

# THE CONTINUED STRUGGLE WITH STOLEN CULTURAL PROPERTY: THE HAGUE CONVENTION, THE UNESCO CONVENTION, AND THE UNIDROIT DRAFT CONVENTION

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## I. INTRODUCTION

Unchecked international trade in plundered treasures and artwork is a trade that hijacks cultural heritage and destroys scientific clues to humanity's common past.<sup>1</sup> The international marketplace for art, artifacts, and antiquities is a billion dollar market.<sup>2</sup> International movement of works of art, including permanent transfers of works of art from one nation to another is nothing new. However, relatively novel is the virtually wholesale illicit expatriation of artwork from nations rich in cultural heritage to nations that are rich in economic terms.<sup>3</sup> The economic incentives acting in favor of both illicit and legitimate transfers have, in many cases, become absolutely staggering.<sup>4</sup> Van Gogh's *Irises* was sold at auction in 1987 for \$53.9 million.<sup>5</sup> A Picasso self-portrait sold for \$47.85 million in May of 1989.<sup>6</sup> Also, the prices of antiquities, many of which had been plundered and looted, are soaring:<sup>7</sup> "In one night the Museum of Ibadan in Nigeria was emptied. A treasure trove of bronze and terra cotta figures disappeared from another Nigerian museum at Ife. Antique dealer Ralph Kiehlo, who works

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1. Thomas Maier, *Picking up the Pieces: Nations Fight to Recover a Past They Say was Plundered*, *NEWSDAY*, May 23, 1995, at B29.

2. Christie's and Sotheby's are two leading art auction houses in the international marketplace. Sotheby's Holdings, Inc. is based in New York City. Sotheby's reported sales from September 1989 through August 1990 of \$3.2 billion. Christie's International, based in London, reported sales for the same period of \$2.4 billion. Heidi Berry, *The Big Uneasy: Auction Houses Brace for a Downturn*, *WASH. POST*, Sept. 20, 1990, at T14. Current reports indicate that the art market is again rising. See also Alexandria Peers, *Art Prices Begin Emerging From 2-Year Slump But Remain Far Below the Height of the 1980s Boom*, *WALL ST. J.*, Nov. 20, 1992, at C8.

3. *Art on the Lam*, *WASH. POST*, Nov. 25, 1995, at A20 ("art-rich" or "source nations").

4. Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 *U. TOL. L. REV.* 919, 920 (1991).

5. Robert Hughes, *Sold! It Went Crazy, It Stays Crazy, but Don't Ask What the Art Market is Doing to Museums and the Public*, *TIME*, Nov. 27, 1989, at 60.

6. *Id.*

7. For an extensive discussion of plundering and looting of archaeological sites, see Paul Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275 (1982).

from Cotonou, Benin's chief port, puts a value of \$250 million US on the Ife hoard."<sup>8</sup>

Given intense upward pressure on prices, some unsurprisingly claim that art thievery now ranks second only to narcotics trade in international criminal activity.<sup>9</sup> A substantial portion of this business involves the transfer of stolen or smuggled property.<sup>10</sup> In 1995, the Hermitage Museum in St. Petersburg, Russia unveiled seventy-four Impressionist and Post-Impressionist works, including masterpieces by Degas, Renoir, Picasso, and Monet, which were taken from Germany by the Red Army in 1945.<sup>11</sup> Many Russians feel very strongly that the paintings should remain in Russia as compensation for the Nazi policy of annihilating Slavic culture.<sup>12</sup> However, Germany wants the artwork returned.<sup>13</sup> Turkey is attempting to repossess the facial segment of an 1800-year-old statue *Weary Hercules*.<sup>14</sup> The upper part was stolen from an excavation of the ancient city of Perge and was later placed on top of a cast of the bottom half at the Boston Museum of Fine Arts.<sup>15</sup> The two pieces fit perfectly together.<sup>16</sup> Turkey plans a lawsuit to repossess ownership of the top half of the statue.<sup>17</sup> The private market is powerful enough to encourage impoverished peasants in Mali, for example, "to regard old works of art which lurk in the parched ground as cash crops."<sup>18</sup> This monetary incentive has cost Mali virtually all of its finest Djenne terra cottas. Collectors in Europe now possess these terra cottas.<sup>19</sup>

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8. Isabel Conway, *Looted African Past Surfacing in Ritziest European Galleries*, VANCOUVER SUN (British Columbia), Nov. 4, 1995, at B3.

9. Carol L. Morris, *In Search of a Stolen Masterpiece: The Causes and Remedies of International Art Theft*, 15 SYRACUSE J. INT'L L. & COM. 59 (1988); see also Norman Hammond, *Looted Artefacts [sic] 'Sold Openly in London'*, TIMES (London), Oct. 9, 1995, at C8.

10. See James Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAW. 835 (1985). Professor James Nafziger estimated in 1985 that the total value of stolen art and artifacts involved in international trafficking exceeded one billion dollars annually, placing this type of trafficking second only to narcotics trafficking in total dollar value. *Id.*

11. Rosalind Gray, *Russia Gets Its Booty Out; Visual Art*, TIMES (London), Apr. 11, 1995, at D5.

12. *Id.*

13. Will Englund, *Russia Unveils Seized Masterpieces*, BALTIMORE SUN, Feb. 10, 1995, at 1A.

14. Kelly Couturier, *Talking Turkey; Aegean Nation Tries to Recover Its Lost Antiquities*, WASH. POST, Nov. 26, 1995, at G4.

15. *Id.*

16. Maier, *supra* note 1.

17. Couturier, *supra* note 14.

18. Tunku Varadarajan, *Who Holds the Rights to Africa's Heritage?; African Art*, TIMES (London), Oct. 2, 1995, at A3.

19. *Id.*

The growing body of case law in the area of stolen arts reveals an interesting picture of how such art is transferred and sold in the international marketplace.<sup>20</sup> Stolen art is generally taken from art-rich locations like Asia, Eastern Europe, and the Middle East.<sup>21</sup> In places such as Italy, Turkey, Mexico, Southeast Asia, and Central America, "literally thousands of unknown or unexcavated archaeological sites"<sup>22</sup> exist. Often this art is smuggled out of its country of origin and taken to a Western European country with liberal bona fide purchaser laws, such as Switzerland.<sup>23</sup> Once the property is transferred into such a jurisdiction, it can be purged of the tainted title and transferred for further value without exposing subsequent buyers to a risk of loss. These transfers produce receipts or bills of sale, which are virtually all that the major auction houses require to show good title.

International efforts to curb the illicit trade in art have been largely unsuccessful.<sup>24</sup> Competing national policies of art-importing and art-exporting countries have weakened attempts to gain world support for international agreements governing stolen property.<sup>25</sup> Proving that such antiquities are stolen is a legitimate and very real worry that may thwart efforts at recovery.<sup>26</sup> Furthermore, rules of common law nations, such as the U.S., which protect the rights of the original owner, conflict with the civil law of other nations which favors the rights of the bona fide purchaser.<sup>27</sup>

In response to problems of the illicit trade in art, the International Institute for the Unification of Private Law is in the process of drafting a model

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20. A sample of case law in this area includes *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.* 717 F. Supp. 1374 (S.D. Ind. 1989).

21. *Art on the Lam*, *supra* note 3.

22. Bator, *supra* note 7, at 290; see also Jonathan Kandell, *How a Grave Looter at a Mexican Site Drools Over Relics*, WALL ST. J., Sept. 8, 1988, at A1.

23. See Karen T. Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L COMP. L.J. 427, 447-450 (1990) (discussing liberal European bona fide purchaser laws which permit a bona fide purchaser to acquire title to stolen property).

24. See George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 80 (1978).

25. See Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long Will the Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55 (1987).

26. *Art on the Lam*, *supra* note 3.

27. Stanislaw Nahik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1083 (1976). (stating that the International Institute for the Unification of Private Law attributes the difficulty of formulating acceptable provisions for restitution to the differences between civil and common law countries).

convention.<sup>28</sup> If the UNIDROIT Draft Convention on Illicit Import, Export, and Transfer of Cultural Objects<sup>29</sup> is ratified by a sufficient number of countries, the Treaty could shift the way art theft is policed internationally and tighten illicit and borderline art-dealing activities in many nations.<sup>30</sup> The UNIDROIT Draft Convention is an attempt to reconcile differences within the national policies and domestic laws of various nations.<sup>31</sup> By creating a workable set of uniform rules and private litigation rights, the drafters of the UNIDROIT Draft Convention seek to harmonize antithetical aspects of common law and civil law jurisprudence in order to attract a large number of signatory nations. The UNIDROIT Draft Convention is broader in scope than existing agreements and takes much needed steps toward balancing the interests of original owners and bona fide purchasers.<sup>32</sup> Among other provisions the UNIDROIT Draft Convention establishes a right of return of stolen objects, thereby protecting the property rights of the original owner.<sup>33</sup> At the same time it provides for an equitable remedy of compensation to be paid to good faith purchasers who have taken appropriate steps to ensure that the art has good title.<sup>34</sup>

This Note analyzes the global need for a uniform standard in view of existing problems with international law and also considers whether the UNIDROIT Draft Convention successfully addresses those problems. Failure to curb the problem of stolen cultural property by the previously ratified 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>35</sup> and the Convention for Prohibiting and Preventing the Illicit Import and Export and

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28. *Smuggled Art Conference Aims to Harmonize Law*, Agence France-Presse, May 31, 1995, available in 1995 WL 7810393. "The goal of the meeting, which will run from June 5 to 26, is to ratify a convention that would expand the means by which stolen art can be recovered throughout the world." *Id.*

29. Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Study LXX - Doc. 40 (1993) (original in English) [hereinafter UNIDROIT Draft Convention].

30. *Art on the Lam*, *supra* note 3.

31. Alexandra Peers, *Art World Shaken by Nations Seeking to Reclaim Items*, WALL ST. J., June 21, 1994, at C1. "The agreement, known as Unidroit [sic], or "One Law" in French, is now in draft form, and due to be debated at a diplomatic conference in early 1995." *Id.*

32. *Id.*

If the agreement is adopted and 'you can establish it was stolen, you can have it back,' says Harold Burman, executive director of the U.S. State Department's advisory committee on private international law and the U.S. negotiator. Moreover, in its current draft form, Unidroit [sic] 'would allow some countries to go into a federal court to seek the return of an illegally exported, not stolen, item,' he says.

*Id.*

33. See UNIDROIT Draft Convention, *supra* note 29, art. 3.

34. *Id.* art. 4.

35. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter the Hague Convention].

Transfer of Ownership of Cultural Property<sup>36</sup> led to the need for UNIDROIT to govern international art trade.<sup>37</sup> Although the economics involved with stolen cultural property are an important reason why these international treaties have been engendered,<sup>38</sup> the exposure of cultural property to damage, destruction, pillage, and looting in times of peace or armed conflict has also resulted in the creation of various provisions of international law to protect cultural property.<sup>39</sup> One treaty, the Hague Convention, aims to protect the physical integrity of cultural property in the event of armed conflict. Another, the UNESCO Convention, poses to protect a people's right to retain control of its cultural objects, while the third, the UNIDROIT Convention:

[W]ould make it easier to recover stolen art from those who bought it without adequately checking where it came from; dealers who could not show they had exercised 'due diligence' in this checking could be financially liable to the disgruntled buyers. The idea is to make less viable, and therefore less tempting, the phenomenon of high-tech art theft and archaeological looting that has actually been speeding up in recent years, pushed by the climb in art prices, the easing of national borders in Europe and the availability of ever more sophisticated tools for breaking into museums and sites and carting away treasure.<sup>40</sup>

The UNIDROIT Convention, if ratified, would protect the rights of both the original owners and bona fide purchasers of art. Moreover, illicit art trade would be considerably discouraged without damaging free trade in art.

## II. PREVIOUSLY RATIFIED INTERNATIONAL TREATIES

### A. The 1954 Hague Cultural Property Convention and Its Impact on Recent Wars

Massive destruction and looting during World War II provided great impetus in the movement for a definite protective shield for the tangible remnants of ancient and modern cultures.<sup>41</sup> Thus, the Hague Convention was promulgated. The Hague Convention rests on the premise that cultural property is a valuable

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36. Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

37. Peers, *supra* note 31, at C1.

38. Edwards, *supra* note 4, at 919.

39. *Id.*

40. *Art on the Lam*, *supra* note 3.

41. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 835-41 (1986).

possession of humankind<sup>42</sup> and incorporates the idea that outstanding cultural property is part of mankind's development and therefore deserving of universal respect.<sup>43</sup> The goal of the Hague Convention is to protect a nation's cultural property during armed conflict.<sup>44</sup> The Preamble to the Hague Convention states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."<sup>45</sup> The Hague Convention substantially expanded the body of law governing stolen cultural property as a subset of the law of war. In 1954, forty-five countries signed the completed Hague Convention, including the U.S. and the United Kingdom, and forty signed the Protocol. The U.S. has refused to ratify the Convention since signing it in 1954, in part because the Hague Convention would limit the capacity to use nuclear weapons. The opposition of the Anglo-American countries to ratification has not proven fatal to the Convention, which gained support from approximately one-half of the members of UNESCO, including nearly all other NATO states.<sup>46</sup> According to most recent records, some seventy-five countries have ratified or acceded to the Hague Convention.<sup>47</sup> Sixty-three have ratified or acceded to the concurrently created Protocol. The Protocol addresses the prevention of the export of cultural property from occupied territories, and the safeguarding and return of exported properties. Also, the United Kingdom and the U.S. have at least signed the Convention. Their signatures provide evidence that the Hague Convention provisions were conceptually acceptable, even though they will not have the binding effect of a treaty until ratified by their governing bodies.

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42. See Edwards, *supra* note 4, at 920-921.

43. Arlene Krimgold Fleming, *A Shield From Marauders; The U.S. Can Help Stop Wartime Destruction of the World's Heritage*, WASH. POST, July 5, 1992, at C4.

44. Edwards, *supra* note 4, at 946; Hague Convention, *supra* note 35, pmbl., 249 U.N.T.S. at 240.

45. Hague Convention, *supra* note 35, pmbl., 249 U.N.T.S. at 240.

46. See UNESCO STATISTICAL YEARBOOK (1992); Conventions Adopted Under the Auspices of UNESCO: Ratifications, Acceptances or Accessions at Dec. 31, 1987, Annex A.3, REPORT OF THE DIRECTOR GENERAL ON THE ACTIVITIES OF THE ORGANIZATION, 1986-1987 (1987). Of the 16 members of the North Atlantic Treaty Alliance (NATO), all but Canada, Denmark, Iceland, Portugal, the United States, and the United Kingdom have ratified the Convention. At least 70 of the approximately 170 members of UNESCO have ratified or acceded to the Convention.

47. Parties to the Hague Convention include: Albania, Australia, Austria, Belgium, Brazil, Burkina Faso, Burma, Cameroon, Cyprus, Cuba, Dominican Republic, Ecuador, Egypt, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jordan, Kampuchea, Kuwait, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Mexico, Monaco, Mongolia, Morocco, Netherlands, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Poland, Qatar, Romania, Russia, Saudi Arabia, San Marino, Senegal, Spain, Sudan, Sweden, Switzerland, Syria, Tanzania, Thailand, Tunisia, Turkey, Yemen, and Zaire. The status of the countries formed from the former Eastern Bloc nations is unclear.

The Hague Convention introduced the term "cultural property" with a clear, broadly inclusive, and widely accepted definition.<sup>48</sup> The definition of cultural property is consistent throughout the Hague Convention, including Article 9 where cultural property encompasses the refuges, not just the movable cultural property that they contain.<sup>49</sup> The Convention defines cultural property as including not only movable and immovable property, but also buildings containing movable property and centers containing concentrations of monuments.<sup>50</sup> The Hague Convention also greatly expanded the scope of cultural property protection to armed conflicts of any kind, rather than full-fledged wars, and eliminated the substantial loopholes of earlier conventions.<sup>51</sup> Article 3 of the Hague Convention requires each nation to take action in peacetime to protect cultural property within its territory in case of war.<sup>52</sup> Article 7 of the Hague Convention requires signatories to promote rules necessary "to foster in the members of their armed forces a spirit of respect" for the culture of all peoples.<sup>53</sup>

The Hague Convention imposes an obligation on the contracting parties to prohibit any form of theft, pillage, or misappropriation of cultural property. This obligation extends to acts of vandalism.<sup>54</sup> Article 4 provides that each nation must respect cultural property in its own territory and in the territory of other

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48. Hague Convention, *supra* note 35, art. 1, 249 U.N.T.S. at 242. For a discussion of the coinage of the phrase "cultural property" and issues related to that choice of words, see Lyndel V. Prott & Patrick J. O'Keefe, "Cultural Heritage" or "Cultural Property," 1 INT'L J. CULTURAL PROP. 307, 312-19 (1992).

49. Hague Convention, *supra* note 35, art. 1(b), 249 U.N.T.S. at 242:

For purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership: (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a).

*Id.*

50. *Id.* art. 1, 249 U.N.T.S. at 242; *see also* Fleming, *supra* note 43. The Hague Convention defines cultural property as religious and secular monuments of architecture, art, or history; archaeological sites; groups of historically or artistically significant buildings; scientific materials; structures housing such valuables; and even entire locales containing large amounts of cultural property. Protection extends to civilian vehicles and personnel used to move cultural objects to safety. *Id.*

51. *See* Nahik, *supra* note 27; *see also* Hague Convention, *supra* note 35, 249 U.N.T.S. at 252. For example, the Hague Convention created a distinctive emblem to be placed on cultural property. Transports bringing cultural property to safety are given special protection. *Id.*

52. Hague Convention, *supra* note 35, art. 3, 249 U.N.T.S. at 242.

53. *Id.* art. 7, 249 U.N.T.S. at 246.

54. *Id.* art. 4(3), 249 U.N.T.S. at 244.

nations.<sup>55</sup> Also, in wartime, occupying forces must protect cultural property in the subject territory regardless of whether that territory has taken protective measures.<sup>56</sup> Article 4 further provides that, even if a contracting party has failed to apply the safeguard measures provided for in Article 3, no other contracting party may avoid the obligations of Article 4.<sup>57</sup> Thus an assailant or occupying force of a contracting party would still be under an imperative to protect cultural property in the besieged or occupied territory of another contracting party, even if the latter had not met its safeguard obligations under the Treaty.<sup>58</sup> This Article emphasizes the relation between the world and cultural property, not just the relation between a given state and the cultural property. Moreover, there is a positive requirement incumbent upon the contracting party occupying the territory of another to support the national authorities of the occupied territory in safeguarding and preserving its cultural property.<sup>59</sup> If the territory's national authorities are unable to take proper protective measures, the occupying power is required by the Hague Convention to take the most necessary measures to assist the national authorities in preserving the cultural property.<sup>60</sup> The Hague Convention further provides that the government of an occupied territory must draw the attention of members of any resistance movement to the protective provisions of the Treaty with respect to cultural property.<sup>61</sup>

An innovation in the Hague Convention is a provision for special protection of cultural property by means of a number of international registries of refuges.<sup>62</sup> Article 8(6) sets out that "[s]pecial protection is granted to cultural property by its entry in the 'International Register of Cultural Property under Special Protection.'"<sup>63</sup> This register has been slow to grow, although some major sites have been added, including the entire area of Vatican City.<sup>64</sup> Included are refuges for movable cultural property, for centers containing monuments, and for other immovable property of very great importance.<sup>65</sup> Article 8(1) provides that this "special protection" is available under two conditions: (1) the property must be

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55. *Id.* art. 4, 249 U.N.T.S. at 242.

56. *Id.*

57. *Id.*

58. Edwards, *supra* note 4, at 947.

59. Hague Convention, *supra* note 35, art. 5(1), 249 U.N.T.S. at 244.

60. *Id.* art. 5(2), 249 U.N.T.S. at 244.

61. *Id.* art. 5(3), 249 U.N.T.S. at 244.

62. *Id.* art. 12, 249 U.N.T.S. at 249. Any High Contracting Party may submit an application for the entry of refuges or centers containing monuments situated within its territory. *Id.* art. 13, 249 U.N.T.S. at 250. Other parties may object only on the grounds that the proposed property is used for military purposes, situated too close to military objectives, or does not comprise cultural property. Arbitration results if neither the application nor the objection is withdrawn. *Id.* art. 14, 249 U.N.T.S. at 251.

63. *Id.* art. 8(6), 249 U.N.T.S. at 248.

64. See Nahik, *supra* note 27, at 1087.

65. Edwards, *supra* note 4, at 948-49.



situated an adequate distance from any large industrial center or important military objective, and (2) it must not be used for military purposes.<sup>66</sup> Meanwhile Article 9 emphasizes the importance of this special protection in that "[t]he High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property. . . ."<sup>67</sup>

While the Hague Convention is broad enough to promote respect for cultural property during armed conflicts, the specifics do not adequately address the question of restitution<sup>68</sup> or effective enforcement.<sup>69</sup> Furthermore, the Hague Convention calls for each party to prosecute and impose penal sanctions against violators, but leaves each nation to create its own penal sanctions.<sup>70</sup> Due to disparities between countries, inconsistent decisions result. The Hague Convention attempts to protect cultural property during war, but does little to provide a coherent body of law to assist in combating the illicit trade of stolen cultural property. Another problem with the Hague Convention is the lack of a binding mechanism for dispute settlement in the first part of the Convention. However, Article 22 does require a meeting between the parties to a conflict through their representatives, if such a session is proposed by one of the protecting powers for the purpose of resolving a disagreement as to the application or interpretation of the provisions of the Hague Convention.<sup>71</sup> Finally, critics also claim countries have been lax in fulfilling their peacetime obligations of identifying and promulgating objects worthy of protection.<sup>72</sup>

### 1. The Persian Gulf War

Jonathan Petropoulos, Assistant Professor of History, at Loyola College in Baltimore stated:

While carting off or destroying a country's cultural heritage has always been a part of warfare, it has become especially common in the 20th century because of a heightened sense of nationalism . . . . Saddam

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66. Hague Convention, *supra* note 35, art 8(1), 249 U.N.T.S. at 246.

67. *Id.* art. 9, 249 U.N.T.S. at 248.

68. See Nahik, *supra* note 27, at 1082.

69. See Fleming, *supra* note 43, at C4. "Critics claim the [Hague] convention has been ineffectual, pointing out that even nations bound by it have damaged or destroyed protected property during armed conflict." *Id.*

70. See Nahik, *supra* note 27, at 1081; see also Hague Convention, *supra* note 35, art. 27, 249 U.N.T.S. at 260.

71. Hague Convention, *supra* note 35, art. 22, 249 U.N.T.S. at 256.

72. Fleming, *supra* note 43, at C4.

Hussein sent in art experts to Kuwait and removed cultural property from museums and palaces.<sup>73</sup>

The application of the Hague Convention in the Persian Gulf War illustrates its current status in the world community. Kuwait, France, Egypt, Saudi Arabia, and other Coalition members, as well as Iraq, are parties to the Hague Convention. The U.S., Canada, and Great Britain are not. Although the Hague Convention has no binding effect on the parties that refuse to ratify or accede to the Convention, by teaching its armed forces about the provisions the U.S. confirms that it has accepted most of its principles.<sup>74</sup>

Although the majority of the participants in the Gulf conflict ratified the Hague Convention, fears of war crimes in the cultural realm surfaced early in the conflict. Iraq invoked Article 4 to fulfill its responsibilities to "prohibit, prevent, and if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against cultural property."<sup>75</sup> Iraq used this provision to justify its Department of Antiquities' removal to Baghdad of carpets, daggers, coins, and Korans from displays and shelves of the Kuwait National Museum.<sup>76</sup> Tariq Aziz, the Iraqi foreign minister, promised the U.N. in June 1991 that works of art stolen from Kuwait would be returned, but expectations of actual return were low.<sup>77</sup> Despite the fears of the directors of the fire-gutted Kuwait National Museum, however, most of the estimated 17,000 artifacts were indeed returned by Iraq in September and October of 1991.<sup>78</sup>

Kuwait is taking new pride in their treasures. For example, Kuwait's Islamic Art Museum built a display for the priceless objects that became a national emblem.<sup>79</sup> Ironically, at a recent conference of the Arab museum world attended by eighty museum directors and related government officials from eighteen Arab countries, Mouyad Mohamed Said Damerджи of Iraq sought international help in

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73. Catherine Foster, *Stolen Art as War Booty: Hostages or Harbingers of Peace?*, CHRISTIAN SCI. MONITOR, Feb. 8, 1995, at 1.

74. Robert K. Goldman, *The Legal Regime Governing Operation Desert Storm*, 23 U. TOL. L. REV. 363, 364 (1992).

75. Hague Convention, *supra* note 35, art. 4, 249 U.N.T.S. at 244.

76. *Kuwait Now Beams Over Art Retrieved*, ST. LOUIS POST-DISPATCH, Dec. 26, 1993, at E7.

77. *See Iraqi Raiders*, WASH. POST, June 15, 1991, at A22.

78. *Iraq Begins to Return Stolen Kuwaiti Art Treasures*, CHI. TRIB., Sept. 17, 1991, at 4; *see also* Sarah Gauch, *Kuwait Museum Remains a Casualty of the Gulf War*, WASH. TIMES, June 8, 1992, at A9. The recovery process is long and slow; by June 1992 approximately 10% of the collections were believed to be lost or destroyed, including 30 pieces of pottery and rock crystal objects in transit to Baghdad and a 16th-century linen shirt used as packing material. The museum buildings themselves were left empty for a year as a reminder of the Iraqi damage. *Id.*

79. *Kuwait Now Beams Over Art Retrieved*, *supra* note 76.

restoring artworks looted from Iraq during the Persian Gulf war.<sup>80</sup> As many as 4000 historic artifacts, some more than 3000 years old, were stolen from Iraqi museums in the postwar chaos and rebellion when anti-Saddam Hussein mobs attacked and looted museums in seven Iraqi cities.<sup>81</sup> Experts say the artifacts are beginning to show up on the art markets of New York and London.<sup>82</sup>

The events of the Persian Gulf War shed light on the level at which the Hague Convention operates. The intent of the Treaty was realized in that the Persian Gulf conflict itself resulted in minimal damage to cultural property, though Iraqi violations in Kuwait and the looting of Iraq's cultural property cast doubt on the overall effectiveness of the Hague Convention.<sup>83</sup> In the end, the provisions of the Hague Convention proved insufficient to protect Kuwait and Iraq's cultural property from turmoil, a weakness emphasized by recent events in the former Yugoslavia.<sup>84</sup>

## 2. The Serbo-Croatian War

In addition to the horrible cost of shattered human lives, war in the territories of the former Yugoslavia has also devastated cultural property.<sup>85</sup> The role of the Hague Convention gains focus through an examination of the events surrounding the destruction in Croatia that began in June 1991.<sup>86</sup> "Not since World II has

80. John Rockwell, *Arab Museums Face Fundamentalism, Issues: A Conference Tackles Some Thorny Problems for Curators in the Islamic World*, ORANGE COUNTY REG., June 23, 1995, at P71.

81. *Stolen Artifacts from Iraq for Sale, Plunder from Gulf War Showing up in Art Markets*, SAN FRANCISCO EXAMINER, Mar. 22, 1992, at A4.

82. *Id.*

83. See Paul Myers, *Iraq: Priceless Islamic Art Collection from Kuwait Found to be "Safe in Baghdad,"* THE GUARDIAN (London), Feb. 22, 1991, at 3; see also *Kuwait Now Beams Over Art Retrieved*, *supra* note 76.

84. See David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 377 (1993).

85. Phil Gunby, *Varied Health Risks Confront Physicians in Former Yugoslavia's Embattled Areas*, 27 JAMA 337 (1994); see also Meyer, *supra* note 84, at 378.

86. See Alan G. Artner, *Yugoslav Civil War Takes High Cultural Toll*, CHI. TRIB., Mar. 6, 1992, at 1.

The two greatest casualties in armed conflict are loss of life and loss of memory. Combatants in the Serbo-Croatian war that began in Yugoslavia last June have suffered both. Loss of memory is perhaps less grievous than loss of life, but the memory of a people is embodied in buildings and monuments that give a sense of culture. When they are destroyed, the culture goes with them.

*Id.*

there been such destruction in Europe,' said Radovan Ivancevic, president of the Association of Art Historians of Croatia and a professor at Zagreb."<sup>87</sup>

The most recent example of cultural warfare continued as the Yugoslavian conflict spread into Bosnia-Herzegovina. In 1991 and 1992, more than 700 Croatian and Bosnian monuments were damaged or destroyed despite being marked with the blue-and-white flag of the 1954 Hague Convention, which is supposed to guarantee wartime protection to cultural property.<sup>88</sup> The military sought to destroy protected areas.<sup>89</sup> Thus, although the world community called for the application of the Hague Convention and clearly has endorsed its principles, it has proven ineffective to protect cultural property in areas that desperately need protection.<sup>90</sup> The shocking loss of lives and cultural treasures in the Yugoslav war accentuate the exigency for the U.S. to join in global efforts to save priceless cultural sites and objects from war's destruction.<sup>91</sup>

A significant step would be for the U.S. Senate to ratify the Hague Convention. Arlene Fleming, the former director of evaluation at the National Endowment for the Humanities emphasized the sway the U.S. would hold if it would only ratify the Convention.<sup>92</sup>

## **B. The UNESCO Convention**

Unlike the Hague Convention, the U.S. actually implemented the UNESCO Convention.<sup>93</sup> In response to the influx of stolen antiquities, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) promulgated the UNESCO Convention in 1970. The UNESCO Convention was designed to curb international trafficking in national treasures<sup>94</sup> and is the major international treaty<sup>95</sup> for the protection of cultural property during peacetime. Much discussion

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87. *Id.*

88. Miriam Horn, *The Vanishing Past: Soot, Water and War are Costing the World its Treasures*, U.S. NEWS & WORLD REP., Sept. 21, 1992, at 33. *see also* Artner, *supra* note 86, at 1.

89. Horn, *supra* note 88, at 33. "[T]o annihilate the core of cultural identity around which opposition forces might build." *Id.*

90. *See* Meyer, *supra* note 84, at 385 (questioning the purpose or effect of laws if no one will obey or enforce them).

91. Fleming, *supra* note 43.

92. *Id.*

93. *See* Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L. L. & POL'Y 225, 249 (1993).

94. John Darton, *Repatriating the Inventory of History; Countries with a Rich Buried Past, Such as Greece, are Increasingly Taking Legal Actions to Reclaim Their National Treasures*, EDMONTON J., Oct. 3, 1993, at E2.

95. *See* M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 299 (1983) (terming the UNESCO Convention as a "multilateral treaty of primary

in American legal materials has taken place regarding the UNESCO Convention,<sup>96</sup> the cornerstone of U.S. policy regarding stolen international art. This may be because the U.S. has been a major market in the international art trade,<sup>97</sup> much of which consists of transactions in materials that have left the country of origin in contravention of that country's cultural property laws. Before the U.S. implemented the UNESCO Convention in 1983, very little U.S. law prohibited the importation of illegally exported cultural property.<sup>98</sup> Consequently, the U.S. lagged behind international law developed or recognized under the UNESCO Convention.<sup>99</sup> Indeed, as Professor Prott has stated, it must be understood that "the 1970 Convention did not emerge suddenly within the context of UNESCO. It was the end product of a long line of efforts to stop the pillaging and looting of archaeological sites, and the theft of cultural property of extreme importance."<sup>100</sup> The UNESCO Convention prohibits the importation of cultural property illegally exported or stolen from a foreign nation.<sup>101</sup> Although seventy nations have signed the Treaty, the U.S. is the first and only market nation to implement it.<sup>102</sup> Only after lengthy delay and implementing legislation did the U.S. ratify the UNESCO Convention.<sup>103</sup> This legislation modified the original UNESCO Convention and severely limited its application.<sup>104</sup> "Art-

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significance"); see also Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 338-39 (1983) (describing the UNESCO Convention as a "major international legal agreement").

96. Edwards, *supra* note 4, at 923.

97. *Cultural Property Treaty Legislation: Hearing Before the Subcomm. On Trade of the House Comm. On Ways and Means*, 96th Cong. 30 (1979); *Convention on Cultural Property Implementation Act: Hearing Before the Subcomm. On International Trade of the Senate Comm. On Finance*, 95th Cong. 42 (1978) (experts testifying that they estimate that the United States constitutes between 25% and 50% of the world market for illegally exported cultural property).

98. An exception was the Act on the Regulation and Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-95 (1976).

99. Edwards, *supra* note 4, at 923-24.

100. See Prott, *supra* note 95, at 338.

101. UNESCO Convention, *supra* note 36, art. 3, 823 U.N.T.S. at 236.

102. See Fox, *supra* note 93, at 249; see also Varadarajan, *supra* note 18. "A 1970 Unesco [sic] treaty which prohibits the illicit trade in cultural property although not ratified by the majority of Western 'art-receiving' countries has rendered entirely private the market for objects without a clear history of ownership and transfer of title." *Id.*

103. Convention on Cultural Property Implementation Act, 19 U.S.C.S. § 2601 (1983).

104. See Prott, *supra* note 95, at 339 (discussing the amendments to the Convention made by those countries, particularly the United States, which had problems with its original wording); see also Douglas N. Thomason, *Rolling Back History: The United Nations General Assembly and the Right to Cultural Property*, 22

importing nations have not been willing to assent to the UNESCO Convention because of a general reluctance to restrict their art markets."<sup>105</sup> Significantly absent from the UNESCO Convention are most Western European countries and Japan.<sup>106</sup> These nations believe that the convention lacks adequate protection for good faith purchasers of art.

Today, most countries attempting to recover plundered treasures focus their legal claims on the UNESCO Convention.<sup>107</sup> The Preamble to the UNESCO Convention, like that of the Hague Convention, propounds the legal principle that cultural property belongs to humankind and involves the moral obligation of all nations to protect human cultural heritage.<sup>108</sup> Although the Preamble, like the Hague Convention, asserts the policy that cultural property belongs to humankind,<sup>109</sup> most art market countries are unwilling to cooperate at an international level to permit repatriation of acquired cultural property without modifications to the UNESCO Convention.<sup>110</sup> Therefore UNESCO's effectiveness is decreased. Also, similar to the Hague Convention, the UNESCO Convention requires member states to protect their property internally.<sup>111</sup>

Moreover, the UNESCO Convention imposes upon exporting state parties the obligation to introduce an authorization certificate that would accompany an item of cultural property being exported and that would show that the export of the item in question was sanctioned.<sup>112</sup> Article 3 of the Convention provides 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>113</sup> When Article 3 and Article 6 are read together, the

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CASE W. RES. J. INT'L L. 47 (1990) (discussing the General Assembly debate surrounding the amendments to the original Convention).

105. William D. Montalbano, *Big Business: Art Thieves Find Italy Is a Gold Mine*, L.A. TIMES, Aug. 25, 1988, at A1.

106. Fox, *supra* note 93, at 251.

107. Maier, *supra* note 1.

108. UNESCO Convention, *supra* note 36, pmbl., 823 U.N.T.S. at 232, 234.

109. *Id.*; see also Hague Convention, *supra* note 35, pmbl., 249 U.N.T.S. at 232.

110. See Prott, *supra* note 95, at 339-40 (noting the reluctance of countries to ratify the UNESCO Convention without modifications).

111. UNESCO Convention, *supra* note 36, pmbl., 823 U.N.T.S. at 232.

112. *Id.* art. 6, 823 U.N.T.S. at 240.

The States Parties to this Convention undertakes (sic):

(a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;

(b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned expert certificate;

(c) to publicize this prohibition by appropriate means, particularly among

persons likely to export or import cultural property.

*Id.*

113. *Id.* art. 3, 823 U.N.T.S. at 236.

UNESCO Convention should have significant bite, for their combined result prohibits a state from importing any item of cultural property unless the export of that item was specifically authorized by the state party of origin.<sup>114</sup>

However, the UNESCO Convention has not successfully curtailed illicit trafficking in cultural property. Additionally:

[i]t . . . (has) offered nothing to those who were trying to tackle the huge problem of illicit international trade in cultural objects stolen from individuals and its attempts to control illegal export took no account of the very wide difference in views as to what cultural property should be allowed to circulate freely in international markets.<sup>115</sup>

The UNESCO Convention is widely regarded as futile.<sup>116</sup> The UNESCO Convention's provisions for the restitution of stolen cultural property in Article 7 aptly illustrate its failings.<sup>117</sup> Article 7(a) requires members, consistent with their national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property "illegally removed from another country."<sup>118</sup> Article 7(b)(i) prohibits member countries from importing cultural property stolen from a museum, religious or public monument, or similar institution.<sup>119</sup> The UNESCO Convention, unlike the Hague Convention, provides for restitution of the illegally exported object.<sup>120</sup> Article 7(b)(ii) requires the importing country to take steps to recover and return the property to the requesting state provided that the bona fide purchaser receives just compensation.<sup>121</sup>

Not only is Article 7 ambiguous with respect to the requirements of parties to the UNESCO Convention, it essentially allows countries to apply their own substantive law regarding cultural property.<sup>122</sup> Ultimately, this lack of uniform structure renders the UNESCO Convention ineffective as a means of solving the problem of illicit movement.

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114. Edwards, *supra* note 4, at 928.

115. Richard Crewdson, *Putting Life into a Cultural Property Convention—UNIDROIT: Still Some Way to Go*, 17 INT'L LEGAL PRAC. 45 (1992).

116. Couturier, *supra* note 14.

117. UNESCO Convention, *supra* note 36, art. 7, 823 U.N.T.S. at 240. Article 7 deals exclusively with stolen cultural property. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457 (1993).

The language is vague<sup>123</sup> throughout the text, possibly in an effort to gain signatures to the Convention.<sup>124</sup> This unclear language<sup>125</sup> promotes inconsistency both at the level of incorporation into domestic law and in the courtroom, where it is subject to judicial interpretation.<sup>126</sup> Article 2 exemplifies the use of ambiguous and rhetorical language.<sup>127</sup> This Article begins with a broad statement regarding the goal of the UNESCO Convention: to promote international cooperation for the protection of cultural property.<sup>128</sup> In subpart (2), the UNESCO Convention then emphasizes each countries' responsibility to use "the means at their disposal" to stop illicit movement.<sup>129</sup>

The UNESCO Convention does not include any binding provisions for the resolution of disputes between or among state parties.<sup>130</sup> The only provision in the Treaty which addresses dispute resolution is Article 17, section 5, which provides that the UNESCO Convention may extend to reach a settlement between state parties that are engaged in a dispute over implementation.<sup>131</sup> Even here there is considerable confusion, for the Treaty provides no definition of "implementation."

Article 1 of the UNESCO Convention defines the cultural property that is subject to import restrictions or controls. The definition specifically includes property of artistic interest, including pictures, painting, drawings; statuary and sculpture; engravings, prints, and lithographs; articles of furniture more than one hundred years old; and numerous other items.<sup>132</sup> One of the major failings of the UNESCO Convention, however, is that this definition of cultural property includes just about every conceivable item of artistic value.<sup>133</sup> Such items must be designated as being "property which, on religious or secular grounds, is

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123. See Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, 72 GEO. L.J. 1155, 1159-60 (1984) (noting the ambiguous character of the Convention's terms).

124. Prott, *supra* note 95, at 339.

125. See UNESCO Convention, *supra* note 36, art. 7, 823 U.N.T.S. at 240. (requiring parties to "undertake: (a) to take the necessary measures, consistent with national legislation . . .").

126. Prott, *supra* note 95, at 339-44.

127. UNESCO Convention, *supra* note 36, art. 2, 823 U.N.T.S. at 236.

128. *Id.*

129. *Id.* It is unclear precisely what "by means at their disposal" entails. Certainly such a sweeping provision should encompass all domestic legislation as well as any international treaties. Additionally, Article 2 discusses "making necessary reparations." *Id.*

130. Edwards, *supra* note 4, at 929. In fact, Article 7(b) conflicts with common law principles because it does not take into account the rule that a good faith purchaser cannot take from a thief. *Id.*

131. UNESCO Convention, *supra* note 36, art. 17, § 5, 823 U.N.T.S. at 246.

132. *Id.* art. 1, 823 U.N.T.S. at 234, 236.

133. *Id.* Examples of the breadth of this language include: "antiquities more than one-hundred years old" and "objects of ethnological interest." *Id.*



specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art, or science."<sup>134</sup> The rhetoric of the UNESCO Convention, in effect, has contributed to its failure; countries have, in their designations of cultural property, created a stasis in the legal export of nearly all manmade artifacts over 50, 75, or 100 years of age.<sup>135</sup> The state parties to the UNESCO Convention have, therefore, effectively sustained a black market by attempting to defuse it.<sup>136</sup> Essentially, the UNESCO Convention fails to promote adherence to a uniform set of laws. Rather, it permits individual countries to maintain their own import and export regulations as well as laws regarding restitution of stolen property.<sup>137</sup>

### III. THE UNIDROIT DRAFT CONVENTION ON ILLICIT IMPORT, EXPORT, AND TRANSFER OF CULTURAL OBJECTS

UNIDROIT aims to replace the spectacularly unsuccessful UNESCO Convention.<sup>138</sup> As a result of the UNESCO Convention's failures, UNESCO commissioned UNIDROIT for a fresh and workable approach on the return of looted and smuggled art. One aim was to shift much of the onus onto recipients in wealthy nations rather than on counting on developing countries to police their own borders.<sup>139</sup> Proponents of the UNIDROIT Draft Convention argue its goals are to return cultural property to its rightful owners and to reduce the profitability of illicit traffic in art. It is this trafficking which leads to the looting and smuggling that is destroying international art treasures.<sup>140</sup> During its 65th session in 1986, the Governing Council of UNIDROIT included international protection of cultural property as a topic of study in the triennial period from 1987 to 1989.<sup>141</sup> The initial draft was presented to UNIDROIT at its 69th session, in April of 1990. The UNIDROIT Draft Convention was distributed to governmental experts of member countries during the winter of 1990-1991. The

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134. *Id.*

135. See Bator, *supra* note 7, at 315. "Embargo, whether explicitly or administratively imposed, is the dominating philosophy of almost all the states rich in antiquities and archaeological materials, including the Mediterranean region, the Middle East, and the nations of Central and South America." *Id.*

136. *Id.* at 317. "The ineffectiveness of embargo: Ten easy lessons on how to create a black market." *Id.*

137. Kinderman, *supra* note 122.

138. Georgina Adam, *Art Sales: They're Out to Steal our Stolen Art*, *Georgina Adam has no Love for the Latest Scheme from Unesco*, DAILY TELEGRAPH (London), May 22, 1995, at D6.

139. *Id.*; see also *Losing Art*, WASH. POST, Sept. 16, 1995, at A16.

140. Peers, *supra* note 31.

141. UNIDROIT, Cultural Property III, in DIGEST OF LEGAL ACTIVITIES (Paula Howarth ed., 9th ed. 1990).

distribution was meant to solicit comments for a revised draft to be presented at the 70th session.<sup>142</sup> The latest session occurred June 5-26, 1995<sup>143</sup> in order to debate and revise the content and structure of the UNIDROIT Draft Convention. The UNIDROIT Draft Convention seeks to correct the failings of the UNESCO Convention, but its ultimate success as an international framework for controlling the movement of cultural property remains to be seen.<sup>144</sup>

Proponents of the UNIDROIT Draft Convention include Turkey, Greece, Italy, and other so-called victim nations.<sup>145</sup> The U.S., however, is yet to take a formal position on UNIDROIT,<sup>146</sup> perhaps due to the wealthy and powerful museum and art gallery lobby. "The urgent part of the problem UNIDROIT is addressing is not objects that were brought into museums or collections long ago; it's objects that are being seized and sold now, in contravention of laws passed in the last twenty years."<sup>147</sup> American museums, collectors, and dealer associations argue the UNIDROIT Draft Convention could require museums and galleries to close.<sup>148</sup> They submit it puts American collections in immense jeopardy and are wholeheartedly in opposition.<sup>149</sup> Furthermore, museums in Europe and the U.S. contend that without their hard work of maintenance, education, and exhibition, many artifacts would have decomposed, vanished, or remained unappreciated.<sup>150</sup> A final reproach of the UNIDROIT Draft Convention is that documentation which confirms a legitimate previous owner will be difficult, if not impossible, to furnish.<sup>151</sup>

Whereas UNESCO says artifacts can be exported only with the permission of the nation where such treasures were found and requires nations to return stolen artifacts, the UNIDROIT Draft Convention would require a nation to return any artifact that another country deems part of its cultural heritage, even if theft cannot be proven.<sup>152</sup>

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142. See generally UNIDROIT Draft Convention, *supra* note 29, Docs. 20-21. Document 20 compiles the observations on the Draft by Canada, Mexico, Sweden, and Turkey. Doc. 21 compiles the observations on the Draft of International Organizations. *Id.*

143. *Smuggled Art Conference Aims to Harmonize Law*, *supra* note 28.

144. Kinderman, *supra* note 122.

145. Maier, *supra* note 1.

146. *Id.*

147. *Art on the Lam*, *supra* note 3.

148. Maier, *supra* note 1.

149. *Id.* (quoting Peter Marks, a Manhattan gallery owner and president of the National Association of Dealers in Ancient, Oriental, and Primitive Art); see also Adam, *supra* note 138 (quoting Marjorie E. Stone, General Counsel at Sotheby's New York).

150. *Ancient Treasures, A Modern Dilemma*, ST. LOUIS POST-DISPATCH, June 29, 1994, at B6.

151. Adam, *supra* note 138.

152. Maier, *supra* note 1.

If the UNIDROIT Draft Convention is ratified, the most likely result for those who ratify will be that the wide assortment of laws currently governing ownership rights in cultural property will be preempted and substantially harmonized in a single source.<sup>153</sup> Collectors, gallery owners, curators, and other affected parties could then consult this single source to determine the legality and prudence of certain transactions under consideration.

The key to any future success of the final version of the UNIDROIT Draft Convention rests on its ability to maintain a balance between the differing interests of art-exporting and art-importing nations.<sup>154</sup> Without the support of countries with divergent interests, the UNIDROIT Draft Convention will match the UNESCO Convention's ineffectiveness, becoming irrelevant as the plundering of cultural property continues throughout the world.<sup>155</sup>

Chapter II of the UNIDROIT Draft Convention covers restitution of stolen cultural artifacts.<sup>156</sup> Unlike the UNESCO Convention's approach in Article 7(b),<sup>157</sup> the UNIDROIT Draft Convention applies to all stolen cultural objects. This distinction is especially relevant with respect to claims by individuals, because the UNIDROIT Draft Convention allows claims by private individuals.

The fundamental tenet of the UNIDROIT Draft Convention regarding stolen cultural property is that a possessor of stolen property should return it to the original owner.<sup>158</sup> The right of original owners, however, will not always prevail over those of bona fide purchasers. Paragraph 2 of Article 3 essentially places an affirmative duty on original owners to pursue their claims.<sup>159</sup> The UNIDROIT Draft Convention also endorses the discovery rule.<sup>160</sup> Although the precise length of the limitation period is still in question,<sup>161</sup> the key point is that

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153. *Smuggled Art Conference Aims to Harmonize Law*, *supra* note 28. "Drafted by UNIDROIT, an international organization dedicated to the unification of law, the convention would enable art works to be recovered not only through diplomatic channels, which relies on good will from governments concerned, but through the courts as well." *Id.*

154. Nina R. Lenzer, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 492 (1994).

155. *Id.*

156. UNIDROIT Draft Convention, *supra* note 29, arts. 3-4 (Chapter II is entitled Restitution of Stolen Cultural Objects).

157. UNESCO Convention, *supra* note 36, art. 7(b), 823 U.N.T.S. at 240.

158. UNIDROIT Draft Convention, *supra* note 29, art. 3(1).

159. *Id.*

160. *Id.*

161. *Id.* Generally civil law jurisdictions favor a shorter statute of limitations period while common law systems favor a longer period. If the discovery rule is implemented in the final version of the UNIDROIT Draft Convention, the precise length of the limitations period will become a much less argumentative issue. Common law jurisdictions will not fight so fiercely for an extra two years on the

the statute of limitations does not begin to run until the original owner knows, or reasonably should know, the location of the stolen object.<sup>162</sup> The most contentious aspect of the debate concerning Article 3, paragraph 1 is the inclusion of "or reasonably should have known." The debate centers on the appropriate standards for determining the initiation of the limitations period.<sup>163</sup> Such a standard could be determined through the use of objective measurements of an original owner's due diligence.<sup>164</sup> Maintaining the "should have known" language ensures that original owners will actively utilize all available means for locating stolen property to avoid the risk of losing their rights in the property.<sup>165</sup> Additionally, paragraph 2 proposes a repose period that would bar all claims absolutely.<sup>166</sup> The debate concerning the repose period concentrates primarily upon its length. The longest period under consideration is fifty years, while the shortest is six years.<sup>167</sup>

Article 3(2), one of several significant and innovative provisions, provides that illegally excavated items<sup>168</sup> or those that are excavated legally but are illegally retained<sup>169</sup> (e.g., by the excavator rather than by the rightful owner, which in many instances will be the State) "shall be deemed to have been stolen."<sup>170</sup> Like all other stolen cultural objects, these must be returned.<sup>171</sup>

By setting a maximum time limit, Article 3 of the UNIDROIT Draft Convention attempts to provide a compromise which will allow a purchaser a certain degree of security when buying an art object in good faith. This compromise should appeal to the legal systems of Western Europe which are built on the fidelity of the commercial transaction. However, some commentators feel that a time limitation will encourage fraudulent concealment.<sup>172</sup> Artwork, unlike most movable objects, increases in value over time.<sup>173</sup> Arguably, therefore, a thief or dishonest investor who is not concerned about the provenance of an object could conceal it for thirty years and a day and then reap a high profit after the statute of limitations expires. Article 11,

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statute of limitations if the general practice is not to forbid a cause of action to accrue until the original owner knows the location of the stolen object. *Id.*

162. *Id.*

163. *Id.* art. 3(1).

164. Kinderman, *supra* note 122, at 943.

165. *Id.* at 950.

166. UNIDROIT Draft Convention, *supra* note 29, art. 3(2).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* art. 3(1). "The possessor of a cultural object which has been stolen shall return it." *Id.*

172. See Fox, *supra* note 93, at 258.

173. See Suzanne Possehl, *Russian Art Objects Vanishing to the West in Smugglers' Bags*, N.Y. TIMES, Mar. 17, 1993, at C15 (reporting that Russia's changing borders and economic crisis have led to a significant increase in the number of Russian art objects being smuggled across the borders).

however, allows nations the flexibility to extend the limitations period according to its own "national law" when it is beneficial to the claimant.<sup>174</sup> Thus, in the situation where a thief or possessor has concealed an object in bad faith, Article 11(a)(ii) would permit an adjudicating body to allow a longer limitations period if its national law permits such an extension. Moreover, although Article 3 will not cover all circumstances where a thief fraudulently conceals a piece of artwork, it is designed to cover the largest number of situations possible.<sup>175</sup>

For civil law countries that ratify the UNIDROIT Draft Convention, this aspect of Chapter II is revolutionary, as it "reverses the general civil law presumption prevalent in continental Europe that a bona fide purchaser of a stolen cultural object acquires good title."<sup>176</sup> In this regard, the UNIDROIT Draft Convention also requires possessors to exercise due diligence when acquiring objects if they expect to receive compensation for the return of stolen objects.<sup>177</sup>

This requirement of due diligence, though not described in detail in the UNIDROIT Draft Convention,<sup>178</sup> will undoubtedly impede the market in stolen works of art. Once this provision of the UNIDROIT Draft Convention goes into effect, well-informed individuals and institutions will no longer be able to acquire works hastily and secretly because future compensation rests on the exercise of this diligence.<sup>179</sup> Museums and other institutional purchasers likely will be held to a higher standard of care than individuals with fewer resources available to them.<sup>180</sup> Thus, those in a position to pay the highest price for works of art will be more cautious and illegal trade will be stifled.

Article 4 concerns the circumstances in which bona fide purchasers are entitled to monetary compensation in return for restoration of stolen objects to

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174. See UNIDROIT Draft Convention, *supra* note 29, art. 11 providing that:

[E]ach Contracting State shall remain free in respect of claims brought before its courts or competent authorities: (a) for the restitution of a stolen cultural object: (i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object; (ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under article 3(2); (iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by article 4(1).

*Id.*

175. Fox, *supra* note 93, at 259.

176. Crewdson, *supra* note 115, at 46.

177. UNIDROIT Draft Convention, *supra* note 29, art. 4(1).

178. *Id.*

179. Lenzer, *supra* note 154, at 496.

180. UNIDROIT Draft Convention, *supra* note 29, art. 4(2). Article 4 indicates that "regard shall be had to the circumstances of the acquisition, including the character of the parties and the price paid . . ." *Id.*

their original owners.<sup>181</sup> The issue of compensation is one of the most quarrelsome issues because it strikes at the heart of the conflict between common law and civil law jurisdictions.<sup>182</sup> Attempting to discover a balance between these two interests, the current version of the UNIDROIT Draft Convention offsets restitution of stolen cultural objects outlined in Article 3 with guarantees of compensation to purchasers who can demonstrate that the purchase was made in "good faith."<sup>183</sup> Unlike the presumption of "good faith" endorsed by civil law jurisdictions, the UNIDROIT Draft Convention requires an affirmative showing of good faith in the form of "due diligence."<sup>184</sup> Article 4(3) is also important since it will be an effective means of preventing the "laundering" of stolen cultural objects through gifts or bequests to otherwise innocent parties.<sup>185</sup> This provides that a "possessor shall not be in a more favourable (sic) position than the person from whom it acquired the object by inheritance or otherwise gratuitously."<sup>186</sup> A focus on acquisition by gift or bequest will have special significance for museums and other charitable organizations that receive numerous gifts and bequests of works of art, for they will be in the same position as the original possessor with regard to the application of Articles 3 and 4.<sup>187</sup> They, therefore, will need to exercise particular care in determining the provenance of gifts and bequests as well as purchases of works of art.

#### IV. CONCLUSION

While the UNIDROIT Draft Convention is not perfect, it should be adopted. The UNIDROIT Draft Convention would deter art thefts without disturbing the art market and greatly expands the terms of the Hague Convention and the UNESCO Convention by including privately owned artwork. It, furthermore, creates an avenue for private litigation independent from government action. Also, the UNIDROIT Draft Convention provides a jurisdictional basis and standards to be used in dispute resolutions—provisions which are absent in other international agreements. Given the continuing problem of illicit trade in stolen cultural property which to date had been unchecked due to the lack of an effective international agreement, the nations of the world need to make a concerted effort

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181. *Id.*

182. Kinderman, *supra* note 122, at 951.

183. UNIDROIT Draft Convention, *supra* note 29, art. 4.

184. *Id.* The UNIDROIT Draft Convention states that due diligence of a possessor (*i.e.*, bona fide purchaser) will be measured by several objective criteria: the circumstances of acquisition, the character of the parties involved, the price paid and consultation with a stolen art registry. *Id.*

185. *Id.*

186. *Id.* This language appears in the same form in Article 8(5) with respect to illegally exported cultural objects. *Id.* art. 8(5).

187. Lenzer, *supra* note 154, at 497-98.

to reach a compromise. The UNIDROIT Draft Convention embodies such a compromise. Action must be taken rapidly. Harriet Leyten, the head of the African department at the Royal Dutch Tropical Institute stated: "It could take another two years before the fight against this traffic is enshrined in international agreements. By then the past will have disappeared completely from parts of Africa."<sup>188</sup> This is equally true in many other parts of the world.



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188. Conway, *supra* note 8.

