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The Illicit Trade In Cultural Property: What is the Appropriate Response?

Stacey R Jessiman, *Stanford Law School*

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Introduction

In the face of an international movement toward freer trade, many nations now try to prevent trade of artistic works. They believe works of art define their cultural heritage and view the works as their "cultural property." They have enacted legislation restricting or outright prohibiting the removal of cultural property from their territory.

Despite national efforts to retain cultural property, however, the illicit trade of cultural property continues. This illicit trade involves both illegal export of cultural goods[1] from nations which have national laws restricting or prohibiting such export ("source nations"), as well as theft of cultural goods from their rightful owners and transport of such goods to nations in which they can be easily sold such as England and the United States ("market nations").

It is estimated that the illicit trade in cultural property is worth billions of dollars annually and is second only to drug trafficking and computer theft in quantum.[2] International efforts to prevent illicit trade through the 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (hereinafter "UNESCO Convention")[3] have failed; "according to recent estimates, world-wide art thefts trebled in 1991, while recovery rates fell from 22% to only 5%."[4]

In response to the failure of the UNESCO Convention to prevent trade and illegal export, the International Institute for the Unification of Private Law ("UNIDROIT"), an organization of fifty nations devoted to harmonizing the laws of different countries, recently drafted the Convention on the International Return of Stolen or Illegally Exported Cultural Objects (hereinafter "UNIDROIT Convention").[5] The UNIDROIT Convention gives legal owners a remedy in private international law against thieves and subsequent purchasers. The question is, is the UNIDROIT Convention likely to be more effective than the UNESCO Convention?

This paper analyses national and international responses to the trade of cultural property. It discusses the following issues: (1) whether the reasons for source nations' retention schemes are valid and the negative effects of retention schemes; and (2) international efforts to curb illicit trade of cultural property, including the effectiveness of the UNESCO and UNIDROIT

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[1] Cultural goods normally refer to any artistic work, including paintings, sculptures, manuscripts, pottery etc.

[2] James Walsh, *It's a Steal: The World's Cultural Heritage is Being Looted by Thieves Who Often Have Ties to Organized Crime -- And Even Get Help from the Art World*, Time, Nov.25, 1991, at 86; also Alexander Stille, *Was This Statue Stolen?,* Nat'l L.J., Nov. 14, 1988, at 1; both cited in Nina Lenzner, *The Illicit Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?,* (1994) 15 U Pa.J.Intl.Bus.L. 469 at 473.

[3] 823 United Nations Treaty Series 231 (1972).

[4] Lenzner, supra note 2 at n. 27, quoting Robin Morris Collin, *The Law and Stolen Art, Artifacts and Antiquities*, (1993) 36 How.L.J.17, 18 n.4.

[5] see Appendix of Lenzner's article, supra note 2, for a reproduction of the text of the most recent draft of the UNIDROIT Convention, not publicly available.

Conventions in the war against illicit trade. The premise of this paper is that strict retention policies, currently supported by the international community, are not beneficial and the international community should adopt the more balanced approach to the trade of cultural property taken in the UNIDROIT Convention.

(1) National Cultural Retention Schemes

(a) Introduction

While most nations attempt to keep cultural property within their national boundaries, the means they use to do so may vary. Some states classify cultural goods as state property ("expropriation laws")[6], or give state or domestic institutions a pre-emptive right to buy cultural goods offered for sale and export ("pre-emption laws"), while some simply prohibit their export ("embargo laws").[7] States may adopt some of these approaches, or limit them to only certain kinds of exports, or they may adopt a sweeping approach and prohibit export of any kind of cultural good. Professor Merryman[8] refers generally to such schemes as "retention schemes".[9]

While some wealthy nations do restrict the export of certain cultural property, the most rigourous retention schemes are often found in nations rich in cultural goods but poor in the foreign currency needed to pay for imports and finance domestic development.[10] Mexico and India are examples of such nations where supply of cultural goods greatly exceeds local demand. There is no lack of an eager market for their cultural goods -- in wealthy nations such as the United States, England and Japan, demand for cultural artifacts far exceeds the supply. Such a supply-demand relationship normally encourages export. "What is there about cultural property that produces such an apparently counter-developmental policy?"[11]

(b) Cultural Retention Schemes: Are There Any Valid Justifications?

Why do nations enact legislation prohibiting export of works of art? Professor Merryman explains that most governments (with the exception of Switzerland and the United States) treat works of art as part of their national cultural heritage. For example, Mexico's Aztec Calendar Stone in the collection of the National Museum of Archaeology in Mexico City is seen as a

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[6] John Henry Merryman, *The Retention of Cultural Property*, (1988) 21 U.C.Davis 477 at 487-488. Professor Merryman also refers to expropriation laws as "rhetorical ownership laws": a state declares that all objects anywhere within its national territory are the property of the state and forbids their export without state permission. A number of Latin American countries, including Mexico, Guatemala, Ecuador and Costa Rica, have such laws. The laws are problematic. First, courts must deal with whether a country that enacts such laws should have standing to sue for return of an illegally exported cultural object on the basis that the object has been "stolen" from the state. Second, citizens may oppose enactment of such laws on constitutional grounds, demanding generous compensation for the state's expropriation. Article 7(b) of the UNESCO Convention responds to the "rhetorical ownership law" problems by defining "stolen" state property only as those taken from "a museum or a religious or secular public monument or similar institution... provided that such property is documented as appertaining to the inventory of that institution."

[7] ibid.

[8] Professor of law and art history at Stanford University.

[9] supra note 6.

[10] ibid at 479.

[11] ibid at 479.

"unique monument of an indigenous culture."[12] Retention schemes thus are assertions of a belief in the relationship between the object and the national culture. Also, as Merryman explains, people want to look at the original object because they believe that the work of art is embodied therein. "The peculiar value attached to the authentic object combines with nationalist concerns to support a desire to keep the work from leaving the national territory."[13] Seen in this light, permitting a nation's cultural heritage to be exported seems strange, and repatriating objects to preserve the nation's cultural patrimony seems natural.

What is the basis for a nation treating an artistic work as part of its cultural identity? Merryman proposes that this "cultural nationalism" springs from nationalism.[14] He explains that while nationalism initially simply embodied humanist, liberal republican ideals such as those expressed in the American Declaration of Independence of 1776, the rise of romanticism and the decline of reason changed the content of nationalism. Under the influence of German philosophers and poets such as Fichte, Herder and Heine, nationalism adopted a romantic, mystical character.[15] It incorporated an aspect of national self-worship, which later became the core of Nazism (ie, *Volksgenosse*[16]). Nationalism evolved to become the idea that "the members of a nation reach freedom and fulfilment by cultivating the peculiar identity of their own nation and by sinking their own persons in the greater whole of the nation."[17]

One of the earliest manifestations of cultural nationalism was Lord Byron's passionate opposition to Elgin's removal of the Parthenon sculptures in his poems *The Curse of Minerva* and *Childe Harold's Pilgrimage*[18] in which he asserted that the sculptures were Greek and belonged in Greece. Merryman argues that Byron's promotion of passion-based cultural nationalism helps explain retention schemes: "much of the justification for cultural retention schemes is straightforward Byronism: the romantic attribution of national character to cultural objects, with the corollary that they belong in the national territory."[19]

Many scholars are critical of retention schemes that are based purely on cultural nationalism. Emotional appeals "divert attention from the facts and discourage reasoned discussion of the issues."[20] What would a reasoned discussion comprise? It would no doubt consider any flaws with the cultural nationalism argument. For example, surely not all artists would support a scheme which restricts their work to a local market in order to preserve some romantic vision of a national culture. First, the restriction may have an economic impact on the artist -- but this is not and should not be the overriding consideration. In the art realm we should not subject all arguments to economic analysis; after all, there is something different about artistic endeavour. Art is an endeavour of the soul, and saying that an artist creates for the same reason a trader trades derivatives -- financial gain -- seems to miscomprehend why artists create.

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[12] Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, (1983) 15 Journal of Intl L.&P. 752 at 758.
[13] ibid.
[14] supra note 6 at 489.
[15] supra note 6 at 491.
[16] *i.e.*, indicating shared membership in a "racial community". See E. Kamenka, Nationalism: The Nature and Evolution of an Idea (1973) at 11.
[17] E. Kedourie, Nationalism (1961) at 73.
[18] Byron, Poetical Works (F.Page ed. 1970) at 143 and 196, respectively.
[19] supra note 6 at 494.
[20] supra note 6 at 495.

However, even if we take money out of the analysis, there still seems to be a valid argument for allowing unrestricted trade of art. Maybe the artist does not or did not intend for the work to stay in her country. Perhaps she was or is an anti-nationalist, or created the work to tell the world about the atrocities going on in her country. Maybe the artist is depicting something which is not peculiar to the national culture but is rather a cross-cultural sentiment. If the artist didn't intend for the work to stay in her country, placing export restrictions on the work really seems like a form of government expropriation. Should a government -- anyone-- be able to dictate to artists which of their works can and cannot leave a country? Doing so seems an effort to violate the artist's autonomy, to silence her creative voice. That is not to ignore the fact that certain artists do in fact create to honour their particular culture and intend for their work to stay in their country. But if the artist is alive, should we not leave it up to the artist to decide where her works will end up? And if the artist is dead, should a government be able to take advantage of her death and expropriate her work?

Also, in an age of increasing freedom of movement of goods and people, of expanding cultural integration, of awareness that nationalist sentiments have inflicted serious harm in Nazi Germany and in the former Yugoslavia, it seems nonsensical to attempt to excite nationalist sentiments by justifying restrictions on art export with cultural nationalism arguments. Nationalist sentiments have lead to hate and intolerance in the past. If we want a world in which people understand and appreciate each others' cultures, would it not be better to allow works of art, as ambassadors of their own cultures, travel the world freely so as to spread knowledge and understanding?

It seems dangerous therefore to justify restrictions on export of cultural property with cultural nationalism. There are, however, other arguments that can be used to justify retention schemes that are based more on reason than on emotional fervour. For example, a nation may try to justify its retention scheme with the argument that the presence of cultural property in the nation promotes the general welfare of its people[21], *i.e.*, their lives are enriched by the experience of enjoying their cultural objects in their home country, whereas if the object is exported, the people must go abroad to see it (entailing expense) or look at a reproduction (not the same thing). Works of art also have value as tourist attractions, and thus support the domestic economy.[22] Therefore, it is argued, a nation should prohibit export in order to preserve its citizens' access to its cultural property and enhance the domestic economy, and thereby promote general welfare.

Whether prohibiting export of a work of art will promote general welfare surely depends on whether the general public actually has access to the work of art. If the work is held in a private collection, and the general public does not have access to it or even know of its existence, prohibiting its export would seem to do them little direct good (unless the government plans to expropriate the work). Conversely, permitting export of the work to a foreign museum would allow the citizens greater access to the work. It would allow the economy to indirectly benefit from the sale; great works of art bring high prices on the international art market and any profits that the owner reaps may be pumped into her local economy in some form.

The general welfare argument may be legitimate, however, if the government in question

[21] supra note 6 at 498.
[22] ibid at 500

has laws which give the public access to private collections. Italy's legislative scheme governing cultural property, for example, gives the public access to "collections and series of objects that as a whole have exceptional artistic or historical interest."[23] Few countries, however, have such legislative schemes.

Indeed, it is hard to see how strict retention policies benefit cultural property in private collections. They do, of course, benefit the state. Private collectors are subjected to depressed prices, from which a state would profit if it acquired or expropriated their works, or received them in lieu of taxes (as happened to the Picasso estate). However, while a nation may profit from such laws (and so, arguably, may the general public that views the works in state institutions), such a justification for export restrictions seems somehow offensive. As Merryman states "there is something mean-spirited about a law that keeps objects at hand without the cost and difficulty of acquiring and caring for them..."[24]

Another argument that proponents of retention schemes put forward is that viewers of a work should see the work "in or near the spot for which it was designed, or, if that cannot be managed, in the general environment from which it sprang and of whose history it is a part."[25] Professor Dummet argues that taking a work to a foreign museum causes it to lose information, beauty and power.[26] The argument seems dubious. Is there a real difference between viewing a Monet in the Louvre and viewing a Monet in London's National Gallery? If there is, it is doubtful that the difference is so great that it justifies export restrictions.

There may, however, be instances in which restricting export of a cultural object is valid. One such instance is when an export restriction is necessary to preserve the original form of the object. A complex work composed of many parts such as an altarpiece loses its beauty, force and integrity[27] if one of the panels is removed and sold abroad. Prohibiting export of only part of a work would show respect for the artist's original conception (which is especially important when the artist is no longer the owner or is deceased and cannot be consulted) and would prevent decontextualization of the work and the culture that may have inspired it. Prohibiting export of a complex work restricts its market and discourages its division.

It may also be reasonable to restrict export of cultural objects if they have real and current propinquity to their culture. In such instances, there seems to be a cultural imperative that transcends cultural nationalism: the physical presence of the object is believed to be essential to the welfare of a people. The object is not merely a symbol of national ideas or national history which may or may not be important to every member of the nation. Merryman believes that the cultural imperative operates if: (1) the culture that gave the object its cultural significance is alive and (2) the object is "actively employed for the religious or ceremonial or communal purposes for which it was made".[28] It seems possible that a nation may exploit the potential breadth of Merryman's term "communal purposes", but interpreting the phrase as "uses which are important

[23] Law no.1089 of 8 August 1939, arts. 5, 53 as cited in Merryman supra note 6 at 499.
[24] Merryman, ibid at 502.
[25] Michael Dummet, *The Ethics of Cultural Property*, N.Y. Times Literary Supplement, July 25, 1986, at 809, as cited by Merryman, supra note 6 at n.75.
[26] Merryman, supra note 6 at 505.
[27] Merryman discusses integrity preservation as part of "moral rights" laws, supra note 6 at n. 70 and n. 71.
[28] see Merryman's analysis of the cultural propinquity argument in Merryman, supra note 6 at 497.

to all members of the community" may help avoid this problem. An example of an object which satisfied both criteria is the Afo-a-Kom statue of Cameroon's Kom tribe which disappeared from a travelling exhibition of Cameroon art and re-appeared on the New York art market. The Kom culture was alive, and the object's physical presence was seen as necessary to the religious, ceremonial and communal life of the Kom.[29]

Most objects that nations try to retain do not meet these criteria however. For example, "the relics of ancient Egypt, Greece, China and Mexico have no contemporary religious, ceremonial or communal function."[30] The relics are valued for reasons other than their original use. They may be seen as a testimony of an ancestors' way of life. Or they may be valued as a means of attracting tourists and money. A claim that such relics must be repatriated or the nation's culture will be lost somehow seems dishonest if you consider that they most often retain their cultural identification when displayed in museums:

> If the Aztec Calendar Stone were in a museum in Paris it would still honor the Aztecs, just as the Parthenon Marbles in the National Gallery in London honour the artistry of classical Greek sculptors and the culture in which they lived and worked. To speak of the "loss of cultural heritage" means one thing when cultural objects are destroyed or suppressed. It means something quite different when what is "lost" is location within the national territory. In the Cleveland Museum, the Poussin is still a Poussin.[31]

Current international discourse on the trade of cultural property does not seem to distinguish between claims based on cultural nationalism and claims in which repatriation or export restrictions are necessary to protect the religious, ceremonial or communal use of an object by the culture that created it, or to preserve the integrity of an object. This is problematic. Arguments based on cultural nationalism, general welfare or seeing a work in its original environment are in the most part deficient. Cultural nationalism motivates people through its emotional appeal and recommends circumventing reasoned analysis, thereby failing to take into account competing interests. The general welfare argument seems disingenuous when cultural objects are privately owned. The argument that viewing an object in its original environment provides superior context is tenuous at best. If the international community is going to make the trade of cultural goods its business, it should adopt a rational, reasoned approach which takes into account the interests of affected groups, especially artists, and the reality that many works of art are privately owned.

(c) The Negative Effects of Cultural Retention Schemes

A reasoned discussion of trade in cultural goods should include a cost-benefit analysis of the effects of retention schemes, *i.e.*, weighing the costs of restrictive export schemes (on incentives to create, education, preservation of cultural objects, etc.) against the benefits to a nation in keeping artifacts within its boundaries. It is plausible that a liberal retention scheme, *i.e.*, one that allows export of cultural goods if certain conditions are met such as non-division of

[29] Merryman, supra note 6 at page 495 n.59 notes that the claim was resolved without litigation, the dealer simply cooperating with interested American individuals and museum officials in returning the statue to the Kom tribe. The object was later prominently displayed in a subsequent travelling exhibition of Cameroon Art.
[30] ibid at 497.
[31] ibid at 498.

the work, may be Kaldor-Hicks efficient; it may generate sufficient gains to the beneficiary of the restriction (*e.g.,* the artist whose work not only has integrity -- arguably an invaluable quality -- but also sells for more as a whole) that she could, hypothetically, compensate the loser of the restriction (*e.g.,* the person who has to purchase the entire work, not just a part) so as to render the loser fully indifferent, and yet still have gains left over.[32]

However, strict cultural retention schemes seem unjustifiable when a cost/benefit analysis of such schemes is performed. As previously stated, it is often the nations with the greatest wealth of cultural property and the least financial resources that have the widest sweeping retention schemes. Such nations may amass a large stock of undocumented, un-housed, and unprotected antiquities because they do not have the financial means to document and house the objects properly. It seems doubtful that the people of these nations benefit in any substantial way from having a mass of artifacts in underground storage rooms -- they cannot see or enjoy the art, so their cultural heritage is not visible and their general welfare is not improved.

In contrast, the costs of strict retention schemes are great. A strict retention scheme takes cultural objects out of the world market and restricts sale to the national market, thereby depressing their prices. Wealthy collectors will not bid on works if the works cannot be removed from their country of origin. The pool of potential buyers and interested money is reduced. There are a number of harmful correlative effects.

First, depressed prices give artists less incentive to create. While artists don't necessarily create for money, some artists are likely encouraged to create when their works sell well. If they can't make a living selling their art, they will be forced to devote part of the time they would have spent creating to a different job. Also they may be demoralized by government expropriation of their work. As Professor Howse explains, "a social expropriation of all the benefit of an individual's creativity would, essentially, amount to slavery... unless invention or creation is compensated at its full market value, there will be sub-optimal incentives to undertake it."[33]

Second, depressed prices make state acquisition through purchase or donation in lieu of taxes less costly to the government. This seems somewhat unethical. Third, depressed local prices create an incentive for private owners to evade the retention scheme and seek a more profitable foreign market through illegal means. As well, if there is an international market for the objects, the retention scheme may result in covert and callous excavation and secret export which damages sites and objects. The most valuable works are the most likely to leave the country, while the large income from the illicit trade goes to the thieves and their accomplices rather than to private individuals or government offices that need the money. National scholars, museum personnel, custom officials and others will be frustrated, demoralized and perhaps corrupted.[34]

In addition, if cultural objects cannot be exported people around the world cannot learn

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[32] see Michael J. Trebilcock, The Limits of Freedom of Contract (Cambridge: Harvard University Press, 1993) at 7.
[33] Michael J. Trebilcock and Robert Howse, The Regulation of International Trade, (London: Routledge, 1995) at 250.
[34] for a discussion of the negative effects of wide sweeping retention schemes, see Merryman, supra note 12 at 759.

about foreign cultures by seeing artifacts from those cultures in their local museums. Retention schemes therefore may result in a lost opportunity to pursue a rational policy of representing the national culture in foreign museums.[35] Admittedly, if a nation prohibits permanent export but permits cultural objects to be loaned to foreign museums or merely be displayed in travelling exhibitions, this problem may be overcome. Finally, if a government does not have the funds to properly care for relics, the relics may deteriorate and the pieces of cultural heritage will be lost forever. On a cost/benefit analysis basis, therefore, strict retention schemes are apparently not justifiable.

Despite the fact it seems strict retention schemes are not justifiable, during the last twenty-five years the international community has increasingly supported the efforts of nations to retain cultural property. Why is this so?

(2) International Efforts to Curb Illicit Trade of Cultural Property

Until the 1960's, a country's cultural property retention scheme was generally treated as a matter only within that country's domestic jurisdiction. The country's policy was applied only to its citizens, so that they were the only ones directly affected by the policy (although dealers and collectors and museums around the world felt its indirect effect.) Since the 1960's however, source nations have lobbied successfully in various international forums, including UNESCO, to persuade market nations to enforce the source nations' policies.

The early success of source nations' lobbying in the international forum seems to be evidenced by the inclusion in 1969 of Article XX(f) in the General Agreement on Tariffs and Trade ("GATT"). That article provides:

> Article XX - General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...
>
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

However, source nations' success should not be seen as unequivocal, as the opening words of Article XX place an important restriction on the operation of subsection (f). A retention scheme cannot result in "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[36] It would seem that any wide sweeping retention scheme which prohibits

[35] ibid at 759.

[36] It should be noted that the possibility highlighted by Professor Howse, supra note 24 at page 254, that these qualifying words apply the National Treatment Principle found in Article III of the GATT to article XX exemptions does not seem significant to the article XX(f) exemption, since retention schemes by their nature afford domestically

export of all cultural goods, including those that have minimal artistic, historic or archaeological value, would violate the condition. A retention scheme that does not distinguish between objects of great and little value may, it seems, easily be found to be arbitrary and unjustifiable. It also would fail a least restrictive means test. Further, Article XX stipulates that a retention scheme cannot be a "disguised restriction on international trade." If a retention scheme is based on emotion-based cultural nationalism arguments rather than a rational argument such as the propinquity of an object to its culture, it seems plausible that it could be seen as an unjustifiable and disguised restriction on international trade. Finally, subsection (f) itself states that the scheme must be "imposed for the protection" of a cultural object. A scheme that simply restricts the export of the object but does nothing to preserve the object while it stays in its country of origin surely would fail to meet the condition.

Despite the potential qualifications in Article XX of the GATT on the success of the source nations' campaign to restrict trade of cultural goods, the success has been sufficient to make retention policies an international issue. The international community is now wondering whether market nations should enforce all source nation export restrictions, no matter how extensive they are. The current trend is in that direction. Merryman asserts that internationally the dialogue on cultural property seems to be dominated by the source nations' cries for retention, repatriation and an end to art trade. This is odd considering the fact that the UNESCO Convention seems to take a more balanced approach to restrictions on art trade; it distinguishes between "theft" and "illegal export"[37] and between types of cultural property and shows sensitivity to the interests of dealers, collectors, museums and archaeologists as well as to the claims of source nations. Also, some international documents seem to propose an attitude of free trade. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention"), for example, states that "cultural property belonging to any people whatsoever is the cultural heritage of all mankind."[38]

The United States provides an interesting case study of this contradictory phenomenon. The United States used to favour free trade in cultural goods, but it has become the most responsive of all art importing nations to source nations' retention policies, despite certain legislative efforts to adopt a balanced approach to cultural property trade restrictions. In 1982, the U.S. government enacted the *Convention on Cultural Property Implementation Act of 1982* to implement the UNESCO Convention and to distinguish, like the Convention, between theft and illegal export, as well as pay heed to multifarious interests. Notwithstanding this legislative framework for a balanced approach, the U.S. Customs Service continues to be more aligned with source nations' strict retentive policies. Its response seems an echo of the initial American response to illicit trade in cultural property, namely a highly emotional reaction sparked by

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produced cultural goods treatment which is in fact less favourable than the treatment afforded cultural goods imported into the country.

[37] Illegal export of cultural property is governed by Article 7(a) of the UNESCO Convention. That section requires the parties "[t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported..." Theft of cultural property is governed by Article 7(b) which requires parties "to prohibit the import of.. stolen" cultural property and "to take appropriate steps to recover and return... such cultural property... provided, however, that the resulting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property"; supra note 3 , Art.7(a), at 291.

[38] 249 UNTS 240.

instances of archaeological destruction and pillage.

Strict retention schemes likely were initially inspired by emotional responses to destruction and pillage. "In many countries protective measures were triggered off by a continuous exodus of works of art; in a number of countries, such as China, Turkey, Greece or Italy, archaeological works of art, taken out of the country, resulted from wild and unscientific digs."[39] It was hoped that the UNESCO Convention would help reduce trade in plundered and smuggled antiquities. Indeed, one of the main goals of the UNESCO Convention was said to be "to put a stop to this pilfering of national cultural heritage."[40] Observers point out that the UNESCO Convention has had little success in reducing illicit trade, however. Why is this so?

(a) The Failings of the UNESCO Convention

The UNESCO Convention is an international treaty which relies on public international law mechanisms to prevent illicit trade of cultural goods. Like other international treaties, the UNESCO Convention binds only its signatories. It also relies on its signatories enforcing the provisions of the Convention in their own countries, through implementing legislation and/or other measures. The ineffectiveness of the UNESCO Convention in curtailing illicit trade can be explained in part by the fact that most of the major art-importing countries, including France, England and Japan, are not signatories to it and have not indicated their willingness to abide by its provisions.[41] The United States is the only major market nation among the seventy-three signatories. Some scholars explain the refusal of other major market nations to ratify the Convention by the difficulties and expense its implementation presents to states: "nearly all of the European art-importing counties failed to ratify it because of difficulties in implementation."[42] Their refusal may also be explained by the importance of unrestricted art trade to their economies and by their belief that signing the UNESCO Convention would divert profitable trade activity to another non-signatory market nation.[43]

Some scholars claim that the Convention has also failed to be effective because of textual weakness and a resulting failure to impose obligations on signatories.[44] For example, Article 2(1) simply provides, rhetorically, that the contracting states "recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin...and that international cooperation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom." Article 2(2) then only mentions in permissive language an ideal response, namely that the signatories "undertake to oppose such practices with the means at their disposal, and particularly.. by helping to make the necessary reparations." Since most of the wealthy art market nations are not signatories, and the other signatories are generally rich in cultural goods but poorer financially, Article 2(2) has little force.

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[39] supra note 4 at 476.
[40] ibid.
[41] ibid at 478.
[42] Patricia Hambrecht, *Comments on Draft UNIDROIT Convention on the Return of Stolen and Illegally Exported Cultural Objects for a meeting of the Secretary of State's Advisory Committee on Private International Law,* at 2 (October 16, 1992), as cited in Lenzner, ibid.
[43] supra note 4 at 479.
[44] ibid.

The Convention's impotence has been attributed also to the United States' successful lobbying at the time of the Secretariat Draft of the Convention to delete a provision in Article 7 which would have obliged signatory nations to respect and enforce the export laws of other nations.[45] The provision required every signatory to prohibit export of any cultural good unless accompanied by an export certificate, and to prohibit import of cultural goods not accompanied by an export certificate. Inclusion of the provision would have meant a U.S. federal court must order the repatriation of any object considered by a source nation to have been illegally exported, even if the object was imported into the United States in accordance with its laws. The provision contradicted the long-established principle of private international law that courts of one nation will not enforce claims based on the public law (versus claims based on private rights) of another nation.[46] The provision would have enabled art-exporting nations to bind all other countries to the export laws of their choosing, even laws which prohibited export of culturally insignificant objects. It would have allowed exporting nations to override the importing nation's judgment about whether cultural property should be repatriated or remain with a good faith purchaser. The policy also opened up the danger of "unnecessarily choking the legal market for works of art, creating strong incentives for illegal excavations, exportations, and export licences and contributing to the development of a thriving black market."[47]

The final version of Article 7 merely obligates signatories to take steps that are *consistent with national legislation* to prevent their state institutions (*e.g.*, museums) from acquiring works of art defined by the Convention as "cultural property" which have been illegally exported. This italicized qualifying phrase "renders the article moot in the United States, where it is possible to import something legally regardless of whether the item has been legally exported from its country of origin."[48] Thus Article 7 is another manifestation of the Convention's failure to impose firm obligations on the Contracting States.

It should also be noted that Article 7(b) requires signatory States take appropriate steps to return cultural property only if the State requesting return of such property compensates an innocent purchaser or a legal owner. This provision may compromise the force of the Convention if the requesting State does not have the resources to compensate the good-faith purchaser. Another problem with the Convention is the way in which Article 1 of the Convention defines cultural property. Article 1 may dilute the Convention's force as it limits the application of the Convention to works of art which fall within certain categories.

A further problem with the UNESCO Convention is that Article 7(b) seems to restrict too greatly its definition of stolen property. It defines "stolen" property as property taken from "a

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[45] supra note 4 at page 482, n.59.

[46] For example, in *Attorney General of New Zealand v. Ortiz*, 2 W.L.R. 809 (House of Lords 1983) *aff'g* 3 W.L.R. 570 (Court of Appeal 1982), the New Zealand Court of Appeal denied the plaintiff's claim for recovery of an illegally exported Maori carving; see also *King of Italy v. De Medici Tornaquinci*, 34 T.L.R. 623 (Ch. 1918). In the absence of a treaty or other legal agreement, source nations seeking the return of a cultural object that was legally obtained (e.g. purchased) but then illegally exported must resort to diplomatic or executive channels. For a further discussion of the application of the principle in cultural property cases, see M. Frigo *La Protezione dei Beni Culturali nel Diritto Internazionale* 332 ff. (1986).

[47] supra note 4 at 482.

[48] ibid at 484 to 485.

museum or a religious or secular public monument or similar institution... provided that such property is documented as appertaining to the inventory of that institution." Professor Merryman proposes that the provision was drafted to restrict the effect of rhetorical ownership laws (by which a state declares that all objects anywhere within its the national territory are property of the state and forbids their export without state permission).[49] However, the effect of the provision is that an undocumented object taken from an archaeological site would not be protected from theft as it is not considered stolen property under the Convention. Nor would an object held in a private collection and illegally taken abroad by its owner be considered "stolen."

Thus the Convention seems to protect only states, not individuals, from theft. Article 13 offers minimal assistance to individual private owners. That article provides that the signatories "undertake, *consistent with the laws of each State*,... to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners." The provision ensures recovery of stolen items only to the extent that recovery is consistent with the laws of the state in which the action is brought. The provision adds nothing to the current legal regime; in cases of theft, courts generally recognize and enforce private rights of ownership established under the law of another nation. In the United States especially, law upholds the rights of the true owner at the expense of good faith purchasers. For example, if a painting by a well-known artist is stolen from a private collection in France, smuggled to the United States and sold to a collector, even if that collector buys the painting in good faith, law[50] will require the collector to return the painting to the rightful owner without compensation.[51] In continental Europe, however, applicable law is generally more favourable to good faith purchasers.[52]

There are many possible reasons for the failure of the UNESCO Convention to curb illicit trade in art. No doubt nations favouring wide sweeping export restrictions have been disappointed with the limited definition of "cultural property" in Article 1 and of "stolen property" in Article 7(b); it gives them less scope to bring claims under the Convention for violations of their export laws and theft. The UNESCO Convention has been criticized for failing to take into account "the very wide difference in views as to what cultural property should be allowed to circulate freely in international markets."[53] Private owners of art are also frustrated by the failure of the Convention to protect them. Both public and private owners of art hope that the UNIDROIT Convention will provide them with a more effective means of enforcing their claims of stolen cultural property.

(b) The UNIDROIT Convention - Is it a Solution?

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[49] see supra note 6.

[50] Merryman notes that assertion of the law may be subject to the possible rights of good faith purchasers and operation of statutes of limitation or rules of prescription, supra note 6 at 483.

[51] For example, in *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981) aff'd, 674 F.2d 1150 (2d Cir. 1982), the defendant was ordered by a New York federal court to return two paintings he had bought in good faith to the rightful owner, an agency of the East German government, without compensation. Despite the fact that Elicofon had been unaware when he bought the paintings that they were by Albrecht Dürer and had been stolen at the end of WWII, and the fact that the paintings had been part of Elicofon's collection for many years, the New York federal court applied the rule favouring the rights of the true owner and ordered their return.

[52] For example, in *Winkworth v. Christie, Manson & Woods, Ltd*. [1980] 1 All E.R. 1121, the court applied Italian law in favour of a good faith purchaser against the owner from whom it was stolen.

[53] Richard Crewsden, *Putting Life into a Cultural Property Convention -- UNIDROIT: Still Some Way to Go*, 17 Int'l Legal Practitioner 45 (1992) at 45.

The lack of congruency between the laws of different countries, the deference paid by the UNESCO Convention to national laws, and the failure of the UNESCO Convention to offer real assistance to aggrieved private owners whose cultural property has been stolen, spurred the drafting of the UNIDROIT Convention. Unlike the UNESCO Convention, the UNIDROIT Convention looks to private international law for a solution to the problem of illicit art trade. It gives dispossessed owners -- both public institutions and private individuals -- the right to bring a cause of action under the Convention in a court of the country in which the stolen items are located.[54] This offers parties, especially private owners, substantial advantages over the UNESCO Convention regime. For example, the UNIDROIT regime may result in more timely resolution of claims. Under the UNIDROIT regime, national courts or other competent authorities are responsible for resolving disputes over cultural property, whereas under the UNESCO regime, claims often had to be made through slow diplomatic channels. In the United States, for example, the power to enforce the UNESCO Convention lies in the hands of government agencies such as the Customs Office, not the courts.

Another seeming advantage of the UNIDROIT Convention is that it offers signatories a single harmonized law governing ownership rights in cultural property. Parties could consult this single source *ex ante* to determine the legality of a transaction. It would make sense that any claims filed under the Convention would be governed by its provisions, and disputes over conflicting national laws thereby avoided. However, it may be that the Convention will not preempt national laws in every situation in which a claim is brought under the Convention. Article 10 of the Convention provides: "Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or return of a stolen or illegally exported cultural object than provided for by this Convention." Therefore, for example, a court in a Contracting State may opt to apply its own longer limitation period instead of the one specified in the Convention. One sceptic predicts that "[r]ecovery actions for stolen property in the U.S. would presumably proceed wherever possible under existing State law rather than the Convention, since a plaintiff would not be required to provide compensation under State law even if BFP [bona fide possessor] status could be established, unless title had effectively passed"[55] (note that Article 4 of the Convention entitles a bona fide possessor of a stolen cultural object to compensation by the claimant.) The leniency of Article 10 may lead plaintiffs to shop around for a jurisdiction amenable to their claims, which seems to defeat the goal of the UNIDROIT Convention to provide a single uniform law. The drafters of the Convention may

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[54] Article 9, in Chapter IV - Claims and Actions, provides:

> (1) without prejudice to the rules concerning jurisdiction in force in Contracting States, the claimant may in all cases bring a claim or request under this Convention before the courts or other competent authorities of the Contracting State where the cultural object is located.
>
> (2) The parties may also agree to submit the dispute to another jurisdiction or to arbitration.
>
> (3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

[55] supra note 4 at n.118, referring to Memorandum of Harold s. Burman, Executive Director, Office of the Legal Adviser, State Department, to Advisory Committee on Private International Law on the Status and Issues in the Draft UNIDROIT Convention on International Return of Cultural Property (June 3, 1994) at 4.

have included Article 10 to encourage those nations who reject restrictions on art trade, *i.e.*, the major market nations, to become signatories to the Convention, but in view of the fact the provision compromises the operation of the Convention they may want to consider omitting it.

Despite this potential problem with lack of uniformity, the UNIDROIT Convention seems to successfully address some of the UNESCO Convention's problems. For example, Article 2 of the UNIDROIT Convention allows a wider definition of cultural objects and thereby may appease any source nation whose cultural object did not fit within the UNESCO Convention's definition of cultural property. Article 2 defines cultural objects as "those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention..." Thus any court before which a claim is brought may refer to the UNESCO Convention definition of cultural property for guidance, but then use its discretion to determine whether the object is of the requisite importance. While relying on judicial interpretation may be seen by some as problematic, the provision may succeed in appeasing source nations as well as market nations who are hoping for a more restrictive interpretation of Article 2.

Another important advantage of the UNIDROIT Convention is the broader way in which it defines "stolen" in Chapter II. For example, Article 3(2) provides that "an object which has been unlawfully excavated or lawfully excavated and unlawfully retained shall be deemed to have been stolen." Like all other stolen cultural objects, it is governed by Article 3(1) and must be returned. The provision is significant, especially for continental Europe, as it "reverses the civil law presumption... that a bona fide purchaser of a stolen cultural object acquires good title."[56] Further, Article 4 requires possessors to exercise due diligence when acquiring objects in order to qualify for "fair and reasonable compensation" upon return of the stolen object. The due diligence requirement will likely reduce the trade of stolen works of art. As Lenzner describes:

> well-informed individuals and institutions will no longer acquire works hastily and secretly due to the potential future liability in the event of a title dispute. Museums and other institutional purchasers will likely be held to a higher standard of care than individuals with fewer resources available to them.[57]

As well, the UNIDROIT Convention seems to provide a basis for a rational policy on international art trade. The Convention has been praised for its attempt to balance the often conflicting interests of art-exporting and art-importing nations in cultural property protection.[58] Article 5 in Chapter III, which addresses the return of illegally exported cultural objects, appears to prevent a source nation from making a restitution claim based solely on irrational cultural

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[56] Crewdson, supra note 47 at 46.

[57] supra note 4 at 497.

[58] Ralph E. Lerner and Judith Bresler, Art Law: The Guide for Collectors, Investors, Dealers and Artists (1992) at 160. Balancing these interests was in fact the objective of the Convention cited during the First Session (UNIDROIT Study LXX - Doc. 23, Committee of Governmental Experts on the International Protection of Cultural Property, Report on the First Session 1-2 (May 6-10, 1991) [cited in Lenzner supra note 4 at n.119]:

> The real challenge facing the committee [of experts] was to strike an acceptable balance between the interests of the countries of origin of cultural objects and those of the importing countries and between countries advocating the development of the art trade and those following a restrictive policy of cultural nationalism aimed at the retention of cultural property in the country of origin.

nationalism and yet still protects the source nation's arguably legitimate interests.[59] Under Article 5(2), a court need only order return of an object "if the requesting state establishes that removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of an object or its context,

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

(d) the use of the object by a living culture, or establishes that the object is of outstanding cultural importance for the requesting state."

The criteria established seem generally sound. Protecting the integrity of a complex object and preventing export of objects that have propinquity to a living culture have both been identified as important considerations. Physical preservation of the object is also a key concern. If the requesting State can prove that it has a substantial advantage in terms of ability to preserve the object, then a court would likely order the restitution. However, the court's determination would probably turn on whether the requesting party can prove that the possessing party has an inadequate ability to preserve the object. This would, it seems, be more difficult when the possessing party is a first world museum with advanced methods of preserving objects. Another problem that Article 5(2)(a) poses for source nations is that physical preservation of an object's "context" seems a vague and perhaps overbroad concept, and a court may find it difficult to determine whether to grant restitution for this purpose.

Courts may also find themselves bogged down by claims based on the argument in Article 5(2)(d) that an object is of "outstanding cultural importance." This clause appears to allow an irrational cultural nationalism argument to be the basis for a restitution claim. However, the Convention tries to ensure that states will be somewhat judicious and rational in their claims by requiring in Article 5(3) that requesting states furnish information "of a factual or legal nature as may assist the court or other competent authority... in addressing whether the requirements... have been met." As well, Article 5(4) imposes a limitation period on requests for return of a cultural object.[60] While the length of time has yet to be finalized, the period of time (starting when the location of the object is known or ought reasonably to be known) within which a claim must be

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[59] Article 5(1) provides:
(1) A Contracting State may request the court or other competent authority of another Contracting State acting under Article 9 [Claims and Actions] to order the return of a cultural object which has
(a) been removed from the territory of the requesting State contrary to its law regulating the export of cultural objects because of their cultural significance;
(b) been temporarily exported from the territory of the requesting State under a permit, for purposes such as exhibition, research or restoration, and not returned in accordance with the terms of that permit[, or
(c) been taken from a site contrary to the laws of the requesting State applicable to the excavation of cultural objects and removed from that State].

[60] Article 5(4) states, "Any request for return shall be brought within a period of [one] [three] year[s] from the time when the requesting State knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the date of the export.

brought is sufficiently short that it would bar long-standing disputes such as over the Elgin Marbles from being recognized as legitimate claims.

Thus, despite any potential problems with Article 5, its overall approach does seem to be balanced. It recognizes the legitimate interests of source nations in preserving the physical integrity of the cultural object and in retaining objects that have propinquity to an living culture. It also appears, through the specificity of the criteria in Article 5(2), to attempt to discourage wide sweeping retention schemes. As well, claims cannot be irrationally based and must be brought quickly in order to be recognized.

Another commendable aspect of the UNIDROIT Convention is the respect it shows for the autonomy and wishes of artists. The recent draft of Article 7(2)(a) prohibits a Contracting State from requesting return of a cultural object under Article 5(1) where "the object was exported during the lifetime of the person who created it [or within a period of [five] years following the death of that person]..." Thus the Convention will not apply to art exported illegally during the lifetime of the artist. Even if the Convention was simply trying to ensure that export restrictions would not be enforced on new art that has yet to gain "outstanding cultural importance", an important effect of Article 7(2)(a) is that artists can retain control over the distribution of the art they create.

Conclusion

How should the international discourse on trade of cultural goods progress? The international community must address the question of what kinds of export restrictions, if any, it should enforce. It should also determine whether it will support the efforts of international treaties to curb illicit trade in art.

Restrictions on art export may only be justified, it seems, in limited circumstances, *e.g.*, when there is a need to preserve the integrity of a work or there is a valid cultural imperative present such as propinquity of an object to a live culture. Otherwise, the negative effects of retention schemes outweigh any benefits they may propound to offer. Retention schemes restrict rather than protect the rights of owners and encourage private owners to break laws. An owner of a Monet who cannot remove her property from France without government permission may simply try to sneak the painting out of the country, which may result in the painting being damaged. They also encourage covert activity such as theft from archaeological sites. Such covert activity may result in a secret sale to a private owner, with the concomitant result that the international community never sees the object. As well, the artifact may be damaged during the covert operation and the piece of cultural history lost forever. Finally, retention schemes offend the autonomy of artists and act as a disincentive for them to create.

The fact that cultural retention schemes are undesirable cannot change the fact that national export restriction laws will remain the business of individual nations. The international community cannot prevent a nation from enacting strict retention laws. However, it can determine the effectiveness of the laws by supporting or circumscribing them in international dialogues and international treaties.

International conventions have a key role to play in fighting illicit trade of cultural goods.

However, a convention's strength is determined, as the UNESCO experience demonstrates, by whether art market nations are signatories to the convention. For the UNIDROIT Convention to succeed in curtailing illicit trade, art market nations must ratify it. The UNIDROIT Convention seems to deal effectively with competing interests, *e.g.*, of market nations who favour free trade in art and of source nations who want to assert their autonomy and protect their cultural heritage. By addressing art market nation interests, *e.g.*, by making it possible for a court to define cultural property narrowly and for nations to opt to be governed by a preferable national law, the UNIDROIT Convention may succeed in luring art market nations to sign it.

The UNIDROIT Convention provides the international community with a potentially effective means of controlling illicit trade in art. It offers significant advantages over the UNESCO Convention, especially in terms of providing private owners a remedy in private international law for theft of their art. It adopts a balanced approach in Article 5 to the return of illegally exported cultural objects. As well, it shows respect for artists' wishes with respect to trade of their art. The combination of these factors makes it understandable why many claim that the UNIDROIT Convention will "significantly deter illicit trade without damaging free trade in art."[61]

[61] Claudia Fox, Comment, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, (1993) 9 Am. U. J. Int'l L. & Pol'y 225.

