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# **A NEW WORLD ORDER FOR CULTURAL PROPERTY: ADDRESSING THE FAILURE OF INTERNATIONAL AND DOMESTIC REGULATION OF THE INTERNATIONAL ART MARKET**

## **I. INTRODUCTION**

While beauty may be in the eye of the beholder, works of art have caught the eye of many a beholder across the globe; those pieces of art, in fact, command a heavy monetary price from such admirers. Since the beginning of exploration and colonial conquest, and probably before that, humans have been fascinated with the collection and display of works of art.

The creation and appreciation of art is one of the many ways in which human beings have distinguished themselves from their less developed cousins in the animal kingdom, but one peculiar aspect of human society certainly pervades the world of art collection: humans are willing to pay a very high economic price to collect and maintain works of art. In fact, the societal cost of collecting and maintaining art is greater than the salient monetary cost imposed upon purchasers. As the international market for art blossomed in recent years, the international market for the illicit trade in art skyrocketed.<sup>1</sup>

This comment discusses and analyzes the two major pieces of legislation, one international and one domestic, that address the issue of the illegal trade in cultural property. It analyzes both the 1970 United Nations Educational Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>2</sup> and the 1983 Convention on Cultural Property Implementation Act<sup>3</sup> in order to see how effectively each addresses this global

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1. See 3 P.J. O'KEEFE & L.V. PROT, *LAW AND THE CULTURE HERITAGE: MOVEMENT* 39 (1989).

2. 823 U.N.T.S. 231 (1972), *reprinted in* 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

3. 19 U.S.C. § 2601 (Supp. 1993).

problem. As will be shown, both laws, for various reasons, fail to eliminate the illicit trade in cultural property.

The comment proposes a series of changes to these laws that would increase their efficiency in dealing with the illicit art trade.<sup>4</sup> Essentially, these changes would provide an avenue for better international and domestic control of this voluminous market and provide more stability for third-world countries attempting to cultivate and display their unique and important cultural heritage. Furthermore, the changes would provide stricter controls in the United States to help the administration combat the growing illegal trade in art and cultural property.

The United States must re-examine its commitment, as represented by its signing of the 1970 UNESCO Convention, to curbing the illegal transfer of cultural property. Revising these statutes and actively participating in UNESCO will go a long way toward establishing a strong United States presence in this crucially important field. This field is in dire need of strong moral and political leadership, and the United States is in a position to develop this leadership.<sup>5</sup> It is only through mutual understanding of each other's cultural and national identity that humankind can progress, as a global village, toward a more harmonious future.

## II. BACKGROUND

### A. *The Volume of Illegally Imported Cultural Property: A Black Market Out of Control*

The International Foundation for Art Research (IFAR) compiles rough statistics on art thefts. In December of 1986, IFAR reported an estimated total of 524 foreign thefts, comprising 1,823 objects of art.<sup>6</sup> Even now, the 1986 "traffic in stolen or smuggled art, now estimated at more than \$1 billion a year, has recently become second only to drugs in the world's black-market economy."<sup>7</sup> In fact, Dr. Constance Lowenthal, Director of the International Foundation for Art Research, has suggested that the black market for art may now

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4. See *infra* text accompanying notes 116-127.

5. See *infra* text accompanying notes 118-119.

6. 3 O'KEEFE & PROTTE, *supra* note 1, at 41 (citing 1986 ART THEFT STATISTICS, IFAR reports, Vol. 7, No. 10 at 4 (1986)).

7. Alexander Stille, *Was This Statue Stolen?*, NAT'L L.J., Nov. 14, 1988, at 1, 32.

total twice the 1986 figure, and the illicit sale of art can truly be considered a growth industry.<sup>8</sup> One commentator has even said:

There is nothing new about the international movement of works of art, including permanent transfers of works of art from one nation to another. What is relatively new is the virtually *wholesale illicit expatriation* of works of art from nations rich in cultural heritage to nations that are rich in economic terms.<sup>9</sup>

While economic forces can account for much of this exodus of art from art-producing countries to economically rich countries, there are other, more disturbing forces that accelerate this "wholesale illicit expatriation."<sup>10</sup> As Professor James Nafziger points out, economic realities in developing, art-rich countries make it extremely difficult for governments in those countries to make concerted and effective efforts toward protection of these culturally important pieces.<sup>11</sup> The forces that frustrate these systems include the susceptibility of guards and officials to bribery, the scarcity of hard currency in developing countries, and the simple economic incentive for looters to steal valuable pieces from cultural sites.<sup>12</sup>

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8. Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. Tol. L. Rev. 919, 921 (1991) (citing Yarrow, *The Modern \$1 Billion Growth Industry: Stealing Great Art*, INT'L HERALD TRIB., March 21, 1990 (interviewing Dr. Constance Lowenthal, Director, International Foundation for Art Research, New York)).

9. *Id.* at 920 (emphasis added). Edwards continues:

The economic forces acting in favor of these transfers have, in many cases, become absolutely staggering. It has become routine for paintings to sell for millions of dollars . . . . As early as 1986, it was estimated that illicit trade in art and artifacts exceeded an annual figure of one billion dollars. It is reasonable to assume that the upward pressure on prices for paintings, as well as for antiquities, has resulted in a rise in the illicit trade in art since that 1986 estimate.

*Id.*

10. *Id.*

11. James Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 DEN. J. INT'L L. & POL'Y. 231, 232-33 n.6 (1972).

12. *Id.* Nafziger pinpoints the following as factors that prevent adequate enforcement of international cultural property agreements:

Reliance upon control systems of guards and inspectors that are often prohibitively expensive for the art-rich developing countries; the ancillary susceptibility of poorly paid guards and inspectors to bribes; the susceptibility of other agents of law enforcement, including judges, to bribes . . . ; the lure of hard currency from foreign purchasers in preference to indigenous currency sometimes available from the government

Given limited financial resources and the economic reward for looters, it is no wonder that developing countries inadequately guard against the illicit trade in art. Nafziger concludes that "it is not surprising that the laws are found to be honored more in their breach than in their observance."<sup>13</sup>

The need to combat these problems spawned the creation of the 1970 UNESCO Convention and its domestic partner, the 1983 Cultural Property Implementation Act.<sup>14</sup>

### B. *The 1970 UNESCO Convention: The Minimum Legal Requirements*

In an effort to address the growing illegal trade in cultural property and heritage,<sup>15</sup> the international community, through the United Nations Educational, Scientific and Cultural Organization (UNESCO), came together to negotiate a comprehensive international treatise.<sup>16</sup> The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property<sup>17</sup> arose out of those negotiations and stands as the most important and comprehensive international attempt to prevent the illicit traffic of cultural property.<sup>18</sup>

Though the United States was originally uninterested in the drafting process of the Convention,<sup>19</sup> the changing political climate of the 1960's spurred the United States into ac-

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or local purchasers; topographic and logistic obstacles, particularly in the remote, often treasure-laden, areas of developing countries; an iron law of inflation that sets prices on the international antiquities market beyond government control; draconian, sometimes completely proscriptive, export controls and embargoes that counter-productively drive up the market and invite disobedience; the difficulty of controlling the movement of items intended for re-export in such entrepôts as Switzerland and Lebanon [sic]; and the impossibility of sealing off borders and intercepting diplomatic pouches, which may contain contraband in cultural property.

*Id.* (citation omitted).

13. *Id.*

14. *Id.*

15. See *supra* text accompanying note 5.

16. See 3 O'KEEFE & PROTT, *supra* note 1, at 726-28. In fact, the impetus for the UNESCO Convention came out of European concerns at the end of World War I that United States collectors might take unfair advantage of Europe's impoverished countries by buying art at reduced prices in a depressed market. *Id.* at 726-27.

17. UNESCO Convention, *supra* note 2.

18. See 3 O'KEEFE & PROTT, *supra* note 1, at 726.

19. *Id.* at 727.

tive participation in the negotiations.<sup>20</sup> In particular, the United States delegation objected to "the obligation to impose import controls over any cultural property so designated by the country of export, and thought that the system would require an 'extremely burdensome and expensive customs apparatus.' It did not want to control internal transfers and it made many other objections to the Secretariat draft."<sup>21</sup> In the end, the UNESCO Convention was adopted at the Sixteenth Session of the General Conference of UNESCO in November 1970.<sup>22</sup> There are twenty-six articles to the UNESCO Convention;<sup>23</sup> this comment, however, discusses only those sections that were enacted in the United States domestic legislation or that arguably should have been.

The United States ratified the UNESCO Convention treaty in 1972, subject to one reservation and six understandings.<sup>24</sup> Moreover, most of the art-exporting countries of the world, for various reasons, have not become parties to the

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20. *Id.* at 727-28.

21. *Id.* at 728 (quoting Paul M. Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 372 (1982) (hereinafter Bator, *An Essay*)).

22. *Id.* at 727. The final vote, taken by hand only (thus erasing any quantitative record of which countries voted for or against), was 77 for, 1 against and 8 abstentions. *Id.*

23. UNESCO Convention, *supra* note 2.

24. See SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF CULTURAL PROPERTY* 230 (1977). These reservations and understandings include the following:

The United States reserves the right to determine whether or not to impose export controls over cultural property.

The United States understands the provisions of the Convention to be neither self-executing nor retroactive.

The United States understands Article 3 not to modify property interests in cultural property under the laws of the states parties.

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. The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties for the recovery of stolen cultural property to the rightful owner without payment of compensation. The United States is further prepared to take the additional steps contemplated by Article 7(b)(ii) for the return of covered stolen cultural property without payment of compensation, except to the extent required by the Constitution of the United States, for those state parties that agree to do the same for the United States institutions.

treaty.<sup>25</sup> In fact, as of 1990, there were only seventy-eight parties to the Convention,<sup>26</sup> and the United States remains one of the only significant art-importing nations to have implemented the Convention through domestic law.<sup>27</sup> To date, France, Switzerland, Germany, the United Kingdom, and the Benelux countries have not ratified the treaty, although Italy, Spain, Portugal, Greece, Canada, Australia, and the United States have done so.<sup>28</sup>

The Preamble sets out the goals of the Convention and "notes the duty of States toward their own cultural heritage and that of all nations."<sup>29</sup> The Preamble states:

[T]he illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of Unesco's mission to promote by recommending to interested States, interested conventions to this end . . . the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation . . . .<sup>30</sup>

25. See 3 *id.* at 793-95.

26. Barbara Borst, *Culture: Fight on to End Illegal Trade in World Art*, INTER PRESS SERVICE, February 19, 1994.

27. See Marie C. Malero, *Legal Problems of Museum Administration: Current Problems in Collections Management*, C479 A.L.I.-A.B.A. 19, \*22 (1990) available in Westlaw JLR database. Auction houses, great contributors to the British economy, have been cited as one reason why that market has not responded to the Convention. 3 O'KEEFE & PROT, *supra* note 1, at 786. Switzerland has cited problems with custom control and constitutional difficulties. 3 *id.* In fact, United States acceptance was derailed several times (in 1973, 1975, and 1979) by a concerted lobbying effort of art dealers. 3 *id.*

28. Borst, *supra* note 26.

29. 3 O'KEEFE & PROT, *supra* note 1, at 729.

30. WILLIAMS, *supra* note 24, at 224. The Preamble specifically states:

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,

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

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

Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,

The Convention that followed was an attempt to reconcile the desire of art-importing states to promote the alienability of cultural property with the needs of exporting states to curb the illicit trade of such property.<sup>31</sup>

In defining what constitutes "cultural property," the Convention, under Article I, took a rather expansive and categorical approach.<sup>32</sup> Specifically, each signatory state must decide that its cultural property "is specifically designated . . . as being of importance for archaeology, prehistory, history, literature, art or science" among certain categories of objects.<sup>33</sup> O'Keefe & Prott state that Article I, being categori-

Considering that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of Unesco's mission to promote by recommending to interested States, international conventions to this end,

Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,

Considering that the Unesco General Conference adopted a Recommendation to this effect in 1964 . . . .

Adopts this Convention on the fourteenth day of November 1970.

Preamble, UNESCO Convention, *supra* note 2.

31. 3 O'KEEFE & PROTT, *supra* note 1, at 782. "[T]he text of the UNESCO Convention was . . . [designed to persuade] a majority of UNESCO to adopt a moderate and compromise position. The position of the Soviet bloc countries and many third-world countries, which would have effectively ended all international trade in cultural objects, was rejected." PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART 68* (1983).

32. See 3 O'KEEFE & PROTT, *supra* note 1, at 729-30.

33. *Id.* at 730. The categories of property which, under Article I of the 1970 UNESCO Convention, can be designated as important are as follows:

- (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, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);



cally inclusive, serves to describe "the ambit within which objects are to be selected for export and import control, thus limiting the kinds of property for which States may be obliged to implement export, and more importantly, reciprocal import controls."<sup>34</sup> Presumably, objects outside these descriptive categories would not be considered cultural property.

The United States objected to many of the draft provisions of Article I because "it put power into the hands of exporting States to dictate to an importing State what that State could legally import, regardless of that State's own substantive interests."<sup>35</sup> As will be seen later, some of these concerns found voice in the United States' legislative enactment of the 1970 UNESCO Convention, the Convention on Cultural Property Implementation Act of 1983.<sup>36</sup>

Article III of the UNESCO Convention states that "[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention . . . shall be illicit."<sup>37</sup> There is much controversy as to the meaning of this phrase and its appurtenant obligations, although it appears fairly straightforward on its face.<sup>38</sup> The United States Senate, ratifying the Convention, declared that "the United States understands Article 3 [of the 1970 UNESCO Convention], not to modify property interest in cultural property under the laws of the [sic] states parties."<sup>39</sup>

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- (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
  - (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
  - (i) postage, revenue and similar stamps, singly or in collection;
  - (j) archives, including sound, photographic and cinematographic archives;
  - (k) articles of furniture more than one hundred years old and old musical instruments.

UNESCO Convention, *supra* note 2, at 289-90.

34. 3 O'KEEFE & PROT, *supra* note 1, at 730.

35. 3 *id.* at 731 (quoting Bator, *An Essay*, *supra* note 21, at 328).

36. 3 *id.* at 796.

37. 3 *id.* at 734.

38. 3 *id.* at 736. Different commentators have alternatively interpreted the article as requiring states to regard as illicit their national law transactions that breach the national law of another state party whose law is in accordance with the Convention, that it means that states parties are required to regard such acts as unlawful in international law, or that it means nothing at all. 3 *id.*

39. WILLIAMS, *supra* note 24, at 230.

One United States commentator wrote that "Article 3, declaring that transfers of ownership of cultural property contrary to the Convention are 'illicit', is a mysterious provision that will not be operative in the United States, which expressed its understanding that it does not modify domestic property law."<sup>40</sup> Indeed, such a position is not unique among members of the international community.<sup>41</sup>

Article VI of the UNESCO Convention requires parties to provide a certificate that authorizes export of the cultural property, to prohibit any export that does not have such a certificate, and to publicize said prohibition.<sup>42</sup> Many commentators have belittled its significance,<sup>43</sup> particularly in light of Article VII,<sup>44</sup> and the United States made a reservation to this part of the Convention that evoked a great deal of commentary.<sup>45</sup> Another commentator wrote: "the United States could not and would not give up the right to decide for itself whether and when to apply export controls over works of

40. 3 O'KEEFE & PROT, *supra* note 1, at 377 (citing Bator, *An Essay*, *supra* note 21).

41. For instance, Germany has taken the position that Article 3 does not impose an obligation to nullify transactions involving unlawful import or export and "assumes that transfer of ownership and acquisition abroad . . . are not affected by Article 3." 3 *id.* at 734.

42. 3 *id.* at 744. Article VI specifically states:

The States Parties to the Convention undertake:

- (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
- (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
- (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

UNESCO Convention, *supra* note 2, at 290-91.

43. 3 O'KEEFE & PROT, *supra* note 1, at 744. Ronald Abramson & Stephen Huttler felt that as "import controls were restricted to property stolen from public institutions (Art. 7(b)(i)), property from such institutions which is not 'stolen' and culturally important property, even if stolen, from private collections is not protected." 3 *id.* at 744 (citing Ronald D. Abramson & Stephen B. Huttler, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y IN INT'L BUS. 932, 959-61 (1973)).

44. See *infra* text accompanying notes 44-51.

45. 3 O'KEEFE & PROT, *supra* note 1, at 744. The United States reservation said "[t]he United States reserves the right to determine whether or not to impose export controls over cultural property." WILLIAMS, *supra* note 24, at 230.

art"<sup>46</sup> and "almost every country in the world restricts and regulates the export of cultural property; the outstanding exception is the United States of America."<sup>47</sup> Though it has engendered controversy, Article VI does ensure that State parties who set up export controls will have them recognized by other State parties,<sup>48</sup> and it also serves as a guide for developing countries to establish model export controls.<sup>49</sup>

The first draft of Article VII of the Convention would have complemented the export control provision of Article VI "by requiring importing States to treat cultural property illegally exported from its State of origin as an illegal import."<sup>50</sup> After the United States entered the discussion, the text and subsequent effect of Article VII became much more limited in scope.<sup>51</sup>

46. 3 O'KEEFE & PROT, *supra* note 1, at 377 (quoting Bator, *An Essay supra* note 21).

47. 3 *id.* at 714, 744-45 (arguing that the United States does have some export controls, although on a very small category of materials, and that the suggestion that Article VI is impracticable is unfair).

48. *See* 3 *id.* at 744.

49. *See* 3 *id.* at 745.

50. Abramson & Huttler, *supra* note 43, at 951.

51. *See* 3 O'KEEFE & PROT, *supra* note 1, at 745. Article VII specifically states:

The States Parties to this Convention undertake:

(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property removed from that State after the entry into force of this Convention in both States;

(b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

(b)(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article.

Article VII(a) requires that a State party "take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention . . ."<sup>52</sup> There are several significant points regarding this section of the Convention. The United States lobbied for the inclusion of language "consistent with national legislation" and stated "that the section would be interpreted so as to confine the effect of this measure to museums whose acquisition policies are controlled by the State."<sup>53</sup>

Article VII(b)(ii) requires that states:

prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.<sup>54</sup>

Several aspects of this section deserve close scrutiny. For instance, the cultural property must have been stolen from a museum or other public institution, and it must have been documented as being a part of that institution's inventory.<sup>55</sup> Furthermore, the Convention does not address the issue of other types of cultural property, such as new archaeological finds, which are not immediately catalogued by a state institution.<sup>56</sup> Even if these materials were stolen, they would not fall under the auspices of Article VII(b)(ii) protection.<sup>57</sup>

While many of the provisions of the UNESCO Convention seem overly restrictive, the drafters did provide for action in cases of extraordinary circumstances. Article IX has

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All expenses incident to the return and delivery of the Cultural property shall be borne by the requesting Party.

UNESCO Convention, *supra* note 2, at 291-92.

52. WILLIAMS, *supra* note 24, at 226.

53. 3 O'KEEFE & PROT, *supra* note 1, at 745.

54. UNESCO Convention, *supra* note 2, at 291-92.

55. See 3 O'KEEFE & PROT, *supra* note 1, at 752 (noting that the United States recognizes an obligation to prevent import only if an object is stolen).

56. Cf. JESSICA L. DARRABY, CURRENT DEVELOPMENTS IN INTERNATIONAL TRADE OF CULTURAL PROPERTY: DUTIES OF COLLECTORS, TRADERS AND CLAIMANTS, 297 PLI/Pat 659 at 17 (1990) (commenting on the meaning of the United States' identical legislative enactment of Article VII(b)(i) of the UNESCO Convention) available in Westlaw, TP-ALL database.

57. See 3 O'KEEFE & PROT, *supra* note 1, at 748.

been referred to as the crisis provision of the 1970 UNESCO Convention, and, according to Paul Bator, it is essentially "a direct descendant of the 'crisis' provision contained in the United States alternative draft."<sup>58</sup> It provides:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to the Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.<sup>59</sup>

Note also that, in 1985, the United States left UNESCO as an active participant, yet has pledged to remain committed to the 1970 UNESCO Convention.<sup>60</sup>

### C. *The Domestic Legal Requirements as Defined by the 1983 Convention on Cultural Property Implementation Act*

The United States' enabling legislation, according to several commentators, has further restricted the United States' duties and obligations under the 1970 UNESCO Convention.<sup>61</sup> In fact, after ratification of the Convention, UNESCO was clearly concerned about the United States' reservations to and understanding of the Convention.<sup>62</sup> In particular, the Senate said, "[t]he United States considers the provisions of the Convention to be neither self-executing nor retroactive [and t]he consent of the United States to be bound by the Convention is subject to the reservation and understanding in the instrument of accession and to the provisions of this

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58. *Id.* at 379 (quoting Bator, *An Essay*, *supra* note 21).

59. UNESCO Convention, *supra* note 2, at 230.

60. DARRABY, *supra* note 56, at 6.

61. *See, e.g.*, Edwards, *supra* note 8, at 927-29. O'Keefe & Prott explain "the very restrictive definition of 'archaeological or ethnological material' has significantly restricted the ambit of Article 9, which has not defined this material, just as the definition of 'object of archaeological interest' in s.2601(2)(c)(i) significantly restricts the much more general definition in Article I of the Convention." 3 O'KEEFE & PROTT, *supra* note 1, at 799.

62. 3 O'KEEFE & PROTT, *supra* note 1, at 795.

legislation."<sup>63</sup> UNESCO was quite concerned about this last section, as it hinted that the Convention would be subordinate to United States domestic legislation.<sup>64</sup> Mexico clearly felt these reservations amounted to inadequate compliance with the Convention.<sup>65</sup>

The 1983 Convention on Cultural Property Implementation Act (C.C.P.I.A.) is the Congressional legislation that officially enacted the 1970 UNESCO Convention.<sup>66</sup> Passed some twelve years after ratification of the 1970 UNESCO Convention, only Articles I,<sup>67</sup> VII,<sup>68</sup> and IX<sup>69</sup> are reflected in the United States legislation of the UNESCO Convention.<sup>70</sup>

The C.C.P.I.A. reflects the goals of Article VII(b) at section 2607.<sup>71</sup> The statute provides:

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State which is stolen from such institution after the effective date of this title, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported in the United States.<sup>72</sup>

Again, the statute restricts the importation of works stolen from a museum or religious or secular institution after the enactment of the legislation. The legislation completely ignores works "stolen" prior to 1983, the year of enactment of the C.C.P.I.A.<sup>73</sup> As such, there is a thirteen-year gap of enforcement between the 1970 UNESCO Convention and the 1983 C.C.P.I.A.

63. 3 *id.* at 795.

64. UNESCO queried the United States, "[i]f the United States intends the phrase ['to the provisions of this legislation'] to mean that the legislation in question is to be considered as a reservation to the Convention, this would mean that the Convention would be subordinate to United States national legislation, and such a situation would seem not to be in conformity with the international law of treaties." 3 *id.* at 795 (quoting UNESCO Doc. LA/Depository/1984/3 Annex V).

65. See 3 *id.* at 796.

66. Pub. L. No. 97-446, § 307, 96 Stat. 2329, 2358 (1982) (codified at 19 U.S.C. § 2606 (1988)), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4078, 4108.

67. See *supra* text accompanying notes 32-36.

68. See *supra* text accompanying notes 50-57.

69. See *supra* text accompanying notes 58-59.

70. See 3 O'KEEFE & PROT, *supra* note 1, at 797.

71. 19 U.S.C. § 2607 (1988).

72. *Id.*

73. *Id.*

The United States enactment of Article IX, the crisis provision, is by far the most complex aspect of the Convention on Cultural Property Implementation Act.<sup>74</sup> Section 2602 authorizes the President of the United States to "enter into a bilateral or multilateral agreement in response to the request of a State party whose cultural patrimony is being pillaged; it does not impose upon the President any obligation to enter into such an agreement."<sup>75</sup>

More importantly, however, section 2602(c) forbids the President from entering into any such agreements "unless the pertinent import restrictions under the agreements will be applied in concert with similar actions taken by other nations . . . which have significant imports in the relevant cultural material."<sup>76</sup> In other words, if the requesting party does not enter into a similar arrangement with other art-importing countries, most of whom have not enacted the 1970 UNESCO Convention,<sup>77</sup> the President's hands are tied by the terms of section 2602(c), and may not act at least to stem the illegal tide into the United States. One commentator suggested that this section essentially turned the 1970 UNESCO Convention into an agreement to agree.<sup>78</sup> Also, import restrictions may be imposed only on archaeological and ethnological materials that meet the restrictive definitions.<sup>79</sup>

Lastly, the President may only enter into agreement with other party states if that "State Party has taken measures consistent with the Convention to protect its cultural patrimony."<sup>80</sup> Significantly, cultural patrimony is not defined in either the 1970 UNESCO Convention or in the 1983 Cultural Property Implementation Act.<sup>81</sup>

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74. See 3 O'KEEFE & PROTT, *supra* note 1, at 797.

75. Edwards, *supra* note 8, at 929.

76. *Id.*

77. 3 O'KEEFE & PROTT, *supra* note 1, at 784-85.

78. 3 *id.* at 797.

79. Archaeological material must be "of cultural significance; and at least 250 years old; and normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water." 19 U.S.C. 2602(c) (1988). See also Malero, *supra* note 27, at 4. Ethnological material must be "the product of a tribal or nonindustrial society and important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people." *Id.*

80. 19 U.S.C. § 2602(a)(1)(B) (1988).

81. See *supra* notes 2-3.

The provisions of the 1970 UNESCO Convention and the 1983 Convention on Cultural Property Implementation Act have not been effective at curbing the illegal flow of cultural property.<sup>82</sup> The illegal art market has exploded in recent years and it is that ineffectiveness which allows the illegal art market to flourish. These shortcomings and problems are analyzed in the following section.

### III. ANALYSIS

#### A. *1970 UNESCO Convention: The Failure of International Cooperation*

There are many difficulties with the 1970 UNESCO Convention, especially given the non-uniformity of interpretation by those nations enacting the treaty through domestic legislation. Although earlier drafts of the Convention had provisions prohibiting reservations, the final draft, as is customary in international documents, permitted such reservations.<sup>83</sup> While such reservations may be customary, "there is in every treaty a certain core content which parties must accept if they wish other States to acknowledge them as parties to the treaty at all . . . ."<sup>84</sup>

The reservation problem plagues the 1970 UNESCO Convention as well; when the final draft of the Convention was circulated to the States parties to the Convention, the Mexican government responded with the following pronouncement:

The Government of the United Mexican States has studied the text of the comments and reservations on the Convention . . . made by the United States of America . . . . It has reached the conclusion that these comments and reservations are not compatible with the purposes and aims of the Convention . . . .<sup>85</sup>

While some other countries "may feel that the United States has, for the first time, made . . . some minimal commitment to the principles of control of the illicit trade and that commitment should not be jeopardized,"<sup>86</sup> other countries, such as Mexico, believe that the commitment of the United States

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82. See *supra* section II.A.

83. 3 O'KEEFE & PROTT, *supra* note 1, at 776.

84. 3 *id.*

85. 3 *id.* at 776-77.

86. 3 *id.* at 777.



to controlling the illicit trade in art is illusory.<sup>87</sup> As shown in the implementing legislation of the United States, this perception is well founded and stems from the C.C.P.I.A.'s ineffectiveness.<sup>88</sup>

As Professor Edwards points out, with regard to Articles III and VI, "since the Convention is not self-implementing, the effectiveness of these two provisions is undermined to the extent that State parties, especially the importing ones, fail to fully implement the essential obligations of the Convention in their domestic laws."<sup>89</sup> As shown earlier, very few importing party States have implemented the provisions of the 1970 UNESCO Convention into domestic law;<sup>90</sup> as such, the effectiveness of these two provisions is entirely suspect. Both provisions are effectively meaningless and must be rewritten to encourage greater participation. Without enforcement provisions, Articles III and VI are frustrated in their very purpose.

With regard to Article VII(a) of the 1970 UNESCO Convention,<sup>91</sup> O'Keefe & Prott point out that its interpretation of the United States almost completely eviscerates the meaning by this section because there are only a handful of state-controlled museums in the United States.<sup>92</sup> Furthermore, some United States commentators believe the United States delegation intended this effect, especially considering that Congress removed one of the most important steps in stemming illicit traffic.<sup>93</sup>

Without an ability to control and monitor those museums not controlled by the states, the United States nearly abandons the entire ambit of authority originally intended to be

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87. 3 *id.*

88. See *supra* text accompanying notes 61-82 and *infra* notes 109-124.

89. Edwards, *supra* note 8, at 930.

90. See *supra* text accompanying notes 25-27.

91. See *supra* text accompanying notes 52-53.

92. 3 O'KEEFE & PROTT, *supra* note 1, at 745. Of the many museums in this country, only the Library of Congress and the National Archives are clearly controlled by the United States government, while the Smithsonian and the National Gallery are arguably under such state control. *Id.*

93. See, e.g., Abramson & Huttler, *supra* note 43, at 965-66; 3 O'KEEFE & PROTT, *supra* note 1, at 380 (citing Bator, *An Essay, supra* note 21). But see JAMES NAFZIGER, ARTICLE 7(A) OF THE UNESCO CONVENTION, ART LAW: DOMESTIC & INTERNATIONAL 387 (1975) (L.D. DuBoff ed.) (arguing that Article VII(a) represents a compromise between a weak amendment requiring only ethical obligations and a strong one that would prohibit any acquisition without an export certificate).

supplied by this provision. Not only does the understanding of the United States render it useless, but it demonstrates a clear frustration of the overall purposes of the 1970 UNESCO Convention. While control over state-run museums is a given, the real problems of illicit transfer and import of cultural property lie in the acquisition policies of private museums, institutions, and collectors, because they are much more difficult to monitor.<sup>94</sup> Article VII(a) ultimately fails to control the illegal art trade, especially as it concerns non-state-run museums and institutions.

Article VII(b)<sup>95</sup> similarly fails, because it does not address the issue of artifacts stolen from new archaeological finds. Such finds are often not immediately catalogued by a state institution,<sup>96</sup> and, although technically stolen, such objects would not fall under the protection of Article VII(b).<sup>97</sup> If such an object is stolen from a freshly discovered archaeological site, Article VII(b) would not be available to help return the object to the site or to prevent its import to an art-market state. This would frustrate honest attempts by impoverished countries to develop and safely explore their cultural heritage. Such a provision is completely disingenuous, because it fails to address those problems that are often at the center of illegal art-market controversies. As O'Keefe & Prott also suggest, the processing of a claim:

depends on the commitment and competence of its own national government, as well as an appreciation of international politics in such bilateral requests, e.g. if there is a breach of diplomatic relations at the time when stolen property is suspected to be or is found in the importing country, the chances of activating Article 7(b)(ii) will not be high.<sup>98</sup>

Given the lack of cultural and legal experts in these countries, meeting these requirements will be very difficult for the art-exporting states.<sup>99</sup> Countries will not have the experts to process the claims, nor the political clout, outside the auspices of the United Nations, to force the more powerful

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94. For a discussion of museum and private-collector involvement in the illegal art market, see 3 O'KEEFE & PROTT, *supra* note 1, at 52-61.

95. See *supra* text accompanying notes 54-57.

96. See *supra* note 56 and accompanying text.

97. See 3 O'KEEFE & PROTT, *supra* note 1, at 748.

98. See 3 *id.*

99. See 3 *id.* at 749.

art-importing countries to listen to their claims. Exercising this provision, then, will be most difficult for those parties who need it.

Article IX, the so-called crisis provision,<sup>100</sup> also presents many difficulties for enforcement. As many commentators suggest, there are serious linguistic and substantive interpretation problems with this aspect of the Convention.<sup>101</sup> Of particular note, O'Keefe & Prott point out that the emergency situation only applies to pillage of archaeological and ethnographic materials.<sup>102</sup> Many other classes of cultural property (as defined in Article I of the UNESCO Convention) are not, however, subject to these emergency provisions.<sup>103</sup> Furthermore, countries such as the United States have restricted the interpretation of this provision even further through their own implementing legislation.<sup>104</sup>

Also, Professor Edwards points out that "[t]hese later obligations (controls) are essentially dormant until a state party requests that they be imposed on the basis that its cultural patrimony is being jeopardized from pillage."<sup>105</sup> The processes for such requests can be costly and riddled with delays and bureaucratic stumbling blocks.<sup>106</sup> Essentially, for O'Keefe & Prott, "[t]he United States interpretation [of Article IX] reduces the 1970 UNESCO Convention to an 'agreement to agree' . . ."<sup>107</sup> There is no way for exporting states to force cooperation and enforcement due to the lack of enforcement measures and the fact that not many countries have enacted its principles. Countries with more political clout can simply bully those less-developed nations that have the most cultural property to export. As such, Article IX does little to protect party States from losing valuable cultural heritage from pillage by thieves and looters.

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100. See 3 *id.* at 755.

101. For a discussion of those linguistic interpretation problems, see 3 *id.* at 755-59.

102. 3 *id.* at 755-56.

103. 3 *id.* at 756. As O'Keefe & Prott point out, Article IX "is of no use to countries which may wish to protect a rich heritage of contemporary art from 'pillage'. A country such as Italy, where art smuggling is rife, will never be able to call for assistance to protect even its art and sculpture of the Renaissance period under Article 9." 3 *id.*

104. 3 *id.* at 756. See also *supra* note 61 and accompanying text.

105. Edwards, *supra* note 8, at 926.

106. See *supra* text accompanying notes 95-113.

107. 3 O'KEEFE & PROTT, *supra* note 1, at 797.

The United States effectively eviscerated those provisions of the 1970 UNESCO Convention intended to restrict the transfer of cultural property.<sup>108</sup> While promoting the legal transfer of cultural property, this meddling has adversely affected the enforcement of export and import controls. As such, the 1970 UNESCO Convention needs serious revision, and the United States must re-examine its roles, both in UNESCO and in the prevention of the illegal import and export of cultural property.

B. *The 1983 Convention on Cultural Property Implementation Act: Half-Hearted Enactment of a Flawed Convention*

The implementation of the 1970 UNESCO Convention by the United States leaves much to be desired. As discussed previously, the reservations and understandings by which the United States ratified the treaty call into question the sincerity of the government's alleged desire to implement fully the goals of the 1970 UNESCO Convention.<sup>109</sup>

C.C.P.I.A. section 2607, which implements Article VII(b)(ii) of the 1970 UNESCO Convention, severely restricts the ability of private individuals and private institutions to retrieve stolen cultural property.<sup>110</sup> Furthermore, the legislation completely ignores works "stolen" prior to 1983, the year of enactment of the C.C.P.I.A.<sup>111</sup> As there are only two state-run museums in the United States,<sup>112</sup> this section excludes most museums from making a claim under section 2607. In effect, section 2607 is moot in the United States.

The emergency provisions of section 2602, implementing Article IX of the 1970 UNESCO Convention,<sup>113</sup> are also flawed from inception. The limitation, under section 2602(a)(1)(B), that the President may enter into import restriction agreements with a state party only if that "Party has taken measures consistent with the Convention to protect its cultural patrimony"<sup>114</sup> binds the hands of the President in all circumstances.

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108. See *supra* notes 42-49 and accompanying text.

109. See *supra* text accompanying notes 24, 61-65.

110. 19 U.S.C. § 2607 (1988).

111. See *supra* text accompanying note 73.

112. 3 O'KEEFE & PROT, *supra* note 1, at 745.

113. 19 U.S.C. § 2602(a)(1)(B) (1988).

114. *Id.*

This emergency provision phrase is also ambiguous because "cultural patrimony" is not defined under the UNESCO Convention; incorporating it into domestic legislation makes little sense and is certainly not helpful to other countries trying to interpret the domestic legislation of the United States. It also may be economically impracticable for many developing countries to enact such measures with any degree of effectiveness.<sup>115</sup>

As one commentator has stated, "[a]t most, these controls could theoretically cover archaeological material from all foreign countries. But realistically, what will result is a series of negotiated arrangements dealing with specific categories of archaeological and ethnological materials with those friendly countries that can demonstrate the need for this cooperation."<sup>116</sup>

Furthermore, O'Keefe & Prott argue that implementing the emergency measures of section 2602 "will impose a considerable burden on a State making out its case. The United States clearly wanted to avoid a *general* investigative undertaking as set out in Article 9 [of the 1970 UNESCO Convention]."<sup>117</sup> In fact, most proceedings, according to O'Keefe & Prott, will take a very long time, an unconscionable delay where, as in the case of looting, time is of the essence.<sup>118</sup> Once the goods are stolen, the job of preventing their export becomes much more difficult. By the time the appeal process is completed, the looted art may be impossible to recover.

Also, the requirement that the President cannot act unless the requesting party has made similar arrangements with other art-importing states is absolutely absurd. This requirement serves no purpose other than to frustrate the aims of Article IX.<sup>119</sup> Given that most other art-importing countries have not fully implemented the 1970 UNESCO Conven-

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115. See Nafziger, *supra* note 11.

116. M.B. Feldman, *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97 (1976) (commenting on an earlier, but essentially similar, draft of this provision).

117. 3 O'KEEFE & PROTT, *supra* note 1, at 798.

118. 3 *id.* at 798. To date, five requests have been made by states party to the Convention to the United States (from Canada, El Salvador, Bolivia, Peru, and Guatemala). Only the El Salvadoran and Bolivian requests have been approved. 3 *id.*

119. See *supra* text accompanying notes 58-59.

tion,<sup>120</sup> this exception renders Articles IX useless in the United States. If no agreement can be made without concurrent agreements, and if other countries have not implemented the Convention, Article IX's provisions will never be exercised. Effectively, the President will never be able to act, and affected countries will not receive the assistance they need.

It is crucial to note that not a single case has been brought under C.C.P.I.A. to date.<sup>121</sup> Given the voluminous illegal trade in art, this fact stands as empirical proof that the act does not effectively address the problem of illicit cultural property transfers described in Section II of this comment. As one commentator notes, "the fact that CPIA is relatively new, applies proactively and has a high qualification threshold, and therefore a relatively restrictive impact, suggests that the efficacy of awarding cultural property to claimants under the UNESCO-inspired scheme is still subject to question."<sup>122</sup> In essence, this commentator suggests that no claimant will ever be able to succeed in getting protection under the enactment of the 1970 UNESCO Convention by the United States.<sup>123</sup>

Essentially, the domestic enactment of the 1970 UNESCO Convention by the United States is a hollow and ineffective effort at assisting the international community in addressing the problem of illicit traffic in cultural property.<sup>124</sup>

#### IV. PROPOSALS

As was shown previously, there are numerous substantive problems with both the 1970 UNESCO Convention and the 1983 Cultural Property Implementation Act.<sup>125</sup> The following proposals will improve the implementation and enforcement of both pieces of legislation. These proposals will

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120. See *supra* text accompanying note 25.

121. See DARRABY, *supra* note 56, at 16.

122. *Id.* at 6.

123. *Id.*

124. Again, it bears repeating that there have been no cases brought under the C.C.P.I.A. to date. *Id.* at 16. "It must be emphasized that no stolen cultural property has ever been returned to a Convention signatory under CPIA Section 308 nor has any request every been made by a foreign nation thereunder." *Id.*

125. See *supra* sections III.A. and III.B.

help both statutes achieve the goals outlined in the preamble to the 1970 UNESCO Convention.<sup>126</sup>

A. *Amendments and Changes to the 1970 UNESCO Convention*

First and foremost, the United States government must make a firm commitment to rejoin and take an active role in promoting the goals not only of the 1970 UNESCO Convention, but also those of the UNESCO body in general. Created to promote global understanding of the vast diversity of cultures in this world,<sup>127</sup> UNESCO can do its job only with the full backing and moral force of the United States. As is empirically proven every time an international crisis arises, the United Nations, and by extension UNESCO, is virtually a useless body without the active participation of the United States of America.<sup>128</sup> Promotion of global cooperation in the area of preventing the illicit trade in cultural property must start with a firm commitment on the part of the United States to upholding the goals and standards of the 1970 UNESCO Convention.

To this end, UNESCO should also make an active effort to assist signatory nations to explore, categorize, and cultivate their cultural property assets. Financial and technical assistance should be given to help poorer countries explore their heritage, so that other countries eventually may benefit from the knowledge and understanding of their heritage. Along those lines, UNESCO should also use its resources to enforce and uphold the provisions of the 1970 Convention. Without such enforcement provision, as O'Keefe & Prott note, the 1970 UNESCO Convention is like a watchdog without any teeth; enforcement is simply impossible.<sup>129</sup>

Similarly, the United States should rescind its reservations and one understanding to the 1970 UNESCO Convention, thus giving full effect to the treaty. Also, the United

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126. See *supra* text accompanying notes 29-31.

127. Preamble, UNESCO Convention.

128. See, e.g., the Iraqi-Kuwaiti crisis, the Bosnian atrocities, and the crises in Somalia and Haiti. Such problems are certain to persist unless the United States takes an active international role. In fact, before withdrawal from UNESCO in 1984, the United States contributed over \$60 million to UNESCO, approximately one-quarter of its budget. *Why UNESCO?*, WASH. POST, April 9, 1993, at 22.

129. See 3 O'KEEFE & PROTT, *supra* note 1, at 797.

States government should lead a concerted effort to gain complete compliance and acceptance of the 1970 UNESCO Convention among the other art-importing states of the world. As the Preamble states, the problem can be addressed only through international cooperation among the members of the global community.<sup>130</sup> To that end the 1970 UNESCO Convention must be self-executing and must include enforcement powers under the auspices of the United Nations and the UNESCO General Conference. Much as the world brought moral weight to bear on apartheid in South Africa and on human rights abuses in other countries, so too should international moral persuasion be used to combat this damaging black market.

With regard to the 1970 UNESCO Convention itself, several articles within that document must be amended to provide for greater efficiency in stopping the illicit art trade; such amendments must be consistent with the Preamble's call for an organization operating "both nationally and internationally among States working in close co-operation."<sup>131</sup>

Article I should be reworded to provide for a more expansive definition of cultural property. In order to avoid the categorical limits imposed under the current language,<sup>132</sup> Article I should provide that a signatory state must state simply that a particular item is important to its cultural heritage, thereby triggering the import, export, and reciprocal-import controls described in other sections of the Convention.<sup>133</sup> Article I would then read as follows:

For the purposes of this Convention, the term "cultural property" means property which, on secular or religious grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science, **or other national or cultural purpose, and including but not limited to, which belongs** to the following categories:

- (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, to

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130. Preamble, UNESCO Convention, *supra* note 2.

131. WILLIAMS, *supra* note 24, at 224.

132. See *supra* text accompanying notes 32-36.

133. See, e.g. Articles III, VI, VII & IX, UNESCO Convention, *supra* note 2.



the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest, such as;

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collection;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

Such an expansive interpretation is consistent with the view that a signatory state should have the right to determine for itself what it defines as its cultural heritage. This makes perfect sense because only that particular party has a true understanding of the relevance of certain items to its cultural heritage.

Article III must be fully implemented by signatory states so that there may be a clear vehicle by which aggrieved parties can retrieve their stolen cultural property.

Article VI must also be fully implemented by the United States and other art-market nations, if only to provide model export control systems for developing nations. It is clear that the art-market states have significant cultural heritage of their own to protect, and they should take steps to see that this heritage is protected. This will serve as a beacon of leadership to other parties to the 1970 UNESCO Convention in the effort to stop the illegal trade in cultural property.

Article VII(a) should be changed to force member parties to prevent any persons, whether museums, institutions or private collectors, from acquiring illegally exported cultural property. Furthermore, the United States should drop its insistence that this section applies only to state-run institutions and museums. Clearly, the meaning of Article VII (a) should cover any institution, museum, or private collector who illegally imports cultural property. While policing private collectors may seem difficult, this provision really is not problematic if operated in conjunction with a fully implemented Article VI. Close supervision of import and export of cultural property through export certificates will make the customs work significantly easier.

Article VII(b) should also explicitly prohibit the importation of cultural property stolen from newly discovered archaeological sites. The requirement that material be documented should be dropped. Similarly, this provision should be retroactive. This will help art-exporting countries retrieve cultural property stolen before implementation of the 1970 UNESCO Convention. Furthermore, UNESCO should provide assistance for those art-rich countries that cannot process claims by themselves; by processing claims through UNESCO, some of the vagaries and diplomatic hurdles outlined earlier might be avoided.

After amendment, Article VII would read as follows:

The States Parties to this Convention undertake:

- (a) To take the necessary measures, ~~consistent with national legislation,~~ to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported ~~after entry into force of this Convention,~~ in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property removed from that State ~~after the entry into force of this Convention in both States;~~
- (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular ~~public~~ **public or private**, in another State Party to this Convention ~~after the entry into force of this Convention~~ for the States concerned, ~~provided that such property is documented as appertaining to the inventory of that institution;~~

(b)(ii) at the request of the State Party of origin **or by request of the UNESCO authority**, to take appropriate steps to recover and return any such cultural property imported ~~after the entry into force of this Convention in both States concerned~~, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through ~~diplomatic offices~~ **the appropriate UNESCO authority**. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the Cultural property shall be borne by the requesting Party.

Such an amendment will subject private institutions to the goals of the 1970 UNESCO Convention, and will rest enforcement authority within the power of the United Nations UNESCO General Conference. Furthermore, it will eliminate the loophole discussed earlier, because fresh dig sites, and other non-catalogued materials, may now qualify for Article VII protection. These changes will make enforcement of the 1970 UNESCO Convention much more efficient and much more effective in meeting the goals as outlined in the Preamble.<sup>134</sup>

Article IX should be extended to cover any designations of cultural property as covered by the crisis provisions of this section. As has been pointed out, many countries have pillage problems that are completely unrelated to archaeological or ethnological materials.<sup>135</sup> Article IX would then appear as follows:

Any State Party to this Convention whose cultural ~~patrimony~~ heritage is in jeopardy from pillage ~~of archaeological or ethnological materials~~ **of cultural property, as designated under Article I**, may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out all necessary concrete means, including the control of exports and imports and international com-

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134. See *supra* note 30.

135. See *supra* text accompanying notes 101-108.

merce in the specific materials **cultural property** concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Such changes will advance the cause of more international understanding of the article, as well as give more latitude for international action in areas previously restricted to "archaeological or ethnological materials."<sup>136</sup> Adopting this amendment will significantly increase the effectiveness of the entire 1970 UNESCO Convention. The United States must completely enforce this provision for the benefit of the international community.

These amendments will truly make the 1970 UNESCO Convention an internationally effective treaty with beneficial and substantive provisions that can be enforced by a designated appropriate international authority. This will ensure that the goals of the Preamble are realized and will help curb the illegal transfer of cultural property.

B. *Amendments and Changes to the 1983 Convention on Cultural Property Implementation Act*

Short of completely adopting the 1970 UNESCO Convention as its own domestic law, the United States Congress should at least do the following to provide effective domestic legislation in the fight against the illegal import and export of cultural property:

As they are the same in both laws, the changes proposed in Articles I, III, VI, and VII of the 1970 UNESCO Convention should also be made in the companion United States domestic legislation.<sup>137</sup>

The enactment of Article IX of the 1970 UNESCO Convention, as embodied in section 2602(c) of the C.C.P.I.A., must be amended to *allow* the President, in his discretion, to act in all circumstances, regardless of whether the requesting party has made similar arrangements with other countries.

Section 2602(a) would read:

(A)(1) If the President determines, after request is made to the United States under article 9 of the Convention by any State Party—

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136. UNESCO Convention, *supra* note 2, at 230.

137. *See supra* section IV.A.

(a) that the cultural patrimony **heritage** of the State Party is in jeopardy from the pillage of archaeological or ethnological cultural materials **property** of the State Party; . . .

the President **may**, subject to the provisions of this chapter, take the actions described in paragraph (2).

(A)(2) For purposes of paragraph (1), the President **may** enter into—

(a) a bilateral agreement with the State Party to apply the import restrictions set forth in section 2606 of this title to the ~~archaeological or ethnological material~~ **cultural property** of the State Party the pillage of which is creating the jeopardy to the cultural ~~patrimony~~ heritage of the State Party found to exist under paragraph (1)(a); or

(b) a multilateral agreement with the State Party and with one or more other nations (whether or not a State Party) under which the United States will apply such restrictions, and the other nations will apply similar restrictions, with respect to such material.

~~(C)(1) The President may not enter into a bilateral or multilateral agreement authorized by subsection (a) of this section unless the application of the import restrictions set forth in section 2606 of this title with respect to the archaeological or ethnological material of the State Party making a request to the United States under article 9 of the Convention will be applied in concert with similar restrictions implemented, or to be implemented, by those nations (whether or not State Parties) individually having a significant import trade in such material.~~

As the largest art-importing state<sup>138</sup> and as the leader of the free world, the United States has the duty to stop such importation whether or not other countries do the same. Such import controls will go a long way toward discouraging the illegal trade in cultural property by severely shrinking the largest market and reducing the profits derived through that avenue.

## V. CONCLUSION

This comment has attempted to point out many of the inconsistencies and shortcomings both in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the

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138. See *supra* note 27 and accompanying text.

Illicit Import, Export and Transfer of Ownership of Cultural Property and in the United States' companion legislation, the 1983 Convention on Cultural Property Implementation Act. An analysis of each legislative scheme shows that both are sadly lacking in any enforcement power, and both suffer from lack of commitment among the international community to resolving cultural property issues. Only through coordinated international cooperation and accompanying domestic concern will the problems addressed in this comment be solved.

The illegal import, export, and transfer of cultural property is an ancient problem, but it is sorely in need of a modern, global solution. Just as former President Bush, at the end of the Cold War, proclaimed a new world order to promote peace in our day, President Clinton and the United States, acting through the United Nations, should make a concerted effort to stop the invidious market in illegal art. No one benefits from these acquisitions. In the end, we all lose, because with each stolen artifact or piece of cultural property, we, as a community of nations, hinder UNESCO's attempts at promoting mutual understanding through cultural education and exchange. It is only through such mutual understanding that nations can truly come to a greater knowledge of what makes us at the same time so different, yet so similar. Said diversity of understanding is the root of what will lead to a more peaceful and more productive world community. That understanding is there for the taking, but the wrong people are getting there first.

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