



---

Two Ways of Thinking About Cultural Property

Author(s): John Henry Merryman

Source: *The American Journal of International Law*, Vol. 80, No. 4 (Oct., 1986), pp. 831-853

Published by: American Society of International Law

Stable URL: <http://www.jstor.org/stable/2202065>

Accessed: 26/12/2009 10:48

---

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=asil>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).



American Society of International Law is collaborating with JSTOR to digitize, preserve and extend access to *The American Journal of International Law*.

<http://www.jstor.org>

## TWO WAYS OF THINKING ABOUT CULTURAL PROPERTY

By John Henry Merryman\*

One way of thinking about cultural property—i.e., objects of artistic, archaeological, ethnological or historical interest<sup>1</sup>—is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction. That is the attitude

\* Sweitzer Professor of Law and Cooperating Professor in the Department of Art, Stanford University. This article is part of a work in progress on "cultural property" undertaken with the generous support of the John Simon Guggenheim Memorial Foundation. I am grateful to Professors Thomas Campbell, Detlev Ch. Dicke, Albert E. Elsen, Marc Franklin, Pierre Lalive and P. J. O'Keefe for criticisms and suggestions. Errors of fact, judgment and taste are of course mine.

<sup>1</sup> Any comprehensive definition of cultural property would have to include such objects and much more. Thus, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, *infra* note 6, defines cultural property in Article 1 to include:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history . . . ;
- (c) products of archaeological excavations . . . ;
- (d) elements of artistic or historical monuments 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 . . . ;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ;
- (i) postage, revenue and similar stamps . . . ;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

In some nations, cultural objects and environmental treasures (including natural and artificial landscapes and ecological areas, plus, in cities, urban structures and panoramas) are treated as fundamentally related to each other. See T. ALIBRANDI & P. FERRI, *I BENI CULTURALI E AMBIENTALI* (1985). Cf. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, UNESCO Doc. 17/C/106 (1972). For a discussion of folklore as cultural property, see Glassie, *Archaeology and Folklore: Common Anxieties, Common Hopes*, in *HISTORICAL ARCHAEOLOGY AND THE IMPORTANCE OF MATERIAL THINGS* 23 (L. Ferguson ed. 1977).

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

embodied in the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (hereinafter "Hague 1954"),<sup>2</sup> which culminates a development in the international law of war that began in the mid-19th century.

Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the "repatriation" of cultural property. As a corollary of this way of thinking, the world divides itself into source nations and market nations.<sup>3</sup> In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples.<sup>4</sup> Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.

Despite their enthusiasm for other kinds of export trade, most source nations vigorously oppose the export of cultural objects.<sup>5</sup> Almost every national government (the United States and Switzerland are the principal exceptions) treats cultural objects within its jurisdiction as parts of a "national cultural heritage." National laws prohibit or limit export, and international agreements support these national restraints on trade. This way of thinking about cultural property is embodied in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970 (hereinafter "UNESCO

<sup>2</sup> 249 UNTS 240. The conference that produced Hague 1954 was called by UNESCO, so it is right to think of the Convention as to some extent a UNESCO product. The differences between Hague 1954 and UNESCO 1970 that are described in this article flow to some extent from the different subject matters of the two Conventions, but they also reflect the changes that have taken place in UNESCO's membership, structure, program and ideology since 1954.

<sup>3</sup> L. PROTT & P. O'KEEFE, NATIONAL LEGAL CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY 2 (UNESCO 1983), include a third category of "transit countries" which, though useful for other purposes, is not relevant here.

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

<sup>5</sup> The question why nations prohibit the export of cultural property is an unexpectedly complex and interesting one that I will treat in another article. On the surface, it seems that there are several levels of motivation: romantic Byronism (see Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1880, 1903-05 (1985)); the notion of "national cultural patrimony" and related political/symbolic uses of cultural property; lack of the cultural expertise and organization to deal with cultural property as a resource, like other resources, to be managed and exploited; entrenched interests that illegally, but profitably, exploit cultural property and favor perpetuation of the status quo; and so on.

1970"))<sup>6</sup> which is the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects.

While both Conventions purport to protect cultural property, they give the term "protection" different meanings and embody different and somewhat dissonant sets of values. In part, the divergence flows naturally from the diverse subject matters of the two Conventions, one dealing with protection of cultural property from the acts of belligerents in time of war, the other with international traffic in cultural objects. But the differences in outlook that are of interest here are fundamental, transcending such distinctions. I describe these differences and explore their implications for the national and international policy and law of cultural property.

#### HAGUE 1954 AND CULTURAL INTERNATIONALISM

Hague 1954 is a direct descendant of the work of Francis Lieber, "the man who shaped and laid the cornerstone on which the laws of war, as we now find them, are based."<sup>7</sup> Lieber, a German émigré professor at Columbia College in New York, had assisted Henry Wager Halleck, General-in-Chief of the Union Armies, in defining guerrilla warfare. At Halleck's request, Lieber prepared a proposed "code of conduct by belligerent forces in war" to apply to the conduct of the Union forces in the American Civil War. Issued by the Union command as General Orders No. 100 on April 24, 1863, the Instructions for the Governance of Armies of the United States in the Field or Lieber Code contains 157 articles. Articles 34–36 deal with protection of cultural property and provide:

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property . . . but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precise instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

<sup>6</sup> 823 UNTS 231, reprinted in 10 ILM 289 (1971).

<sup>7</sup> Taylor, *Foreword*, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, at xv (L. Friedman ed. 1972) [hereinafter cited as Friedman]; cf. R. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983).

Lieber, of course, was not the first to argue for protection of cultural property from damage or seizure by belligerents. Polybius of Athens, a Greek historian of the 3d–2d century B.C., is frequently quoted as the earliest such advocate. See De Visscher, *La Protection internationale des objets d'art et des monuments historiques (2me partie)*, 16 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* (3d ser.) 246, 247 (1935), translated and republished as De Visscher, *International Protection of Works of Art and Historic Monuments*, 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 821, 823 (1949) (quoting Polybius).

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.<sup>8</sup>

The Lieber Code was the first attempt to state a comprehensive body of principles governing the conduct of belligerents in enemy territory. Its influence can be traced through a number of succeeding efforts. Thus, at an international conference of 15 states called by the Russian Government and held in Brussels in 1874, the "Declaration of Brussels" was promulgated (but never adopted as an international convention because of the resistance of Great Britain). Article 8, of a total of 56 articles, states:

The property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or wilful damage to, such establishments, historical monuments, or works of art or science, shall be prosecuted by the competent authorities.<sup>9</sup>

In 1880 the prestigious Institute of International Law (an organization of scholars of international law) included a similar provision (Article 56) in its "Manual of the Laws and Customs of War."<sup>10</sup> In 1899, again at the initiative of the Russian Government, a conference of 26 nations was convened at The Hague. This important conference produced a number of international agreements, including the Convention with Respect to the Laws and Customs of War on Land (Hague II, 1899) and a set of Regulations Respecting the Laws and Customs of War on Land in 60 articles, of which Article 56 deals with the protection of cultural property in similar terms.<sup>11</sup>

Such provisions appear with increasing frequency in the present century. In 1907, at the initiative of the United States (President Theodore Roosevelt) and, again, of Russia, another important conference was convened at The Hague, attended by 44 nations. The Convention on Laws and Customs of War on Land (Hague IV, 1907) adopted at that conference has a set of appended Regulations Respecting the Laws and Customs of War on Land, of which Article 56 provides in similar terms for the protection of cultural property.<sup>12</sup> The same 1907 conference produced the Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), which pro-

<sup>8</sup> Friedman, *supra* note 7, at 165; R. HARTIGAN, *supra* note 7, at 51-52.

<sup>9</sup> Friedman, *supra* note 7, at 195.

<sup>10</sup> RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 36-37 (J. B. Scott ed. 1916).

<sup>11</sup> For the Convention, July 29, 1899, see 32 Stat. 1803, TS No. 403, *reprinted in* Friedman, *supra* note 7, at 234.

<sup>12</sup> For the Convention, Oct. 18, 1907, see 36 Stat. 2277, TS No. 539, *reprinted in* Friedman, *supra* note 7, at 323.

vides in Article 5 for the protection of "historic monuments," "art" and "science."<sup>13</sup> In 1923 another Hague conference produced the Hague Rules of Air Warfare (which were never adopted by the powers concerned). Articles 25 and 26 provide for the protection of cultural property.<sup>14</sup>

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

The Lieber Code and its progeny all dealt comprehensively with the obligations of belligerents; the protection of cultural property was merely one among many topics. In the 1930s, however, international interest turned to the preparation of a convention dealing solely with the protection of cultural property in time of war. In 1935 the 21 American nations promulgated a Treaty on the Protection of Artistic and Scientific Institutions and Monuments, now generally referred to as the Roerich Pact.<sup>15</sup> As the first international convention entirely devoted to the protection of cultural property, this document is historically important, but it is now, for all practical purposes, superseded. In 1939 the Governments of Belgium, Spain, the United States, Greece and the Netherlands, under the auspices of the League of Nations, issued a Draft Declaration and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War.<sup>16</sup> Like the Roerich Pact, these League efforts were quickly overtaken by the events of World War II, by changes in the technology, tactics and strategy of warfare and the new concept of "total war," and by the offenses against cultural property deliberately and systematically committed by the Nazis. By the end of World War II, the governing rules concerning protection of cultural property against belligerent acts had clearly become inadequate. Two major legal events then occurred: the Nuremberg Trials and the promulgation, under the auspices of the United Nations Educational, Scientific and Cultural Organization, of Hague 1954.

Alfred Rosenberg, one of the principal accused Nazis at the Nuremberg Trials, was among other things head of the infamous Einsatzstab (Special Staff) Rosenberg. The Einsatzstab was charged with looting German-occupied countries of cultural property, an assignment that it ruthlessly, vora-

<sup>13</sup> Oct. 18, 1907, 36 Stat. 2351, TS No. 542.

<sup>14</sup> Friedman, *supra* note 7, at 441.

<sup>15</sup> Apr. 15, 1935, 49 Stat. 3267, TS No. 899, 167 LNTS 279. Roerich was a Russian painter, poet and activist on behalf of cultural preservation who also lived in Finland, Britain, the United States and India, where he died in 1947. His draft of a proposed convention and his design for a banner—"the Banner of Peace" (reproduced with the Treaty in TS No. 899)—were in large part adopted by the parties to the convention. See E. ALEXANDROV, *THE ROERICH PACT AND THE INTERNATIONAL PROTECTION OF CULTURAL INSTITUTIONS AND TREASURES* (Sofia 1978).

<sup>16</sup> 1. U.S. DEP'T OF STATE, *DOCUMENTS AND STATE PAPERS* 859 (1949).

ciously and efficiently executed. Rosenberg's indictment and the evidence introduced at his trial detailed his (and the Einsatzstab's) offenses against cultural property.<sup>17</sup> Rosenberg was found guilty of these (and many other) offenses and was hanged. The innovation here, as elsewhere in the Nuremberg Trials, was that other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name. The Lieber Code and its progeny had a different basis: such offenses violated international law, but offending personnel were to be disciplined, if at all, by their own governments.<sup>18</sup>

Hague 1954, the first universal convention to deal solely with the protection of cultural property, appears to incorporate the principle of individual international responsibility, affirmed at Nuremberg, in Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, *of whatever nationality*, who commit or order to be committed a breach of the present Convention" (emphasis added). This language seems to authorize, indeed to oblige, nations that acquire personal jurisdiction of persons accused of Hague 1954 violations to try them.

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

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

<sup>17</sup> See materials collected in J. MERRYMAN & A. ELSER, *LAW, ETHICS AND THE VISUAL ARTS* 1-43 ff. (1979-); S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 23-29 (1978).

<sup>18</sup> In fact, the principle that individuals accused of (other kinds of) war crimes could be tried by the offended governments had been accepted long before. See R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 17 ff. (1960). In addition, there was recent relevant evidence that trials of accused war criminals by their own national courts were ineffectual. The Treaty of Versailles provided in Article 228 that Germans accused of war crimes would be tried by military tribunals of the victorious Allies. In pursuance of this provision, a list of 896 alleged war criminals, including highly placed officers, was submitted by the Allies with the demand that they be turned over for trial.

The German cabinet strenuously objected to the demand, citing the opposition of the German public. The Germans reported to the Allies that there would be an insurrection if they tried to deliver the names on the list, and army leaders said they would resume the war if the Allies pressed the matter.

Friedman, *supra* note 7, at 777. It was eventually agreed that the Germans would conduct the trials in their own high court, the Reichsgericht in Leipzig, applying international law. The Allies provided a drastically reduced list of 45 names, and the Germans agreed to try 12 of them. Six were eventually tried and convicted; they received light sentences, ranging from a few months to 4 years in prison. (Those who were eventually imprisoned immediately "escaped.") For a contemporary account and evaluation of the trials, see C. MULLINS, *THE LEIPZIG TRIALS* (1921).

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

While it seems clear that such considerations underlay the protection of cultural property in Lieber's code and its successors, their expression in Hague 1954 is a significant innovation. The quoted language, which has been echoed in later international instruments,<sup>19</sup> is a charter for cultural internationalism, with profound implications for law and policy concerning the international trade in and repatriation of cultural property. The principle appears to apply, for example, to the Elgin marbles; they are a part of "the cultural heritage of all mankind." It follows that people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study.<sup>20</sup> The perennial debate about the propriety of their removal from Greece by Elgin and the current proposals to return them to Athens become the business of others besides Greeks and Britons. As the smog of Athens eats away the marble fabric of the Parthenon, all of mankind loses something irreplaceable. These matters are discussed below.<sup>21</sup>

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

<sup>19</sup> Such echoes can be found in the language of the UNESCO Recommendation Concerning the International Exchange of Cultural Property of Nov. 26, 1976, UNESCO Doc. IV.B.8, though usually combined with insistence on the centrality of national interests. Thus, the Preamble states: "Recalling that cultural property constitutes a basic element of civilization and national culture," and "Considering that a systematic policy of exchanges among cultural institutions . . . would . . . lead to a better use of the international community's cultural heritage which is the sum of all the national heritages" (emphasis supplied). Article 2 of the recommendation contains a less nationalistic statement: "Bearing in mind that all cultural property forms part of the common heritage of mankind. . . ."

<sup>20</sup> For a discussion of the marbles and of preservation, integrity and distribution/access as the three main categories of international interest in cultural property, see Merryman, *supra* note 5, at 1916-21.

<sup>21</sup> Two colleagues have suggested that one can distinguish cultural objects of merely local, national or regional interest from those of truly international importance. Hague 1954 specifically rejects any such distinction, as the quoted provision from the Preamble makes clear, equating "cultural property belonging to any people whatsoever" with "the cultural heritage of all mankind" because "each people makes its contribution to the culture of the world." Still, it does not seem unreasonable to suppose that some objects really have little or no importance beyond local or national borders: the bronze effigy of an obscure politician executed by a mediocre artist of merely local reputation standing in a park in a provincial town in Brazil, as one example; the Liberty Bell, as another. Neither of these objects has intrinsic value, and the cultural importance of each seems to be entirely specific to the town in Brazil or to the United States, respectively. Would the rest of the world be culturally impoverished by the destruction of either? Arguably not, but there are two major difficulties: one is that the effort to distinguish objects of local from those of international significance enters a no-man's-land that is shrouded in uncertainty and strewn with land mines. The Liberty Bell, for example, is a symbol of the American Revolution, a great event in Western history. Does it really ring only for Americans? The other problem is that what seems of local and minor interest now may unexpectedly assume major international importance. The minor politician may be reevaluated by scholarship, or the artist may have gone on to greater things, leaving only this bronze as an example of an important formative stage in his career.



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

15. Military necessity . . . allows of all destruction of property.  
 . . . <sup>22</sup>

Hague 1954 is not greatly different. Article 4(2) provides that the obligation to respect cultural property "may be waived . . . in cases where military necessity imperatively requires such a waiver." In short, military necessity can justify the destruction of cultural property otherwise protected by the Convention.

This principle, whose origin has been attributed to Prussian militarism—"la célèbre conception prussienne de la Kriegsraison"<sup>23</sup>—was strongly debated at the conference that produced Hague 1954 and was retained by a divided vote.<sup>24</sup> The criticisms are of several kinds. One is that the concept of military necessity is so indefinite and the circumstances of its use in the field so fluid that "necessity" too quickly and easily shades into "convenience." The problem was anticipated by General Eisenhower in a statement to the Allied forces on December 29, 1943: "[T]he phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference."<sup>25</sup> Military necessity was one of the standard defenses used by accused war criminals after World Wars I and II.<sup>26</sup>

A related but more subtle difficulty is that, in practice, field commanders can be expected to place other values higher than cultural preservation and to translate them into "military necessity." The conduct of the Allied forces in Europe in 1943–1945 provides various examples. General Eisenhower issued clear directions for the preservation of cultural property on December

<sup>22</sup> Friedman, *supra* note 7, at 161; R. HARTIGAN, *supra* note 7, at 48.

<sup>23</sup> Nahlik, *La Protection internationale des biens culturels en cas de conflit armé*, 120 RECUEIL DES COURS 61, 87 (1967 I).

<sup>24</sup> Nahlik, *id.* at 128 ff., describes the debates and states that the United States, Great Britain and Turkey insisted on including an exception for military necessity, while the USSR, Romania, Greece, Belgium, Ecuador and Spain were among those that argued that such an exception was "incompatible avec l'esprit et les principes essentiels de la Convention." It is ironic that the United States, which insisted on the military necessity exception and, with Great Britain, argued that without it "plusieurs pays ne se trouveraient plus en mesure de signer et de ratifier la Convention," has not itself ratified Hague 1954. It is also significant that the earlier Roerich Pact, *supra* note 15, to which the United States was a party, contained no military necessity clause. The decisive vote on the Soviet motion to delete the military necessity clause was 20 opposed, 7 in favor and 14 abstentions. *Id.* at 131.

<sup>25</sup> AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT 48 (1946) [hereinafter cited as REPORT]. The Report describes the work of the Commission, created in 1943, the field operations of the Monuments, Fine Arts, and Archives Section (MFA&A), and the treatment of cultural property during and after hostilities in World War II.

<sup>26</sup> Dunbar, *Military Necessity in War Crimes Trials*, 29 BRIT. Y.B. INT'L L. 442 (1952).

29, 1943 in Italy,<sup>27</sup> and on May 26, 1944, as the Allies began to sweep across northern Europe.<sup>28</sup>

General Eisenhower's reference to the Abbey of Monte Cassino, one of the oldest and most revered and honored sites in Europe, is unfortunate and revealing. The Allies destroyed Monte Cassino, but there was no military necessity of doing so. As the *Report* of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas states:

Although the German High Command had apparently issued orders that troops were not to enter the monastery under any circumstances, there were enemy observation posts and mortar and other defensive positions all over the mountain around the abbey, and to the Allied armies the towering walls crowning the mountain may well have grown into a symbol of the opposition against a victorious advance. In any case these defensive positions and the abbey were blasted by artillery and aerial bombardments and the abbey was very largely destroyed in attacks on February 5, 8, and 11, culminating in the aerial assault of February 15.

Of the seventeenth-century church almost nothing remained. The monastic buildings, library, picture gallery, and all structures were reduced to rubble.<sup>29</sup>

27

Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments as far as war allows.

If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.

REPORT, *supra* note 25, at 48.

28

Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.

It is the responsibility of every commander to protect and respect these symbols whenever possible.

In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders may order the required action even though it involves destruction to some honored site.

But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance.

*Id.* at 102.

<sup>29</sup> *Id.* at 67.

The choice between saving human lives and saving irreplaceable monuments is not an easy one. To use a classroom example, suppose you command a company of soldiers in the vicinity of the cathedral of Chartres. An enemy artillery spotter in one of the towers is directing fire against you and your men and must be removed. You can bomb the cathedral without endangering your men or you can order some of them to enter the cathedral and find and remove the spotter. One or more of the men would in that case probably be killed. Do you bomb the cathedral? Is this a case of "military necessity"? Students try to evade the issue, but when forced to choose, they generally state that human lives are more important. Only a minority agree with Sir Harold Nicolson:

I am not among those who feel that religious sites are, as such, of more importance than human lives . . . ; nor should I hesitate, were I a military commander, to reduce some purely historical building to rubble if I felt that by doing so I could gain a tactical advantage or diminish the danger to which my men were exposed. Works of major artistic value fall, however, into a completely different category. It is to my mind absolutely desirable that such works should be preserved from destruction, even if their preservation entails the sacrifice of human lives. I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark's even if I were aware that by so doing I should bring death to my sons. . . . My attitude would be governed by a principle which is surely incontrovertible. The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.<sup>30</sup>

The Monte Cassino example and many others described in the *Report* illustrate both the complexity of the field commander's decision and the depressing regularity with which "honored objects" and "revered sites" were destroyed as the Allied armies advanced and the Allied air forces bombed. We did enormous damage to irreplaceable works. A military necessity equation that routinely values the possibility of loss of life higher than the certainty of destruction of cultural property necessarily produces that kind of result. Where the cultural property in question belongs to the enemy, the equation tilts further against preservation. In World War II, "military necessity" justified saturation bombing of towns containing irreplaceable cultural treasures and "precision" bombing of factories and yards adjacent to great monuments of human achievement, guaranteeing widespread damage and destruction.<sup>31</sup>

A third objection is more fundamental, arguing that military necessity is a relic of an age that treated aggressive war as a legitimate instrument of

<sup>30</sup> Sir Harold Nicolson, *Marginal Comments*, SPECTATOR, Feb. 25, 1944, reprinted in full in J. MERRYMAN & A. ELSÉN, *supra* note 17, at 1-85 ff.

<sup>31</sup> Not to mention enormous loss of noncombatant lives. See D. IRVING, *THE DESTRUCTION OF DRESDEN* (1963); cf. K. VONNEGUT, *SLAUGHTERHOUSE-FIVE; OR THE CHILDREN'S CRUSADE* (1969).

national policy—an age evoked by such terms as *jus ad bellum*, *Kriegsraison*, *Kriegsbrauch*, *raison de guerre*, *raison d'état*, and so on. Why, such critics ask, should a great cultural monument be legally sacrificed to the ends of war? What does it say about our scale of values when we place military objectives above the preservation of irreplaceable cultural monuments?<sup>32</sup> This criticism obviously gains force from the present century's outlawing of aggressive war<sup>33</sup> and from acceptance of the idea that cultural property belongs to all mankind, not merely to the nation of its situs or to the belligerents.<sup>34</sup>

Finally, the concession to military necessity seems inconsistent with the premises of Hague 1954: "the cultural heritage of all mankind" is put at the mercy of the relatively parochial interests of certain belligerents. In an international convention to which national states are parties, this is perhaps unsurprising and may be unavoidable. Still, the matter was vigorously discussed and the concession to nationalism strongly opposed by major nations at the conference.

Despite its deference to military necessity, Hague 1954 expresses several important propositions affecting the international law of cultural property. One is the cosmopolitan notion of a general interest in cultural property ("the cultural heritage of all mankind"), apart from any national interest.<sup>35</sup> A second is that cultural property has special importance, justifying special legal measures to ensure its preservation. Another is the notion of individual

<sup>32</sup> See the discussion of the debate in Nahlik, *supra* note 23, at 128 ff.; and compare the views of G. BEST, *HUMANITY IN WARFARE passim* (1980), with those of J. BAKER & H. CROCKER, *THE LAWS OF LAND WARFARE CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS* 149 ff., 209–13 (1919).

<sup>33</sup> Beginning with the Kellogg-Briand Pact of Aug. 27, 1928, 46 Stat. 2343, TS No. 796, 94 LNTS 57, and followed by the United Nations Charter, Article 2, paragraph 4, the illegality of aggressive war has been generally accepted among nations. One of the charges against the major war criminals at Nuremberg was that they initiated and waged wars of aggression. Charter of the International Military Tribunal, Art. 6, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, U.S. DEP'T OF STATE PUB. NO. 380, 2 INTERNATIONAL ORGANIZATION AND CONFERENCE SERIES, 1 EUROPEAN AND BRITISH COMMONWEALTH 423 (1949).

<sup>34</sup> Still, if military necessity can justify the denial or limitation of the constitutionally guaranteed rights of individuals, as it sometimes does in American constitutional law (Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980)), perhaps it is not surprising that we permit it to justify the destruction of cultural treasures.

<sup>35</sup> There is growing international acceptance of a similar interest of "all mankind" in the physical environment, in space and in the seabed. Cf. UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, reprinted in UNITED NATIONS, *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (UN Pub. Sales No. E.83.V.5), which provides in the Preamble that "the area of the sea-bed and the ocean floor and the subsoil thereof . . . as well as its resources, are the common heritage of mankind," and in Article 136 that the "Area and its resources are the common heritage of mankind." Disagreement with the implications of this concept for access to and management of deep sea resources was a principal reason for the U.S. refusal, among others, to accede to the LOS Convention. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 281–82 (5th ed. 1984). For a discussion of the proposed application of the "common heritage" concept to Antarctica (also opposed by the United States), see D. SHAPLEY, *THE SEVENTH CONTINENT: ANTARCTICA IN A RESOURCE AGE* 160 (1985).

responsibility for offenses against cultural property. The fourth is the principle that jurisdiction to try offenses against cultural property is not limited to the government of the offender.<sup>36</sup> The first and second of these propositions are expressed in a variety of other international acts and agreements (including UNESCO 1970 and its cluster of related events and documents, which will be discussed below). One can therefore treat them as principles of general applicability, not limited to controlling the conduct of belligerents in time of war or civil conflict.

The third and fourth propositions, however, growing out of the Lieber Code, the Hague 1899 and 1907 Conventions, the experiences of World Wars I and II and the Nuremberg Trials, are more closely tied to the international law of war. For example, they do not at present apply to the peacetime traffic in smuggled or stolen cultural property. Like all major international conventions, however, Hague 1954 exerts an influence that extends beyond the obligations imposed on and accepted by its parties. It is a piece of international legislation that exemplifies an influential way of thinking about cultural property, which I will call "cultural internationalism."<sup>37</sup> We now examine another way, exemplified by UNESCO 1970.

#### UNESCO 1970 AND CULTURAL NATIONALISM

The forerunners of the UNESCO 1970 Convention include: Resolution XIV, Protection of Movable Monuments, of the Seventh International Conference of American States of 1933;<sup>38</sup> three draft international conventions prepared by the League of Nations in 1933, 1936 and 1939, the last of which was entitled Draft International Convention for the Protection of National Collections of Art and History;<sup>39</sup> and the UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property of 1964.<sup>40</sup>

<sup>36</sup> Hague 1954 also provides that the ordinary courts—i.e., the courts that ordinarily try criminal offenses—should be used, rather than military tribunals or special tribunals created for the purpose. One reason for the Germans' resistance to the provision in the Treaty of Versailles that alleged German war criminals be tried by the Allies was that Allied military tribunals would try them.

<sup>37</sup> "Supranationalism," "meta-nationalism" or "cosmopolitanism" might, strictly speaking, be better than "internationalism," since the idea is that humanity, independently of nations and international arrangements, is the party in interest. Use of "internationalism" in this sense, however, has become common enough and will do.

<sup>38</sup> REPORT OF THE DELEGATES OF THE UNITED STATES OF AMERICA TO THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, MONTEVIDEO, URUGUAY, DECEMBER 3–26, 1933, U.S. DEP'T OF STATE CONFERENCE SERIES NO. 19, at 208 (1934).

<sup>39</sup> All three are set out in 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 865 (1949).

<sup>40</sup> 1 UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS 382 (1984) [hereinafter cited as COMPENDIUM]. Later relevant materials include the Convention on the Protection of Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) of 1976, *id.* at 370; and the UNESCO Recommendation for the Protection of Movable Cultural Property of 1978, *id.* at 386. In 1985 the Council of Europe promulgated the European Convention on Offences Relating to Cultural Property, ETS No. 119, which adds penal to the more usual civil enforcement of national cultural property retention laws.

The basic purpose of UNESCO 1970, as its title indicates, is to inhibit the "illicit" international trade in cultural objects. The parties agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and transfer of ownership" of cultural property (Article 2), agree that trade in cultural objects exported contrary to the law of the nation of origin is "illicit" (Article 3), and agree to prevent the importation of such objects and facilitate their return to source nations (Articles 7, 9 and 13).<sup>41</sup>

As of this writing, 58 nations have become parties to UNESCO 1970. Of these, only two could be classified as major market nations: the United States and Canada. None of the other market nations, such as Belgium, France, Germany, Japan, the Netherlands, the Scandinavian nations and Switzerland, are parties.<sup>42</sup> Most source nations, however, many of them in the Third World, are parties. The reason for this disparity lies in the Convention's purpose: to restrain the flow of cultural property from source nations by limiting its importation by market nations. It is true that the Convention applies only to the "illicit" international traffic in cultural property, but since many source nations have policies that, in effect, prohibit *all* export of cultural property, the distinction as to them is not significant.

By ratifying UNESCO 1970, a market nation commits itself to forgo the further importation of some kinds of cultural property from those source nations that are parties. Why should it do so? The Preamble to the Convention sets out a series of more or less related propositions that state the case for international action, of which the core is the following: "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting" (emphasis added). The concern is that unauthorized, clandestine excavations and removals are almost always undocumented. A Mayan stele torn from an undeveloped, undocumented site in the jungle of Belize and smuggled to Switzerland to be sold becomes anonymous. Both it and the site have been deprived of valuable archaeological and ethnological information that would have been preserved had the removal been properly supervised and documented, or had the stele remained in place.<sup>43</sup>

<sup>41</sup> UNESCO 1970 imposes other obligations on the parties: to take steps to ensure the protection of their own cultural property by setting up appropriate agencies, enacting laws and regulations, listing works of major cultural importance, supervising excavations and through education and publicity (Arts. 5, 12 and 14). In general, however, these provisions are much less significant in the international discussion and activity under the Convention. The principal effort is to enlist the market nations to support the restrictions on export adopted by the source nations.

<sup>42</sup> As this is written, France is reported to be taking the necessary steps to join UNESCO 1970, and the Federal Republic of Germany to be "actively investigating the notion." Letter of Apr. 22, 1986 from Professor P. J. O'Keefe, University of Sydney, to the writer. Professor O'Keefe also reports that Denmark is introducing legislation pursuant to becoming a party, as is Australia.

<sup>43</sup> This concern is more fully developed in LEAGUE OF NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON EXCAVATIONS 1 ff. (1937); the UNESCO Recommendation Concerning the Preservation of Property Endangered by Public or Private Works of 1968, UNESCO Doc. CFS.68/vi.14x/AFSR; and the European Convention on the Protection of the Archaeological Heritage, May 6, 1969, ETS No. 66, COMPENDIUM, *supra* note 40, at 365.

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

Recent international discussions of cultural property law and policy have been carried on in a special language. One of its characteristics is a tendency toward euphemism. Thus, UNESCO 1970 is largely about national retention of cultural property, but the term "retention" is seldom used. Instead, the dialogue is about "protection" of cultural property—i.e., protection against removal. For example, another clause of the Preamble states: "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 illegal export." One way to read this language is that it imposes an obligation on source nations to care for cultural property in their national territories, and Article 5, paragraphs (c) and (d) of the Convention are consistent with that interpretation.<sup>44</sup>

An alternative reading, however, is that these words justify national retention of cultural property. That is indeed the prevailing interpretation among source nations; the notion that they are obligated by UNESCO 1970 does not arise. When interpreted in this way, the quoted language of the Preamble might be paraphrased as follows: "Considering that it is right for every State to retain cultural property existing within its territory and to prevent its theft, clandestine excavation and export." This intention is made clear in Article 2 of the Convention, which states: "The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property. . . ."

The emphasis on national retention of cultural property is legitimized throughout UNESCO 1970 by use of the term "illicit," which is given an expansive meaning. Article 3 defines as "illicit" any trade in cultural property that "is effected contrary to the provisions adopted under this Convention by the States Parties thereto." Thus, if Guatemala were to adopt legislation and administrative practices that, in effect, prohibited the export of all pre-Columbian artifacts, as it has done, then the export of *any* pre-Columbian object from Guatemala would be "illicit" under UNESCO 1970. Several source nations that are parties to UNESCO 1970 have such laws. This feature of UNESCO 1970 has been called a "blank check" by interests in market

<sup>44</sup> Examples of international instruments that clearly do seek to impose obligations on nations to protect cultural property are: UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage of 1972, UNESCO Doc. 17/C/107 (Nov. 15, 1972); and UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972, 27 UST 37, TIAS No. 8226, 1037 UNTS 151.

nations; the nation of origin is given the power to define "illicit" as it pleases. Dealers, collectors and museums in market nations have no opportunity to participate in that decision. That is why legislation implementing United States adherence to UNESCO 1970 took 10 years to enact.<sup>45</sup> Dealer, collector and museum interests sought, with some success, to limit the effect on the trade in cultural property that would follow if the United States automatically acquiesced in the retentive policies of some source nations.<sup>46</sup>

Since the promulgation of UNESCO 1970, the attention of source nations has turned to what is now generally called "repatriation": the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed). Beginning in 1973, the United Nations General Assembly adopted a series of resolutions calling for the restitution of cultural property to countries of origin.<sup>47</sup> In 1978 UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation,<sup>48</sup> and in 1983 the Council of Europe Parliamentary Assembly adopted a Resolution on Return of Works of Art.<sup>49</sup> The premises of the repatriation movement are a logical extension of those that underlie UNESCO 1970: cultural property belongs in the source country; works that now reside abroad in museums and collections are wrongfully there (the result of plunder, removal by colonial powers, theft, illegal export or exploitation) and should be "repatriated."<sup>50</sup>

#### A COMPARISON OF HAGUE 1954 AND UNESCO 1970

We have seen that the Hague 1954 Preamble speaks of "the cultural heritage of all mankind." UNESCO 1970, however, in its Preamble and

<sup>45</sup> The United States ratified UNESCO 1970 in 1972 but reserved its obligations under the Convention until the enactment by Congress of implementing legislation. The result of a number of efforts and much negotiation, the Convention on Cultural Property Implementation Act was enacted in 1983 as Pub. L. No. 97-446, 96 Stat. 2351 (codified at 19 U.S.C. §§2601-2613 (West Supp. 1986)).

<sup>46</sup> The provisions of UNESCO 1970 were moderated by the participation of the United States in its drafting. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 370 (1982), republished as THE INTERNATIONAL TRADE IN ART 94 (1982). Their effects were further limited in the United States by reservations and understandings attached to U.S. ratification of the Convention in 1972. J. MERRYMAN & A. ELSEN, *supra* note 17, at 2-180 ff. The provisions of the Cultural Property Implementation Act, *supra* note 45, further limit the effects of UNESCO 1970 in the United States by requiring an independent U.S. investigation and determination of the gravity of the allegedly illicit traffic before action is taken under the Convention.

<sup>47</sup> For a discussion of these resolutions and other components of the repatriation movement, see Nafziger, *The New International Framework for the Return, Restitution, or Forfeiture of Cultural Property*, 15 N.Y.U.J. INT'L L. & POL. 789 (1983).

<sup>48</sup> See *id.*

<sup>49</sup> Eur. Parl. Ass., Texts Adopted by the Assembly, 35th Ordinary Sess., pt. 2 (Sept. 26-Oct. 6), Res. No. 808 (1983).

<sup>50</sup> I will discuss the repatriation movement and the assumptions that underlie use of the term "repatriation" in more detail in another article.



throughout, emphasizes the interests of states in the "national cultural heritage." Hague 1954 seeks to preserve cultural property from damage or destruction. UNESCO 1970 supports retention of cultural property by source nations. These different emphases—one cosmopolitan, the other nationalist; one protective, the other retentive—characterize two ways of thinking about cultural property. I refer to them as "cultural internationalism" and "cultural nationalism." At this writing, cultural nationalism dominates the field; it provides the reigning assumptions and terms of discourse in UNESCO and other international organizations, in national forums and in the literature on cultural property.<sup>51</sup>

In some cases the two approaches reinforce each other, but they may also lead in different and inconsistent directions. Thus, in discussing the Greek demand for return of the Elgin marbles from England, the case is easy if only the assumptions and terms of cultural nationalism apply: the marbles are Greek, belong in Greece and should be returned to Greece. But if cultural internationalism is introduced into the discussion, the question becomes much more complex and interesting.<sup>52</sup> The same is true of almost any other prominent cultural property claim: e.g., should Mexico return the Mayan Codex, stolen by a Mexican (a lawyer!) from the Bibliothèque Nationale in Paris, to France?<sup>53</sup>

The differences between cultural nationalism and internationalism become particularly significant in cases of what might be called "destructive retention" or "covetous neglect." For example, Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve or display.<sup>54</sup> If endangered works were moved to some other nation, they might be better preserved, studied and displayed and more widely viewed and enjoyed. To the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its "loss" through export. To a cultural internationalist, the export of threatened artifacts from Peru to some safer environment would be clearly preferable to their destruction through neglect if retained. For example, if they were in Switzerland, Germany, the United States or some other relatively wealthy nation with a developed community of museums and collectors knowledgeable about and respectful of such works, they could be better preserved. By preventing the transfer of fragile works to a locus of higher protection while inadequately preserving them at home, Peru endangers

<sup>51</sup> The leading works include: P. O'KEEFE & L. PROTT, *supra* note 3; Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L. J. 1089 (1976); B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY* (1974); K. MEYER, *THE PLUNDERED PAST* (1973).

<sup>52</sup> See Merryman, *supra* note 5.

<sup>53</sup> According to newspaper reports, the Mexican Government now has the Codex and has refused to return it to Paris, claiming that it was stolen from Mexico in the 19th century. Riding, *Between France and Mexico, a Cultural Crisis*, Int'l Herald Tribune, Aug. 31, 1982, at 1; San Francisco Chron., Aug. 19, 1982, at 41.

<sup>54</sup> Compare *Peru Wages Campaign to Halt Trade in Stolen Treasures*, N.Y. Times, Oct. 4, 1981, at 23; with Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, §C, at 14, col. 1.

mankind's cultural heritage; hence "destructive retention" or "covetous neglect."

Cultural nationalism and internationalism also diverge in their responses to the practice of hoarding cultural objects, a practice that, while not necessarily damaging to the articles retained, serves no discernible domestic purpose other than asserting the right to keep them.<sup>55</sup> Thus, multiple examples of artifacts of earlier civilizations reportedly are retained by some nations although such works are more than adequately represented in domestic museums and collections and are merely warehoused, uncataloged, uninventoried and unavailable for display or for study by domestic or foreign scholars. Foreign museums that lack examples of such objects would willingly acquire, study and display (and conserve) them. Foreign dealers and collectors would gladly buy them.

Cultural nationalism finds no fault with the nation that hoards unused objects in this way, despite the existence of foreign markets for them. Cultural internationalism, however, urges that objects of that kind be made available abroad by sale, exchange or loan. In this way, the achievements of earlier cultures of the source nation could be exhibited to a wider audience, the interest of foreigners in seeing and studying such works (their "common cultural heritage") could be accommodated, and the demand that is currently met through the illicit market could be partially satisfied by an open and licit trade in cultural property. It is widely believed that a number of source nations indiscriminately retain duplicates of objects beyond any conceivable domestic need, while refusing to make them available to museums, collectors and dealers abroad.<sup>56</sup> They forbid export but put much of what they retain to no use. In this way, they fail to spread their culture, they fail to exploit such objects as a valuable resource for trade and they contribute to the cultural impoverishment of people in other parts of the world.<sup>57</sup>

A further criticism of retentive cultural nationalism is that by prohibiting or unduly restricting a licit trade in cultural property, source nations assure

<sup>55</sup> I will discuss the possible motivations for such hoarding in a separate article; cf. note 5 *supra*.

<sup>56</sup> Consider the following language from the UNESCO Recommendation Concerning the International Exchange of Cultural Property, *supra* note 19:

Considering that many cultural institutions, whatever their financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and that some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries. . . .

Other provisions of this interesting UNESCO Recommendation urge nations to exchange cultural property with institutions in other nations and are clearly aimed at the hoarding tendency described in the text. As a recommendation, it imposes no legal obligation and, out of tune with the dominant retentive nationalism, has had no discernible impact on source nation practice.

<sup>57</sup> An eminent colleague has suggested that the expression "cultural impoverishment of people in other parts of the world" is specious and/or excessive. Perhaps. On reflection, however, I think it is valid and, though dramatic, accurate. If the notion of a common human cultural heritage is taken seriously, and if access to the objects that compose it is necessary to its enjoyment, as many believe, then hoarding has the effect I describe.

the existence of an active, profitable and corrupting black market.<sup>58</sup> Historically, the tighter the export control in the source nation, the stronger has been the pressure to form an illicit market. Source nations generally take the contrary approach, citing the existence of the illicit market as evidence of the need for international controls. The Preamble of UNESCO 1970 incorporates the source nations' argument: the entire Convention is based on the premise that the illicit traffic can be significantly reduced by adopting more extensive legal controls. Opposite assumptions are at work: to the source nations and UNESCO, the existence of the illicit trade justifies further legal controls. To the critic, the extension of legal controls makes more of the traffic illegal and thus, perversely, makes the argument of the source nations and UNESCO self-inflating: more controls produce more illegal trade, which calls for more controls, and so it escalates.

There is ample empirical evidence that retentive laws have not effectively limited the trade in cultural property, but have merely determined the form that traffic takes and the routes it follows. There is little reason to suppose that the illicit traffic will cease as long as the world's peoples have an appetite for access to representative collections of works from the great variety of human cultures. That appetite is the source of the demand for cultural objects. The demand is substantial and, it appears, growing.<sup>59</sup>

If it is true that the demand for cultural objects guarantees that *some* illicit traffic will occur, then the arguments for controlled legalization of the traffic become impressive. For example, Mayan sites in Mexico and Central America currently are mistreated by *huaqueros* who, out of ignorance and the need to act covertly and in haste, do unnecessary damage both to what they take and to what they leave. Their activities, being surreptitious, are not docu-

<sup>58</sup> See discussion in Bator, *supra* note 46, at 317 ("Ten easy lessons on how to create a black market"); Merryman with Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, J. ARTS MGMT. & L., No. 3, Fall 1982, at 5, 16.

<sup>59</sup> One need not approve of the traffic, or of some of the people who carry it on (avaricious dealers, corrupt police and customs officials, ethically insensitive collectors, cynically acquisitive museum professionals), to observe its existence and comment on its implications. Still, a blanket condemnation of those who participate in the traffic may be too easy: illegal excavations may reveal important works that would otherwise remain hidden; smuggling may save works that would otherwise be destroyed through covetous neglect; the laws prohibiting export may be senselessly overinclusive; etc.

Art dealers are commonly blamed not only for dealing knowingly in illegally obtained cultural objects but for encouraging, instigating, and even (it is sometimes alleged) planning and funding illegal excavations and smuggling. An aroused art historian has complained to me that by writing books on antiquities an important New York dealer has encouraged the demand for, and hence the illegal trade in, cultural objects. The role of dealers in the illegal traffic can be seen in contrasting ways. One view is that the dealer merely serves an already existing demand. The other blames the dealers for creating and nurturing the demand. Some combination of both effects undoubtedly exists, but it is difficult, if one looks at the history of the great private and public collections, to lay major blame for creation of the demand at the feet of dealers. Dealers bring the cultural artifact and the collector or museum together and undoubtedly encourage the demand for their own services and inventories. But the basic demand has its own existence, growing out of people's interest in and curiosity about the human past, nurtured by education, scholarship, and the whole apparatus of museums and exhibitions. Dealers are an easy target, but they are not the source of the problem.

mented; consequently, the objects they remove become anonymous, deprived by the act of removal of much of their value as cultural records. Would it be better if such activities were conducted openly, with the *huaqueros*, doing legally what was formerly illegal, supervised by professionals?<sup>60</sup> In this way, unnecessary physical damage could be avoided and the work of removal documented. At present, the money paid for illegally removed works goes in part to the *huaqueros* but, in large part, to bribe police and customs officials and to make profits for the criminal entrepreneurs, local and foreign, who conduct the traffic. Would it be better if the income from cultural property sold abroad were available in the nation of origin to support the work of its archaeologists, anthropologists and other professionals, as well as the work of supervised *huaqueros*? Objects that merely replicate works already adequately represented in the source nation are expensive to store properly and constitute a valuable, but unexploited, resource for international trade. Would it be better if such objects were sold and the proceeds used to enrich archaeological, ethnographic and museum activities in the nation of origin?

Some nations with strongly retentive policies clearly lack the resources or the present inclination to care adequately for their extensive stocks of cultural objects. To the cultural internationalist (and to many cultural nationalists), this is tragic. Such objects could be sold to museums, dealers or collectors able and willing to care for them. One way that cultural objects can move to the locus of highest probable protection is through the market. The plausible assumption is that those who are prepared to pay the most are the most likely to do whatever is needed to protect their investment. Yet the UNESCO Convention and national retentive laws prevent the market from working in this way. They impede or directly oppose the market and thus endanger cultural property.<sup>61</sup> It is not necessary, however, to sell pieces of the nation's cultural heritage in order to exploit it. Such objects could be traded to foreign museums for works that would enrich the ability of each nation to expose its own citizens to works from other cultures. They could be deposited on long-term loan in foreign institutions able and willing to care for and display them.

#### A ONE-SIDED DIALOGUE

I have emphasized the criticisms of retentive cultural nationalism for two reasons. One is that I find these criticisms persuasive. The more important

<sup>60</sup> See the description of experiments with this strategy in Italy and Germany in J. MERRYMAN & A. ELSEN, *supra* note 17, at 2-112 ff.

<sup>61</sup> The UNESCO Recommendation Concerning the International Exchange of Cultural Property of 1976, *supra* note 19, expresses a clear antimarket bias in its Preamble, stating:

[T]he international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.

The recommendation only supports exchanges between institutions, rejecting sales and any form of transaction with collectors and dealers. The market argument is obviously a controversial one and, in any case, needs much fuller discussion, which I will provide in another place.

reason, however, is that in the 1970s and 1980s, the dialogue about cultural property has become one-sided. Retentive nationalism is strongly and confidently represented and supportively received wherever international cultural property policy is made. The structure and context of such discussions, at international organizations and conferences, is congenial to presentation of the position embodied in UNESCO 1970, while the interests represented in Hague 1954 have no prominent or convenient voice. The international agencies that might be expected to represent the more cosmopolitan, less purely nationalist, view on cultural property questions—the United Nations General Assembly and UNESCO in particular—are instead dominated by nations dedicated to the retention and repatriation of cultural property. First World–Third World and capitalist-socialist politics combine with romantic Byronism<sup>62</sup> to stifle the energetic presentation of the views of market nations. As a result, the voice of cultural internationalism is seldom heard and less often heeded in the arenas in which cultural policy is made.

The danger is that UNESCO 1970, with its exclusive emphasis on nationalism, will further legitimize questionable nationalist policies while stifling cultural internationalism. The only hint of recognition of these realities in UNESCO 1970 occurs in a pallid and generally ignored clause in the Preamble describing the benefits of the international interchange of cultural property: "Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations." The rest of the Convention, including the Preamble, provides unqualified support for retentive cultural nationalism.<sup>63</sup>

In the United States, a major cultural property market nation, the tide runs strongly against the forces of cultural internationalism. The United States has never become a party to Hague 1954.<sup>64</sup> It has, however, ratified UNESCO 1970 and enacted implementing legislation under it.<sup>65</sup> The United States has also supported the retentive nationalist position through a bilateral treaty with Mexico,<sup>66</sup> executive agreements with Peru<sup>67</sup> and Guatemala,<sup>68</sup>

<sup>62</sup> The element of romance in cultural nationalism and the influence of Byron in creating and nurturing it are discussed in Merryman, *supra* note 5, at 1903–05.

<sup>63</sup> To UNESCO's credit, some efforts at a broader, less exclusively nationalistic approach have been made in some of its recommendations, previously cited in this article. See in particular the Recommendation Concerning the International Exchange of Cultural Property, *supra* note 19. That instrument's formal status as a mere recommendation, however, combined with its antimarket bias, deprives it of any practical force.

<sup>64</sup> For an exchange of correspondence setting out the official reasons for U.S. refusal to sign Hague 1954, see J. MERRYMAN & A. ELSÉN, *supra* note 17, at 1-75–1-77.

<sup>65</sup> See note 45 *supra*.

<sup>66</sup> Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States–Mexico, 22 UST 494, TIAS No. 7088, 791 UNTS 313.

<sup>67</sup> Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, United States–Peru, TIAS No. 10136.

<sup>68</sup> Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, United States–Guatemala (not yet published).

legislation controlling the importation of pre-Columbian monumental sculpture and murals,<sup>69</sup> executive action,<sup>70</sup> aggressive administrative action by the U.S. Customs Service<sup>71</sup> and criminal prosecution of smugglers.<sup>72</sup> Indeed, the United States (together with Canada) is of all cultural property market nations the most strongly committed, both in declaration and action, to the enforcement of other nations' retentive laws and policies,<sup>73</sup> though it freely permits the export of cultural property from its own national territory.<sup>74</sup>

This paradoxical policy began in the late 1960s, when the United States decided to participate in drafting what eventually became UNESCO 1970.<sup>75</sup> Until then, the national policy had been consistent: works of art and other cultural property could be freely imported without duty and could be freely exported. The United States was committed to free trade in cultural property. Works stolen abroad and brought into the United States could of course be recovered by their owners in civil actions before state or federal courts, as had long been the rule in all nations.<sup>76</sup> The novelty was the gradual

<sup>69</sup> Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§2091-2095 (1982)).

<sup>70</sup> See discussion of "The Boston Raphael" in J. MERRYMAN & A. ELSEN, *supra* note 17, at 2-7 ff.

<sup>71</sup> Fitzpatrick, *A Wayward Course: The Lawless Customs Policy toward Cultural Property*, 15 N.Y.U.J. INT'L L. & POL. 857 (1983). Proposed legislation that would limit Customs Service activities is at this writing before Congress but appears unlikely to pass.

<sup>72</sup> *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). Both cases were prosecutions under a U.S. statute punishing transportation of stolen property in interstate or foreign commerce. McClain had illegally removed pots and beads from Mexico; Hollinshead had illegally removed a stele from a Mayan site, Machiquila, in Guatemala. Both had brought the objects into the United States for sale. In both cases, the courts treated the removals in violation of the foreign laws as "thefts" under the U.S. statute and upheld the convictions.

<sup>73</sup> Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U.J. INT'L L. & POL. 757 (1983).

<sup>74</sup> Freedom of export of cultural property from the United States was significantly limited for the first time in 1979 by §470ee of the Archaeological Resources Protection Act, Pub. L. No. 96-95, 93 Stat. 721, 724 (codified at 16 U.S.C. §470aa-470ll (1982)), which, however, applies only to objects illegally taken from "public lands and Indian lands"—i.e., to lands under federal ownership or protective jurisdiction.

<sup>75</sup> For a brief explanation of the reasons for U.S. involvement in the project that culminated in UNESCO 1970, see Bator, *supra* note 46, at 370.

<sup>76</sup> A recent example is *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (two Dürer portraits stolen at the end of World War II ordered returned to East Germany). Such actions are of course subject to the normally applicable rules protecting good faith purchasers and to rules limiting the time within which actions to recover property may be brought. The International Institute for the Unification of Private Law in Rome is currently studying proposals that good faith purchasers of cultural property should receive less protection than is normally given them under the laws of most European nations. The proposals would bring the European rules closer in effect to those in the United States, which are generally less protective of bona fide purchasers and thus more protective of owners. There is a brief description of the Institute's work on this topic in 1986 REVUE INTERNATIONALE DE DROIT COMPARÉ 130-31. As to limitation of actions, a bill entitled "The Cultural Property Repose Act" is at this writing before the United States Congress. If enacted, it would sharply reduce the period of the applicable statute of limitations in actions brought by foreign owners to recover stolen cultural objects. It appears unlikely to pass. A similar bill passed by the New York legislature was vetoed by the Governor on July 28, 1986. N.Y. Times, July 29, 1986, at 21.

introduction, over a period beginning around 1970, of a growing number and variety of restrictions on the importation of cultural property in response to the retentive policies of source nations. Despite the occasionally successful efforts of collector, dealer and museum interests to moderate this response, the general direction in the United States has been one of support for cultural nationalism.

### CONCLUSION

Both ways of thinking about cultural property are in some measure valid. There are broad areas in which they operate to reinforce each other's values. Those are the easy cases. The interesting ones arise when the two ways of thinking lead in different directions. Then distinctions have to be made, questions require refinement and it becomes necessary to choose. Thus, any cultural internationalist would oppose the removal of monumental sculptures from Mayan sites where physical damage or the loss of artistic integrity or cultural information would probably result, whether the removal was illegal or was legally, but incompetently, done.<sup>77</sup> The same cultural internationalist, however, might wish that Mexico would sell or trade or lend some of its reputedly large hoard of unused *Chac-Mols*, pots and other objects to foreign collectors<sup>78</sup> and museums, and he might be impatient with the argument that museums in other nations not only should forgo building such collections but should actively assist Mexico in suppressing the "illicit" trade in those objects. In principle, any internationalist would agree that paintings should not be stolen from Italian churches for sale to foreign (or domestic) collectors or museums. But if a painting is rotting in the church from lack of resources to care for it, and the priest sells it for money to repair the roof and in the hope that the purchaser will give the painting the care it needs, then the problem begins to look different.<sup>79</sup> Even the most dedicated cultural nationalist will find something ludicrous in the insistence that a Matisse painting that happened to be acquired by an Italian collector had become an essential part of the Italian cultural heritage.<sup>80</sup>

More fundamentally, the basis of cultural nationalism and the validity of its premises seem to require reexamination. In a world organized into nation-

<sup>77</sup> Although, if the site is a neglected one and the removal saves works that would otherwise crumble away, a crude and undocumented job of removal might still be preferable from the cultural internationalist point of view.

<sup>78</sup> A distinguished colleague has questioned the desirability of permitting such works to fall into the hands of collectors because they will not be available for public viewing and study, and the opportunity to monitor the quality of care they receive is limited. These are important considerations, but if the alternative is to leave them in a place where they are unavailable for viewing and study and receive no attention from qualified conservators, a collector may be preferable. Eventually, many works of museum quality in the hands of private collectors find their way to museums.

<sup>79</sup> See Stewart, *Two Cheers for the Tombaroli*, NEW REPUBLIC, Apr. 28, 1973, at 21 ("per piacere, rubatelo!"); Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, in UNITED NATIONS SOCIAL DEFENCE RESEARCH INSTITUTE, *THE PROTECTION OF THE ARTISTIC AND ARCHAEOLOGICAL HERITAGE* 164 (1976).

<sup>80</sup> *Jeanneret v. Vichy*, 693 F.2d 259 (2d Cir. 1982).

states and in a system of international law in which the state is the principal player, an emphasis on nationalism is understandable. But the world changes, and with it the centrality of the state. A concern for humanity's cultural heritage is consistent with the emergence of international laws and institutions protecting human rights.<sup>81</sup> A slighter emphasis on cultural nationalism is consistent with the relative decline of national sovereignty that characterizes modern international law. In the contemporary world, both ways of thinking about cultural property have their legitimate places. Both have something important to contribute to the formation of policy, locally, nationally and internationally, concerning pieces of humanity's material culture. But where choices have to be made between the two ways of thinking, then the values of cultural internationalism—preservation, integrity and distribution/access<sup>82</sup>—seem to carry greater weight. The firm, insistent presentation of those values in discussions about trade in and repatriation of cultural property will in the longer run serve the interests of all mankind.

<sup>81</sup> See UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS, STUDIES AND DOCUMENTS ON CULTURAL POLICIES NO. 3 (1970).

<sup>82</sup> See Merryman, *supra* note 5, at 1916–21.