nationalize movable artifacts and that the jury had received inadequate instructions on subsequent laws of Mexico that may or may not have expropriated the property in question.<sup>746</sup> On retrial, the defendants were again convicted and again appealed. In the second *United States v. McClain*<sup>747</sup> (“McClain II”), the court of appeals reversed and cleared the defendants on every charge except conspiracy, holding that the Mexican laws pertaining to nationalization of artifacts “were too vague to be a predicate for criminal liability under our jurisprudential standards.”<sup>748</sup> The scope of the NSPA was further clarified in a much-anticipated criminal trial, *United States v. Schultz*, in February, 2002 in New York.<sup>749</sup> Frederick Schultz, a leading American antiquities dealer, was convicted for receiving stolen Egyptian antiquities from an English dealer. The conviction was affirmed on appeal and Schultz was sentenced to 33 months in prison, fined \$50,000, and required to return an ancient Old Kingdom relief to Egypt.<sup>750</sup> The decision was based in part on the court’s recognition of Egyptian law establishing clear ownership by Egypt of the objects. This case is important because of the lingering uncertainties after *McClain I* and *II* about when the bringing of cultural property into the United

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<sup>741</sup> See 19 U.S.C. § 2092 (2003).

<sup>742</sup> See 19 U.S.C. § 2093 (2003).

<sup>743</sup> *McClain*, 545 F.2d at 988.

<sup>744</sup> 18 U.S.C. §§ 2314, 2315.

<sup>745</sup> *McClain*, 545 F.2d at 992.

<sup>746</sup> *Id.* at 991 n.1, 992.

<sup>747</sup> See *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

<sup>748</sup> *Id.* at 670.

<sup>749</sup> *United States v. Schultz*, 333 F.3d 393 (2nd Cir. 2003).

<sup>750</sup> *Id.*

States may violate a foreign country's nationalization laws and thus the NSPA.<sup>751</sup>

Schultz claimed that the Egyptian antiquities were not owned by anyone and therefore could not be stolen. The prosecution contended "that the antiquities were owned by the Egyptian government pursuant to a patrimony law known as "Law 117", which declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government."<sup>752</sup> The evidence showed that Schultz and his partner, Parry, smuggled a sculpture of Amenhotep III out of Egypt and sold it to a private collector for \$1.2 million.<sup>753</sup> They also endeavored to bring other Egyptian antiquities into America for resale, smuggled them out of Egypt, coated them with plastic so as to make them look like cheap souvenirs, assigned them false provenance, and then restored them with 1920s techniques.<sup>754</sup> Some antiquities were obtained by bribing corrupt members of the Egyptian antiquities police, who had a variety of antiquities in police possession.<sup>755</sup> This case makes it clear that the NSPA applies to cases involving foreign patrimony laws.

Egypt's patrimony law, entitled "The Law on the Protection of Antiquities," declares that all antiquities discovered after the statute was enacted in 1983 belong to the Egyptian government.<sup>756</sup> The law provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt.<sup>757</sup> The law also makes private ownership or possession of antiquities found after 1983 illegal and imposes criminal penalties for violating the law or for unlawfully smuggling an antiquity outside the country.<sup>758</sup> Egypt's Law 117 reads in part as follows:

Article 1. An "Antiquity" is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from such period...

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<sup>751</sup> See, e.g. Note, *Criminal Law: Theft of Artifacts — Once a Nation Declares Ownership of an Artifact, an Illegally Exported Artifact Can Be Considered Stolen Under the National Stolen Property Act*, 17 VA. J. INT'L. L. 793 (1977).

<sup>752</sup> Schultz, 333 F.3d at 396.

<sup>753</sup> *Id.*

<sup>754</sup> *Id.*

<sup>755</sup> *Id.* at 397.

<sup>756</sup> *Id.* at 399-400.

<sup>757</sup> *Id.*

<sup>758</sup> *Id.*

Article 6. All antiquities are considered to be public property — except for charitable and religious endowments.... It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.

Article 7. As of [1983], it is prohibited to trade in antiquities...

Article 8. With the exception of antiquities whose ownership or possession was already established [in 1983] or is established pursuant to [this law's] provisions, the possession of antiquities shall be prohibited as from [1983].<sup>759</sup>

The *Schultz* court interpreted the NSPA to apply to property owned by the nation of Egypt and determined that the law vests ownership with the Egyptian government to all antiquities as defined in the statute, even though such items have not been reduced to possession by the state. The court held that there are no circumstances under which a person who finds an antiquity in Egypt can keep it legally.<sup>760</sup> The NSPA thus applies to property subject to a declaration of national ownership and illegally exported. The fact that the rightful owner of the stolen property is foreign has no impact on prosecution.<sup>761</sup>

### B. Civil Litigation in the United States for Foreign Looting

There have been a number of cases in the United States in which foreign claimants have successfully sought the repatriation of looted artifacts held in private collections or museums.<sup>762</sup> The cases discussed in this section have several common threads: (1) litigation is instituted by a party claiming to be the

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<sup>759</sup> *Id.*, (quoting Egyptian Law 117).

<sup>760</sup> *Id.*

<sup>761</sup> See *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1996).

<sup>762</sup> See, e.g., *Federal Republic of Germany v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (allowing German government to recover stolen World War II painting held by U.S. art dealer); *United States v. Hollingshead*, 495 F.2d 1154 (9th Cir. 1974) (applying National Stolen Properties Act to antiquities taken from foreign countries); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (holding same as *Hollingshead*); *Kunstsmmulugen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (allowing use of foreign law on protection of art to recover painting held by U.S. art dealer); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd* 917 F.2d 278 (7th Cir. 1990) (tolling statute of limitations to recover stolen art until owner discovered location of stolen property); *Turkey v. OKS Partners*, 797 F. Supp. 64 (S.D.N.Y. 1990) (applying civil RICO statute to conspiracy theft of stolen antiquities); *Schultz*, 333 F.3d 393 (allowing prosecution under National Stolen Property Act for antiquities smuggled into United States in violation of Egypt's patrimony laws); see Joshua E. Kastenber, *Assessing the Available Actions for Recovery in Cultural Property Cases*, 6 DEPAUL J. ENT. LAW 39 (1995), for a good discussion of laws and cases affecting the recovery of cultural property in civil cases.

rightful owner of artifacts; (2) the artifacts were allegedly stolen, looted or illegally smuggled in violation of a foreign state's patrimony laws or taken by military officials as war booty or in the form of reparations; (3) many years have elapsed from the precipitating events and the filing of the action; and (4) substantial legal issues pertaining to choice of law, sovereign immunity and the statute of limitations must be dealt with in these cases.

The time and expense associated with civil litigation for the recovery of looted artifacts can present insurmountable obstacles and the procedural pitfalls are often impossible for dispossessed owners to overcome. For example, in some cases the plundered objects do not surface for decades and, by the time they do, are often in the hands of bona fide purchasers who may have paid substantial sums for the property and will therefore fight hard to keep it.<sup>763</sup> The question then becomes one of choice of law: should the laws of the country of origin define the status of ownership of cultural artifacts or should the country to which the artifacts were smuggled or in which the eventual bona fide purchasers reside determine ownership according to its laws? In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, (S.D. Ind. 1989),<sup>764</sup> a federal district court had to determine whether Indiana, Germany or Switzerland provided the applicable law in a case involving competing claims to a Byzantine mosaic. The court decided that the appropriate law to apply was that of the place of financing for the purchase, which was Indiana. The court rejected arguments that the locus of the transaction, Germany, or the location of the mosaic at the time of the transaction, Switzerland, should be dispositive in the choice of which law applied.<sup>765</sup>

Another problem that arises in cases in which a foreign government is the claimant is that the antiquities often predate the government claiming ownership. This means that state succession issues may need to be adjudicated, which can compound any conflict of law problems. The artifact in question may have survived several state regimes, and each regime may have had a different position regarding the status of archaeological objects and the ownership of such objects. An example of the complexity of sorting out state succession issues occurred in *Kunstsammlungen Zu Weimar v. Elicofon*,<sup>766</sup> in which the court had to decide among the competing claims of East Germany, West Germany, and the Grand Duchess of Saxony-Weimer over ownership of two priceless Durer portraits stolen in 1945 and later purchased by an American in New York. The

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<sup>763</sup> *Kunstsammlungen Zu Weimar*, 678 F.2d 1150.

<sup>764</sup> *Autocephalous v. Goldberg*, 917 F.2d 278 (7th Cir. 1990).

<sup>765</sup> *Autocephalous*, 717 F. Supp. at 1393-94.

<sup>766</sup> *Kunstsammlungen Zu Weimar*, 678 F.2d 1150.

court had to trace 19th century German dynastic law, contemporary German property law, Allied Military law during the post-war occupation of Germany, and New York State law, while also dealing with the statute of limitations and addressing sovereignty succession in Germany.<sup>767</sup>

A corollary problem is that of factual proof of origin. A country seeking the return of artifacts in the courts of the United States must prove ownership. In order to prove ownership, the claimant state must first demonstrate that it has an expropriation law that is not unconstitutionally vague; the state must then prove that the items in question were excavated and looted from its territory after the expropriation law took effect. The question of the interpretation of foreign law is a legal issue that the court must decide.<sup>768</sup>

In the civil context, American courts have at times concluded that governing national ownership statutes were vague and hence refused to return artifacts claimed by the foreign state.<sup>769</sup> For example, in the case *Peru v. Johnson*,<sup>770</sup> the court noted significant ambiguities in the law purporting to nationalize archaeological sites and the contents therein. And in *Republic of Turkey v. OKS Partners*,<sup>771</sup> the court has faced the issue of timing and applicability of the expropriation law. In this case, the court is addressing a claim by the Republic of Turkey to two thousand ancient Greek and Lycian silver coins. Turkey has alleged that the coins were illegally removed from the country and later purchased by the defendants with knowledge of the illegal nature of the transaction. Turkey has also argued that its patrimony law vested title to all ancient artifacts within national borders in the government, and has claimed that since 1906, its laws have been unequivocal in establishing outright ownership of artifacts such as the coins. The defendants have countered that Turkey could obtain true ownership of the coins only if it paid for them.<sup>772</sup> This matter has been in litigation for over a decade, and has gone through numerous procedural battles with respect to discovery and partial summary judgment motions. Trial is now pending in the U.S. District Court in Massachusetts.

Since looted artifacts are often excavated clandestinely from sites unknown to the archaeological community (and hence not policed or guarded), there will frequently be no records of origin. This often makes it difficult for claimant governments to establish a case.<sup>773</sup> While courts may entertain the opinions of

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<sup>767</sup> *Kunstsammlungen Zu Weimar*, 678 F.2d at 1153.

<sup>768</sup> See FED. R. CIV. P. 44.1.

<sup>769</sup> See Borodkin, *supra* note 411, at 393; see also *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

<sup>770</sup> *Johnson*, 720 F. Supp. at 813.

<sup>771</sup> *Turkey v. OKS Partners*, 797 F. Supp. 64 (S.D.N.Y. 1990).

<sup>772</sup> *Turkey v. OKS Partners*, 176 F.R.D. 24, 28 (D. Mass. 1993).

<sup>773</sup> See Borodkin, *supra* note 411, at 396.

experts on the question of origin, expert testimony without further proof of origin may be insufficient to help a country recover artifacts — even those that are an important part of its patrimony. In many instances, experts may hypothesize that an item is from one country, Peru for example, while admitting that the item might be from one of several other countries, perhaps Ecuador, Columbia or Mexico. Since geographical origin may be nearly impossible to prove in many cases after an object has been smuggled out of a country, litigants may try to prove origin from forensic or stylistic clues. The extensive need for expert testimony in antiquities litigation has resulted in a subsidiary debate over the qualifications of hired experts.<sup>774</sup>

The court in *Peru v. Johnson*<sup>775</sup> denied Peru's claim that certain pre-Columbian artifacts imported by an American collector had been illegally smuggled. Experts testified that the artifacts could have originated in Bolivia or Ecuador, and there was insufficient evidence to trace the artifacts to specific archaeological sites.<sup>776</sup> In its opinion, the court noted that while the principal expert witness who testified on behalf of the government of Peru was knowledgeable and respected in his field and honest and reputable in his beliefs, he also had a genuine interest in helping his country recover artifacts that were important to the country's patrimony. In other words, the expert's conclusions were potentially tainted by a conflict of interest.<sup>777</sup> The court found that the antiquities at issue might have originated in an area no longer within the borders of Peru, noting that population centers that were part of pre-Columbian Peruvian society and from where the disputed artifacts might have been taken were now within the borders of Bolivia and Ecuador.<sup>778</sup> Even if Peru could prove that the objects originated from sites that were Peruvian in pre-Columbian times, the proper claimant today might be Bolivia or Ecuador.

Similar issues played out in *Republic of Lebanon v. Sotheby's*,<sup>779</sup> which involved competing claims to the "Sevso Silver," a collection of ancient Roman silver worth \$70 million dollars. Experts from Lebanon, Hungary and Croatia presented evidence regarding the origin of the collection. The Lebanese

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<sup>774</sup> In France, the descendants of an artist are deemed authoritative to make assessments as to the authenticity of an artist's work. See Franklin Feldman, *French Droit Moral in U.S. Courts: What Respects To Be Paid?*, IFAR REPORTS, Aug. 1994, at 5.

<sup>775</sup> *Johnson*, 720 F. Supp. at 812.

<sup>776</sup> See *id.* The *Johnson* court conceded that the artifacts could have come from Peru but that it was equally plausible that they originated from Bolivia or Ecuador. While the excavation of the artifacts from Bolivia or Ecuador would have been illegal under the cultural protection laws of those nations, the judge concluded that as he could not determine the origin of the artifacts in question, the defendant would prevail. *Id.*

<sup>777</sup> See *id.*

<sup>778</sup> *Id.*

<sup>779</sup> *Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990).

plaintiffs claimed that the collection had been looted from Lebanon and then made its way through the black market into the hands of the defendant, the Earl of Northampton, who had consigned the collection for sale with the auction house of Sotheby's. The experts used forensic evidence from soil traces, organic remains and wood slivers found in the silver. Lord Northampton's defense was that the collection had been legally excavated and exported from Lebanon. The jury was unable to agree on the origin of the silver and awarded it to Lord Northampton.<sup>780</sup>

Issues of sovereignty and sovereign immunity present a different set of problems. In *Price v. United States*,<sup>781</sup> an art investor sued the United States to recover four watercolors painted by Adolf Hitler as well as photographic archives compiled by Hitler's personal photographer. The United States confiscated the materials during Allied occupation of Germany after World War II. The plaintiff acquired an assignment of rights to these artifacts and brought the action under the Federal Tort Claims Act.<sup>782</sup> The court considered the issue of sovereign immunity and was guided by the principle that the United States is immune from suit unless it has waived its immunity and consented to suit. The court held that since the watercolors were seized by the United States in Germany, the district court did not have jurisdiction under the Federal Tort Claims Act because of an express exception for "claim[s] arising in a foreign country."<sup>783</sup> With respect to the photographic collection, the court considered the fact that all rights to the collection had vested in the Attorney General pursuant to the Trading with the Enemy Act,<sup>784</sup> "to be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."<sup>785</sup> Thus the court held that a tort claim concerning the archives was not cognizable under the Federal Tort Claims Act.<sup>786</sup> Under the Trading with the Enemy Act, there is a two-year statute of limitations to bring an action with respect to a vesting order.<sup>787</sup>

In *Republic of Austria v. Altmann*,<sup>788</sup> the United States Supreme Court must consider the question of whether the Foreign Sovereign Immunities Act

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<sup>780</sup> See *id.*; see also Associated Press, *Jury Says Sevso Silver Belongs to English Lord*, N.Y. TIMES, Nov. 5, 1993, at C3.

<sup>781</sup> *Price v. United States*, 69 F.3d 46 (5th Cir. 1995), *modified*, 81 F.3d 520 (1995), and *cert. denied*, 519 U.S. 927 (1996).

<sup>782</sup> 28 U.S.C. §§ 2671-2680.

<sup>783</sup> *Price*, 69 F.3d at 52 (citing 28 U.S.C. § 2680(k)).

<sup>784</sup> 50 U.S.C. app. §§ 1-33.

<sup>785</sup> *Price*, 69 F.3d at 52 (citing Vesting Order 17952, 16 Fed. Reg. 6162).

<sup>786</sup> *Id.*

<sup>787</sup> *Id.* at 53.

<sup>788</sup> *Altmann v. Austria*, 159 L. Ed.2d 1 (2004).



("FSIA")<sup>789</sup> confers jurisdiction in the United States over the Republic of Austria and the state-owned Austrian Gallery. In granting certiorari and accepting the appeal, the Supreme Court agreed to decide only whether provisions of the FSIA may be applied retroactively to action predating its enactment. The FSIA grants federal district courts jurisdiction over civil actions against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under either another provision of the FSIA or "any applicable international agreement."<sup>790</sup> The plaintiff in this action, Maria Altmann, alleges that the Republic of Austria is not entitled to the immunity under the FSIA because the Act's "expropriation exception," § 1605(a)(3), expressly exempts from immunity all cases involving "rights in property taken in violation of international law," provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activity in the United States.<sup>791</sup>

Ms. Altmann claims to be the rightful owner of six Klimt paintings held by Austria. Her aunt, Mrs. Bloch-Bauer, died in 1925, leaving a will in which she requested that upon her husband Ferdinand's death, he leave the paintings to the Austrian Gallery. However, the works belonged not to her but to Ferdinand. When the Nazis seized power in Austria in 1938, he fled to Switzerland without making any legal arrangements to donate the paintings to the government or its museum. The Nazis took control of the Bloch-Bauer assets, including the Klimt paintings. Three of the paintings went to the Austrian Gallery, one was sold to the Museum of the City of Vienna, and a Nazi lawyer kept one for himself. When Ferdinand died in Switzerland in 1945, the paintings remained in his estate although they were no longer in his hands. He did not mention the paintings in his will, but he named as residuary legatee, Maria Altmann, his niece. Ms. Altmann, who also escaped Austria and has lived in California since 1942, is his only surviving heir. In 1948, she and other family members asked Austria to return a large number of family artworks. Austria agreed to export some items but only in exchange for Altmann's recognition of an agreement in which she ceded ownership of the five Klimt paintings to the Gallery. Fifty years later, in the 1990s, Austria enacted a restitution statute allowing individuals to reclaim properties that were subject to coerced donation in exchange for export permits. In 1999, Ms. Altmann brought a claim for restitution for several items, including the Klimt paintings. The restitution board ordered some items returned, but found that the five Klimt paintings belonged to

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<sup>789</sup> 28 U.S.C. §§ 1602-1611 (1976).

<sup>790</sup> 28 U.S.C. § 1330(a); *see also Altmann*, 159 L. Ed. 2d at 11.

<sup>791</sup> *Altmann*, 159 L. Ed.2d at 11.

the Gallery. After deciding that the Austrian lawsuit filing fee was prohibitive (the standard formula used to calculate the court fees in Austria is 1.2% of the amount in controversy and the paintings at issue are worth approximately \$135 million), Altmann filed in the United States, where she lives, suing the Gallery, an agency of the Austrian Government, in federal court in Los Angeles, and seeking the return of the five paintings.<sup>792</sup>

The Court had to consider whether anything in the FSIA or the circumstances surrounding its enactment suggested any reason why it should not apply to actions of the Republic of Austria in 1948.<sup>793</sup> “Not only do we answer this question in the negative, but we find clear evidence that Congress intended the Act to apply to pre-enactment conduct.”<sup>794</sup> The Court noted that “[m]any of the Act’s provisions unquestionably apply to cases arising out of conduct that occurred before” it was enacted.<sup>795</sup> In a 6-3 decision, the Court held that Ms. Altmann could pursue her lawsuit against the Austrian government and its national art gallery for the return of the six Klimt paintings as the FSIA applies to conduct that predated the law’s enactment. The lawsuit can now go forward in Federal District Court in Los Angeles.<sup>796</sup> In remanding the case, the Court made clear that it was not ruling on the question of whether the “act of state” doctrine applies to the alleged wrongdoing, and that the FSIA “in no way” affects the “act of state” doctrine.<sup>797</sup> The act of state doctrine “provides foreign states with a substantive defense on the merits.... [T]he courts of one state will not question the validity of public acts... performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.”<sup>798</sup>

The Supreme Court has explained the “act of state” doctrine in the following way:

[Courts] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.<sup>799</sup>

Under the doctrine, a defendant may assert that an object was lawfully

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<sup>792</sup> *Altmann*, 159 L. Ed.2d 1.

<sup>793</sup> *Altmann*, 159 L. Ed.2d at 19.

<sup>794</sup> *Id.*

<sup>795</sup> *Id.*

<sup>796</sup> *Id.*

<sup>797</sup> *Id.* at 21.

<sup>798</sup> *Id.* at 21.

<sup>799</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

requisitioned by government authorities, such as those of an occupying power in the prosecution of its law, and that the taking was a proper confiscation of the property.<sup>800</sup> The doctrine typically precludes a court from judging the validity or legality of an act of a foreign state performed within that state's territory as it pertains to acts committed by foreign sovereigns in the exercise of their governmental authority.<sup>801</sup> Thus the doctrine would not apply to the Napoleonic plunder of Egypt because although the taking was done by a foreign government, it did not occur within the territorial limits of the French government. And in the case *Menzel v. List*,<sup>802</sup> which arose out of a replevin action involving a painting by Marc Chagall that was seized by the Nazis, the defense attempted to use the act of state argument. However, the court found that the painting had not been seized by a foreign sovereign but rather by the "Centre for National Socialist Ideological and Educational Research," which was an organ of the Nazi party. Thus, the court found that the act of state defense did not apply.<sup>803</sup>

The statute of limitations creates additional problems for parties wishing to bring claims to repatriate cultural artifacts. Arguments regarding the statute of limitations may be interposed by defendants and, due to stale or inadequate records, plaintiff claimants may find it difficult to document the date at which the cause of action accrued. The case *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992),<sup>804</sup> involved the Turkish government's claims of replevin, conversion and right of possession over a hoard of ancient coins. The defendants argued that all of Turkey's claims were barred by the statute of limitations. However, the court noted that while a cause of action generally arises at the time of injury, "tort claims are subject to the so-called 'discovery rule,' under which a cause of action which 'is based on an inherently unknowable wrong' only accrues 'when the injured person knows, or in the exercise of reasonable diligence should know of the facts giving rise to the cause of action.'"<sup>805</sup>

A wrong is inherently unknowable if it is "incapable of detection by the wronged party through the exercise of reasonable diligence."<sup>806</sup> The statute of limitations is generally tolled with respect to an inherently unknowable wrong until the wrong is discovered by the aggrieved party. However, "[a]scertaining

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<sup>800</sup> See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 813 (1966).

<sup>801</sup> See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>802</sup> *Menzel*, 267 N.Y.S.2d 804.

<sup>803</sup> See *id.* at 815.

<sup>804</sup> *OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992).

<sup>805</sup> *Id.* (citing *Dinsky v. Framingham*, 386 Mass. 801, 438 N.E.2d 51, 52 (1982)).

<sup>806</sup> *Id.* (citing *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass.App.Ct. 215, 560 N.E.2d 122, 126 (1990)).

'reasonable diligence,' like ascertaining 'reasonable care,' is ordinarily a fact-dominated enterprise."<sup>807</sup> Moreover, a wrong may be "inherently unknowable if the party wronged was the victim of fraudulent concealment so long as the fraudulent concealment was explicit."<sup>808</sup>

In cases involving surreptitious smuggling or extraction of archaeological artifacts from sites not policed by officials, the facts giving rise to a claimant's cause of action are often "inherently unknowable." Smugglers, surreptitious dealers of artifacts and clandestine looters of archaeological sites typically keep their activities secret and make false representations on customs documents as to the country of origin. A plaintiff can not have "discovered" the existence of a replevin cause of action or other tort involving unique and concealed works of art until the plaintiff has learned enough facts to believe that a tortfeasor has looted, exported or otherwise unlawfully converted the items. Then the plaintiff must attempt to uncover the identity of the tortfeasor or tortfeasors specifically responsible.

New York has a "demand and refusal" rule with respect to its statute of limitations that applies to situations involving defendants who have come into possession of stolen property in good faith.<sup>809</sup> Once the identity of a tortfeasor has been ascertained, the claimant has a "duty to make a demand for return within a reasonable time after the current possessor is identified."<sup>810</sup> The statute of limitations starts to run only upon the defendant's refusal to return the property on demand.<sup>811</sup> Until such demand and refusal occurs, the statute of limitations is tolled.<sup>812</sup> This rule also exists in a handful of other jurisdictions,<sup>813</sup> some of which apply the rule such that the statute of limitations begins to run when the claimant knew or, exercising reasonable diligence, should have known, the whereabouts of the property.<sup>814</sup> If the claimant has delayed making a demand for return of artifacts, perhaps delaying for an unreasonable period of time, it may be difficult for the court to know how to apply the rule. There may be additional difficulties in determining the proper degree of knowledge required for the plaintiff to make a demand and thus elicit a response by the holder. Generally, once the occasion of looting or smuggling of artifacts has come to light, a plaintiff has the duty to exercise reasonable diligence in

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<sup>807</sup> *Id.* (citing *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 376 (1st Cir. 1991)).

<sup>808</sup> *Id.*

<sup>809</sup> *See, e.g., Menzel*, 267 N.Y.S.2d 804, 809.

<sup>810</sup> *DeWeerth v. Baldinger*, 836 F.2d 103, 108 (2d Cir. 1987).

<sup>811</sup> *See Kunstsammlungen Zu Weimar*, 678 F.2d 1150.

<sup>812</sup> *See Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

<sup>813</sup> *See Kaye, supra* note 596, at 661.

<sup>814</sup> *See, e.g., O'Keefe v. Snyder*, 416 A.2d 862 (N.J. Sup. Ct. 1980).

discovering its whereabouts and making a demand upon the alleged tortfeasor.<sup>815</sup>

XIX. REPATRIATION OF LOOTED ARTIFACTS THROUGH DIPLOMACY, PRIVATE  
NEGOTIATION AND PUBLIC PRESSURE

*A. The Preference for Diplomatic Solutions*

There is broad international support for expanding notions of group ownership of cultural artifacts in the effort to repatriate artifacts to their countries of origin.<sup>816</sup> “The current domestic and international legal regimes require or encourage broad repatriation for all cultural properties operating on a ‘content neutral’ basis that disregards the specific norms and mores of the producing group.”<sup>817</sup> The cases discussed in the preceding Section involved situations where objects were either looted by illegal excavation and then black market exportation, such as in the *Peru v. Johnson* case, or under some color of authority in time of war, such as in the *Republic of Austria v. Altmann* case. It is admittedly much easier to resolve disputes through existing legal machinery when the objects at issue were looted in relatively recent times. Recovering looted artifacts is especially difficult when the objects were removed many decades ago — as is the case with the Elgin Marbles or the Egyptian booty seized by Napoleon and ceded to Britain — or even hundreds of years in the past. Modern Conventions — such as Hague of 1954, which pertains to the protection of cultural objects during war, and the 1970 UNESCO Convention, pertaining to the repatriation of illegally smuggled artifacts — do not address the repatriation of antiquities looted in past centuries. Repatriation and restitution of cultural property looted long ago may be even more important to a source nation’s cultural heritage than property seized in more recent decades. The passage of time may not necessarily heal the wounds occasioned by the plunder and loss of property that is important to a nation’s cultural heritage, as evidenced by the persistent long-standing efforts of Greece to persuade Britain to return the Elgin Marbles. It is important for nations to work together to develop principles to be followed in this area. This is a field without any precedent legal norms and hence is *sui generis*. The repatriation of objects looted long ago presents an historic opportunity for the international community to forge a new domain of cultural justice.

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<sup>815</sup> *Metro. Museum of Art*, 762 F. Supp. at 46.

<sup>816</sup> See Jonathan Drimmer, *Hate Property: A Substantive Limitation for America’s Cultural Property Laws*, 65 TENN. L. REV. 691, 746 (1998).

<sup>817</sup> *Id.* at 747.

### *B. General Arguments in Support of Repatriation*

It seems intuitive that repatriation should dampen the black market in looted objects and reduce incentives for future illegal excavating. As noted above, however, when there is litigation over the return of artifacts to a party claiming ownership, the outcome is highly unpredictable. There are the numerous evidentiary problems, such as the complexities surrounding proof of origin, the status of bona fide purchasers, and the nature of the removals from the claimant's state. And there are other challenges as well: difficult choice of law questions, application of the statute of limitations, discerning sovereign immunity and succession, and addressing "act of state" defenses. Claimants may find it difficult or impossible to obtain a remedy through civil litigation.

At the same time, there is an emerging public policy in support of the repatriation of looted artifacts. This policy is expressed in the overall thrust of the UNESCO Convention, in enabling laws passed by signatory states, and in the repatriation movement that led to the enactment of such laws as NAGPRA in the United States. In lieu of litigation, there are numerous options for claimants seeking repatriation. Diplomatic negotiations, such as have been advanced between Greece and Britain concerning the Elgin Marbles, may be useful. Coercion imposed by the court of public opinion may also be effective, as was the case with the Denver Museum of Art's decision to repatriate a ceremonial war god to the Zuni Indians of New Mexico. Additional tactics and options short of litigation that may be employed include: private pressure, private donations for or outright purchase of the objects at issue, compromises involving the return of items by exchange or indefinite loan, and formal arbitration by an independent tribunal.

### *C. Arguments in Favor of Repatriation of Looted Antiquities from Past Centuries: Retroactive Application of Modern Customary International Law*

As discussed in Section XIII, C, *supra*, customary international law during the French Revolution mandated the repatriation of artifacts looted by military conquerors. This section argues that the taking of wartime booty — regardless of when it was appropriated and whether it was directly taken by an occupying force, pursuant to terms in a treaty, coerced by the victor upon the vanquished, or taken as a means of reparation — violates customary international law as construed today. Therefore, modern international law should have retroactive application even to events of the distant past.

Modern treaties and conventions protecting cultural property do not apply to the return of cultural property taken during the Napoleonic occupation. The UNESCO and UNIDROIT as well as the 1954 Hague Convention are not

retroactive and only apply in limited specific contexts.<sup>818</sup> The UNESCO and UNIDROIT conventions are limited to the return of cultural property that has been illegally exported or stolen from the country of origin. The 1954 Hague Convention is concerned only with the protection of cultural property in time of war and the return of such property taken from enemy territory. Moreover, United Nations resolutions and UNESCO Final Reports calling for the restitution of cultural property taken by colonial powers are non-binding and do not rise to the level of customary law.

Although this Article disputes the claim, it must be admitted that an examination of the international law of the eighteenth century reveals that a plausible argument can be made that title to Egyptian cultural property taken by Napoleon and transferred to Britain rests with Britain. Proponents of this view might base it on the application of the laws of war and conquest, as understood by Egypt, France and Britain, to the conditions prevalent in Egypt during the period of Napoleonic occupation. Even if the modern Conventions had the status of customary international law and were binding on all states (something that is a matter of debate among scholars),<sup>819</sup> this international law does not necessarily govern the return of Egypt's cultural property because the custom was not established at the time of the taking from Egypt.<sup>820</sup> As the modern Conventions and the doctrines they embrace are inapplicable to the looting that occurred during the Napoleonic occupation of Egypt, this Section examines whether modern day customary international law might be applied retroactively to establish a case for the repatriation of the Egyptian artifacts.

The Nuremberg Charter considers the plunder of cultural property a war crime, constituting a "grave breach" under the 1949 Geneva Convention.<sup>821</sup> Additionally, the war crimes established by the Nuremberg Tribunal were retroactive; there is no statute of limitations for the plunder of cultural property. This reflects the critical importance to the international community of preserving the cultural property of peoples from pillage during wartime.<sup>822</sup> This was confirmed by Article I of the 1968 Convention on the Non-Applicability of

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<sup>818</sup> UNIDROIT Convention, *supra* note 655, arts. 1, 3, 5, 10, 34, at 1331-35; UNESCO Convention, *supra* note 614, arts. 2, 10, at 290; *see also* Cuning, *supra* note 479, at 220.

<sup>819</sup> Scholars argue that the status of the restitution principle of the Conventions is in doubt due to insufficient ratification, particularly by market states, and sporadic support for the principle as customary international law. *See* Hatti, *supra* note 396, at 481.

<sup>820</sup> *See* HENKIN, *supra* note 503, at 37-40.

<sup>821</sup> *See* London Charter, *supra* note 564 (establishing Nuremberg Tribunal).

<sup>822</sup> For example, the preamble to the Hague Convention states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." 1954 Hague Convention, *supra* note 397.

Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>823</sup> which was passed by the United Nations General Assembly in 1968. The 1968 Convention provides as follows:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg... particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims.<sup>824</sup>

Some commentators have persuasively argued that no statute of limitations should apply in any case involving a claimant seeking the return of property looted during wartime.<sup>825</sup>

This principle has been invoked in connection with the so-called "Hermitage Trove" controversy, which occurred at the end of World War II. Approximately 30,000 items of art looted by the Nazis from private collections were subsequently seized by the Soviet Army and became part of the Pushkin and Hermitage collections in Moscow.<sup>826</sup> The general consensus is that Russia is presently bound by international law to return the twice-looted art to Germany.<sup>827</sup> The existence of this Soviet cache of "trophy art" did not become generally known until 1995, when selected pieces were displayed at the Pushkin Museum in Moscow and the Hermitage in St. Petersburg. These exhibits ignited a firestorm, with some observers calling for the return of the stockpile to Germany and others contending that it should be retained by Russia as war compensation.<sup>828</sup> Despite intensive negotiations between the two countries, the dispute remains unresolved.<sup>829</sup>

Much of the Hermitage Trove narrative parallels Napoleon's plunder of Egypt. Hitler dreamed of founding a great art museum in Linz, Austria, near his

<sup>823</sup> U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73. Although Russia and a number of Eastern European nations have ratified this Convention, neither the United States nor any of the other major Western nations have done so.

<sup>824</sup> *Id.* art. 1.

<sup>825</sup> See Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, in *THE SPOILS OF WAR*, *supra* note 530, at 101, 105 ("no statute of limitations should apply in any case seeking the return of cultural property looted during wartime").

<sup>826</sup> See generally Wilske, *supra* note 450, at 223.

<sup>827</sup> See *id.* at 269.

<sup>828</sup> See *id.* at 263.

<sup>829</sup> But see, e.g., Jack Achiezer Guggenheim, *Art & Atrocity: Cultural Depravity Justifies Cultural Deprivations*, 8 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 699 (1998); see Margaret M. Mastroberardino, *Comment, Spoils of War? A Solution to the Hermitage Trove Debate*, 18 *U.P.A.J INT'L ECON. L.* 409 (1997).



birthplace.<sup>830</sup> Napoleon dreamed of collecting art to establish a “super-museum.”<sup>831</sup> Nazi troops systematically looted and plundered art; Napoleon and his army did the same in Egypt. Hitler recruited Hans Posse, a Dresden museum curator, to oversee the acquisitions;<sup>832</sup> Napoleon enlisted the assistance of members of the *Institut d’Egypte* as his trophy brigade. There is one key difference: the current German government admits that “the theft of art treasures... was a barbaric attack on the cultural identity of the Slavic peoples, fueled by the inhumane ideology underlying the German war of conquest”;<sup>833</sup> the French and British governments, on the other hand, have issued no such admission. After World War II, the majority of cultural property stolen by the Germans was returned to rightful owners.<sup>834</sup> None of the artifacts looted from Egypt have been returned. Art stolen during World War II by the Nazis and others has received considerable attention in the literature.<sup>835</sup> Aside from concern over Holocaust-looted art, museums have largely ignored the problem of stolen antiquities.<sup>836</sup> However, there is some precedent for the notion that emerging principles of international law can and should be applied retroactively. Justice Robert H. Jackson, American Chief of Counsel for the prosecution of major war criminals in the *ad hoc* International Military Tribunal of Nuremberg said:

International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. *But every custom has its origin in some single act*, and every agreement has to be initiated by the action of some state.... [W]e cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a

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<sup>830</sup> See Wilske, *supra* note 450, at 227-28.

<sup>831</sup> See *id.* at 245.

<sup>832</sup> See *id.* at 228.

<sup>833</sup> Hagen Graf Lambsdorff, *Return of Cultural Property: Hostages of War or Harbingers of Peace? Historical Facts, Political Positions, and An Assessment from the German Point of View*, in *THE SPOILS OF WAR*, *supra* note 530, at 241.

<sup>834</sup> See Wilske, *supra* note 450, at 229.

<sup>835</sup> See NORMAL PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES, AND PRACTICE* (2000). The Association of Art Museum Directors as well as the American Association of Museums established codes of ethics and procedures for museums to undertake provenance research and to set standards for the return of art work looted during the Holocaust. See Gerstenblith, *supra* note 425, at 437. Museums have, in turn, created lists of objects with gaps in their provenance between the years 1933 and 1945 that were known to have been on the European continent before or during this time period. Several museums have posted these lists on their web sites to permit potential claimants an opportunity to review this information. See *id.* at 439.

<sup>836</sup> See Willard L. Boyd, *Museums as Centers of Controversy, America’s Museums*, *DAEDALUS*, VOL. 128:3; see also Gail Chaddock, *Art World Wary of New Rules*, *CHRISTIAN SCIENCE MONITOR*, Feb. 10, 1998, at 11, cited by Gerstenblith, *supra* note 425.

newer and strengthened International Law.... Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances.... Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct.<sup>837</sup>

Another leading commentator, Sheldon Glueck, has written:

Much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of States in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time. "International law was not crystallized in the seventeenth century, but is a living and expanding code."<sup>838</sup>

A shift in customary international law can occur quickly, "particularly if the rule was uncertain or still developing." According to some commentators, even "a single precedent could be sufficient to create international custom."<sup>839</sup> For example, it has been pointed out that the principle of national sovereignty over airspace arose as a norm of customary international law "at the moment the 1914 war broke out."<sup>840</sup> The advent of aircraft was a sudden and new phenomenon, bringing into focus the issue of airspace, which states had never considered in earnest before. Another example relates to the establishment of new norms developed during the Nuremberg Tribunal, which stated that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."<sup>841</sup> This and other "Nuremberg Principles" became principles of customary international law at the moment they were announced.<sup>842</sup> The Nuremberg Tribunal established a

<sup>837</sup> Report of June 7, 1945, from Justice Robert H. Jackson, Chief of Counsel for the United States for the prosecution of Axis War Criminals, *reprinted in* 39 AM. J. INT'L L. (Supp.) 178, 187 (1945).

<sup>838</sup> Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 398 n.6 (quoting from author's book, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 14 (1944)).

<sup>839</sup> ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 58 (1971) (quoting Gilberto Amado).

<sup>840</sup> *Id.* (quoting James L. Briery). There had been an earlier effort in the 1899 Hague Convention to deal with aerial warfare by banning the launching of projectiles from balloons. *Id.*

<sup>841</sup> Nuremberg Resolution affirming the Principles of International Law Recognized by The Charter of the Tribunal, and the spelling out of these principles by the International Law Commission of 1950, Res. 9(1) (1946).

<sup>842</sup> One of the objectives of the Nuremberg Trials was to lay down the rule of individual accountability. "Henceforth, no matter how exalted your position, whether you were captains, kings, presidents, prime ministers, secretaries of parties, heads of parlor bureaus, military chieftains, bankers, industrialists, no matter how exalted, Justice Jackson [American Chief of Counsel of the Nuremberg Trials] said, 'We will give you short shrift, a long rope, and into your hands, we will

principle of international law that permitted retroactive application of new standards.

The Executive Committee of the International Council of Museums (ICOM) adopted the findings of a study, entitled the "Study on the principles, conditions, and means for the restitution or return of cultural property in view of reconstituting dispersed heritages." The Study concluded the following:

The reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived thereof, is now considered to be an ethical principle recognized and affirmed by the major international organizations. This principle will soon become an element of *jus cogens* of international relations.<sup>843</sup>

This statement, issued in 1979, suggests that repatriation of cultural property to source nations was then an emerging norm in customary international law, from which no derogation should be permitted and on the same footing as egregious violations of human rights such as apartheid, slavery and the use of torture.<sup>844</sup> The following policy statement regarding situations where objects may have been "legally" acquired but under circumstances that today would be illegal or unethical sheds light on the above statement.

In cases where the methods of acquisition of objects may have been technically legal at the time of acquisition but which may be considered

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pass the poisoned chalice.' . . . In other words, if war comes, . . . (n)o longer does exalted status confer immunity." Thomas F. Lambert, Jr., *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 16-17 (1995). Another commentator has noted that in neither Tokyo nor the Nuremberg Trials was it sufficient for the defense to show that the acts of responsible officers or of government ministers and officials were protected as "acts of state." The twin principles of individual criminal responsibility and of universal jurisdiction in the prosecution and punishment of war criminals were thus firmly established. R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 33 (1995). A third commentator had this to say: "Nuremberg was a historical landmark in other respects as well. It marked the start of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt throughout the world in the United Nations Genocide Convention, the United Nations Universal Bill of Rights and Fundamental Freedoms." Henry T. King, Jr., *The Nuremberg Context From the Eyes of a Participant*, 149 MIL. L. REV. 37, 46 (1995). A fourth and final commentator wrote the following: "The decision at Nuremberg built on and confirmed the growing changes in international law, but it represented a turning point for individual responsibility and for international law. . . . The rejection of the 'superior orders' defense is of necessity based on the presumption of an applicable legal order outside of and beyond the nation state. This in itself is the most important sign of transformation of the paradigm that was being made." Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 MIL. L. REV. 207, 212 (1995).

<sup>843</sup> See James A. R. Nafziger, *The New International Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789, 804 (1983).

<sup>844</sup> See *id.* at 805-06.

unethical by standards either then or by standards since, museums should weigh both legal and ethical considerations when considering requests for repatriation. Museums should also weigh the value and benefit of such objects to their public mission with the interests of the requesting party.<sup>845</sup>

The repatriation movement is itself predicated on the retroactive application of emerging principles. The dispossession in 1799 of Egyptian artifacts held by Napoleon, and the surreptitious and manipulative “taking” by Lord Elgin of the Elgin Marbles, was misguided and unjust then and now. Whether one supports or opposes the repatriation of artifacts looted in the distant past, questions of justice and fairness are central to the resolution of these issues. Arguments supporting the *repatriation* of Egyptian artifacts are analogous to arguments calling for *reparations* in what is known as the “reparations movement.”<sup>846</sup> The reparations movement has taken the form of public apologies and financial packages to formally disown past acts and provide for damages. This movement, predicated on equitable principles to permit consideration of redress for past records of egregious human injustice,<sup>847</sup> has embraced a diversity of cultures and circumstances: Japanese Americans detained as internees during World War II, indigenous Hawaiians, Nazi Holocaust victims, Native Americans subjected to genocide and land theft, and African Americans subjected to slavery and discrimination.<sup>848</sup> The movement is gaining momentum and is likely to grow in significance in the future.<sup>849</sup>

In the summer of 2004, Berlin pledged more aid for Namibia, its former colony in southwestern Africa. The move came in response to demands from descendants of the Herero people, who were massacred a century ago by

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<sup>845</sup> See American Association of Museums, Policy Regarding the Reparation of Native American Ceremonial Objects and Human Remains, reprinted in *NAGPRA: Hearings on S. 1980 Before the S. Select Comm. On Indian Affairs*, 101st Cong., 2d Sess. 173 (1990).

<sup>846</sup> See generally, Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

<sup>847</sup> See generally, William Bradford, “With a Very Great Blame on Our Hearts”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002/2003).

<sup>848</sup> See *id.*; see also K. Hopkins, *Forgive U.S. Out Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001); A.E. Cook, *King and the Beloved Community: a Communitarian Defense of Black Reparations*, 68 GEO. WASH L. REV. 959 (2000); A.L. Brophy, *Losing the (Understanding of the Importance of) Race: Evaluating the Significance of Race and Utility of Reparations*, 80 TEX. L. REV. 911 (2002); L.B. Glaunder, *The Need for Accountability and Reparation: 1830-1976. The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002); L.A. Harris, *Political Autonomy as a Form of Payments- An Exclusion Revisited*, 34 U.S.F. L. REV. 705 (2000); see F. Michael Higginbotham, *Introduction: A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2003).

<sup>849</sup> See Ogletree, *supra* note 825, at 279-80.

German troops.<sup>850</sup> At a ceremony in Namibia to commemorate the massacre, the German ambassador said Germany took “moral responsibility” for the killing of 65,000 Hereros on January 12, 1904, after they were compelled to migrate, pressed into labor, and forced to give up their traditions.<sup>851</sup> There appears to be good cause for reparations in a broad array of human rights abuses. This is reflected in the numerous legislative initiatives addressing reparations.<sup>852</sup>

There are two immediate criticisms of the reparations movement: first, it is often difficult to discern the specific wrongdoers and the proper party claimants; second, formulating an appropriate monetary remedy is fraught with complications.<sup>853</sup> Both of these problems, especially the latter, may be less challenging in the context of claims for repatriation of looted cultural property. With repatriation, it is more often possible to identify specific individual perpetrators or ultimately responsible parties, such as Napoleon, Lord Elgin or Hitler. By definition, repatriation involves the identification and physical return of objects. This is a very different process than the attempted calculation of an appropriate monetary remedy. Repatriation — restitution *in specie*, the return of the objects — is often an easier and more effective remedy than monetary compensation provided through reparations. Due to the nature of cultural property, it is generally not possible to fully compensate for its loss other than through the actual repatriation of the property. Monetary compensation — reparation — is often simply inadequate. In order for reparations to be meaningful, they must “as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would... have existed if that act had not been committed.”<sup>854</sup> The basic principle behind repatriation is of course just that — *restitutio in integrum* or “restitution to the previous condition.” Staying true to this principle seems especially appropriate in addressing the removal of irreplaceable cultural property. The only remedy that can “wipe out all consequences” of looting is return of the objects.<sup>855</sup>

The reparations movement is tied to the human rights movement. There are commentators who argue that the human rights model in international law should be applied to the problem of compensation for expropriated property.<sup>856</sup>

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<sup>850</sup> See *Namibia: Germany Regrets Colonial Massacre*, N.Y. TIMES, Jan. 13, 2004, at A15.

<sup>851</sup> See *id.*

<sup>852</sup> See Ogletree, *supra* note 825, at 282.

<sup>853</sup> See *id.* at 279, 306-07.

<sup>854</sup> *Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, at 46-47 (Sept. 13).

<sup>855</sup> See GREENFIELD, *supra* note 437, at 261-66.

<sup>856</sup> See, e.g., Eduardo Moises Penalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 110 (2000).

Human rights are seen as inhering in the individual in a way that transcends location and time. For example, the Preamble to the Universal Declaration of Human Rights declares that the rights it sets forth “derive from the inherent dignity of the human person.”<sup>857</sup> Noted commentator Jack Donnelly has addressed the breadth and depth of human rights. “From where do we get human rights? The very term ‘human’ rights points to a source: humanity, human nature, being a person or a human being.”<sup>858</sup> To the extent that cultural property is seen as implicating basic human rights and the return of cultural property is based on protecting these rights, cultural property rights may be seen as existing universally. Seen in this way, modern governments have a moral obligation to observe human rights, including perhaps the repatriation of cultural property, whether or not governmental leaders have always embraced the philosophical basis for cultural property rights as basic human rights.

#### *D. Examples of Successful Repatriation of Artifacts*

Many objects of antiquity were removed from their original contexts long ago, when virtually no ethical considerations prevailed. Preservation movements, such as those focused on environmental concerns, which are based on the principle of conserving rather than consuming the environment, have changed the focus of archaeology, shifting it away from excavation and towards conservation. However, campaigns to recover looted artifacts are almost never won without substantial struggle. Restitution movements generally meet sharp resistance. The return of artifacts is rarely an outgrowth of pure magnanimity on the part of the museum or nation against which the demand is made. Restoration of cultural property is more often the result of protracted and acrimonious negotiations.

This is not always the case. Authorities will sometimes rapidly uncover unlawful excavations, apprehend the looters, and swiftly return the artifacts. In October of 2003, Egyptian police arrested a truck driver trying to sell a 2,500 year-old mummy.<sup>859</sup> The driver bought the mummy for \$7,000 from a man who said he had found it in the desert and he then tried to sell the mummy in upscale neighborhoods around Cairo, thinking he could fetch up to \$2 million for it. The suspect gradually reduced his price and the matter came to the attention of the police, who arrested him and seized the mummy.<sup>860</sup> Another example of a

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<sup>857</sup> *Universal Declaration of Human Rights*, G.A. Res. 217(A) (III), at 71, U.N.Doc. A/810 (1948).

<sup>858</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 16 (1989).

<sup>859</sup> See Agence France-Press, *World Briefing, Egypt: Mummy For Sale*, N.Y. TIMES, Oct. 4, 2003, at A4.

<sup>860</sup> See, e.g., Agence France-Press, *Thieves Plunder Egypt's Tombs, Dealers Sell Treasures*

relatively trouble-free repatriation occurred recently when the Michael Carlos Museum at Emory University in Atlanta, Georgia returned a mummy believed to be Ramses I that was looted from a tomb and smuggled out of Egypt by a Canadian doctor nearly 150 years ago.<sup>861</sup> The Emory museum bought the mummy in 1999 from a museum in Ontario but it will now be part of the permanent collection at the Luxor Museum in Egypt. The Egyptian Antiquities Director, Zahi Hawas, said that the return was “a great, civilized gesture” by the Emory museum.<sup>862</sup> Mr. Hawas added that there are numerous Egyptian artifacts that were illegally excavated and now sit in foreign museums. Egypt is seeking their return.<sup>863</sup>

Most repatriation efforts, even when successful, are contentious. One ultimately successful but hardly hassle-free instance of repatriation of cultural property occurred in 1978, when the United States government entered into an agreement by which it returned to the Hungarian people the crown, orb and scepter of St. Stephen, the first Hungarian king, who had received them from Pope Sylvester II in 1001. These items had been repeatedly lost and stolen over the years before showing up in Fort Knox after World War II.<sup>864</sup> President Jimmy Carter authorized the repatriation of these artifacts but a lawsuit was instituted by Senator Bob Dole to block the repatriation. The court ultimately ruled that the President had the authority to repatriate the artifacts.<sup>865</sup>

Another hard-won repatriation concerned the “Lydian Hoard,”<sup>866</sup> which was finally returned via an out-of-court settlement between the Republic of Turkey and the Metropolitan Museum of Art. The 1993 repatriation occurred more than twenty-five years after the acquisition of the property by the museum. In this instance, public pressure induced the repatriation.<sup>867</sup> In yet another example of repatriation, the government of Italy recently agreed to return an 80-foot-high, 200-ton obelisk that Mussolini seized in 1937 when he invaded Ethiopia and

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*Worldwide*, AGENCE FRANCE PRESSE, Aug. 18, 1993, available at LEXIS, New Library, Non-U.S. File.

<sup>861</sup> See Ariel Hart, *A Journey Back to Egypt for a Mummy Thought to Be a Pharaoh*, N.Y. TIMES, Oct. 25, 2003, at A13.

<sup>862</sup> See Associated Press, *Egypt Welcomes Mummy's Return from U.S.*, N.Y. TIMES, Oct. 27, 2003, at A10.

<sup>863</sup> See Hart, *supra* note 863. Mr. Hawas has recently been embroiled in a dispute with the Virginia Museum of Fine Arts over a relief from the Nile Valley. *Id.*

<sup>864</sup> See *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977).

<sup>865</sup> *Id.*

<sup>866</sup> See Mark Rose & Ozge Acar, *Turkey's War on Illicit Antiquities Trade*, ARCHAEOLOGY, 44, 46 (1995) (referring to 6th Century B.C. hoard of silver and gold antiquities illegally excavated and smuggled out of Turkey, which was knowingly purchased by Metropolitan Museum of Art).

<sup>867</sup> See Nancy C. Wilkie, *Public Opinion Regarding Cultural Property Policy*, 19 CARDOZO ARTS & ENT. LAW JOURNAL 97, 102 (2001).

plundered some of its treasures.<sup>868</sup> This reflects a change in Italy's attitude towards its past and may open a wedge that will help prompt other countries to re-examine whether they should return the cultural heritages of taken from other countries.

It is far more common for governments to simply refuse to repatriate objects that have been looted from other countries. As discussed in Section XIX, C, *supra*, during World War II, Russia confiscated a substantial amount of art from secret German repositories and kept the art hidden until the early 1990s.<sup>869</sup> Much of the art had previously been looted by the Germans. Russia refuses to return any of the "twice-looted" art to its rightful owners, contending that the items constitute partial reparations for Germany's acts of aggression.<sup>870</sup> Part of the argument seems to be that the property has garnered a provenance gradually over time simply by virtue of being part of the "permanent" collection of museums. The statue of Queen Nefertiti was taken in the early 1930s by German archaeologists and turned it over to a museum in West Berlin.<sup>871</sup> Hitler himself demanded that the statue remain in Germany; and the statue sits in Germany to this day, with apparent legitimacy, as though its looted past was laundered away.<sup>872</sup>

There are numerous instances of voluntary repatriations that have occurred only after protracted and persistent efforts by claimants. In one noted example, Mary Leakey, the archaeologist who discovered the *Proconsul africanus* skull, loaned the skull to the British Museum of Natural History in 1948.<sup>873</sup> Later, her son Richard, who had become Director of the National Museums in Kenya, requested the return of the skull for the collection of the National Museum of Nairobi, which was equipped to conserve it properly. The British Museum claimed that the Proconsul skull had been a gift rather than a loan and refused to return it. In 1982, a copy of a 1948 letter from the Chief Secretary of the Kenya Government was produced, revealing that the item was merely on loan and could be recalled at any time. The British Museum had previously denied all knowledge of this letter. The Trustees of the Museum finally agreed in 1982 to "de-access" the Proconsul and reluctantly returned it to Kenya.<sup>874</sup> Another

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<sup>868</sup> See Bruni, *supra* note 400.

<sup>869</sup> See Konstantin Akinsha & Grigorii Koslov, *The Secret Repositories, in SPOILS OF WAR 162-65* (Elizabeth Simpson ed., 1997).

<sup>870</sup> See Sylvia L. Depta, *Comment: Twice Saved or Twice Stolen?: The Trophy Art Tug of War Between Russia and Germany*, 10 TEMP. INT'L & COMP. L.J. 371 (1996).

<sup>871</sup> See GREENFIELD, *supra* note 437, at 7, 276.

<sup>872</sup> *Id.*

<sup>873</sup> See Mary Leakey, *DISCLOSING THE PAST 100-101* (Weidenfeld, 1984); see also GREENFIELD, *supra* note 437, at 6.

<sup>874</sup> *Id.*



example of a difficult repatriation effort involved a Colorado museum and the Zuni Indians of New Mexico. Public pressure eventually persuaded the Denver Art Museum to repatriate a Zuni ceremonial war god which had somehow found its way onto the art market in violation of tribal law. Initially, museum trustees balked at the idea of returning the artifact, asserting that the artifact was “communally owned by the people of Denver,” and that “no legal precedent exists of a museum donating an object to any religious group on the basis that the object is of religious significance and should be presumed to have been stolen by virtue of having been communal religious property.”<sup>875</sup> However, as public pressure mounted, the museum decided to return the artifact a year later. This happened despite concerns that the item would be placed in an outdoor setting where it faced gradual destruction by the elements.<sup>876</sup> In announcing its eventual decision, the museum cited its “interest in strengthening its relations with the Zuni people and other creative cultures.”<sup>877</sup>

#### *E. The Unresolved Controversy Regarding the Elgin Marbles*

Perhaps the world’s most famous repatriation conflict involves the British Museum’s persistent refusal to return the so-called “Elgin Marbles”<sup>878</sup> to Greece. In 1799, Scottish nobleman Thomas Bruce, the 7th Earl of Elgin and a member of the British House of Lords, was serving as London’s envoy to Constantinople. Although officially in Turkey to help maintain friendly relations with the Ottoman Empire, Lord Elgin also had a personal agenda: to improve the standing of the fine arts by re-introducing English artists to classical Greek art. To accomplish this goal, in 1803 Elgin sought and received permission from the Turkish government to examine and sketch the Parthenon. He later managed to remove various marble sculptures from the Parthenon and, without clear permission, sailed to England with the booty in the ship’s hold. In 1816, when he needed money, Elgin offered to sell his collection to the British government for £25,000. Although some members of the House of Commons

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<sup>875</sup> Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 ENVTL. L. & LITIG. 109, 125 (1993) (quoting from release by trustees of Denver Art Museum in 1979).

<sup>876</sup> *See id.* at 125.

<sup>877</sup> LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* IV-42 (Supp. 1984). Of course, had NAGPRA been law at the time of this episode, the trafficking by private museums, dealers and collectors in the illegally acquired Zuni war gods would have been a critical violation. *See* 18 U.S.C. § 1170(b). Under NAGPRA, a major factor in determining whether a cultural artifact was acquired illegally is whether the artifact was property of the tribe as a whole, and whether it was obtained in violation of the tribe’s communal interest. *Id.*

<sup>878</sup> The term “Elgin Marbles” is used by those who claim they belong to Britain. The term “Parthenon Marbles” is used by those who say they were stolen. *See* Fred A. Bernstein, *Greece’s Colossal New Guilt Trip*, N.Y. TIMES, Jan. 18, 2004, at Arts & Leisure 1.

argued that the government should not become a party to what they viewed as Elgin's trickery of the Turkish government, the Parliament voted 83-30 to purchase the marble sculptures and the works were put on permanent display in the National Gallery of Art. Those who voted against the measure questioned the propriety of Elgin's actions and sought to amend the bill to hold the sculptures in trust for later return to Greece.<sup>879</sup> Some modern legal commentators think that the British Parliament "committed fraud" in claiming title to the marble sculptures.<sup>880</sup>

In 1983, the Greek government formally asked the British government to return the Elgin Marbles. The effort behind this request was led by actress and then-Minister of Culture and Education, Melina Mercouri,<sup>881</sup> who said: "The Marbles are part of a monument to Greek identity, part of our deepest consciousness of the Greek people: our roots, our continuity, our soul. The Parthenon is our flag."<sup>882</sup> The request was denied in 1984 and subsequent requests have also been denied, largely on the grounds that more people are able to view the sculptures in England and that the Greek government does not have the funds to properly preserve them.<sup>883</sup> In the meantime, the term "Elginism" has become a common shorthand reference for the plunder of cultural property.<sup>884</sup> Apologists for the British claim that these pieces are better preserved in the British Museum than at the Acropolis, where they would suffer the effects of the elements. The apologists simply ignore that the Greek government intends to place the sculptures in a museum at the foot of the Acropolis and that Greece is more than capable of proper conservation of the objects.<sup>885</sup> It is interesting to note that the British Museum actually displays the sculptures out of sequence, whereas a specially designed gallery in the new Acropolis museum would display the pieces as they were when mounted on the Parthenon.<sup>886</sup> If the Elgin Marbles are not returned to Greece, the special gallery will sit empty.<sup>887</sup> As of this writing, the controversy remains unresolved. Further aspects of this case are discussed in Section XIX, F and G, *infra*.

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<sup>879</sup> See Moustakas, *supra* note 417, at 1198 n.82.

<sup>880</sup> See Bernstein, *supra* note 858.

<sup>881</sup> See 50 PARL. DEB., H.C. (6th Ser.) (1983), at 379.

<sup>882</sup> SUNDAY TIMES [LONDON], May 22, 1983, at 15.

<sup>883</sup> See 58 PARL. DEB., H.C. 188 (6th Ser.) (1984) (Written Answers).

<sup>884</sup> See JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW ETHICS AND THE VISUAL ARTS 12-25 (3d ed. 1998) (for discussion of supporting authorities). As these authors point out, none of the money paid by the British government went to Elgin (his creditors took it all) and Elgin himself died alone in 1842, broken in spirit and penniless. *Id.*

<sup>885</sup> See Bernstein, *supra* note 858.

<sup>886</sup> See *id.*

<sup>887</sup> See *id.*

*F. The UNESCO Intergovernmental Committee*

In the wake of the UNESCO Convention, source claimant nations have taken a special interest in seeking the repatriation of cultural objects that have illegally found their way to market nations. This movement began on an international level in 1973, when the United Nations General Assembly adopted a series of resolutions calling for the restitution of cultural property to countries of origin.<sup>888</sup> In 1978, UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.<sup>889</sup> In 1983, the Council of Europe Parliamentary Assembly adopted a Resolution on Return of Works of Art.<sup>890</sup> The philosophy behind these efforts is that cultural property belongs to the source country and works that end up abroad in museums and collections as a result of plunder, theft, removal by colonial powers, illegal export, or other exploitation, should be repatriated.<sup>891</sup>

The Intergovernmental Committee has defined its objectives as promoting the “restitution or return” of “cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.”<sup>892</sup> The Intergovernmental Committee is empowered to promote bilateral agreements for the repatriation of cultural property, especially when the property was taken within the context of colonization or military occupation.<sup>893</sup> The controversy regarding the Elgin Marbles, and the situation concerning the antiquities taken during Napoleon’s occupation of Egypt, are precisely the types of situations which concern the Intergovernmental Committee.

The Secretariat Report of the 12th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin, issued at UNESCO headquarters in Paris in March of 2003,<sup>894</sup> discusses various cases pending before the Committee. One case involves the Elgin Marbles. The Director General renewed efforts to hold a meeting between

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<sup>888</sup> See Nafziger, *supra* note 823, for a discussion of these resolutions and the repatriation movement.

<sup>889</sup> *Id.*

<sup>890</sup> EUR. PARL. ASS. DEB. 35th Sess. pt.2 808 (Oct. 6, 1983).

<sup>891</sup> See Merryman, *supra* note 397, at 845.

<sup>892</sup> UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Art. 3.2.

<sup>893</sup> See Nafziger, *supra* note 823, at 801.

<sup>894</sup> See *The Secretariat Report of the 12th Sess., UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin*, UNESCO, 12th Sess., at 25-28, U.N. Doc. CLT-2003/CONF.204/2 (2003).

Greece and the United Kingdom. Initially, no meeting could be arranged because, for one thing, Greece wanted the agenda to include return of all, not just some, of the Marbles. Nonetheless, in November 2002, a private meeting occurred in London between the Greek Minister of Culture and the British Secretary of State for Culture, Media and Sport, and the Director of the Board of Trustees of the British Museum. The discussions focused on items that may be loaned from the British Museum to Greece during the 2004 Olympic Games.

The United Nations General Assembly has passed annual resolutions supporting the return and restitution of looted cultural properties to the countries of origin.<sup>895</sup> Resolution 56/97, introduced by Greece and cosponsored by the United States among other countries, was adopted on December 14, 2001.<sup>896</sup> The resolution calls upon all relevant bodies of the UN system and other relevant intergovernmental organizations “to work in coordination with UNESCO, within their mandates and in cooperation with Member States, in order to continue to address the issue of return and restitution of cultural property to the countries of origin”.<sup>897</sup> The resolution urges member states “to introduce effective national and international measures to prevent and combat illicit trafficking in cultural property.”<sup>898</sup>

This is a stronger call for concrete action against illicit trafficking than in the predecessor resolution 54/190, adopted on December 17, 1999. In addition, Resolution 56/97 invites Member States to continue drawing up systematic inventories of their cultural property.<sup>899</sup> Like its predecessors, the new resolution supports UNESCO’s efforts to promote the use of modern identification systems for the purpose of tracing lost or stolen property and encourages the linking of information systems and databases, including the one developed by the International Criminal Police Association — Interpol.<sup>900</sup> The UN General Assembly also welcomed the adoption of the International Code of Ethics by the General Conference on November 16, 1999.<sup>901</sup> Resolution 56/97 also takes note of the creation and launching of the International Fund for the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.<sup>902</sup> The Director General is encouraged to devise a strategy for its effective promotion and Member States as well as intergovernmental bodies, the private sector, and other interested parties are

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<sup>895</sup> See Nafziger, *supra* note 823, at 802.

<sup>896</sup> U.N. Resolution A/RES/56/97.

<sup>897</sup> *Id.*, para 7.

<sup>898</sup> *Id.*, para 6.

<sup>899</sup> *Id.* at para 8.

<sup>900</sup> *Id.* at para 8.

<sup>901</sup> UNESCO, *Records of the General Conference*, UNESCO, 30th Sess., vol. 1, at 65 (1999).

<sup>902</sup> U.N. Resolution A/RES/56/97.

invited to make voluntary contributions to the fund.<sup>903</sup> Previous resolutions on this subject generally tried to encourage states to take adequate measures to prohibit and prevent illicit trafficking of artifacts, prepare national inventories, become parties to the UNESCO Convention, and build public support in favor of programs of repatriation.<sup>904</sup>

### *G. Museum Policies for and Against Repatriation*

Museums are at the forefront of public policy-making on the issues of what should and should not be acquired, preserved and exhibited for the edification of the larger community. Museums are in agreement that they have the duty to refrain from knowingly acquiring or exhibiting artifacts which have been stolen, illegally exported from their country of origin, or illegally salvaged or removed from commercially exploited archaeological or historic sites, as attested to by the standards of the American Association of Museums and the International Council of Museums.<sup>905</sup> At the same time, museum trustees are concerned about increasing admission revenues and do not wish to offend powerful donors

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<sup>903</sup> *Id.* at para 11.

<sup>904</sup> See Nafziger, *supra* note 823, at 802.

<sup>905</sup> See American Association of Museums, CODE OF ETHICS FOR MUSEUMS 2000, available at <http://www.aam-us.org/aamcoe.cfm> ("acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials"); see also International Council of Museums, CODE OF ETHICS FOR MUSEUMS, available at [http://icom.museum/ethics\\_rev\\_engl.html](http://icom.museum/ethics_rev_engl.html) (3.2 Acquisition of Illicit Material: The illicit trade in objects and specimens encourages the destruction of historic sites, ethnic cultures and biological habitats and promotes theft at local, national and international levels. . . . Museums should recognize the destruction of human and natural environment and loss of knowledge that results from the illicit servicing of the market place. The museum professional must warrant that it is highly unethical for a museum to support the illicit market in any way, directly or indirectly. A museum should not acquire any object or specimen by purchase, gift, loan, bequest, or exchange unless the governing body and responsible officer are satisfied that a valid title to it can be obtained. Every effort must be made to ensure that it has not been illegally acquired in, or exported from, its country of origin or any intermediate country in which it may have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production, before acquisition is considered. In addition to the safeguards set out above, a museum should not acquire objects by any means where the governing body or responsible officer has reasonable cause to believe that their recovery involved the unauthorized, unscientific, or intentional destruction or damage of ancient monuments, archaeological, or geological sites, or natural habitats, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities. . . . A professional conflict can exist when a acquisition, highly desired by a museum, lacks provenance. However, the ability to establish legal title to the item must be an overriding factor when considering acquisition. In very rare cases an item without provenance may have an inherently outstanding contribution to knowledge that it would be in the public interest to preserve. Such discovery is likely to be of international significance and should be the subject of a decision by specialists in the discipline concerned. The basis of the decision should be without national or institutional prejudice, based on the best interests of the subject discipline and be clearly stated).

who may offer dazzling objects of dubious provenance that could help generate popular support.

On December 11, 2002, the directors of 18 museums in the United States, Germany, France, Italy, the Netherlands, Spain and Russia issued a Declaration that states in part that “[c]alls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation.”<sup>906</sup> Certain factors, such as indisputable documentation of provenance, may be convincing enough to a museum to return an object on a voluntary basis. For example, the Getty Museum voluntarily restored looted antiquities to Italy when presented with convincing documentation that the articles were stolen.<sup>907</sup> In addition to returning artifacts to their countries of origin, museums may aid in thwarting the black market by establishing stringent acquisition policies.

This author believes that the Getty Museum stands out as having an exemplary acquisition policy. The museum’s policy is to acquire only objects having legal, clearly documented origin. A number of spectacular repatriations have been initiated by the Getty; thus the museum may be seen as a model of a paradigm shift for other major museums to follow in the art market. Many other museums have acquisition policies with loopholes that allow the acquisition of archaeological objects with little or no information concerning provenance, legality of title or legitimacy of export from the country of origin.<sup>908</sup> Some museums have policies requiring some form of assurance that an object has not been exported from its country of origin in violation of that country’s laws “within a recent time.”<sup>909</sup>

Auction houses also play an important role in promulgating policies that can effectively regulate the marketing of cultural artifacts. Whether a given item should be purchased or accepted for donation by a museum, or be declined on ethical grounds, largely depends on whether the item is a product of a degraded, illegal or looted excavation. Auction houses will generally rely on provenance information provided by the seller. In major antiquities auctions, however, this information is sometimes inadequate. For example, Christie’s auction house sold a portrait of the Roman Emperor Trajan, which Federal officials charged had been stolen from a storage area at the Capitoline Museum in Rome in

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<sup>906</sup> *UNESCO Intergovernmental Committee*, UNESCO, 12th Sess., § I(13), at 25-28, U.N. Doc. CLT-2003/CONF.204/2 (2003).

<sup>907</sup> See Suzanne Muchnic, *Getty to Return 3 Acquisitions to Italy*, L.A. TIMES, Feb. 4, 1999, A1.

<sup>908</sup> See Walter V. Robinson & John Yemma, *Harvard Museum Acquisitions Shock Scholars*, BOSTON GLOBE, Jan. 16, 1998, at A1.

<sup>909</sup> See Gerstenblith, *supra* note 425, at 430 (quoting the acquisition policy of Harvard University Art Museums).

1998.<sup>910</sup> The auction house had relied on provenance information that was believed to be credible but had not independently checked the authenticity of the information.<sup>911</sup> According to an independent consultant on art-ownership disputes, art auction houses “have a responsibility not to take a provenance merely on faith. It is hearsay without further research.”<sup>912</sup> On the other hand, some think that “[t]o declare, as some scholars have, that one should not publish, study, or teach from works of art without known provenance, and that museums should not acquire them, is not in the service of advancing knowledge but in opposition to it.”<sup>913</sup>

The problem with imposing a consistently strict provenance standard and not giving some items the benefit of the doubt is that this presumes that objects with uncertain provenance were clandestinely excavated from their archaeological context and lack historical research value.<sup>914</sup> Many objects may simply have been recovered by farmers or others who found the objects in the course of their work. Such objects might not have been “professionally” excavated, and archaeological information may be sketchy at best, but there is no reason to automatically conclude that they were illegally looted or have no historical value. Objects may have unclear provenance and yet be legitimate and useful objects for dealers, collectors and museums to acquire. Some archaeologists may shun such objects because “without historical context, the objects retain little more than aesthetic appeal.”<sup>915</sup> However, aesthetic appeal is a significant feature of an artifact, and it seems appropriate for museums to consider acquisitions that may have ambiguous historical narrative value but which have critical aesthetic appeal.

There are a number of arguments to be made supporting retention by non-source countries of looted artifacts. For example, those who support the retention by the British Museum of the Elgin Marbles argue that Lord Elgin acquired good title to the Marbles because the Ottomans, who ruled Greece at the time of the seizure of the statues, granted Lord Elgin permission to take

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<sup>910</sup> See Barry Meier, *U.S. Seizes Portrait of a Roman That Was Sold at Auction*, N.Y. TIMES, Jan. 16, 1998, at A1.

<sup>911</sup> See *id.*

<sup>912</sup> See *id.* (quoting Constance Lowenthal, a New York consultant on art-ownership disputes).

<sup>913</sup> See Cuno, *supra* note 642, at 92. David Stuart of Harvard’s Peabody Museum of Archaeology and Ethnology, has said: “I work with looted objects routinely in my research. I have no qualms about using materials if it’s going to be scientifically useful. If I’m looking for a glyph — say, the glyph for ‘cave’ — I’m going to look for as many examples as I can get.” See John Dorfman, *Getting Their Hands Dirty? Archaeologists and the Looting Trade*, 8 LINGUA FRANCA 28, 32 (1998).

<sup>914</sup> See Cuno, *supra* note 642, at 94.

<sup>915</sup> Richardo J. Elia, *Chopping Away Culture: Museums Routinely Accept Artifacts Stripped of Context by Looters*, BOSTON GLOBE, Dec. 21, 1997, at D1.

them. Thus, the argument goes, Britain has the right to retain the marbles as a bona fide purchaser. It is also said that the statues have become part of the British national heritage and that they are accessible to more people in London than in Athens. Additionally, some argue that returning the marbles would set a bad precedent, setting off a potential wave of similar repatriations and draining the collections of the world's great museums. A final argument in support of retention, suggested by Professor Merryman,<sup>916</sup> is that the universalist approach of the 1954 Hague Convention means that such artifacts belong to the "common heritage of mankind."<sup>917</sup> This line of thought supports nations refusing to restore looted objects to countries of origin because such treasures belong to the world and thus need to be preserved. In the case of the Marbles, the argument is that the Greek government is not in as good a position to take care of them as the British government; thus it would be unsafe to return the Elgin Marbles to Athens because this would subject them to air pollution, deterioration, and the prospect of being looted.<sup>918</sup> While it would be imprudent to return a precious cultural object to a country that has failed to adequately house and curate its existing collections, this is a factual question for which the answer needs to be determined in a legal proceeding and not merely presumed outright.

Sir David Wilson, the director of the British Museum, has stated: "To rip the Elgin Marbles from the walls of the British Museum is a much greater disaster than the threat of blowing up the Parthenon."<sup>919</sup> In response to being told by the British Consul that the taking of Eleusian statuary was illegal, Lord Elgin himself said that the "Greeks were peasants" and "did not deserve such wonderful works of antiquity."<sup>920</sup> Another commentator stated: "[T]he moral order dictates that Britain should keep the Elgin Marbles because Britain is the 'true heir of Pericles' democracy."<sup>921</sup> A similar argument is that these objects have been kept safe in Britain for a long time. Had they not been removed from Greece, they might not have survived the cycles of looting and plunder that ravaged their home country.

Another pro-retention argument is that the museum has acquired rights to the artifacts by the doctrine of "prescription." Russia has argued this with respect to

<sup>916</sup> See Merryman, *supra* note 704, at 56-63.

<sup>917</sup> See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (Aug. 7, 1956).

<sup>918</sup> See Merryman, *supra* note 704, at 56-63.

<sup>919</sup> C. HITCHENS, *THE ELGIN MARBLES* 98 (1987) (quoting British Museum Director Sir David Wilson).

<sup>920</sup> T. VRETTOS, *THE SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES* 82 (1974) (quoting Lord Elgin).

<sup>921</sup> HITCHENS, *supra* note 894, at 26 (quoting Roger Scranton, publisher of the *Salisbury Review*).



cultural properties seized from the Germans at the end of World War II.<sup>922</sup> Prescriptive arguments are based on the idea that the passing of time can result in the creation of new legal rights or the elimination of earlier rights.<sup>923</sup> In other words, an ownership arrangement can become, over time, legally cognizable, although it was not so originally. This is referred to as “acquisitive prescription” and is similar to adverse possession. Time gaps may also render claims obsolete either substantively or procedurally by blocking assertion of the claim in court. This is referred to as “extinctive prescription.”<sup>924</sup> The doctrine of prescription is helpful in preserving international order and stability by not permitting the prolongation of uncertainty through inactivity.<sup>925</sup> However, there is not a universally recognized period of time that the international community recognizes as validating or invalidating a prescriptive transfer.<sup>926</sup> The principle of acquisitive prescription, which would seem to apply to Britain’s retention of the Elgin Marbles and the Egyptian antiquities looted by Napoleon, is a modern development in the law.<sup>927</sup> Moreover, the principle of prescription has mainly been invoked in international law to justify title to territory, not artifacts.<sup>928</sup> As a result, some authors suggest that this principle can not be applied to cultural property.<sup>929</sup> It is worth noting, however, that a claim of prescription would contradict the original claim of Britain that the property had been acquired legally, through the Treaty of Capitulation of 1801. More importantly, all of the above arguments fail to overcome an overriding legal principle: rightful title to *stolen* objects can not be gained, even with the passage of time. The fact that objects were stolen rather than obtained by voluntary transfer of title strengthens arguments in favor of repatriation.

Perhaps the most significant legal argument against repatriation is that the artifacts at issue may have been acquired under some colorable claim or license. For instance, one might argue that Lord Elgin acquired the Marbles under some colorable claim of right granted by the Ottomans, who were then occupying Greece. However, today we increasingly recognize that certain objects of cultural property are simply inalienable from source nations. The communal nature of certain types of cultural property makes it inalienable. In such circumstances, no entity, not even the cultural group of origin, has authority to

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<sup>922</sup> See Wilske, *supra* note 450, at 265.

<sup>923</sup> See CARL AUGUST FLEISCHHAUSER, *Prescription*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327 (Rudolf Bernhardt ed., 1995).

<sup>924</sup> See *id.*

<sup>925</sup> See Wilske, *supra* note 450, at 267.

<sup>926</sup> See *id.* at 266.

<sup>927</sup> *Id.*

<sup>928</sup> See FLEISCHHAUSER, *supra* note 925, at 328, for discussion of supporting authorities.

<sup>929</sup> See Kaye, *supra* note 803, at 101, 105.

transfer title. In this sense, no entity had the right to license Lord Elgin to take the Marbles. The Ottomans lacked legal standing and the moral authority to sell the monuments of the country they controlled.

The British Museum and the Louvre share a reputation for being reluctant to return anything.<sup>930</sup> Many of the greatest treasures in the British Museum, including the Egyptian collection and the Elgin Marbles, were acquired in circumstances that were thoroughly unethical if not illegal, especially when viewed through the lens of modern international law. Public pressure may be needed to change the recalcitrant positions of institutions such as the British Museum and the Louvre. Museums may sometimes be impeded from de-accessing items not only by Boards of Trustees but also by other legal concerns. There are legal issues pertaining to fiduciary duties in the de-acquisition of museum collections for repatriation. A museum holds its collection in trust for the public for all time. Voluntary repatriation of looted antiquities, without statutory mandate or a court order requiring such action, presents various fiduciary issues.

Under the British Museum Act of 1963, the trustees of the British Museum are not empowered to repatriate artifacts unless they are duplicates of another object.<sup>931</sup> The British Museum can not legally dispose of these parts of its collection because British law prohibits it.<sup>932</sup> Duplicates, as mentioned, can be disposed of but are narrowly defined by law as "objects struck from the same die or printed from the same block or plate."<sup>933</sup> Thus, for the museum to be able to repatriate the Elgin Marbles or the Egyptian antiquities, Parliament would have to change the law. It should be noted, however, that repatriation of stolen property does not appear to be a violation of the museum's fiduciary duties since the museum never acquired good title and would merely be returning the property to the true owner.<sup>934</sup>

Britain is not the only country that has amassed the archaeological treasures of other nations. France, Belgium, Germany, Holland, Italy and Denmark all possess large collections of cultural property.<sup>935</sup> There has also been extensive looting and plunder of artifacts in Latin America.<sup>936</sup> The tension concerning

<sup>930</sup> See GREENFIELD, *supra* note 437, at 7.

<sup>931</sup> British Museum Act, 1963, c. 24, § 5 (Eng.).

<sup>932</sup> See Katherine Walker Tubb, *Thoughts in Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES, *supra* note 704, at 243.

<sup>933</sup> See *id.*

<sup>934</sup> See Gerstenblith, *supra* note 425, at 7.

<sup>935</sup> See GREENFIELD, *supra* note 437, at 7.

<sup>936</sup> See, e.g., Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART. J. 94, 94 (1969) ("Not since the sixteenth century has Latin America been so ruthlessly plundered.").

repatriation of cultural property is usually more acute with regard to archaeological artifacts, because this material is often significantly associated with cultural group identity and a country's national heritage. These objects often have an especially strong cultural nexus to groups who are associated with the ancient cultures and who may still live in or near the archaeological sites.

## XX. PROPOSED MODEL FOR SETTLEMENT OF CULTURAL PROPERTY DISPUTES

### *A. Establishing an International Tribunal*

The nature of cultural property disputes suggests that reliance on impartial third parties may be more productive than bilateral negotiations or diplomatic efforts. Disputes over cultural property may persist for generations, as in the case of the Elgin Marbles, and the parties may become deeply entrenched in their positions. The injection of a neutral third party into longstanding stalemates can be helpful. An ideal legal forum for the resolution of disputes relating to cultural property would be a special international tribunal.<sup>937</sup> Such a tribunal could consider claims brought by origin countries and resolve issues such as: the circumstances and manner in which certain property was removed; whether the property in fact originated in the claimant country; the significance of the property to the cultural heritage of the claimant country; previous efforts at repatriation and why they failed; claims of third party bona fide purchasers; and any equitable considerations underlying the case. Such a tribunal would need to have effective means of enforcing judgments. Thus, the tribunal would need to have substantial international membership in order for it to have jurisdictional validity.

The international community could establish such a tribunal pursuant to Article 25 of the UNESCO Convention, which provides that the Convention may be amended by General Conference.<sup>938</sup> There would be a range of important considerations in this process, such as: the composition of the tribunal; the procedures for appointing mediators; the procedures for handling cases; establishment of a conciliation structure to foster settlements prior to submission of cases for adjudication; provisions for the issuing of advisory opinions; the procedures for accessing the tribunal; and office terms. Tribunal subject matter jurisdiction could not exceed that already conferred by the

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<sup>937</sup> See, e.g., Ann P. Prunty, *Toward Establishing an International Tribunal for the settlement of Cultural Property Disputes: How to keep Greece from Losing its Marbles*, 72 GEO. L.J. 1155 (1984).

<sup>938</sup> UNESCO Convention, *supra* note 612, art. 25. The General Conference could adopt a comprehensive statute setting forth tribunal procedures and subject matter jurisdiction. Under article 25, it is contemplated that any revision would then need to be ratified by state parties to become operative under the Convention.

UNESCO Convention without a specific amendment ratified by the signatory states. It is important to recall that the Convention is not retroactive; extra-Convention disputes arising prior to implementation, such as those concerning the Elgin Marbles or the Egyptian artifacts in the British Museum, could only be handled by way of arbitration at the request of the parties. In such cases, the tribunal would examine all relevant factors surrounding the dispute and seek to reach an equitable solution in light of the international legal principles relevant to the inquiry.

Any such claims need to start with claimant countries taking concrete steps to make an official request for the return of the artifacts at issue. While Greece has clearly made numerous requests for the repatriation of the Elgin Marbles, Egypt has made no such request for the return of the collection of artifacts seized during the Napoleonic occupation. Egypt has made demands concerning other specific pieces of property, such as a piece of the Sphinx,<sup>939</sup> but none of its requests approach the scale of the large body of artifacts seized during Napoleon's occupation. Following a country's request for repatriation of artifacts, a series of diplomatic negotiations and consultations should take place so that the issues can be clarified. If the parties express their willingness to resolve the matter, negotiations may proceed. The process, however, may take quite some time. Governments may undergo regime changes, so that negotiations with one government may end up being thwarted by successors. This actually happened in negotiations between Ethiopia and Italy for the return of the 200-ton obelisk that Mussolini looted in 1937.<sup>940</sup>

### *B. Issues to be Assessed in Mediating a Claim for Repatriation of Cultural Property*

How should an international cultural property tribunal assess repatriation claims involving artifacts looted long ago? What are the main issues that are likely to arise in determining whether cultural property should be transferred from the present holder to the claimant? This section of the Article presents an overview of the proposed tribunal's process for addressing and ruling on cultural property claims by exploring the key issues that will face the tribunal.

#### 1. Did the Property Originate in the Country of the Claimant?

This is a crucial threshold question that the tribunal will have to answer in assessing claims. There are various methods that the tribunal will employ in addressing the issue of origin. Two of the primary means will be analysis of

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<sup>939</sup> See GREENFIELD, *supra* note 437.

<sup>940</sup> See Bruni, *supra* note 400.

historic evidentiary material regarding provenance and consideration of expert testimony. As mentioned in the above discussion of *Peru v. Johnson*,<sup>941</sup> courts may entertain the opinions of experts on the question of origin, where the objects themselves are of ambiguous provenance. Some artifacts, such as those of ancient Egypt, show straightforward provenance because they have distinct stylistic markers such as hieroglyphics, scenes depicting the uniquely Egyptian religious pantheon, and so forth, and this obviates the need for expert testimony as to origin. In ambiguous cases, the presentation of expert testimony should be undertaken with care to insure impartiality.<sup>942</sup> It may be difficult, however, to find impartial expert witnesses. Certain witnesses will have a genuine interest in helping particular claimants recover artifacts; this may influence their conclusions regarding the origin of the objects in question.

## 2. Resolution of Claims Among Competing Cultural Groups

If the tribunal decides that there is a valid claim, it will then have to consider more detailed and complex issues. For example, in view of changing national boundaries during the course of history, the tribunal may encounter difficulties in determining which specific claimed properties should be returned and to which cultural group they should be returned. The strongest historic cultural link seems to provide the most appropriate basis for determining cultural group-specific claims, and if that group has a modern-day counterpart, the property's destination may be fairly clear. One criterion suggested by the UNESCO Intergovernmental Committee is "the country with the traditional culture to which the object was related."<sup>943</sup> However, it is not always a straightforward matter to ascertain the strongest cultural link. In some cases, cultural groups that may be the modern-day successors of ancient cultures will have migrated or become assimilated into other populations. The tribunal may have to decide whether the culture that originally gave the property at issue cultural significance is technically still alive. Retention by the present-day holder might be permitted if the cultural group that is identified with the property is determined by the tribunal to no longer survive as a people. However, if the cultural group does still exist in some coherent way, this clearly favors repatriation.

In some cases, a cultural group may still occupy its historic region but the nature of the government will have changed. This may complicate determination of which legal entity deserves the repatriated property. For

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<sup>941</sup> See *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

<sup>942</sup> See *id.*

<sup>943</sup> See GREENFIELD, *supra* note 437, at 256 (quoting UNESCO Intergovernmental Committee).

example, when the United States returned the Crown of St. Stephen to Hungary in 1977, it returned the crown specifically to the Hungarian people and not to their Communist government.<sup>944</sup> This was due to concerns expressed by expatriate Hungarians and prominent U.S. politicians on political grounds that the transfer would strengthen the legitimacy of the communist regime.<sup>945</sup>

### 3. In What Ways Is the Property Significant to Claimants?

The tribunal will likely have to consider the ways in which property at issue is significant to the claimant. A stronger case for repatriation may exist where objects are strongly constitutive of the cultural heritage of the source nation. Mediators may rely on expert testimony from both sides of a repatriation dispute in order to ascertain the cultural or historic significance of the objects. It may prove insufficient for claimants to argue for repatriation based solely on the fact that looted items are now in a museum or private collection in a foreign country. Claimants will likely need to introduce evidence to prove cultural significance. Objects may have cultural importance that is entirely specific to a source nation or group; historical data and expert testimony may help elucidate these concerns. To some extent, the significance of an item to a claimant's cultural heritage is a subjective matter, but the tribunal's inquiry should focus on objective facts that shed light on the significance of the objects in dispute.

Priority might be given to the repatriation of artifacts that are necessary for religious, ceremonial or communal use by the present culture.<sup>946</sup> Sometimes certain artifacts are intended to serve ceremonial or talismanic functions that are essential to the spiritual welfare of a society. Objects that were created for use in religious ceremonies or placed in graves with the intention that they remain with the dead were not intended to end up in private collections or be on display in museums. Other ceremonial objects may need to be physically present to fulfill the religious, ceremonial or communal needs of the people who make up the relevant cultural group. Removal and display of such items may be sacrilegious to the source culture and may violate their human rights. Certain ancient sculptures of the Maori people in New Zealand fall into this category. The Maoris believe that the spirits of their ancestors dwell in these sculptures.

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<sup>944</sup> See *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977).

<sup>945</sup> See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 351 (1989).

<sup>946</sup> This condition, emphasizing the present culture's use of the object for religious, ceremonial or communal practices, is paralleled in the Native American Graves Protection and Repatriation Act, NAGPRA, 25 U.S.C. § 3001(3)(C), which, in mandating the repatriation of certain sacred objects, defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." *Id.*

Maori tribal councils would therefore need to approve the loaning of their sculptures to foreign exhibitions.<sup>947</sup> If these objects were looted, their absence would leave a cultural void that could only be filled by their return. In contrast, ancient Egyptian funerary and ceremonial objects seem to fall outside this category because today the pantheon religious apparatus of these ancients has long since vanished. Artifacts looted from ancient Egyptian tombs have little if any contemporary religious, ceremonial or communal function today. Modern Egyptians may place a high value on such relics for any number of reasons, but the use for which they were created is not among them. Among the values to be considered is the right of sepulture, and the respect to be accorded to the wishes of the dead regarding their remains.

Another priority class of looted objects might be the historic records or manuscripts of a nation, objects torn from immovable property forming part of the monuments or edifices of a cultural group or sovereign state, palaeontological materials, and, as previously mentioned, human relics (*e.g.*, mummies). Such objects may have substantial aesthetic or archaeological value for the broader public and might provide current cultural value as well in a museum in London, Paris or New York as in the possession of the source cultures. This universalist approach posits that such artifacts belong to the "common heritage of mankind" and suggests that nations may properly refuse to restore looted objects like the Elgin Marbles to the country of origin because they belong to the world at large and need to be preserved for the largest possible audience. But such objects, though no longer needed by the claimant cultural group or state for practical purposes, may hold some of the most significant cultural value.

Cultural property may not be as significant to claimants in the context of "hoarding." If a claimant country such as Egypt already possesses a significant number of objects that are similar or identical to works subject to repatriation claims, then an equitable issue may arise as to how denial of recovery of the instant works would damage the claimant's cultural heritage. This line of thought cuts against the universalist approach to the Elgin Marbles noted above. Greece has no abundance of artifacts identical or similar to the Elgin Marbles that could support a claim of hoarding in defense of British retention. In evaluating the significance of the property to the claimant, consideration of the following factors may prove useful. To the extent the following factors come into play, cultural groups will be more likely to view the antiquities at issue as not only irreplaceable but also constitutive of their cultural identity.

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<sup>947</sup> See Merryman, *supra* note 691, at 496.

a. *Length of Time*

The longer a cultural group possessed an object, the more priceless and sentimental it may be. It will also likely be bound up with the group's cultural identity. For example, the artifacts seized by Napoleon from Egypt stood as a tribute to the genius, craftsmanship, inventiveness and resourcefulness of the Egyptians for millennia. For thousands of years, outsiders marveled at the incredible temples, artifacts and monuments of the Egyptians, even before the Greeks developed their own distinctive, albeit derivative, works of artistic and architectural genius. This history provides a powerful cultural weight to Egyptian claims.

b. *Historic Factors*

Other historic factors may help determine the significance of cultural property to a cultural group. Monuments, relics of famous leaders, ceremonial and sacred objects, statues, and other artifacts may have significant historical significance to a culture. An international tribunal considering a claim should look at the extent to which the ongoing loss of the cultural objects at issue might erode a people's social and political ties with their past, or the extent to which this might foster a sense of "cultural amnesia."<sup>948</sup> Archival materials, such as the Declaration of Independence, may hold unique importance for a culture's understanding of its history.

c. *Group Identity*

A third strand of concern is the way in which cultural objects have been a source of reverence and pride that unifies a modern culture with its ancestors. Even though cultures change over the course of history, they may take great pride in cultural objects from the past. The development of culture is a continuous process; it is hard to draw distinct lines separating a people's sense of cultural heritage from the distant past to the present. Modern Egyptians, for instance, share a sense of group membership with those who lived millennia ago. All of ancient Egypt's temples were uniquely tied to and deeply embedded in the culture's religious and spiritual life, the glorification of life itself, and the peoples' celebration of the afterlife. Each pharaoh had a part in commissioning some of the greatest public works known to history. The themes embodied in the monuments and artifacts of ancient Egypt hold special meaning today, even as modern Egyptians have come to embrace the Muslim faith in place of the religious pantheon of their ancestors. Egyptians today take great pride in their cultural artifacts, and consider them to be symbols of national identity and

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<sup>948</sup> Moustakas, *supra* note 417, at 1227.



evidence of the civilization they share with their ancestors. The cultural property of modern Egyptians tells them who they are and what those who came before them were like.

d. *Intentions of Ancestors*

The intentions of those responsible for building cultural monuments and other properties is relevant in assessing the degree of importance such objects have to a people's cultural identity. Those who created the monuments and constitutive elements of ancient Egypt dedicated them to the people, not just to the privileged few. The temples were intended to be enduring tributes to the sublime privilege of being alive, perpetual memorials to the gods without whose goodness life would not be possible. Today, a monument such as the Temple at Karnak, thousands of years old, remains a sacred site, watched over by contemporary temple guardians, and visited by hundreds of thousands of tourists every year. While all of the temple implements, artifacts, and moveable objects that were dedicated with the temple have been looted, the site remains an enduring memorial and a property of undeniable public character.

e. *Sacred or Spiritual Significance*

An object is more likely to be associated with a group's identity if it has spiritual significance. The loss of certain sacred or ceremonial objects can make it difficult or impossible for people to practice their traditional religious ceremonies. If the objects of cultural property were created for use in religious ceremonies or to serve other ceremonial or talismanic functions essential to the spiritual welfare of the group, these objects likely have significant cultural importance for the group. Some sacred objects may be considered indispensable to a group's ongoing religious practices; other sacred objects might be conceded to be inessential. Similarly, some objects may have been used by a cultural group's ancestors but are no longer needed due to changes in the group's religious practices.<sup>949</sup> However, to display such items in a museum may constitute a sacrilege that violates the intentions of the relevant group. For some indigenous cultures, a wide range of objects, including those long unused, may be considered sacred. This is partially because animistic concepts dominate in certain cultures so there is a lack of clear distinction between secular and sacred

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<sup>949</sup> NAGPRA defines sacred objects as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." NAGPRA, *supra* note 920, *reprinted in* American Association of Museums, *Policy Regarding the Repatriation of Native American Ceremonial Objects and Human Remains*, *reprinted in Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 173 (1990) [hereinafter NAGPRA Hearings].

objects.<sup>950</sup> There may be a tendency in this context for certain cultural groups to declare any object not created specifically for commercial use to be sacred.

f. *Aesthetic Concerns*

The aesthetic quality of artifacts may be incomparable, from stunningly beautiful craftsmanship to mysteriously compelling shapes, from hieroglyphics to the architectural designs of temples, from the tombs of kings to the various statues, sculptures and other elements of cultural property. Such aesthetic value may enhance a group's claims that the loss of certain objects can not be compensated for except through their repatriation.

4. Under What Circumstances Was the Property Removed?

It is also important to consider the manner and circumstances in which the cultural property was removed from the claimant. This inquiry raises various other questions. Was the property taken in connection with a coercive treaty of capitulation? Was it taken pursuant to imposed colonial power? Was it taken by a temporary occupying force? If the property was removed by other dubious means such as illegal excavation by private parties, a claimant's case would be bolstered. However, this is not the end of the inquiry. Many artifacts have been conserved by the very fact that they were looted and removed from places that were in a state of upheaval. An example of this was the saving of looted objects from the cultural destruction that occurred in China during the Cultural Revolution of the late 1960s. Afghanistan and Iraq present two recent cases in which much is unknown about the ultimate allocation of looted property. Had international third parties intervened to relocate artifacts imperiled by the Taliban, or had United States officials provided ample protection for artifacts in the Baghdad Museum in the wake of the 2003 invasion, many artifacts might have been saved from their present uncertain futures.

In considering the circumstances surrounding removal, the mediation tribunal will also need to consider: (1) the proximity in time between removal of cultural property and the present bringing of a claim; (2) whether third parties have purchased the property and, if so, whether they should be reimbursed; and (3) the extent to which the property at issue has become associated with historic and cultural values of the nation where it is presently located, including the impact removal will likely have on the host nation.

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<sup>950</sup> NAGPRA Hearings, *supra* note 925, at 235 (statement of James Reid).

#### 5. Long Delays in Making a Claim?

If a significant period of time has elapsed since the looting of the property, such as centuries in the case of Napoleon's looting of Egypt, mediators will need to consider why a claim is being presented now and why there was such a long delay in bringing a claim. Does the passing of a long period of time suggest some sort of abandonment of any claim that might have existed? Perhaps the claimant never brought a claim until now because it would have been futile, and only in recent years has there been a shift in international concern about repatriation of looted artifacts. Or perhaps the property was relatively unimportant at the time of its divestiture but has since become much more culturally significant given the amount of time that has elapsed.

#### 6. Finding an Appropriate Equitable Solution

Once the tribunal has established the validity of a repatriation claim, it will need to fashion an equitable solution, from total denial of the claim to total repatriation without compensation to the respondent. Complete divestment of ownership may not be the most equitable solution, especially if the present holder is a museum that acquired the property as a bona fide purchaser or through little or no complicity and has kept the property for an extended period of time under exemplary conditions, conserved or even enhanced the property, allowed it to be exchanged with other museums, allowed it to be used for scholarly purposes, and so on. On the other hand, if suspicious circumstances attend the acquisition, or if the property is not well conserved or is not on display but rather relegated to museum storage, these factors would support repatriation to the claimant.

#### 7. Object-Centered Concerns: Where Will Property Be Better Conserved and Are There Hazards in Repatriation?

Object-centered concerns should also be addressed, such as consideration of how artifacts will fare if repatriated. There are three broad issues here. First, some cultural property presents particular moving challenges. Some objects are so delicate that any movement may expose them to an unacceptable risk of damage or destruction. Other objects may be so large and heavy that their transportation may pose expensive and burdensome engineering risks. Second, there may be a risk that cultural property will be destroyed or dispersed upon repatriation. In such circumstances, it may be preferable for the property to remain in its present location. There is no guaranteed place of safety anywhere in the world but it would be unconscionable to divest a respondent country of cultural property and return it to the claimant if there were credible evidence that people in the claimant state will engage in reckless practices or otherwise

endanger the property. The political climate of the claimant state will be an important consideration, for if there is internal unrest, civil chaos, or insurrection, it may be preferable to allow the respondent to continue to possess the property, at least until certain conditions are met. Third, an international cultural property tribunal will have to consider the relative abilities of the disputing countries to conserve the property. This is a somewhat paternalistic inquiry but there may be instances in which good arguments can be made that cultural property will be subjected to lack of care in the claimant state.

Many artifact-rich sites are and have been located in developing countries, whose resources for the conservation and security of their national heritage is often inadequate. In Peru, for example, the ceilings of museum storage rooms in Lima are literally collapsing on national collections of priceless ceramic pottery.<sup>951</sup> The tribunal may have to consider whether the claimant state has adequate facilities in which to house the property or whether there is noticeably deficient curatorship of the claimant's existing in-state collections of artifacts. On a recent visit to the Cairo Museum, it seemed apparent that the 100-old-year building was too small to house the extremely large collection of Egyptian antiquities, many of which are in a state of near dilapidation, obscured by dirt, haphazardly curated, with many items not even labeled. In such circumstances, the tribunal may need to consider how the source nation could be expected to conserve items under present consideration if it has failed or is failing to properly care for other artifacts.<sup>952</sup> There is an argument to be made that the rest of the world will be culturally impoverished by the improvident return of cultural objects to a source nation that is unable to properly care for them.

#### 8. The Impact of Breaking Up Collections

Present holders of looted cultural property may argue that it is necessary for them to retain the artifacts in the interest of preserving the sanctity of the "collection." Sometimes it may be true that the breakup of a collection would be a devastating blow to the sanctity of the assemblage. However, this ignores the fact that the assembly of many international collections occurred only at the cost of destroying the completeness of the original "collections" of the culture from whom the objects originated. Moreover, this argument seems to ignore the illicit methods by which many "collections" were acquired.

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<sup>951</sup> See Nathaniel C. Nash, *Poor Peru Stands By As Its Rich Past Is Plundered*, N.Y. TIMES, Aug. 25, 1993, at A3.

<sup>952</sup> The Executive Committee of the International Council of Museums (ICOM) adopted a Study on the principles, conditions, and means for the restitution or return of cultural property in view of reconstituting dispersed heritages, in which it was stated that, among other things, "In no case should an object restituted or returned be subject to conservation conditions that do not meet international standards." See Nafziger, *supra* note 822, at 804.

### 9. Consideration of Whether Cultural Property Claimants Have a Surplus of Similar Artifacts

The tribunal will have to consider whether the present museum where disputed artifacts are housed has a surplus of objects of a similar kind. If disputed objects are relegated to basement storage, never to be viewed by the public, it is difficult to justify reluctance or refusal to part with such artifacts if claimants can present a solid case for repatriation. The same analysis may of course be posed in the other direction: if the source nation has an abundance of artifacts of the same type, it may be difficult to understand why the foreign retention of these objects causes a cultural lacuna that can only be cured by repatriation. Indeed, if the source nation has an abundance of such artifacts, the demand for return of particular similar or identical items may seem to present a case of hoarding.<sup>953</sup> The hoarding of artifacts by source nations — in terms of retaining duplicate objects beyond any conceivable domestic need, or warehousing such objects, or failing to care adequately for them — is a disservice to the cultural enrichment of other parts of the world. Hoarding thwarts the interests of a broader public audience in seeing and studying cultural works.

#### *C. Manner of Repatriation: Compromise or Settlement?*

Once a decision is made that a claimant ought to be awarded repatriation of cultural objects, the tribunal's focus will shift to the manner of repatriation. Fully vesting title to the property in the claimant is a rather extreme form of relief that nevertheless should be used when the relevant factors weigh heavily in favor of repatriation. Other solutions, however, may be fashioned. For example, a conditional return may be proposed in which there are special conditions, such as payment of just compensation to a bona fide purchaser. Conditions may be imposed to ensure proper care and security and there may be a right of reversion in the event these conditions are breached. Another approach is to establish a renewable loan and exchange agreement. The tribunal might declare legal title to be held by the respondent but provide for a permanent loan to the claimant. Such an approach might work with respect to items held by Britain that were looted by Napoleon, or for the Elgin Marbles. A compromise might involve Britain recognizing Egypt's ownership of specific items and Egypt agreeing that objects might remain in the collection of the

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<sup>953</sup> Professor Merryman has stated that the importance of art to the international community should be considered before an importing nation accedes to enforcing restrictive local export laws, asking: "why should the rest of the world honor [a state's] policy of hoarding artifacts? Only objects central to a culture, like the Liberty Bell, should have constraints on their sale." See Gerson, *Who Owns Artifacts? International Art Trade Spurs Legal Discussions*, NAT'L L.J., Dec. 27, 1987, at 9.

British Museum for a periodically renewable time limit, say twenty-five years.

A controversy is currently under negotiation between the Russian government and Harvard University concerning 18 bells that Stalin had removed from the 13th Century Danilov Monastery in Moscow.<sup>954</sup> The bells were subsequently purchased from the Soviet government to save them from being destroyed and are now at Harvard under a bequest. The bells clearly are objects of cultural property that the brethren of the monastery regard as tied up with their cultural identity. A spokesman for the monastery stated: "These bells lived a long history in this monastery. They are witnesses. They watched people come to the church who are now considered saints. For me, these are not just instruments. These are what bind us to our roots."<sup>955</sup> The monks in Moscow are concerned that for seven decades the bells have been rung at Harvard for something other than the work of God.<sup>956</sup> The university has agreed to pay for a study concerning the feasibility of returning these bells to the monastery. A compromise may be reached in which the Russians pay to ship the old bells to Moscow and replace them with new bells for Harvard.<sup>957</sup> The resolution of this matter poses other logistical problems because the bells were installed in the tower of Lowell House, a university residence hall, which was built in 1930 specifically to house the bells, and removing them will mean dismantling at least part of the tower.<sup>958</sup> Opponents of the repatriation of the bells claim that the bells have been viewed by thousands of people from all over the world and that they have been in a "very open curatorship" so that if they were returned "there wouldn't be that kind of openness."<sup>959</sup>

Alternatively, agreements can be made for long-term or permanent loans in which one party would be granted legal title to the property but it would be transferred for permanent or long-term display with the other party. This might be combined with a plan to provide reciprocal loans of objects. For example, in the case repatriation of artifacts to Egypt, the Egyptians might provide reciprocal loans of certain artifacts that are complementary to pieces currently housed in British museums. The claimant might cede certain items or have items deemed on permanent loan to the museum where they presently are housed. Also, a claimant such as Egypt might allow the British and other cooperative nations greater archaeological access to coveted archaeological sites at Luxor, Saqqara and Tel el-Amarna. Other solutions might be fashioned in the nature of an

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<sup>954</sup> See Steven Lee Myers, *For Whom Will Harvard's Bells Toll? That's in Question*, N.Y. TIMES, Jan. 5, 2004, at A4.

<sup>955</sup> See *id.*

<sup>956</sup> *Id.*

<sup>957</sup> *Id.*

<sup>958</sup> *Id.*

<sup>959</sup> *Id.*

exchange. For example, the claimant might agree to transfer to the other party a comparable collection of artifacts in exchange for the objects being repatriated. The claimant nation would select the replacement items, subject to the tribunal's approval. The larger the collection involved in the dispute, however, the harder it will be to establish a proper exchange.

Another solution might be time-sharing, in which the tribunal orders one party to possess the property for a specified time and then transfer possession to the other party for an identical period. This might be a "win-win" solution. However, time-sharing may be difficult and unwieldy for large collections and for collections containing particularly large pieces. It is important that items be appropriately displayed in a proper space. Objects may also be endangered by frequent transportation back and forth between time-sharing states or may even be seriously endangered by the first instance of transport. Moreover, time-sharing is acceptable only when the level of curatorship in the sharing countries is comparable.

Another approach is to provide restitution in kind. This pertains to looted artifacts that were subsequently destroyed, can not be found, or which were de-accessed or subsequently stolen, so that direct restitution is impossible. Generally speaking, this means providing equivalent objects in place of the looted items. Restitution in kind occurred after World War I with respect to the Louvain Library, which had been intentionally burned. Under the Treaty of Versailles, Germany was obliged to submit to the Louvain University "manuscripts, *incunabula*, printed books, maps, and other objects of the collection corresponding in number and value to the similar objects destroyed in the fire set by the Germans to the library in Louvain."<sup>960</sup> Restitution in kind may also be a solution when repatriation would break up an existing collection. Provisions were made in the Treaty of Riga to protect the unity of collections that were subject to repatriation: "If the elimination of any object subject... to return to Poland, would impair the completeness of such a collection, the object should remain where it is, with the approval of both sides of the Mixed Commission... and an equivalent object, of the same scientific or artistic value [should be provided]."<sup>961</sup>

Finally, in some instances where there are concerns about claimants having inadequate capabilities for housing and conserving their cultural property, it may be necessary to implement terms to insure proper handling. The tribunal may need to specify where the property is to be displayed, what kind of climate control will be necessary to protect the property, and additional conservation efforts that will be necessary to ensure the property's ongoing preservation.

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<sup>960</sup> KOWALSKI, *supra* note 517, at 35 (quoting the Treaty of Versailles, Art. 247).

<sup>961</sup> *Id.* (quoting the Treaty of Riga, Art. XI.7).

These concerns may be particularly significant when the tribunal determines that certain objects should be repatriated to a specific cultural group or community rather than to a state museum.

#### CONCLUSION

In 1798, when Thomas Jefferson excavated mounds of graves on his property, claiming he had the right to systematically excavate and remove the remains of over 1000 known Native American graves by “virtue of a higher order called science,”<sup>962</sup> there was virtually no ethical concern respecting this action. In the intervening years, we have seen the ever-expanding development of archaeological ethics. The attitudes of past generations have largely disappeared. For pragmatic, legal and ethical reasons, modern archaeologists show greater sensitivity than their predecessors to the selection of sites, the manner of excavation, and the study and curation of archaeological materials. Many archaeologists contend that the repatriation of excavated remains to groups that are aggrieved results in the destruction of information about the past.<sup>963</sup> Nevertheless, many archaeologists are willing to concede that “where a modern group has a reasonably clear affiliation, that group’s desire to control its own heritage takes precedence over scientific and public interests.”<sup>964</sup>

Taken in perspective, in a world haunted by poverty, war, and the displacement of millions of people, the issue of returning cultural property does not rate very high on the list of human priorities. Very few governments have actually taken the formal step of seeking the restoration of major artifacts that have been plundered from the homeland during colonial occupation or time of war in the distant past. From the standpoint of museums and archaeologists, the repatriation of cultural objects is not necessarily the preferred solution. Rather, a kind of partnership in stewardship may be appropriate, to insure that the objects are properly cared for, respectfully housed, and appropriately interpreted in museum settings.<sup>965</sup>

I think it is clear that archaeologists do not own or control the past but they do have a responsibility to respect the past and must recognize the interests of various stakeholders in the present. One of the principal ethical challenges is how to allow archaeological research to continue so that we can learn more about the ways past cultures lived while respecting the interests of those who

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<sup>962</sup> See James Riding In, *Without Ethics and Morality: Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 15 (1992) (quoting JOHN C. GREENE, AMERICAN SCIENCE IN THE AGE OF JEFFERSON xiii (1984)).

<sup>963</sup> See, e.g., NAGPRA Hearings, *supra* note 925, at 136 (testimony of Keith Kintigh).

<sup>964</sup> *Id.*

<sup>965</sup> See NAGPRA Hearings, *supra* note 925, at 176 (statement of Martin E. Sullivan).



wish to protect their past from inappropriate exploitation. Certain cultural property has an importance to indigenous cultural heritage through its symbolism, its inspirational value, its tribal memory or its close association with group identity that may outweigh its collective importance to the world at large. Of course, it would be absurd to take the idea of repatriation to some extremist view that *every* item from archaeological finds representing a particular era or civilization must be returned to its primary source. It is also permissible and even good in certain circumstances for archaeological artifacts to be allowed to enter the marketplace. Archaeologists and museum trustees can do a good deal to help satisfy the appetite of private collectors for artifacts with proper provenance, and thereby help eliminate the black market, by releasing plausibly redundant artifacts into the marketplace.

For any archaeological excavation on land or at sea there is a common “Catch-22” problem. If the site is left untouched, scientists will never be able to see or study what is there. If study of the site is allowed, there will inevitably be some destruction of materials. There is a certain sacrifice inherent in these matters: nothing ventured, nothing gained. Is it better to leave a site untouched and gain nothing or to study and excavate the site as circumstances may allow and gain some knowledge, albeit imperfectly? Of course, “archaeology without excavation... cannot fully achieve its potential social contributions.”<sup>966</sup> When archaeological objects are severed from their contexts, everyone loses; when archaeological objects are properly studied, curated, displayed, conserved and written about, everyone gains knowledge and aesthetic enjoyment. Archaeology is important to science and social inquiry. Yet the excavation of human remains is inevitably going to remain a contentious and hotly debated — and perhaps unresolved — issue. There will continue to be both winners and losers. At the same time, archaeologists who are sensitive to the cultural concerns of indigenous groups can achieve unparalleled working relationships that can result in win-win situations.

Effective archaeological protection requires the recognition that archaeological resources are finite and nonrenewable.<sup>967</sup> The Society for American Archaeology acknowledges certain principles of stewardship and conservation as ethical norms for archaeologists. The rationale behind its concern for conservation is this:

[T]he number of archaeological sites relating to a given culture, time period, or subject is finite, and... they represent a nonrenewable resource.

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<sup>966</sup> William D. Lipe, *In Defense of Digging: Archaeological Preservation as a Means, Not an End*, 19 CRM MAG. 23, 24 (1996).

<sup>967</sup> See Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 113 (1992).

As the relevant cultural processes change or disappear, no further sites of a given type will be created, and once they are disturbed, they cannot be reconstructed to their original configuration. If productive archaeological inquiry is to continue into the next century, archaeologists must be prepared to protect a representative body of intact archaeological sites not just from looting and development, but from exploitation for present archaeological purposes.<sup>968</sup>

In addition to the importance of professional techniques of excavation, site preservation, scientific study, and proper reporting of research results, which are crucial to the flourishing of archaeology, there are other ethical responsibilities that have emerged in recent years. Tombs were never to be rummaged through and taken apart, much less opened to the public, and entombed dead bodies were not to be put on public display. Yet archaeology depends on the knowledge it obtains from examining ancient human remains so the application of archaeological ethics must be balanced. There is a need to respect human remains regardless of the historical or cultural context in which they were originally interred; ancient burial sites should be accorded the same respect as those of modern vintage. Yet the public continues to be fascinated with the public display of "mummies," which bolsters tourism in places such as Cairo, London and Paris. Luxor's Valley of the Kings, in which the tombs of ancient pharaohs are open to the public, is a cash-cow theme park that Egyptian officials would not even consider closing.

Clearly, archaeology is a crucial science. Archaeology provides information about past cultures and peoples within the context of their responses to changes in the natural and social environment. Archaeology allows us to learn about population dynamics, religious practices and economic development. Archaeologists are also historians in that they not only provide the raw material for study by going out into the field and excavating but also supply critical interpretation which sheds light on past cultures. While archaeology can serve science, it can also disempower cultural groups. Archaeologist may regard human remains as evidence shedding light on past cultures or as a means to understand the cultural past. Other stakeholders may regard these materials as having intrinsic worth and feel that the dignity of ancestral graves should not be disturbed. No archaeology is conducted in a social vacuum. At some point in their careers, almost all archaeologists will come up against an ethical dilemma that requires a consideration of complex and competing interests. Those who operate in a spirit of stewardship will be more likely to show respect for the

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<sup>968</sup> Mark J. Lynott & Alison Wylie, *Stewardship: The Central Principle of Archaeological Ethics*, in *ETHICS IN AMERICAN ARCHAEOLOGY: CHALLENGES FOR THE 1990s* 28, 30 (Mark J. Lynott & Alison Wylie eds., 1995).

living and the dead without turning their backs on research of the past.

In recent years, there has been considerable discrepancy between the general public's perception of what professional archaeologists do and what archaeologists really do. This variance has been evident in representations of archaeological activity in the popular culture and has serious implications for the future of the discipline because archaeology depends to a substantial extent on public support. Sometimes a stakeholder will be a land developer whose project is held up because something has been unearthed in digging a foundation. Sometimes it will be necessary to educate diverse people or groups, from the Army Corps of Engineers to a town mayor who is upset about the holding up of a development project because of the need to carefully examine a cache of artifacts. Archaeology is important and meaningful to almost everyone. The fruits of archaeological research can often have direct practical application to modern society. In particular, we may gain greater knowledge and understanding of human behavior and of humanity itself. Archaeology is an analysis of the relationships of material culture and nonmaterial human activity as a means of gaining greater knowledge and understanding of human behavior.

Why has there been no single convention drafted dealing with all aspects of the protection of cultural property? The answer is simple. There has been a lack of political will on the part of the international community to develop such a framework, especially in light of the conflicting values, interests and strategies of the world's nations. It has been suggested that states might adopt a comprehensive unified convention dealing with all aspects and types of protection of cultural property, irrespective of whether offenses against cultural property have occurred during time of war or time of peace. It will be difficult for such a convention to appropriately differentiate and define offenses and solutions. And the world's nations will continue to struggle to agree on jurisdictional parameters, provisions for the prosecution or extradition of offenders, and establishment of the duty to lend judicial assistance and cooperation in the investigation, prosecution and enforcement of the provisions of the judgments of foreign tribunals. In pursuing and establishing such a convention and any attendant international tribunal, states will have to adopt model national implementation legislation so that they will have the same laws pertaining to the protection of claims regarding illicit cultural property. The principles and methods developed by states in this process of international cooperation may eventually inform and facilitate the recovery of looted property and provide enduring value as a paradigm for future conduct in addressing cultural property disputes.

