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## The Need for a National Registry of Cultural Objects

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Graham J. Dickson

## **Abstract**

Part I of this Note discusses a pending case, *Republic of Turkey v. Metropolitan Museum*, and then gives a brief historical overview of the developing regard for the cultural integrity of nations. Part II examines international convention as well as U.S. federal and common law principles as they apply to pilfered cultural objects. Part III proposes that the creation of a national registry of cultural objects, including a statute of limitations, is necessary. This Note concludes that a national registry of cultural objects is needed to balance more equitably the legitimate concerns of art-acquiring nations such as the United States with the concerns of art-rich nations, such as Turkey, which have little control over the illegal taking and export of objects integral to their cultural heritage.

# THE NEED FOR A NATIONAL REGISTRY OF CULTURAL OBJECTS

## INTRODUCTION

It has been said that if all illegally exported cultural objects<sup>1</sup> were returned to their countries of origin, the museums of the world would be virtually empty.<sup>2</sup> The moral argument that all such objects should be repatriated has been articulated

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1. For the purposes of this note, "cultural object" will be defined as it is in 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, 10 I.L.M. 289 [hereinafter UNESCO Convention]:

For the purposes of this Convention, the term "cultural property" means property which on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) Property relating to history, including the history of science and technology and military and social history, to the 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;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

UNESCO Convention, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90 (emphasis added).

2. Shirey, *Most Ancient Art Smuggled, Curator Says*, N.Y. Times, Mar. 2, 1973, at 42, col. 1. John D. Cooney, the curator of ancient art of the Cleveland Museum of Art, is quoted as saying: "[E]ven if I know it's hot, I can't be concerned about that. If the museums in this country begin to send back all the smuggled material to their countries of origin, the museum walls would be bare." *Id.*; see also Shirey, *Syrian Mosaic*

by many, but the solution is not so simple.<sup>3</sup> A current case between the Republic of Turkey and The Metropolitan Museum of Art ("Metropolitan" or "Museum") typifies the problem of resolving disputes about cultural objects between art-rich<sup>4</sup> and art-acquiring<sup>5</sup> nations.

Part I of this Note discusses a pending case, *Republic of Turkey v. Metropolitan Museum*,<sup>6</sup> and then gives a brief historical overview of the developing regard for the cultural integrity of nations. Part II examines international conventions as well as U.S. federal and common law principles as they apply to pilfered cultural objects. Part III proposes that the creation of a national registry of cultural objects, including a statute of limitations, is necessary. This Note concludes that a national registry of cultural objects is needed to balance more equitably the legitimate concerns of art-acquiring nations such as the United States with the concerns of art-rich nations such as Turkey, which have little control over the illegal taking and export of objects integral to their cultural heritage.

### I. THE PROBLEM OF THE LYDIAN OBJECTS

The current litigation between the Republic of Turkey and the Metropolitan Museum of Art emphasizes the lack of clarity in the law. The idea that the cultural heritage of other countries is deserving of international protection and respect has developed very gradually.

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*Returned by the Newark Museum*, N.Y. Times, Dec. 25, 1974, at 16, col. 1 (attributing a similar statement to the director of the Newark Museum).

3. For a full discussion of a legal argument as opposed to a moral argument, see Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

4. "Art-rich nations" is used to describe countries such as Turkey, Thailand, and Mexico that are rich in cultural objects, especially archaeological objects. Such countries are likely to be economically underdeveloped, and therefore lack the resources to regulate the export of their cultural heritage. 1 J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 63 (1987).

5. "Art-acquiring nations" is used to describe countries such as Great Britain, the United States, and France that, while possessed of their own cultural heritage, are likely to be importers of cultural objects. These countries are economically developed and able to regulate export of their own cultural objects. 1 J. MERRYMAN & A. ELSÉN, *supra* note 4.

6. *Republic of Turkey v. Metropolitan Museum of Art*, No. 87 Civ. 3750 (S.D.N.Y. filed June 3, 1987).

A. *The Lydian Art Treasures*

In June 1987, the Republic of Turkey filed suit against the Metropolitan Museum of Art ("Metropolitan" or "Museum") in the United States District Court for the Southern District of New York.<sup>7</sup> The government of Turkey maintains that approximately 250 objects, called by Turkey "Lydian Art Treasures" and by the Metropolitan "Eastern Greek Treasures," were unlawfully excavated in the 1960s from burial mounds within Turkey and then illegally exported.<sup>8</sup> The Metropolitan argues that Turkey's claim is stale and barred by the statute of limitations and the doctrine of laches.<sup>9</sup>

The Metropolitan purchased the pieces between 1966 and 1968 from a dealer in New York City and a foreign dealer located in Switzerland.<sup>10</sup> The Museum maintains that the New York dealer was reputable and that he claimed legal title to the objects.<sup>11</sup> However, the Museum did not publicly announce the purchase<sup>12</sup> and its catalogue lists many of the objects in question only as "confidential" or "Greek."<sup>13</sup> The Museum briefly displayed a few pieces on two occasions.<sup>14</sup> It was not until 1984 that the Museum displayed fifty pieces and published an exhibition catalogue of those fifty pieces.<sup>15</sup> However, about 200 objects have remained in storage since their acquisi-

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7. *Id.*

8. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 6-9, Republic of Turkey v. Metropolitan Museum of Art, No. 87 Civ. 3750 (S.D.N.Y. filed Dec. 21, 1987) [hereinafter Plaintiff's Memorandum].

9. Memorandum in Support of Defendant's Motion to Dismiss the Complaint at 2, Republic of Turkey v. Metropolitan Museum of Art, No. 87-3750 (S.D.N.Y. filed July 1987) [hereinafter Defendant's Memorandum].

10. *Id.* at 3.

11. Pearson, *Turkey Sues Metropolitan for Antiquities*, INT'L FOUND. ART RES. REPS., July 1987, at 6. The article quotes John Ross, manager for public information at the Metropolitan: "The objects we think the Turks are claiming were purchased from a reputable New York dealer, J.J. Klejman, in the 1960s and he represented to the museum that he had legal claim to them." *Id.*

12. *Id.* at 6.

13. See *The Met's Catalog—How Easy to Look for Stolen Art?*, ME. ANTIQUE DIG., Jan. 1986, at 7a, quoted in INT'L FOUND. ART RES. REPS., July 1987, at 6.

14. Defendant's Affidavit at 4, Republic of Turkey v. Metropolitan Museum of Art, No. 87-3750 (S.D.N.Y. filed Dec. 21, 1987) (affidavit of Dietrich von Bothmer, Department Head, Department of Greek and Roman Art, Metropolitan Museum of Art).

15. Plaintiff's Affidavit No. 1 in Opposition to Defendant's Motion to Dismiss at 8, Republic of Turkey v. Metropolitan Museum of Art, No. 87 Civ. 3750 (S.D.N.Y. filed July 1987) [hereinafter Plaintiff's Affidavit].

tion.<sup>16</sup>

New York State's three-year statute of limitations is triggered only when the true owner has discovered the location of the object, made a demand for its return, and had that demand refused.<sup>17</sup> The Turkish government claims that it first officially demanded that the Metropolitan return the objects in 1986 and that its suit is not stale.<sup>18</sup> The Museum claims that Turkey made several demands for repatriation as far back as the 1970s, which triggered the limitation period, thereby rendering Turkey's claim stale in 1986.<sup>19</sup> The Museum also maintains that it has repeatedly requested specific information from Turkey to prove Turkish ownership of the objects.<sup>20</sup>

Turkey has a national patrimony law that vests ownership of all archaeological objects located within Turkey in the state and makes any export of them illegal.<sup>21</sup> But Turkey has had great difficulty in proving ownership of the disputed objects because they were never under its actual control. Because the objects were taken from unexcavated tombs, Turkey did not even know of their existence until after reports that they were stolen.<sup>22</sup> The only evidence relating the disputed objects to Turkey was the empty tombs themselves and a few similar items taken from native diggers who had broken into the tombs.<sup>23</sup> Although Turkish law prohibits the export of such objects, under general principles of international law illegal export alone is not the equivalent of theft,<sup>24</sup> nor is the subsequent import into another country illegal.<sup>25</sup>

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16. There are varying estimates of the number of objects involved. Deitrich von Bothmer, curator of the Metropolitan's Greek and Roman collections, states that there are 248. Defendant's Affidavit, *supra* note 14, at 2-3. As about 50 are on display, this leaves some 200 objects in the Museum's possession that are not on display. Plaintiff's Affidavit, *supra* note 15, at 2-3.

17. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1162 (2d. Cir. 1982).

18. Plaintiff's Memorandum, *supra* note 8, at 11-13.

19. Defendant's Memorandum, *supra* note 9, at 3, 10-23.

20. *See* Pearson, *supra* note 11, at 6.

21. Turkey claims its ownership under a 1906 Turkish law that declares all its antiquities to be property of the state. Plaintiff's Affidavit, *supra* note 15, at 3.

22. Plaintiff's Affidavit, *supra* note 15, at 6.

23. *Id.* at 4-5.

24. *United States v. McClain*, 545 F.2d 988, 996 (5th Cir.), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977) (per curiam); *United States v. McClain*, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979).

25. F. MANN, *STUDIES IN INTERNATIONAL LAW* 501 (1973).

Twenty years have passed since the Metropolitan acquired the objects. Key witnesses are no longer available.<sup>26</sup> Why the Turkish government did not act more promptly to recover the objects remains unclear. The fact that the Metropolitan did not make the purchase public for nearly two decades raises questions as well.

### B. *Historical Overview*

#### 1. "Legitimate" Plunder in War

The idea that a country's cultural heritage is deserving of respect and protection developed very gradually. Ancient Rome legitimized the plunder of the cultural property of defeated nations on the ground that a defeated nation returned to a state of nature and its laws ceased to exist.<sup>27</sup> The people, wealth, and art of the defeated nation were simply the prizes of war.<sup>28</sup>

Later legal theories no longer accepted the fiction that defeat obliterated all of a nation's law.<sup>29</sup> However, even into the eighteenth century it was commonly accepted that everything done against an enemy was lawful and that a conqueror had unlimited rights over all property.<sup>30</sup> In the later part of the eighteenth century distinctions began to be made between legitimate and illegitimate actions in war.<sup>31</sup> One theorist even went so far as to condemn any destruction of a nation's cul-

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26. Defendant's Memorandum, *supra* note 9, at 34-35.

27. H. MAINE, *ANCIENT LAW* 237-40 (1930). However, early Roman law also had an interesting conception of objects. They were of two types, *familia* (all persons and things of the household) and *pecunia* (the things of the field). M. MAUSS, *THE GIFT* 48 (1967). Within the *familia* there was no distinction between personam and rem. *Id.* at 49. An object from within the *familia* was not just a pot as a commodity. Its exchange carried with it obligations on the part of the receiver beyond the pecuniary consideration involved in the exchange of things of the field. *Id.* at 51. Possessing an object from within the *familia* placed the possessor in an inferior position to the *familia* spiritually and morally as well as legally until the obligation was released by an agreed-upon reciprocation. *Id.* at 53. The theft of such objects was more than economic. *Id.* at 46-53. By analogy, archaeological objects, as part of the patrimony of a culture, might be seen as involving more than money in their exchange. There are cultural, scientific, moral, aesthetic, national, and international interests involved.

28. H. MAINE, *supra* note 27, at 240.

29. *Id.* at 239.

30. S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVEABLE CULTURAL PROPERTY* 5 (1978).

31. *Id.* at 5-6.

tural monuments as barbaric.<sup>32</sup>

During the Napoleonic wars, France justified its wholesale appropriation of the cultural treasures of other states by claiming to be the cultural center of Europe and therefore the most appropriate repository of the heritage of those it defeated.<sup>33</sup> Apparently this argument seemed inadequate, even to France, for it felt compelled to legitimize much of its taking by signed treaty, particularly with the various states of Italy.<sup>34</sup> After the defeat of Napoleon, the armistice contained no mention of the confiscated cultural property that had found its way into the museums and libraries of France.<sup>35</sup> This silence led the French negotiators of the Convention of Paris to presume that the misappropriated objects would find repose in France.<sup>36</sup> They sought to have a clause inserted into the Convention to "guarantee the integrity of museums and libraries" of France.<sup>37</sup> The clause was rejected and the treaties under which objects had been removed were not recognized.<sup>38</sup> All states that had been deprived of cultural property demanded its repatriation.<sup>39</sup> However, France did not return many of the objects.<sup>40</sup> Some were damaged during their return and others were simply lost.<sup>41</sup>

## 2. The Hague Convention: Protection and Respect

Later in the nineteenth century, legal theorists argued that the plunder of cultural property ought to be prohibited in conditions of war.<sup>42</sup> A clear distinction was made between the *justified* seizure or destruction of *military* property and the *unjustified* seizure or destruction of *non-military* property not within

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32. *Id.* at 6.

33. S. WILLIAMS, *supra* note 30, at 7.

34. Graham, *Protection and Reversion of Cultural Property*, 21 INT'L LAW. 755, 758. Treaties were made with Bologna, Palma, Milan, and even Pope Pius VI. *Id.* at 758 n.9 (1987).

35. Quynn, *Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437, 446 (1945).

36. *Id.*

37. *Id.* at 447.

38. S. WILLIAMS, *supra* note 30, at 8.

39. Quynn, *supra* note 35, at 456.

40. *Id.*

41. *Id.*

42. S. WILLIAMS, *supra* note 30, at 15-18.



“military necessity.”<sup>43</sup>

The developing regard for cultural property in conditions of war culminated in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>44</sup> (“Hague Convention”). In its preamble, the Hague Convention declares that cultural property is “part of the cultural heritage of all mankind”<sup>45</sup> and is thus deserving of “protection”<sup>46</sup> and “respect”<sup>47</sup> in conditions of war. This statement implies that cultural property is not merely the patrimony of one particular nation. An invader is required to respect a country’s cultural heritage because that heritage is understood to be part of all mankind’s inheritance.

## II. CULTURAL OBJECTS UNDER INTERNATIONAL CONVENTION AND U.S. LAW

The principle that cultural objects are part of an international heritage deserving of protection and respect has proven to be a far more elusive ideal when discussed outside the context of war.<sup>48</sup> Although the League of Nations discussed proposals for peacetime protection of cultural property, the discussion was abruptly ended by World War II.<sup>49</sup> Not until the 1960s was UNESCO able to formulate an international agreement for the peacetime protection of cultural objects.<sup>50</sup>

### A. The 1970 UNESCO Convention

The most comprehensive multinational agreement on the protection of cultural property in peacetime is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>51</sup> (“UNESCO Convention”).

While the UNESCO Convention speaks of the “in-

43. *Id.*

44. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

45. *Id.* preamble, 249 U.N.T.S. at 240.

46. *Id.* art. 2, 249 U.N.T.S. at 242.

47. *Id.* art. 4, 249 U.N.T.S. at 242.

48. K. MEYER, *THE PLUNDERED PAST* (1973).

49. S. WILLIAMS, *supra* note 30, at 21-22; *see also* Graham, *supra* note 34, at 764.

50. Graham, *supra* note 34, at 771.

51. UNESCO Convention, *supra* note 1.

terchange of cultural property,"<sup>52</sup> its provisions concern themselves primarily with restrictions on illicit movement.<sup>53</sup> It makes almost no mention of means of promoting the licit<sup>54</sup> flow of cultural objects. Article 13(d) of the UNESCO Convention "recognize[s] the indefeasible right of each state party . . . to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported."<sup>55</sup>

Article 13 validated existing national patrimony laws of some countries<sup>56</sup> and led some art-rich nations to enact legislation that declares all cultural property within a state's borders to be property of the state.<sup>57</sup> Some nations have made any export illegal,<sup>58</sup> while others permit export in theory, but not in fact.<sup>59</sup> It is primarily art-rich nations that are concerned with the "illicit import, export, and transfer of ownership of cultural property."

52. *Id.* preamble, 823 U.N.T.S. at 232, 10 I.L.M. at 289.

53. Apart from definitional and procedural articles the UNESCO Convention: recognizes the harm of illicit flow and calls for repatriations, *id.* art. 2, 823 U.N.T.S. at 236, 10 I.L.M. at 290; declares any import, export, or transfer of ownership contrary to the principles of the UNESCO Convention to be "illicit," *id.* art. 3, 823 U.N.T.S. at 236, 10 I.L.M. at 290; proposes the creation of national services for the protection of cultural property, *id.* art. 5, 823 U.N.T.S. at 238, 10 I.L.M. at 290; proposes an export certification requirement, *id.* art. 6, 823 U.N.T.S. at 240, 10 I.L.M. at 290-91; proposes measures to prevent museums from acquiring illegally exported objects, *id.* art. 7, 823 U.N.T.S. at 240, 10 I.L.M. at 291; proposes penalties for violations of article 7, *id.* art. 8, 823 U.N.T.S. at 242, 10 I.L.M. at 291; calls for a "concerted" effort by State Parties to restrict international commerce in "specific objects" in cases where a country's patrimony is in jeopardy, *id.* art. 9, 823 U.N.T.S. at 242, 10 I.L.M. at 291; proposes to obligate "antique dealers" to "register" cultural property and to sanction those who fail to do so, *id.* art. 10, 823 U.N.T.S. at 242, 10 I.L.M. at 291; declares any export under compulsion arising from the occupation of a country to be "illicit," *id.* art. 11, 823 U.N.T.S. at 242, 10 I.L.M. at 291; and declares the right of nations to declare certain property inalienable, *id.* art. 13, 823 U.N.T.S. at 244, 10 I.L.M. at 291-92.

54. Licit means allowable and not just "legal." 1 *OXFORD ENGLISH DICTIONARY* 1615 (compact ed. 1971). Licit is used to make the point that something may be illicit but still legal. For example, international law does not recognize illegal export from one country as making subsequent import into a second country illegal. As far as the second country is concerned the import may be perfectly legal. F. MANN, *supra* note 25, at 501.

55. UNESCO Convention, *supra* note 1, art. 13(d), 823 U.N.T.S. at 244, 10 I.L.M. at 292.

56. For example, Turkey, which updated its national patrimony law in 1973. See L. DUBOFF, *DESKBOOK OF ART LAW* 1064 (1977).

57. P. BATOR, *THE INTERNATIONAL TRADE IN ART* 39 (1983).

58. *Id.* at 38-39.

59. *Id.* at 43.

By contrast, art-acquiring nations have been the beneficiaries of the illicit flow. Of more than fifty signatories to the UNESCO Convention, only two are so-called art-acquiring nations—the United States and Canada.<sup>60</sup> Thus, the UNESCO Convention has not proven to be especially effective in mediating points of difference between art-rich nations and art-acquiring nations.

The shortcomings of the UNESCO Convention not only inhibit any licit interchange of cultural property but actually promote illicit trade.<sup>61</sup> Unless art-acquiring nations are willing to assist in stemming illicit trade, alternatives that would promote a licit flow stand little chance of success.

### B. *Nationalism Versus Internationalism*

The efforts to protect cultural objects reveal tension between two competing notions of ownership of cultural objects; that is, between the idea that these objects are part of the national patrimony of one country exclusively, and the idea that they are really part of the cultural heritage of all mankind. The Metropolitan, for example, is not entirely mistaken when it refers to the Lydian objects as “Eastern Greek”; they are the creations of a culture related more closely to ancient Greece than to modern Turkey.<sup>62</sup> The location of the objects within the current borders of Turkey is as much an accident of history as it is a source of Turkish national pride. The objects are remnants of peoples who were not simply “Turkish.”<sup>63</sup>

Yet the argument for cultural internationalism becomes self-serving when it is used to justify the one-way movement of objects from economically developing, art-rich nations to wealthy, art-acquiring nations. Those who profit economically often are not the art-rich nations, but third-party dealers who

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60. The United States and Canada are the only art-acquiring nations to actually subscribe to the UNESCO Convention. 1 J. MERRYMAN & A. ELSEEN, *supra* note 4, at 96.

61. P. BATOR, *supra* note 57, at 41-43. Bator discusses the problem of broad and unenforceable export regulation as a factor in continuous illegal trade. With strong demand and no legal way of satisfying the demand, an illegal market is inevitable. *Id.*

62. As a trade center of great wealth Lydia was at different times connected to Greek, Roman, and Persian Empires. 17 ENCYCLOPEDIA AMERICANA 880 (1984). However, they are specifically described as “non-Greek people.” *Id.*

63. *Id.*

are themselves from developed nations.<sup>64</sup>

The tension between art-acquiring nations, who are likely to be economically developed, and art-rich nations, most likely to be underdeveloped, is reversed by the dispute over the meaning of the phrase "heritage of mankind." The self-interest evident in cultural internationalism has its counterpart in the dispute concerning the allocation of natural resources. That resources should be shared suddenly becomes less self-evident when applied to natural resources located on the ocean floor<sup>65</sup> or on the Moon.<sup>66</sup>

### C. *United States Reservations and Understandings*

The United States recognized the UNESCO Convention in a manner that preserved its interests as an acquiring nation and greatly limited the application of the Convention. The U.S. Senate ratified the Convention in 1972 subject to a reservation and six understandings.<sup>67</sup> The United States understood article 13(d), calling for repatriation of illegally exported objects, as applying only to objects removed from their countries of origin after the Convention entered into force in the United States.<sup>68</sup> The Convention was also understood not to require nations to establish national control over private institutions such as museums.<sup>69</sup> The United States further understood that actions for repatriation must be brought under the laws of the country where the objects have been taken.<sup>70</sup> The nation demanding return must provide the "necessary proofs of ownership" as defined by the country where the objects are found.<sup>71</sup>

The dispute between the Metropolitan and Turkey over

64. For example, the sale by a New York dealer to Norton Simon of the Swapuram Natraja for US\$900,000. The government of India sued for the objects' return and settled out of court. L. DUBOFF, *supra* note 56, at 109-12.

65. Goldie, *A Note on Some Diverse Meanings of the Common Heritage of Mankind*, 10 SYRACUSE J. INT'L L. & COM. 69, 75 (1983).

66. Note, *The Commercial Space Launch Act: America's Response to the Moon Treaty*, 10 FORDHAM INT'L. L.J. 763 (1987).

67. United States Ratification of UNESCO Convention, 118 CONG. REC. 27,925 (1972).

68. *Id.* at 27,925.

69. *Id.*

70. *Id.*

71. *Id.*

ownership of the Lydian objects does not fall within the UNESCO Convention as it is understood by the United States. First, the objects entered the United States before the UNESCO Convention was enacted.<sup>72</sup> Second, the U.S. understanding does not require any governmental control over the actions of a private museum such as the Metropolitan.<sup>73</sup> Finally, Turkey might have great difficulty in establishing itself as the "rightful owner" of objects that it has been unable even to describe. A Turkish claim of national ownership might not satisfy a definition of ownership under U.S. law.<sup>74</sup>

#### D. *The Implementation Act*

Because of the understanding that the Convention is not self-executing, it did not come into force in the United States until the enactment of enabling legislation some ten years after ratification. The enabling legislation is known as the Convention on Cultural Property Implementation Act<sup>75</sup> ("Implementation Act").

The Implementation Act not only codifies the reservation and understandings of the ratification, but also reflects the position of the United States when it participated in the creation of the UNESCO Convention itself. For example, section 308 of the Implementation Act deals specifically with stolen property, but requires that a stolen object be "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution."<sup>76</sup> Objects, like the Lydian treasures, taken by illegal excavation from a tomb are not documented. Thus under the Implementation Act, a coun-

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72. As the thefts of the tombs occurred in the 1960s, they precede the 1970 UNESCO Convention, the U.S. ratification in 1972, and the Implementation Act of 1983.

73. See United States Ratification of UNESCO Convention, 118 CONG. REC. at 27,925.

74. As possession is the primary incident of common law ownership, a claim for objects never under the actual control of the claimant, who cannot even describe what he owns, would be problematic. Cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (stating that "possession is the beginning of ownership" and that a state claim to ownership of wild birds, in no one's possession, was not supportable).

75. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-2613 (1982)).

76. 19 U.S.C. § 2607.

try whose unopened tombs are looted has no claim under section 308.

Section 303 of the Act<sup>77</sup> effects article 9 of the UNESCO Convention, which is a crisis provision seeking to prevent "irremedial injury to the cultural heritage of the requesting state."<sup>78</sup> It applies specifically to archaeological materials.<sup>79</sup> Because it deals only with prospective import controls, it would be of no use to Turkey in its case against the Metropolitan. However, to make use of section 303, an art-rich nation would first have to apply to the President of the United States.<sup>80</sup> The President would then have to consider a number of factors: first, whether a nation's archaeological materials were really in jeopardy from pillage;<sup>81</sup> second, whether a nation had taken "measures consistent with the Convention to protect its cultural patrimony";<sup>82</sup> third, whether the application of import restrictions by the United States, in conjunction with other states having a significant import of the same objects, would be of "substantial benefit in deterring a serious situation of pillage";<sup>83</sup> fourth, whether less drastic restrictions were not available;<sup>84</sup> and fifth, whether such restrictions promoted cultural interchange.<sup>85</sup> If these conditions were satisfied, the President could apply import controls.

However, there is another condition to section 303. The President may not apply import restrictions if other nations having a "significant import trade" in the requesting nation's cultural objects do not also implement restrictions within a reasonable time or do not do so satisfactorily.<sup>86</sup> In such cases the President "shall suspend" import restrictions.<sup>87</sup>

Section 304 of the Implementation Act permits the United

77. *Id.* § 2602.

78. UNESCO Convention, *supra* note 1, art. 9, 823 U.N.T.S. at 242, 10 I.L.M. at 291.

79. 19 U.S.C. § 2602.

80. *Id.* § 2602(a)(1).

81. Convention on Cultural Property Implementation Act § 303 (a)(1)(A), 19 U.S.C. § 2602(a)(1)(A).

82. *Id.* § 303(a)(1)(B), 19 U.S.C. § 2602(a)(1)(B).

83. *Id.* § 303(a)(1)(C)(i), 19 U.S.C. § 2602(a)(1)(C)(i).

84. *Id.* § 303(a)(1)(C)(ii), 19 U.S.C. § 2602(a)(1)(C)(ii).

85. *Id.* § 303(a)(1)(D), 19 U.S.C. § 2602(a)(1)(D).

86. *Id.* § 303(c)(1), 19 U.S.C. § 2602(c)(1).

87. *Id.* § 303(d), 19 U.S.C. § 2602(d).

States to implement unilateral import restrictions in an emergency situation.<sup>88</sup> Emergency restrictions can be applied only on three conditions: first, that the objects to be restricted were "a newly discovered type of material" recognized as coming from a "site of high cultural significance"; second, that the pillage "is or threatens to be of crisis proportions"; and third, that the import restrictions applied by the U.S. must "in whole, or in part, reduce the incentive for such pillage."<sup>89</sup>

#### D. *The National Stolen Property Act*

Having fallen through the cracks of the UNESCO Convention and the Implementation Act, a nation such as Turkey might look to other United States law for the return of objects. Under the National Stolen Property Act ("NSPA"), a person who transports goods valued at US\$5000 or more in interstate commerce, "knowing the same to have been stolen, converted or taken by fraud" or to receive, conceal, store, sell or dispose of such goods, is guilty of a federal crime.<sup>90</sup>

##### 1. *United States v. Hollinshead*

The NSPA was largely a theoretical threat to art dealers and museums until the 1970s. If a nation is unable to locate or describe an object in detail, it is next to impossible to charge someone with theft under the NSPA or to sue for its return on a civil claim. In 1974, however, in *United States v. Hollinshead*, a California art dealer was convicted of the theft of a Mayan stela from Guatemala.<sup>91</sup> Although the case began as a civil suit in California state court for the return of the object, before the trial the Federal Bureau of Investigation seized the stela, and the defendants were charged with transporting and conspiring to transport stolen goods in interstate and foreign commerce.<sup>92</sup> The dealers were convicted on the strength of photographic evidence and expert testimony on Guatemalan law.<sup>93</sup>

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88. *Id.* § 304, 19 U.S.C. § 2603.

89. *Id.* § 304(a), 19 U.S.C. § 2603(a).

90. 18 U.S.C. §§ 2314-2315 (1982 & Supp. IV 1986).

91. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). For discussion of this case see, e.g., P. BATOR, *supra* note 57, at 68-70; L. DUBOFF, *supra* note 56, at 91-99.

92. P. BATOR, *supra* note 57, at 70.

93. *Id.*

2. *United States v. McClain*

Three years later the possibility of using the NSPA against those who deal in stolen cultural objects was significantly expanded. *United States v. McClain*<sup>94</sup> enunciated the principle that "exportation constitutes a sufficient act of conversion to constitute theft," but only when the object is illegally exported from a country that has enacted a national patrimony law.<sup>95</sup> Because an object is "owned" by its nation of origin, any export without official approval would be an act of theft. Appellants argued against the court's reliance on Mexican law<sup>96</sup> that grants Mexico property rights in things that, in Anglo-American understanding, are private property, the taking of which requires compensation.<sup>97</sup> While there have not been subsequent convictions on the *McClain* principle, the threat of criminal liability, often raised by U.S. Customs, has virtually halted the flow of cultural objects from Central and South America.<sup>98</sup> *McClain* made U.S. dealers, collectors, and museums vulnerable to liability for objects that may have been legally possessed by an individual in their country of origin, but whose export is deemed illegal because of property rights imposed by the country of export.<sup>99</sup>

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94. *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979); *United States v. McClain*, 545 F.2d 988 (5th Cir.), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977) (*per curiam*).

95. *McClain*, 545 F.2d at 1003 n.33.

96. *Id.* For discussion of this case, see L. DUBOFF, *supra* note 56, at 79-91; P. BATOR, *supra* note 57, at 70-78; I J. MERRYMAN & A. ELSEN, *supra* note 4, at 118-24; McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813 (1983).

97. See P. BATOR, *supra* note 57, at 72. Ironically, the United States once itself acted to take property without compensation—during the Civil War. While justified as a "necessity of war," the freeing of slaves without compensation to their "owners" violated the fifth amendment of the United States Constitution—but only if those enslaved were considered in law to be mere chattels. Of course the issue involved much more than the sanctity of the private property rights of slaveholders. See, e.g., Fladeland, *Compensated Emancipation: A Rejected Alternative*, 17 J. S. HIST. 169, 169-86 (1951); Lucie, *Confiscation: Constitutional Crossroads*, 23 CIV. WAR HIST. 307, 307-21 (1977).

98. McGill, *Senators To Weigh Limit on Claims to Stolen Art*, N.Y. Times, Jan. 9, 1986, at C19, col. 1. See generally McAlee, *supra* note 96. McAlee describes how *McClain* has been construed by the U.S. Customs Service to warrant seizures of artifacts from Central and South America, effectively freezing the importing of these objects into the United States. *Id.*

99. P. BATOR, *supra* note 57, at 75.



### 3. Proposed Legislation

Since *McClain*, observers have argued that even legitimate importing has ceased and that the flow of objects has simply been diverted to other acquiring nations such as France and Japan.<sup>100</sup>

As a result, in 1985, Senator Daniel Patrick Moynihan proposed legislation to overturn *McClain* by amending the NSPA.<sup>101</sup> The amendment would have excluded museums from liability that purchased "archaeological or ethnological materials" when the objects were taken from a foreign country with a national property law which made export illegal.<sup>102</sup> Supporters of the proposal argued that *McClain* recognized a concept of property alien to the common law.<sup>103</sup> According to these lawmakers, the Implementation Act was the appropriate legal framework for controlling the illicit trade in cultural objects.<sup>104</sup>

Although the amendment was never passed, these arguments persist. However, there is no justification for U.S. legislation that extinguishes all rights and interests of art-rich nations in their cultural objects without providing those nations an opportunity to assert their interests, even if those interests differ from common law understandings of ownership.

*McClain* is not entirely at odds with Anglo-American theories of property. Under the common law, property is the aggregate of rights that are guaranteed and protected by the government.<sup>105</sup> Public property is "not restricted to the dominion of a private person."<sup>106</sup> Private ownership is understood to be the "unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it and to exclude everyone else from interfering with it."<sup>107</sup> Yet, even Anglo-American understandings of private ownership do not

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100. 43 CONG. Q. 1154 (June 15, 1985).

101. S. 605, 99th Cong., 1st Sess. (1985); see also McGill, *supra* note 98, at C19, col. 1 (discussing the proposed bill).

102. S. 605, 99th Cong., 1st Sess. (1985).

103. 131 CONG. REC. S2612 (daily ed. Mar. 6, 1985) (statement of Sen. Moynihan).

104. 43 CONG. Q. 1154 (June 15, 1985).

105. BLACK'S LAW DICTIONARY 635 (5th ed. 1979).

106. *Id.*

107. *Id.*

extend to every object that might conceivably be owned. U.S. law recognizes that there are rights and interests that attach to some things and outweigh the rights of a private possessor.<sup>108</sup> In the interests of society as a whole, certain things are simply not treated as chattels. For example, while there is certainly a market for bodily organs, federal law prohibits their sale in interstate commerce.<sup>109</sup> Endangered species also come under protection because of interests other than those of the marketplace.<sup>110</sup> Federal law recognizes that there are more than the interests of buyers and sellers at stake in such transactions.

The proponents of the NSPA amendment argued that preventing illicit trade in cultural objects was the purpose of the Implementation Act. However, the Implementation Act was so carefully drafted as to be of little use when dealing with undocumented objects, the theft of which renders documentation impossible.<sup>111</sup> The Act's provisions for undocumented objects apply only in situations of massive pilfering, and not to individual cases, and then only after an approval process subject to numerous conditions.<sup>112</sup>

#### 4. Commercial Considerations

*McClain* should not be interpreted as supporting a prohibition of the purchase and sale of cultural objects. There are real benefits to ascribing market value to such objects. The existence of a market for cultural objects increases their distribution and leads to their being treated with great care.<sup>113</sup> Many art-rich nations are unable to display, preserve, or even to document their vast holdings.<sup>114</sup> Often the objects are less valued in their country of origin than they are internationally.<sup>115</sup> In many cases the objects are one of many of the same

108. See *infra* notes 109-10.

109. 42 U.S.C. § 274e (Supp. III 1985).

110. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. IV 1986).

111. See Convention on Cultural Property Act § 308, 19 U.S.C. § 2607 (1982).

112. See *supra* text accompanying notes 76-90.

113. See 1 J. MERRYMAN & A. ELSEN, *supra* note 4, at 62-64.

114. Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, at C14, col. 1.

115. de Varine, *The Rape and Plunder of Cultures: An Aspect of Deterioration of the Terms of Cultural Trade Between Nations*, 139 MUSEUM 152 (1983), reprinted in 1 J. MERRYMAN & A. ELSEN, *supra* note 4, at 46-50.

or similar type.<sup>116</sup> All these factors make distribution of cultural objects outside of art-rich nations desirable. When objects are pilfered, the art-rich nations receive nothing in "exchange." A local dealer may have sold an object for profit. But the significant profits in the sale of an object of "doubtful provenance"<sup>117</sup> and the objects themselves are often exchanged between parties in acquiring nations.<sup>118</sup>

### 5. Replevin and Repose

Most cases involving stolen cultural property concern the return of the object rather than the criminal prosecution of possessors or demands for compensation.<sup>119</sup> These cases are in the nature of equitable replevin, which seeks the return of objects that are unique and irreplaceable.<sup>120</sup>

A good-faith purchaser has defenses to such a claim. It is considered reasonable to require a true owner to act on his claim within a reasonable period of time.<sup>121</sup> This requirement protects a good-faith purchaser from delay that might make it impossible to recover his purchase price.<sup>122</sup> A timely claim

116. Schumacher, *supra* note 114. In this article, a Peruvian archaeologist discusses the advantages of selling duplicates of cultural objects to generate income for preservation. *Id.*

117. "Doubtful provenance" is an art dealer's euphemism for origins a dealer would rather were not determined. See comments of J.J. Klejman, *quoted in* Canady, *Met Proud of Rare Greek Pitcher*, N.Y. Times, Feb. 26, 1983 at 24, col. 1. "Mr. Klejman says that the Greek collection was his last purchase in the field of classical antiquity by the old (and still largely current) code by which a work of art may be 'legitimately purchased' and 'legitimately sold' under such conditions as are known when its provenance cannot be specifically demonstrated as illegal." *Id.* Oddly, the article containing Mr. Klejman's statement was used in the affidavit of Dietrich von Bothmer to defend the Metropolitan Museum of Art's claim to the Lydian objects, and is in reference to them. See Defendant's Affidavit, *supra* note 14, Exhibit A.

118. Canady, *supra* note 117. According to the article, J.J. Klejman stated that the Lydian objects were obtained from "ignorant men who had received the works at fourth or fifth hand, who themselves did not know the places of origin and could not distinguish the good pieces from the masses of 'junk' they also offered." *Id.*

119. *Hollinshead*, for example, was initiated by Guatemala as a civil action to recover the Mayan stela, not as a criminal indictment. See *supra* note 91 and accompanying text.

120. Replevin is an action for the return of goods or chattels. D. DOBBS, *REMEDIES* 399 (1973). Turkey maintains that its claim is equitable rather than legal because it seeks the return of unique and irreplaceable objects rather than mere fungible goods. Plaintiff's Memorandum, *supra* note 8, at 13 n.6.

121. See *Dalsis v. Hill*, 424 F. Supp. 784, 788 (W.D.N.Y. 1976).

122. *Id.*

also serves to ensure the availability of evidence and witnesses to the transaction.<sup>123</sup>

To protect good-faith purchasers from stale claims, statutes of limitations, or repose laws, are enacted to set a time limit within which a claim must be brought.<sup>124</sup> If the statutory period of years has passed, the good-faith purchaser has obtained good title by default on the part of the true owner.<sup>125</sup>

State jurisdictions have differing criteria for their limitation statutes. One important distinction is the event used to define the point at which the statute of limitations begins to run. In some states a limitation statute may be triggered at the time an object is first stolen.<sup>126</sup> Other states determine the statute to be triggered when the object first comes into the hands of a good faith purchaser.<sup>127</sup> Still others take the view that the statute is triggered when the owner discovers or should have discovered the location of the object.<sup>128</sup> Turkey's claim against the Metropolitan comes under the New York rule.<sup>129</sup> New York adopts a minority view; its limitation statute is triggered only when the true owner has discovered the location of the object, made a demand for its return, and had that demand refused.<sup>130</sup>

There was a 1985 proposal in the New York State Assembly<sup>131</sup> for a repose law applying specifically to cultural objects. The proposal did not become law because it was perceived to be an attempt to shield U.S. possessors from claims rather than

123. *Meyer v. Frank*, 550 F.2d 726, 730 (2d Cir. 1977).

124. New York's limitation for an action to recover a chattel is three years. N.Y. CIV. PRAC. L. & R. § 214(3) (McKinney Supp. 1988).

125. *Priester v. Millman*, 55 A.2d 540, 543-44 (Pa. Super. 1947). *See generally* 51 AM. JUR. 2d *Limitation of Actions* § 90 (1970).

126. *Jackson v. American Credit Bureau*, 531 P.2d 932, 934 (Ariz. App. 1975); *see also* Weil, *Repose*, INT'L FOUND. FOR ART RES. REPS., Aug.-Sept. 1987, at 6-7 (discussing differing determinations of when limitation statutes begin to run as they apply to stolen art).

127. *Christensen Grain, Inc. v. Garden City Coop. Equity Exch.*, 192 Kan. 785, 787, 391 P.2d 81, 83 (1964); Annotation, *When Statute of Limitations Begins to Run Against Action for Conversion of Property by Theft*, 79 A.L.R.3d 851 (1977).

128. *O'Keefe v. Snyder*, 83 N.J. 478, 493, 416 A.2d 862, 872 (1980).

129. *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1964).

130. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1162 (2d Cir. 1982).

131. 11462-A New York State Assembly (June 11, 1986); *see* McGill, *supra* note 98, at C19, col. 1 (New York State repose act suggested by Metropolitan Museum of Art).

an effort to strike a balance between possessors and owners.<sup>132</sup> The proposal provided that a limitation period was triggered when the object came into the hands of a good-faith purchaser, thus requiring the owner to race against the clock to try to find a listing in a museum catalogue, periodical, or other such publication.<sup>133</sup> It is unclear how an art-rich nation was to search for objects held by private collectors or dealers.

Apart from beating the clock, a plaintiff in an action in replevin may have to defeat the defense of laches. The plaintiff may not prevail when the defendant has been prejudiced by delay on the part of the plaintiff in bringing the action.<sup>134</sup> This defense presumes that the plaintiff was in a position to make a demand and delayed without justification.<sup>135</sup> The Metropolitan has raised this defense against Turkey.<sup>136</sup> However, Turkey has asserted that it could not have made a demand prior to 1986 because the Metropolitan refused to supply information sufficient to establish that Turkey had a claim at all.<sup>137</sup>

#### 6. *Republic of Turkey v. Metropolitan Museum of Art*

While the suit between Turkey and the Metropolitan is yet to be resolved, it serves to point out the problems faced by both parties in a dispute over cultural objects.

Nearly twenty years ago the Metropolitan purchased numerous objects from a reputable dealer who is no longer available.<sup>138</sup> The Museum would not be able to recover the purchase price if it is required to surrender the objects.<sup>139</sup> It has not received a satisfactory description of the objects in question proving they were the property of the government of Turkey.<sup>140</sup> Evidence as to the purchases must be reconstructed after a hiatus of nearly twenty years. What the Metropolitan perceives as demands and refusals, triggering a statute of limitations, are seen by Turkey as mere requests for infor-

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132. See N.Y. Times, July 29, 1986, at C14, col. 3.

133. 11462-A New York State Assembly (June 11, 1986).

134. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 693 (S.D.N.Y. 1987).

135. *Id.*

136. Defendant's Memorandum, *supra* note 9, at 32-36.

137. Plaintiff's Memorandum, *supra* note 8, at 11-21.

138. Defendant's Memorandum, *supra* note 9, at 34-35.

139. Defendant's Memorandum, *supra* note 9, at 35.

140. Pearson, *supra* note 11, at 6.

mation prior to demands.<sup>141</sup>

Turkey has not been able to determine what objects were taken because it never knew exactly what was in the tombs; the objects were undocumented and could not have been documented because the tombs were never excavated by archaeologists.<sup>142</sup> Now that the site has been looted, obtaining information that might have been gathered by a careful excavation is no longer possible.<sup>143</sup> Objects of great economic value have been taken from Turkey without its permission and without compensation.<sup>144</sup> Neither the people of Turkey nor the many visitors to the Metropolitan have access to most of the objects.<sup>145</sup> Turkey's requests to the U.S. State Department for information about the Metropolitan's purchases were not answered because the Metropolitan is not under the control of the State Department.<sup>146</sup> In Turkey's view requests for information from the Metropolitan were never satisfactorily answered.<sup>147</sup>

### III. NATIONAL REGISTRY

If the Implementation Act were amended to require registration of cultural objects, many of the problems typified by the litigation between the Metropolitan and the Republic of Turkey could be resolved.

Registration itself would not be particularly difficult. Objects, the date of purchase, and the source could be as readily described in a national register as they are in museum catalogues.<sup>148</sup> If the Metropolitan had purchased objects listed in a national registry, it would not be subject to litigation some

141. Defendant's Memorandum, *supra* note 9, at 11-13.

142. Plaintiff's Memorandum, *supra* note 8, at 6-7.

143. I J. MERRYMAN & A. ELSER, *supra* note 60, at 54.

144. The objects are said to be worth US\$1.7 million. Lowenthal, *Met Moves to Dismiss Turkey's Suit*, INT'L FOUND. ART RES. REPS., Aug.-Sept. 1987, at 5.

145. Accessibility is one of the arguments made for art as an international patrimony. Merryman, *supra* note 3, at 1920-21. This interest is not served when 200 objects remain in the basement of the Metropolitan after 20 years.

146. United States Ratification of UNESCO Convention, 118 CONG. REC. 27,925 (1972); *see also* Plaintiff's Affidavit, *supra* note 21, at 16-17 (detailing Turkey's request and the response of the State Department).

147. *See* Plaintiff's Memorandum, *supra* note 8, at 17, 20-24.

148. K. MEYER, *supra* note 48, at 167-68. Meyer points out that Wall Street requires rules of disclosure, while museums do not. *Id.*

twenty years after the purchase. If Turkey had the opportunity to search such a registry and did not have the burden of finding concealed objects, it could have been in communication with the Metropolitan and made a claim within a reasonable time.

Registration of cultural objects could also serve as a warranty of title from the seller.<sup>149</sup> If a registered object is found to have been stolen, a purchaser could be guaranteed a return of the purchase price for the length of time the limitation statute runs. In the existing case the Metropolitan is at risk of losing the objects without compensation from the seller.<sup>150</sup>

When the true owner is an art-rich nation, limited in resources, it seems patently unfair to require that it be alert to the varying time periods and triggering conditions of U.S. state laws, that it diligently search the periodicals, catalogues, and exhibitions of every institution, and expect it to have a reasonable chance of making a claim before the clock runs out. It would be more fair to couple any repose act with a registration provision, requiring a purchaser to list the object in a readily accessible public registry before he is able to benefit from any time limitation on claims. Moreover, a reasonably short limitation period would avoid prejudicial delay to a possessor. If Turkey had made a claim against the Metropolitan's purchase within a certain period of time, defined by a statute of limitations, witnesses and documents would have been more readily available. Purchasers would also be assured that once the object has been listed for the requisite period, the object would be theirs without fear of litigation as to ownership.

By registering cultural objects, art-acquiring nations would be recognizing, rather than avoiding, the interests of art-rich nations. Art-rich nations might be more willing to grant long term loans of objects if the listing of the objects were known to guarantee title. Turkey, for example, has stated its willingness to lend its objects to other countries, but is reluctant to do so under the present circumstances.<sup>151</sup> The will-

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149. The Metropolitan argues that the warranty provisions of the Uniform Commercial Code apply, and that under U.C.C. § 2-725 (1977) the four-year statute of limitations on a warranty of title has expired. See Defendant's Memorandum, *supra* note 9, at 35-36.

150. *Id.*

151. See Plaintiff's Memorandum, *supra* note 8, at 6 n.2.

ingness of an art-acquiring nation to share information about cultural objects and to act affirmatively to return misappropriated objects might promote the sharing of the objects themselves.

Art-rich nations might be encouraged to list their most valued objects on a U.S. registry to serve as notice of their ownership to any potential U.S. purchaser and activate section 304 of the Implementation Act.<sup>152</sup>

Furthermore, the registry would protect not only art-rich nations, but also U.S. owners of cultural objects. Both are plagued by thefts.<sup>153</sup> A listing of private U.S. owners' holdings in a national registry would protect against illegal dealings in these objects as well.<sup>154</sup>

As claims arise, a balancing of the interests of both possessors and owners would be encouraged. National and international interests would be served. For example, if a museum were required to return an object it could stipulate that the object must be adequately preserved and displayed in its country of origin.<sup>155</sup> A museum might be permitted to retain the item on loan for an extended period, with title remaining in the country of origin.<sup>156</sup> Or, in exchange for the return of the objects, a possessor might be offered other objects, or an opportunity to work with the art-rich nation in new excavations. In addition, a claim for repatriation could be released in exchange for compensation or offers of assistance in documenting or preserving the holdings.

152. 19 U.S.C. § 2603 (1982).

153. See generally INT'L FOUND. ART RES. REPS. This periodical lists art and cultural objects stolen from museums, collectors, and galleries in the United States and throughout the world.

154. *Id.*

155. This would serve to further the interests in art as an international patrimony. Merryman, *supra* note 3, at 1916-17.

156. Such a loan might be analogous to the common law concept of trusts, wherein title resides in one party and the benefits accrue to another. If art-rich nations retain title while objects resided in the United States, for example, the international interests of preservation and accessibility would be served without extinguishing the source country's relation to the objects. The objects might one day be returned when international interests could realistically be served. Or, the objects could be part of worldwide exhibitions.



## CONCLUSION

*There is no greater curse to be found in this life than sharp practice masquerading as intelligence; for it is from this that countless apparent conflicts arise between expediency and moral good. In fact there are few people who would refrain from doing wrong, if they were assured that no punishment or even knowledge of the deed would result.*  
Cicero<sup>157</sup>

It is a peculiar morality that, in the interest of protecting the cultural heritage of all mankind, condones the pilfering of cultural objects by providing them a haven in an art-acquiring nation while ignoring the claims of art-rich nations from which they were taken. It is even more odd to think that by virtue of being the sole possessor of an object, the possessor is more cultured.<sup>158</sup> Culture is not benefitted by assertions of exclusive ownership of objects, but rather by the sharing of the objects.<sup>159</sup> Pilfering by art-acquiring nations and hoarding by art-rich nations defeats culture.

To further mankind's appreciation of its cultural heritage, cultural objects and information about those objects should be made widely available. The interests of art-rich nations can be well served by the display and preservation of objects in another country. Respect for another country is increased when its heritage is better known. The interests of acquiring nations are served when they offer to share information about objects and seek ways to promote sharing of them because art-rich nations, which would benefit from an exchange, are more likely to exchange willingly. Respect for the objects is directly related to respect for peoples whose past may be more closely linked to the objects.<sup>160</sup>

The United States is in a unique position as an acquiring nation to promote the licit flow of cultural objects. Giving art-

157. CICERO, ON MORAL OBLIGATION III, 17, 72 (J. Higginbotham trans. 1967).

158. Cf. K. MEYER, *supra* note 48, at 187-97. Meyer discusses the motivations, noble and otherwise, of collectors and museums in their passion for acquisition.

159. S. WILLIAMS, *supra* note 30, at 201-02.

160. See generally L. HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (1983). Hyde makes an argument that exchanges involving art and bodily organs are not the same as commodity exchanges. The essence of a commodity exchange is the extinguishing of all rights and interests to an object once it is transferred, whereas a gift exchange, as Hyde describes it, creates bonds between the giver and receiver. The bonds are strengthened rather than extinguished by reciprocation.

rich nations an opportunity to settle equitably claims to objects of doubtful provenance would be a positive step in affirming the principle that such objects are to be shared as part of an international heritage. If the United States wishes to encourage other nations to look beyond their nationalist interests we must do so ourselves.

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