THE PROTECTION OF CULTURAL PROPERTY

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One way of thinking about cultural property —*i.e.* objects of artistic, archaeological, ethnological or historical interets [1]— is as components of a common human culture, whatever their places of origin or present location, independently of property rights or national jurisdiction. That is the attitude embodied in the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (hereinafter "Hague 1954"),[2] which culminates a development in the international law of war that began in the mid-nineteenth century.

Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies

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[1] Any comprehensive definition of cultural property would have to include such objects and much more. Thus the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import. Export and Transfer of Ownership of cultural Property of 1970 defines Cultural property in Article 1 to include *(a)* Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest: *(b)* property relating to history, including the history of science and technology and military and social history ...; *(c)* products of archaeological excavations ...; *(d)* elements of artistic or historical monuments which have been dismembered; *(e)* antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; *(f)* objects of ethnological interest; *(g)* objects or artistic interest ...; *(h)* rare manuscripts and incunabula, old books, documents and publication of special interest ...; *(i)* postage, revenue and similar stamps ...; *(j)* archives, including sound, photographic and cinematographic archives; *(k)* articles of furniture more than one hundred years old and old musical instruments. In Italy cultural objects and environmental treasures (including natural and artificial landscapes and ecological areas plus, in cities, urban structures and panoramas) are treated as fundamentally related to each other. See Alibrandi, Tommaso, and Piergiorgio Ferri, *I Beni Culturali e Ambientali;* Milán, 1985, *Cf.,* the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972, UNESCO Document 17/C/106 of November 15, 1972.

[2] 249 United Nations Treaty Series 240. The conference that produced Hague 1954 was called by UNESCO, so it is right to think of the Convention as to some extent a UNESCO product. The differences between Hague 1954 and UNESCO 1970 described in this article reflect the changes that have taken place in UNESCO's membership, structure, program and ideology since 1954.

the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the "repatriation" of cultural property. As a corollary of this way of thinking, the world divides itself into source nations and market nations.[3] In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples.[4] Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property from source nations. Despite their enthusiasm for other kinds of export trade, however, most source nations vigorously oppose the export of cultural objects. Almost every national government (the United States and Switzerland are the principal exceptions) treats cultural objects within its jurisdiction as parts of a "national cultural heritage". National laws prohibit or limit export, and international agreements support these national restraints on trade. This way of thinking about cultural property is embodied in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 17 November 1970 (hereinafter "UNESCO 1970"),[5] which is the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects.

While both conventions purport to protect cultural property, they give the term "protection" different meanings and embody different and somewhat dissonant sets of values. I describe these differences and explore their implications for national and international cultural property policy and law.

[3] Prott, Lyndel V., and P. J. O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property*, Paris, UNESCO, (1983), p. 2, include a third category of "transit countries" which, though useful for other purposes, need not be included here.

[4] The reader will not need to be reminded that a nation can be both a source of and a market for cultural property. For example, there is a strong market abroad for works of North American Indian cultures, even though Canada and the United States are thought of primarily as market nations. Conversely, there are wealthy collectors of foreign as well as national cultural objects in most source nations.

[5] I *International Legal Materials* 289.

I. Hague 1954 and cultural internationalism

Hague 1954 is a direct descendant of the work of Francis Lieber, "the man who shaped and laid the cornerstone on which the laws of war, as we now find them, are based".[6] Lieber, a German emigre professor at Columbia College in New York, had assisted Henry Wager Halleck, General-in-Chief of the Union Armies, in defining guerilla warfare. This association led to Lieber's preparation of a proposed "code of conduct by belligerent forces in war" which was issued by the Union command as General Orders No. 100 on April 24, 1863, to apply to the conduct of the Union forces in the American civil War. Entitled "Instructions for the Governance of Armies of the United States in the Field", the Lieber Code contains 157 articles. Articles 34-36 deal with protection of cultural property and provide:

> *ARTICLE 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... but is may be taxed or used when the public service may require it.
> *ARTICLE 35.* Classical works of art, libraries, scientific collections, or precise instruments, such as astronomicall telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
>
> *ARTICLE 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.
> In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.[7]

[6] Taylor, Telford, "Foreword", *in* Friedman, Leon (ed.), *The Law of War: A Documentary History*, p. xv (1972) (cited herein as Friedman); *cf.*, Richard Shelly Hartigan, *Lieber's Code and the Law of War* (1983) (cited herein as Hartigan).

[7] Friedman, p. 165; Hartigan, pp. 51-52.

The Lieber Code was the first attempt to state a comprehensive body of principles governing the conduct of belligerents in enemy territory. Its influence can be traced through a number of succeeding efforts. Thus at an international conference of fifteen states called by the Russian Government and held in Brussels in 1874, the "Declaration of Brussels" was promulgated (but never adopted as an international convention because of the resistance of Great Britain). Article 8, of a total of 56 articles, states:

> The property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or wilful damage to, such establishments, historical monuments, or works of art or science, shall be prosecuted by the competent authorities.[8]

In 1880 the prestigious Institute of International Law (an organization of scholars of international law) included a similar provision (article 56) in its "Manual of the Laws and Customs of war".[9] In 1899, again at the initiative of the Russian government, a conference of 26 nations was convened at The Hague. This important conference produced a number of international agreements including the Convention on the Laws and Customs of War (Hague II, 1899) and a set of "Regulations Respecting the Laws and Customs of War on Land" (Hague II Regulations) in 60 articles, of which article 56 deals with the protection of cultural property in similar terms.[10] Such provisions appear with increasing frequency in the present century. In 1907, at the initiative of the United States (President Theodore Roosevelt) and, again, of Russia, another important conference was convened at The Hague, attended by 44 nations. The "Convention on Laws and Customs of War on Land" (Hague IV, 1907) adopted at that conference has a set of appended "Regulations Respecting the Laws and Customs of War on Land" (Hague IV Regulations), of which article 56 provides in similar terms for the protection of cultural property.[11] The same 1907 conference produced the Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX) which provides in article 5 for the protection of "historic

[8] Friedman, p. 195.
[9] Scott (ed.), *Resolutions of the Institute of International Law*, 1916, pp. 36-37.
[10] Friedman, 234.
[11] *Idem*, p. 323.

monuments", "art" and "science". In 1923 another Hague conference produced The Hague Rules of Air Warfare (which were never adopted by the powers concerned). Articles 25 and 26 provide for the protection of cultural property.[12]

Hague IV, 1907, and related conventions were the governing general international legislation on the conduct of belligerents until the end of World War II. On the whole these conventions merely restated earlier provisions concerning cultural property. Although the language varied slightly from one to another, the basic structure of protection remained the same: subject to an overriding concession to military necessity, which will be discussed below, cultural objects were protected. Individuals responsible for offences against cultural property were to be punished by the authorities of their own nations.

The Lieber Code and its progeny all dealt comprehensively with the obligations of belligerents; the protection of cultural property was merely one among many topics. In the 1930's, however, international interest turned to the preparation of a convention dealing solely with the protection of cultural property in time of war. In 1935 the 21 American nations promulgated a Treaty on the Protection of Artistic and Scientific Institutions and Monuments, now generally referred to as the Roerich Pact.[13] As the first international convention entirely devoted to the protection of cultural property this document is historically important, but it is now, for all practical purposes, superceded. In 1939 the governments of Belgium, Spain, The United States, Greece and The Netherlands, under the auspices of the League of Nations, issued a Draft Declaration and a Draft international Convention for the Protection of Monuments and Works of Art in Time of war[14] Like the Roerich Pact, these League efforts were quickly overtaken by the events of World War II, by changes in the technology, tactics and strategy of warfare and the new concept of "total war", and by the offences against cultural property deliberately and systematically committed by the Nazis. By the end of World War II the governing rules concerning protection of cultural property against belligerent acts had clearly become inadequate. Two major legal events then occurred: the Nuremberg Trials and the promulgation, under the auspices of UNESCO, of Hague 1954.

[12] *Idem*, p. 441.
[13] U.S. Treaty Series No. 899 (1936).
[14] U.S. Department of State, Documents and State Papers, Vol. I, No. 15, June 1949, pp. 859 ff.

Alfred Rosenberg, one of the principal accused Nazis at the Nuremberg trials, was among other things head of the infamous Einsatzstab (Special Staff) Rosenberg. The Einsatzstab was charged with looting German-occupied countries of cultural property, an assignment which it efficiently, voraciously and ruthlessly executed. Rosenberg's indictment and the evidence introduced at his trial detailed his (and the Einsatzstab's) offences against cultural property.[15] Rosenberg was found guilty of these and other offences and was hanged. The innovation here, as elsewhere in the Nuremberg Trials, was that other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name. The Lieber Code and its progeny had a different basis: such offences violated international law, but offending personnel were to be disciplined, if at all, by their own governments.[16]

Hague 1954, the first universal convention to deal solely with the protection of cultural property, incorporates the principle of individual international responsibility, established at Nuremberg, in Article 28:

> 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. (Emphasis added.)

[15] See materials collected in Merryman and Elsen, *Law Ethics and the Visual Arts* 1-43 ff.; Williams, Sharon A., *The International and National Protection of Movable Cultural Property: A Comparative Study,* Dobbs Ferry, N. Y., 1978, pp. 23-29.

[16] In fact, the long-established principle that alleged war criminals would be tried by their own governments had been brought into serious question in the aftermath of World War I. The Treaty of Versailles provided in Article 227 for trial of the German Kaiser before an international tribunal, but no such trial was held. Article 228 of the Treaty provided that Germans accused of war crimes would be tried by military tribunals of the victorious Allies. In pursuance of this provision, a list of 896 alleged war criminals, including highly placed officers, was submitted by the Allies with the demand that they be turned over for trial. "The German cabinet strenuously objected to the demand, citing the opposition of the German public. The Germans reported to the Allies that there would be an insurrection if they tried to deliver the names on the list, and army leaders said they would resume the war if the Allies pressed the matter." Friedman 777. It was eventually agreed that the Germans would conduct the trials in their own high court, the Reichsgericht in Leipzig, applying international law. The Allies provided a drastically reduced list of 45 names, and the Germans agreed to try 12 of them. Six were eventually tried, convicted and received light sentences, ranging from a few months to four years in prison. (The two officers who were sentenced to four years escaped soon after imprisonment). For a contemporary account and evaluation of the trials see Mullins, Claud, *The Leipzig Trials,* London, 1921.

A more significant novelty of Hague 1954, however, is that it provides a rationale for the international protection of cultural property. The language of the preamble is for this reason alone memorable:

> Being convinced 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; Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection; ...

While it seems clear that such considerations underlay the protection of cultural property in Lieber's code and its succesors, their expression in Hague 1954 is a significant innovation. The quoted language, which has been echoed in later international instruments,[17] is a charter for cultural internationalism, with profound implications for law and policy concerning the international trade in and repatriation of cultural property. The principle would appear to apply, for example, to the Elgin Marbles; they are a part of "the cultural heritage of all mankind." It follows that people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study.[18] The perennial debate about the propriety of their removal from Greece by Elgin, and the current proposals to return them to Athens, become the business of others besides Greeks and Britons. As the smog of Athens eats away the marble fabric of the Parthenon all of mankind loses something irreplaceable. These matters are discussed below.

Hague 1954, like its predecessors, limits the protection of cultural property by the doctrine of "military necessity". As stated in the Lieber Code, Articles 14 and 15:

[17] Such echoes can be found in the language of the UNESCO Recommendation Concerning the International Exchange of Cultural Property of 1976, UNESCO Document IV.B.8, though usually combined with insistence on the centrality of national interests. Thus the preamble states: "Recalling that cultural property constitutes a basic element of civilization *and national culture,*" and "Considering that a systematic policy of exchanges among cultural institutions ... would ... lead to a better use of the international comunity's cultural heritage *which is the sum of all the national heritages*" (emphasis supplied). Article 2 of the Recommendation contains a less nationalistic statement: "Bearing in mind that all cultural property forms part of the common heritage of mankind ..."

[18] For a discussion of the Marbles and of preservation, integrity and distribution/access as the three main categories of international interest in cultural property see Merryman, "Thinking about the Elgin Marbles", 83 *Mich. L. R.,* 1880 (1985).

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

15. Military necessity ... allows of all destruction of property...[19]

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". In short, military necessity can justify the destruction of cultural property otherwise protected by the Convention.

This principle, whose origin has been attributed to Prussian militarism —"la celebre conception prussienne de la Kriegsraison",[20] was strongly debated at the conference that produced Hague 1954 and was retained by a divided vote.[21] The criticisms are of three kinds. One is that the concept of military necessity is so indefinite and the circumstances of its use in the field so fluid that "necessity" too quickly and easily shades into "convenience". Military necessity was one of the standard defenses of accused war criminals after World Wars I and II.[22] This criticism, in short, accepts the concept of military necessity in the abstract but finds its use in the concrete uncontrollable. The second objection is more fundamental, arguing that military necessity is a relic of an age that treated aggressive war as a legitimate instrument of national policy-an age evoked by such terms as *jus ad bellum, Kriegsraison, Kriegsbrauch, raison de guerre, raison d'etat,* and so on. Why such critics ask, should a great cultural monument be legally sacrificed to the ends of war? What does it say about our scale of values when we place military objectives above the preservation of irreplaceable cultural monuments?[23] The second criticism obviously gains force from the present century's outlawing of aggressive war and from acceptance of the idea that cultural prop-

[19] Friedman, p. 161; Hartigan, p. 48.

[20] Nahlik, *La Protection Internationale des Biens Culturels en Cas de Conflit Arme,* Recueil des Cours 1967.I.59, 87.

[21] Nahlik, 128 ff.

[22] Dunbar, "Military Necessity in War Crimes Trials", 29 *B.Y.I.L.* 442 (1952).

[23] See the debate concerning military necessity in Intergovernmental Conference for the Protection of Cultural Property in the Event of Armed Conflict, Acts of the Conference. The Hague, 1961, and compare Geoffrey Best, Humanity in Warfare. London 1980, *passim.* with Joseph R. Baker & Henry G. Crocker, *The laws of Land Warfare Concerning the Rights and Duties of Belligerents,* Washington D.C. 1919, pp. 149 ff., 209-213.

erty belongs to all mankind, not merely to the belligerents. Still, if military necessity justifies the denial or limitation of constitutionally guaranteed rights, as it sometimes does in American constitutional law,[24] perhaps it is not surprising that we permit it to justify the destruction of cultural treasures.[25] Finally, the concession to military necessity seems inconsistent with the premises of Hague 1954: "the cultural heritage of all mankind" is put at the mercy of the relatively parochial interests of belligerents. In an international convention to which national states are parties this is perhaps unsurprising and may be unavoidable. Still, the matter was vigorously discussed and the concession to nationalism strongly opposed by major nations at the conference.

Despite its deference to military necessity, Hague 1954 expresses several important propositions affecting the international law of cultural property. One is the cosmopolitan notion of a general interest in cultural property ("the cultural heritage of all mankind"), apart from any national interest. A second is that cultural property has special importance, justifying special legal measures to insure its preservation. Another is the notion of individual responsibility for offences against cultural property. The fourth is the principle that jurisdiction to try offences against cultural property is not limited to the government of the offender.[26] The first and second of these propositions are expressed in a variety of other international acts and agreements (including UNESCO 1970 and its cluster of related events and documents, which will be discussed below). One can therefore treat them as principles of general applicability, not limited to controlling the conduct of belligerents in time of war or civil conflict. The third and fourth propositions, however, growing out of the Lieber Code, the Hague 1899 and 1907 conventions, the experiences of World Wars I and II and the Nuremberg trials, are more closely tied to the international law of war. For example, they do not at present apply to

[24] Levine, "The Doctrine of Military Necessity in the Federal Courts", 89 *Military Law Rev.* 3 (1980).

[25] But see Nicolson, Sir Harold, "Marginal Comments", *The Spectator*, Feb. 25, 1944, quoted in Merryman and Elsen, *Law, Ethics and the Visual Arts* 1-85 ff., arguing that it would be right to sacrifice lives in war to save an irreplaceable work of art.

[26] Hague 1954 also provides that the ordinary courts —*i.e.* the courts that ordinarily try criminal offences— should be used, rather than military tribunals or special tribunals created for the purpose. One reason for the German resistance to the Treaty of Versailles provision that alleged German war criminals be tried by the Allies was that Allied military tribunals would try them.

the peacetime traffic in smuggled or stolen cultural property. Like all major international conventions, however, Hague 1954's influence extends beyond the obligations imposed on and accepted by its parties. It is a piece of international legislation that exemplifies an influential way of thinking about cultural property, which I will call "cultural internationalism".[27] We now examine another way, exemplified by UNESCO 1970.

II. UNESCO 1970 AND CULTURAL NATIONALISM

The forerunners of the UNESCO 1970 Convention include: Resolution XIV, Protection of Movable Monuments, of the Seventh International Conference of American States of 1933,[28] three draft international conventions prepared by the League of Nations in 1933, 1936 and 1939, the last of which was entitled: Draft International Convention for the Protection of National Collections of Art and History,[29] and the UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property of 1964.[30]

The basic purpose of UNESCO 1970 is, as its title indicates, to inhibit the "illicit" international trade in cultural objects. The parties agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and transfer of ownership" of cultural property (Article 2), agree that trade in cultural objects exported contrary to the law of the nation of origin is "illicit" (Article 3), and agree to prevent the importation of such objects and facilitate their return to source nations (Articles 7, 9 and 13).[31]

[27] "Supronationalism", "metanationalism" or "cosmopolitanism" might, strictly speaking, be better than "internationalism", since the idea it that humanity, independently of nations and international arrangements, is the party in interest. Use of "internationalism" in this sense has, however, become common enough and will do.

[28] Report of the Delegates of the United States of America to the Seventh International Conference of American States, Montevideo, Uruguay, December 3-26, 1933, U.S. Department of State Conference Series No. 19, p. 208 (1934).

[29] All three are set out in U.S. Department of State, Documents and State Papers, vol. I, No. 15 (June 1949), pp. 865 ff.

[30] Compendium 382. Later relevant materials include the Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) of 1976, Compendium 370; and the UNESCO Rocommendation of the Protection of Movable Cultural Property of 1978, Compendium 386.

[31] UNESCO 1970 imposes other obligations on the parties: to take steps to insure the protection of their own cultural property by setting up appropriate agencies, enacting laws and regulations, listing works of major cultural importance,

As of this writing, 58 nations have become parties to UNESCO 1970. Of these, only two could be classified as major market nations: the United States and Canada. None of the others, such as Belgium, France, Germany, Japan, the Netherlands, the Scandinavian nations or Switzerland, are parties. Most source nations, however, many of them in the Third World, are parties. The reason for this disparity lies in the Convention's purpose: to restrain the flow of cultural property from source nations by limiting its importation by market nations. It is true that the Convention applies only to the "illicit" international traffic in cultural property, but since many source nations have policies that, in effect, prohibit *all* export of cultural property, the distinction as to them is not significant. By ratifying UNESCO 1970 a market nation commits itself to forego the further importation of some kinds of cultural property from those source nations that are parties. Why should it do so? The preamble to the Convention sets out a series of more or less related propositions that state the case for international action, of which the core is the following:

> Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to *the fullest possible information regarding its origin, history and traditional setting* (emphasis added).

The concern is that unauthorized, clandestine excavations and removals are almost always undocumented. A Mayan stele torn from an undeveloped, undocumented site in the jungle of Belize and smuggled to Switzerland to be sold becomes anonymous. Both it and the site have been deprived of valuable archaelogical and ethnological information that would have been preserved had the removal been properly supervised and documented, or had the stele remained in place at the site.[32]

supervising excavations, and through education and publicity (Articles 5, 12 and 14). In general, however, these provisions are much less significant in the international discussion and activity under the Convention. The principal effort is to enlist the market nations to support the restrictions on export adopted by the source nations.

[32] This concern is more fully developed in League of Nations, Final Act of the International Conference on Excavations, Museion (Paris) 1937, pp. 1 ff.; the UNESCO Recommendation Concerning the Preservation of Property endangered by Public or private works of 1968, UNESCO Document CFS.68/vi.14x/AFSR; and the European Convention on the protection of the archaeological heritage of 1969, Compendium 365.

Such concerns apply with particular force to undocumented archaeological objects. Others, such as works previously removed from their sites; those remaining in their sites that have been fully documented in place; and the very large body of art works and artifacts *(e.g.* paintings, sculptures, ceramics, jewelry, coins, weapons, manuscripts, etc.) that are movable without significant loss of information obviously raise no such problem. The quoted preamble provision applies in practice to only a small, though extremely important, proportion of the total trade in stolen and illegally exported cultural objects.

One of the difficulties in discussing cultural property policy is the tendency toward euphemism in much of the dialog. Thus UNESCO 1970 is largely about national retention of cultural property, but the term "retention" is seldom used. Instead, the talk in about "protection" of cultural property —*i.e.* protection against removal—. Thus, for example, another clause of the preamble states:

> Considering that it is incumbemt upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illegal export,

One way to read this language is that it imposes an obligation on source nations to care for cultural property in their national territories, and Article 5, paragraphs *(c)* and *(d)* of the Convention are consistent with that interpretation.[33] An alternative reading, however, is that these words justify national retention of cultural property. That is indeed the prevailing interpretation among source nations; the notion that they are obligated by UNESCO 1970 does not arise. When interpreted in this way the quoted language of the preamble might be paraphrased as follows:

> Considering that it is right for every State to retain cultural property existing within its territory and to prevent its theft, clandestine excavation and export,

This intention is made clear in Art. 2 of the Convention, which states;

[33] Examples of international instruments that do seek to impose obligations on nations to protect cultural property are: UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage of 1972, UNESCO Document 17 C/107 (Nov. 15, 1972); and UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972, UNESCO Document 17/C/106 (Nov. 15, 1972).

> The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property...,

The emphasis on national retention of cultural property is legitimated throughout UNESCO 1970 by use of the term "illicit", which is given an expansive meaning. Article 3 defines as "illicit" any trade in cultural property that "is effected contrary to the provisions adopted under this Convention by the States Parties there to". Thus if Guatemala were to adopt legislation and administrative practices that, in effect, prohibited the export of all pre-Columbian artifacts, as it has done, then the export of *any* pre-Columbian object from Guatemala would, under UNESCO 1970, be "illicit". A number of source nations who are parties to UNESCO 1970 have such laws. This is the feature of UNESCO 1970 that has been called a "blank check" by interests in market nations; the nation of origin is given the power to define "illicit" as it pleases. Museums, collectors and dealers in market nations have no opportunity to participate in that decisión. That is why legislation implementing United States adherence to UNESCO 1970 took ten years to enact.[34] Museum, collector and dealer interests sought, with some success, to limit the effect on the trade in cultural property that would follow from automatic acquiescence by the United States in the retentive policies of some source nations.[35]

Following promulgation of UNESCO 1970 the attention of source nations has turned to what is now generally called "repatriation": the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed). Beginning in 1973, the United Nations General Assembly has adopted a series of resolutions calling for the restitution of cultural property to coun-

[34] The United States ratified UNESCO in 1972 but reserved its obligations under the Convention until the enactment by Congress of implementing legislation. The result of a number of efforts and much negotiation, the Cultural Property Implementation Act was enacted in 1983 as Public Law 97-446, 19 U.S.C. ss. 261 ff.

[35] The provisions of UNESCO 1970 were moderated by the participation of the United States in its drafting. Bator, "An Essay on the International Trade in Art." 34 *Stan. L. R.* 275, 370 (1982). Their effects were further limited in the U.S. by "reservations" and "understandings" attached to U.S. ratification of the Convention in 1972. Merryman and Elsen, 2-180 ff. The provisions of the Cultural Property Implementation Act further limit the effects of UNESCO 1970 in the United States.

tries of origin.[36] In 1978 UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or its Restitution in Case of Illicit Appropriation.[37] In 1983 the Council of Europe Parliamentary Assambly adopted a Resolution on Return of Works of Art.[38] The premises of the repatriation movement are a logical extension of those that underlie UNESCO 1970. Cultural property belongs in the source country. Works that now reside abroad in museums and collections are wrongfully there (the result of plunder, removal by colonial poyers, theft, illegal export, or exploitation) and should be "repatriated".[39]

III. A comparison of Hague 1954 and UNESCO 1970

We have seen that the Hague 1954 preamble speaks of "the cultural heritage of all mankind". UNESCO 1970, however, in its preamble and throughout, emphasizes the interests of states in the "national cultural heritage". Hague 1954 seeks to preserve cultural property from damage or destruction. UNESCO 1970 supports retention of cultural property by source nations. These different emphases: one cosmopolitan, the other nationalist; one protective, the other retentive, characterize two ways of thinking about cultural property. I refer to them as "cultural internationalism" and "cultural nationalism". At this writing, cultural nationalism dominates the field; it provides the reigning assumptions and terms of discourse in UNESCO and other international organizations, in national fora, and in the literature on cultural property.[40]

In some cases the two approaches reinforce each other, but they may also lead in different and inconsistent directions. Thus in discussing the Greek demand for return of the Elgin Marbles from En-

[36] For a discussion of these resolutions and other components of the repatriation movement see Nafziger, "The New International Framework for the Return, Restitution, or Forfeiture of Cultural Property", 15 *N.Y.U.J. of Int. L. & Politics* 789 (1983).

[37] See Nafziger, *op. cit. supra.*

[38] Council of Europe Parliamentary Assembly, 35th Ordinary Session, Resolution 808 (1983).

[39] I will discuss the repatriation movement and the question-begging nature of the term "repatriation" in another article.

[40] The leading works include: O'Keefe, P. J. & L. V. Prott, *Law and the Cultural Heritage,* Oxford, 1984; Niec, "Legislative Models of Protection of Cultural Property", 27 *Hastings L. J.* 10089 (1976); Burnham, B., *The Protection of Cultural Property,* Paris, 1974; Meyer, K., *The Plundered Past,* New York, 1973.

gland, the case is easy if only the assumptions and terms of cultural nationalism apply: the Marbles are Greek, belong in Greece and should be returned to Greece. But if cultural internationalism is introduced into the discussion, the question becomes much more complex and interesting.[41] The same is true of almost any other prominent cultural property claim: *e.g.* should Mexico return the Mayan Codex, stolen by a Mexican (a lawyer!) from the Bibliotheque Nationale in Paris, to France?[42]

The differences between cultural nationalism and internationalism become particularly significant in cases of what might be called "destructive retention" or "covetous neglect". For example, Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve or display.[43] If moved to some other nation they might be better preserved, studied and displayed and more widely viewed and enjoyed. To the cultural nationalist, any such destruction of cultural property is regrettable, but might be preferable to its "loss" through export. To a cultural internationalist, the export of threatened artifacts from Peru to some safer environment would be clearly preferable to their destruction through neglect. For example, if they were in Switzerland, Germany, or some other relatively wealthy nation with a developed community of museums and collectors knowledgeable about and respectful of such works, they could be better preserved. By preventing the transfer of fragile works to a locus of higher protection while inadequately preserving them at home, Peru endangers mankind's cultural heritage. Hence "destructive retention" or "covetous neglect".

Cultural nationalism and internationalism also diverge in their responses to the practice of hoarding cultural objects, a practice that, while not necessarily damaging to the articles retained, serves no discernible domestic purpose other than asserting the right to retain. Thus multiple examples of artifacts of earlier civilizations reportedly are retained by some nations although such works are more than

[41] See Merryman, "Thinking about the Elgin Marbles", 83 *Mich. L. Rev.* 1880 (1985).

[42] According to newspaper reports, the Mexican Government now has the Codex and has refused to return it to Paris, claiming that it was stolen from Mexico in the 19th century. Riding, "Between France and Mexico, a Cultural Crisis", *International Herald Tribune,* Aug. 31, 1982, p. 1; *San Francisco Chronicle,* August 19, 1982, p. 41.

[43] "Compare Peru Wages Campaign to Halt Trade in Stolen Treasures", *New York Times,* October 4, 1981, p. 23; with Schumacher, "Peru's Rich Antiquities Crumbling in Museums", *New York Times,* August 15, 1983, III, 14.

adequately represented in domestic museum and collections and are merely warehoused, uncatalogued and uninventoried, and unavailable for study or display. Foreign museums and collections that lack examples of such objects would acquire, study and display (and conserve) them. Cultural nationalism finds no fault with the nation that hoards unused multiples in this way. Cultural internationalism, however, urges that objects of that kind be made available abroad by sale, exchange or loan. In this way the achievements of earlier cultures of the source nation could be exhibited to a wider audience, the interest of foreigners in seeing and studying such works (their "common cultural heritage") could be accomodated, and the demand that is currently met through the illicit market could be partially satisfied by an open and licit trade in cultural property. It is widely believed that a number of source nations indiscriminately retain multiples of objects beyond any conceivable domestic need while refusing to make them available to museums and collectors abroad.[44] They forbid export but put much of what they retain to no use. In this way they fail to spread their culture, they fail to exploit such objects as a valuable resource for trade, and they contribute to the cultural impoverishment of people in other parts of the world.

A further criticism of retentive cultural nationalism is that by prohibiting or unduly restricting a licit trade in cultural property source nations assure the existence of an active, profitable and corrupting black market.[45] The tighter the export control in the source nation, the stronger the pressure to form an illicit market will be. Source nations generally take a contrary approach, citing the existence of

[44] Consider the following language from the UNESCO Recommendation Concerning the International Exchange of Cultural Property, UNESCO Document IV.B.8 of Nov. 26, 1976: "Considering that 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 that 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..." Other provisions of this interesting UNESCO Recommendation urge nations to exchange cultural property with institutions in other nations and are clearly aimed at the hoarding tendency described in the text. As a Recommendation, it imposes no legal obligation and, out of tune with the dominant retentive nationalism, has had no discernible impact on source nation practice.

[45] See the discussion in Bator, "An Essay on the International Trade in Art", 34 *Stan. L. Rev.* 275, 317 (1982) ("Ten easy lessons on how to create a black market"); Merryman with Elsen, "Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects", 12 *J. of Arts Management and Law* No. 3 (Fall 1982), pp. 5, 16.

the illicit market as evidence of the need for international controls. The preamble of UNESCO 1970 makes the same argument, and indeed the entire Convention is based on the premise that the illicit traffic can be significantly reduced by adopting more extensive legal controls. Opposite assumptions are at work: to the source nations and UNESCO the existence of the illicit trade justifies further legal controls. To the critic, the extension of legal controls makes more of the traffic illegal and thus, perversely, makes the source nations/UNESCO argument self-inflating: more controls produce more illegal trade, which calls for more controls, and so it escalates.

There is ample empirical evidence that retentive laws have not effectively limited the trade in cultural property but have merely determined the form that traffic takes. There is little reason to suppose that the illicit traffic will cease as long as there is an appetite among the world's peoples for access to representative collections of works from the great variety of human cultures. That appetite is the source of the demand for cultural objects. The demand is substantial and, it would appear, is growing.

If it is true that the demand for cultural objects guarantees that *some* illicit traffic will exist, then the arguments for controlled legalization of the traffic become impressive. For example, Mayan sites in Mexico and Central America currently are mistreated by *huaqueros* who, out of ignorance and the need to act covertly and in haste, do unnecessary damage both to what they take and what they leave. Their activities, being surreptitious, are not documented, so that the objects they remove become anonymous, deprived by the act of removal of much of their value as cultural records. Would it be better if such activities were conducted openly, with the *huaqueros,* doing legally what was formerly illegal, supervised by professionals? In this way unnecessary physical damabe could be avoided and the work of removal documented. At present the money paid for illegally removed works goes in part to the *huaqueros* but, in large part, to bribe police and customs officials and to make profits for the criminal entrepreneurs who conduct the traffic. Would it be better if the income from cultural property sold abroad were available in the nation of origin to support the work of its archaeologists, anthropologists and other professionals, as well as the work of supervised *huaqueros?* Objects that merely replicate works already adequately represented in the source nation are expensive to store properly and constitute a valuable but unexploited resource for international trade. Would it be better if

such objects were sold and the proceeds used to enrich archaeological, ethnographic and museum activities in the nation of origin?

It is clear that some nations with strongly retentive policies lack the resources or the inclination to care adequately for their extensive stocks of cultural objects. To the cultural internationalist this is tragic. Such objects could be sold to museums, dealers or collectors able and willing to care for them. One way in which cultural objects can move to the locus of highest probable protection is through the market. Those who are prepared to pay the most for them are the most likely to do whatever is likely to protect their investment. The UNESCO Convention and national retentive laws, however, prevent the market from working in this way. They impede or directly oppose the market and thus endanger cultural property.[46] It is not necessary, however, to sell pieces of the nation's cultural heritage in order to exploit it. Such objects could be traded to foreign museums for works that would enrich each nation's ability to expose its own citizens to works from other cultures. They could be deposited on long term loan in foreign institutions capable and willing to care for and display them.

IV. A ONE-SIDED DIALOG

I have emphasized the criticisms of retentive cultural nationalism for two reasons. One is that I find these criticisms persuasive. The more important reason, however, is that in the 1970's and 80's the dialog about cultural property has become one-sided. Retentive nationalism is naturally and strongly represented wherever international cultural property policy is made. The structure and context of such discussions, at international organizations and conferences, is congenial to presentation of the position embodied in UNESCO 1970. The interests represented in Hague 1954, however, have no prominent or convenient voice. The international agencies that might be expected

[46] The UNESCO Recommendation Concerning the International Exchange of Cultural Property of 1976, *cit. supra,* opposes the market approach in the preamble, stating: "...the international circulation of cultural property is still largely dependent on the activities of selfseeking 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." The Reommendation only supports exchanges between institutions, rejecting sales and any form of transaction with collectors and dealers. The market argument is obviously a controversial one and, in any case, needs much fuller discussion, which I will provide in another place.

to represent the more cosmoplitan, less purely nationalist, view on cultural property questions —the United Nations General Assembly and UNESCO in particular— are instead dominated by nations dedicated to the retention and repatriation of cultural property. First world/Third world and Capitalist/Socialist politics combine with romantic Byronism[47] to stifle energetic presentation of the views of market nations. As a result, the voice of cultural internationalism is seldom heard and less often heeded in the arenas in which cultural policy is made.

The danger is that UNESCO 1970, with its exclusive emphasis on nationalism, will further legitimize questionable nationalist policies while stifling cultural internationalism. The only hint of recognition of these realities in UNESCO 1970 occurs in a pallid and generally ignored clause in the preamble describing the benefits of the international interchange of cultural property:

> Considering 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 rest of the Convention, including the preamble, provides unqualified support for retentive cultural nationalism.[48]

In the United States, a major cultural property market nation, the deck is thoroughly stacked against the forces of cultural internationalism. The United States has never become a party to Hague 1954.[49] It has, however, ratified UNESCO 1970 and enacted implementing legislation under it.[50] The United States has also supported the retentive nationalist position through a bilateral treaty with Mexico,[51]

[47] The element of romance in cultural nationalism and the influence of Byron in creating and nurturing it are discussed in Merryman, "Thinking about the Elgin Marbles", 83 *Mich. L. Rev.* 1880 (1985).

[48] To UNESCO's credit, some efforts at a broader, less exclusvely nationalistic approach have been made in some of its Recommendations, previously cited in this article. See in particular the Recommendation Concerning the International Exchange of Cultural Property, UNESCO Document IV.B.8 of Nov. 26, 1976. That instrument's formal status as a mere recommendation, however, combined with its anti-market bias, deprives it of any practical force.

[49] For an exchange of correspondence setting out the official reasons for U.S. refusal to sign Hague 1954 see Merryman and Elsen 1-75 to 1-77.

[50] Public Law 97-446, 96 Stat. 2351, 19 USC ss.2601 ff. (1982).

[51] Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 22 *U.S.T.I.A.* 494.

executives agreements with Peru[52] and Guatemala,[53] by legislation controlling the importation of pre-Columbian monumental sculpture and murals,[54] by executive action,[55] by agressive administrative action by the U.S. Customs Service,[56] and by criminal prosecution of smugglers.[57] Indeed, the United States (along with Canada) is of all cultural property market nations the most strongly committed, both in declaration and action, to the enforcement of other nations' retentive laws and policies,[58] while freely permitting the export of cultural property from its own national territory. This paradoxical policy began in the late 1960's, when the United States decided to participate in drafting what eventually became UNESCO 1970.[59] Until then the national policy had been consistent: works of art and other cultural property could be freely imported without duty and could be freely exported. The United States was committed to free trade in cultural property. Works stolen abroad and brought into the U.S. could of course be recovered by their owners in civil actions before state or federal courts, as has long been the rule in all nations.[60] The novelty was the gradual introduction, over a period beginning around 1970, of a growing number and variety of restrictions on the importation of cultural property in response to the retentive policies of source nations. Despite the occasionally successful efforts of collector, dealer and

[52] TIAS 10136, signed Sept. 15, 1981.

[53] Agreement of May 21, 1984 (not yet published).

[54] Public Law 92-587, 19 U.S.C. ss.2091 ff. (1972).

[55] See discussion of "The Boston Raphael" in Merryman and Elsen 2-7 ff.

[56] Fitzpatrick, "A Wayward Course: The Lawless Customs Policy toward Cultural Property", 15 *N.Y.U.J.L.* & Pol. 857 (1983). Proposed legislation that would limit Customs Service activities is at this writing before Congress but appears unlikely to pass.

[57] *U.S. v. McClain,* 593 F. 2d 658 (5th Cir. 1979); *U.S. v. Hollinshead,* 49? F. 2d 1154 (9th Cir. 1974). Both cases were prosecutions under a U.S. statute punishing transportation of stolen property in interstate or foreign commerce. McClain had illegally removed post and beads from Mexico; Hollinshead had illegally removed a stela from a Mayan site, Machiquila, in Guatemala. Both had brought the objects into the United States for sale. In both cases the courts treated the removals in violation of the foreign laws as "thefts" under the statute and upheld the convictions.

[58] Merryman, "International Art Law: From Cultural Nationalism to a Common Cultural Heritage", 15 *N.Y.U.J. Int. L.* & *Pol. 757* (1983).

[59] For a brief explanation of the reasons for U.S. involvement in the project that culminated in UNESCO 1970 see Bator, "An Essay on the International Trade in Art", 34 *Stanford L. Rev.,* 275, 370 (1982), republished as Bator, *The International Trade in Art,* Chicago, 1982.

[60] A recent example is Kunstsammlungen zu *Weimar v. Elicofon,* 678 F. 2d 1150 (2d Cir. 1982) (two Durer portraits stolen at the end of World dar II ordered returned to East Germany).

museum interests to moderate this response, the general direction in the United states has been one of support for cultural nationalism.

V. Conclusion

Both ways of thinking about cultural property are in some measure valid. There are broad areas in which they operate to reinforce each other's values. Those are the easy cases. The hard ones arise when the two ways of thinking lead in different directions. Then distinctions have to be made, questions require refinement, and it becomes necessary to choose. Thus any cultural internationalist would oppose the removal of monumental sculptures from Mayan sites where physical damage or the loss of artistic integrity or cultural information would probably result, whether the removal was illegal or was legally but incompetently done. The same cultural internationalist might, however, wish that Guatemala would sell or trade or lend some of its reputedly large hoard of unused Chac-Mols, pots, and other objects to foreign collectors and museums, and he might be impatient with the argument that other nations should not only forego building such collections but should actively assist Guatemala in suppressing the "illicit" trade in those objects. In principle, any internationalist would agree that paintings should not be stolen from Italian churches for sale to foreign collectors. But if a painting is rotting in the church from lack of resources to care for it, and the priest sells it for money to repair the roof and in the hope that the purchaser will give the painting the care it needs, then the problem begins to look different.[61] Even the most dedicated cultural nationalist will find something ludicrous in the insistence that a Matisse painting that happened to be acquired by an Italian collector had become an essential part of the Italian cultural heritage.[62]

More fundamentally, the basis of cultural nationalism and the validity of its premises require reexamination. In a world organized into nations-states and in a system of international law in which the state is the principal player, an emphasis on nationalism is understandable. But the world changes, and with it the centrality of the state. A

[61] See Stewart, "Two Cheers for the Tombaroli", *The New Republic*, April 28, 1973, p. 21 ("per piacere, rubatelo!"); Giovanna Luna, "The Protection of the Cultural Heritage: An Italian Perspective", in *UNSDRI, The Protection of the Artistic and Archaeological* heritage 164 ff. (Rome 1976).

[62] *Jeanneret v. Vichy*, 693 F. 2d 259 (2d Cir. 1982).

concern for humanity's cultural heritage is consistent with the emergence of international laws and institutions protecting human rights.[63] A slighter emphasis on cultural nationalism is consistent with the relative decline of national sovereignty that characterizes modern international law. In the modern world both ways of thinking about cultural property have their legitimate place. Both have something important to contribute to the formation of policy, locally, nationally and internationally, concerning pieces of humanity's culture. But where choices have to be made between the two ways of thinking, then the values of cultural internationalism: preservation, integrity and distribution/access,[64] seem to carry greater weight. The firm, insistent presentation of those values in discussions about trade in and repatriation of cultural property will in the longer run serve the interests of all mankind.

[63] See UNESCO, *Cultural Rights as Human Rights, Studies and Documents on Cultural Policies* No. 3 (1970).

[64] See Merryman, "Thinking about the Elgin Marbles", 83 *Mich. L. Rev.* 188 (1985).