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ARTICLES

Cultural Property Internationalism

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Abstract: Cultural property internationalism is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives. This article describes its historical development and its expression in the international law of war, in the work of UNESCO, and in the international trade in cultural objects and assesses the ways in which cultural-property world actors support or resist the implications of cultural property internationalism.

"Cultural property internationalism" is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property,[1] wherever it is situated, from whatever cultural or geographic source it derives. In the frequently quoted words of the 1954 Hague Convention, cultural property is "the cultural heritage of all mankind."[2] In an earlier article[3] I briefly described and contrasted "cultural internationalism" and "cultural nationalism," as they concern cultural property. Here I return to cultural property internationalism, describing its historical development and its expression in the international law of war, in the work of UNESCO, and in the international trade in cultural objects.

What is "cultural property?" It sometimes seems that any human artifact (matchbook covers? baseball cards? fruit box labels? perfume bottles?) can qualify.[4] Most people, however, will discriminate, reserving the "cultural property" title for a more limited range of objects that are distinguishable from the ordinary run of artifacts by their special cultural significance and/or rarity. Any attempt at a definition will reveal that the cultural property category is heterogeneous. The problems created by including Matisse paintings, archaic Chinese bronzes, and African masks in the same "cultural property" category are not pursued here, although such disparities clearly must, at some level, eventually require distinctive treatment. As cultural property law and

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policy are currently structured, however, that process has barely begun. The UNESCO instruments described later in this article, for example, typically define "cultural property" to include anything and everything and treat the category as a collective unit. Much source nation legislation is similarly structured. Most recently, a practical distinction between antiquities and other cultural objects seems to have emerged.[5]

The cultural property category is also amorphous and boundless. Thus the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*[6] applies to objects "which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science [what else is there?] and belong to one of the categories listed in the Annex to this Convention."[7]

Empirically, cultural property centrally includes the sorts of things that dealers deal in, collectors collect, and museums acquire and display: principally works of art, antiquities, and ethnographic objects. These are the foci of a social subsystem we can call "the cultural property world," which is populated by artists, collectors, dealers and auction houses, museums and their professionals, art historians, archaeologists and ethnographers, and source nation cultural officials, among others. These people and institutions form a kind of ecology; whatever significantly affects one actor affects the others.

The cultural property world is international. Ethnographic museums in London and Berlin maintain extensive collections of African, Oceanic, and American objects. The Metropolitan Museum mounts a Vermeer exhibition from a variety of foreign and domestic lenders and its own collections. Japanese dealers attend New York and London auctions to bid on works by French impressionists and German expressionists. Swiss dealers offer Greek and Roman antiquities in widely distributed illustrated catalogs. American collectors build important art and antiquity collections of works from Europe, Africa, East and South Asia, the Middle East, and Latin America. The works of American artists are acquired by Dutch museums and German collectors. In this empirical sense, cultural property internationalism is not an argument or a hypothesis; it is an observable fact.[8]

No thinking person argues for free trade in cultural property. Regulation is necessary in order to preserve cultural property and to support its proper international circulation. Appropriate regulation serves the international interest of "all mankind" in the preservation and enjoyment of its "cultural heritage." Excessive regulation, however, thwarts that same international interest. Regrettably but predictably, the various cultural-property world actors do not always agree on whether a restriction is or is not "excessive." The international cultural property world is divided along this and other dimensions. I address these divisions, with particular emphasis on their implications for cultural internationalism, at a number of points in this article.

In my view, source nation regulations preserve the cultural heritage when and to the extent that they protect fragile objects that are likely to be damaged or destroyed by movement and when they prevent the dismemberment of complex objects, like the panels of an altarpiece or the components of a sculptural group. When antiqui-

ties are removed from their contexts in order to preserve, study, and enjoy them, archaeologists rightly urge and source nations rightly require that the removal be done with care and that it be accompanied by full documentation. It seems right that objects of ritual/religious importance to living cultures remain with or be returned to the representatives of those cultures, as were the Afo-a-Kom[9] and, under NAGPRA,[10] American Indian artifacts. And finally, it is internationally important that the inhabitants of every nation, including the poorest survivors of colonial exploitation, have access to a fully representative collection of objects that represent their history and culture.

We begin with the history of the idea that cultural property should be protected from destruction and plunder in war.

CULTURAL PROPERTY AND WAR

Classical international law placed few restraints on the destruction or plunder of enemy property, cultural or other. Our history of the topic begins with Polybius of Athens, writing before 146 B.C.:

> One may perhaps have some reason for amassing gold and silver; in fact, it would be impossible to attain universal dominion without appropriating these resources from other peoples, in order to weaken them. In the case of every other form of wealth, however, it is more glorious to leave it where it was, together with the envy it inspired, and to base our nation's glory, not on the abundance and beauty of its paintings and statues, but on its sober customs and noble sentiments. Moreover, I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country.[11]

As a historian, Polybius is here making an argument ("it is more glorious") and expressing a wish ("I hope that") and does not suggest that his proposition is in any sense law. His wish was not soon fulfilled. In the reigning pattern of conquest established by the Romans, victors appropriated works of art and other cultural treasures from conquered peoples as trophies of war, to be displayed in triumphal marches and installed in the Roman Forum. The Forum became the world's first great outdoor museum, adorned with works whose presence affirmed Roman military power and illustrated its conquests. The Roman style was revived by the Venetians and other Italian powers during the Crusades and the Renaissance.

The legal status of cultural property in war began to change in the seventeenth century with Grotius, who summarized the weight of received legal opinion and international practice from antiquity up to his time in this way:

> That it is not contrary to nature to despoil him whom it is honorable to kill, was said by Cicero. Therefore it is not strange that the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted.[12]

While accepting that this harsh rule was law, Grotius argued for its moderation. In a particularly pertinent passage, he proposed that sacred or artistic works should not be destroyed where there is no military advantage in doing so, citing Polybius, Marcellus and Cicero:

> Polybius says it is a sign of an infuriated mind to destroy those things which, if destroyed, do not weaken the enemy nor bring gain to the one who destroys them: such things are temples, colonnades, statues and the like. Marcellus, whom Cicero praises, spared all the buildings of Syracuse, public and private, sacred and profane, just as if he had come with his army to defend them, not to capture them.[13]

Grotius, a natural lawyer, is here employing general philosophical principles of moderation and proportion: destruction that neither weakens the enemy nor helps the destroyer is immoderate and disproportionate. Grotius appears to deplore the violation of these principles, rather than the resulting loss of cultural property.

Two centuries later Vattel provided a more robust argument for the protection of works of art and architecture in time of war:

> For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, and do not contribute to the enemy's strength—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste; and in that light Belisarius represented the matter to Tittila, King of the Goths. We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.[14]

Here we see what may have been the earliest expression of true cultural property internationalism: Vattel argues that cultural property should be spared in the interests of "mankind" and "human society," and he broadens the basis for protection to include aesthetics ("works of remarkable beauty"). Like Grotius, Vattel recognizes the primacy of military necessity but he also draws a distinction between necessity and mere convenience:

> Nobody presumes to blame a general who lays waste gardens, vineyards, or orchards, for the purpose of encamping on the ground, and throwing up an entrenchment. If any beautiful production of art be thereby destroyed, it is an accident, an unhappy consequence of the war; and the general will not be blamed, except in those cases when he might have pitched his camp elsewhere without the smallest inconvenience to himself.[15]

We will return to military necessity below.

A major development in the history of cultural property internationalism took form as a reaction against Napoléon's appropriation of works of art for the Musée Français (later to become the Louvre) during his first Italian Campaign in 1796–99. The planning for this extended plundering enterprise began in Paris, where "as early as October 16, 1794, the Commission temporaire des arts had appointed a subcom-

mittee of four members to compile full information concerning works of art and science to be found in countries which the republican armies were expected to invade."[16] Accompanied by commissioners armed with these lists, Napoléon exacted huge concessions of works of art from the Italians, formalizing some of them as "reparations" in the terms of armistice treaties imposed on the losers. Thus the Duke of Modena surrendered forty-nine pictures; Parma another forty-seven; Milan twenty-five; Venice its famous bronze horses, the lion from St. Mark's, sixteen pictures and other treasures; and so it went. The list is long, and at one time Napoléon boasted that "We have stripped Italy of everything of artistic worth, with the exception of a few objects in Turin and Naples!"[17]

The French plunder of Italian art excited strong feelings. Poets declaimed and intellectuals argued. Some emphasized the benefit to a larger public of mounting and publicly displaying so great a concentration of important works of art that had formerly been widely dispersed, often among private holders, and visible only to the few. The French defended their behavior on a variety of grounds: compensation for the blood and toil of French soldiers; the cultural superiority of France, which made it only right that great art be brought and kept there; if France did not "give a home" to Italian cultural treasures they would be acquired by England or the Tsar through purchase; they had been ceded to France in treaties and they were now legally French; and so on. Others referred to the French actions as those of "a band of practiced robbers" and "hordes of thieves."[18]

Among the French intellectuals who opposed the plunder of Italy's art was Quatremère de Quincy, whose published protest in the form of letters addressed to one of Napoléon's generals, *Letters to Miranda*, contained the following passages (my translation):

> [I]n Europe the arts and sciences form a republic whose members, joined by the love of and quest for truth and beauty, tend less to isolate themselves in their respective nations than to pursue their interests from the point of view of a universal fraternity. . . . [T]he arts and sciences belong to all of Europe and are no longer the exclusive property of any nation. . . . [I]t is as a member of that general republic of arts and sciences, and not as an inhabitant of this or that nation, that I will discuss the interest that all parties have in the conservation of all. What is that interest? It is that of civilization, of perfection of the means of welfare and pleasure, of the advancement and progress of education and thought, of amelioration of the human condition. Everything that could contribute to this end belongs to all peoples; no one has the right to dispose arbitrarily of it.[19]

The cited volume also sets out two contemporary petitions addressed to the Directoire.[20] One, dated 16 August 1796, "supporting the theses of Quatremère de Quincy" and signed by fifty artists, requested that before removing works of art from Rome a commission composed of artists and men of letters be appointed by the National Institute to prepare a report on the topic. The other, dated 30 October of the same year and signed by thirty-nine artists "to support the seizure of works of art in Italy," spoke aggressively throughout of "the honor, the glory of the French name."

There is no evidence that Quatremère de Quincy's plea had any restraining effect on the French forces in Italy, but it may have influenced the decision of an English judge in an 1813 prize case, *The Marquis de Somerueles*.[21] The case is unusually interesting for two main reasons: it appears to be the earliest reported judicial decision to treat works of art as cultural property excepted from ordinary rules of the law of war, and the opinion provides a rare and eloquent judicial statement of cultural property internationalism.

The case arose during the War of 1812 between the United States and England. An American merchant vessel carrying a shipment of paintings and prints bound from Italy to the Pennsylvania Academy of the Fine Arts in Philadelphia was seized by a British ship and taken to the British Court of Vice-Admiralty in Halifax, Nova Scotia, for judgment as prize. A petition from the Academy, pleading that "even war does not leave science and art unprotected," asked that the paintings and prints be released, and the judge, Dr. Croke,[22] so ordered, stating that:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.

The similarities to Quatremère de Quincy's language are striking. His book would likely have been known to a cosmopolitan English civilian, and Dr. Croke would have found the book's argument to be congenial, if only because, in opposing Napoléon's actions, it supported the British side in the conflict with France. It seems probable that Quatremère de Quincy is Dr. Croke's immediate source for his statement of the law of nations.

There is, however, a more fundamental source for that statement in the humane component of later Enlightenment and natural law thought about the law of war,[23] of which Vattel and Quatremère de Quincy provide examples. The ideal of restraints on belligerent behavior in order to protect art and science for humanity was in the air breathed by cosmopolitan Europeans in the latter half of the eighteenth century. Dr. Croke's opinion contains substantial internal evidence of this kind of thinking,[24] to which he was attuned by his civilian education and outlook.[25] Passages in his opinion clearly reflect the conflict between the humane internationalist ideal to which he appealed and the nationalist glorification of military campaigns that the French under Bonaparte (that "foreign despot") had embraced. The conflict persists today in the international law of cultural property.[26]

American writers in the first half of the nineteenth century took a narrower and less internationalist view than the Europeans. Thus Wheaton, writing in 1836, neither refers to nor displays awareness of the *Letters to Miranda* or Dr. Croke's opinion in *The Marquis de Somerueles*. His discussion of the law concerning enemy cultural property is briefer and less nuanced than Vattel's:

> By the ancient law of nations, even what were called *res sacrae* were not exempt from capture and confiscation.... But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.[27]

Wheaton's basis for this relaxation of the ancient rule was, like that of Grotius, the application of natural law principles of moderation and proportion: the "principle of international law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities."[28] Wheaton makes no reference to a general interest of mankind in the preservation and enjoyment of cultural property.

Halleck, writing on the eve of the American Civil War, also displayed no awareness of Quatremère de Quincy or Dr. Croke. Unlike Wheaton, however, he distinguished destruction from plunder and immovables from movables:

> No belligerent would be justifiable in destroying temples, tombs, statutes [*sic*], paintings, or other works of art (except so far as their destruction may be the accidental or necessary result of military operations.) But, may he not seize and appropriate to his own use such works of genius and taste as belong to the hostile state, and are of a moveable character? This was done by the French armies in the wars of conquest which followed the revolution of 1789. . . . The acquisitions of the Parisian galleries and museums from the conquest of Italy, were generally obtained by means of treaty stipulations, or forced contributions levied by Napoleon on the Italian princes.[29]

Halleck recognized that opinions differed on the legal effect of such forced treaty stipulations, but his discussion shows that he clearly favored the view that they were binding.

In July 1862, when the same Halleck became General-in-Chief of the Union Armies in the American Civil War, the stage was set for the next development. Francis Lieber, a German emigré who was a professor at Columbia College, had earlier collaborated with Halleck in an effort to define guerilla warfare. At Halleck's request, Lieber now prepared a proposed code of conduct for the Union forces. Issued as General Orders No. 100 on April 24, 1863, these *Instructions for the Governance of Armies of the United States in the Field*, later known as the *Lieber Code*,[30] contained 157 articles. The provisions on protection of cultural property appear in articles 34–36:

> 34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31 [authorizing seizure of enemy public property]; but it may be taxed or used when the public service may require it.
>
> 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured

> against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
>
> 36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

The *Lieber Code* was one of the earliest attempts to state a comprehensive body of principles to govern the conduct of belligerents in enemy territory. It was widely admired as an enlightened and humane document, was frequently copied in Europe, and provided the template for modern international conventions on the law of war. The influence of the *Lieber Code's* treatment of cultural property can be traced through Article 8 of the *Declaration of Brussels* (1874)[31]; Article 56 of the Institute of International Law's *Manual of the Laws and Customs of War* (1880)[32]; Article 56 of the "*Regulations Respecting the Laws and customs of War on Land*" under Hague II (1907)[33]; article 56 of the corresponding Regulations under Hague IV (1907)[34]; Article 5 of the *Convention Concerning Bombardment by Naval Forces in Time of War* of October 8, 1907 (Hague IX)[35]; Articles XXV and XXVI of the *Hague Rules of Air Warfare* (1922)[36]; and other international instruments, culminating in the 1954 Hague Convention, which is discussed below.

As World War II approached, the *Roerich Pact*,[37] promulgated by the Organization of American States at its meeting in Washington, D.C. in 1935, was the first multinational convention entirely devoted to the protection of cultural property in war. Most American states, including the United States, became members. It stated:

> Article 1. The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents. The same respect and protection shall be due to the personnel of the institutions mentioned above. The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.

The *Roerich Pact* was limited to the Western hemisphere, protected only immovable cultural properties and "institutions," lacked essential details and, although still in force, is in practice a dead letter.

Following the signature of the *Roerich Pact*, attempts were undertaken to draft a more comprehensive convention for the protection of monuments and works of art in time of war. In 1939, a *Preliminary Draft International Convention for the Protection of Monuments and Works of Art in Time of War*,[38] elaborated under the auspices of the League of Nations International Museums Office, was presented to governments by the Netherlands, but it was an early casualty of the outbreak of World War II.

During World War II the German Nazis engaged in a highly organized campaign of art plunder. The operation was placed in the hands of a "special unit" (*Ein-*

satzstab) directed by Alfred Rosenberg, a high Nazi official. The *Einsatzstab Reichsleiter Rosenberg* was separate from the German military and uninhibited by the military's traditional policy against looting. As the German armies invaded and occupied other nations, the *Einsatzstab* seized the property of Jews and great quantities of other works that Nazi party officials, principally Hitler and Goering, directed to be seized. The quantity of art taken and shipped to Germany was enormous. Rosenberg produced an illustrated catalog of 39 volumes, with about 2,500 photographs of works seized. If the entire body of loot had been photographed and catalogued it would have run to about 300 volumes. The similarities and contrasts with Napoléon's Italian campaign are a tempting topic that cannot be pursued here.[39]

On August 8, 1945 the victorious Allied Powers signed the agreement constituting the Allied Military Tribunal and ordering the Nuremberg trials of major Nazi officials. At Nuremberg, Rosenberg was charged with multiple crimes against peace, war crimes, and crimes against humanity. Among the war crimes charged was "looting and plundering of works of art." Rosenberg was found guilty of this and other charges and was hanged.[40]

A new proposal for an international convention was submitted to UNESCO by the Netherlands in 1948. UNESCO convened a committee of government experts to draft a convention in 1951, and an intergovernmental conference of 56 nations held at The Hague adopted the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*[41] on 14 May 1954. Although the United States has not become a party, Hague 1954 has been widely adopted by other nations (105 as of March, 2003) and represents the reigning international consensus about the protection of cultural property from destruction and plunder in war.

In addition to the powerful statement of cultural property internationalism in its Preamble that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world," the Convention contains the following interesting provision in Article 29:

> The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

This post-Nuremberg language is itself an extraordinary expression of cultural property internationalism. States by becoming Parties acquire jurisdiction to try as crimes breaches of the Convention committed by individuals anywhere whose States may or may not be Parties.

The widespread adoption of Hague 1954 assured a prominent place for cultural property internationalism in the law of war, but changes in weapons and modes of warfare since the 1940s and the resulting new threats to cultural property led to concern about its adequacy. This concern became more general during the early 1990s, particularly during the Gulf War and the wars in the former Yugoslavia. Largely

stimulated (again) by the government of the Netherlands, a series of studies, meetings of experts, and meetings of governmental representatives that began in 1991 eventually led to the diplomatic conference in The Hague in March, 1999, that adopted the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*.[42] The protocol increases cultural property protections and establishes a Secretariat to administer the Convention's terms.

All of the authorities and conventions so far mentioned, with the sole exception of the *Roerich Pact*, include a significant concession to nationalism: the doctrine of "military necessity." As stated in Articles 14-15 of the *Lieber Code*:

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the end of war, and which are lawful according to the modern law and usages of war. . . . Military necessity . . . allows of all destruction of property. . . .

Hague 1954 is not greatly different. Article 4(2) provides that the obligation to respect cultural property "may be waived . . . in cases where military necessity imperatively requires such a waiver." Article 6a of the Second Protocol to Hague 1954 retains but limits and clarifies the military necessity waiver.[43]

The exception for military necessity, whose origin has been attributed to Prussian militarism—"*La célèbre conception prussienne de la Kriegsraison*"[44]—was strongly debated at the diplomatic conference that produced Hague 1954 and was retained by a divided vote. Nahlik describes the debates and says that the United States, Great Britain, and Turkey insisted on including an exception for military necessity, while the USSR, Romania, Greece, Belgium, Ecuador, and Spain argued that such an exception was "incompatible with the spirit and essential principles of the Convention." It is ironic that the United States, which argued that it could not ratify the Convention if it did not contain the military necessity clause, thus compelling its inclusion, has never become a party to Hague 1954.[45]

It is not entirely clear when the international interest in protecting cultural property from the hazards of war began to expand into a more general cultural property internationalism. We do know that by 1945, when UNESCO was created, that evolution was well advanced and, in its expanded form, was expressly incorporated into UNESCO's cultural property competence, as the following discussion demonstrates.

UNESCO

A United Nations Conference for the establishment of an educational and cultural organization convened in London in November 1945, attended by the representatives of forty-four countries. Led by France and the United Kingdom, the delegates hoped to create an organization that would embody a genuine culture of peace. In their eyes, the new organization should establish the "intellectual and moral solidarity of mankind" and, in so doing, help to prevent the outbreak of another world

war. The Constitution of UNESCO was signed on 16 November 1945. As of October 2003, UNESCO had 190 Member States and 6 Associate Members.

Cultural internationalism obviously is basic to UNESCO's existence and legitimacy. The preamble to its Constitution speaks of "the history of mankind," "peoples of the world," "the diffusion of culture" and "the education of mankind," and Article 1 states that:

> The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

Achievement of these internationalist objectives, however, is limited by a domestic jurisdiction clause, which also appears in Article 1:

> With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States members of this Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction.[46]

As a result, UNESCO's cultural sector activities display a familiar kind of interplay between group and member interests whose results are ultimately embodied in UNESCO conventions and recommendations.

Article 1(2)(c) of the UNESCO Constitution states the organization's cultural property competence: 1) conservation and protection; 2) recommending international conventions; and 3) encouraging international exchange. "Conservation and protection" is a simple but important logical expansion of the protection of cultural property during war: whether in war or at peace, cultural property should be preserved against damage or destruction. The third commitment, to encouragement of the international exchange of cultural property, has been variously interpreted, as will appear below. UNESCO's pursuance of the second activity is amply demonstrated in the legal instruments it has produced,[47] to the most important of which we will turn below.

Something important seems to be missing from the language of Article 1(2)(c). I have argued elsewhere[48] for a related triad of regulatory imperatives. The most basic is preservation: protecting the object and its context from impairment. Next comes the quest for knowledge, for valid information about the human past, for the historical, scientific, cultural, and aesthetic truth that the object and its context can provide. Finally we want the object to be optimally accessible to scholars for study and to the public for education and enjoyment. This triad may be summed up as "preservation, truth, and access." The addition of "truth" adds meaning and weight to "preservation" and "access."

As to "recommending international conventions," the 1954 Hague Convention, which we have already seen, is one such instrument. Like it, the others assume, and usually contain language invoking, the international interest in cultural property.

They significantly differ, however, in the ways in which they characterize and pursue that interest, as the following brief examination of some particularly relevant UNESCO instruments shows.

UNESCO 1970. We begin with the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*,[49] under which, in Article 7(a), States Parties agree to enforce each others' cultural property export controls and related legislation. The Preamble, however, consistently with the UNESCO Constitution's commitment to encouraging the international "interchange" of cultural property, states that:

> the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations

The answer to any apparent inconsistency between promoting international interchange and enforcing national export controls appears to be obvious: UNESCO 1970s provisions are aimed only at "illicit" exports; "licit" exports are not a problem. That distinction, however, requires us to look more closely at the Convention and the meaning of "licit."

The Convention defines "cultural property" in Articles 1 and 4 as, in effect, anything that the authorities of a State so designate, and it provides in Article 3 that "The import, export or transfer of ownership of cultural property" without a certificate, described in Article 6, "shall be illicit." Thus, for example, the export of van Gogh and Matisse paintings by their Italian owners without certificates (which were denied) would be "illicit." The same would be true of an Italian collector's export of Adolf Hitler water colors of Austrian scenes and exports by French owners of a Yuan vase, a collection of Italian drawings, and a painting by a Swiss artist of a Swiss scene painted in Switzerland, for all of which export certificates were denied.

Skeptics might conclude that this Convention, in the name of cultural property internationalism, actually supports a strong form of cultural property nationalism. It imposes no discipline on a State's definition of the cultural property that may not be exported without permission. It leaves States free to make their own self-interested decisions about whether or not to grant or deny export permission in specific cases. The only likely applicants for such permission are, in the words of Article 5(e), "curators, collectors, antique dealers, etc." who have little voice in such decision-making. In this way, the Convention condones and supports the widespread practice of over-retention or, less politely, hoarding of cultural property. To some skeptical eyes, this does not look much like encouragement of international exchange. The problems created by the notorious practice of overretention are explored elsewhere.[50]

The 1976 Recommendation. UNESCO's 1976 *Recommendation Concerning the International Exchange of Cultural Property*,[51] on the contrary, encourages cultural property exchanges and recommends measures for regularizing and securing such transactions. One might suppose that this support would extend to circulation

through market transactions, which are the principal medium for the international circulation of goods of all kinds. The Recommendation, however, while supporting the international *exchange* of cultural property, opposes international *trade*, stating that:

> the international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.

This curious statement, exuding disapproval of the market, calls buyers and sellers of cultural objects "self-seeking parties" and the normal human tendency to base present action on assumptions about the future "speculation." It advances the economically naive supposition that speculation "causes" the prices of works of art and other cultural objects to rise, although it seems clear that "speculation," to the extent that it can "cause" price behavior at all, can just as easily "cause" prices to fall.

Constricting the licit supply of cultural objects would appear to most knowledgeable people to be a more effective way to cause prices to rise and to encourage the spread of illicit trading. That is of course what excessive source nation export controls and their enforcement under the 1970 UNESCO Convention combine to do. As to "poorer countries," many of which are source nations, the orderly marketing of surplus cultural objects could *pro tanto* displace the black market, while providing a significant source of income to the source nation and its citizens. That major source nations typically hoard stocks of marketable surplus objects is confirmed by another paragraph in the *Recommendation*'s Preamble:

> Many cultural institutions, whatever their financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and … some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries.[52]

It hardly needs to be said that such objects would also be welcomed to the licit international market by museums, collectors and the art trade.

The *Recommendation*, however, does not say it. Instead, it rejects the market and relies exclusively on interinstitutional (government to government and museum to museum) exchanges as the medium through which to promote enrichment of cultures and mutual understanding and appreciation among nations. Such exchanges are a valuable tool of museum collections management. They are, however, a form of barter, with all of barter's considerable limitations. The market is a much more efficient and productive mechanism for the international circulation of cultural property, and to exclude it seems misguided. In its exclusion of market transactions this Recommendation appears to discourage, rather than encourage, the interchange of cultural property.

In its exclusive preference for interinstitutional and inter-governmental exchanges, the *Recommendation* contemplates a cultural property world that is populated solely by governments and "institutions":[53]

> "International exchange" shall be taken to mean any transfer of ownership, use or custody of cultural property between States or cultural institutions in different countries—whether it takes the form of the loan, deposit, sale or donation of such property—carried out under such conditions as may be agreed between the parties concerned.

Under this interpretation of "international exchange," there is no place for private collectors or an active art trade and no scope for a licit market. There is no recognition of the historic roles of collectors and dealers in supporting artists and promoting their work; in building private collections that ultimately enrich museums; and in pioneering the collection of objects that eventually are recognized for their cultural importance. Nor is there any recognition of the utility of the market as an efficient transactional arena and a provider of price indicators of value.

The 1978 Recommendation for the Protection of Movable Cultural Property.[54] This Recommendation is unusual in that it recognizes the existence of collectors, dealers, and other international market participants, but only to express concern about the safety of cultural objects in their hands. It warns States that growing public interest in cultural property has led to "an increase in all the dangers to which cultural property is exposed as a result of particularly easy access or inadequate protection, the risks inherent in transport, and the recrudescence, in some countries, of clandestine excavations, thefts, illicit traffic and acts of vandalism," and counsels that:

> The growing perils which threaten the movable cultural heritage should incite all those responsible for protecting it, in whatever capacity, to play their part: staff of national and local administrations in charge of safeguarding cultural property, administrators and curators of museums and similar institutions, private owners and those responsible for religious buildings, art and antique dealers, security experts, services responsible for the suppression of crime, customs officials and the other public authorities involved.

In Articles 11-24, in language sometimes reminiscent of Polonius, the Recommendation provides a set of admonitions about protective measures, including in Articles 14 and 15 those that should be taken to protect cultural objects in private hands. In no provision does this Recommendation indicate approval of dealers, collectors, or the market.

The 2001 UNESCO Convention on Protection of the Underwater Cultural Heritage.[55] This Convention provides that States Parties shall preserve underwater cultural heritage *in situ* "for the benefit of humanity in conformity with the provisions of this Convention." Underwater cultural heritage is defined as:

> all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically

> or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

The Convention demonstrates that UNESCO's antimarket bias has grown stronger since promulgation of the 1976 Recommendation, discussed above. Article 2 (7) of the Convention states in its entirety:

> Underwater cultural heritage shall not be commercially exploited.

This breathtaking provision is elucidated in Rule 2 of the *Rules concerning the activities directed at underwater cultural heritage* annexed to the Convention:

> The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

The statement that market transactions are "fundamentally incompatible with the protection and proper management of underwater cultural heritage" expresses a position that, as we shall see below, is broadly embraced by the archaeological establishment in the United Kingdom and the United States.

As of September 2004, the Convention, which requires 20 adoptions to enter into force, had been ratified only by Panama (5/20/03) and Bulgaria (6/10/03). This apparently unenthusiastic reception may demonstrate a lack of consensus among the world's nations concerning the importance of protecting underwater sites, structures and objects. Or it may represent a reaction to the severity of the Convention's prohibition of commercial exploitation and its prohibition, in Article 38, of reservations. Or it may simply reflect national desires to retain unfettered control over their internal waters, archipelagic waters, territorial sea, and contiguous zones.

UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage of 17 October 2003.[56] In the wake of the Taliban's demolition of the Bamiyan Buddhas, the destruction of Kosovo churches and the Mostar bridge, and the United States military actions in Afghanistan and Iraq, the General Conference of UNESCO published this Declaration, which emphatically restates the international interest in cultural property and calls on all States to act to prevent its intentional destruction. Article VII also urges States to assert jurisdiction over and prosecute individuals who commit or order the commission of acts of destruction of cultural heritage. Your author is not aware that any such prosecutions have been instituted by any States.

UNESCO Convention For the Safeguarding of the Intangible Cultural Heritage of 17 October 2003.[57] According to Article 2 of this important instrument:

> The intangible cultural heritage . . . is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehi-

> cle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.

The preamble states the internationalist credentials of this Convention when it refers to "the universal will and the common concern to safeguard the intangible cultural heritage of humanity"; recognizes that "communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity"; and asserts that "the international community should contribute, together with the States Parties to this Convention, to the safeguarding of such heritage in a spirit of cooperation and mutual assistance." States Parties are to draw up inventories of the intangible cultural heritage present in their territories, and an Intergovernmental Committee is to prepare and maintain a "Representative List of the Intangible Cultural Heritage of Humanity" and a "List of Intangible Cultural Heritage in Need of Urgent Safeguarding."

In fact, "safeguarding" the intangible cultural heritage is the primary concern of the Convention. Article 3 states that:

> "Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

The Convention contains no reference to international traffic, whether by barter or market transaction, in intangible cultural heritage. Nor does it deal with retention. Indeed, it takes a stretch of the imagination to suggest ways in which a loss of intangible cultural heritage through export might occur. A Korean induces a Japanese "living national treasure" to emigrate? The few remaining members of an isolated tribe of First People in Canada join a thriving related group in Minnesota? The French Minister of Culture persuades the Dance Theater of Harlem to establish its seat in Paris? As of August 20, 1904, five nations had adopted this Convention. Thirty adoptions are necessary for it to come into force.

****

This brief survey of UNESCO instruments dealing with cultural property illustrates an interesting range of actions taken to meet UNESCO's three constitutional obligations to the "cultural heritage of all mankind": conservation and protection, recommending international conventions, and encouraging international exchange. Given the difficulties commonly encountered in reaching international consensus and the notorious inertia of large bureaucracies, UNESCO's record as an advocate for cultural property internationalism may seem to others, as it does to me, impressive.

That record, however, is flawed. The instruments we have examined reveal two major deviations from UNESCO's internationalist mission. One, implied in the contents of some of those instruments and openly expressed in the 1976 Recommendation, was pressed to a logical extreme in the 2001 Underwater Convention's provision that "Underwater cultural heritage shall not be commercially exploited." This drastic and potentially damaging (to underwater cultural heritage) provision was only made possible by narrowly interpreting the words "international exchange" in UNESCO's Constitution to exclude market transactions.

In this way, the international cultural property world's principal actors (all of the uncountable numbers of artists and artisans, the zillions of collectors, the thousands of dealers and auction houses, etc.) and the overwhelming majority of international cultural property transactions are made to disappear. What remains is a shriveled and stunted cultural property world, peopled only by governments and "institutions" that lend to, borrow from, and barter with each other. Where did such a diminished image of the cultural property world come from?

Collectors and the art trade generally respect legal restraints on international trade in cultural objects. They are encouraged to do so by the widespread adoption in the major market nations of statements of approved professional practices and codes of ethics for dealers. Members of the Art Dealers Association of America, for example, agree to observe the CINOA[58] *Guidelines*. The same or comparable principles have been adopted by national dealers' organizations in Britain (the British Art Market Association) and other nations and by a European federation of dealers' associations (Fédération Européenne des Associations de Galeries d'Art).

In 1999 UNESCO adopted a *Code of Ethics for Dealers in Cultural Property*[59] that was drafted with the assistance of dealers. This Code is remarkable in that, by offering principles to regulate the conduct of dealers, UNESCO recognized their existence and implied the legitimacy of collectors, dealers, and a market in cultural objects (but only in order to express concern about the safety of cultural objects in their hands). The Code states in its entirety that:

> Members of the trade in cultural property recognize the key role that trade has traditionally played in the dissemination of culture and in the distribution to museums and private collectors of foreign cultural property for the education and inspiration of all peoples.
>
> They acknowledge the world wide concern over the traffic in stolen, illegally alienated, clandestinely excavated and illegally exported cultural property and accept as binding the following principles of professional practice intended to distinguish cultural property being illicitly traded from that in licit trade and they will seek to eliminate the former from their professional activities.
>
> ARTICLE 1 Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.

> ARTICLE 2 A trader who is acting as agent for the seller is not deemed to guarantee title to the property, provided that he makes known to the buyer the full name and address of the seller. A trader who is himself the seller is deemed to guarantee to the buyer the title to the goods.
>
> ARTICLE 3 A trader who has reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument will not assist in any further transaction with that object, except with the agreement of the country where the site or monument exists. A trader who is in possession of the object, where that country seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of origin.
>
> ARTICLE 4 A trader who has reasonable cause to believe that an item of cultural property has been illegally exported will not assist in any further transaction with that item, except with the agreement of the country of export. A trader who is in possession of the item, where the country of export seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of export.
>
> ARTICLE 5 Traders in cultural property will not exhibit, describe, attribute, appraise or retain any item of cultural property with the intention of promoting or failing to prevent its illicit transfer or export. Traders will not refer the seller or other person offering the item to those who may perform such services.
>
> ARTICLE 6 Traders in cultural property will not dismember or sell separately parts of one complete item of cultural property.
>
> ARTICLE 7 Traders in cultural property undertake to the best of their ability to keep together items of cultural heritage that were originally meant to be kept together.
>
> ARTICLE 8 Violations of this Code of Ethics will be rigorously investigated by (a body to be nominated by participating dealers). A person aggrieved by the failure of a trader to adhere to the principles of this Code of Ethics may lay a complaint before that body, which shall investigate that complaint. Results of the complaint and the principles applied will be made public.

This Code of Ethics seems to be reasonable and constructive. Unfortunately, however, the context in which it applies is permeated by source-nation trade restraints that, as we have seen, are excessive in concept and in practice. Those excesses are implicitly condoned by other UNESCO instruments, particularly the 1970 Convention.

As was said earlier, no thinking person argues for free trade in cultural property. Regulation is necessary in order to preserve cultural property and to support its proper international circulation. Such regulation serves the international interest of "all mankind" in preservation and enjoyment of its "cultural heritage." Excessive regulation, however, violates rather than serves the international interest, and a pro-

hibition against trading clearly is excessive. The archaeologists' war against acquisitors (collectors, museums, and the art trade), to which we now turn, is another source of excess.

WAR AND PEACE

Archaeologists have a complex relationship with cultural property internationalism. The field of archaeology clearly is international; sites and objects of archaeological interest exist everywhere, and the profession is interested in all of them. Individual archaeologists, however, are not typically internationalists. An archaeologist's fieldwork usually requires commitment to the sites of a specific culture in a defined area to which the archaeologist typically returns over a period of years and often becomes deeply attached. When American archaeologists work outside the United States, they tend to identify more strongly with the host nation than with the international community or "all mankind." Archaeologists' dependence on host nations for excavation permits, support services, and access to sites further inclines them to identify with the host nation and support its cultural property policies.

Context is centrally important to archaeology. In conducting excavations, professional archaeologists carefully document sites, the excavation process, and the precise locations and postures of unearthed objects. Clandestine excavation and the undocumented removal of antiquities from archaeological sites, even if carefully done, destroy potentially important information about the past. The objects taken become "orphans" whose sources, contextual identities, and meaning are lost or diminished.

All source nations have laws criminalizing clandestine excavation and the unauthorized removal of antiquities from their sites. Often, such laws also declare that antiquities are property of the nation, with the intention of making their unauthorized removal theft. Archaeologists strongly support such laws and their enforcement by market nations, as provided in the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, previously mentioned; the U.S. Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. §§2601ff; and the 1995 *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*.[60]

The above considerations converge to lead archaeologists to support national policies and laws and international conventions that limit the international movement of cultural objects. We have seen that the UNESCO Constitution, in Article 1(2)(c), commits the Organization to three interrelated kinds of cultural property activities: 1) conservation and protection; 2) recommending international conventions; and 3) encouraging international exchange. The prevailing ideology among archaeologists supports the first two of these but not the third. Archaeologists do not actively oppose the barter or loan of antiquities by governments and museums. They do, however, oppose international trade.

Indeed, since the 1970s, archaeologists have effectively promoted the thesis that collectors and dealers are responsible for the illicit trade in antiquities and destruction of the archaeological record. Their logic is simple: if collectors did not collect and dealers did not deal there would be no antiquities market, and if there were no market, the illicit traffic in antiquities would disappear. Although some archaeologists take a more nuanced view,[61] the archaeological establishment as a whole has vigorously embraced and propagated this reductive argument, which I have criticized elsewhere, though with little apparent effect.[62] Consequently, to the archaeological establishment, every commercial antiquities transaction is suspect. If not proven to be blameless by archaeologists' standards it is blameworthy, illicit. Elaborate due diligence is not enough. An anecdote will illustrate the point.

In 1987 The Getty Museum adopted an elaborate new due diligence policy for the acquisition of antiquities. When an interesting object was offered to it, the Museum thoroughly researched the object and compiled a dossier which was sent to the antiquities authorities of all plausible nations of origin, asking whether they saw any reason why the Museum should not acquire the object. If any such objection were made, the Museum declined to acquire it. The Museum's curator of antiquities also actively assisted source nations in the recovery of offered objects that appeared to have been stolen. To many observers this policy appeared to be responsible and constructive.

In 1989 the Museum organized a private two-day conference of source nation officials, archaeologists, museum professionals, dealers, lawyers, and academics (including the author) to discuss this policy and to initiate a dialogue that might lead to a resolution of differences among the interested parties. Instead, the conference provided a dispiriting glimpse of a tendency toward archaeological fundamentalism when a number of the archaeologists present attacked the Museum's new acquisition policy as disingenuous and damaging. Such attacks continued after the conference.

In 1995 the Getty trustees felt compelled to bow to the archaeologists. They announced that the Museum would forego the acquisition of any antiquities that were not previously published or otherwise documented as parts of established collections. Every proposed acquisition or loan would now be treated as "illicit" unless proved to be "licit." Some other cultural property world actors have since adopted this "guilty unless proved innocent" presumption. Archaeologists now feel free to condemn, as "looters" and worse, collectors who acquire and museums that display antiquities that no nation claims and that no one has shown to have been improperly acquired.

Excessive source nation retention of cultural property is a potent instrument in the war against acquisitors. As we have seen, the 1970 UNESCO Convention leaves it to each State Party, within broad limits and subject to no review, to provide its own definition of "cultural property"; to establish its own limitations on the "import, export or transfer of ownership" of cultural property so self-defined; and provides that any transaction that violates these controls "shall be illicit." So encouraged,

most source nations have adopted excessively retentive legislation that, in practice, prohibits the export of objects that bear no significant relation to the nation's culture, objects of slight cultural importance, and redundant objects—particularly antiquities—that it will never study or exhibit.

Consider a typical law prohibiting export of works of art over 100 years old. Such a law may protect works too fragile to travel, but it also immobilizes sturdier works that could circulate without significant risk of damage or destruction. The same law may keep at home works of outstanding importance to the nation's history and culture but, as we have seen, it also can be and has been used to prevent the export of works that have no such relationship or importance. Similarly, a law that prohibits trade in antiquities can help immobilize objects that ought to be retained in place, but it will also add to the hoarded stocks of redundant antiquities that languish unconserved, unstudied, unpublished, unseen, and unloved in the warehouses of major source nations. The considerable problems thus created are explored elsewhere.[63]

UNESCO instruments tell us that the international interchange of cultural property "increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and insures mutual respect and appreciation among nations"[64] and leads to "a better use of the international community's cultural heritage."[65] Excessive restraints thwart these internationalist goals by improperly limiting the international interchange of cultural property. And by artificially expanding the meaning of "illicit" they reduce the possibilities for a licit cultural property trade.

The liberalization of international trade by the World Trade Organization (WTO)[66] and the European Communities (EC) provides a potentially strong counterforce to the archaeologists' crusade and source nation overretention. Both the WTO and EC treaties[67] prohibit export controls on "goods,"[68] which the European Court of Justice ruled, in *Commission v. Italy*, includes works of art."[69] Both treaties, however, WTO in Article 130 and EC in Article 30, permit national measures for "the protection of national treasures possessing artistic, historic or archaeological value."[70] This key phrase has until now received little judicial attention. Eminent commentators agree, however, that it should be treated as restrictive.[71] "The exception's purpose is not to preserve the totality of an artistic patrimony," but to safeguard its "essential and fundamental elements."[72]

Source nation export controls that prohibit the international exchange of works that are neither "national" nor "treasures" and do not "protect" them from anything but export clearly exceed permissible limits under these treaties. Cases involving the interpretation of WTO Article 130 and EC Article 30 have not yet arisen, but when they do, some inescapable questions will present themselves. Does the object in question fall within an appropriately restrictive interpretation of "national treasures?" If so, does application of the export control "protect" it? Can the treaty's application be evaded by legislation declaring that cultural objects are "national property"? Such questions will ultimately be answered by the European Court of Justice and the WTO dispute resolution panels. Will they disarm the source nation-archaeologists

alliance of one of its major weapons and help bring peace to the cultural property world? We do not know.

WHITHER CULTURAL PROPERTY INTERNATIONALISM?

People everywhere, including all of the actors in the cultural property world, share an interest in the preservation, study, and enjoyment of cultural property. In addition, collectors, museums, dealers, and auction houses have their own particular self-interests in an active, licit international art and antiquities market. Source nations, UNESCO, and archaeologists have their own particular self-interests, which have led them to oppose or restrict an otherwise licit market and to limit the interchange of cultural objects to interinstitutional loans and exchanges.

All of these diverse interests are, in principle, legitimate. That they sometimes conflict simply reflects the reality that the cultural property world is complex. I am aware of no basis for supposing that any of the conflicting interests, even those of the archaeologists, dwell on a higher moral plane than any of the others. The reasonable course is for the interested parties to seek the optimal accommodation of their various interests, and that requires that the parties speak and listen to each other.

That dialogue, although frequently called for, has yet to begin. Source nations, supported by UNESCO and archaeologists, continue to hoard cultural objects, in apparent conflict with trade liberalization treaties, while calling on other nations to enforce their excessive restrictions on export and their blanket declarations of "ownership." Prominent archaeologists hold fast to the position that they are right; collectors, museums, and the art trade are iniquitously wrong; and the international interest in the circulation of cultural objects, if it is considered at all, is adequately served by rhetoric about interinstitutional loans and exchanges. UNESCO conventions support source nations and archaeologists, contemplate a cultural property world inhabited solely by governments and "institutions," and expressly oppose markets in cultural goods.

In short, the prospects look dark for those who favor a licit international trade in cultural objects. Under present conditions a large, growing demand confronts a sharply restricted licit supply. If one set out to design a system that would discourage a licit market and encourage a black market, it would be difficult to improve on the present one. As Quentin Byrne-Sutton put it: "*On arrive ainsi à la situation ridicule où une réglementation alimente ce qu'elle cherche à éliminer*."[73] Right.

Finally, it should be obvious that such a system, dictated by the preferences of retentive source nations and zealous archaeologists, even if it is embodied in UNESCO instruments, does not provide optimal conditions for the preservation of the cultural heritage of all mankind or its optimal distribution for access, study, and enjoyment. Will the situation right itself? Do social systems automatically self-correct when things get too far out of line? Or, to use another figure, if the pendulum swings too far in one direction, will it eventually swing back? Will enforcement of the WTO and EC trade-liberalizing treaty provisions finally start a process that will eventually

restore the balance? Can articles like this one help, or do they make things worse, or are they irrelevant? All good questions, to which no one knows the answers.

ENDNOTES

1. The terms cultural "property," "objects," "heritage," and "patrimony" variously appear in legislation and the scholarly and popular literatures, but there do not appear to be any agreed meanings or standard usage. In this article "cultural property" and "cultural objects" interchangeably serve the same purpose: to designate objects of cultural significance. "Cultural heritage" includes such objects and immaterial cultural expressions, such as folklore and traditional knowledge, which are not ordinarily considered to be cultural property and are not considered in this article. "Cultural patrimony" usually appears in contexts that assume or express cultural nationalism, i.e., the attribution of national character (the nation of origin or of the *situs*) to cultural objects.

2. The quoted words first appear in the Preamble of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (hereinafter Hague 1954), and are repeated or paraphrased in the subsequent UNESCO instruments collected in UNESCO, *Conventions and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage*, cited herein as *UNESCO Conventions and Recommendations*.

3. Merryman, "Two Ways of Thinking About Cultural Property."

4. Most, perhaps all, value is attributed rather than intrinsic, and the value attributed to a given object is itself a cultural expression that often changes over time. The point is elegantly developed in Thompson, *Rubbish Theory*.

5. In the fourth edition of Merryman and Elsen, *Law, Ethics and the Visual Arts*, works of art are considered in Chapter 2 and antiquities are treated in a separate Chapter 3.

6. The *UNIDROIT Convention* can be viewed at <http://www.unidroit.org/english/conventions/c-cult.htm> (Last visited 8/17/04).

7. The Annex lists the following Categories of Cultural Objects:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the lives of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins or engraved seals; (f) articles of ethnological interest; (g) articles of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand; (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.), singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

8. Another observable fact is that nonwealthy nations do not have substantial private or museum collections of artifacts from wealthy nation cultures. The international traffic in cultural objects, like the traffic in other goods, thus reflects the wealth disparity between the first and third worlds. The significance of this phenomenon for cultural property internationalism is unclear. To date, most efforts have focused on aiding in the establishment and preservation of national collections of works of art and artifacts in third world nations. Chapters IV and V of the UNESCO *Convention Concerning the Protection of the World Cultural and National Heritage* of 16 November 1972, in UNESCO, *Conventions and Recommendations* 75 ff., set out an apparatus for assisting source nations through a "Fund for the Protection of the World Cultural and National Heritage," but a survey of the literature produces little evidence that the Fund has provided significant assistance to needy nations.

9. The case of the Afo-A-Kom, a statue that "embodies the spiritual, political and religious essence of the 35,000 people of the West African kingdom of Kom in Cameroon," is described in Merryman and Elsen, *Law, Ethics, and the Visual Arts*, 267.

10. NAGPRA is the acronym for the *Native American Graves Protection and Repatriation Act* of 1990, 25 U.S.C. §§3001 ff., under which American museums were required to inventory cultural objects and human remains and, on request, return them to recognized Indian nations.

11. Polybius, in *The Histories*, (before 146 B.C.). The English text of this quotation is taken from de Visscher, "International Protection of Works of Art and Historic Monuments," which itself is a translation (translator unidentified) of the passage in de Visscher's originally French article.

12. Grotius, *The Law of War* III, Chapter V, Section I.

13. Grotius, *The Law of War* III, Chapter VI, Section XII.

14. Vattel, *The Law of Nations* III, Chapter 9, Section 168.

15. Vattel, *The Law of Nations* III, Chapter 9, Section 168.

16. Gould, *Trophy of Conquest*, 41. For fuller accounts of the art confiscations of the Italian campaign see Gould, *Trophy of Conquest*, 13ff., and Treue, *Art Plunder*, 147ff.

17. Quoted in Treue, *Art Plunder*, 151.

18. For a discussion of the varying reactions, see Treue, *Art Plunder: The Fate of Works of Art in War and Unrest* (Basil Creighton trans. 1960), 175ff.

19. Quatremère de Quincy, *Lettres au général Miranda sur le déplacement des monuments de l'art de l'Italie*, 88–89. As the title indicates, the letters were an atypical French reaction against and condemnation of the appropriation of works of art by the French armies in Napoléon's Italian campaign.

20. Quatremère de Quincy, *Lettres au général Miranda sur le déplacement des monuments de l'art de l'Italie*, 141–146.

21. Stewart, *Reports of cases argued and determined in the Court of Vice-admiralty at Halifax, in Nova Scotia*. 482. See also Merryman, "Note on *The Marquis de Somerueles*."

22. That the Judge, Alexander (later Sir Alexander) Croke, is referred to as *Dr*. Croke signifies that, like other admiralty judges of the time, he was a civil lawyer. Typically, the English civilians held doctorates from Oxford or Cambridge and were qualified to appear as advocates before the ecclesiastical courts and the Court of Admiralty. The entry for Sir Alexander Croke in the *Dictionary of National Biography* states that he received BCL and DCL degrees from Oxford and was a member of the College of Advocates. In the competition between the civilians and the common lawyers, history was on the latter side, and the College of Advocates was doomed when the Court of Probate Act 1857 abolished the testamentary jurisdiction of the ecclesiastical courts and established the common law Court of Probate. The last surviving member of Doctors' Commons, *alter ego* of the College of Advocates, was Dr. Thomas Hutchinson Tristram, who died in 1912. For the full history see Squibb, *Doctors' Commons*.

23. These ideas are developed in chapters 1–3 of Best, *Humanity in Warfare*.

24. The language of the opinion is dominated by the humane ideal, both in the quoted passage and throughout its text, while French actions seen to be in conflict with that ideal are condemned: "[T]he present governor of *France*, under whose controul that country has fallen back whole centuries in barbarism. . . ." (p. 483). "The lawless government of *France*. . . ." (p. 484). There is, of course, a subtext. Britain was also at war with France, which supported the Americans, and much of the opinion can be read as an effort to separate the Americans, whose interests lay with "the land of their forefathers," from France, the "common enemy."

25. "In part due to their romantic search for the *ius gentium* of the Roman law texts, and in part to their very real international career system, later English civilians developed a commitment to cosmopolitanism and to the ideal of a rational, universal legal science. This civilian commitment was often in sharp contrast to the localized outlook of the common lawyers." Coquillette, *The Civilian Writers of Doctors' Commons*, 8.

26. See Merryman, "Two Ways of Thinking About Cultural Property."

27. Wheaton, *Elements of International Law*, Section 346, 341.

28. Wheaton, *Elements of International Law*, Section 347.

29. Halleck, *International Law*, Ch. XIX, Sections 10–11.

30. The Lieber Code is set out and discussed in Hartigan, *Lieber's Code and the Law of War*, and in Friedman, *The Law of War*, 158ff.

31. Friedman, *The Law of War*, 194.

32. Institute of International Law, *Resolutions of the Institute of International Law Dealing with the Law of Nations*, 36-37.

33. *Convention with Respect to the Law and Customs of War on Land of July 29, 1899*, in Friedman, *The Law of War*, 234.

34. *Convention on the Laws and Customs of War on Land of October 18, 1907*, in Friedman, *The Law of War*, 323.

35. 36 Stat. 2351, TS No. 542.

36. The Hague Rules of Air Warfare of December, 1922-February, 1923, in Friedman, *The Law of War*, 437.

37. League of Nations, *Interamerican Treaty on the Protection of Artistic and Scientific Institutions and Monuments* (hereinafter the *Roerich Pact*).

38. U.S. Department of State, *Draft Declaration and Draft International Convention for the Protection of Monuments and Works of Art in Time of War*.

39. The topic is discussed at <http://www.houseofice.com/history/napoleonandhitler.shtml> last consulted 8/11/04.

40. See materials in Merryman and Elsen, *Law, Ethics and the Visual Arts*, 26–33.

41. The texts of the Convention and its accompanying Protocol (the "First Protocol") are set out in UNESCO, *Conventions and Recommendations*, 13. For a history and commentary on the Convention see Toman, *The Protection of Cultural Property in the Event of Armed Conflict*.

42. The Second Protocol may be viewed at <http://www.unesco.org/culture/laws/hague/html_eng/protocol2.shtml> (Last viewed on 8/17/04) and is reproduced in Merryman and Elsen, *Law, Ethics and the Visual Arts*, 1174. For accounts of the genesis and content of the Second Protocol see Desch, "The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict," Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict," 593. As of December 2003, 20 nations had become parties to the Second Protocol. The United States is not a party.

43. Article 6 (a) of the Second Protocol provides that: "a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: i. that cultural property has, by its function, been made into a military objective; and ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective; . . . the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise; . . ."

44. Nahlik, *La Protection internationale des biens culturels en cas de conflit armé*, 87.

45. The military necessity doctrine is more fully considered in Merryman, "Two Ways of Thinking About Cultural Property."

46. Constitution of the United Nations Educational, Scientific and cultural Organization Adopted in London on 16 November 1945 and amended by the General Conference at its second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, fifteenth, seventeenth, nineteenth, twentieth, twenty-first, twenty-fourth, and twenty-fifth sessions.

47. There are 33 such UNESCO instruments. They are listed and reproduced at: <http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html> (last consulted 5/25/04). Those promulgated up to 1980 are published in UNESCO, *Conventions and Recommendations*.

48. Merryman, "The Nation and the Object."

49. UNESCO, *Conventions and Recommendations*, 59ff. As of 5/28/04 there were 104 parties.

50. Merryman, "The Retention of Cultural Property," Merryman, "A Licit International Trade in Cultural Objects," Merryman, "Cultural Property, International Trade, and Human Rights."

51. UNESCO, *Conventions and Recommendations*, 183.

52. Gaskill makes the point more strongly in "They Smuggle History," 21: "Almost nobody has any idea what enormous, fantastic mountains of such 'duplicates' exist in the state-owned museums around the Mediterranean. Italian archaeologists laugh hollowly when newspapers report the theft of some 'unique, priceless' Etruscan vase. They know, but the public does not, how many thousands of these 'unique, priceless' vases they already have in storage and quite literally don't know what to do with."

53. The Convention defines "cultural institution" in Art. 1: "'cultural institution' shall be taken to mean any permanent establishment administered in the general interest for the purpose of preserving, studying and enhancing cultural property and making it accessible to the public and which is licensed or approved by the competent public authorities of each State."

54. UNESCO, *Conventions and Recommendations*, 211.

55. Online at <http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html> Last visited on 8/31/04. As this is written there appear to be only two ratifications, by Panama and Bulgaria.

56. The Declaration is available at <http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html> Last viewed on 10/2/04.

57. The Convention may be viewed at <http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html> Last visited 9/7/04.

58. CINOA (Confédération des Négociants en Oeuvres d'Art) is an international confederation of art and antiquities dealer associations. Its full *Guidelines* can be found at <http://www.cinoa.org/index.cfm> (Last visited 11/10/04).

59. The Code is set out at, together with information about its origin, at www.unesco.org/culture/legalprotection/committee/html_eng/ethics3.shtml>, last viewed 14 October 2004.

60. The Convention can be viewed at <http://www.unidroit.org/english/conventions/c-cult.htm> last visited 9/17/04.

61. See for example Chippindale and Gill, "Material Consequences of Contemporary Classical Collecting," 505–506.

62. Merryman, "A Licit International Trade in Cultural Objects," 19; Merryman, "Archaeologists Are Not Helping," 26.

63. See for example, Merryman, "The Retention of Cultural Property," Merryman, "A Licit International Trade in Cultural Objects," Merryman, "Cultural Property, International Trade, and Human Rights."

64. The quoted words appear in the Preamble of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*.

65. The quoted words appear in the Preamble of the 1976 UNESCO *Recommendation Concerning the International Exchange of Cultural Property*.

66. The World Trade Organization had 148 members as of 13 October 2004.

67. The North American Free Trade Agreement (NAFTA) and other international trade agreements incorporate the same provisions by reference.

68. Article 29 of the EC Treaty prohibits "Quantitative restrictions on exports, and all measures having equivalent effect" between Member States. The equivalent GATT provision appears in Article XI.

69. The European Court of Justice held, in *Commission of the European Communities v. Republic of Italy*, Judgment of 10 December 1968, Case 7-68, that works of art are "goods" within the meaning of the Treaty of Rome and thus, in principle, subject to the same trade liberalizing rules as other "goods."

70. The English version of the Treaty of Rome uses "national treasures," as does the French version. The German version is *nationales Kulturgut* and the Italian is *patrimonio nazionale*. Commenting on this difference in nomenclature, Biondi, "The Merchant, the Thief & the Citizen," states in footnote 27: "However, there is no doubt that the definition should be uniform, and considering the ECJ's case law on other exceptions, it might be argued that [for Italy] the expression 'national treasures' should be preferred as it is narrower."

71. This topic is explored in Pescatore, "Le Commerce de l'art et le Marché Commun," and Biondi, "The Merchant, the Thief & the Citizen."

72. Pescatore, "Le Commerce de l'art et le Marché Commun." Judge Pescatore wrote the decision of the European Court of Justice in *the Commission v. Italy* case, mentioned in note 69 above.

73. Byrne-Sutton, *Le trafic international des biens culturels sous l'angle de leur revendication par l'Etat d'origine*, 1.

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