

The Protection of Cultural Property: Post-Colonial and Post-Conflict Perspectives from Sri Lanka

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Abstract: Cultural property is related to the evolution of a nation's identity. It forms a vital link to the past, wherefrom the present and future may be nurtured and enriched. However, objects related to cultural heritage have been the target of looting and pilfering, resulting in loss to the country concerned. The situation is worsened where these objects have been removed during an era where there were no laws and regulations to control such removal. This article focuses on the loss of cultural property with reference to two specific modes of loss of particular concern to Sri Lanka—the removal of cultural property during the colonial era and the loss of cultural property during the more recent ethnic conflict. Through an analysis of the relevant laws and regulations, this article evaluates Sri Lanka's rights to its cultural property and its efforts to regain, and preserve, its cultural heritage.

Keywords: Sri Lanka, ownership, cultural property, cultural heritage, restitution, colonialism

INTRODUCTION

Sri Lanka, an island in the Indian Ocean, has had a civilization spanning thousands of years. Culture and the arts flourished even before the time of Lord Buddha, which is estimated to be as early as the sixth century BC.¹ With the advent of Buddhism to Sri Lanka, which received state patronage, and with the economic stability that arose out of a far-sighted agricultural policy, works that had grown to be part of

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¹The Asoka Pillar of 249 BC sets the year of the Buddha's birth at 623 BC. The testing of archaeological remains at Lumbini, the birthplace of the Buddha, have provided validating evidence of this claim. For further information, see Lumbini, "Birthplace of the Lord Buddha," <http://whc.unesco.org/en/list/666> (accessed 18 November 2017).

our culture continued to grow in number, sophistication, and beauty. As a result of trade, Sri Lanka grew to be home to peoples of different races, religions, and cultures, and this diversity in turn began to be reflected in the cultural objects that we hold dear today.

After almost four centuries of colonization, Sri Lanka finally gained independence in 1948. However, in the years following independence, the lack of a comprehensive policy with regard to cultural property, and the proper know-how and resources to document and store these artifacts, has resulted in a failure to preserve and appreciate them. Furthermore, civil tensions have led to instances of near anarchy, where looting of areas deemed to be of archaeological and cultural importance has been rampant. This, in turn, has contributed on a wide scale to the draining of cultural property out of the country. In 1975, Hemasiri de Silva, the then director of the National Museum of Colombo, published a catalogue of objects that have been taken out of the country. This reflects the seriousness of the problem.² All of this has impacted heavily on the rich cultural heritage that is a part of Sri Lanka.

Cultural property gives us a sense of history, of “belonging,” and of a sense of pride in the magnificent history to which we are proud heirs. However, the National Museum of Colombo is a sorry testimony to this significant and culturally rich heritage as a result of the fact that many of our cultural artifacts are adorning museums of other countries instead of being available to the descendants of their creators. The history of Sri Lanka reveals that colonialism and trade had much to do with the movement of cultural objects. Further, this movement cannot be fully appreciated unless we are to understand the concepts of “ownership,” “provenance,” and “movement” of cultural property and the legal bases on which they rest.

This article will focus on two specific areas of concern to Sri Lanka—namely, the removal of cultural property during the colonial era and the removal of cultural property during the ethnic conflict. It will not only assess how much damage, or threat of damage, is caused, and has been caused, by the looting and removal of cultural property, but also analyze the legal measures that have been taken to preserve and protect cultural property in the face of these dangers. It will evaluate how effective these measures have been and will compare some of the experiences

²De Silva 1975. This publication, which is just one of many by de Silva, is a fairly comprehensive catalogue of items in 40 different institutions in 27 countries. The publication covers items in various institutions in Australia, New Zealand, Malaysia, Singapore, India, Africa, Europe, United Kingdom, Canada, the United States, and South America. It contains more than 15,000 entries and over 100 leaves of plates. It is a seminal work as far as the subject is concerned. It remains as the only indicator of cultural items taken out of the country, as can be seen by the reference to it as recently as 2012, where the work was used to highlight some of the issues surrounding the move to regain Sri Lankan artifacts in foreign museums, which the then minister of national heritage announced he intended to do. For a fuller discussion, see Hemasiri de Silva, “Retrieving Sri Lankan Cultural Property from Foreign Institutions,” http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=53280 (accessed 18 November 2017).

from other countries in arriving at a conclusion. Finally, it will project to the future and offer suggestions and guidelines for the effective management of cultural resources.

THE CASE FOR THE RETURN OF CULTURAL PROPERTY REMOVED DURING THE COLONIAL ERA

The Historical Nature of the Problem

Sri Lanka was colonized by the Portuguese, Dutch, and the British over a period of about 375 years. The country itself was made up of three smaller kingdoms, and only the British had full control of the entire country, being the only nation to bring down the Kandyan Kingdom. De Silva's catalogue, which is the only work of this nature, lists the objects from Sri Lanka that are found in museums around the world.³ Interestingly, the catalogue does not contain any accounts of Sri Lankan antiquities in Portuguese museums. However, objects from the Portuguese era are to be found in German museums. It has been confirmed that many objects were removed from the country during the Portuguese era.⁴ Whatever the legal basis for this transfer was, it must have resulted from the deed of a gift made out by Prince Dharmapala in 1580.⁵ Prince Dharmapala, who established his kingdom in Kotte (which is also the present capital of Sri Lanka), was put on the throne by the Portuguese. He ruled from 1551 to 1597 and was the only Roman Catholic king of Sri Lanka, having changed his religion to satisfy the Portuguese.⁶

Historical sources indicate that Prince Dharmapala, who succeeded to a part of Sri Lanka called Kotte, was entrusted to the protection of the Portuguese by his grandfather King Buvanekhabahu. This was ordered so that the king's brother Mayadunne would be deprived of the throne. Prince Dharmapala converted to Christianity, adopting the name Don Juan Dharmapala. In 1580, he made out a deed donating his dominions to the king of Portugal. When Prince Dharmapala died in 1597, the Portuguese emissary, the captain-general, took formal possession of the kingdom.⁷ The Portuguese eventually extended their control over a large part of the country, including Jaffna, the kingdom in the north.

³De Silva 1975.

⁴Interview with Hemasiri de Silva, former director of the National Museum of Sri Lanka and president of the Ceylon National Committee, International Council of Museums 2008 (on file with author).

⁵Sri Lanka, "Historical and Cultural Heritage," <http://www.infolanka.com/org/srilanka/hist/hist2.html> (accessed 18 November 2017), 12. The original document is not available today, but historical sources confirm that such a transfer did take place.

⁶"King Don Juwan Dharmapala, House of Siri Sanga Bo, Kotte (1551–1597)," <http://www.mahawansaya.com/king-in-sri-lanka-king-don-juwan-dharmapala-226.html> (accessed 18 November 2017).

⁷"King Don Juwan Dharmapala."

The next to colonize the island were the Dutch. They were invited by Rajasinha, the king of Kandy, to help him in fighting the Portuguese, but they eventually took control of most of the country. The Portuguese surrendered Colombo and Jaffna to the Dutch in 1656 and 1658 respectively.⁸ During the Dutch era, there was more movement of cultural property out of Sri Lanka than there was during the Portuguese era. De Silva's catalogue contains over 300 listings for objects that are to be found in museums in the Netherlands. Some of the entries acknowledge that they were either captured in battle or given as gifts by the Dutch governor of Ceylon to the Dutch king.

The British also came in to help the king of Kandy to get rid of the Dutch but decided to stay on due to the lucrative spice market in Sri Lanka. The Dutch formally ceded the island to the British in the 1801 Peace of Amiens, and Sri Lanka became Britain's first crown colony. The Kandyan Kingdom fell in 1815, and the British ruled Sri Lanka till independence was granted in 1948. The British appear to have been the most prolific gatherers of Sri Lankan cultural property. Cultural objects from Sri Lanka can be found in over 16 museums in England. De Silva's catalogue also lists items in the possession of many personal collectors as well. In all, the objects in British hands account for about half the entire catalogue and number well over 3,000.⁹ They include statues, coins, ivories, personal ornaments, utensils, boxes, weapons, musical instruments, toys, paintings, masks, manuscripts, and textiles. While many of them are statues of the Buddha, there is one statue that is described in particular detail as being priceless—the statue of Tara.

Tara is described in ancient chronicles as being a Buddha of compassion and protection. She is said to have been born from the tears of Avalokitesvara, the male Buddha of compassion. Yet she is also considered to be the mother of all Buddhas, including Avalokitesvara. She was fully enlightened, actively compassionate, and manifests in many forms and many colors. She is said to embody the perfection of wisdom as well as the other five perfections of generosity, patience, moral discipline, enthusiastic effort, and concentration and is also said to be able to calm human afflictions.¹⁰

A 1.43-meter-high statue of Tara, dating back to the tenth century, was taken out of Sri Lanka in 1830 by Sir Robert Brownrigg, one of the British governors of Ceylon (Sri Lanka was known as "Ceylon" during the colonial era and took the name "Sri Lanka" after independence in 1948). It was subsequently gifted to the British Museum, where it lies today. The statue is said to be from the northeast coast of Ceylon, somewhere between Trincomalee and Batticaloa. It must be noted that, unlike the removal of the Parthenon Marbles by Lord Elgin, which was done

⁸"King Don Juwan Dharmapala."

⁹Amounting to 225 pages out of a total of 509.

¹⁰For a fuller discussion on the statue of Tara, see Dharmachari Purna, "Tara: Her Origins and Development," http://www.westernbuddhistreview.com/vol2/tara_origins_a_development.html (accessed 18 November 2017).

in a somewhat semi-legitimate manner,¹¹ the removal of Tara by Sir Brownrigg was done in a most arbitrary fashion. He simply removed her, without asking the permission of anyone.¹²

This figure of Tara (or Pattini, as she is also called) is unique because it is one of the few female figures of the time that evokes beauty but not eroticism. Of all the replicas of Tara made in Ceylon at the time, none can equal this particular statue in beauty and technical perfection. Additionally, this statue was remarkably well preserved so that all of its finer details can be observed properly.¹³ The description of the statue mentions that it is made of bronze gilt. Some other noteworthy features include the high headdress and the fact that she is bare above the waist. The folded drapery reaches to a little above the ankles. The feet are bare. The statue has a narrow waist and long ear lobes (this last feature being characteristic of a Buddha or an enlightened one) (see Figure 1).

The Legal Nature of the Problem

The problem facing modern-day Sri Lanka is the same one that faces all of the former colonies: what is the legal basis on which a claim for the return of cultural property can be made? To better understand this issue, we shall have to understand the nature of cultural property as well as the legal theories affecting its ownership.

Cultural Property Defined

The major international instruments that deal with cultural property are the 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) and the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).¹⁴ According to these instruments, “cultural property” can be broadly defined as any item that a country regards “as being of importance for archaeology,

¹¹This assertion is made only because Lord Elgin obtained from the Turks, who were controlling Greece at the time, a *firman* (Turkish administrative written instrument) authorizing him to remove certain sculptures and inscriptions. However, it is agreed that the removal of the Parthenon Marbles was not envisaged by the *firman*, and the current thinking appears to be that the removal was illegitimate. For a fuller discussion on this topic, see Irini Stamatoudi, “The Law and Ethics Deriving from the Parthenon Marbles Case,” <http://www.parthenon.newmentor.net/legal.htm> (accessed 18 November 2017).

¹²Though the British maintain that Sir Brownrigg found the statue, bought it, and gifted it to the British Museum in 1830, Sri Lankan officials contend that he wrongfully seized it from the collection of the last king of Kandy. For a fuller discussion of this point, see Lillehoj 2017.

¹³De Silva 1975.

¹⁴Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457 (hereafter UNIDROIT Convention); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (hereafter UNESCO Convention).



FIGURE 1. Image of Statue of Tara, now found in the British Museum. Image courtesy of the British Museum.

prehistory, history, literature, art or science” on “religious or secular grounds.”¹⁵ Cultural property therefore includes art, artifacts, antiques, historical monuments, rare collections,¹⁶ and religious objects that are of particular significance to the cultural identity of a people and that represent important historical, artistic, and social accomplishments.¹⁷

Modern Legal Theories on the Ownership of Cultural Property

The Evolution of the Western Concept of Ownership. Today, the use of force as a means of acquiring territory has been outlawed with the advent of the United Nations (UN). Chapter VI of the UN Charter prohibits the use of force under any circumstances.¹⁸ This is backed up by Chapter VII, which promotes the pacific settlement of disputes. However, cultural property acquired during the colonial era must be considered in a context in which international law permitted war and conquest as perfectly acceptable methods of acquiring territory. What rights did the conqueror have over the newly conquered territory? Hugo Grotius, in his classic work *De Jure Belli ac Pacis*, was of the opinion that a conqueror had absolute and unlimited rights over the conquered.¹⁹ This view, which held sway in the seventeenth century, began to change, and, by the mid-eighteenth century, it became recognized that the conqueror would only take possession of state property, leaving individual property intact. This meant that the conquering power had rights over public property, including cultural property and, with it, the power to administer it as the new government.²⁰

Ownership in the Eastern Context. In Sri Lanka during the time of the monarchy, it was recognized that the king was the absolute owner and ruler of his domain. However, at the time of the advent of Buddhism, the idea of absolute ownership changed to one of public trusteeship. This can be traced back to the famous incident where King Devanampiyatissa was out hunting.²¹ Just as he was about to shoot a deer, “Arahat”²² Mahinda, the son of King Dharmasoka of India, who is credited with introducing Buddhism to Sri Lanka, stopped him, saying: “O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it.”²³ From then on, the king was seen as the guardian

¹⁵UNIDROIT Convention, Art. 2, 1331; UNESCO Convention, Art. 1, 289–90.

¹⁶Hatti 2000, 465, citing Greenfield 1996.

¹⁷Hatti 2000, 465, citing Greenfield 1996.

¹⁸Charter of the United Nations, 26 June 1945, 1 UNTS 16.

¹⁹Grotius 1625, bk. III, ch. v–vi, 304–23.

²⁰De Vattel 1758, ch. 13, para. 200.

²¹250–207 bc. See Sri Lanka, “Historical and Cultural Heritage,” 4–5.

²²A person who has attained a very high state of enlightenment. See Rahula 1956, 217–21.

²³This sermon is recorded in the *Mahavamsa* (or *Great Chronicle of Ceylon*), ch. 14. The incident is reported to have taken place around 223 bc. This passage was used by Judge C.G. Weeramantry, then vice-president of the International Court of Justice, in his separate opinion in *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, ICJ Reports (1997) 7.

of public property. In fact, if the king were to make a gift to a foreign dignitary, he would commission a new object to be made. He would not present an object that was already made or remove a statue from a temple or monument. It may have been that, at the time, these objects were not considered worthy enough to be given as gifts, but it appears to be the case that they were not taken by the king for his personal enjoyment. According to de Silva's catalogue, the different kings of Sri Lanka gifted to the Portuguese, Dutch, and British royalty objects that were contemporary during their rule. They did not gift articles already made. In contrast, many of the objects taken out by the foreign governors and representatives of the colonial powers were all considerably older in time. For example, the statue of Tara, which is the focus of this article, dates back to the tenth century but was taken out by Sir Robert Brownrigg in 1830.

The concept of state guardianship over public property has since grown and has been used by the courts to combat corruption and theft in the public sector as well. The concept thus seems to be that the sovereign is the protector of such property but may not acquire it to the detriment of the populace. The doctrine has been developed extensively in the subject area of environmental law in present-day Sri Lanka. In *Environmental Foundation Ltd v. Land Commissioner*, the Supreme Court of Sri Lanka held that, prior to the leasing of public land, the Land Commissioner was obliged to notify the public of this fact.²⁴ The public had a right to voice their opinions on such a lease, and the lease could not take place until any objections were considered. The court based this decision on the public trust doctrine, holding that the state is the guardian of public property and cannot dispose of it as it pleases. In *Gunaratne v. Ceylon Petroleum Corporation*, the Supreme Court also spoke of the public trust doctrine as applying in Sri Lanka.²⁵ In *Bulankulama v. Minister of Industrial Development*, the court cited from the dicta of Judge Weeramantry in the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* to illustrate the point that the concept of public guardianship is followed in Sri Lanka.²⁶

Which System of Law Prevails?

When the British invaded Sri Lanka, they acquired the territory through conquest. There is no doubt that, according to the law at the time, this was a legitimate means of acquiring territory. The question remains as to whether their appropriation of Sri Lankan cultural property was legal according to the time. Much depends on which legal doctrine we choose to follow—that of ownership or guardianship. It must be borne in mind that the law to be applied is not contemporary law but, rather, the law prevalent at the time. This has been stated by the Permanent Court

²⁴Case 573/1992, *Environmental Foundation Ltd v. Land Commissioner* (1994) 1(2) South Asian Environmental Law Reporter 53.

²⁵(1996) 1 Sri Lanka Law Reports 315.

²⁶Case 884/99, *Bulankulama v. Minister of Industrial Development* (2000) LKSC 18; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*.

of International Justice in *Island of Palmas Case (Netherlands v. United States)* as follows: “[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises.”²⁷ The International Court of Justice was of the same opinion in the *Right of Passage over Indian Territory (Portugal v. India)*.²⁸ These decisions suggest that the applicable law is not that of the twentieth century but, rather, that of the eighteenth and nineteenth centuries when conquest was a perfectly acceptable way of acquiring territory.

It is difficult to reconcile these two views as there appears to be a conflict. The Western view would sanction the removal of property from a vanquished state based on the principle of ownership, while the Sri Lankan view would probably not sanction such an action. In any case, if the concept of guardianship is applied, which would mean that the sovereign would hold the object or property until the time came when the people would need it, then, technically, Britain should return these objects when the Sri Lankan government asks for their return. This view, however, is not supported by the international law of the time, and this will be discussed more fully in the later section dealing with international law.

A Comparative Analysis: The Indian Position

India has a culture dating back even further than Sri Lanka. It has also been a colony of Britain and has had numerous issues about the return of cultural property. However, in India, the concept of ownership appears to have been more rigid than even what was held by the Western view. The Indian position seems to have been that the conqueror had full rights over all property located in the conquered territory. This is more sweeping than the Western view, which gave the conqueror rights only over public property.²⁹

In recent times, India has requested the return of several priceless objects, including the Sultanganj Buddha (also known as the “Birmingham Buddha”); the Amravati railings, a series of limestone carvings dating from around AD 100, acquired from a Buddhist temple in Andhra Pradesh by Victorian explorers; the Koh-i-Noor diamond, which sits in the heart of a crown first made for Queen Victoria and then for the Queen Mother as the last empress of India;³⁰ and the Saraswati idol, a sculpture of the Hindu deity from the Bhoj temple.³¹ However, nothing concrete has materialized, probably due to a fear of opening the floodgates.

²⁷4 April 1928, reprinted in 2 UNRIAA 829, 845.

²⁸26 November 1957, ICJ Reports (1957) 125; Alexandrowicz 1967, 4–6.

²⁹Hatti 2000, 465.

³⁰The history of the diamond and the quest to have it returned are more fully discussed by Dalrymple and Anand 2017.

³¹A more fuller account of cultural objects taken from India and other countries are given in the article “On Display Here, Wanted by India,” *Independent*, 31 May 2010, <http://www.independent.co.uk/news/uk/home-news/on-display-here-wanted-by-india-1988002.html> (accessed 18 November 2017).

Had India recorded even limited success in regaining its cultural property, it might have provided Sri Lanka with the necessary fillip to ask for its property; as the matter stands, there is no comparable example from which to draw inspiration.

International Law Relating to Cultural Property

The body of international law in this area covers a wide range of subjects, from the return of cultural property acquired during colonial times, to the return of objects taken during war, and also to those that have been illicitly smuggled out of the country. For example, the UNESCO Convention and the UNIDROIT Convention focus on the return of illegally exported or stolen cultural property. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) and its two Protocols (1954 and 1999) deal with the return of cultural property taken during war and from occupied territories.³² In addition, there have been resolutions passed by the Non-Aligned Movement (NAM) as well as the United Nations General Assembly (UNGA). Each of these will be examined with a view to finding a solution to the present problem.

UNESCO Convention. This convention seeks to prevent cultural property from being illegally exported and imported. Article 6 calls on states to define cultural property under their national laws. Articles 10–14 contain provisions mandating that state parties help each other to recover and return stolen property when requested to do so by the source country. As of 18 November 2017, 134 member states of the United Nations Education, Scientific and Cultural Organization (UNESCO) have ratified this convention, Sri Lanka and the United Kingdom (UK) among them.³³ However, the convention will only affect the movement of objects after 1970. Hence, while it will be of great use in combating the illicit movement of cultural property in the modern context, it is not of much use to Sri Lanka in relation to objects of the colonial era.

UNESCO has not given up its efforts to encourage states to return objects taken during earlier times, even though a legal basis may be lacking. In 1976, under the auspices of UNESCO, a committee of experts met in Venice and studied the question of the restitution or return of lost cultural property, either due to foreign or colonial occupation or due to the result of illicit traffic before the entry into force, for the states concerned, of the 1970 UNESCO Convention. A welcome result of this resolution was the inclusion of the topic of restoring cultural property taken during

³²Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358 (First Protocol); Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 172.

³³UNESCO, “State Parties,” <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/> (accessed 18 November 2017).

colonial times into the work being done by the UNESCO Committee of Experts. This Committee considered the important question of the restitution or return of lost cultural property, either due to foreign or colonial occupation or the illicit traffic of cultural objects before convention's entry into force for the states concerned.³⁴

Noting the lack of international mechanisms, the experts invited the director-general of UNESCO to set up an international body to facilitate bilateral negotiations between the concerned countries for the restitution or return of cultural property and to encourage them to reach agreements to this effect. This led to the formation of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation.³⁵ The fund for this committee was established about 30 years after the adoption of the Convention.³⁶ The Committee recommended that a broad campaign be undertaken to educate people in the countries where these objects now lie on the need to return these objects to their countries of origin, due to their overriding importance for cultural and historical identity and for the personality and the spiritual values of particular peoples or groups of peoples. The UNESCO director-general issued a document entitled "A Plea for the Restitution of an Irreplaceable Cultural Heritage to Those Who Created It."³⁷ It must be noted, however, that all of these initiatives are at best only persuasive and cannot compel any nation to return artifacts taken in earlier times.

UNIDROIT Convention. The UNIDROIT Convention is an improvement on the UNESCO Convention and addresses some of the issues that were not satisfactorily met by the earlier convention. For example, it provides a time limit for claims to be brought for the return of a stolen object. This limit is three years from the time the location of the object and the identity of the possessor are known, and 50 years in any event, and is dealt with in Article 3. The Convention, however, places the burden of proof on the state claiming the object. Article 1(b) provides that the claimant state must prove that the objects have been removed in violation of national laws. Additionally, it must establish that the removal of the object significantly impairs one or more of the state or community interests listed in

³⁴UNESCO, "Historical Background," <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/historical-background/> (accessed 18 November 2017).

³⁵Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, adopted by 20 C/Resolution 4/7.6/5 of the 20th session of the General Conference of UNESCO, Paris, 24 October–28 November, 1978.

³⁶Island of Palmas Case (Netherlands v. United States), 4 April 1928, reprinted in 2 UNRIAA 829, 845.

³⁷UNESCO, "A Plea for the Restitution of an Irreplaceable Cultural Heritage to Those Who Created It," 1978, <http://unesdoc.unesco.org/images/0003/000346/034683eb.pdf> (accessed 18 November 2017). The Intergovernmental Committee meets regularly and had its twentieth session in 2016. For more details about the committee and its work, see UNESCO, "Sessions," <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/sessions> (accessed 18 November 2017).

Article 5(3) or that the object is otherwise of significant cultural importance to that state. The interests outlined above include:

- the physical preservation of the object or of its context;
- the integrity of a complex object;
- the preservation of information, for example, of a scientific or historical character;
- the traditional or ritual use of the object by a tribal or indigenous community.

However, as of 1 September 2017, only 41 states have become parties to the Convention.³⁸ Neither Sri Lanka nor the UK have ratified, signed, or acceded to the Convention, so it is of little direct relevance to this discussion.³⁹

An analysis of both the UNESCO and UNIDROIT Conventions reveals that they are not suitable in the context of cultural property taken in colonial times. Neither is the Hague Convention, which has a different focus. It aims to protect cultural property by prohibiting combatants from damaging or stealing such property in a war situation. Hence, it also is not suited to the problem at hand and will be discussed in another context. Finally, let us turn to some of the resolutions of the NAM and the UNGA.

NAM. Many of the countries of the NAM began the debate on the return of cultural property taken during colonial times perhaps due to the fact that many of them were former colonies. The fifth Conference of the NAM was held in Colombo, Sri Lanka, in 1976. It was here that the members passed Resolutions 17 and 24, which requested “all States in possession of works of art and manuscripts to restore them promptly to their countries of origin.”⁴⁰ All of this may sound good, but these resolutions have no binding effect and mark only the desire of those art-rich nations to have their property returned.

UNGA. UNGA Resolution 3187 of 1973 is entitled “Restitution of Works of Art to Countries Victims of Expropriation.”⁴¹ It makes clear in the preamble that it does not accept the wholesale removal, virtually without payment, of objects of art from one country to another, frequently as a result of colonial or foreign occupation. It maintains that the restitution of such works would make good the serious damage suffered by those countries as a result of such removal and emphasizes that prompt restitution would constitute just reparation for the damage done.

³⁸“UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,”<http://www.unidroit.org/status-cp> (accessed 18 November 2017).

³⁹“UNIDROIT Convention.”

⁴⁰Protts and O’Keefe 1989, 838–43. Resolution 17, Restitution of Art Treasures and Ancient Manuscripts to the Countries from Which They Have Been Looted, and Resolution 24, Resolution and Explanatory Note on Restitution of Works of Art to the Countries from Which they Have Been Expropriated, Colombo, 1976, http://cns.miis.edu/nam/documents/Official_Document/5th_Summit_FD_Sri_Lanka_Declaration_1976_Whole.pdf.

⁴¹GA Resolution 3187 on Restitution of Works of Art to Countries Victims of Expropriation, UN GAOR, 28th Session, UN Doc. A/Res.3187 (XXVIII), 1973.

Modern Jurisprudential Thinking on the Return of Cultural Objects Taken during Times of Conflict

There has been considerable academic writing on this topic in light of the various conflicts that have taken place from the period under discussion to the present day. The Holocaust, in particular, has triggered many instruments that seek to provide for the restitution of cultural property taken during the Nazi regime. The 1998 Washington Conference Principles on Nazi-Confiscated Art, the Council of Europe's Resolution 1205 on Looted Jewish Cultural Property in 1999, and the 2000 Vilnius Forum Declaration all relate to the return of Holocaust-related Nazi-confiscated art.⁴² It must be noted that much of the debate as well as the international instruments and proposed mechanisms under this heading relate to the Holocaust and Jewish heritage. A discussion about other conflicts is absent in the international discourse. This leads to the question of whether art is regarded as important only when it is concerned with West-West cultural property restoration. In any case, there is relative silence on the property taken during other wars or periods of colonization.

Ana Vrdoljak, in her article entitled "International Law, Museums and the Return of Cultural Objects," draws comparisons between the intentional destruction of culture and heritage by Fascist regimes (for example, the Nazi regime) and the similar racist theories that may underlie colonialism.⁴³ This analogy is important, as Vrdoljak points out, since there has been restitution in the former instance (possibly because those regimes and their acts were openly denounced) but no restitution with respect to those states that were colonized. She maintains that

[t]he destruction or removal of cultural objects viewed as embodying the identity of certain groups was central to the discriminatory and genocidal policies of the Nazi and other fascist regimes during the 1930s and 1940s. Equally, the victorious Allied nations affirmed the importance of the restitution of cultural objects to these victims as a means of ameliorating or reversing the effects of such acts. The policies of these regimes stemmed from the race-based theories that had also informed the colonization of non-European peoples since the nineteenth century. However, by the mid-century, the scale of civilization that had been espoused by International Law and anthropology was no longer sustainable. The cultural Darwinism which it represented was gradually replaced by the ascendancy of cultural pluralism, and the barbarism visited on particular groups during the Holocaust and the Second World War propelled the international community to acknowledge the contribution of all peoples to the "cultural heritage of all (hu)mankind." Yet, as the twentieth century progressed, whilst the overt structures of colonialism were slowly

⁴²Washington Conference Principles on Nazi-Confiscated Art, Resolution 1205 on Looted Jewish Cultural Property, 5 November 1999, Vilnius Forum Declaration, <http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf> (accessed 3 December 2017).

⁴³Vrdoljak 2006, 193.

dismantled, its underlying principles were implicitly reinforced. A stark reminder of this ongoing inequality within the international community was the retention of the cultural objects of formerly colonized peoples by metropolitan powers following decolonization.⁴⁴

Vrdoljak further points out that, according to Lord Castlereagh, there are three rationales for the restitution of cultural objects.⁴⁵ The first seeks to restore the “sacred” link between people, land, and cultural heritage. Lord Castlereagh acknowledged perceptively the symbolic value of these objects as “the title deeds of the countries.”⁴⁶ The second rationale promotes the restitution of cultural objects as a means of ameliorating or reversing internationally wrongful acts, including discrimination and genocide. Those seeking to eliminate a group usually target its cultural manifestations— “the very essence of its being”—through its systematic destruction and confiscation. The Allied restitution program, following World War II, affirmed the importance of the restitution of cultural heritage as a means of addressing the effects of such policies and ensuring the continuing contribution of the group to the “cultural heritage of all (hu)mankind.” The third rationale for the restitution of cultural objects in international law is intimately tied to the broader notion of the right to self-determination that evolved following decolonization. It is argued that restitution of cultural objects held by the museums of former metropolitan and national capitals is an essential component of a people’s ability to maintain, revitalize, and develop their collective cultural identity.

Vrdoljak further points out four areas on which the international community is focusing in its work to restore the “cultural heritage of all (hu)mankind.” They are:

- firstly, the taking of steps to address the absence of the cultural elements of genocidal practices from the definition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide 1948.
- Secondly, striving to recognize the effective exercise of the right to self-determination by all peoples, including indigenous peoples, by States and facilitated by the international community. It has been noted that indigenous peoples and minorities were denied the effective exercise of this right during decolonization. The unequal application of this foundational human right perpetuates the scale of civilization originally formulated to justify and facilitate European colonial and commercial expansion.
- Thirdly, working towards the acknowledgement that the ability of non-State groups, including indigenous peoples, to maintain and develop their cultural identity be recognized and enforceable in international law as a group and individual right.

⁴⁴Vrdoljak 2006, 193.

⁴⁵Memoir of Lord Castlereagh to Allied Ministers, Paris, 11 September 1815, reprinted in Vrdoljak 2006, 194.

⁴⁶Vrdoljak 2006, 194.

- Fourth, making the international community recognize that legal ownership and control of their cultural heritage by a group is crucial to the right to determine the preservation and development of that group's cultural identity. It is important that the international community, particularly former metropolitan powers and settler States, must "confront their [colonial] past honestly" and acknowledge the role of their museums in the cultural losses sustained by colonized peoples. Whilst settler States have shown a degree of willingness to engage in this process, by contrast, former metropolitan powers and their holding institutions have been reticent about doing so, especially when compared to their eventual response to the claims of Holocaust survivors and their heirs.⁴⁷

Resolution of the Issue: There Is No Case for the Return of Cultural Property Taken during the Colonial Era

Even though substantive steps have been taken by the international community to redress the grievances of countries that have lost their cultural property, the fact remains that there is no legal remedy to be taken for the restitution of cultural property taken during the colonial era. The only possible remedy seems to be to appeal to those nations, or at least to public sentiment in those nations, to return these items out of compassion for the formerly suppressed nations. A written request was made to the UK a few decades back, asking that the cultural property removed from Sri Lanka be returned. However, the UK refused to do so. The reason given was that, apart from the fact that Sri Lanka had no legally acceptable claim under international law, the UK would find itself in an awkward position if it returned objects to Sri Lanka since it would then be obliged to return cultural property to other countries such as India and Greece. This would no doubt deprive the UK museums of much of their collections. In fact, the UK has domestic legislation—namely, the British Museum Act of 1963, that expressly forbids the museum from disposing of its holdings, except in a small number of exceptional circumstances.⁴⁸ A renewed request was made in 2013, which also yielded negative results.⁴⁹ No new efforts have been made, and the matter appears to have sunk into oblivion.

It is disheartening to note that the international conventions dealing with the topic have chosen to confine themselves to restricted time periods, which automatically deprives the former colonies of their right to request the return of artifacts that have been taken before the prescriptive period. This factor weakens the legitimacy of these instruments, as they promote the rights of one set of countries, while denying

⁴⁷Vrdoljak 2006, 196–97.

⁴⁸British Museum Act 1963, ch. 24.

⁴⁹"British Mum over Returning SL Cultural Properties," *Daily Mirror*, 5 March 2013, <http://www.dailymirror.lk/article/british-mum-over-returning-sl-cultural-properties--26206.html> (accessed 18 November 2017).

the rights of others. While there appears to be no legal basis on which to claim these objects, the states that have suffered losses have nevertheless not lost hope that at least some of them will be returned as gifts. There have been a few recorded instances where Sri Lankan cultural objects have been returned by private individuals.⁵⁰ What objects remain in the museums, though, will probably continue to remain there, protected as they are by the various laws created for those very purposes.

THE MODERN-DAY PROBLEM: LOSS OF CULTURAL PROPERTY DUE TO ARMED CONFLICT

The Prevailing Context

Sri Lanka's ethnic conflict, which lasted for over 30 years, resulted in some degree of civil disorder. Such disorder never augurs well for those objects that are most vulnerable, and the case of cultural property in Sri Lanka is no different. Since it appears that many of the objects lost during the colonial era will not be returned, we must now strive to protect those objects that still remain. This portion of the article will examine the problems caused by looting and theft and will attempt to provide a glimpse at the efforts taken by post-conflict Sri Lanka to protect its cultural property.

The Geographic Issues of Looting

It has been said that in Sri Lanka one cannot dig up one's own backyard without finding an object of cultural value, and this is true of many of the cities that were once the nation's capital. This has led to the designation of an area between three of the major cities in the central part of the country as "the cultural triangle." They are Anuradhapura, Polonnaruwa, and Kandy. Each of these cities was, at some point in time, the capital of the country. The cultural triangle is being protected and preserved under the UNESCO–Sri Lanka cultural triangle project. Strict measures apply to protect artifacts found in this area, and they belong to the state. Since there are many artifacts waiting to be discovered, and few resources available to discover, document, and store them carefully, it is almost a given fact that there will be plunder and looting on a large scale. This problem was exacerbated during the ethnic conflict, which was centered in the northeastern part of the country. The armed rebel group known as the Liberation Tigers of Tamil Eelam (LTTE) had de facto control over a large part of the north and east regions from the late 1980s until the mid-2000s. During this time, Sri Lankan law enforcement was virtually

⁵⁰De Silva, writing the piece on Sri Lanka highlights this point and notes that it is not all the property that is requested, but those pieces that are integral to the identity of the nation, including the statue of Tara. De Silva 1979, 22–25.

inoperative in these areas, with the LTTE having its own police, judiciary, and laws and not administering the law of the state of Sri Lanka. As such, there was little or no control over, or protection of, cultural property in these areas.

International Regime Governing Cultural Property during Times of Armed Conflict

The international regime governing cultural property in times of armed conflict has evolved through the centuries. From a view that war was morally acceptable under any circumstance, the view taken during the Renaissance focused more on the idea of the “just war.” Even under this concept, belligerent actions needed to win the war were justified. At that time, there was no distinction between civilian property and property of the state. The seizure and destruction of cultural objects appears to have been permitted. The first formal attempt at codifying the laws of war was the 1863 Lieber Code.⁵¹ The “Lieber Instructions” were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, and promulgated by President Abraham Lincoln. Although they were binding only on the forces of the United States, they corresponded to a great extent to the laws and customs of war existing at that time. The “Lieber Instructions” set the stage for the adoption of the Hague Conventions on land warfare in 1899 and 1907 and the subsequent international instruments in this area.⁵² Article 22 of the Lieber Code posits that civilian property should be spared “as much as the exigencies of war will admit.”⁵³ It could be assumed that cultural property, only to the extent that it is also civilian property, could be spared, given this definition. However, Article 5 of the Lieber Code also permits the damage or destruction needed to secure the end of the war, and this would justify the destruction of cultural property if it stands in the way of victory.⁵⁴

The 1954 Hague Convention deals with the protection of cultural property in times of armed conflict by prohibiting combatants from damaging or stealing such property in a war situation. Article 1 defines “cultural property” to cover, irrespective of origin or ownership,

- a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a

⁵¹Instructions for the Government of Armies of the United States in the Field, General Order no. 100 (Lieber Code), 24 April 1863, https://archive.org/stream/pdfy-NG4E2nsEimXkB5mU/The%20Lieber%20Code%20Of%201863_djvu.txt (accessed 18 November 2017).

⁵²Hague Convention for the Pacific Settlement of International Disputes 1899, 1 AJIL 103 (1907); Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) 187 CTS 227.

⁵³Lieber Code.

⁵⁴Lieber Code.

whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

- b. buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- c. centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.

Article 4(2) of the Convention, which deals with the principle of military necessity, posits the view that cultural property may be targeted only where there is “imperative military necessity.” The First Protocol to the Hague Convention requires its members to prevent exportation of cultural property from an occupied territory in the event of armed conflict;⁵⁵ take into custody cultural property imported into its territory directly or indirectly from any occupied territory;⁵⁶ return to the competent authorities of the previously occupied territory, cultural property that is in its territory, if such property has been exported in contravention of the principles of the 1954 Hague Convention;⁵⁷ and pay indemnity to the holders in good faith of any cultural property that has to be returned in accordance with the First Protocol.⁵⁸ Sri Lanka is neither a state party to the Convention nor to this Protocol.

National Laws Designed to Protect Cultural Property

Local legislation geared toward protecting cultural assets in Sri Lanka is found mainly in the 1940 Antiquities Ordinance and the more recent 1988 Cultural Property Act no. 73.⁵⁹ The Antiquities Ordinance was drafted prior to independence and, apart from a few minor changes, has not been modified much. The Act was drafted for the better management of antiquities. It defines an “antiquity” to be any object such as a statue, carving, or other movable object that dates prior to March 1815. Section 16 describes “archaeological heritage” as being “that part of the material heritage of mankind in respect of which archaeological methods provide primary information and includes all vestiges of human existence and places relating to all manifestations of human activity, abandoned structures and remains of all

⁵⁵First Protocol, Art. 1(1).

⁵⁶First Protocol, Art. 1(2).

⁵⁷First Protocol, Art. 1(3).

⁵⁸First Protocol, Art. 1(4).

⁵⁹UNESCO, Antiquities Ordinance, 1940, http://www.unesco.org/culture/natlaws/media/pdf/srilanka/srilanka_antiquities_ordinance9_engorof.pdf (accessed 18 November 2017); Cultural Property Act, No. 73, 1988.

kinds ... together with all the portable cultural material associated with them.” The definitions of the Antiquities Ordinance are outdated compared with the terms in the 1988 Cultural Property Act.

The Cultural Property Act was enacted specifically to deal with the control of the export of cultural property and to provide for a scheme of licensing to deal in cultural property. Accordingly, the controller of exports may issue a license to an applicant who wishes to export any cultural property from Sri Lanka, provided the person pays the requisite fee and obtains the consent of the archaeological commissioner. The archaeological commissioner can object to such an export if he or she is of the opinion that the object is required for a museum in Sri Lanka. Persons aggrieved by the decision of the commissioner may appeal to the secretary of the Ministry of Cultural Affairs. Part II of the Act deals with the establishment of the Cultural Property Board. Part III provides for the minister to publish, in the *Government Gazette*, a list of cultural property that needs to be registered if it is in private hands. Individuals may not own cultural property unless they have a certificate of registration for such property. Violation of this section carries a fine of one thousand rupees and/or a prison term not exceeding one year. Part IV mandates that a person who wishes to deal in cultural property must also be licensed to do so.⁶⁰ It requires the archaeological commissioner to consider, among other factors, the expertise of the applicant and the place of business. Section 21 mandates that anyone attempting to sell cultural objects without a license shall be subject to more stringent penalties than those laid out for the contravention of other sections of the Act.⁶¹ Part V lists the duties of the archaeological commissioner, which include preparing the list of cultural property that must be registered,⁶² conserving and repairing cultural property,⁶³ controlling and administering the registration and sale of cultural property,⁶⁴ and purchasing valuable cultural property, with funds granted by Parliament.⁶⁵ Part VI contains a comprehensive definition of cultural property, which appears to be based largely on the UNESCO Convention. The definition is not exhaustive and includes property that is designated as such by the minister, that is of importance for archaeology, prehistory, history, literature, art or science, and that belongs to one of 10 categories, ranging from fauna, flora, minerals, and anatomy to old musical instruments.

This Act seems to be a good piece of legislation. First, it does not leave the decision to issue the license to a single individual. Hence, it minimizes the chances of bribery and corruption by increasing accountability. Further, it does not prohibit the trade and export of cultural property but mandates that it should be regulated.

⁶⁰Cultural Property Act, s. 18.

⁶¹These include either a fine not exceeding 5,000 rupees or to imprisonment of either description for a period not less than three years or to both the fine and the imprisonment.

⁶²Cultural Property Act, s. 22(a).

⁶³Cultural Property Act, s. 22(b).

⁶⁴Cultural Property Act, s. 22(c).

⁶⁵Cultural Property Act, s. 22(d) (emphasis added).

This policy appears to be more far-sighted than banning the export and trade of cultural property altogether, which simply drives the trade underground. Next, it does not vest all cultural property in the state but, rather, acknowledges that individuals may also own cultural property. Finally, it provides that where the state wishes to have a certain object for one of its museums, it must purchase it from the individual who owns it. The Act does not specifically address the issue of looting, but it does provide that if the archaeological commissioner feels that any cultural property of national importance that is privately owned is in danger of destruction or decay, he or she can ask the owner to take steps to protect it. If the owner does not or cannot, the commissioner can take the object into his custody for the purpose of restoring it or protecting it but must return it once the danger is past. Hence, it is submitted that the Act provides an adequate amount of protection to cultural property without being protectionist. It has no retrospective effect and looks to regulate only those activities that will take place in the future.

While the local authorities do not seem to be fazed by the problem of looting, the matter was debated in the House of Commons of the British Parliament during the second reading of the Dealing in Cultural Objects (Offences) Bill.⁶⁶ The Bill sought to “provide for an offence of acquiring, disposing of, importing or exporting tainted cultural objects, or agreeing or arranging to do so; and for connected purposes.”⁶⁷ During the debate, it was mentioned that a stone frieze was seized from a London auction house by the Art and Antiques Unit.⁶⁸ The piece was apparently being sold by Sri Lankan terrorists, who identified themselves as the LTTE, to fund their war effort. Although this is just one reported incident, it serves to remind us of the many others that are unreported. Looting is not the only problem that Sri Lanka faces in the modern day. This next section of the article will look at some of the other resource-related constraints with which the country must contend.

Resources Available for the Protection of Cultural Property

The annual budget allocated for the preservation of cultural assets in Sri Lanka is less than US \$2 million per year.⁶⁹ In addition, several other institutions are also reported to invest money to protect the country’s cultural heritage. The Department of Archaeology, which is the primary institution in this regard, has seven divisions

⁶⁶Debated in December 2002. Dealing in Cultural Objects (Offences) Bill, No. 30, 11 December 2002, <https://publications.parliament.uk/pa/cm200203/cmbills/030/2003030.pdf> (accessed 18 November 2017).

⁶⁷Dealing in Cultural Objects (Offences) Bill, 1.

⁶⁸The Art and Antiques Unit is a specialized unit of Scotland Yard, which is currently under threat of closure. For more information, see “Warning over Break-up of Scotland Yard Specialist Art Unit,” *Financial Times*, <https://www.ft.com/content/53a4d768-82a2-11e7-94e2-c5b903247afd> (accessed 18 November 2017).

⁶⁹Sri Lanka, “Budget Estimates 2017,” <http://www.treasury.gov.lk/documents/10181/336544/volume3.pdf/aa9b9535-fa20-4839-be01-dd3a9f229bc9> (accessed 18 November 2017).

in order to more easily handle the enormous workload it faces, including divisions on exploration and documentation, excavation and museums, architectural conservation, chemical conservation, maintenance, epigraphy and numismatics, and general services. Each of these sections is headed by a director who is professionally qualified in the respective discipline. As for manpower, the professional staff consists of approximately 125 persons, while 250 people are employed as technical staff. At the craftsman level, the department employs about 2,500 people.

Problems Facing the Department of Archaeology

There are a number of factors that threaten cultural property. Among them are negligence, deterioration, climate, humidity, biological attack, and lack of maintenance. As a developing country, Sri Lanka is faced with a number of difficulties in carrying out conservation work. The biggest drawback appears to be the lack of appropriate funding for conservation work, evidenced by the budgetary figures that we have already considered.

CONCLUSION

The Sri Lankan government does not seem to have developed a strong case for reclaiming cultural property taken during the colonial era. Apart from a few efforts made by certain concerned individuals, there has been no concerted government effort to regain these lost treasures. It is submitted that the government should at least try to use some political influence to try and regain the statue of Tara. The effort made by the Greek government to regain the Parthenon Marbles has served to stir up a debate on this topic. Unless the government of Sri Lanka takes the initiative by asking for the return of at least one object that is of vital importance to its cultural identity, the rest of the world and, indeed, most of Sri Lanka would not even be aware of its importance. The government's attitude has been lukewarm, to say the least. Hence, it seems for the present that Tara is destined to remain in Britain.

While looting continues to be a problem that is yet to be formally acknowledged by the Department of Archaeology, it is, as in many other countries, one that poses the greatest threat to cultural property in modern Sri Lanka and should be addressed as quickly as possible. One step in the right direction comes from the recent legislation that permits export and trade, subject to registration requirements. Hopefully, this will help to weed out the illicit trade in cultural property and ensure that only objects that are sanctioned by the archaeological commissioner will find their way out of the country. The resource-related problems are not capable of being solved overnight. However, it is to be hoped that with greater awareness and appreciation of the magnificent heritage that finds its home in Sri Lanka, there will be more attempts to restore and revive it. This will in the long term bring in more resources, both human and financial, and help Sri Lanka to rediscover her lost identity.

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