PIRACY IN THE MODERN AGE: REVIEWING THE MECHANISMS WHICH COMBAT PILLAGE

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To destroy a people’s unique cultural artifacts is to assault its soul.¹

I INTRODUCTION

Our cultural heritage is destroyed by many things: war, environmental changes and vandalism. But no single event eclipses the catastrophic effect of continuous and organised pillage. Throughout history, the pillage of cultural artifacts has provided empires and colonial rulers with showcases of their victories of war. These spoils of war were usually transported from the place of conquest to the victor’s homeland. As history has shown, this forcible transfer of cultural property² has brought with it the demise of the cultural and artistic wealth of the defeated country and the disintegration of the historical identity of the people. The identity of a people is rooted in their cultural property and represents an expression of their ‘collective personality’.³

Despite the efforts to regulate this pillage through international treaties, theft of ancient antiquities is today ‘less discriminate, more violent, less scrupulous, better

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² Cultural Property has been classified in four ways: movable, immovable, tangible and intangible. This paper only deals with movable tangible cultural property. This includes such objects as books, artifacts, rare collections and specimens, statues and antiques. See the discussion in Patty Gerstenblith, ‘Identity and Cultural Property: The Protection of Cultural Property in the United States’ (1995) 75 Boston University Law Review 559, 561. Restricting the discussion of this paper to movable tangible property in no way diminishes the importance of protecting the other forms of cultural property. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage is an instrument dedicated to protecting intangible cultural property.

organised, better paid and more closely linked to organised crime as a whole’. It appears that the protection of cultural heritage has been forgotten and the development of penalties to enforce any such protection and discourage the illicit trade in stolen antiquities has reached a roadblock. One look at Iraq and Afghanistan confirms these suspicions. Compounding this situation is the development of a new threat – trade liberalization. Ideals embodied in the Agreements of the World Trade Organization (WTO), in particular the General Agreement on Tariffs and Trade (GATT), clash with measures that aim to curb significantly the illicit trade, predominantly export and import controls. In the current climate and with the current favour in which international and national bodies hold the GATT, looting may be disastrously legitimized by free trade.

II THE PROBLEM OF LOOTING

Many arguments may be used to justify the destruction of cultural heritage, for example military necessity, religious offence, or circumstance of conflict. But none so greatly affects the loss of our past than does the clandestine excavation of ancient sites for archaeological treasures, which embellish the international art scene with a mountain of unprovenanced antiquities. Ancient treasures are removed from their resting places - tombs, castles or archaeological sites - to supply the international art trade for commercial profit. This continual desecration of archaeological cultural material constitutes a permanently-missed opportunity to learn about the history and prehistory of nations around the globe. Removing artifacts from an archaeological site without authority separates the object from its context and, as noted by Brodie, Doole and Watson, an ‘ethnographic object without contextual information is an object stripped of meaning – it reflects back at us our own conceptions of beauty but tells us little … about its original social value and purpose’.6,7

Museums, collectors and dealers who deal in unprovenanced antiquities do not help the situation. The continued purchase and sale of such objects supports illegal excavation and exportation to jurisdictions that allow dealing in unprovenanced antiquities. Publication in collection catalogues adds credibility to the object. On-sale to a bona fide purchaser increases the difficulty the original owner has in making a claim for ownership, as the item becomes entangled in the legal labyrinth that unsuccessfully underpins the protection of cultural heritage.

5 General Agreement on Tariffs and Trade, 55 UNTS 187, as modified by the 1994 Marrakesh Agreements, opened for signature 15 April 1994, 33 ILM 1140 (entered into force 1 January 1995).
6 Neil Brodie, Jenny Doole and Peter Watson, Stealing History: The Illicit Trade in Cultural Material (2000) 11.
III PROTECTION AGAINST PILLAGE

A Protection of Cultural Property as a Human Right

Cultural property represents in tangible form some of the evidence of man’s origins and development, his traditions, artistic and scientific achievements and generally the milieu of which he is a part.\(^8\)

Unfortunately, the expansion of the use and meaning of the term ‘cultural property’ and its interchange with ‘cultural heritage’ has meant that a clear interpretation of the phrase can no longer be found. Cultural property has been used for an array of different objects and structures, both tangible and intangible, movable and immovable, past and present, still and kinetic, written and oral. But this ‘living’ definition remains subject to differing approaches regarding the designation of cultural property.

The 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, (The 1954 Hague Convention)\(^9\) defines cultural property as ‘property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular …’\(^10\) (emphasis added). This Convention approaches the designation of cultural property from an internationalist perspective, where cultural heritage forms part of the common heritage of mankind. Indeed the preamble to the Convention states

> that this heritage should receive international protection [because] … 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.\(^11\)

Alternatively, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property\(^12\) (the 1970 Convention) provides that cultural property is designated by each State, based on the object’s historic, artistic or religious importance. The notion of national patrimony was first recognized in the Treaty of Vienna, 1815\(^13\) and has continued to be held in the highest regard.\(^14\) This approach is nationalistic, leaving categorization

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10 Ibid art 1(a).
11 Ibid Preamble.
up to the subjective interests of each state. The 1970 Convention, as the primary
convention on the illicit transfer of cultural property, remains the authority on the
matter.\textsuperscript{15} Later conventions avoided the debate.

The removal and subsequent destruction of cultural property equates to the
destruction of an evolutionary link between the cultural heritage of past civilizations
and the culture that has stemmed from it. The removal of an object from its original
context, ‘irrevocably divests that culture of one of its dimensions. Through the loss
of this essential link in the chain the culture is no longer able to perceive itself in
the natural logic of its own evolution’.\textsuperscript{16} Thus, our knowledge of the past becomes
limited and many communities lose the chance to rediscover and reconnect with
their past.\textsuperscript{17} In many ways, it indicates a loss in identity. As such, it can be argued
that the preservation of cultural heritage (\textit{in situ}) is a fundamental human right.\textsuperscript{18}

\textbf{B The International Legal Framework}

\textit{1 Early attempts: the Hague Conventions}

An enormous body of international law has built up over the last two hundred years
to protect cultural property from forcible removal during armed conflict. Warring
states have been obliged to prevent the misappropriation, theft or pillage of movable
cultural property since 1899 under two of the first Hague Conventions (the 1899
\textit{Convention with Respect to the Laws and Customs of War on Land}\textsuperscript{19} and the 1907
\textit{Convention Respecting the Laws and Customs of War on Land}).\textsuperscript{20} These obligations
have been reinforced over the centuries, in particular with the ratification of the
1954 Hague Convention,\textsuperscript{21} in response to the looting that occurred during and after
the Second World War. Importantly for preserving a people’s cultural identity, the
1954 Hague Convention prioritized \textit{in situ} preservation of cultural property unless
such property came under the military exception rule. The First Protocol to the 1954
Hague Convention, 1954\textsuperscript{22} was specific to movable cultural property and prohibited
the export of such property from an occupied territory. The Second Protocol to the

\begin{footnotesize}
\begin{enumerate}
\item See discussion of \textit{res communis} in the section on restitution.
\item Salah Stéité, delegate of Lebanon to the UNESCO Intergovernmental Committee for the
\item Renfrew, above n 7, 12.
\item Brodie, Doole and Watson, above, n 6, 12.
\item \textit{Convention with Respect to the Laws and Customs of War on Land}, opened for signature 29
July 1899, 32 Stat. 1803, TS No 03, 26 Martens Nouve Recueil (ser. 2) 949 (entered into force
4 September 1900).
\item \textit{Convention Respecting the Laws and Customs of War on Land}, opened for signature 18
October 1907, 36 Stat. 2277 (1907), TS No 539, 3 Martens Nouve Recueil (ser. 3) 461
(entered into force 26 January 1910).
\item \textit{Convention for the Protection of Cultural Property in the Event of Armed Conflict with
Regulations for the Execution of the Convention}, opened for signature 14 May 1954, 249
UNTS 215 (entered into force 7 August 1956).
\item Protocol to the \textit{Convention for the Protection of Cultural Property in the Event of Armed
Conflict 1954}, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August
1956).
\end{enumerate}
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1954 Hague Convention, of 1999,\(^\text{23}\) which entered into force on 9 March 2004, made it more difficult to justify attacks on the grounds of military necessity.

2 The 1970 Convention

In 1970, UNESCO adopted what was to become the most important Convention on the subject of pillaging cultural artifacts. The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970*\(^\text{24}\) (the 1970 Convention) represents a milestone in the ongoing battle to reduce the incentive of pillaging ethnological and archaeological objects. The 1970 Convention embodies a point in time where the historic notion of ‘divide and conquer’ was no longer seen as tenable with modern notions of historic preservation.

The most effective provisions against the illicit trade in antiquities require that states:

- institute a system for issuing export certificates which should accompany all items of cultural property exported;
- prevent museums and other institutions from importing and acquiring illegally exported cultural property in particular those items listed on a national inventory;
- establish a national inventory of important cultural property whose export would constitute an impoverishment of the national cultural heritage; and
- take steps to return illegally removed cultural property at the request of the state of origin.

The 1970 Convention reinforced the obligations of the States Parties regarding the illegal acquisition of cultural property and today is the most authoritative convention on the subject. The objectives of this convention have been reflected in the *Convention for the Protection of the World Cultural and Natural Heritage, 1972*\(^\text{25}\) and the *Convention on the Protection of the Underwater Cultural Heritage, 2001*.\(^\text{26}\)

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Unfortunately, the 1970 Convention is non-retrospective and has been criticized as being too vague. The doctrine of national sovereignty also impedes the Convention’s success, instituting a reliance on States Parties to implement the measures, taking into account compatibility with their national legal systems. The Convention suffers further setbacks in the unwillingness of some of the ‘North’ (industrialized countries) to become parties and the inability of many of the ‘South’ (developing countries) to administer and enforce legislation giving effect to the Convention. The faltering adherence to obligations under the Convention was revealed with the continuous looting of the Iraq National Museum that occurred during the military intervention in 2003.

Several pivotal articles in the 1970 Convention stand in direct opposition to ideals of free trade, minimizing the Convention’s effectiveness. Articles 6 and 9 of the Convention stipulate the requirement that States Parties introduce controls on importing and exporting of cultural property. This is antithetical to the ideology of the GATT. Articles 8 and 10 of GATT oblige States Parties to impose penalties or administrative sanctions on any person breaching the prohibitions on importation which may encounter claims of unjustified extra-territorial application. Article 13 explicitly mentions recovery and restitution as rights of each State Party and these notions continue to encounter problems related to the question of legal ownership.

3 Criminalization of Pillage

The Nuremberg Trials saw four defendants (Walther Funk, Alfred Rosenberg, Joachim von Ribbentrop and Arthur Seyss-Inquart) convicted of war crimes relating to the misappropriation and destruction of property. In the same era, the seizure of public or private property not justified by military necessity was criminalized in the Charter of the International Military Tribunal for the Far East. Later, in 2001, the International Criminal Tribunal for the Former Yugoslavia (ICTY) convicted one Yugoslav army general and three officers on similar charges for the destruction

29 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 UNTS 279 (1945).
30 Military necessity is the only exception allowed to the international rules governing both the destruction and illegal acquisition of property during war and is specified in every convention on the issue to date.
to cultural heritage caused by the shelling of Dubrovnik in 1991-92.\(^\text{32}\) In addition, the ICTY Statute followed the code of the *Charter of the International Military Tribunal for the Far East* in criminalizing property seizure not justified by military necessity (article 3 (e)).\(^\text{33}\) Similar provisions appear in Part IV of the 1949 Geneva Convention,\(^\text{34}\) and in its 1977 Additional Protocols I and II\(^\text{35}\) whereby extensive appropriation of cultural property was specified as a grave breach of the laws of war (1949 Geneva Convention, article 147).

The 1970 Convention attempts to set guidelines for the use of penal provisions where cultural property has been misappropriated. This was later supported with the ratification of the Second Protocol to the Hague Convention \(^\text{36}\) which codifies individual criminal responsibility and asserts jurisdiction over the offences of theft, pillage or misappropriation of cultural property. The Protocol specifies violations against cultural property that are prosecutable (specifically in articles 15(1) and 21(b)), and obliges States Parties to adopt appropriate measures to establish these crimes as offences under domestic law (article 15(2)). Jurisdiction under the Protocol is established in accordance with the territoriality, nationality and passive personality principles (article 16(1)) and enables States Parties to prosecute (in accordance with the rules of due process) or extradite offenders (articles 17 and 18). This Protocol was one of the most influential of the international agreements in setting out a framework on individual accountability for pillage.

Attempts at criminalizing pillage internationally have been thwarted by a serious lack of undertaking by states. The Second Protocol has only 42 States Parties; most Western nations (including the United States, Australia and the United Kingdom) have neither signed nor ratified it. Under article 16(2)(b) members of armed forces of a state not party to the Protocol are not bound by its terms and do not incur criminal responsibility for violating its terms. Thus, the neatly codified criminal jurisdiction relating to cultural property offences appears futile, particularly when notable non-member states are those who hold the power of enforcement. Any enforcement without a strong political framework, supported by dominant trade powers is weak, because it can be easily illegitimated as a serious incursion into


\(^{34}\) Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).


\(^{36}\) Second Protocol to the Hague Convention, above n 23.
sovereign rights. This is supported by the prima facie respect afforded to sovereignty principles in international law and in an array of international instruments.

The Rome Statute of the International Criminal Court (ICC)\(^{37}\) codified extensive destruction and appropriation of property, not justified by military necessity, as a war crime (article 8(2)(a)(iv)). Should this instrument gain a wider adherence than it currently has, the Statute would become a powerful ally in the fight against illicit antiquities trading, not least because of its assertion of universal jurisdiction over the crime of pillage.\(^{38}\) Now listed alongside the crime of genocide, pillage is condemned as a universal crime: one that engages universal reprehensibility – both in jurisdiction and character.

C National Control Mechanisms

While international conventions aim to facilitate international co-operation, most often it is the state that can be the most effective at enforcing primary responsibilities in preventing the illicit traffic in artifacts. International codes and conventions are only as good as the member-states’ commitment to enforce their principles. Under the 1970 Convention, States Parties are required both to set up a system of national services to protect cultural property \textit{in situ} – measures could include drafting laws, establishing museums and other technical institutions, increasing public awareness and developing a national inventory (article 5) – and to activate a system of export certificates to legitimate legal transfer of cultural property (articles 5, 6 and 14). Importing countries are required to implement general measures to prohibit the importation of stolen cultural property whether by individuals or by museums or other institutions (article 7) and must take appropriate steps for the recovery and return of property (article 7(b)(ii)) provided that the requesting State pays compensation to any ‘innocent purchaser’.

The system of reporting to UNESCO under article 16 of the Convention ensures States Parties comply with their undertakings to implement national measures. Each State Party must provide information on the legislative and administrative provisions adopted in an effort to incorporate the Convention into the domestic sphere. However, there is no mechanism to ensure adherence to the system of reporting. Countries which are financially poor are often laden with a significant number of cultural objects. These countries are loot-targeted and would be pressed to record all cultural property.\(^{39}\)


\(^{38}\) Article 8(2)(a)(iv) defines as a war crime, over which the court has jurisdiction ‘Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.

\(^{39}\) Sharon Williams, \textit{The International and National Protection of Movable Cultural Property, A Comparative Study} (1978) 190.
A system of reporting that has proven successful is that under the *Treasure Act 1996* (UK)\(^{40}\) which encourages finders of objects falling within the definition of ‘treasure’ to report finds to the Coroner of the relevant district within fourteen days. Acquisition takes place once an independent Treasure Valuation Committee approves a price. The acquiring museum pays the price to the Department of Culture who then pays it to the finder, deducting any fines incurred if the law has not been complied with.\(^{41}\) Despite this aspect of the Act however, the effectiveness of this and other similar legislation is threatened by continual sales of illicitly excavated items via internet auction sites which escape jurisdictional limits.

One of the most successful measures is the *Convention on Cultural Property Implementation Act, 1983* (CPIA),\(^{42}\) a piece of United States legislation which followed the example set by the 1970 Convention. The CPIA allows US officials, in clear cases of pillage, unilaterally to impose emergency import restrictions on objects at the request of countries of origin which provide a catalogue of objects at risk. The US has received petitions for such a unilateral response in cases of looted material from El-Salvador, Guatemala, Peru and Mali.

Under the CPIA, agreements have been made with Greece (1996), Italy (2001), Bolivia (2001), Canada (renewed in 2001) and Peru (also renewed in 2001) which have facilitated the return of ceramics, artifacts and other objects of cultural significance.\(^{43}\) Such agreements foster international cultural dialogue and are protected by the 1970 Convention under article 15 which states:

> Nothing in this Convention shall prevent States Parties from concluding special agreements among themselves...regarding the restitution of cultural property removed...before the entry into force of this Convention for the States concerned.

The major concern with the national administration of measures to prevent the illicit import and export of cultural property is the failure of art-importing countries to pay any attention to the 1970 Convention and the inability of art-exporting countries (mainly the developing countries) to effectively monitor and enforce their regulations. Other concerns include the non-retrospectivity of the laws (which indicates their inability to deal with property stolen during past centuries) and the short limitation period within which claimants must file an action (in the United Kingdom it is only 6 years).\(^ {44}\)

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Regional Agreements

Regional agreements may have considerable potential to prevent the illicit trade in antiquities and are becoming increasingly used. The International Council of Museums (ICOM) is a leader in instigating regional programs. In 1999 ICOM supported the establishment of AFRICOM, the International Organisation of African Museums. The Asia-Pacific Regional Organisation of ICOM (ASPAC) organized, in partnership with the Vietnam Ministry of Culture and Information, a workshop on the protection of cultural heritage in 2001. Today there appears on ICOM’s website a list of regional organizations carrying out the activities of ICOM. These include ASPAC (Asia & Pacific); CIAO (West Africa); ICOMAC (Central Africa); ICOM-ARAB; ICOM-EUROPE; and LAC (Latin America and Caribbean).

ICOM is not the only instigator of regional operations. Europe has tried collaborating on the protection of cultural heritage since 1969 with the European Convention on the Protection of the Archaeological Heritage. This was replaced in 1992 with the European Convention for the Protection of the Archaeological Heritage of Europe. This Convention requires States Parties to institute a legal system for the protection of archaeological heritage by maintaining an inventory, creating archaeological reserves for the preservation of material which can be studied by later generations and by requiring mandatory reporting of chance discoveries to the relevant authority (article 2).

Another significant regional agreement is the Organization of American States’ Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations which relies on import and export measures.

Codes of Ethics for Museums and Auction Houses

Museums and other collectors of artifacts are the major players in the art and antiquities market and therefore represent one of the largest influences on the illicit trade in these treasures. Until recently their market power had been largely unchecked and the industry had had the freedom to act under its own rules. With the increasing attention being given to institutions displaying unprovenanced antiquities, the need for more stringent regulation is clear.

The pivotal role played by museums in the illicit antiquities trade is recognized in the 1970 Convention. Article 7 requires a State Party to take necessary measures to

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prevent museums within its jurisdiction from acquiring foreign cultural property that has been illegally exported and to inform the state of origin of its whereabouts. This article prohibits the importation of cultural property stolen from a museum or religious/secular monument that is registered in an inventory and States Parties must provide for the recovery and return of such cultural property, with compensation paid to a bona fide purchaser. Under article 8, States Parties are obliged to impose penalties or administrative sanctions on any person exporting or importing stolen property (those objects imported without authorization and certification) and these have included fines, confiscation of objects and cancelling of licences.49

Article 10 requires States Parties to oblige dealers to maintain a register of items in their possession including the origin of the item, a description, the price and the details of the supplier. Failing this, dealers are liable to penalty. A major flaw with the Convention is that it is non-retrospective and it only relates to States Parties.

The 1970 Convention stimulated the hasty development of voluntary ethical standards by professional bodies including museums, archaeologists and dealers. The 1985 United Kingdom Code of Practice for the Control of International Trading in Works of Art50 mirrors the 1970 Convention in requiring subscribers not to import, export or transfer the ownership of property where they have reason to believe that the object does not have good title, or where the exportation of the object was in violation of the country of origin’s laws, or when the object was looted. These standards were mirrored in the UK Museums Association’s 1997 Code of Conduct for People who Work in Museums,51 and the 1996 Society of American Archaeologists’ Principles of Archaeological Ethics.52 Journals such as the American Journal of Archeology also promote such principles. A major impediment to the success of such codes is that actions against breaches are rare.53

Codes of ethics have become increasingly stringent as a result of the realization that museums and their organizations play a significant role in fighting the illicit trafficking of antiquities. Of particular importance is ICOM which plays a central role in tracking stolen antiquities in conjunction with Interpol. ICOM’s Code of Ethics for Museums54 and the UK Museums Association’s Code of Ethics for

51 Code of Conduct for People who Work in Museums, Museums Association (UK) 1997.
53 Skeates, above n 41, 48-52.
54 ICOM Code of Professional Ethics adopted by the 15th General Assembly of ICOM in Buenos Aires, (Argentina) on 4 November 1986. It was amended by the 20th General Assembly in Barcelona (Spain) on 6 July 2001, retitled ICOM Code of Ethics for Museums, and revised by
Museums, both prohibit acquisition of an object that had been illegally exported (in violation of the export laws of the country of origin), regardless of legal title obtained in an intermediary country, or where there was a failure to disclose the find to the relevant authorities. Members are to notify the proper authorities when, upon identification or authentication, they suspect an object to be illegally or illicitly acquired, transferred, imported or exported. Where such circumstances arise and a request has been made for the object’s return, the museum should do everything to ensure it is returned. The same standards are applied to gifts and bequests. However, it has proven much harder to follow ethical guidelines in situations where there are obvious benefits for the museum or when the gift comes from a major benefactor. Even where an acquisition is minor, the codes can potentially be disregarded through the loophole of allowing curators to use their personal judgment when there is no detailed documented history.

With the introduction of a due diligence test, there now exists a positive burden on the acquiring party to make sure that the object has valid title, even where this requires discovery and production procedures. The ICOM Code provides that:

2.2 Valid Title
No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.

2.3 Provenance and Due Diligence
Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item from discovery or production.

In 1999, the UK based Council for the Prevention of Art Theft (CoPAT) issued codes of due diligence aimed at protecting honest dealers and auctioneers by requiring them to maintain a record of the evidence of an object’s history and the means of its first acquisition. This includes, among other things, obtaining the name and address of the vendor and getting them to sign a form identifying the item and its legitimate ownership. If an item is thought stolen, local police should be contacted, registers checked and payment made by a method that leaves a paper trail. Maintaining this standard is costly and time-consuming, but balanced by the financial embarrassment that would result if a mistake were made.

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56 Brodie, Doole and Watson, above n 6, 43-47.
57 Council for the Prevention of Art Theft, a registered UK charity, Stourhead Park, Stourton, Warminster, Wiltshire, BA12 6QD UK.
58 Brodie, Doole and Watson, above n 6, 49 and 51.
New approaches could be developed to ensure that collectors take their role seriously. Individual agreements could be reached as was done between the J Paul Getty Museum and Turkey concerning the return of an unprovenanced sarcophagus. Because a two year investigation could not satisfactorily determine the origin of the object, the Museum was allowed to display it on the proviso that it would be returned if any new evidence proved it was illegally removed from Turkey.59

Other options to encourage documentation and fair trade include:

- removing tax relief given to donors where the item is unprovenanced;
- giving a premium for the purchase of provenanced antiquities; or
- developing the concept of collective ownership of property by indigenous peoples which may result in partnerships with local peoples and inter-museum loans.60 61

Responsibility for ensuring the collection and display of antiquities only with well-documented provenance will and should always fall on the private and public institutions that proclaim themselves the great collectors and protectors of the past.62

Museums are today more than passive collectors of ancient treasures: they have a role to play in educating the public and facilitating communication with the past. Museums are also no longer the sole protector: there are ‘a large and diverse number of people [who] now claim a moral, if not a strictly legal, stake in the material remains of the past’.63

**IV FREE TRADE AND THE GATT EXCEPTION**

Cultural heritage protection relies on national efforts to control the importation and exportation of cultural objects. Unfortunately, regulation of any sort is antithetical to the concept of free trade perpetuated in the GATT.64 GATT is the epitomisation of economic liberalism and the justification for the removal of any barrier to free trade. Yet GATT may do more than support economic rights: it provides looters and the communities that sponsor them with a defensible excuse for their activities. Ironically, the economic reasons which see the black market prosper, does not distribute prosperity evenly: the majority of it ends up in the pockets of middlemen.65

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59 Brodie, Doole and Watson, above n 6, 48 and 54.
60 Brodie, Doole and Watson, above n 6, 48 and 54.
62 Skeates, above n 41, 54.
63 Skeates, above n 41, 54.
65 C Forrest, ‘Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?’ (2003) 34 *Journal of Maritime Law & Commerce* 309, 320. In a study
Wealth generation from non-renewable resources like cultural property occurs more efficiently where the property is managed like an asset, for example by being displayed in local museums and providing a source of income for the whole community through cultural tourism.\textsuperscript{66} Presently, the people who benefit most from the exhibition of artifacts are those whose nations can afford to build museums and galleries to house the objects. It is a "one way trade … Cultural objects … [moving] from south to north, from east to west, from third and fourth worlds to the first …"\textsuperscript{67}

The 1970 Convention attempts to balance the interests of the North and South. But where the interests of art-importing countries lie in maintaining a steady flow of artistic objects across their borders, lax laws will continue to permeate the legal landscape. The odds that successful international litigation will curb the illicit trade, which is prohibitively expensive in any case, are stacked against countries of the South who have the burden to prove when, where, how and from whom an object was stolen, a near impossible task when looters keep no transaction records.

Proponents of free trade will argue that restrictions on the importation of unprovenanced antiquities contravene free market ideology and GATT and, on the face of it, this may be true. The fact that the free market will foster and legitimize the illicit market, perpetuating the current cycle, is regarded as a side effect. This ideological and practical clash resembles that which occurred between GATT and multilateral environmental agreements, where trade restrictions aimed at protecting the environment still came under attack as violating free trade ideals.

Any trade restriction or embargo is a potential violation of GATT, unless it can escape through the loophole created by article XX, in particular, article XX(f) in which GATT recognizes that in certain circumstances trade barriers may be justified to protect cultural property. Two requirements must be met in order to justify the imposition of a trade barrier: the requirements of the chapeau and the requirements of subparagraph (f).

There have not been any reported cases concerning cultural property and the exception in article XX(f). Nonetheless, a direct comparison with trade/environmental cases before the WTO Dispute Settlement Body (DSB) can be made, where the article XX exception (particularly subparagraph (g)) has been used with varying degrees of success when applied to environmental/trade disputes. With the current interpretation given to the article and the few dispute outcomes favouring environmental agreements, it is unlikely that cultural property protection will win when set abreast trade ideals.

\textsuperscript{66} Brodie, Doole and Watson, above n 6, 13-14.
\textsuperscript{67} Brodie, Doole and Watson, above n 6, 12.
The first requirement that must be met is the chapeau of article XX which requires that measures not be applied in a manner which constitutes *arbitrary or unjustifiable discrimination between countries where the same conditions prevail* or *a disguised restriction on international trade*. Relevant considerations include the flexibility of policy objectives, whether extra-territorial pressure is used and whether domestic policy is subject to similar restraints. The current interpretation given to the chapeau would be applied synonymously across all article XX exceptions, including that related to the cultural property. The predominantly environmental cases that have come before the DSB have been successful in elucidating the principles of the chapeau and there would be no need for a re-interpretation.

The second requirement is the satisfaction of the specifics of article XX(f) which states that trade restrictions must have been imposed for the *protection of national treasures of artistic, historic or archaeological value*. This requirement appears somewhat more lenient than the chapeau. There is no qualification as to the measures’ objective. In other exceptions in article XX, measures must *relate to* or be *necessary to* their objectives. The DSB must judicially consider the qualifications (namely, ‘relate to’ or ‘necessary to’) and determine their precise application. Each qualification refers to a distinct degree of connectedness between the measure brought before the DSB and the policy under which such a measure was floated. Thus far, these qualifying terms have been strictly defined, with very few measures escaping invalidation, which would indicate that even a large degree of connectedness is not sufficient to validate a measure restricting trade.

Conversely, sub-article XX(f) adopts a quasi-strict liability standard. It only requires a factual determination as to whether a measure has been imposed. One could assume that this involves a simple consideration of whether the measure is written, codified and formally existing, perhaps as law. Potentially, there would be no need for a judicial determination of whether the measure is justified; the measure would only have to be imposed.

Interestingly, the exception relates to the protection of *national* treasures, rather than treasures important to the cultural heritage of mankind, cementing the sovereignty of each State to designate those treasures worth protecting and the laws required to protect them. It would be unlikely that a court or international body would intrude upon the judgment of national authorities, a proscription known to every international lawyer.

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V LEGAL OWNERSHIP AND THE STRUGGLE BETWEEN RETENTION AND RESTITUTION

The constant quarrel between supporters of retention of cultural property by those who now possess it and supporters of restitution to those from whom it was taken indirectly resonates with the old trade/environment debate. The free trade argument is supported by traditional notions of ownership, which have in turn supported arguments for retention of cultural property where clear legal title can be established. Restitution, on the other hand, discards traditional notions of ownership and requires acknowledgment of a trade which does not comply with national or international laws. Notions of ownership are changing rapidly and, coupled with increasing pressure to return artifacts illegally excavated and exported from their place of origin, the laws on restitution may be gathering steam.

The case of the Icelandic Manuscripts illustrates the difficulties in determining the ownership of cultural heritage, or rather the most correct owner of cultural heritage. The return of these manuscripts by Denmark to Iceland between 1971 and 1997 was the first documented return of a significant cultural item and is noteworthy for several reasons. The initial request for return from the Icelandic people was in the 1830s but the issue reached a climax in 1945 when Iceland obtained constitutional separation from Denmark. The case never involved a legal battle between Iceland and Denmark, but was resolved through diplomacy.70

Despite diplomatic resolution and the absence of legal intervention in this case, questions of legal ownership will always arise where an item has been stolen or taken without permission. The current possessors may have legal title, the historical owner may have never given up legal title and there may be a moral or cultural owner, defined as that entity which should be regarded as the rightful owner by virtue of connectedness with the object.

A Legal ownership and the Laws Supporting Retention

Before the 1899 Hague Convention,71 the general rule governing the acquisition of cultural property was discrepio jis praeae where the victor acquired a legal title over property taken during war. Over time, laws have developed that legitimize legal title when the object changes hands, irrespective of whether it was originally obtained unlawfully. Laws supporting validation of purchaser title include the laws of finds, salvage, treasure trove and sovereignty.72

70 The case is discussed at length in Greenfield, above n 8, 12-41 and it constitutes the full account written in English.
71 Convention with Respect to the Laws and Customs of War on Land, opened for signature 29 July 1899, 32 Stat. 1803, TS No 403, 26 Martens Nouveau Recueil (Ser. 2) 949 (entered into force 4 September 1900).
1 Legal Title to the Bona Fide Purchaser

Many states retain the *lex situs* rule, where an earlier valid title defers to a later title acquired by a good faith (bona fide) purchaser in an overseas country if the application of that country’s law gives the buyer good title. Conversely the International Institute for the Unification of Private Law (UNIDROIT) in its 1995 *Convention on Stolen and Illegally Exported Cultural Objects*\(^{73}\) has confined these bona fide entitlements, making it the obligation of the purchaser to prove due diligence at the time of purchase. Even where proof exists, title is not retained by the bona fide purchaser but they are entitled to reasonable compensation. In other words, the requirement to show bona fide purchase is a necessary prerequisite for compensation should an object be reclaimed. Article 4(4) outlines the elements for due diligence:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

The state of origin is made responsible for the costs of restitution including any compensation payable to good faith purchasers with valid title.\(^{74}\)

2 Legal Title to the State

There are many national legal regimes that claim ownership of all cultural property found or rightfully held within their territory. An example is the old law of Treasure Trove in England, which gave automatic ownership rights to the state, now replaced by the *Treasure Act 1996*.\(^{75}\) The common law concerning wrecks is another example which grants title to the Crown as long as the vessel has been abandoned and no owner has come forward to claim title within a year and a day of finding the wreck. Such claims are supported by the doctrine of state sovereignty and also by the recognition that states have the right to protect their national patrimony.\(^{76}\)

B Changing Notions of Ownership and the Laws Supporting Restitution

Many indigenous peoples, as the traditional custodians of the past, believe that cultural property cannot be owned by a single person or entity but is rather *res*


\(^{74}\) See the 1970 Convention, above n 12, art. 7(b)(ii); *First Protocol to 1954 Hague Convention*, above n 22, arts. I(3) and II; also Palmer, above n 4, 11-12.

\(^{75}\) *Treasure Act 1996* (UK) see above n 40.

\(^{76}\) Skeates, above n 41, 20; Palmer, above n 4, 113; Tay, above n 72, 113.
communis (property belonging to everyone) or res nullius (property belonging to no one). An object’s significance lies in its representation of identity: although it may not have been created by or for the people whose identity it describes, it may nevertheless constitute an important documentary record of their history and represent continuity of identity with the past.77

Changing conceptions about title mirror the evolution of values surrounding cultural property itself. After centuries of sanctioned plunder, the French Revolution brought about an appreciation of values, other than economic, in cultural property. Later, the Napoleonic Civil Code provided protection for cultural property, in the interests of the public, which had historic, artistic and scientific value and this was codified in 1887. Today, in France, once an object is registered as cultural property, it is forbidden to sell it abroad.78

1 Tracing the Original Owner and Bona Fide Purchasers

Conflicting national laws and the lack of an international regime governing legal ownership of cultural property, prevent the effective resolution of legal title where more than one entity claims ownership. Where an object is stolen in one country, exported illegally and passes through an intermediary country which does not check provenance, it may be on-sold in a third country to a bona fide purchaser who cannot find any trace of its origin. Here, the original owner in the state of origin never gave up legal title and his or her interests are protected by the laws of that country, even upon illegal exportation. But title also rests with a bona fide purchaser under a different set of laws in the third country. At any one time more than one entity can be recognized as holding valid legal title under different national laws.79

Many states use blanket claims to add strength to a case for ownership, through legislation which declares the state as being the owner of all antiquities found within its borders after a specified date. Countries which have such a blanket claim include Malaysia, New Zealand, Belize, Greece, Iceland, Italy, Turkey and Tanzania. Such claims may be considered state interference in private law, but perhaps this is necessary in cases concerning cultural heritage.80

Technological progress means that the origin-state can, today, be determined more readily. The origin-state can be traced using the property law concept of equitable tracing where title is checked against the current holder of title. A statutory duty to report finds of value to the police to assist in the tracing process could be a

77 See generally Greenfield, above n 8, 255 and 296.
78 Tay, above n 72, 114-5.
80 Ibid 77-78; Tay, above n 72, 115.
beneficial counterpart to this process. Origin-state may also be proven through the use of photographic evidence (as it was in Attorney-General of New Zealand v Ortiz), oral testimony, or scientific analysis, for example see Union of India v Bumper Development Corporation Ltd, which tested brick fragments, soil colour and termite runs. Experts in metallurgy, statistical analysis, soil analysis and even termite workings also may be useful, as they were in Republic of Cyprus and Autocephalous Greek Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts, Inc. These kinds of evidence are the most certain ways of adding strength to a claim for ownership.

Technology has also thrown up sophisticated databases which act as surveillance systems. One such system, which surveys the auction market, is Thesaurus, developed in the United Kingdom. Inexpensive and yet powerful, it scans every auction sale catalogue in the UK as it is published and compares those items offered for sale with the Word Profiles documenting stolen property. This is vital in combating the illicit trade where the easiest way of laundering stolen cultural property is through a system of public auctions where title changes hands quickly.

Other databases trace stolen and missing artifacts while still others maintain a register of stolen antiquities. The latter include databases such as those of Interpol and the Art Loss Register, which must be actively checked by both dealers and buyers for the provenance of the item they are dealing in. These databases have reduced the validity of the doctrine caveat emptor where the purchaser is immune from liability if they make a purchase in good faith. This legal principle no longer provides blanket immunity to dealers and buyers, which is another contributor in fighting the illicit trade.

Sometimes, where the origin-state cannot be definitely determined, the object may remain in the place of acquisition. This happened with the Sevso Treasure which was left in the hands of the acquirer, the Marquis of Northampton who did not have legal title, after the Court failed to decide whether the Treasure was part of the heritage of Croatia or of Hungary.

It is to be hoped that solving the quandary as to who holds legal title will be replaced in the future by the question of who should be regarded as the owner, based on cultural, moral and historical grounds. Creative thinking may even devise a system which recognizes multiple owners where an object is important to the identities of several groups and therefore must be shared amongst them.

81 Statutory reporting duty currently exists in Australia: see Tay, above n 72, 111.
82 (1983) 2 All ER 98 (English case).
83 [1995] 7 WWR 80 (Canadian case).
84 (1989) 771 F Supp 1374; (1990) 917 F 2d 278 (7th Cir).
85 O’Keefe, above n 79, 74; Palmer, above n 4, 13.
89 Skeates, above n 41, 54.
2 Laws of Restitution

The transfer of cultural property may be necessary in situations of political or religious turmoil to protect the object from harm. Where special protection is needed, any object being transported is immune from seizure under the 1954 Hague Convention, article 14. However, this does not entitle the country of ‘salvage’ to retain legal possession beyond the period of conflict.

Both the return of cultural items and the prohibition of their retention as war reparations are stipulated under the First Protocol to the Hague Convention. The 1970 Convention was the first Convention that formally adopted restitution as a doctrine that carried legal responsibility. Under that Convention (articles 7 and 13(b)), States Parties are not only responsible for the recovery of stolen cultural artifacts but also their return to the origin-state. If stolen property is returned, compensation is to be given to a bona fide purchaser but only one who has exercised due diligence. Stipulated as an obligation in article 15 of the 1970 Convention, many bilateral and regional agreements that address restitution have been concluded between states. Early examples include the Treaty of Vienna of 1815, the 1970 United States-Mexico Treaty, and the 1954 European Cultural Convention.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is the most important of the international covenants which provides a procedure for restitution of stolen objects, or those deemed stolen. Article 3 provides that

any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft’ (article 3 (3)).

This fifty year period can be extended ad infinitum where the object is an integral part of an identified monument or archaeological site or belongs to a public collection (article 3 (4)) or can be extended to 75 years by domestic legislation

90 Williams, above n 39, Forward by Baxter.
92 Treaty of Vienna, 1815, UNESCO Doc. SHC/MD/3, 8.
(article 3 (5)). Article 4 provides that the possessor of a stolen item shall be required to return it but is entitled to fair and reasonable compensation provided that ‘the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object’ (article 4 (1)). The elements of due diligence are outlined in article 4 (4), quoted above, which makes it clear that the UNIDROIT Convention favours the return of cultural material over the protection of a bona fide purchaser.96

Finally, political avenues should always be considered as a way of achieving mutually satisfactory return over a period of time because diplomacy does not pivot on the admission of wrongdoing by any party.97 An international committee, associated with or operating under the auspices of ICOM and consisting of international experts on archaeology, anthropology, curatorship and conservation, could determine whether cultural objects should be returned. Considerations could include:

- local and contextual significance;
- legality of removal from place of origin;
- care with which an item is being treated in its current place including display efforts;
- the association or identification of a group of peoples with the object whether national or cultural;
- the laws of the country which holds the item;
- public opinion.98

VI CONCLUSION

Despite the increasing willingness with which States participate in diplomatic dialogue regarding cultural property and despite growing appreciation by museums and private collectors of their role in fostering the illicit trade in antiquities, the current and stagnant international framework suffers from too many drawbacks to be effective. International cultural property law suffers from non-retrospectivity, short limitation periods within which to make a claim and weak national implementation. The GATT provides States with a legitimate excuse to advocate for trade rights rather than to adhere to cultural heritage obligations.

It appears that the historical practice of dividing and conquering remains with us today. The idea that exotic objects may be taken from their homeland by treasure seekers and sold to extravagant entrepreneurs with a taste for the finer creations of the world represents an ideology that still delights in the spoils and ruins of others – it makes one wonder whether we really went through the Enlightenment.

96 Prott, above n 27, 62.
97 Palmer, above n 4, 6.
98 These were adapted from the arguments for and against the restitution of the Elgin marbles: see Greenfield, above n 8, 297.
Nevertheless, support for restitution is increasing, as demonstrated by the increased use of a strict standard of due diligence in both international and national codes of conduct. This may yet save the historical and cultural importance of our many cultural wonders.