

# SAVING CULTURE, BUT PASSING THE BUCK: HOW THE 1970 UNESCO CONVENTION UNDERMINES ITS GOALS BY UNDULY TARGETING MARKET NATIONS

*Janene Marie Podesta\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	458	R
II.	THE MOTIVES AND GOALS, FAILINGS AND BIASES OF INTERNATIONAL CULTURAL PROPERTY CONVENTIONS .....	465	R
	A. <i>The Hague Convention</i> .....	465	R
	B. <i>The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property</i> .....	468	R
	1. <i>The Influential Context</i> .....	468	R
	2. <i>The Nationalistic Approach</i> .....	469	R
	i. The Parthenon Marbles Case – An Illustration of the Discord .....	471	R
	3. <i>The Biased Articles</i> .....	473	R
III.	PUTTING UNESCO INTO ACTION: THE PROTECTION OF DOMESTIC CULTURAL PROPERTY .....	475	R
	A. <i>The Legal Methods</i> .....	476	R
	1. <i>Ownership Laws</i> .....	476	R
	2. <i>Export Laws</i> .....	476	R
	3. <i>Hybrid Laws</i> .....	477	R
	B. <i>The Effects of the Laws</i> .....	478	R
	1. <i>Ownership Laws</i> .....	478	R
	2. <i>Export and Hybrid Laws</i> .....	479	R

---

\* Managing Editor of the Cardozo Journal of International and Comparative Law (2007-2008). J.D. (2008) Benjamin N. Cardozo School of Law; B.A., (2005) Wesleyan University. I would like to thank Dean David Rudenstine for enabling me to begin researching my topic during my 1L summer (and get paid for it); Matt Kittay, for providing invaluable advice and encouragement of my topic; my parents, Pat and Jack, and Bema, who continue to marvel over (and proof read) every paper I write; David A. Smith, at the NY Public Library; and my friends, for allowing me to always maintain a sense of normalcy throughout law school and the note-writing process.

IV. PUTTING UNESCO INTO ACTION: THE COST OF PROTECTING OTHER'S CULTURE .....	480	R
A. <i>The Convention on Cultural Property Implementation Act</i> .....	481	R
B. <i>The Ability to Define</i> .....	482	R
1. <i>Foreign Law in Interpretation of the Terms of the National Stolen Property Act</i> .....	482	R
2. <i>Dugong v. Rumsfeld: Foreign Law in Interpretation of the Terms of the National Historic Preservation Act</i> .....	485	R
C. <i>A Dangerous Precedent</i> .....	486	R
1. <i>United States v. Schultz</i> .....	486	R
V. CONCLUSION: ALTERNATIVES TO THE CURRENT SYSTEM .....	488	R

I. INTRODUCTION

As he tills, a farmer in rural Italy finds an ancient amphora<sup>1</sup> in the soil of his own land. Though he owns the very dirt out of which it came, at that very moment, the Italian government can claim legal ownership of the piece and can seize it without compensation.<sup>2</sup> Even with a limited knowledge of antiquities, this farmer knows that across the Atlantic, American curators and collectors are willing to pay thousands, perhaps even millions of dollars for a relic like this one.<sup>3</sup> He finds a dealer willing to pay him a few hundred for the jug, more than he might make in months. The farmer gladly accepts the offer, while the dealer, through a series of exchanges in the extensive Italian black market, winds up selling it to

<sup>1</sup> An ancient type of ceramic vase, used for carrying liquids.

<sup>2</sup> Gazz. Uff. No. 1089 (June 1, 1939), Legge 1 giugno 1939, No. 1089, Tutela delle cose di interesse artistico e storico (Protection of Artistic and Historic sites) (Italy).

<sup>3</sup> The Euphronios krater was purchased in 1972 for one million dollars. Lawrence Van Gelder, *The Mysterious Trail of a Treasure, Retraced*, N.Y. TIMES, Feb. 5, 2006, at A27. This krater has been the center of a drawn-out dispute between Italy and the Metropolitan Museum of Art, with Italy claiming that the krater, along with about 30 other pieces, had been illegally excavated and transported to the United States, and demanding its return from the museum. Elisabeth Povoledo and Randy Kennedy, *Confrontation Looms at the Met*, N.Y. TIMES, Nov. 21, 2005, at E1. Ultimately, the director of the Met, Philippe de Montebello, agreed to return the krater, along with about two dozen other Classical antiquities in early 2008, in exchange for a long-term loan from Italy of objects of "equivalent importance." Daniel Williams, *Met to Return Looted Artworks to Italy*, WASH. POST, Feb. 22, 2006, at C01. This piece was eventually returned to Italy in January of 2008, along with 20 other artifacts. Carol Vogel, *Ciao to a Met Prize Returning to Italy*, N.Y. TIMES, Jan. 11, 2008, at E33.

one of those American collectors, netting thousands of dollars for himself.

A landowner in England, while laying the foundation of his new home, disinters an aged wooden chest. His country lays no claim to the piece found on the landowner's own property, only asking that he make his find known to the State.<sup>4</sup> Like the Italian farmer, this English landowner knows very little about ancient relics, although he, too, knows it must have some value. While his counterpart in Italy must defy national law to attain any of this value for himself, the Englishman may have a national museum official knock on his door and make an offer for the piece.<sup>5</sup>

On the other side of the globe, in Japan, the finder of an antiquity must make a difficult choice. While the country does not immediately claim possession of everything found within its boundary, it does lay claim to those things it declares to be "national treasures," and is permitted to direct the finder as to all matters in the handling and custody of a piece so declared; despite the risk, it is contrary to national law not to register the piece.<sup>6</sup> Perhaps it will be declared culturally unimportant, but that certainly does not mean valueless, especially to the many ready and willing collectors across the Pacific.

Any of these items may ultimately find their way to the United States. Here, the curator of New York's Metropolitan Museum of Art, Phillipe de Montebello, came under attack for the purchase and retention of the Euphronios krater, the provenance of which is still dubious.<sup>7</sup> In Los Angeles, Marion True, curator of the Getty Museum, went on trial in Italy to defend herself against claims that she hoarded dozens of Italian artifacts.<sup>8</sup> In fact, within the United States, the possession and/or sale of illicit cultural artifacts can

---

<sup>4</sup> Treasure Act Draft Code of Practice (2nd Revision), 1996 c. 23 (Eng. & Wales).

<sup>5</sup> See *id.*; see also Treasure Act Draft Code of Practice (2nd Revision), 1996, c. 71 (Eng. & Wales).

<sup>6</sup> See Law for the Protection of Cultural Properties, 1950, c. 1, art. 4, para 2; c. 3, art. 27, para. 2 (Japan), translated at <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

<sup>7</sup> Elisabetta Povoledo and Hugh Eakin, *Italy Seeks Meeting With Met on Looting*, N.Y. TIMES, Nov. 12, 2005, at B7.

<sup>8</sup> Hugh Eakin, *Embattled Getty Curator Steps Down*, N.Y. TIMES, Oct. 4, 2005, at E1. As of this writing, Ms. True remains on trial in Rome after two years, though several civil charges were dropped after the Getty returned forty artifacts to Italy. She maintains her innocence. Elisabeth Povoledo, *Antiquities Trial Continues in Rome*, N.Y. TIMES, Feb. 21, 2008, at E2; Elisabeth Povoledo, *Some Charges Dropped Against Former Curator*, N.Y. TIMES, Dec. 15, 2007, at B7.

carry criminal liability.<sup>9</sup> Although the United States only regulates the ownership and export of historical and archaeological goods that are in some way governmentally connected (e.g., governmentally-funded building project, items found in federal or state land), the market for such goods is essentially insignificant as compared to items from many European countries.<sup>10</sup>

The definition of “cultural property” is surely a question with roots at least as far back as those first laws attempting to preserve it.<sup>11</sup> Its definition has caused many difficulties in the regulation of its exchange. The United Nations Educational, Scientific and Cultural Organization (UNESCO),<sup>12</sup> for instance, indicates that cultural property must be “specifically designated by [the] State,”<sup>13</sup>

---

<sup>9</sup> See Convention on Cultural Property Implementation Act, 19 U.S.C. § 2607 (1983); see also *United States v. Schultz*, 333 F.3d 393, 395 (2d Cir. 2003).

<sup>10</sup> While there is certainly a market for Native American goods in Japan and Europe, even high-end estimates suggest only a few million dollars over half a century, as compared to a few million dollars a year for artifacts from outside the U.S. TED Cases Study, Case No. 216, *Artifact Trade in US*, <http://american.edu/ted/artifact.htm> (last visited Nov. 19, 2006).

<sup>11</sup> Pope Pius II's restriction on the export of works of art from the papal states in 1464 is often thought to be the first known example of a check on the trade of art with a significant cultural value. Paul M. Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 313 (1982).

<sup>12</sup> “UNESCO functions as a laboratory of ideas and a standard-setter to forge universal agreements on emerging ethical issues. The Organization also serves as a clearinghouse—for the dissemination and sharing of information and knowledge—while helping Member States to build their human and institutional capacities in diverse fields. In short, UNESCO promotes international co-operation among its 192 [as of March 2007] Member States and six Associate Members in the fields of education, science, culture and communication.” UNESCO, *About Us*, [http://portal.unesco.org/en/ev.php-URL\\_ID=3328&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Mar. 5, 2007).

<sup>13</sup> The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property states that they must fall into one of the following several “categories” of “cultural property”:

- (a) [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist[s] and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered,
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand . . . ; (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs;
- (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ;
- (i) postage, revenue and similar

while some curators and collectors would counter that any “objects of artistic, archaeological, ethnological or historical interest . . . [or any] components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction”<sup>14</sup> should be considered within the scope of “cultural property.”

The illegal trade of cultural property is the third most profitable illicit trade in the world.<sup>15</sup> The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) attempted to temper the flow of cultural relics and artifacts from countries which, in general, had lower GNPs, but greater amounts of ancient cultural artifacts, to those with greater economic riches, but fewer cultural ones.<sup>16</sup> Unsurprisingly, the “source nations” (nations from which the artifacts flowed) were much more motivated to sign on: in the three decades following the 1970 UNESCO Convention. Whereas, only four primarily “market” nations—Canada,<sup>17</sup> the United States,<sup>18</sup> Australia<sup>19</sup> and France<sup>20</sup>—became parties to the Convention.<sup>21</sup>

The primary difficulty, and the reason many market nations were hesitant to adopt the 1970 UNESCO Convention’s proposals,

---

stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Nov. 12, 1970, art. 1 [hereinafter 1970 UNESCO Convention], available at [http://www.unesco.org/culture/laws/1970/html\\_eng/page2.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page2.shtml).

<sup>14</sup> John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831 (1986) [hereinafter Merryman, *Two Ways*].

<sup>15</sup> The two most profitable illicit trades are drug and illegal arms exchanges. Lucille Roussin, Director, Holocaust Restitution Claims Practicum, Lecture at Benjamin N. Cardozo School of Law: Who Owns the Past? Cultural Heritage Law in the 21st Century (Feb. 19, 2007)[hereinafter Roussin Lecture].

<sup>16</sup> “Indiana Jones has no future,” Interview by Michel Bessières, with Lyndel Prott, UNESCO COURIER, April 200, available at [http://www.unesco.org/courier/2001\\_04/uk/doss11.htm](http://www.unesco.org/courier/2001_04/uk/doss11.htm).

<sup>17</sup> Canada signed on in 1978. State Parties to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, available at <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E>.

<sup>18</sup> The United States signed on in 1983. *Id.*

<sup>19</sup> Australia signed on in 1989. *Id.*

<sup>20</sup> France signed on in 1997. *Id.*

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

is that UNESCO espoused a “nationalistic approach” to cultural property. This approach appeals mainly to the source nations, while most market countries, chiefly the United States, France, Switzerland, along with some other Western countries (many of whom have not yet signed on to UNESCO), do not adopt such a position.<sup>22</sup> Instead, they subscribe to what is known as an “internationalist” approach.<sup>23</sup> Essentially, “nationalistic” approach nations believe that relics found within the State are culturally special to that State and should be regulated accordingly, usually by prohibiting or limiting the export of those relics.<sup>24</sup> “Internationalist” countries, on the other hand, and individuals who deal in the international antiquities market, argue that the academic usefulness, public interest and economic value of the objects applies to the world over and that such pieces should be freely exchanged.<sup>25</sup>

Due to this fundamental split in understanding, “internationalist” nations have been forced to regulate and penalize more often and more harshly than their own understanding of “cultural property” and view of the importance of exchange would indicate. For example, prior to the United States’ 1983 acceptance of the 1970 UNESCO Convention—specifically, the decree that nations respect each others’ categorization of, and ownership laws in relation to, cultural property—there had never been a situation where a U.S. citizen was held subject to action simply because he possessed something exported contrary to another country’s law.<sup>26</sup> Since the acceptance, there have been two major federal cases, *U.S. v. McClain*<sup>27</sup> and *Peru v. Johnson*,<sup>28</sup> in which the courts have attempted to apply foreign ownership and export law to a cultural property

---

<sup>22</sup> Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT’L L. 179, 194 (1992).

<sup>23</sup> See Merryman, *Two Ways*, *supra* note 14, at 831–37.

<sup>24</sup> See *id.* at 832. These source nations “vigorously oppose the export of cultural objects . . . , treat[ing] cultural objects within [their] jurisdiction as parts of a ‘national cultural heritage.’” *Id.*

<sup>25</sup> See Ana Sljivic, *Why Do You Think It’s Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT’L & ECON. 393, 413–14 (1998) (describing the internationalists’ view that cultural objects should be considered “components of a common human culture”).

<sup>26</sup> See Bator, *supra* note 11, at 287 (describing the United States’ policy, before it ratified the 1970 UNESCO Convention, that “illegal export does not itself render the importer . . . in any way actionable in a U.S. court”).

<sup>27</sup> *United States v. McClain*, 593 F.2d 658, 665 (5th Cir. 1979) [hereinafter *McClain II*] (interpreting whether something was “stolen” as defined by the U.S. National Stolen Property Act, based on five Mexican laws that declared all “products of culture” to be “owned” by Mexico).

R

R

exchange between a United States citizen and the citizen of another country. There have also been two instances where the courts actually adopted the definitions and laws of other countries: *Dugong v. Rumsfeld*,<sup>29</sup> and *U.S. v. Schultz*.<sup>30</sup> In the latter and most recent example, the art dealer was subject to criminal charges and convicted of conspiracy to violate the National Stolen Property Act,<sup>31</sup> a particularly broad statute, instead of being charged under the Convention on Cultural Property Implementation Act, which was enacted specifically to deal with these types of controversies.

In contrast, many “source” countries have simply enacted actual or virtual embargos against the export of anything deemed (often in very encompassing and vague language) “cultural property.”<sup>32</sup> This gives the finders of valuable artifacts almost no incentive to report their findings and immense motivation to guide their piece into the black market.<sup>33</sup> As many source countries do not have the resources to prevent the occurrence of these exchanges, either by offering market value for the item or by effectively policing underground art smuggling rings, they turn to the few market countries to essentially do their work for them. Instead of targeting those who neglect to report their cultural discoveries and those who illegally ship them to other countries, source countries simply wait for those possibly innocent *buyers* to be punished in another country.

This is a dangerous path for the market nations to follow. The United States is particularly susceptible, because most other market nations only recently signed on to UNESCO, and most do not seem as spirited in allowing other countries’ laws to control their

---

<sup>28</sup> *Gov’t of Peru v. Johnson*, 720 F.Supp. 810, 814–15 (C.D. Cal. 1989)(interpreting whether a country “owned” a particular artifact, based on Peruvian ownership laws).

<sup>29</sup> *Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at \*1 (N.D. Cal. Mar. 2, 2005)(deciding whether a habitat could be “cultural property”, based on the Japanese Law for the Protection of Cultural Property).

<sup>30</sup> *Schultz*, 333 F.3d. at 398–400 (examining whether, again, an item was “stolen” under the NSPA by virtue of being taken in violation of the patrimony law of *another country*, namely Egypt).

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

<sup>32</sup> See Bator, *supra*, note 11, at 315 (describing embargo attempts by states “rich in antiquities and archaeological materials”).

<sup>33</sup> See *id.* at 318 (“The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the illegal trade.”).

actions.<sup>34</sup> The “nationalistic approach” has been criticized as one that is rooted in sentimentality and lacking regard for the best interests of the artifacts themselves.<sup>35</sup> The crux of the argument is that the relics will lose value if they are allowed to remain in areas that have neither the capital to properly care for them nor the resources to make them available to the public at large.<sup>36</sup> The United States is doing the world a disservice by adhering stringently to UNESCO, while requiring little comparable effort from the nations whose cultural property UNESCO seeks to protect. A system in which only one party is punished for the wrongs of multiple partners in crime has no negligible impact on those escaping punishment. It simply encourages their continued wrongdoing, and may motivate the countries whose people are being punished to question the system’s effectiveness and fairness.

This Note argues that UNESCO’s current policy, which makes a minority number of market nations almost universally responsible for the protection of source nations’ cultural property, is contrary to the international public good and cannot succeed in its current form. While well intentioned, placing all responsibility on the receivers of illicit goods will not curb the flow of these goods; it will only send the market further underground. It may also result in criminal prosecution for those who were simply ignorant rather than those who purposefully decimated their own countries’ heritage. UNESCO requires almost nothing from some nations (generally, those who gain the most from the system) and burdens others with disproportionate accountability.

Part II of this Note will focus on the various international conventions on the subject of cultural property, predominately the 1970 UNESCO Convention. It will look at the context in which the 1970 UNESCO Convention was convened, the conflicting theories on the concept of “cultural property” underlying the drafting, and the resulting bias against internationalist nations within the

---

<sup>34</sup> The U.K., in one of the most famous cultural property debates, has consistently refused to return the Elgin Marbles to Greece, despite Greece’s insistence that, under its laws, the Elgin Marbles belong to the state and should be returned in deference to UNESCO. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. R. 1881, 1911–12 (1985) [hereinafter Merryman, *Elgin Marbles*].

<sup>35</sup> See *id.* at 1915 (describing the “national pride” and “sentiment” behind the Greeks’ wish that the British Museum return the Elgin Marbles).

<sup>36</sup> See *id.* at 1917 (comparing the fate of the Elgin Marbles, which the British Museum has carefully preserved, to the sculptures remaining on the Parthenon in Athens, which have arguable lost value because of their erosion by “exposure to a variety of hazards”).

2008]

## 1970 UNESCO CONVENTION

465

1970 UNESCO Convention. These factors make the system ultimately unsustainable.

Part III traces the development of the current situation by exploring the various interpretations countries have had of the UNESCO decree to “carry out the necessary concrete measures” to protect the state’s own “cultural patrimony.”<sup>37</sup> It will focus on the three main types of ownership laws that have been enacted by various countries, and will also reflect on the success that each such method has shown.

Part IV will, conversely, look at those steps taken by market countries, particularly the United States, to “prevent museums and similar institutions . . . from acquiring cultural property,” and “to recover and return” any such property.<sup>38</sup> This part will highlight not only laws specifically enacted in reaction to UNESCO, but also laws that have substituted for such laws in cases of cultural property “theft.” It will then analyze the effects that various rulings have had on the cultural patrimony arena, and forecast the dangers likely to result from such holdings.

Part V suggests alternate possibilities that would more evenly balance the responsibility between those nations that wish to protect their own cultural heritage, and those that wish to help in this quest without sacrificing their own belief systems and citizens’ rights.

## II. THE MOTIVES AND GOALS, FAILINGS AND BIASES OF INTERNATIONAL CULTURAL PROPERTY CONVENTIONS

### A. *The Hague Convention*

There have been several attempts at multi-national regulation of cultural patrimony. The first significant conference convened in Brussels in 1879, but did not produce any legislation or noteworthy suggestions. A subsequent attempt in Hague, in 1899, produced a treaty (later amended in 1907). The treaty, amongst other directives for wartime activity, commented on the handling of cultural property during times of conflict. The treaty was ratified by forty nations, but it was not necessarily adhered to, as evidenced by the rampant pillaging after both World Wars.<sup>39</sup>

---

<sup>37</sup> 1970 UNESCO Convention, *supra* note 13, at art. 9.

<sup>38</sup> *Id.* at art. 7.

<sup>39</sup> Roussin Lecture, *supra* note 15.

R

R

UNESCO first took on the issue of cultural patrimony in 1954, with the passage of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention).<sup>40</sup> It was then regarded as the first international agreement wholly focused on the protection of cultural property,<sup>41</sup> and was an effort by UNESCO to help quell the widespread looting and theft that occurred during and after World War II.<sup>42</sup> The articles contained within the Hague Convention, however, were fairly limited in regards to illicit trafficking of cultural property. The earliest draft simply stated that “States Party are (sic) required to prevent the exportation of cultural property from territories they have occupied during an armed conflict” and should return any such property to its rightful nation once the hostilities have ceased.<sup>43</sup> Although no country actually passed particular legislation implementing the entire Hague Convention, some nations did adopt certain provisions into their local laws.<sup>44</sup>

In particular, following the Hague Convention, UNESCO advanced two noteworthy recommendations that were adopted by several state parties. The first is the 1956 *Recommendation on international principles applicable to archaeological excavations*, which, among other things, urged museums to take “all necessary measures” to “ascertain that there is no reason to believe that [archaeological] objects have been procured by clandestine excavation, theft or any other [illicit] method,” further recommending that museums and excavators lend assistance in recovering any objects improperly removed from excavations.<sup>45</sup> The second, the

---

<sup>40</sup> Kate Fitz Gibbon, *Chronology of Cultural Property Legislation, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 3, 5 (Kate Fitz Gibbon ed., (Rutgers Univ. Press: in association with The Am. Council for Cultural Policy 2005).

<sup>41</sup> UNESCO, The Hague Convention, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=1518&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1518&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Jan. 29, 2007).

<sup>42</sup> World War II saw the greatest pillage of artwork, architecture, and artifacts of all time. At least one fifth of the art of Western Europe was plundered, as estimated by thorough records kept by the Nazis. Between 250,000 and 600,000 paintings alone were stolen during the War. Roussin Lecture, *supra* note 15.

<sup>43</sup> PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON IL-LICIT TRAFFIC 10 (2000).

<sup>44</sup> *Id.* at 11. Some aspects of the Convention were also used during the Nuremberg Trials. Roussin Lecture, *supra* note 15.

<sup>45</sup> O'KEEFE, *supra* note 43, at 11. It is interesting to note that the 1956 recommendation appealed directly to institutes of art and artifact collection, as many nationalists continue to denounce museums as a contributing to the commercial market for “illicit” cultural property. *Infra* note 61.

R

R

R

R

2008]

## 1970 UNESCO CONVENTION

467

1964 *Recommendation on the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property*, was the impetus for the 1970 UNESCO Convention. After Mexico and Peru complained about the unlawful trade in cultural property, the General Conference decided that before such an obviously necessary international convention was assembled, they should first create and circulate a recommendation amongst the affected nations.<sup>46</sup> This recommendation essentially prepared the way for the 1970 UNESCO Convention by justifying the need for States to work together to curb the problem of illicit export, urging them to adopt the provisions that would result from such a convention.<sup>47</sup>

Overall, the 1954 Hague Convention is considered more of a general reflection on the importance of cultural property than an operative document. However, in regard to the nationalism/internationalism debate, the most notable aspect of this Convention was the assertion, in its preamble, that cultural property was not simply for the use and benefit of the country from which it came, but of importance to “the cultural heritage of mankind.”<sup>48</sup> This may have reflected a significant change of attitude from a narrow nationalistic viewpoint to one more in line with internationalism.

An alternative, perhaps more cynical view would be that this statement did not reflect the drafter’s underlying view that all countries should share equally in the cultural history of one, because they did not actually have such a view. The internationalist wording may simply have been a strategy to discourage the destruction of one country’s relics by a citizen of another country, by patently appealing to their common “European” brotherhood. This interpretation is supported by the fact that the follow-up 1970 UNESCO Convention, which attempted to deal with various exchanges, contexts, and areas, steered away from this viewpoint and back toward a more nationalistic approach.

---

<sup>46</sup> O’KEEFE, *supra* note 43, at 12.

<sup>47</sup> *Id.* One interesting provision: “Each Member State should adopt whatever criteria it deems most suitable for defining which items of cultural heritage within its territory should receive the protection envisaged in this recommendation by reason of *their great importance.*” *Id.* (emphasis added).

<sup>48</sup> Fitz Gibbon, *supra* note 40, at 5.

R

R

B. *The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*

The 1970 UNESCO Convention was undertaken to curb the flow of cultural property from its origin country to any country whose citizens were willing and able to acquire it. And, for the first time, such an attempt was made on a worldwide scale. The Articles of the 1970 UNESCO Convention endeavored to halt the practice through directives aimed at participating States, compel source nations to create a system for tracking and certifying their societal artifacts, and require market nations to aid any country seeking the return of such relics. However, due to the context in which it was created, and the fundamental difference in understanding the concept and role of “cultural property” held by the States, the resulting instrument contained biases that would ultimately doom the enterprise.<sup>49</sup>

1. *The Influential Context*

While the 1954 Hague Convention technically applied worldwide, and did reference the transfer of cultural artifacts across borders, that Convention was mainly concerned with preventing the destruction of cultural property in Europe during times of conflict. It was not until the 1970 UNESCO Convention that UNESCO issued guidelines for a universal arena and narrowed their focus to the acquisition and transfer of goods for eventual sale. Mexico and Peru appealed to UNESCO in 1960 to advance global measures curtailing the unlawful trade of cultural artifacts.<sup>50</sup> Over the next decade, more and more countries began to request that something be done, on a global scale, to prevent the hemorrhaging of their cultural heritage. While other market nations, namely Germany, France and the United Kingdom, participated in the 1964 conference and acknowledged the need for such a Convention, only one of the seventy nations actually contributing to the 1970 UNESCO Convention, the United States, was not a primarily source nation.<sup>51</sup>

---

<sup>49</sup> See O'KEEFE, *supra* note 43, at 8 (citing claims that the 1970 UNESCO Convention was “fatally flawed”). Some even went so far as to call it *dépassée dans son spirit et sa teneur* (outdated in its spirit and its terms). *Id.*

<sup>50</sup> Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States and Mexico*, 38 *TEX. INT'L L.J.* 145, 149 (2003).

<sup>51</sup> State Parties to UNESCO, *supra* note 17.

Certainly, the fact that source nations got the ball rolling, and the fact that market nations were severely under-represented, separately and jointly contributed to the nationalistic bias and the resulting Convention. The ensuing Articles placed most of the blame for the siphoning of cultural artifacts on the (absent) market nations, and therefore, gave them more responsibility to temper the flow. Indeed, the initial reason that the United States even became involved after the 1964 conference was due to its uneasiness in an early draft, the so-called “Secretariat Draft,”<sup>52</sup> produced in 1968. This initial version sought to impose “blanket export and import controls.”<sup>53</sup> Such regulation would have stifled almost all legal trade in antiquities, even that which, at that time, was legitimate and acceptable. Because, at this point, the United States wanted to cultivate relations with developing nations in the Americas,<sup>54</sup> it was in its best interest to prevent the passage of such a one-sided draft. If the United States was unable to do so, it would face incredible difficulties in adhering to the resultant Convention, and would have likely declined the option to ratify the Convention. Consequentially, the nation would have had trouble aligning itself with the developing source nations, as it desired.<sup>55</sup>

## 2. *The Nationalistic Approach*

It would be pragmatic to assume that the bias against market nations is a result of expectations and assumptions that they have better financial and other resources, and should, therefore be harnessed with the regulation responsibilities.<sup>56</sup> However, it is actually the fundamental theory on ownership of cultural heritage espoused by the competing nations that bears the most responsibility in the disparate treatment of source and market nations.

As previously discussed, there is a great divide between countries that look at cultural property and heritage from an internationalist perspective, and those that do so through the lens of nationalism. The internationalists reason that humans have a common, universal heritage and history, and therefore, that any cul-

---

<sup>52</sup> Jowers, *supra* note 50.

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

<sup>54</sup> *See id.* at 149 n.36 (describing the reason for the United States’ interest in the Convention as its desire to “develop better relations with, and gain the support of, a number of developing states”).

<sup>55</sup> *See id.*

<sup>56</sup> The U.S. tax system, for instance, requires those most able to pay to contribute a greater percentage of their income, which, in turn, goes to pay for communal benefits.

tural property, no matter where it is located, is important to every human being.<sup>57</sup> Nationalists, conversely, think of cultural property as originating within their jurisdiction as part of (if not exclusively, than primarily) a *national* cultural heritage.<sup>58</sup> Such theories essentially rest on the sense that the artifact is a “manifestation and a mirror of its culture, and that the existence and awareness of a common culture is intimately tied to the existence and awareness of a sense of community.”<sup>59</sup> They prefer to think of the issue of ‘who owns cultural property’ in a moral sense, rather than a legal one.<sup>60</sup>

Though rooted in sentimentality, the nationalistic approach taken by UNESCO does have some of the scientific community, namely archaeologists, behind it. Many of these scientists claim to be “at war” with collectors, museums, and the antiquities trade because their actions result in the “commercialization” of the objects, which cause “destruction of the archaeological record and the loss of contextual information.”<sup>61</sup> They believe that when artifacts are removed from their original context, the value of those pieces is irreversibly destroyed, and that advancing the notion of art and artifacts as commodities to be bought and sold is what leads to this destructive commercialization.<sup>62</sup>

While the 1954 Hague Convention, as noted, declared its internationalist approach, that one country’s cultural heritage belonged to the world, the 1970 UNESCO Convention emphasized an opposite, nationalistic approach. The Preamble to the 1970 UNESCO Convention declares, “Cultural property constitutes one of the basic elements of . . . *national* culture . . . . “It is incumbent upon every State to protect the cultural property existing *within its*

---

<sup>57</sup> Merryman, *Two Ways*, *supra* note 14, at 831–32.

<sup>58</sup> *Id.* at 832.

<sup>59</sup> Bator, *supra* note 11, at 304.

<sup>60</sup> Roussin Lecture, *supra* note 15.

<sup>61</sup> JOHN MERRYMAN, *A Licit International Trade in Cultural Objects, in WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW*, *supra* note 40, at 269, 277–78. The Archaeological Institute of America’s Code of Ethics even goes so far as to advise its members to “refuse to participate in the trade of undocumented antiquities and refrain from activities that enhance the commercial value of such objects.” Archaeological Society of America, AIA Code of Ethics (adopted Dec. 29, 1990), *available at* [http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_EthicsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_EthicsA5S.pdf).

<sup>62</sup> It is important to note, however, that once objects have been removed from the ground and properly studied and documented, most archaeologists are willing to allow the goods to leave the country of origin for further study or presentation, so long as money is not exchanged.

R

R

R

R

*territory*” and “every State . . . [should] become increasingly alive to the moral obligations to respect its *own* cultural heritage.”<sup>63</sup>

Essentially, the 1970 UNESCO Convention, likely because its members are almost exclusively nationalistic nations, places almost all emphasis on trying to keep cultural property in the country from which it originated, regardless of whether it would best preserve or advance the significance of the piece. The danger of such a nationalistic approach is compounded by the fact that countries were given free reign to designate any artifact as one of cultural importance.<sup>64</sup> Since critics already attacked the nationalistic approach as being based on “sentiment,”<sup>65</sup> and being possibly harmful to the relics,<sup>66</sup> the countries’ added discretion adds fuel to the sentimental flame.

i. The Parthenon Marbles Case – An Illustration of the Discord

One of the most famous debates in cultural property, the Parthenon Marbles (also known as the Elgin Marbles or Parthenon Sculptures) dispute, is a perfect example of the problems associated with ignoring a fundamental difference in national opinion when trying to craft a legal solution to an international problem. This controversy, which is rooted in the difference between the nationalism and internationalism perspectives, surrounds Greece’s request for the return of the unquestionably Greek Parthenon Sculptures, which have resided on display in Great Britain’s British Museum since Lord Elgin acquired them from the Acropolis in Athens and brought them there in 1837.<sup>67</sup>

While citing no *legal* obligation for Great Britain’s return of the Marble,<sup>68</sup> Greece argues that “[t]he plunder of the marbles of Parthenon . . . consists a [sic] main act of ‘orphaning’ of the heri-

<sup>63</sup> 1970 UNESCO Convention, pmbl. (emphasis added), *supra* note 13.

<sup>64</sup> This policy is problematic because it gives them the option to impose a blanket export restriction on any cultural property; precisely the fear of the United States.

<sup>65</sup> Merryman, *Elgin Marbles*, *supra* note 34, at 1915.

<sup>66</sup> *See supra* note 36.

<sup>67</sup> Merryman, *Elgin Marbles*, *supra* note 34, at 1881–1883.

<sup>68</sup> Great Britain maintains that Lord Elgin secured all of the proper paperwork from the Turkish ambassador at the time he received the Marbles, thus Greece has no legal leverage. *See* The British Museum, *The Parthenon Sculptures: Facts and Figures*, *infra* note 72. *But see*, David Rudenstine, *Did Elgin Cheat at Marbles?*, *CARDOZO LIFE* (Summer 2000), available at <http://www.cardozo.yu.edu/life/summer2000/elgin> (arguing that these papers may have been forged or misinterpreted, calling their assumed authenticity “a grand illusion,” and pointing out Great Britain’s refusal to delve into deeper research on the topic).

R

R

R

R

R

tage of the Greek people” and “demand[s] the return of the antiquities to their birthplace,”<sup>69</sup> obviously making the nationalism-based assertion that the country of origin, by mere nature of being the object’s “birthplace,” inherently has a stronger claim than any other country.<sup>70</sup> Great Britain responds that, considering the entire history of the Parthenon Marbles, they have now taken on cultural significance in the British context.<sup>71</sup> It acknowledges Greece’s certain relationship with the Sculptures, but argues that the mere fact of their Greek origin does not necessarily mean that Greece’s cultural connection to the Marbles is any stronger than Great Britain’s.<sup>72</sup> Moreover, the ability to adequately publicize great pieces of cultural property to the public is of primary importance to internationalist nations, and Great Britain further argues that it is better equipped to allow more people access to these great works.<sup>73</sup>

Although the 1970 UNESCO Convention was written with a nationalistic sentiment, it does not force a particular mind-set upon the participating Party States. Therefore, under the 1970 UNESCO Convention, both Greece and Great Britain have valid claims. When considering the thousands of artifacts, many from different countries, on display at national museums around the world, the difficulty of enforcing vague directives such as the 1970 UNESCO Convention becomes more apparent.

---

<sup>69</sup> Greek Rectors’ Conference (February 22–24, 2002), <http://www.culture.gr/a/1/12/ea123.html>.

<sup>70</sup> *Id.* Unsurprisingly, at the 1982 UNESCO World Conference on Cultural Policies, Recommendation No. 55 was published, urging return of the Parthenon Sculptures “to Greece, the country in which they were created.” Irimi A. Stamatoudi, *The Law and Ethics Deriving from the Parthenon Marbles Case*, [1997] 2 WEB JCLI, STAMATOUDI, <http://spade3.ncl.ac.uk/1997/issue2/stamatoudi2.html>.

<sup>71</sup> See Merryman, *Elgin Marbles*, *supra* note 34, at 1915 (“The Elgin Marbles . . . have entered British culture, help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship.”)

<sup>72</sup> See, The British Museum, *The Parthenon Sculptures: Facts and Figures*, <http://www.thebritishmuseum.ac.uk/gr/debate.html> (last visited Feb. 24, 2008). Furthermore, Great Britain’s position is that had Lord Elgin left the Parthenon Sculptures as he found them, they would almost certainly have been destroyed by warfare or the elements. *Id.*

<sup>73</sup> See *id.* John Merryman, a staunch critic of nationalism and commentator on the Elgin Marbles debate, argues that “it is not clear that enjoyment of cultural value . . . requires possession of the Marbles . . . the Marbles are, or could easily be made to be, as accessible to the Greeks through reproductions as through the originals. There must be some cultural magic inherent in the authentic object, and not in an accurate reproduction, that speaks only to Greeks, or the argument fails. Merryman, *Elgin Marbles*, *supra* note 34, at 1913.

### 3. *The Biased Articles*

Considering the backdrop against which the Conference took place and the drafters' overwhelmingly nationalistic viewpoint, it is not surprising that the resulting instrument contained many subtle and unsubtle biases in its attempts to regulate illicit trade. The 1970 UNESCO Convention defined "cultural property" as "property which, on religious or secular grounds, is *specifically designated by each State* as being of importance for archaeology, prehistory, history, literature, art or science,"<sup>74</sup> giving great leeway to the countries to decide for themselves what constituted such property. It goes on to declare that "[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."<sup>75</sup> This is an interesting, and perhaps rather purposeful, choice of words, because "illicit," as opposed to "illegal" or "unlawful," has an additional connotation of immorality.<sup>76</sup>

The 1970 UNESCO Convention then compels nations to set up services designed to prevent the removal of cultural heritage, suggesting that these services formulate laws, create a national inventory of cultural property, establish institutions to preserve such property, supervise archaeologists, and, notably, "see[ ] that appropriate publicity is given to the disappearance of any items of cultural property."<sup>77</sup> The 1970 UNESCO Convention subsequently mandates the creation of an "export certificate," and prohibits exportation of cultural goods without such an accompanying certification.<sup>78</sup> The 1970 UNESCO Convention further recommends that such services should be provided with "an adequate budget."<sup>79</sup> While this is a reasonable expectation, it was probably no mystery to the drafters that a considerable number of the nations to whom these directives applied lacked the financial resources necessary to implement the directives. The drafters likely knew that many countries would not be able to comply.

---

<sup>74</sup> 1970 UNESCO Convention, *supra* note 13 (emphasis added).

<sup>75</sup> 1970 UNESCO Convention, *supra* note 13, at art. 3.

<sup>76</sup> O'KEEFE, *supra* note 43, at 44.

<sup>77</sup> 1970 UNESCO Convention, *supra* note 13, at art. 5. This might certainly be a result of the fact that many countries, particularly Italy, often use the "spectacle" of a legal trial as a catalyst for change or simply as publicity for a cause. Elisabetta Povoledo, *Prosecutors Bet Big on Antiquities Trial in Italy*, INT'L HERALD TRIB., Nov. 16, 2005, at E1.

<sup>78</sup> 1970 UNESCO Convention, *supra* note 13, at art. 6.

<sup>79</sup> 1970 UNESCO Convention, *supra* note 13, at art. 14.

R

R

R

R

R

R

As for countries who may find themselves the ultimate destination for such “illegally exported” cultural property, the 1970 UNESCO Convention dictates that they should, among other things, “take the necessary measures . . .to prevent museums . . .from acquiring cultural property originating in another State Party,”<sup>80</sup> “take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention,”<sup>81</sup> and insist that antique dealers and other similar entities “maintain a register recording the origin” of every piece they import, subject to penal or administrative sanctions.<sup>82</sup> State parties are also required, when called upon by source nations, to “participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned.”<sup>83</sup>

Of the eleven articles specifically directing some type of affirmative action, three deal with source nations and their obligations to protect their own cultural property, while four of the articles deal with market nations and their responsibilities in protecting the source nations.<sup>84</sup> While the “victim” nations are primarily directed to label, track, and certify their artifacts as culturally significant, it is important to note that the bulk of the responsibility for the actual prevention of illicit trafficking, along with risk of sanctions (particularly penal sanctions) for non-compliance, falls squarely on the market nations.

Given the overwhelming evidence of the situation surrounding the 1970 UNESCO Convention, the actual opinions of those who were present, and the specific decrees of its articles, there can be no doubt that the 1970 UNESCO Convention was ripe with biases against market nations. As a result, the Convention levied an undue burden on the market nations to fix a problem that was not entirely their fault.

---

<sup>80</sup> 1970 UNESCO Convention, *supra* note 13, at art. 7 (a).

<sup>81</sup> 1970 UNESCO Convention, *supra* note 13, at art. 7 (b)(ii).

<sup>82</sup> 1970 UNESCO Convention, *supra* note 13, at art. 10.

<sup>83</sup> 1970 UNESCO Convention, *supra* note 13, at art. 9.

<sup>84</sup> 1970 UNESCO Convention, *supra* note 13. The 1970 UNESCO Convention consists of twenty-seven articles in total, many of them defining terms and noting the responsibilities and abilities of UNESCO as a resource as applied to both source and market nations. *Id.*

When asked about the necessity of continuing the aims of the 1970 UNESCO Convention, even the Director-General of UNESCO, Frederico Mayor, confirmed that the drafting parties were, and continue to be, biased against those wealthy nations (wealth being the very characteristic that allows them to import the majority of cultural property) that are easier to burden with responsibility. “It is very clear that the victim countries, try as they may, cannot solve the problem of their disappearing heritage on their own. That is why the General Conference of UNESCO in 1979 adopted the CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY . . . .”<sup>85</sup> Mr. Mayor, it seems, fully acknowledges the fact that UNESCO is asking some countries to do very little to protect themselves, thereby “passing the buck” to countries having more resources but not necessarily greater culpability.

Despite the 1970 UNESCO Convention’s flaws, approximately 110 nations,<sup>86</sup> including those who could only anticipate negative consequences, have adopted its directives. Now, after three decades, UNESCO’s errors have produced two significant consequences: (1) source countries that are unable to protect and manage their cultural patrimony; and (2) market countries harmed by penalties that are dangerously close to altering the entire concept of international law. To better understand exactly why this is and how this plays out, one must look at the way that some countries have implemented the UNESCO directives.

### III. PUTTING UNESCO INTO ACTION: THE PROTECTION OF DOMESTIC CULTURAL PROPERTY

Understandably, a country’s theory of ownership heavily impacts its manner of compliance with the UNESCO articles. In general, the methodology varies based on who is bestowed ownership of a found item (“ownership laws”) and/or how an item’s exportation is restricted once it enters the marketplace (“export laws”). Some countries may rely exclusively on one type of law, while others may combine the two into “hybrid laws.”

---

<sup>85</sup> Frederico Mayor, *Appeal*, reprinted in PERNILLE ASKERUD & ETIENNE CLÉMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY: A RESOURCE HANDBOOK FOR THE IMPLEMENTATION OF THE 1970 UNESCO CONVENTION 3 (UNESCO 1997), available at <http://www.unesdoc.unesco.org/images/0011/001187/118783eo.pdf>.

<sup>86</sup> 1970 UNESCO Convention, *supra* note 13, at app.

## A. *The Legal Methods*

### 1. *Ownership Laws*

Italy, along with thirty-nine other countries, has enacted “ownership laws” to conform with the UNESCO directive to establish laws preserving the nation’s cultural property.<sup>87</sup> Basically, anything found in the state, even goods found on or under private land, do not belong to the finder or the landowner, but to the Italian government.<sup>88</sup> In other words, such countries have enacted actual or virtual<sup>89</sup> embargos, and any exported works are assigned to a “minister of culture,” whose responsibility is to recover works already out of the country.<sup>90</sup>

In Italy and Greece, the Minister of Culture generally uses the press to serve notice and to publicize the illicit handling of an object before (or in lieu of) serving legal notice. Perhaps the most famous Greek Minister of Culture was Minister Melina Mercouri, a former singer and film star who served in the position for ten years.<sup>91</sup> Using all the connections she acquired as a famous performer, Ms. Mercouri fought for the return of the aforementioned Parthenon Marbles,<sup>92</sup> bringing the debate into the international arena and revitalizing debates about cultural property.

### 2. *Export Laws*

In contrast to Italian, Greek, and other countries’ ownership-based cultural property laws, Japan has enacted a series of export laws based on the cultural significance of the item, as designated by the Minister of Education.<sup>93</sup> The Japanese “Laws on the Protection of Cultural Property” is essentially a committee-produced docu-

---

<sup>87</sup> Michael Kimmelman, et al, *supra* note 16 (Mr. Cuno, President and Director of the Art Institute of Chicago, describes Italy’s and 39 other countries’ “ownership laws,” which reflect those countries’ attempts to fulfill their UNESCO obligations). **R**

<sup>88</sup> Gazz. Uff. No. 1089 (June 1, 1939), *supra* note 2; *see also* Michael Kimmelman, et al, *supra* note 16 (Mr. Cuno states, “Things that are found in the ground in Italy belong to the state of Italy. They don’t belong to the person who owns that land.”). **R**

<sup>89</sup> Some States allow for licenses on exportation, but these are almost never granted.

<sup>90</sup> *See* Michael Kimmelman, et al, *supra* note 16 (Professor Appiah describes the “Minister of Culture” position suggested by the UNESCO directives). **R**

<sup>91</sup> Dedication: Melina Mercouri, <http://www.greece.org/parthenon/marbles/> (last visited Nov. 16, 2007).

<sup>92</sup> *Id.*

<sup>93</sup> Law for the Protection of Cultural Property, 1950, ch. 3, art. 27 (Japan), *translated at* <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>

ment, listing various categories of objects.<sup>94</sup> Restrictions are placed on the types of cultural property that may be exported from the country.<sup>95</sup> The Council for the Protection of Cultural Properties, in combination with the Minister of Education or the Commissioner of the Agency for Cultural Affairs, investigates and makes decisions as to designation for all cultural property.<sup>96</sup> The spectrum of designations runs the gamut from items deemed to be “national treasure[s],”<sup>97</sup> which are not permitted to leave the country and/or will be sold or donated<sup>98</sup> to Japanese national museums, to artifacts declared “important,”<sup>99</sup> which may be exported only with special permissions from the Commissioner of the Agency for Cultural Affairs, to those without significant cultural value, which may presumably be exported at will.

### 3. Hybrid Laws

Great Britain and Canada use a type of hybrid law.<sup>100</sup> Like Japan, a list of classes of objects is created by factors such as age, cultural, scientific and/or historic importance.<sup>101</sup> When a citizen makes a find and wishes to export it, he may apply for an export license, which is reviewed by an “expert adviser” who must resolve whether the found object falls into any of the categories requiring special attention.<sup>102</sup> If so, an export review board (in Great Britain, this is known as the “Reviewing Committee”) will use what is known as the “Waverly criteria” to decide whether the object is of

---

<sup>94</sup> *Id.* at ch. 1, art. 2.

<sup>95</sup> *Id.* at ch. 3, art. 44.

<sup>96</sup> *Id.* at ch. V-4, art. 84.

<sup>97</sup> *Id.* at ch. 3, art. 27

<sup>98</sup> Like England and Canada, Japan offers tax benefits to people who donate or sell important works of art to the government or its cultural institutions. Bator, *supra* note 11, at 317. “In Japan, 100% tax deductions are available for donations or bequests of art to the government or national museums. Bequests are also exempt from estate taxes. A tax exemption is granted for income from sales of cultural property to the state or its national museums.” *Id.* at 317, n. 81 (citing an interview with Mr. Takeyoshi Tsuruta, Research Fellow of the Tokyo National Research Institute for Cultural Property, July 23, 1981).

<sup>99</sup> Law for the Protection of Cultural Properties, 1950, CORRECT ch.3 art.44 (Japan), translated at <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

<sup>100</sup> See Bator, *supra* note 11, at 316, n.80 (describing Canada’s system, which is based on an English model and contains both ownership and export methods of oversight).

<sup>101</sup> *Id.* at 320.

<sup>102</sup> *Id.* at 320. In Great Britain, this “expert advisor” may be, for example, the Director of the National Gallery or Keeper of Manuscripts at the British Library. *Id.* at 320, n.83.

R

R

“outstanding” aesthetic importance or cultural significance.<sup>103</sup> If the export review board concludes that the object should remain in the country because of its cultural significance, the board will delay its application for six months so that a national institution for public authority has the opportunity to buy the object.<sup>104</sup> If no entity makes an offer, the board will grant an export license.<sup>105</sup> Furthermore, if an entity makes an offer that the finder rejects, the board will examine that offer “to determine whether it was fair;” and if the price offered is found to be reasonable, the export permit may be refused for a period of at least two years.<sup>106</sup>

## B. *The Effects of the Laws*

### 1. *Ownership Laws*

As a result of its stringent anti-export laws and the abundance of historical artifacts, Italy has one of the highest instances of looting in the world.<sup>107</sup> This is because policing is infrequent and the agencies charged with enforcement are exceptionally under-funded in proportion to the problem. The problem is further exacerbated by corruption, which is a logical result of the vast wealth to be made.<sup>108</sup> Italy’s situation can be summarized as follows: the cultural property items coming out of the country are particularly coveted, the all-or-nothing ban imposed by the country is unduly restrictive, and the risk to those engaged in illicit trade is nearly non-existent—most know that if any party is penalized for the exchange, it will almost certainly be the buyer.<sup>109</sup> Under such circumstances—when a country’s citizens lack any financial incentive for legal excavation and the country has no concept of legal exportation—the practice of looting and sales on the black market be-

---

<sup>103</sup> Bator, *supra* note 11, at 320, 320 n.84. For example, the Waverly criteria include the following inquiries: “(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?” *Id.* at 320.

<sup>104</sup> Bator, *supra* note 11, at 316, n.80.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* However, the owner may retain it or sell it domestically. *Id.* In Great Britain, the Reviewing Committee actually establishes the “fair” price of the object concurrently, and this is the cost that a national institution will have to match. *Id.* at 321, n.85.

<sup>107</sup> “Turkey probably has the most severe current problem, followed by Italy (where it is estimated that more than half of all excavation of Greek and Etruscan remains is carried on by ‘tombaroli’).” *Id.* at 292.

<sup>108</sup> *Id.* at 292.

<sup>109</sup> Merryman, *Elgin Marbles*, *supra* note 34, at 1889.

R

R

R

comes “virtually inevitable.”<sup>110</sup> Additionally problematic, these actual or virtual embargos leave no room for legal debate about whether a particular item is cultural property or whether the country may claim it.

Embargos create a situation that runs completely contrary to that which they strive to achieve. Not only are embargos ineffective at preventing the export of cultural property, they severely increase the demand for such goods outside the source country. Once a country attempts to cut off the supply of a product, the demand at the other end will naturally increase, driving up the price and the esteem associated with acquiring such goods.<sup>111</sup>

## 2. *Export and Hybrid Laws*

In contrast to Italy, in England and Japan there is very little illegal export of works.<sup>112</sup> That is not to say, however, that there is little export of cultural property from these countries. Because of the low incentive to illegally export an artifact or antique, these countries have both successfully retained those objects deemed most meaningful to the country and kept proper track of other, less vital pieces. This is not only beneficial to those in the market, because a secure provenance increases the value of the object, but also to those in the educational field who may study such pieces without fear that their lineage has been corrupted.<sup>113</sup> The fact that the number of “extraordinary objects” is relatively small also allows for far more “effective” enforcement.<sup>114</sup>

Nationalistic thinkers, however, still argue against allowing exportation of cultural patrimony, particularly in countries that serve as “source” nations as well as “market” nations, like England and Japan. There are both practical and psychological prongs to their argument. Pragmatically speaking, these countries are “stable,

<sup>110</sup> Bator, *supra* note 11, at 292; *see also* Merryman, *Two Ways*, *supra* note 14, at 848 (stating that restricting trade in cultural property, “source nations assure the existence of an active, profitable and corrupting black market”).

<sup>111</sup> *See* Bator, *supra* note 11, at 318–19 (describing the effects of an absent legal market).

<sup>112</sup> *See* Michael Kimmelman, et al, *supra* note 16 (Professor Stone states, “As a result of [selective export policy], there is no incidence of looting in Japan. There is a licit market. The same thing in England . . . .”); *see also* Bator *supra* note 11, at 321 (“There is, by all accounts, little or no illegal export of works of art from England or Japan.”).

<sup>113</sup> Though, certainly, many archaeologists have derided the entire market for artifacts, art and antiquities as contrary to the goals of archaeology, as they implicitly encourage looting. Archaeological Institute of America Frequently Asked Questions, <http://www.archaeological.org/webinfo.php?page=10421>.

<sup>114</sup> Bator *supra* note 11, at 322.

R

R

R

R

R

highly organized and notably law-abiding,” “affluent,” and able to “provide an important market at home.”<sup>115</sup> Psychologically, those in the countries may feel they are *allowing* their cultural patrimony to be depleted, which is uncomfortably at odds with the nationalistic rhetoric. Globally, most archaeologists have aligned with the nationalistic approach.<sup>116</sup> As they “speak with a respectable voice and command a sympathetic ear . . . their influence has affected governmental and institutional policies, particularly in the United States,”<sup>117</sup> which has been reflected in decisions handed down over the last two decades.

#### IV. PUTTING UNESCO INTO ACTION: THE COST OF PROTECTING OTHER’S CULTURE

Parties to the Convention, including both source and market nations, must accept UNESCO’s general notion that all countries should be at least somewhat equally involved in preventing the illicit flow of cultural patrimony. Market nations have to do their part to help countries less able to deal with investigations and containment. However, if they are either too forceful in the application of the articles of the Convention or too inflexible in their interpretation, these market countries risk both the wellbeing of their citizens and successful prevention of artifact depletion. If the countries do not look at the “big picture”, that is, endorse the outcome that promotes fairness and motivates preventative actions on both sides, the overall UNESCO system may lose support from market nations, which will then encourage ineffective behavior from source nations. To achieve fairness and balance, a country must look principally to its own laws, statutes and adopted procedures, thereby limiting the amount of influence other countries’ interpretations (especially those at odds with national sentiment) have on its holdings.

---

<sup>115</sup> *Id.* at 324.

<sup>116</sup> John Henry Merryman, *A Licit Trade in Cultural Objects*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 269, 279 (Kate Fitz Gibbon ed., 2005).

<sup>117</sup> *Id.*

A. *The Convention on Cultural Property Implementation Act*<sup>118</sup>

The United States adopted the 1970 UNESCO Convention September 2, 1983.<sup>119</sup> In December of 1987, the United States Congress enacted the Convention on Cultural Property Implementation Act (CPIA).<sup>120</sup> Also known as PL 97-446, the CPIA mainly implemented Article Nine of the 1970 UNESCO Convention. This required the United States, when called upon by another state party to the Convention, to “determine and to carry out the necessary concrete measures” if the other state party’s “cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials.”<sup>121</sup>

To begin the process crafted under the CPIA, an applicant State must submit a request to the Cultural Property Advisory Committee (Committee), a panel of eleven individuals appointed by the President.<sup>122</sup> The Committee then determines whether the request falls in line with the requirements of the CPIA and makes recommendations. The Committee submits these recommendations to the United States State Department, which considers the Committee’s finding and takes one of three actions: it (1) negotiates an agreement with the requesting party; (2) calls for an emergency import restriction; or (3) reports to Congress the reasons the recommendations were not adopted.<sup>123</sup>

The requirements to which the request must conform are quite limiting. For the President to agree to implement the request sought by the inquiring country, it must be found:

---

<sup>118</sup> As the United States was one of the earliest market countries to adopt the 1970 UNESCO Convention, thus giving it the time necessary to analyze the effects of following the directives, this section will focus exclusively on its efforts.

<sup>119</sup> UNESCO, Legal Instruments: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1970, Fr., <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (last visited Jan. 29, 2007).

<sup>120</sup> Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (1983), available at <http://exchanges.state.gov/culprop/97-446.html> (codified at 19 U.S.C.A. § 2602).

<sup>121</sup> 1970 UNESCO Convention, *supra* note 13, at art. 9.

<sup>122</sup> Cultural Property Implementation Act, 19 U.S.C.A. § 2605(1)(A-D). The panel includes two members representing the interests of museums, three members who are experts in archaeology, anthropology, or ethnology; three members who are experts on the international scale of those fields; and three members representing the general public interest. *Id.* Each term is three years. *Id.* at 19 U.S.C.A. § 2605(3)(A)

<sup>123</sup> *Id.* 19 U.S.C.A. § 2605

(A) that the culture patrimony of the State Party *is* in jeopardy . . . ; (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony; (C) that (i) the application of the import restrictions . . . would be of substantial benefit in deterring a serious situation of pillage, and (ii) remedies less drastic . . . are not available; and (D) that the application of the import restrictions . . . is consistent with the general interest of the international community . . . .”<sup>124</sup>

While a dozen countries<sup>125</sup> have utilized the CPIA to compel agreements with the United States, many avoid using it directly because of these “cumbersome requirements.”<sup>126</sup> This avoidance seems to have been implicitly approved by the judicial branch. Even though the CPIA endeavored to funnel such issues through the Executive Branch, there has been a tendency in recent judicial decisions “to reflect the policy embedded in [this] international agreement[ ]<sup>127</sup> to which the United States is a party,”<sup>128</sup> by utilizing alternative penal processes than those laid out in CPIA. Such judicial activism overrides both the legislative attempt to moderate the manner in which cultural property cases are handled and the executive’s expressly granted power in such situations.

## B. *The Ability to Define*

### 1. *Foreign Law in Interpretation of the Terms of the National Stolen Property Act*

Two of the most pertinent cases dealing with the cultural property trade are *United States v. McClain*<sup>129</sup> and *Gov’t of Peru v. Johnson*.<sup>130</sup> In each case, a United States court was confronted with the issue of whether to allow a jury to convict based on the definitions of “stolen” and “owned,” respectively, which were adopted by other countries. In *United States v. McClain*, the four

---

<sup>124</sup> 19 U.S.C.A. § 2602(a)91)(A-C)

<sup>125</sup> Bolivia, Cambodia, Canada, Columbia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru. United States State Department International Cultural Property Protection Homepage, Chart of Emergency Actions & Bilateral Agreements, <http://exchanges.state.gov/culprop/chart.html> (last visited Jan. 28, 2007).

<sup>126</sup> Jowers, *supra* note 50, at 156.

<sup>127</sup> Referring to the 1970 UNESCO Convention and its implicit directive to defer to the originating country’s definition of cultural property when aiding the country in retrieving an illicitly exported artifact.

<sup>128</sup> Jowers, *supra* note 50, at 158.

<sup>129</sup> *United States v. McClain*, 545 F.2d 988 (1977) [hereinafter *McClain I*].

<sup>130</sup> *Johnson*, 720 F.Supp. at 810.

R

R

defendants were first convicted of charges stemming from a violation of the National Stolen Property Act (NSPA).<sup>131</sup> To order a conviction under the NSPA, it must be shown that the objects (here, several pre-Colombian artifacts) were, in fact, stolen property at the time of interstate transport, and that the defendants actually knew that the goods were stolen at that time.<sup>132</sup> The court sustained these charges based on the application of five Mexican laws on the concept of “stolen.” These Mexican ownership laws granted possession of all archaeological monuments, further defined as all “products of the cultures,” to the Nation of Mexico.<sup>133</sup> The trial court, it seems, felt that these foreign, blanket ownership laws were enough to bestow ownership to the country, and convicted the defendants for trafficking stolen goods and thus violating the NSPA.

After a lengthy series of appeals and convictions, in *McClain II*, the Court of Appeals for the Fifth Circuit reversed, holding that determination of the meaning of foreign law was not a task for a jury, but for a judge.<sup>134</sup> The court then went on to say that the Mexican laws were too vague to serve as a predicate to criminal liability.<sup>135</sup> Perhaps realizing the direction this might lead if left

---

<sup>131</sup> *McClain I*, 545 F.2d at 988.

<sup>132</sup> *Id.* at 992. The National Stolen Property Act, 18 U.S.C.A. §2315, imposed criminal liability in 1979 as follows: “[W]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods . . . of the value of \$5,000 or more . . . moving as, or which are part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .” *Id.*

<sup>133</sup> The five laws and their relevant passages are: 1.) Article 1 of the Law on Archaeological Monuments, May 11, 1897, which provided that “archaeological monuments were the property of the Nation and that no one may remove them . . . without the express authorization of the Executive of the Union;” 2.) Law on the Protection and Conservation of Monuments and Natural Beauty of January 31, 1930, which applied the previous Act to objects of “artistic, archaeological or historical value,” whether moveable or immovable;” 3.) Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty of January 19, 1934, which further expanded the definition of “archeological monuments” to encompass “all vestiges of the aboriginal civilization dating from before the completion of the Conquest”, including items found in or on immovable monuments; 4.) Federal Law Concerning Cultural Patrimony of the Nation of December 16, 1970, which declared that all items which could be deemed as part of the Cultural Patrimony could not be permanently exported; 5.) Federal Law of Archaeological, Artistic and Historical Monuments and Zones of May 6, 1972, which said that “[a]rchaeological monuments, movables and immovables, are the inalienable and imprescriptible property of the Nations.” *Id.* at 997–1000 (construing *Diario Oficial*, May 11, 1897; 58 *Diario Oficial* 7, Jan. 31, 1930; 82 *Diario Oficial* 152, Jan. 19, 1934; 303 *Diario Oficial* 8, Dec. 16, 1970; and 312 *Diario Oficial* 16, May 6, 1972, respectively).

<sup>134</sup> *McClain II*, 593 F.2d at 669.

<sup>135</sup> Church, *supra* note 22, at 190.

unchecked, it warned that the NSPA “cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature.”<sup>136</sup> However, it is important to note, as the court did, that the standard was as high as it was predominately because it was a criminal case. Also important is the fact that the court found that the *amended* Mexican law *was* clear enough to apply to U.S. court proceedings. Although the primary charge against the defendants (theft) occurred before the amendment, the defendants planned on continuing their importation and therefore were found guilty of *conspiracy* to violate the statute.<sup>137</sup> This means that, although the court was unwilling to apply a law too vague by American jurisprudence standards, it ultimately did not hesitate to allow a conviction based on a sweeping law at odds with the United States concepts of ownership and theft.

Indeed, the District Court for the Central District of California, in dicta in *Gov't of Peru v. Johnson*, advocated the same view. The court empathized with Peru over the rampant smuggling of priceless cultural artifacts out of the country, but found that Peruvian laws at the time of the alleged export were not specific enough to confer ownership to the state.<sup>138</sup> Had the plaintiffs been able to prove that the objects in question came from Peru, the court seemed willing to have allowed Peru to prove its “ownership” of the objects via its own legal definition of the word.<sup>139</sup>

---

<sup>136</sup> *McClain II*, 593 F.2d at 671.

<sup>137</sup> *Id.*

<sup>138</sup> *Johnson*, 720 F.Supp. at 813–14. Even the Court seemed confused by Peru’s multiple and occasionally conflicting laws on the ownership of artifacts found by citizens. *Id.* Law No. 6634, for instance, requires that all such objects be registered in a “special book”, and that any objects not registered after one year would become property of the state, although there is no evidence that such a book was ever created or what happened to those that were registered. *Id.* at 813. This law was repealed and replaced by Law No. 24047, which, according to testimony during the trial, *might* confer ownership to the state if the item is not registered. *Id.* The next related document is a Supreme decree by the President of Peru, which proclaimed that all pre-Hispanic objects “belonging to the nations’ wealth are untouchable”, and that their removal is “categorically forbidden”, though it makes no mention of any *ownership*. *Id.* at 814. Finally, a June 22, 1985 statute clearly specifies that all archeological sites belong to the state. *Id.*

<sup>139</sup> *Id.* at 811–12.

2. *Dugong v. Rumsfeld*:<sup>140</sup> *Foreign Law in Interpretation of the Terms of the National Historic Preservation Act*

The “Agreement Between the United States and Japan Concerning the Ryukyu Islands and the Daito Islands” granted the Japanese administration ability over a number of islands off their coast, but allowed the United States to maintain control over a number of military bases on these islands. These bases included the Marine Corps Air Station Futenma on the island of Okinawa.<sup>141</sup> In 2002, the base began planning an expansion. This expansion, however, impeded on the habitat of the Okinawa dugong.<sup>142</sup> Alleging that this animal was “central to the creation mythology, folklore, and rituals of the traditional Okinawan culture,”<sup>143</sup> plaintiffs, consisting of the Okinawa dugong, American and Japanese environmental groups, and three Japanese citizens, brought an action against United States Department of Defense Secretary Donald Rumsfeld, complaining that defendants failed to comply with the National Historic Preservation Act.

The defendants’ primary argument was that the Japanese law should not have control over whether these creatures could be protected as “cultural property” because it was not ‘equivalent’ to the National Register of the United States.<sup>144</sup> The National Register provides no protection for any animal species, while Japanese law provides such for animate objects.<sup>145</sup> In a motion for summary judgment on the issue, the court permitted the use of foreign lists that were simply “corresponding . . . in effect or function”<sup>146</sup> to those used in the U.S. This holding indicates that a United States court dealing with United States property may be required to use the definition, no matter how vague or contrasting to the definition, of “cultural property” espoused by another country.

The implications of such a decision may spread to those dealing in almost any international trade, but will certainly jeopardize anyone trading in art and antiquities. Such reasoning signals that any country may define essentially anything as “cultural property,”

---

<sup>140</sup> *Dugong*, 2005 U.S. Dist. WL 522106.

<sup>141</sup> *Id.* at \*1.

<sup>142</sup> A dugong “is an herbivorous marine mammal that inhabits tropical and subtropical coastal and island waters in the Indo-Pacific . . . .” *Id.* at \*3.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at \*6.

<sup>145</sup> *Id.* at \*6.

<sup>146</sup> *Id.* at \*7.

and that the United State courts will be bound by that country's definition. A worst-case scenario certainly might entail a well-regarded antiques dealer being jailed for trading in artifacts which the United States would not normally consider illicit under their interpretation of trade, but which the source country, acting nationalistically, does.

### C. *A Dangerous Precedent*

Such rulings and opinions by the judicial branch could be an indication that the nationalistic viewpoint is being tolerated to a degree that could negatively impact the United States' art market. Prior to the United States' acceptance of UNESCO:

Customary international law ha[d] never been interpreted to render the importer or possessor of an art object subject to action solely on the ground that the object was exported in violation of another country's laws . . . . No U.S. authority, judicial or diplomatic, ha[d] ever asserted that under international law such a cause of action exists. Further, no court in the United States, state or federal, ha[d] ever recognized an action based on domestic common law against the holder of such an object, or an action to disturb its possession on such grounds.<sup>147</sup>

This is precisely the situation in *United States v. Schultz*, in which there was evidence that the defendant motivated the illicit trade, but his criminal charge was a mere conspiracy to receive art that violated the total embargo Egypt had set upon all of its treasures.<sup>148</sup> Moreover, he was charged under an inappropriate statute, even though there was one specifically crafted to deal with such incidents on the U.S. law books.<sup>149</sup>

#### 1. *United States v. Schultz*

On June 25, 2003, Frederick Schultz was convicted of "conspiracy to receive stolen property that had been transported in interstate and foreign commerce." In doing so, he violated the United States' National Stolen Property Act (NSPA).<sup>150</sup> Schultz, a successful art dealer, was accused of transporting Egyptian antiquities,

---

<sup>147</sup> Bator, *supra* note 11, at 369, n.30.

<sup>148</sup> *Schultz*, 333 F.3d at 395.

<sup>149</sup> The facts of the case make clear that Schultz's behavior should be punished. The preceding argument merely infers that the manner in which the case was brought, and the factors that went into the decision-making were not the proper ones.

<sup>150</sup> *Schultz*, 333 F.3d at 395.

the most notable being a sculpture of the head of Pharaoh Amenhotep.<sup>151</sup>

During his appeal, Schultz disputed the notion that Egyptian Law 117 was an ownership law at all.<sup>152</sup> He argued, instead, that it took the form of a patrimony law because it declared that it was simply “impermissible to own possess or dispose of antiquities [discovered after the enactment of the Law, in 1983],” without specifically vesting ownership of such goods in the Nation of Egypt.<sup>153</sup> Because the United States does not have such patrimony laws, he reasoned, this type of ownership could not be recognized as the word is used under the NSPA.<sup>154</sup> The United States court, he argued, should avoid attempting to insert clarifying provisions into a foreign law in order to manipulate it to fit within the necessary spectrum of clarity necessary for criminal conviction under the Constitution. Nor, he claimed, should the word “stolen” be applied to his situation, because the party from whom he obtained the pieces did not steal them in the commonly used sense of the word, but simply unlawfully possessed them.<sup>155</sup> The Court of Appeals for the Second Circuit rejected Schultz’s arguments, agreeing with the trial court by holding that it was perfectly proper to recognize a form of ownership non-existent in the United States to convict a citizen under the laws of the United States.<sup>156</sup>

Schultz’s final argument concerned the Convention on Cultural Property Implementation Act, and the fact that it should supplant the NSPA in these types of cases. Up until the late 1990’s, the majority opinion amongst legal scholars was that United States’ stolen-property law should only be applied to “objects that had been clearly stolen from a foreign museum, individual, or archaeo-

---

<sup>151</sup> *Id.* at 396. His manner of transport was, while reprehensible, quite clever: it was alleged that Schultz and an accomplice, Jonathan Tokeley Parry, smuggled this sculpture and other antiques out of the country by coating them with plastic to make them look like cheap souvenirs, and removing the plastic once they arrived in England. *Id.*

<sup>152</sup> *Id.* at 398–99.

<sup>153</sup> *Id.* at 399.

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 403.

<sup>156</sup> *Id.* at 410. Schultz’s partner in England, Jonathan Tokeley-Parry, was also convicted of violation of the British Theft Act by the British Court of Appeals under the theory that he had handled the “stolen” property of the Egyptian State. Anthony Browne & Pierre Valentin, *The Art Market in the United Kingdom and Recent Developments in British Cultural Policy*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 97, 99 (Kate Fitz Gibbon ed., 2005).

logical site.”<sup>157</sup> This was the understanding when Congress passed the Convention on Cultural Property Implementation Act (CPIA). The decision in *Schultz* (which sustained the holding in *McClain*) that the NSPA could still be applied *in tandem* to the Implementation Act all but superseded the entire purpose of the CPIA. It allowed countries seeking the return of their cultural property to sidestep the entire legislative process and, instead, prosecute in *criminal* court.<sup>158</sup> While the CPIA managed to balance the interests of the United States’ museums and art markets, the general public, archaeologists, and source nations, the court’s method of prosecution under the NSPA provides absolutely no benefits for the United States and its citizens and allows foreign nations to use an easier, only vaguely applicable, statute to achieve their goals.

#### V. CONCLUSION: ALTERNATIVES TO THE CURRENT SYSTEM

The 1970 UNESCO Convention was created with a nationalistic bias blinded to the reality that illicit trade cannot be stopped by a total embargo. It allowed and encouraged its member nations to unduly constrict the availability of their societal artifacts. By doing so, the member nations have deprived the rest of the world of the many benefits, education, appreciation, and communication that such works could provide as “ambassador[s]” of their countries.<sup>159</sup> Allowing cultural objects out of the country “stimulates interest in, understanding of, and sympathy and admiration for that country.”<sup>160</sup> By importing cultural property of another nation, the importing country also increases its own cultural patrimony.<sup>161</sup> There is also the argument that, without the free exchange of cultural property, many of the artistic renaissances that we now look back on may never have occurred.<sup>162</sup> The artistic theories and techniques of each civilization contribute to the overall evolution of

---

<sup>157</sup> William G. Pearlstein, *Cultural Property, Congress, the Courts, and Customs*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 9, 9 (Kate Fitz Gibbon ed., 2005).

<sup>158</sup> Consider the fact that the National Stolen Property Act, created in the 1940s, was a “general purpose criminal law” concerned predominately with, for instance, deterring “interstate car theft.” *Id.* at 10. One could reasonably assume that the drafters did not intend for it to apply to the current situation.

<sup>159</sup> Bator, *supra* note 11, at 306–07.

<sup>160</sup> *Id.* at 306.

<sup>161</sup> *See id.* at 307 (describing the importing country’s interest in import as enriching its own national patrimony).

<sup>162</sup> *See id.* at 308 (arguing that “we would all be poorer” of some travel of art among countries had not occurred).

“art” as we know it; without exchange, there can be no progress.<sup>163</sup> Instead of this cultural evolution, because of embargos, there continues to exist an ever-expanding black market that drives cultural objects into the hands of private collectors and investors, which diminishes the value of the works as a glimpse into the cultures of the past. UNESCO must acknowledge that internationalism has a place in the debate and must be embraced when the situation warrants.

There are alternative methods of regulating a nation’s cultural relics. However, they would almost all require the source nations to accept that *some* of their cultural patrimony may have to leave the boundaries of the country. In terms of material responsibility, alternative methods would also require the source countries to make an effort to catalogue and license their cultural property. If an inventory of what cultural property exists does not itself exist, there is no conceivable way for a source country to effectively limit export.<sup>164</sup> Computers have made such a task infinitely easier, and can not only allow a country to gauge the importance of certain pieces by enabling them to deduce its rarity, but can permit them to track, and thereby more easily control, the flow of exportation.<sup>165</sup> The ultimate goal would be to establish a “global network,” connecting all of the nations’ art and artifact catalogues.<sup>166</sup> Although there are many examples of such systems being built,<sup>167</sup> Royal Tropical Institute (KIT) in the Netherlands is developing a particularly promising system specifically for museums in the Third World. Requiring only some computer hardware, software, a back-up battery, a digital camera, and hands-on training, this program, which should cost less than \$30,000 in total to implement, is already

---

<sup>163</sup> See *id.*

<sup>164</sup> See Kate Fitz Gibbon, *Alternates to Embargo*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 291, 292 (Kate Fitz Gibbon ed., 2005)(describing an effective export system as “dependent” on an inventory).

<sup>165</sup> See *id.* at 293–95 (describing the benefits of digitalization).

<sup>166</sup> *Id.* at 295. However, it must be assumed that either an international organization or a resource-rich nation would provide economic assistance to less well-off countries to begin such an undertaking, and that those dealing in the art trade would actually pay a premium for pieces that had gone through a legal network and had an established providence. *Id.* at 295–96.

<sup>167</sup> See *e.g., id.* at 294 (noting that Taiwan has undertaken to collect digital images and descriptions of all 650,000 pieces in the National Palace Museum, as well as the 400,000 Qing-dynasty documents and rare books; the Canadian Heritage Information Network has operated a centralized network since 1972, which includes twenty-five million objects and eighty thousand archaeological sites in its database).

being attempted in eighteen museums in Africa and Asia.<sup>168</sup> There seems little reason, other than principle, to avoid expanding the program elsewhere.

On the other hand, some countries, and their main proponents, archaeologists, insist that *ownership* need not be part of attempts to showcase cultural patrimony or allow it out of the country.<sup>169</sup> It would be equally effective to allow for continual and open long-term loans to museums around the world, without actually bestowing property rights in the items.<sup>170</sup>

In September 2007, a Harvard economics professor and an MIT graduate student published a paper proposing that long-term leases of antiquities would “raise revenue for the country of origin while preserving its long-term ownership rights.”<sup>171</sup> Their method involved creating a series of “model” nations and calculating the effects of a total ban on exports or a totally free trade environment on each.<sup>172</sup> They begin with a “typical” country, which is described as one that seeks to preserve cultural heritage to an extent, but does not have all the money necessary to preserve its antiquities. This “model” then incorporates an assortment of tax incentives (some high and some low) encouraging retention of the item in the country, considers corruption levels within the government, and looks at situations wherein a country’s economic status is quickly changing from poor to wealthy.<sup>173</sup> Ultimately, they conclude that even countries completely “unwilling[ ] to alienate objects from the nation” should, at the very least, consider leases.<sup>174</sup> Italy is the forerunner in such an experiment, having lent out hundreds of pieces to touring exhibits and museums.<sup>175</sup> Time will tell if this adequately supplies the art and antiquity market.

Market countries cannot be burdened with the bulk of the responsibility to preserve cultural patrimony. This will lead to disproportionate punishment of the citizens of these states and will not lessen the depletion of cultural heritage in countries that need

---

<sup>168</sup> *Id.* at 296–97.

<sup>169</sup> Roussin Lecture, *supra* note 15.

<sup>170</sup> *Id.*

<sup>171</sup> Michael Kremer & Tom Wilkening, *Antiquities: Long-Term Leases as an Alternative to Export Bans*, abstract (Jan. 3, 2007), available at <http://www.economics.harvard.edu/faculty/kremer/files/Antiquities%2011Sept2007cToSend.pdf>.

<sup>172</sup> *Id.* at 4–5.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 32.

<sup>175</sup> Roussin Lecture, *supra* note 15.

R

R

2008]

## 1970 UNESCO CONVENTION

491

it most. It is essential that the United States resist the impulse to align with the nationalistic nations by reforming its criminal law so as to punish those actually engaged in the smuggling and looting of archaeological relics, not those simply in violation of foreign ownership laws.<sup>176</sup> The Convention on Cultural Property Act should be the predominate instrument through which defendants should be prosecuted, meaning that foreign nations must actually “justify the scope and effect” of their countries’ ownership laws.<sup>177</sup> They should not be allowed to claim ownership of all artifacts found within their borders and then leave it up to the market nations to police those who remove such objects. In order to have a reasonable chance of success, any legal system enacted must equitably divide responsibility between those nations that seek to prevent the diminution of their cultural patrimony, and those countries that desire to assist such nations without neglecting their own interest in exposing their citizens to such works.

---

<sup>176</sup> See Pearlstein, *supra* note 157, at 27 (offering suggestions as to how the United States should reform its law)

<sup>177</sup> *Id.*

