

ARTICLES

The Retention of Cultural Property

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INTRODUCTION

Most nations attempt to retain cultural property.¹ They declare that cultural objects are state property (“expropriation laws”), or prohibit

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¹ The principal varieties of cultural property for present purposes are works of art and objects of archaeological, ethnological, and historical interest. Any comprehensive definition of cultural property would have to include these objects and many more. Thus, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), 10 INT’L LEGAL MATERIALS 289 (1971) [hereafter UNESCO Convention], 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) property of artistic interest . . . ; (h) rare manuscripts and incunabula, old books, documents and publications 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 some nations cultural objects and environmental treasures (including natural and artificial landscapes and ecological areas plus, in cities, urban structures and panora-

the export of cultural objects ("embargo laws"), or give the state or domestic institutions a preemptive right to buy objects offered for export ("preemption laws").² Some laws mix these categories: they may totally forbid the export of particularly important objects; permit the export, subject to preemptive purchase, of other kinds; and allow the export, with or without a permit, of less important objects. Others indiscriminately retain everything. Elucidated by administrative regulations and administered by governmental officials and agencies, these laws express the intention to keep cultural objects within the national territory. They are a form of export control.³ We can refer to them generically as "retention schemes."

mas) are treated as fundamentally related to each other. See T. ALIBRANDI & P. FERRI, *I BENI CULTURALI E AMBIENTALI*. MILAN. (1985). Cf. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, November 16, 1972, 1037 U.N.T.S. 151 (1977).

For a discussion of folklore as cultural property, see Glassie, *Archaeology and Folklore: Common Anxieties, Common Hopes*, in *HISTORICAL ARCHAEOLOGY AND THE IMPORTANCE OF MATERIAL THINGS* 23 (L. Ferguson ed. 1977).

The entire question of the proper definition of cultural property for legal and policy purposes is large and unruly, and fortunately need not be pursued here. Works of art and archaeological, ethnological, and historical objects certainly qualify under any definition; museums acquire and display them, scholars study them, collectors collect them, and dealers sell them. National laws and international conventions provide for their preservation and regulate their trade. A strong international consensus supports their inclusion in any definition of cultural property.

² For surveys of cultural property legislation, see B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS* (1974); UNESCO, *THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS* (1984); S.A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 108-29 (1978). There is a useful table of national protective laws in K. MEYER, *THE PLUNDERED PAST* 240-53 (1973); see also L. PROTT & P. O'KEEFE, *Discovery and Excavation*, in 1 *LAW AND THE CULTURAL HERITAGE* (1984) (the first volume in a projected five-volume work includes a brief discussion of national legislation affecting archaeological objects).

³ Export controls, particularly of technology, military equipment, and strategically important goods, are a common phenomenon in world trade. In the United States, the generic legislation is the Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (1982 & Supp. 1985). The Act describes three categories of permissible controls: "national security," "foreign policy" and "short supply." *Id.* § 2402(2). Of these, short supply controls provide the obvious analogy to cultural property retention schemes, being justified "where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand." *Id.* § 2402(2)(C).

There is a critical discussion of export controls and of the Export Administration Act of 1979 in Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 *MINN. L. REV.* 739 (1981). Although Professor Abbott

Many of the most extensive retention schemes are found in nations rich in cultural artifacts but short of foreign exchange. Their development policies normally encourage export trade to earn foreign exchange to pay for imports and to finance domestic growth. But cultural property is an exception: despite a substantial and well-funded market for such objects abroad, export trade in cultural objects is prohibited or restrained. The contrast is striking and seems to call for explanation. What is there about cultural property that produces such an apparently counter-developmental policy?

Many wealthy nations also restrict the export of cultural property. From time to time the suggestion is heard that the United States, one of the few nations that freely permits export, should enact retentive legislation.⁴ Any such proposal raises the same questions as foreign cultural property retention schemes: Why do nations prohibit the export of cultural property? What interests do such schemes serve? What policies do they advance?

These questions have become internationally important only in the last two decades. Before then, it was reasonable for one nation to treat the cultural property policy of another nation as a matter solely within its domestic jurisdiction. For example, if Mexico wished to declare all pre-Columbian objects national property and rigorously prohibit their export, that was Mexico's business. The consequences of the Mexican policy directly affected only Mexicans, although interested dealers, collectors, and museums in other nations might feel the indirect effects. However, since the mid-1960s the source nations⁵ have campaigned in

focuses on foreign policy and national security controls, his conclusion that export controls are difficult to enforce and are of dubious benefit suggests some of the difficulties of justification and of application that short supply controls also face. *See also* EXPORT CONTROLS: BUILDING REASONABLE COMMERCIAL TIES WITH POLITICAL ADVERSARIES (M. Czinkota ed. 1984).

⁴ *See, e.g.*, Fishman, *Protecting America's Cultural and Historic Patrimony*, 3 ART & L. NO. 3 (1977). Freedom of export of cultural property from the United States was significantly limited for the first time in 1979 by the Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 724 (codified at 16 U.S.C. §§ 470aa-470ee (1982)). Section 470ee attempts to prohibit the export of objects illegally removed from "public lands or Indian lands," lands under federal ownership or protective jurisdiction, and thus is arguably a law that protects, rather than limits, ownership. *See also* *infra* note 59 and accompanying text for a discussion of theft and illegal export.

⁵ In this Article, as in the international politics of cultural property, "source nations" and "market nations" have their obvious connotations. The source nations have the cultural property and the retention laws. The market nations are the countries to which the cultural property is likely to be exported if the retention laws did not exist or

the United Nations General Assembly, in UNESCO, and in regional organizations to persuade market nations to enforce source nation restrictions on export. The success of this effort has made the retention policies of source nations everyone's business. Should market nations enforce all source nation restrictions, no matter how extensive they may be? If not, what kinds of restrictions deserve market nation enforcement?

The United States has taken a number of measures to support the retentive policies of source nations.⁶ The American response — the most generous of all market nation responses to source nation concerns — has had two major phases. In the first phase, marked by good intentions and high emotions, attention focused on “worst case” examples of archaeological destruction and theft. The propriety of rigorous national restraints and the importance of their enforcement by foreign nations was taken as given. There could be little doubt that sawing up Mayan temples to remove sculptural elements for sale abroad was barbarous and against everyone's interest.⁷ The difficulty was that the emotion

were evaded. Clearly, a nation may be both a source nation and a market nation. For example, a lively foreign market exists for the objects that American Indian cultures produce, and there are Mexicans who collect European art. Still, the United States is a heavy net importer of cultural property and is a market nation, while Mexico is, or would be in the absence of a retention scheme, a net exporter. P. O'KEEFE & L. PROTT, NATIONAL LEGAL CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY, UNESCO 73 (1983) add a third category of “transit nations” which, though useful in other contexts, need not be pursued here. As the term suggests, transit nations are those through which cultural objects are transported on their way from source to market nations. The prime example of a transit nation is Switzerland.

⁶ These measures are briefly described in Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. OF INT'L L. & POL. 757 (1983).

⁷ Dr. Clemency Coggins, a Harvard art historian specializing in pre-Columbian antiquities, wrote the article that set off American interest and action. Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969). Dr. Coggins emphasized the mutilation and loss of information resulting from the illegal removal and shipment of monumental sculptures and reliefs from sites in Mexico and Central America to dealers, collectors, and museums in market nations.

The American responses included the 1970 Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088, and the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act of 1972, Pub. L. 92-587, 86 Stat. 1297 (codified at 19 U.S.C. §§ 2091-2095 (1982)). During the same period two dealers were convicted under the United States Stolen Property Act for the importation of articles taken from Guatemala, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), and Mexico, *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979). For a

and the accompanying rhetoric (“pillage” and “rape” were commonly encountered terms) were carried over and applied to quite different cases, to the point where it could be (and has been) plausibly argued that an American court should indirectly enforce Italy’s claim to a Matisse painting exported by its owner without the permission of the Italian government.⁸

The second phase was marked by enactment of the Cultural Property Implementation Act,⁹ implementing United States adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.¹⁰ The Convention and the Act make important distinctions between “theft” and “illegal export” and between types of cultural property. Further, they both show some sensitivity to the interests of dealers, collectors, museums, and professional groups, especially archaeologists and anthropologists, as well as to the claims of source nations.

Still, a survey of the cultural property landscape finds disorder and confusion. Within the United States different policies compete with each other: the Customs Service continues to apply a first phase policy even though Congress, in enacting the Cultural Property Implementation Act, would seem to have intended to move the national response to a less primitive level.¹¹ Internationally, the dialogue is one-sided, dominated by the source nations, with their emphasis on retention and repatriation, rejection of the market, and dislike of the art trade.¹² First

brief discussion of the ambiguities in describing such objects as “stolen,” see *infra* notes 26-29.

⁸ See *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982), in which the purchaser of a Matisse painting sought rescission and damages for breach of warranty of title because the painting, purchased from its owners in New York, was bought from its Italian owner and removed from Italy without an export permit. A trial judgment for the plaintiff purchaser was reversed and remanded on appeal. *Jeanneret v. Vichey*, 541 F. Supp. 80 (S.D.N.Y. 1982). At this writing a retrial is pending.

⁹ 19 U.S.C. §§ 2601-2613 (1982).

¹⁰ See UNESCO Convention, *supra* note 1.

¹¹ See Fitzpatrick, *A Wayward Course: The Lawless Customs Policy toward Cultural Properties*, 15 N.Y.U. J. INT’L L. & POL. 857 (1983); McAlee, *The McClain Case, Customs and Congress*, 15 N.Y.U. J. INT’L L. & POL. 813 (1983).

¹² Some of the force behind international support for source nation retention policies comes from an unsophisticated form of market aversion. Thus, the *UNESCO Recommendation Concerning the International Exchange of Cultural Property*, UNESCO Doc. IV.B.8 (Nov. 26, 1976), states:

[T]he international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible

world/third world and East/West politics complicate matters. In such an atmosphere the basic questions about cultural property policy are submerged under layers of prejudice, rhetoric, and romance.

A third phase in developing a cultural property policy can appropriately begin by excavating for the basic questions: What are the objectives of national and international policy toward cultural property? How may such objectives be evaluated? How may appropriate objectives best be achieved? To answer these questions it helps to understand why source nations want to retain cultural property.

I.

A. *Theft and Illegal Export*

We begin with a clarifying distinction. Consider two cases:

*Case 1. A Durer painting is stolen from a German museum, brought to the United States and sold to a collector who buys it in good faith (i.e., without any reason to suspect that it was stolen).*¹³

Case 2. A french collector sells his¹⁴ Poussin painting to a

to poorer countries and institutions while at the same time encouraging the spread of illicit trading.

Compare the attitude that an important cultural object is demeaned by being traded: "We could not allow something which we consider part of our historical artistic heritage . . . to become the object of common trade . . ." Statement attributed to Spanish Minister of Culture Javier Solana in Thomas, *Goya Portrait to Go Back to Spain*, N.Y. Times, Apr. 11, 1986, at C30, col. 4.

Another source of market aversion is the belief that trade in cultural objects would be conducted in ways that were unfair to the source nation. At one level the attitude is paternalistic: clever and knowledgeable foreigners will take advantage of gullible, unsophisticated locals. At another level, the concern is that the international economic system systematically operates to the disadvantage of third world nations, leading to a pattern of unfair transactions in which national resources are traded for inadequate payment. To believers in dependency theory, advocates of a new economic order and others who see injustice in the world economic system, even to allow trade in cultural objects would mean submission to economic exploitation, merely another kind of colonialism. See, e.g., FORD FOUNDATION, *THE SEARCH FOR A NEW ECONOMIC ORDER* (1982); UNITED NATIONS, *TOWARDS THE NEW INTERNATIONAL ECONOMIC ORDER* (1982). The complex and interesting question of the proper role of the market in the international movement of cultural property will be treated in another article.

¹³ See *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982), in which the court ordered two Durers acquired in good faith by a Brooklyn collector returned to East Germany.

¹⁴ Cultural property retention schemes generally admit private possession and enjoyment of cultural objects. Embargo and preemption schemes presuppose private owner-

*dealer. The dealer removes the painting from France without the export permit required by French law and takes it to the United States, where he sells it to an American museum.*¹⁵

Case 1 is simple because the painting was stolen from its owner. All moral and legal systems recognize and enforce ownership and condemn and punish thieves. Rights of ownership established under the law of one nation will be recognized and enforced by the courts of another nation (subject, of course, to the possible rights of good faith purchasers and the operation of statutes of limitation or rules of prescription). The case of *Kunstsammlungen zu Weimar v. Elicofon*¹⁶ is an excellent example. Defendant Elicofon, a Brooklyn lawyer, bought two paintings in good faith, unaware that they were Albrecht Durer paintings and had been stolen from storage in Germany at the end of World War II. The owner of the paintings, an agency of the East German govern-

ship and the possession, enjoyment, and power to give or sell to others that go with ownership. Even expropriation schemes often permit individuals to possess, enjoy, and transfer cultural objects, perhaps as "usufructuaries," although the objects may technically belong to the state. Thus, private dealers in and private collections of cultural objects exist in most retentive nations. It is perfectly legal for a Japanese tourist to buy an ancient marble sculpture in Athens or a renaissance painting in Florence. The prohibition is not against acquisition, but against removal from the national territory. Although she owns it, the tourist cannot legally take the object with her when she leaves the country.

¹⁵ Compare the Cleveland Museum's acquisition of a Poussin painting and the reaction of the French government, culminating in a French warrant for the arrest of the Director of the Cleveland Museum, Sherman Lee. An ambiguous provision in French law made it arguable that no permit was required for export of the Poussin. Mr. Lee, on advice of counsel, had adopted that interpretation, but the French government disagreed. See Nilson, *Poussin's Holy Family Feud*, ARTNEWS 78 (Feb. 1982); *Dispute over Cleveland Poussin Flares Again*, ARTNEWSLETTER 3 (July 10, 1984). The case remained unresolved for several years: the painting remained in Cleveland and Mr. Lee remained at liberty, although he probably thought twice about visiting France. The matter was finally resolved in March 1987 by an agreement between the Louvre and the Cleveland Museum recognizing the latter's ownership of the Poussin but agreeing to lend the painting to the Louvre for 25 years. See N.Y. Times, March 28, 1987, at L11, col. 4.

¹⁶ 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 674 F.2d 1150 (2d Cir. 1982). For a comparable decision from the Netherlands, see *Hooge Rad der Nederlanden* (Criminal Division), 445 N.J. 1402 (1983) (ordering stolen wooden madonna which was property of the French state returned to France over objection of the alleged good faith purchaser). There is a brief comment on the Dutch case in Verheul, *Foreign Export Prohibitions: Cultural Treasures and Minerals*, 31 NETHERLANDS INT'L L. REV. 419, 420-22 (1984).

ment, sued for their recovery in a federal court in New York and won.¹⁷

The East Germans won the case because they owned the Durers. It was irrelevant that Durer was a German painter or that the plaintiff art museum was an agency of the German Democratic Republic. The result would have been the same if the paintings were by a Dutch master, or if the plaintiff-owner were a private collector, or if the objects in question had been platinum ingots or computers, rather than cultural property; the law similarly protects ownership of all kinds of objects. *Elicofon* illustrates the imposing power of ownership: ownership impelled an American court to order two important paintings bought in good faith and held for many years in an American collection returned, without compensation, to an agency of a socialist nation.

Case 2 is different. The Poussin painting was not stolen from the owner. On the contrary, the owner voluntarily sold the painting and was paid for it. The legal offense charged was not theft, but violation of a French law prohibiting export by anyone, including the owner. Courts do not routinely enforce foreign claims based on such laws; in the absence of a treaty or other special legal provision, the source nation seeking the return of a cultural object that is legally obtained but illegally exported is limited to diplomatic or executive channels.¹⁸

The non-enforceability of export restrictions abroad can be seen as an application of the principle of private international law that courts of one nation will not enforce claims based on the public law (as distinguished from claims based on private rights, like ownership) of another nation. The principle has been the topic of a good deal of recent schol-

¹⁷ The federal court applied the New York rule concerning the effect of a sale to a good faith purchaser. That rule, like those in most of the United States, routinely prefers the owner to the good faith purchaser. In continental Europe, however, the applicable rules are generally more favorable to purchasers. *See, e.g.*, *Winkworth v. Christie, Manson & Woods Ltd.*, [1980] 1 All E.R. 1121 (applying Italian law in favor of good faith purchaser of painting against owner from whom it was stolen). In the Durer case the American defendant, *Elicofon*, unsuccessfully argued for application of the German rule, while the East German plaintiff successfully argued for application of the New York rule.

¹⁸ *King of Italy v. De Medici Tornaquinci*, 34 T.L.R. 623 (Ch. 1918) (remedy granted for Medici documents that were state papers and thus the property of the Italian government; remedy denied for documents that were privately owned, although illegally exported from Italy); *Attorney-General of New Zealand v. Ortiz*, 2 W.L.R. 809 (House of Lords 1983), *aff'g*, 3 W.L.R. 570 (Court of Appeal 1982) (remedy denied in action by New Zealand to recover illegally exported Maori carving).

arly discussion,¹⁹ although judicial decisions have generally applied it without question in cultural property cases.²⁰

A further difficulty with enforcing foreign export restrictions concerns the remedy. In the Poussin case, for example, the French government would request "return" of the painting, but if it went back to France, who would get it? Surely not the French collector who sold the painting, or the dealer who bought it and resold it abroad. The applicable French statute, the Law of 23 June 1941, provides in Article 4 that objects exported contrary to law shall be seized and confiscated *au profit de l'Etat*.²¹ The "return" of an illegally exported work is truly a return only in the geographical sense; in practical terms it is a transfer of ownership to the foreign state. In seeking "return" of the painting to France, the French would, in effect, be asking the American court to enforce the French statute, a remedy that our authorities would be reluctant to provide in the absence of some violation of United States laws.²² The 1970 UNESCO Convention²³ incorporates the distinction

¹⁹ Bermann, *Public Law in the Conflict of Laws*, 34 AM. J. COMP. L. 157 (Supp. 1986); P. Lalive, *Sur l'application du droit public étranger*, ANNUAIRE SUISSE DE DROIT INTERNATIONAL 103 (1971); Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT'L L. & POL. 603 (1987). There is an excellent discussion of the principle's application to cultural property cases in M. FRIGO, *LA PROTEZIONE DEI BENI CULTURALI NEL DIRITTO INTERNAZIONALE* 332 ff. (1986).

²⁰ The leading decisions are *King of Italy*, 34 T.L.R. at 623 and *Ortiz*, 2 W.L.R. at 809. The only arguably inconsistent judicial decision I have found was given in 1972 by the West German Bundesgerichtshof, BGHZ 59, 82, in which the court refused to enforce a policy of marine insurance on a cargo of Nigerian art objects in favor of a German insured. Since the objects were illegally exported from Nigeria, enforcing the contract would, according to the court, violate the "international public policy" of the forum. Professor Bermann, *supra* note 19, would treat such a decision as a "recognition" rather than an "enforcement" of the Nigerian law.

²¹ Provisions of this kind are common among export control laws. The operation of a similar statute is discussed in *Ortiz*, 2 W.L.R. at 809.

²² When an object is smuggled into the United States or the importer deliberately misdescribes it in the customs declaration, the object becomes "contraband" and can be seized without compensation. In several cases the United States Customs Service has used violation of import restrictions as a basis for seizure, followed by "return" of the articles to the offended foreign government. See the discussion of the "Boston Raphael" and related cases in J. MERRYMAN & A. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* 78-83 (2d ed. 1987).

²³ See UNESCO Convention, *supra* note 1. The Convention is the most important piece of international legislation affecting the international traffic in cultural property. It has not, however, been universally adopted. Only two major market nations have become parties: the United States and Canada (and Canada may have been strongly motivated to join by its interests as a source nation). Other major market nations, among them England, France, Germany, Japan, and Switzerland, at this writing have not ratified UNESCO 1970.

between stolen and illegally exported objects. Article 7(a) applies to illegal export. It obliges the parties “[t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions . . . from acquiring cultural property . . . which has been *illegally exported*.”²⁴ Article 7(b) applies to theft. It requires parties “to prohibit the import of . . . *stolen*” cultural property and to “take appropriate steps to recover and return . . . such [stolen] cultural property . . . provided, however, that the requesting State shall pay just compensation to an innocent purchaser.”²⁵

The distinction between theft and illegal export seems clear enough, but ambiguity is introduced by what we may call “rhetorical ownership laws.” Consider:

Case 3. Guatemala adopts a law declaring all pre-Colombian objects anywhere within the national territory to be property of the state and forbids the export of any such object without state permission. A dealer buys objects from a Guatemalan collector, smuggles them out of the country, and sells them to an American collector. Can the Guatemalan government recover them in an action in a United States court?

Guatemala would of course prefer that its claim be treated like Case 1 since ownership is readily enforceable abroad. The state, as owner, can then claim standing to sue for the return of illegally exported — “stolen” — cultural property. A number of Latin American countries,

²⁴ UNESCO Convention, *supra* note 1, art. 7(a), at 291 (emphasis added). In an “understanding” annexed to its consent to ratification of the Convention in 1972, the U.S. Senate stated: “The United States understands Article 7(a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions.” According to this “understanding,” only federal museums (the National Gallery, the Smithsonian Institution, etc.) are affected by Article 7(a). Since the great majority of American museums are private or state or local government institutions, the obligations incurred by the United States under Article 7(a), as so understood, leave most of the United States art world unaffected.

²⁵ *Id.*, art. 7(b), at 291 (emphasis added). The provision for compensation to an innocent purchaser contrasts with the general rule in American jurisdictions permitting the owner to recover stolen property without compensating innocent purchasers. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

including Mexico, Guatemala, Ecuador, and Costa Rica have laws declaring state ownership of cultural property.²⁶

There are both analytical and legal (and, within the exporting nation, political and constitutional) difficulties with this tactic. All that may have occurred is the formal process of enactment; a few words published in the *Gaceta Oficial*. Little else has changed. Objects that were in private collections remain in private collections; undiscovered sites remain undiscovered; unprotected sites remain unprotected; undocumented objects remain undocumented. Analytically, it is not clear why this kind of rhetorical law, unimplemented by state action, should change the way the importing nation will treat attempts to "recover" illegally exported objects.²⁷

The political problem is that citizens in the source nation are likely to oppose implementation of such legislation unless unusually generous compensation is provided (*i.e.*, fair market value in cash). Legally, the nation's constitution and laws are likely to require a hearing, and perhaps prior compensation, to accomplish a transfer of ownership from the individual to the state. Administrative and/or judicial proceedings directed at specifically identified properties are the usual pattern.²⁸

²⁶ See L. PROTT & P. O'KEEFE, *supra* note 2, at 188-97; see also *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (discussing the Mexican law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (discussing the Guatemalan law).

²⁷ This is one of the reasons why the convictions in *Hollinshead*, 495 F.2d at 1154, and *McClain*, 593 F.2d at 658, caused comment. Both were criminal prosecutions under the United States Stolen Property Act. In *Hollinshead*, a stone stela was pried from a Mayan temple in Guatemala; in *McClain*, beads and pots were taken from Mexico. In both cases, a finding that the objects were stolen required that the court treat removal from the foreign country as theft. The defendants in both cases were convicted by courts that treated the foreign nations as owners. One of the arguments commonly made against United States enforcement of such laws is that they give the foreign nation a "blank check." Regardless of the merits or other facts, the nation that declares itself owner (of anything? under any circumstances?) is treated as owner. See also an Italian decision: *Repubblica del Ecuador c. Danusso, Matta e altri*, 18 Riv. di diritto internazionale privato e processuale 625 (1982). The court ordered articles illegally exported from Ecuador "returned" to the Government of Ecuador because they were its property under its generic cultural property ownership law. The facts indicate that this may have been a typical "rhetorical ownership law" since private individuals could acquire, retain, and transfer these objects under Ecuadoran law.

²⁸ That such laws, if enforced, are constitutionally questionable within the nations that enact them seems clear. See, *e.g.*, the decision of the Supreme Court of Costa Rica reported in *Boletín Judicial* No. 90 of 12 May 1983, in which the Court considered the Law on the National Archaeological Patrimony of 28 December 1981. Article 3 of that Law provided: "All archaeological objects that are discovered in any way after this law takes effect . . . are the property of the State." (translation of author). The court found this and other provisions of the Law unconstitutional because they attempted to appropriate private property without observing the procedures or providing the compensation

Thus, the declaration of state ownership may be an empty formalism, intended primarily for a foreign audience, or it may be an act of expropriation of dubious internal legality.

The 1970 UNESCO Convention, article 7(b), deals pragmatically with the problem of the rhetorical law that declares state ownership by treating as "stolen" only objects taken from "a museum or a religious or secular public monument or similar institution . . . , provided that such property is documented as appertaining to the inventory of that institution."²⁹ Thus, an object taken from a Mexican museum or church would be "stolen" within the meaning of the Convention. But an object taken from an unprotected Mayan site, or from a site that was protected but undocumented or not inventoried, is not treated as "stolen." Nor, obviously is an object held in a private collection and voluntarily sold or taken abroad by its "owner" considered "stolen." In effect, UNESCO 1970 requires that the state's declaration of ownership be implemented by some act of "appropriation" of the object.³⁰

Rhetorical ownership laws are merely one variety of cultural property retention law. Like embargo and preemption laws, their purpose is to keep cultural objects within the national territory. Such laws do not protect ownership; they restrict it. In France, the owner of the Poussin painting is told that she may not remove her property from French territory without government permission (which, for a Poussin painting, certainly would not be granted). In Mexico, the collector is told that her Mayan pot may not be removed from Mexican territory without a government permit (which certainly would not be granted). The question before us is why France, Mexico, and most other nations have

required by the Costa Rican constitution. (I am indebted to the Honorable Carlos Jose Gutierrez, Ambassador of Costa Rica to the United Nations for this reference). Questions about the constitutionality of such laws or about the procedural regularity of their enactment and execution cannot ordinarily be raised in foreign proceedings as in *Hollinshead*, 495 F.2d at 1155-56, and *McClain*, 593 F.2d at 658, for example, because of the act of state doctrine. For a brief discussion of the doctrine, see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 51, 55-56 (5th ed. 1984).

²⁹ UNESCO Convention, *supra* note 1, art. 7(a), at 291. The Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified at 19 U.S.C.A. §§ 2601-2613 (Supp. 1987)) incorporates the same definition of "stolen." If that definition had been used in *Hollinshead*, 495 F.2d at 1154, and *McClain*, 593 F.2d at 658, there would have been no convictions.

³⁰ See Merryman & Elsen, *Hot Art: A Re-examination of the Illegal International Trade in Cultural Objects*, *International Institute of Higher Studies in Criminal Sciences, The Penal Protection of Works of Art*, in QUADERNI DI SCIENZE CRIMINALI 151 (1983), reprinted in 12 J. OF ARTS MGMT. & L. NO. 3 at 5 (Fall 1982).

such laws, and why Switzerland and the United States do not. We begin by examining cultural nationalism.

*B. Cultural Nationalism*³¹

The practice of national retention of cultural property has a superficial appeal; it seems to many people to be natural and reasonable, a normal expression of the obvious relation between the object and the national culture: Olmec heads clearly belong in Mexico because they are Mexican; classical Greek sculptures are Greek and belong in Greece. The retention of cultural property needs no justification; on the contrary, permitting cultural objects to be exported is what seems anomalous. How can one permit the nation's "cultural heritage," or "cultural patrimony," to be taken abroad? National cultural objects held (imprisoned?) in foreign museums and collections should be rescued — "repatriated" — returned to their homeland, their *patria*.³² This concept of a "national cultural patrimony" is frequently cited and treated as an established political and legal category.³³

This is the basic cultural nationalist position, which has become part of Western culture. Cultural nationalism transcends jurisdiction and sovereignty; even though many "Greek" sculptures are in the British Museum and the Louvre beyond the reach of Greek laws, they remain

³¹ "Cultural nationalism" sounds like an appropriate term but presents problems. Thus some writers, insisting that nationalism *is* cultural, might find it redundant. "Modern man is not loyal to a monarch or a land or a faith, . . . but to a culture." E. GELLNER, *NATIONS AND NATIONALISM* 36 (1983); *see also* discussion *id.* at 37-38, 141-43. Others, while conceding that cultural nationalism is distinguishable from, say, political or economic nationalism, would restrict it to those aspects of nationalism flowing from cultural concerns: *i.e.*, nationalism as a cultural expression. *See* A.D. SMITH, *THEORIES OF NATIONALISM* 34, 172 (1971). Another variation might apply the term to manipulation of the culture for nationalist purposes, for example, commissioning or encouraging nationalist art, music, and literature; a common practice that continues today. My interest here is in a different nation/culture relationship: the claim, based on nationalism, to cultural objects identified in some plausible way with the nation.

³² Thus, a patriotic Mexican lawyer "liberates" a rare Aztec Codex from the Bibliothèque Nationale in Paris and returns it to Mexico, where the Mexican government takes possession and refuses to return it to France. *San Francisco Chron.*, Aug. 19, 1982, at 41; *International Herald Trib.*, Aug. 31, 1982, at 1.

³³ *See Return and Restitution of Cultural Property* (special issue), 31 *MUSEUM* 62, No. 1 (1979); Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 *INT'L LAW* 755 (1987). *Cf.* Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 *N.Y.U. J. INT'L L. & POL.* 789 (1983).

Greek. Where do these attitudes come from? The major premise is nationalism itself, which we must now briefly examine.

A BRIEF EXCURSUS ON NATIONALISM

Of all the visions and faiths that compete for men's loyalties in the modern world, the most widespread and persistent is the national ideal.³⁴

Nationalism is a complex and emotionally charged subject.³⁵ Kedourie defines it this way:

[T]he doctrine divides humanity into separate and distinct nations, claims that such nations must constitute sovereign states, and asserts that the members of a nation reach freedom and fulfillment by cultivating the peculiar identity of their own nation and by sinking their own persons in the greater whole of the nation.³⁶

European in origin, nationalism is a modern addition to the history of ideas emerging clearly only at the time of the French Revolution³⁷ as nations became the primary actors in world affairs with nationalism as the supporting ideology. In Enlightenment thought, nationalism had humanist roots; it embodied liberal republican ideas of the kind expressed in the American Declaration of Independence in 1776 and the French Declaration of the Rights of Man and of the Citizen in 1789.³⁸ But with the rise of romanticism and the relative decline of faith in

³⁴ A.D. SMITH, *NATIONALISM IN THE TWENTIETH CENTURY* 1 (1979).

³⁵ The following works say more about nationalism than most readers may care to know: B. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983); J. DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* Ch. 3 (1979); E. GELLNER, *NATIONS AND NATIONALISM* (1983); E. KEDOURIE, *NATIONALISM* (1961); H. KOHN, *NATIONALISM: ITS MEANING AND HISTORY* (1955) [hereafter H. KOHN, *NATIONALISM*]; H. KOHN, *PRELUDE TO NATION-STATES* (1967) [hereafter H. KOHN, *PRELUDE*]; D. LERNER, *THE PASSING OF TRADITIONAL SOCIETY* (1958); K. MINOGUE, *NATIONALISM* (1967); A.D. SMITH, *supra* note 34; A.D. SMITH, *supra* note 31; *NATIONALISM: THE NATURE AND EVOLUTION OF AN IDEA* (E. Kamenka ed. 1973) [hereafter E. Kamenka].

³⁶ See E. KEDOURIE, *supra* note 35, at 73.

³⁷ See *id.* at 9. "Nationalism is a doctrine invented in Europe at the beginning of the nineteenth century." *Id.* "The history of Europe since the French Revolution has been the history of the rise and development of political nationalism." Kamenka, *Political Nationalism — the Evolution of the Idea*, in E. Kamenka, *supra* note 35, at 3.

³⁸ E. Kamenka, *supra* note 35, at 10, states:

The king had obviously been a unity, a single person; the people, the new sovereign, would also have to be defined, given limits or personality as a 'nation.' Thus, in elevating the concept of citizen, the French Revolution came to elevate the concept of the nation. . . . The *basic* concept of the French Revolution was not that of the *Frenchman*, but that of the *citoyen*. (Emphasis in original)

reason and in the humanist ideal, the content of nationalism changed.³⁹ Led by German philosophers and poets, such as Fichte, Herder, and Heine, nationalism acquired new premises and a romantic, mystical overlay:

[G]erman romanticism, . . . was an interpretation of history and society, of the totality of human life, which mobilized the fascination of the past to fight against the principles of 1789. Starting as extreme individualists the German romanticists developed the opposite longing for a true, harmonious community, an organic folk-community, which would immerse the individual in the unbroken chain of tradition.⁴⁰

Concepts like that of the *Volk* (with *Volksgenosse* and *Volksg Geist*) became current.

To the French concept of the *citoyen* the Germans counterposed a concept that was to become the core of Nazism, but also of most modern nationalist movements, the concept of *Volksgenosse*, of the man who shares your blood, your language, your history and your national aspirations.⁴¹

A particularly striking implication of this kind of thinking is shown in its application to people. Here is an example: a statement by Rudolph Hess that, although extreme, is a logical consequence of romantic premises:

The Führer has come in order to hammer into all of us the fact that the German cannot and may not choose whether or not he will be German, but that he was sent into this world by God as a German, and that God thereby has laid upon him, as a German, duties of which he cannot divest himself without committing treason to Providence. Therefore, we believe and we know that the German everywhere is a German — whether he lives in the *Reich*, or in Japan, in France or in China, or anywhere else in the world. Not countries or continents, not climate or environment, but blood and race determine the world of ideas of the German.⁴²

³⁹ “Thus, while France turned from the Cult of Reason to the Cult of Napoleon, a generation of Germans . . . set about creating the cult of nationalism.” *Id.*

⁴⁰ H. KOHN, NATIONALISM, *supra* note 35, at 34. Although the Germans are generally credited with the romanticization of nationalism, the French were early and enthusiastic converts. For a full discussion, see H. KOHN, PRELUDE, *supra* note 35, at 119. As early as 1790, in the *fête de la federation*, in all the communities of France an “altar of the fatherland” was erected with the inscription: “The citizen is born, lives and dies for the fatherland.” H. KOHN, NATIONALISM, *supra* note 35, at 25. England was an early source of romantic ideas and sentiments in the work of the English romantic poets. Byron, who is discussed *infra* note 52 and accompanying text, is a particularly relevant exemplar.

⁴¹ E. Kamenka, *supra* note 35, at 11.

⁴² *Id.*

A related attitude justifies laws that prohibit the emigration of people from the national territory. These "people retention laws" and the stern version of nationalism that they express sometimes authorize drastic enforcement methods. Another variation was expressed by President De Gaulle in his memorable "Vive le Quebec libre!" speech of July 24, 1967, in Montreal. De Gaulle encouraged the view that the Quebecois were actually French, unnaturally and unwillingly bound to the Canadian union, waiting only for liberation from Canada and, presumably, reunion with France.⁴³

Under the romantic influence, conceptual distinctions between nationalism, patriotism, and national consciousness blurred.⁴⁴ The way was opened to nation-worship, the adoration of national character, national achievement, national culture, national ambitions, and national policies. As each nation preened itself, nationalism became invidious. Patriotism and xenophobia became natural correlates.⁴⁵ Nationalism justified violence when employed in the national interest.⁴⁶ Nationalism, which "begins as Sleeping Beauty . . . [and] ends as Frankenstein's Monster."⁴⁷ Romanticism succeeded the Enlightenment; faith in rationalism declined; reason slept. In nationalism, as elsewhere, the sleep of reason produced monsters.⁴⁸

Nationalism in itself is neither good nor bad; the difficulty lies in the tone it has taken and the uses to which it has been put under the influence of romanticism.

⁴³ For a discussion sympathetically placing the Quebec speech in the context of French nationalism and Quebec separatism, see P. MALLIN, *VIVRE LE QUEBEC LIBRE* (1978).

⁴⁴ See the discussion of these related but distinct ideas in Plamenatz, *Two Types of Nationalism*, in E. Kamenka, *supra* note 35, at 23-25.

⁴⁵ See E. KEDOURIE, *supra* note 35, at 73-74.

⁴⁶ H. KOHN, *NATIONALISM*, *supra* note 35, at 52, states:

The new spirit of violence, of glorification of heroic deeds, . . . was first noticeable in 1848. . . . A growing popular impatience made violence and revolt in the service of the nation appear as highest moral values; nationalist self-sacrifice replaced the martyrdom of saints. The same spirit made itself felt outside Central Europe, in Ireland and later in Asia. Even the national anthem of Mexico written in 1854 is a resounding call to war. . . . The centenary of this poem of 'roaring cannons' was celebrated in 1954 all over Mexico with unusual solemnity.

⁴⁷ See K. MINOGUE, *supra* note 35, at 7. For discussions of the ways in which nationalism has turned monstrous, see *id.* at 21; E. KEDOURIE, *supra* note 35, ch. 5.

⁴⁸ In no. 43 of a series of etchings entitled *Los Caprichos*, Goya incorporated and illustrated the Spanish aphorism: *El sueño de la razon produce monstruos*. An exact translation would probably substitute "dream" for "sleep", but I have used the form given the saying by C.P. Snow in his novel. See C.P. SNOW, *THE SLEEP OF REASON* (1968).

[T]he romantic style . . . tends to blur and sometimes entirely obliterate the boundary between literature and life, between dreams and reality. The tragedy of Flaubert's *Madame Bovary*, it will be recalled, originated in her having read too many novels; *Madame Bovary* may stand not only as an archetype of romantic love, but also as a symbol of romantic politics, and nationalism may be described as a species of political *bovarysme*.⁴⁹

END OF EXCURSUS

The application of these attitudes of nationalism to cultural objects owes much to the English romantic poet George Gordon, Lord Byron. In 1821 the Greeks began their war for independence from four centuries of Ottoman rule. Byron was a powerful publicist for the Greek cause though his poetry and correspondence (and through his actions, dying of fever at Missolonghi while actively supporting the Greeks). The cause of Greek nationalism captured the Western imagination, where it was seen through romantic spectacles.⁵⁰ Byron passionately opposed Lord Elgin's removal of the Parthenon sculptures, the "Elgin Marbles," and wrote about the episode in two poems: *The Curse of Minerva* and *Childe Harold's Pilgrimage*.⁵¹ Although these passages contain some of his least memorable poetry, they were enormously effective as propaganda. The key premise was that of cultural nationalism: the Marbles were Greek and belonged in Greece. Since Byron, that premise has been solidly built into Western thought.⁵²

⁴⁹ See E. KEDOURIE, *supra* note 35, at 85.

⁵⁰ H. KOHN, NATIONALISM, *supra* note 35, at 40, states: "The immense hopes aroused by the Greek war of independence are an example of that strange alliance of historicism and nationalism which believes not only in the legendary continuity of blood but even in the mystical survival of the national genius over many centuries."

⁵¹ The relevant passages from *The Curse of Minerva* appear in BYRON, POETICAL WORKS 143 (F. Page ed. 1970); those from *Childe Harold's Pilgrimage* are found *id.* at 196.

⁵² Byron's poetic attack on Elgin reflects some of the unseemly tendencies, described above, to which romantic nationalists are susceptible. Thus, in *The Curse of Minerva*, Byron repeatedly assures the goddess that she should not hold the English responsible, since Elgin was a Pict — a Scot — and not an Englishman. These lines are illustrative:

Frown not on England; England owns him not:
Athena, no! thy plunderer was a Scot.
And well I know within that bastard land
Hath Wisdom's goddess never held command;
A barren soil, where Nature's germs, confined
To stern sterility, can stint the mind;
A land of meanness, sophistry, and mist.
Each breeze from foggy mount and marshy plain

We need a term. The epithet "elginisme," coined by the French to refer to the wrongful (*i.e.*, by persons who are not French)⁵³ removal of cultural property from its site, became part of the common language of discourse on cultural property.⁵⁴ In a similar spirit we could use the term "Byronism" to characterize the application of romantic nationalism to cultural objects. Byronism has dominated post-World War II discourse on cultural property. It is the unexamined premise of much contemporary national and international policy toward cultural property. Let's examine it.

Much of the justification for cultural retention schemes is straightforward Byronism: the romantic attribution of national character to cultural objects, with the corollary that they belong in the national territory. When viewed objectively, this looks more like a statement of faith than a reason. Its effect, however, is no less because of that; it may indeed be more powerful in its candidly emotional appeal than any log-

Dilutes with drivell every drizzly brain,
and so on. Compare Herder on the French language:

Wouldst greet your mother in French?
O spew it out, before your door
Spew out the ugly slime of the Seine
Speak German, O you German!

E. KEDOURIE, *supra* note 35, at 59.

⁵³ The attitude that France had a superior claim to other people's cultural property was particularly evident during the Napoleonic wars, when Europe was systematically looted of art treasures by the French army to fill the Musée Français (today the Louvre). Consider the language of a petition to the Directory in October 1796, signed by most French artists of the day. It refers to "[T]he French people . . . naturally endowed with exquisite sensitivity, . . ." and proceeds: "[T]he French Republic, by its strength and superiority of its enlightenment and artists, is the only country in the world which can give a safe home to these masterpieces." A lieutenant of Hussars, in a speech to the Convention, stated: "These immortal works are no longer on foreign soil. They are brought to the homeland of arts and genius, to the homeland of liberty and sacred equality, the French Republic." Napoleon himself wrote in 1796: "[A]ll men of genius, all those who have attained distinction in the republic of letters, are French no matter in what country they may have been born." The quotations are taken from Quinn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV., No. 3, 437-60 (1945).

Frenchmen were as eager in their pursuit of the marbles as was Elgin, who merely happened to be in the right place at the right time. See W. ST. CLAIR, *LORD ELGIN AND THE MARBLES* (1983).

⁵⁴ "[E]lginisme . . . n.m. (du n. de Thomas Bruce, comte d'Elgin (1766-1841), diplomate angl. qui constitua, par des moyens parfois douteux, d'importantes collections d'objets d'art étrangers.) Forme de vandalisme consistant à arrecher les oeuvres d'art de leur pays d'origine pour en constituer des collections privées ou publiques." 2 GRAND LAROUSSE DE LA LANGUE FRANCAISE 1528 (1972).

ical argument would be. Consider these statements by Melina Mercouri in her campaign for return of the Elgin Marbles to Athens:

This is our history, this is our soul. . . . You must understand us. You must love us. We have fought with you in the second war. Give them back and we will be proud of you. Give them back and they will be in good hands.⁵⁵

and

[T]hey are the symbol and the blood and the soul of the Greek people. . . . [W]e have fought and died for the Parthenon and the Acropolis. . . . [W]hen we are born, they talk to us about all this great history that makes Greekness.⁵⁶

Such statements appeal primarily to the emotions. They divert attention from the facts and discourage reasoned discussion of the issues.⁵⁷ When a similar emotion is applied to the Poussin case, the result is obvious: the painting is French — Poussin was a Frenchman and the painting was created in France — and should be “returned”⁵⁸ to France. This type of sentiment exerts great power.

C. The Afo-A-Kom and Essential Propinquity

How can the cases described above be distinguished from the Afo-A-Kom, a sculpture originating with the Kom, a tribe in Cameroon? The Afo-A-Kom statue mysteriously appeared on the New York art market, exciting an eloquent reaction from the First Secretary of the Cameroon Embassy in Washington:

It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together. It is not an object of art for sale and could not be.⁵⁹

⁵⁵ San Francisco Chron., May 26, 1983, at 26, col. 3 (reporting on a Mercouri press conference). The same Associated Press report states that Minister Mercouri was “at times apparently near tears as she ran her fingers over the white sculptures” during a visit to the British Museum. *Id.*

⁵⁶ *Q. & A. Melina Mercouri*, N.Y. Times, Mar. 4, 1984, at E9.

⁵⁷ For an attempt at a reasoned discussion of the Elgin Marbles, see Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880 (1985).

⁵⁸ The reader will recall that in illegal export cases, “return” has a peculiar meaning. See *supra* note 21 and accompanying text.

⁵⁹ The case is discussed at length in F. FERRETTI, *AFO-A-KOM: SACRED ART OF CAMEROON* (1975). For a brief description of the case, see J. MERRYMAN & A. ELSSEN, *supra* note 22, at 54, 56-58. It was never clear whether the statue was stolen or merely illegally exported, a distinction that might be difficult to apply in Kom law and custom. There was no litigation; the dealer cooperated with interested American individuals and museum officials in returning the sculpture to the Kom. Rumors that the

The quoted statement suggests something different from and more compelling than Byronism: A belief that the presence of the object is essential to the welfare, perhaps even the continued existence, of the tribe.⁶⁰ This attribution of magical qualities to objects, a practice common among many religions — consider the importance of relics and effigies in Christianity and Buddhism — is related to, but seems distinguishable from, other practices: for example, use of an object as a symbol of national ideals (the Statue of Liberty), or as the embodiment of national history (the Liberty Bell), or culture (the Aztec Calendar Stone). These cases seem different from the Afo-A-Kom. Consider these statements directed toward the repatriation of cultural property, but clearly applicable to retention:

[Objects] so heavily charged with cultural or national significance that their removal from their culture of origin left that culture shorn of one of

statue soon reappeared on the international art market seem to have been untrue; it was prominently displayed in a subsequent travelling exhibition of "Art of the Cameroons" under the auspices of the Cameroon government.

⁶⁰ Compare the belief in *mana*:

On a more mystical level, in the past a great work of art was thought at times to contain the *mana* of its royal owner. From Nero to Napoleon, rulers would plunder art to capture the soul or mystical identity of its royal or urban owner. That magical *mana* or life spirit contained in art is now seen as belonging to a nation.

Elsen, *Why Do We Care About Art?* 27 HASTINGS L.J. 951, 952 (1976).

A related consideration is that objects collected and displayed in museums often were created for use in secret ceremonies or were placed in graves with the intention that they remain with the dead or continue to serve ceremonial or talismanic functions that are essential to the spiritual welfare of the society. To remove and display these objects violates those intentions; it seems like a form of sacrilege that can have serious consequences for believers.

In 1984-85, after "heated debate in tribal councils" about the propriety of allowing their most sacred objects to go abroad, Maori objects were allowed to appear at exhibitions in major United States museums. Since the Maori believe that the spirits of their ancestors dwell in the sculptures, a group of 60 Maoris and their elders accompanied the objects to the United States and held a ceremony, including a ritual dance, to welcome the spirits to the United States and to ask them to receive visitors to the exhibition in peace. N.Y. Times, Sept. 11, 1984, at C15, col. 1; S.F. Chron., July 10, 1985, at 22, col. 2.

Compare the belief of the population of Eleusis that the statue of Demeter embodied something essential to their welfare. "The Eleusinian peasants, at the very mention of moving it, regarded me as one who would bring the moon from her orbit. What would become of their corn, they said, if the old lady with her basket was removed?" Statement by the Rev. Edward Daniel Clarke about his removal of the Demeter over the protests of the local population. The episode is described in W. ST. CLAIR, *supra* note 53, at 105-07.

its dimensions and diminished in the eyes of its own creators. . . .⁶¹

For many Greeks the Parthenon and its sculptures are just such a symbol of their national identity and of their heritage from the past, and the retention of the sculptures in Bloomsbury is seen as a diminution of their dignity as a people, all the more humiliating now that other peoples and states are recovering their national symbols.⁶²

Is there something here that transcends mere Byronism, a cultural imperative that validates national retention of some, if not all, cultural objects? Nationalism aside, are there objects whose propinquity fills a religious or ceremonial or communal need of the people concerned? In the case of the Afo-A-Kom, if one is to believe press reports, its physical presence was necessary to the religious, ceremonial, and communal life of the Kom. Its absence, even though it was not damaged or destroyed, left a cultural lacuna that could only be filled by its return. Can the same be said for *every* pre-Columbian object in Peru, for all of the redundant sculptures and pots in Mexican warehouses, for paintings by Italian masters in French and British collections, for indeed, the Poussin painting in a private collection in France?

It seems possible to distinguish those object-culture relationships that truly depend on propinquity from those that do not. Two criteria appear to apply. First, the culture that gave the object its cultural significance must be alive. Second, the object must be actively employed for the religious or ceremonial or communal purposes for which it was made. The Afo-A-Kom met both criteria: the Kom culture survived, and the object's presence played a role in the life of the Kom (at least until it was sent abroad as part of a travelling exhibition of Art of the Cameroons.) Objects associated with surviving American Indian cultures would similarly qualify, and examples from other parts of the world will occur to the reader.

However, most of the objects that nations try to retain under cultural property retention schemes do not meet these criteria. The relics of earlier cultures in Egypt, Greece, China, and Mexico have no contemporary religious, ceremonial, or communal function. People who live in those nations today may place a high value on relics for other reasons, but the use for which they were created is not among them. The spe-

⁶¹ Statement attributed to Salah Stetie, then Chairman of the Intergovernmental Committee for the Return or Restitution of Cultural Property, established by UNESCO in 1979, in Browning, *The Plundering of Nationhood*, N.Y. Times Literary Supplement, July 25, 1986, at 805. Mr. Stetie is quoted further as referring to a "*privation d'un avoir qui est une privation d'etre.*" *Id.*

⁶² *Id.*

cific cultural value of the relics — for example, as testimony of the way of life of a vanished people, as great works of the art of a specific time and place — is independent of propinquity.

The point is important; retentive laws and requests for the repatriation of cultural objects are not concerned with misrepresentation or misattribution of the works in question.⁶³ If the Aztec Calendar Stone were in a museum in Paris it would still honor the Aztecs, just as the Parthenon Marbles in the National Gallery in London honor the artistry of classical Greek sculptors and the culture in which they lived and worked. To speak of the “loss of cultural heritage” means one thing when cultural objects are destroyed or suppressed. It means something quite different when what is “lost” is location within the national territory. In the Cleveland Museum, the Poussin is still a Poussin.

We can thus distinguish the general attitude that we have denominated Byronism — the romantic claim that cultural objects belong in the national territory — from the smaller class of cases in which the object’s presence is necessary for religious, ceremonial, or communal use by the culture that created it. In the international discourse on cultural property such a distinction is not made. The generic claim of cultural nationalism goes unexamined. Examination reveals it to be a questionable basis for cultural property retention, but, like many other romantic ideas, it retains the power to motivate much human behavior. Encouraged by nation-builders and exploited by demagogues, cultural nationalism sums up an important group of reasons why nations try to prevent the export of cultural property. Whether those reasons support the call for foreign enforcement of the source nation’s retention scheme is a separate question, which I will discuss in another place.

D. General Welfare

We turn now to a different group of possible explanations for the existence of cultural property retention schemes based on the familiar power of governments to promote the general welfare of their people. Does the presence of cultural property in private hands in the national territory promote the general welfare? Does export impair it?

One plausible suggestion is that the lives of French people are enriched by the experience of enjoying cultural objects like the Poussin

⁶³ Any tendency to supply a misleading provenance for a smuggled work, and thus to misrepresent its origin, is more likely to be encouraged by retentive laws than prevented by them. If Mexico is aggressively pursuing illegally exported Mayan artifacts and Honduras is not, then there may be some market advantage in attributing a Mayan work found in Mexico to a Honduran site.

painting. After export, the Frenchman who might have enjoyed the painting at home must go abroad to see it; otherwise, she is limited to indirect access to the work through reproductions. It surely is appropriate for the French government to promote the cultural welfare of its citizens by preserving their access to cultural property.

But whether export really causes a significant loss of access to the work depends on whether it was publicly accessible before export, and in this case, the Poussin painting was privately owned. In France, as in the United States, private owners of works of art generally restrict them to private enjoyment. The owner can choose to make the work publicly accessible, but she is not required to do so. In the Poussin case there is no indication that the painting was accessible to the French public before sale to the Cleveland Museum.⁶⁴ Thus, although the export of the Poussin might have some marginal effect on its accessibility to the French people, the loss would not be significant. (To a cosmopolitan observer, that loss would be offset by the broader availability for enjoyment of the painting in the Cleveland Museum, which is open to the public, but a Frenchperson might not take comfort from that fact.)

Loss of cultural pride is another matter. French people enjoy knowing that they are a culturally rich nation. When the Poussin painting left France and came to the United States, the basis for that kind of pride might have been marginally impaired. "Loss" of a great work by a major figure in world art history hurts the Frenchman's *amour-propre*, just as "gain" of the painting by the United States makes Americans feel culturally richer. (Observe that the effect is independent of the nationality of the artist or the origin of the work. It would be as true if the French collector exported an important painting by an Italian Renaissance artist or an ancient Greek pot.) But the fact that the Poussin was privately owned also reduces the significance of this effect. Its existence in a private collection may have been known only to a few French; most would never have known of its existence and would be unaware that a great work of art had left the national territory.

It might be suggested that the objects that compose French culture speak with particular effect to French people. The Poussin painting has more "cultural value" to the French than to others who, since they are of different cultures, cannot derive the same depth of appreciation and pleasure from it. When the Poussin left France and went to the Cleve-

⁶⁴ Italy, which has an extensive legislative scheme for cultural property, does provide for the possibility of public access to "collections and series of objects that as a whole have exceptional artistic or historical interest." Law no. 1089 of 8 August 1939, arts. 5, 53. France has no similar legislation.

land Museum, the French lost more than the Americans acquired. The purpose of retentive legislation is to prevent such “culturally unequal” transactions by prohibiting export.

How does one evaluate such an argument? The notion that the Poussin speaks with more effect to the French people seems, in these days of progressive cultural internationalization, quaint and self-congratulatory. Why would a work of art not speak with greater power to people who have little exposure, who have suffered from artistic privation and have a consequently greater artistic appetite, than to those for whom it is merely one additional taste in an already rich diet? Or, since there are more Americans than French, why would it not be right to argue that for more people to enjoy the painting a little less is at least the equivalent of fewer people enjoying it a little more? And, again, we are speaking of a privately owned work, enjoyed primarily by its owner and perhaps by family and friends. If the painting spoke with particular effect to them, presumably that would be reflected in the price for which they sold it.

Which brings us to economics.

Economic considerations legitimately apply to cultural property. Great works of art command an international market and bring high prices when offered for sale. They also have value as tourist attractions, bringing money to the local economy. But again it is not clear that such considerations explain retention schemes. True, if the owner of the Poussin painting sells it abroad, that valuable object has left the nation, but the owner was paid for it. Unless he made a bad bargain and sold the painting for less than it was worth, the valuable object has been replaced by an equivalent value in money. The French economy is no poorer. The loss of “tourist value” to the French economy would be substantial only if the Poussin actually had been a tourist attraction and only if the price received failed to capture the “tourist value.” But a Poussin in a private collection is hardly a tourist attraction.

When applied to objects like the Poussin painting (an important qualification, as we shall see below), these “general welfare” considerations do not make a strong case for retention schemes. Since the Poussin is an example of an important class of objects routinely subject to cultural property retention schemes, we are pressed toward the troubling suspicion that such schemes may be, as to them, irrational.⁶⁵ One natu-

⁶⁵ The term “irrational” is used in its strict sense, to indicate that the result does not follow from the application of reason. Cultural nationalism, which does support retention, is an expression of sentiment — of emotion rather than reason. Whether public action should be based on reason only, on emotion only, or on some mix of the two is a

rally resists that notion, since the French are known to be a rational people. Is there a more convincing reason why they might want to prevent export of the Poussin?

E. Opportunity Preservation

As long as the Poussin painting remains in French territory it is available for potential capture by the state. The owner may donate it to a museum (a less common occurrence in France than in the United States, but not an impossibility); or the owner may cede it to the nation in settlement of a tax obligation (as in the Picasso estate); or the owner may offer it for sale at a time when a state institution happens to have the funds to purchase it; or the state might decide to expropriate it. Once the painting goes abroad — particularly if it enters the collection of a foreign museum — these opportunities are lost. The cultural property retentive scheme thus serves as a significant “opportunity preservation” device.

A successful retention scheme also takes cultural objects out of the world market and limits them to the national market. This depresses their prices. The wealthy Japanese collector and the Getty Trust will not bid on the Poussin painting if it cannot be removed from France. Restriction to the national market means fewer potential buyers and a smaller pool of interested money. This makes eventual acquisition by the state through purchase, expropriation, or donation in lieu of taxes less costly to the fisc and thus enhances the state’s opportunity prospects. However, it also creates an incentive for French owners to evade the retention scheme.⁶⁶ If the international market price of the work is higher than the national market price, the French will naturally prefer to sell abroad, and some of them will find ways of doing so.

Opportunity preservation is a rational but not very inspiring basis

separate and interesting, but ultimately bootless, question. We hardly need to be reminded that reason has its limits and that much rational argument merely justifies (“rationalizes”) positions taken on emotional bases. Still, public action, particularly law making, purports to be a reasoned activity, requiring at the least that emotionally motivated choices be put in reasoned form.

⁶⁶ In commenting on the effects of the French law, Professor Chatelain observes:

Or de telles oeuvres valent sensiblement plus sur le marché international que sur le seul marché français; l'exportateur auquel on refuse la sortie a donc le sentiment d'une véritable spoliation, puisqu'il ne peut pas tirer de son oeuvre le prix qu'il en tirerait a l'étranger. . . il a le sentiment d'avoir été privé d'une partie de son patrimoine.

J. CHATELAIN, *OEUVRES D'ART ET OBJETS DE COLLECTION EN DROIT FRANCAIS* 124-25 (1982).

for cultural property retention laws. There is something mean-spirited about a law that keeps objects at hand without the cost and difficulty of acquiring and caring for them until the decision is made to acquire them for the state (at a cost, pegged to the national market, below what it would sell for abroad). One can see how restrictions of this kind would appeal to the authorities in the source nation, but it is not at all clear that such a justification would persuade market nations to enforce them.

F. Preservation, Context, and Integrity

The case for cultural property retention schemes is, up to this point, only mildly persuasive. Cultural nationalism and the nation's desire to keep the object in the hope that it may fall into national ownership as a gift or by acquisition at a reduced price hardly add up to something worth producing a UNESCO Convention about. As applied to objects like the privately owned Poussin painting, one could easily decide that the case has not been made for foreign enforcement of the French export restriction. However, there are other types of cultural property and other reasons to consider. For example:

Case 4. An American dealer, in complicity with a landowner in a Central American jungle, hires local workmen to pry a stela from a Mayan temple. The stela is an integral part of the temple, and both are damaged. The dealer bribes police and customs officials to export the stela in crates purporting to contain "machinery." Once in the United States, the dealer offers the stela for sale to museums.⁶⁷

Case 5. An Italian farmer, plowing his field near Cerveteri, discovers an Etruscan grave containing a painted Greek pot (Etruria was a major market for Greek ceramics) of unusual beauty and value. He sells the pot to a dealer who smuggles it to Switzerland and sells it to an American

⁶⁷ These facts are suggested by those in *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), in which Mr. Hollinshead, a dealer, was convicted for violating the United States Stolen Property Act. For further materials on the Hollinshead case, see J. MERRYMAN & A. ELSER, *supra* note 22, at 118-24. A civil action in which Guatemala sued Hollinshead to recover the stela was settled before trial. As part of the settlement, the stela was returned to Guatemala after exhibition in a Los Angeles museum. *Id.* at 115-16.

*museum.*⁶⁸

These cases bring three new and related concepts into play: preservation, context, and integrity. When the stela is torn from the temple, physical damage to the temple, and often to the stela, is unavoidable; the stela is removed from its context. Both the stela and the temple have lost integrity — each has less cultural value when separated than as a unit. One purpose of cultural property retention schemes arguably is to prevent such acts; if the stela cannot be exported, it cannot be sold abroad. That severely restricts the market for the stela and thus discourages vandalism. Whether retention schemes actually do have that protective effect is an important question which is discussed below.

There is no serious debate about the proposition that cultural property should be preserved. If the object is damaged or destroyed the opportunity to study and learn from it, to enjoy it, to be inspired by it,⁶⁹ is impaired or lost. Public action to protect and preserve cultural property appears to be not only reasonable but laudable. Public action to preserve contextual values also makes sense. To the archaeologist, ethnographer, or historian, an object may derive much of its significance from its context and the context may derive meaning from the object. If a stela is taken from a Mayan temple without full documentation, the value of the stela and the temple are diminished. The act of removal destroys information, impedes learning, and impairs enjoyment. The stela, rendered anonymous by the act of undocumented removal, becomes an orphan; the temple, an amputee. “Decontextualization” of this kind is a genuine problem for parts of architectural monuments. Even for unattached works, loss of context can be a serious problem. Consider Case 5, removal of the pot from the Etruscan tomb. Unless removal is accompanied by elaborate documentation of the site and its contents and identification of the pot’s origin in the site, it leads to the irreparable loss of cultural information. It is a form of destruction, a kind of vandalism.

Loss of integrity is a related problem that is particularly applicable

⁶⁸ The facts are one version — the version still widely believed in Italy and among archaeologists and art historians in the United States — of the events in the Metropolitan Museum’s controversial acquisition of a Calyx Krater painted by Euphronius. For a collection of materials about the case, see J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 2-13 to 2-26 (1979).

⁶⁹ The importance of preservation depends on the belief that cultural objects have a special kind of value. Most readers would agree that they do. For those who would not, see Elsen, *supra* note 60, at 951; A.E. ELSÉN, *PURPOSES OF ART: AN INTRODUCTION TO THE HISTORY AND APPRECIATION OF ART* vi-vii and *passim* (1981).

to works of art. A complex work, such as an altarpiece composed of several panels, arguably is greater than the sum of its parts. If one of the panels is removed and sold, both the panel and the remaining part lose something essential. Fidelity to the artist's conception is only a part of the problem;⁷⁰ there is also the concern for the object's preservation in its authentic form.⁷¹ The purpose is to preserve the integrity of the culture, to avoid its falsification and decontextualization.

The troika of preservation, context, and integrity constitutes a set of higher "public welfare" values that transcend national interests and boundaries. They are concerned with *protection* of cultural objects, of things that embody or express or evoke the human record. Such objects, in the words of The Hague Convention of 1954, are "the cultural heritage of all mankind."⁷²

When the Poussin painting was exported from France to Cleveland, these values were not impaired. The painting was not physically endangered or damaged. It was not a part of a larger work; there was no loss of integrity. No physical decontextualization comparable to that resulting from the undocumented removal of the stela or the Greek pot occurred. We must, however, examine another type of contextual argument suggested by Professor Dummett.⁷³ It is familiar learning among art historians that "[a] work of art is the product of a particular time and place, and cannot be fully understood save as being of that time and place."⁷⁴ From this, Professor Dummett argues that the preferred location of the cultural object is "in or near the spot for which it was designed, or, if that cannot be managed, in the general environment from which it sprang and of whose history it is a part."⁷⁵ According to this view, taking the Poussin from France to Cleveland removes it from its cultural context in a way that is analogous to removing the Mayan

⁷⁰ "Moral right" laws in many foreign nations and in California, Louisiana, Massachusetts, New York, and Pennsylvania prohibit alteration — including dismemberment — of an artist's work by the owner in order to protect the artist's personal interest in his creation. See J. MERRYMAN & A. ELSEN, *supra* note 22, at ch. 3.

⁷¹ Several "moral right" laws also include a provision for a public action to protect the public interest in cultural preservation; France, Italy, California, and Massachusetts are among them.

⁷² The words are taken from the Preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. For a discussion of their significance, see Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

⁷³ Dummett, *The Ethics of Cultural Property*, N.Y. Times Literary Supplement, July 25, 1986, at 809.

⁷⁴ *Id.*

⁷⁵ *Id.*

stela from its temple or separating a panel from the Van Eyck altarpiece. Professor Dummett argues that there is a comparable loss of information, beauty, and power. Those who enjoy the Poussin, those who study it, or draw inspiration from it, would receive more from it in France than in Cleveland.⁷⁶

As an explanation of national retention of cultural property, Professor Dummett's point is unconvincing, even when applied to a publicly exhibited object. It is one thing to suggest that the Elgin Marbles, for example, should be in their original places on the Parthenon for reasons of context and integrity. It is quite another to suggest that they should be in a museum in Athens,⁷⁷ rather than in a museum in London, because of

the enhancement of the work of art, for all who then view it, by its restoration to its native home. . . . [I]f there is an atmosphere in which they would breathe once more, those who would take them there have a genuine claim on them, if not always a decisive one.⁷⁸

The argument loses force when applied to a situation presented such as the Poussin painting. As part of a private French collection, it was available for enjoyment only to the owner and his guests. It was not available to the public for study and enjoyment, as it is in the Cleveland Museum.

A further consideration: that the Poussin speaks of its own time and place can as easily be used by the French to favor export, so that the painting can instruct others about the achievements of the people and culture that produced it. There is ample evidence that the French expect their culture to be admired abroad, and one way to achieve that goal is through "missionary art" that bears the French cultural message to less fortunate peoples.⁷⁹ A French statesman might also reasonably

⁷⁶ Cf. the discussion of a similar idea, phrased in different terms, *supra* part I.D.

⁷⁷ The marbles cannot be replaced on the Parthenon because that would expose them to the corrosive effects of the Athenian atmosphere, effects so serious that remaining sculptures on the Acropolis — the Caryatids on the Erechtheion, for example — have had to be removed for safekeeping indoors and replaced by replicas. The current Greek campaign for return of the Elgin Marbles proposes to place them in a museum near the Parthenon. See Merryman, *supra* note 57, at 1917-19.

⁷⁸ Dummett, *supra* note 73, at 810. Byron's voice is evident in this quotation and in other passages in Professor Dummett's article.

⁷⁹ See Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 306-07 (1982) (finding "Art as a good ambassador"). Cf. Decision No. 2031 (A)/1951 of the Austrian Administrative Court, overruling the Federal Ministry of Education's refusal to permit the export of an Egon Schiele painting. According to the court, the Ministry should have perceived that the interest of the state in retaining the Schiele painting in Austria was outweighed by the interest in propagating Austrian art abroad.

favor the broader international distribution of French cultural property for a less nationalistic reason: people want access to cultural objects in order to learn from them; a more cosmopolitan learning and better international understanding result from exposure to the works of other cultures.

This discussion suggests that there are, for present purposes, two distinct classes of cultural property. One class includes architectural sculptures like the Mayan stela; objects whose removal threatens the values of preservation, context, or integrity. The other class includes paintings like the Poussin, which can be moved without threatening these values. For the latter class, which, in addition to paintings, includes sculptures and other movable works of art, as well as articles of furniture, books and manuscripts, stamps and coins, ceremonial objects, and many others, conservation, integrity, and context often fail as explanations for retention schemes.

II. RETENTION AND PROTECTION

Protection and retention are, however, distinct ideas, and we have yet to consider whether cultural property retention schemes effectively protect objects that embody the culture. It is true that national legislation and international conventions and resolutions often treat the two terms as though they are synonymous. Thus, the 1970 UNESCO Convention is largely about retention of cultural property, but the Convention speaks only of "protection" — that is, protection against removal.⁸⁰ The implication is that retention accomplishes, or at least advances, protection. The argument is that nations try to retain cultural property to protect it.

It takes little thought to see that, while preventing the export of cultural property may in some cases protect it, in other cases, retention may endanger the object or be irrelevant to its preservation; there is no generally predictable relation between the two concepts. For example, rigorous enforcement of the prohibition against export might discourage destructive looting of the Mayan site in Case 4 and the Etruscan tomb in Case 5. But mere retention of such objects without protective measures, which are expensive and require sustained professional attention, can assure their destruction through neglect, the action of the elements, vandalism, and so on. If sold, traded, or lent abroad, they might enter

(I am indebted for this reference to Univ. Prof. Dr. h.c. Ignaz Seidl-Hohenveldern of Vienna.)

⁸⁰ See discussion in Merryman, *supra* note 72, at 831.

museums or other environments in which they would be carefully conserved. For example, Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve.⁸¹ In museum and professional circles it is widely believed that comparable problems exist in a number of tenaciously retentive source nations. We can call such cases examples of "destructive retention" or "covetous neglect." By preventing the transfer of fragile works to a place where they might be well protected while inadequately preserving them at home, such nations impair, rather than advance, their own and the more general interest in preservation, context, and integrity.

The related practice of hoarding redundant cultural objects, while not necessarily damaging to the articles retained, serves no discernible preservation, context, or integrity purpose. It is widely believed that a number of source nations indiscriminately retain duplicates of objects far beyond any conceivable domestic use and refuse to make them available to museums, collectors, and dealers abroad.⁸² A hoarded Mayan artifact crumbling in a warehouse in Mexico is unavailable for enjoyment or study. If allowed to leave Mexican territory it might be preserved and publicly exhibited.

One can reasonably suggest that a source nation seriously interested

⁸¹ Compare *Peru Wages Campaign to Halt Trade in Stolen Treasures*, N.Y. Times, Oct. 4, 1981, at 23, col. 2, with Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, § 3, at 14, col. 1. Peru is not an isolated case. See, e.g., Brooke, *African Art Museums Fight to Save Art*, N.Y. Times, Mar. 12, 1987, at 7, col. 6; Hazarika, *Historic New Delhi Monuments Losing the Race with Decay*, N.Y. Times, Mar. 12, 1987, at 7, col. 1.

⁸² That is evidently the reason for the following language in the *UNESCO Recommendation*, *supra* note 12.

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.

Compare the equally ignored and ineffectual declaration in the Preamble of the UNESCO Convention, *supra* note 1, at 289: "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."

in protecting cultural objects would not try to retain them unless it was prepared to invest in conservation measures comparable to those the object would receive if it were allowed to go abroad. Since, as we have seen, some nations do not conserve much of what they retain, it seems reasonable to suppose that protection is not their motive for retention.⁸³ The rational choice for a nation motivated by a concern for protection is to lend endangered objects to those who are prepared to care for them until they can be safely returned. I know of no source nation that makes any effort to do so.

The proposition that retention entails the obligation of protection is hardly a novel one. UNESCO 1970, which provides for international enforcement of national retention schemes, requires the retaining state to promote "the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops) required to ensure the preservation and presentation of cultural property."⁸⁴ Other international instruments define the obligation to protect cultural property in greater detail.⁸⁵ Indeed, one way to read these international conventions and recommendations is that they state a precondition for retention: the state that wishes to retain cultural property should maintain the physical and technical facilities and personnel to protect and present it. In most source nations, including some of the wealthiest ones, any such regime of protection exists only as a remote objective, hopelessly behind in the competition for resources.

⁸³ Consider the argument that the source nation wants to protect its cultural property but cannot because of lack of funds and professionally qualified personnel. Retention without protection is a temporary expedient, to be corrected with economic and professional development. This is another kind of "opportunity preservation" argument. *See supra* text accompanying note 66. Its most obvious flaw is that, while opportunity is preserved, the objects in question are not. There is something perverse about the proposition that cultural property should be left unprotected because it might someday be protected, if the alternative is that it be protected now.

⁸⁴ UNESCO Convention, *supra* note 1, art. 5(c), at 290.

⁸⁵ *See, e.g., The European Convention on the Protection of the Archaeological Heritage*, (May 6, 1969) I Compendium 365; *The Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations* (Convention of San Salvador) (June 16, 1976), I Compendium 37; UNESCO, *Recommendation on International Principles Applicable to Archaeological Excavations* (Dec. 5, 1956); UNESCO, *Recommendation for the Protection of Movable Cultural Property* (Nov. 28, 1978); UNESCO, *Recommendation Concerning the Protection, at the National Level, of the Cultural and National Heritage* (1972).

III. THE BLACK MARKET

There is another sense in which retention may be inconsistent with protection: by prohibiting or unduly restricting a licit trade in cultural property, source nations assure the existence of an active, profitable, and corrupting black market.⁸⁶ Retention laws do not prevent export, they merely ensure that the export trade moves underground, putting cultural property traffic in the hands of the wrong people, who will do it the wrong way. Historically, the tighter the export control in the source nation, the stronger the pressure to form an illicit market.⁸⁷

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 and the routes it follows. 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.⁸⁸

If it is true that the demand for cultural objects guarantees that *some* illicit traffic will exist, then the consequences of that traffic for cultural property must be considered. For example, Mayan sites in Mexico and Central America are mistreated by *huaqueros* who, out of ignorance and the need to act covertly and in haste, unnecessarily damage cultural objects and the sites from which they are taken. Since the *huaqueros'*

⁸⁶ See Bator, *supra* note 79, at 317 (describing "Ten easy lessons on how to create a black market"); Merryman & Elsen, *supra* note 30, at 5, 16.

⁸⁷ Some of the pressure comes from the difference between the price an object will bring if restricted to the national market and its price on the international market. See *supra* text accompanying note 69. Source nations generally argue the opposite, citing the existence of the illicit market as evidence of the need for increased controls. The preamble of UNESCO 1970 incorporates the source nation reasoning, and 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.

⁸⁸ One need not approve of the traffic, or of some of the people who conduct it (avaricious dealers, corrupt police and customs officials, ethically insensitive collectors, cynically acquisitive museum professionals), to observe its existence and comment on its implications. Still, a blanket condemnation of those who participate in the traffic may be too easy. Illegal excavations may reveal important works that would otherwise remain hidden; smuggling may save works that would otherwise be destroyed through covetous neglect; the laws prohibiting export may be senselessly overinclusive; etc.

activities are surreptitious and undocumented, the objects taken 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?⁸⁹ In this way, unnecessary physical damage could be avoided and the work of removal documented. At present, the money paid for illegally removed works goes in large part to bribe police and customs officials⁹⁰ and to make profits for the criminal entrepreneurs, local and foreign, who conduct the traffic. Would it be better if the income from cultural property sold abroad were available in the source nation to support a professionally operated cultural property management program?

In the abstract, anyone would oppose the removal of monumental sculptures from Mayan sites when 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. But if the site is neglected and the removal saves works that would otherwise crumble away a crude and undocumented job of removal ultimately might be less destructive. It is clearly right for a nation to retain important works of indigenous cultures. One might, however, wish that Mexico would sell, trade, or lend some of its reputedly large hoard of unused Chac-Mools, pots, and other warehoused objects to foreign collectors⁹¹ and museums, and he might be impatient with the argument that museums in other nations should not only forego building such collections, but should actively assist Mexico in suppressing the "illicit" trade in those objects. In principle, everyone would agree that paintings should not be stolen from Italian churches for sale to foreign or domestic collectors or museums. But if a painting is rotting in the church from lack of resources to care for it, and the priest sells it for

⁸⁹ See the description of experiments with this strategy in Italy and Germany in J. MERRYMAN & A. ELSEN, *supra* note 68, at 2-112.

⁹⁰ Knowledgeable curators and dealers have suggested that police and customs officers in some source nations support cultural property retention schemes and oppose legalization of export to protect this source of income.

⁹¹ A distinguished colleague has questioned the desirability of permitting such works to fall into the hands of collectors, where they will not be available for public viewing and study, and argued that the opportunity to monitor the quality of care they receive is limited. These are important considerations, but if the alternative is to leave them in a place in which they are unavailable for viewing and study and in which they receive no attention from qualified conservators, a collector may be preferable. Eventually, many works of museum quality in the hands of private collectors find their way to museums.

money to repair the roof in the hope that the purchaser will give the painting the care it needs, then the problem begins to look different.⁹²

IV. AN EVALUATION OF REASONS FOR RETENTION

We have seen three plausible explanations of why nations try to prevent the export of cultural property: Byronism (*i.e.*, nationalist sentiment), protection (*i.e.*, preservation, context and integrity), and opportunity preservation (*i.e.*, if it stays in the national territory the nation may eventually acquire it at a bargain price or may decide to protect it). Other reasons have been offered and considered, but they do not survive inspection.

For the large class of cultural objects represented by the Poussin painting, protection does not appear to explain or justify retention. Even in the case of monumental and architectural works like the Mayan temple, the protective motive may be ill-served by retention schemes. Cultural property that is poorly protected at home might be better protected abroad. Retentive laws, by driving the cultural property traffic underground, may increase the prospect of destruction and compound the problems of decontextualization and loss of integrity. Indeed, few nations that currently maintain cultural property retention schemes could convincingly show that they serve a significant protective function.

It is true that source nations with tenaciously retentive schemes also have, on paper, laws that provide for the protection of cultural property against vandalism, casual souvenir-hunting, looting, and other typical dangers at home. Even in wealthy nations, however, the steps actually taken to enforce these provisions are normally inadequate for the purpose. Looting, souvenir-hunting, and vandalism continue despite enforcement laws. For example, despite protective legislation in the United States, sites containing the works of indigenous cultures on public lands are regularly looted of pots, tools, and other objects.⁹³ Graves are violated and their contents scattered. Structures are deliberately damaged by vandals and abused by sightseers. The laws designed to protect these works — including, most recently, laws prohibiting export

⁹² See Stewart, *Two Cheers for the Tombaroli*, *The New Republic*, Apr. 28, 1973, at 21 ("per piacere, rubatelo!"); Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, in UNITED NATIONS SOCIAL DEFENCE RESEARCH INSTITUTE [UNSDRI], *THE PROTECTION OF THE ARTISTIC AND ARCHAEOLOGICAL HERITAGE* 164. (Rome 1976).

⁹³ See Goodwin, *Raiders of the Sacred Sites*, *N.Y. Times Magazine*, Dec. 7, 1986, at 65.

— are justified as “protective,” but the resources devoted to enforcement are laughably inadequate.⁹⁴

Enactment of inadequately staffed and funded protection and retention schemes creates the appearance of protective concern and action with little cost. There are, of course, people in all source nations who are sincerely devoted to the preservation and study of cultural objects. These people are not well served by unenforced cultural property retention schemes that create the illusion of protective action. Nor is their cause advanced by indignant speeches at international conferences. The international rhetoric, by pointing the finger abroad, diverts attention from the failure at home. In this way a cultural property retention scheme can become a substitute for, rather than an instrument of, the protection of cultural property.

The protective purpose of cultural property retention schemes is, in short, easily overstated. This leaves Byronism and opportunity preservation as the major driving forces for protection. For the source nation, nationalist sentiment and the desire to keep valuable objects within reach without actually acquiring them (with the attendant cost of acquisition and the burdens of storage and maintenance) amply justify retentive schemes. They do not play nearly as well in UNESCO or in international archaeological, anthropological, and museum organizations, however, as protection. Market nations are more likely to respond to appeals to protect our common cultural heritage. Hence, the invariable use of the term “protection” in the international dialogue concerning cultural property traffic.

CONCLUSION

The above discussion applies to three separate fora. One forum is the source nation itself, in which a realistic acknowledgment of the reasons for and limitations of cultural property retention laws can lead to better cultural property policies. Second is the international forum — UNESCO in particular — in which the play of source nation, market nation, and transit nation interests would ideally be resolved in ways that protect our common cultural heritage and lead to its appropriate distribution and productive study and enjoyment.

The third forum is the market nation, which must decide how to respond to source nation and international concerns. Unrelated political

⁹⁴ See U.S. GENERAL ACCOUNTING OFFICE, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, CULTURAL RESOURCES: PROBLEMS PROTECTING AND PRESERVING FEDERAL ARCHAEOLOGICAL RESOURCES (GAO/RCED-88-3, December 1987).

considerations will often come into play in making such decisions.⁹⁵ Still, a clear view of the merits of the source nation's cultural property claims can help the market nation make appropriate decisions when political conditions permit. What principles ought the market nation apply in such cases?

The outlines of an answer to that question have emerged above in identifying and evaluating the source nation's possible reasons for imposing cultural property export controls. A full answer must be the subject of another article.

⁹⁵ For example, it is generally believed that the 1971 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.S. 494, T.I.A.S. No. 7088 (1971) represented U.S. agreement to cooperate with Mexico on cultural property in return for Mexican agreement to help control the movement of drugs into the United States.

