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Recommended Citation
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Protection and Reversion of Cultural Property: Issues of Definition and Justification

The proper treatment of cultural property, in general, and of movable cultural property, in particular, has long figured as a concern of public international law. Beginning with its disposition under the law of war, appreciation for its vital contribution to mankind's identity prompted international recognition of its inviolability. From ancient times until the Second World War, the protection acknowledged (although not always conferred) was not absolute. By contrast, although present law admits exceptions to protective provisions on the ground of military necessity, it imposes otherwise unconditional obligations upon states to preserve against mutilation or destruction all forms of cultural property in the event of hostilities.

The United Nations regime normatively supposes the peaceful coexistence of states members of an international community. As part of the postwar arrangement, both states which had and had not participated in the fighting agreed that one of the fundamental aims of the reconstituted community was to repair cultural property damaged and to preserve from future natural and man-made destruction the cultural property remaining. Thus, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was born.

The emphasis shifted from the negative responsibilities of particular states toward discrete elements of cultural property to a positive collective...
responsibility toward a common cultural heritage, exercised nationally where necessary, but ever against the background of a larger community. Two critical problems confronted the United Nations: (1) the hemorrhaging from primarily Third World states of crucial items of their national patrimony as the result of a brisk illicit traffic in the goods; and (2) the confrontation of the demands of largely formerly colonized states for the return or restitution of those items of their cultural heritage essential to their self-understanding as a people. Both problems forced members of the international community to act collectively through the promulgation and pronouncement of international, supranational, and regional instruments and declarations, as well as on a bilateral and unilateral basis to regulate and safeguard a recognized common cultural heritage.

In order effectively to meet their obligations, however, it is necessary for states to reach an understanding as to what constitutes cultural property forming part of the common cultural heritage, in addition to the underlying justification for its inclusion therein. The intention of this article is to describe that process of definition, originating as a set of largely negative duties in the law of war and moving toward the undertaking of predominantly affirmative responsibilities in the law of peace, expanding incrementally as the circle of the international community grows to embrace increasingly diverse elements. It is only a definition, loosely circumscribed and capable of accepting novel content, which will survive the variegated composition of the contemporary community. The individual members of that community may accept the definition precisely because its contours and content have been formed and informed by a rich history, the elements of which are in many respects, shared.

I. Treatment of Cultural Property up to 1947

A. Practice before the Napoleonic Wars

The current precision of definition of cultural property grew painfully through a long history of removal of cultural items during war. Despite occasional protests in classical antiquity, military victors routinely removed cultural items of the greatest importance from a city with the intent of weakening it morally or spiritually. Although the Catholic Church, to vindicate its supranational position and the ideal of a Christian commonwealth, attempted above all to preserve property affected with a religious interest from deprecation, pillage continued largely unabated throughout

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the Middle Ages. The general rule emerging from this practice was discreteo jus praedae: the victor acquired a title legally equivalent to gift or purchase over property taken in war. By the Renaissance this rule had been qualified, with respect only to immovables, by the doctrine of jus postlimini, under which title could be revested in the original owner under certain conditions.

During the eighteenth century, Vattel, building on the proposals of certain seventeenth-century jurists to extend previous existing protective doctrines, undertook to narrow the scope of warfare: he maintained that a belligerent was permitted to appropriate enemy property only to the extent strictly necessary to conduct military operations, exact indemnification, or establish a secure peace. Strikingly, Vattel argued ecumenically, condemning the ravaging of "structures which honor mankind" and "works cherished for their beauty." His protests were not wholly lacking in contemporary support: treaty practice had already begun to show more regard for cultural property, now seen in terms of a sovereign's exercise of right over his patrimony, albeit limited to the more noteworthy items of his personal collection. Treaties from both the seventeenth and the eighteenth centuries showed an increasing willingness to provide for the return or exchange of cultural property (notably archives) between former belligerents.

B. FROM THE NAPOLEONIC PERIOD TO WORLD WAR I

The Napoleonic Wars interrupted eighteenth-century developments. French forces abroad plundered on an unprecedented scale. Their ex-

2. Body of Canon Law, quoted in Nahlik, Biens Culturels et Conflict Armé, 1967 Académie de Droit International 65, 66, 68. Charlemagne, practically alone, acknowledged the exceptional character of cultural property situated on subdued territory. Out of respect for the relationship between the cultural heritage of the conquered and their cultural property, he refrained from removing cultural property from Italian territory.

3. See, e.g., F. De Vitoria, La relecciones De Indis y De Iure belli (1981).


5. E. De Vattel, 3-4 Le Droit des Gens 168-69 (author's translation).


7. Declaration of the Empress Maria Theresa (Vienna), Sept. 11, 1772, Austria-Poland; Declaration of King Frederick II (Berlin) Sept. 13, 1772, Prussia-Poland; Declaration of St. Petersberg, Sept. 18, 1772, Russia-Poland.
actions did not rest on the customary right to spoils alone. In a rather
perverse reversal of eighteenth-century theory, post-revolutionary France
viewed itself as a pan-European *parens patriae*, an image derived to some
extent from the recent enthusiastic "rediscovery" and recreation of the
European classical heritage. France, as the centre of liberty and enlight-
ened thought, saw herself as the natural repository for the cultural trea-
sures of conquered states. Sensitive to both the lingering influence of
eighteenth-century restrictions on *jus in bello* and the nascent force of
nationalism, France sought to legalize a number of its seizures. Some
of the transfers of cultural property were described in armistice conven-
tions and peace treaties as war reparations or contributions.

Napoleon's conduct was heavily criticized, particularly within France.
Pleading the concept of a common cultural heritage (albeit to Europe
alone) from the standpoint of mutual appreciation of multiple cultural
heritages, the scholar Quartrième de Quincy wrote:

The arts and sciences have long formed in Europe a republic whose members,
bound together by the love of and the search for beauty and truth, which from
their social contract are much less likely to isolate themselves in their respective
countries than to bring the interests of these countries into closer relation, from
the cherished point of view of universal fraternity. It is as a member of this
universal republic of arts and sciences and not as an inhabitant of this or that
nation, that I shall discuss the concern of all parts and the preservation of the
whole. What is this concern? It is a concern for civilization, for perfecting the
means of attaining happiness and reason: in a word, for the improvement of
the human race. Everything that can build up toward this end belongs to all
peoples; no one of them has the right to appropriate for itself, or to dispose of
it arbitrarily. . . .

Following Napoleon's defeat, the allies debated the disposition of the
art collected in Paris. Some argued that overturning formally valid treaties
would harm the integrity of treaty law. But Lord Castlereagh, positing
the invalidity of agreements exacted under duress and stressing the con-
nection of cultural objects to their territory of origin by ties alike of
sovereignty and artistic heritage, persuaded the other powers to enforce


10. C. de Visscher, *International Protection of Works of Art and Historic Monuments*, 3590 U.S. Dep't St. Pub. 823, 824 (1949) (quoting Quartrième de Quincy, Lettres au général Miranda sur le préjudice qu'occasionairaient aux arts et à la science le déplacement des monuments de l'art de l'Italie, le démembrement de ses collections et la spoliation de ses collections, galeries, musées, etc. (1796)).
restitution of the French removals. Various states then pressed their claims for restitution, grounded both on the British argument and on the standard eighteenth-century principle of the immunity of certain types of cultural property to belligerent appropriation.¹¹

Before the outbreak of the next great European war a century later, the Hague Conventions of 1899¹² and 1907¹³ had codified the law of warfare. This well-intentioned project summed up, among other things, a number of developments in cultural property law. It drew particularly heavily upon the principles enunciated in two mid-nineteenth-century instruments: the Lieber Code, promulgated to regulate the conduct of the Union Armies in the Civil War,¹⁴ and the unratified Declaration of the pan-European Brussels Conference of 1874.¹⁵ The Hague Conventions reinforced the principle that a state retains sovereignty over its national patrimony; the occupying power, far from having the old rights of displacing the local sovereign, was now limited in dealing with most categories of property to a mere right of usufruct. Public property, unless specially exempted, could still be appropriated, provided that it was militarily necessary and that compensation was given; otherwise, only usufruct attached. All private property, on the other hand—and defined categories of cultural property in public ownership privileged owing to their being legally assimilated to private property—was immune from confiscation or pillage under any conditions, on pain of conviction of the confiscator for a war crime. Certain categories of cultural property were further protected from bombardment.¹⁶

¹¹. Id. at 824-25.
¹⁵. The Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, August 27, 1874, 65 B.F.S.P. 1110, 1 AM. J. INT'L L. SUPP. 96 (1902) [hereinafter Brussels Declaration].
¹⁶. Hague Convention 1907, supra note 13, Hague IV, art. 55 (right of usufruct), art. 56 (assimilation provision); Hague IX, arts. 5, 27 (bombardment provisions); see also 1. VÁSÁRHELYI, RESTITUTION IN INTERNATIONAL LAW 56 (1969).
Meanwhile, nineteenth-century state practice, predominantly with respect to the archives of partitioned or ceded territories, had established the basis for the integrity of collection doctrine. The notion is that cultural property, part of a national collection, which had been removed from the national patrimony of another state, may by virtue of its incorporation into that collection be deemed to have been integrated into the national patrimony of the second state. Length of repose of an item within a collection is not dispositive of a finding that the integrity of collection doctrine entitles the second state to claim ownership of the property. Rather it is that the item in combination with the others forms a unity of collection that ought not to be disturbed. This concept was extended into the field of strictly cultural property and given a new twist, as Austria undertook to transfer to Italy, in connection with the cession of the former Republic of Venice, "objects of art and science specially allocated to the ceded territory."  

C. THE POST-WORLD WAR I SETTLEMENT

The Central Powers grossly violated the cultural protection provisions of the Hague Conventions during the First World War. These outrages impelled scholars to denounce the destruction on the basis of a principle of common cultural heritage, of a conviction that the landmarks destroyed belonged not to a particular state, but to the world. Although hardly apparent in the immediate postwar settlement, this principle was to acquire vitality later. The postwar treaties, for their part, embodied a broad concept of respect for the national patrimony of a given state. Building upon nineteenth-century integrity of the collection doctrine, the relevant articles of the Treaties of Versailles and St. Germain stressed the reconstitution of artistic unities within the territory of their origin, even against subsequent bona fide purchasers of the property. Items of cultural property were returned to their former territories as reparations (rather than post-confiscation restitution), under article 247 of the Treaty of Versailles, thus demonstrating the preeminence of the preservation of a national patrimony. Articles 193 and 194 of the Treaty of St. Germain stipulated various reciprocal restitutions of cultural property seized after a desig-

17. See infra sec. I.C.; see also, e.g., Treaty of Frankfurt, June 10, 1871, Germany-France; Supplementary Convention, Dec. 11, 1871, Germany-France.
18. Treaty of Vienna, June 10, 1871, Austria-Italy, art. 18.
19. See e.g., Garner, Some Questions of International Law in the European War, 9 AM. J. INT'L L. 72, 108 (1915).
nated date. The treaty terms reflected respect for the integrity of collection doctrine that had its beginnings in the post-Napoleonic Wars settlements.

In litigation before the Reparations Commission established under the Treaty of St. Germain, sub silentio respect for the integrity of collection doctrine contributed to a rejection of the claims brought by Italy, Belgium, Poland, and Czechoslovakia against the late Austro-Hungarian Empire for the restoration of important items of cultural heritage. One may generally extract from the cases a sentiment in favor of the unity of a collection assembled and long held by the formerly multinational Austrian state, which had thereby become part of the national patrimony and could only be disturbed by claims more unambiguous in law and more compelling in equity than those in question.

In the settlement between Austria and Italy, by contrast, the principle of integrity of collection met an equally strong manifestation of the notion of a national patrimony: the concept of creative origin. The Convention for the Execution of the Italo-Austrian Treaty was grounded on three principles: (1) recognition of the value of the integrity of collection doctrine; (2) recognition of the nexus between collection and territory; and (3) recognition of the right of a state to its national patrimony. The disposition no doubt reflected the "special character" of the Italian claims, presumably owing to the unique historical reputation of Italy. The organic character of the albeit composite Viennese collection, however, was also undisputed. While Italy secured major restitutions, the two states attempted to find an equitable balance through classifications and by stipulating that no property acquired before the death of Emperor Joseph II, and no property freely transferred by individual owners, was to be subject to restitution.


22. The Committee reached its decisions solely on the basis of the public law in force at the time of the various transfers of cultural property in question, expressly refusing to take into account "justice, equity and good faith." (Treaty of St. Germain, supra note 20, at part VIII, at sec. 1, annex II). In this sense, the Committee may be charged with having reached its decision by applying political and legal concepts out-of-sync with those governing contemporary international relations. This must be borne in mind should analogies be drawn by tribunals called upon today to decide reversionary claims. On the other hand, and more positively, the claims may be read as sub silentio support by the court of the integrity of collection doctrine. Given the consistency of reasoning and outcome of the cases, the latter argument, with which the author is in accord, seems quite plausible.


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The same three principles informed article 177 of the Treaty of Trianon, which gave Hungary the right to negotiate with Austria for the return of the "intellectual patrimony" of Hungary. In the event, Hungary, deferring to Austrian insistence on the inviolability of the Austrian collections, reduced its original demands and claimed only objects of Hungarian origin. By contrast, a sense of national patrimony defined by place of creation informed the Treaty of Riga, which obliged Soviet Russia and the Ukraine to restore to Poland defined categories of cultural property removed since the first Partition, without regard to the circumstances of the removal or the nature of the prior owners.

D. INTERWAR DEVELOPMENTS

A series of legal projects in the period between the world wars aimed to adapt the Hague Conventions to new forms of warfare, to extend their protection to integrated districts of cultural importance, and ultimately to break cultural property issues free from exclusive attachment to the law of war. Out of these developments emerged the germ of a new understanding of the fundamental interests lodged in cultural property.

The development started with proposals advanced by the Netherlands Archeological Society while the war was ongoing and continued with a set of rules for aerial warfare drafted by a Commission of Jurists in 1923 and with the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), a forward-looking initiative by the Pan-American Union. Each successive project incorporated the terms of its predecessors. The one definitional innovation of these instruments was to classify as potentially protected property extensive ensembles of buildings—even whole districts—of historic interest. Far more significant was the overall justification offered by the several groups of framers for regimes of cultural property: they were now conceived to protect the "cultural treasures of all people." The Roerich


27. Id. at 839-40. The Commission was comprised of representatives from the British Empire, France, Italy, Japan, the Netherlands, and the United States of America.

28. The Roerich Pact, April 15, 1935, 167 L.N.T.S. 279, T.S. 899, 49 Stat. 3267 [hereinafter Roerich Pact]. The parties to the Roerich Pact were: Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, United States, and Venezuela.

29. C. de Visscher, supra note 10, at 839.
Pact, moreover, expressly recognized that a state's responsibility to protect its cultural patrimony extends to property in private as well as public ownership.\textsuperscript{30}

These forerunners guided the International Museums Office (IMO) in drafting, at the request of the League of Nations, an International Convention for the Protection of Historic Buildings and Works of Art in Times of War and accompanying Declaration. The draft further drew upon a report by the international jurist Charles de Visscher.\textsuperscript{31} The drafters, seeking a practical result, were anything but radical in their definitions. Rather, the interest again lay in the climate of justification. A national cultural heritage as expressed, in part, by its movable cultural property, is subject to an international regime of protection and preservation, for it contributes to a universally recognized common cultural heritage. This international involvement engenders, at once, a national right and a national responsibility. Each state has the right to require that all other states respect its cultural heritage and hence its cultural property, and the complementary obligation to protect and preserve its cultural heritage for the benefit of all mankind.\textsuperscript{32}

The initial impetus for an extension of international law from reactive or protective measures, concerned almost exclusively with war, to more active measures applicable in peacetime came from the national plane. The new field was, therefore, initially more nationalistic in temper than were contemporary developments in the law of war. By the 1930s a number of states had adopted legislation declaring their inalienable right to their national patrimonies. The laws generally classified as public property, and hence inalienable, property belonging to museums, public collections, and

\textsuperscript{30} Roerich Pact, supra note 28, preamble, art. 1.


\textsuperscript{32} The Draft Convention and Draft Declaration listed only historic buildings, monuments or groups of monuments, and works of art in their definitional sections, otherwise merely incorporating by reference the "stipulations of the Hague Conventions of 1899 and 1907 concerning the protection of buildings dedicated to the arts." Draft Convention for the Protection of Historic Buildings, supra note 31, at preamble, para. 3, arts. 1, 3, 5, 6; Draft Declaration Concerning the Protection of Historic Buildings, supra note 31, at preamble, para. 3, arts. 1, 3, 4, 5, 6.
the like; they also impressed a quasi-public character on inventoried cultural property in private hands, which was declared either inalienable or subject to preemptive purchase by the state.\footnote{33}

States began to recognize, however, the need for concerted action to overcome the limitations of their individual jurisdiction. Presently, the Assembly of the League of Nations directed the IMO to draft a convention to mandate "the repatriation of objects of artistic, historic or scientific interest, if lost, stolen or the subject of unlawful alienation or exportation."\footnote{34}
The International Commission on Intellectual Cooperation meanwhile submitted to the League its own recommendations for promoting interstate efforts to restore items of cultural property "abstracted from national collections or exported clandestinely," and conversely to limit export restrictions to works of "particular interest to a national patrimony." The Commission supported the right of a state to possession of its national patrimony even to the unconventional extent of disturbing the settled collection of another state. It balanced this stance with advice to keep open the channels of circulation of cultural property: partly to reduce clandestine trade, but apparently primarily to serve the then popular notion that the dispersion of a state's cultural heritage among foreign museums enriches the common mind and raises the reputation of the state from which the property originated.\footnote{35}

The IMO duly produced three draft conventions between 1933 and 1939, the last of which was submitted to a diplomatic conference.\footnote{36} This last interwar project enshrined three principles: (1) the state's absolute right to its national patrimony; (2) the importance of the integrity of collection doctrine; and (3) the primacy of restitution as a remedy for violation of that integrity. Further action on the convention was overtaken by the outbreak of World War II.


\footnote{34. See C. de Visscher, supra note 10, at 858-59.}

\footnote{35. See Foundoukidis, Report to the International Commission on Intellectual Co-operation by the Secretary General of the International Museums Office, 23-24 MOUSEION 242 (1933).}

E. WORLD WAR II AND ITS AFTERMATH

The confiscation of cultural property by the Axis Powers during the war exceeded any previous wartime seizures. The Allied Powers, which had enjoined their own forces to respect and protect cultural property, flatly refused to acknowledge the legality of the plunder. In a 1943 Declaration and again in the Final Act of the Bretton Woods Conference, the Allies condemned the Axis confiscations and, more radically, reserved the right to declare invalid, even as against neutral states, any transfer of cultural property from Axis occupied or controlled territory.

These principles were embodied in the armistice agreements and peace treaties. The Axis Powers were held responsible for ensuring the restitution of cultural property removed from its national territory. Some provisions compelled restitution of items removed prior to the Second World War. This practice was not unprecedented. What was novel was a requirement of substituted restitution, under which objects of cultural property irretrievably lost were to be replaced, as far as possible, by objects of the same kind and equivalent value. The substitution policy was not tantamount to mere reparations; its aim was the positive reconstruction of national patrimonies.

A second innovation of Allied wartime and post-war practice was to sweep away all former distinctions in vulnerability to belligerent seizure between public and private items of movable cultural property.

37. See NOBLECOURT, supra note 31, at 6. The United States created a Commission for the Protection and Salvation of Artistic and Historic Monuments in War Areas; it also organized an officers corps to deal with Monuments, Fine Arts and Archives.

38. See Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, Jan. 5, 1943, reprinted in NOBLECOURT, supra note 30, at 6; Final Act of the Bretton Woods Conference, June 22, 1944, which, inter alia, entreated “the Governments of the neutral countries to take immediate measures to prevent any disposition or transfer within their territory of assets looted by the Axis Powers.”


41. See, e.g., id. at 178. Defined categories of cultural property “produced by Yugoslav or Czechoslovak artists, writers or scientists” under state control as a result of Hungarian rule prior to 1919 were also subject to restitution. Where historically applicable, analogous clauses were found in the other peace treaties.

42. See, e.g., id. arts. 11, 24. Defined as cultural property were objects of artistic, historic, cultural, or archaeological value, original works of an artistic, literary, and scientific nature, produced by the nationals of the state from which they were removed, historical archives, libraries, historic documents, and antiquities.

43. See NOBLECOURT, supra note 31, at 6; supra notes 38-41; Hague Conventions of 1899 and 1907, supra notes 12-13.
publicly held had to be dealt with at the governmental level. Where possible, the Axis Powers were expected to assist with third state restitutions.\textsuperscript{44} Finally, the Nuremberg Tribunal found guilty the four men charged with the execution of Hitler's orders of January 1940, which had resulted in the "plunder of both public and private property throughout the invaded countries of Europe," for the pillage was "not justified by military necessity."\textsuperscript{45}

This unitary treatment of all cultural property carried on a trend of the interwar years. Nineteenth-century law and practice, codified in the Hague Conventions, had regarded private property as the privileged category and accorded protection to selected categories of public property by the legal fiction of treating them "as if" they were private. The interwar vision of coherent national patrimonies within a "common treasure of mankind," by contrast, had resulted in new notions of state responsibility and consequently in the endowing of some private collections with a quasi-public character. Henceforth, the posited public character of cultural property was to be the normative engine of the law and, in postwar national legislation and United Nations initiatives, to justify increasing imposition of regulations and responsibilities on nongovernmental holders of cultural property. Beyond that, the posited international—the ultimate type of public—character of culture was to support UN exhortations to governments to assume a species of trusteeship over their segments of the global fund of cultural property.

\textsuperscript{44} See, e.g., Treaty of Peace with Hungary, supra note 39, at art. 24, paras. 5, 6. Private suits were also instituted on the basis of the post-war peace treaties. Private property rights and their treatment in municipal and transnational jurisprudence exceed the scope of this article, however, and will not be discussed. A few of the more noteworthy cases, however, do deserve mention. See, e.g., Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), aff'd per curiam (1967), 28 A.D.2d 516, 279 N.Y.S.2d 608 (App. Div. 1967); Kostoris c. Meiml, 72 Foro It. 198 (1949), 16 I.L.R. 471; Ministry of War c. Colorni and Fattori, 71 Foro It. 171 (1948), 15 I.L.R. 553; Mazzoni c. Finanze dello Stato, 11 Foro It. 1960 (1927), 4 Ann. Dig. 564.

\textsuperscript{45} Extensive pillage of cultural property took place in France, Norway, Holland, Luxembourg, the Soviet Union, and Poland. Orders issued by the Führer at the Supreme Headquarters were phrased so as to appear to comply with the Hague Conventions. Actions taken and statements made by those in superior positions indicated that the actual intent was to seize and appropriate as many items of movable cultural property as possible. Paintings, antiques, rare books, tapestries, furniture, and jewelry were included among the property seized. Prosecutions were based upon actions taken in violation of the Convention Concerning the Laws and Customs of War on Land (Hague IV), general principles of criminal law as derived from the criminal laws of "civilized nations," the internal penal law of the state in which such crimes were committed, and article 6(b) of the Nuremberg Charter. The four indicted were Frank, Seyss-Inquart, Rosenberg, and von Ribbentrop. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 288, art. 6(b) (1945) [hereinafter Nuremberg Charter]; 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS: NUREMBERG NOVEMBER 14, 1945-OCTOBER 1, 1946, at 242 (1947) [hereinafter NUREMBERG TRIALS]; 4 NUREMBERG TRIALS 56-59, 78-81; 22 NUREMBERG TRIALS 486 (1948).
II. The United Nations Regime of Cultural Property

A. The Contribution of UNESCO

1. The Role of UNESCO

The United Nations Educational, Scientific and Cultural Organization (UNESCO) was intended to be a strong influence in the postwar dispensation. Under its broad mandate "to contribute to peace and security by promoting collaboration among nations through education, science and culture," the organization is charged with "preserving the independence, integrity and fruitful diversity of the cultures . . . of [its] States Members." At the same time, the several national ensembles of cultural property are declared to merge into a common cultural heritage, a "common treasure of mankind [which] is not merely the sum of the individual treasures of all States; it includes but exceeds them, and may even call for certain sacrifices by States." The nationalist and internationalist elements of this creed have often since proved to be in tension.

In furtherance of its mandate, UNESCO is empowered to recommend to its member states a range of cooperative measures, including the adoption of international conventions. It serves as a secretariat for instruments promulgated under its auspices and has established a Division of Cultural Heritage, which acts as a clearinghouse for legislation and other information relating to cultural property. Moreover, under the terms of various agreements, the Organization may lend its good offices to parties in a dispute over interpretation or application.

In the aftermath of the war, however, immediate needs dominated the Organization's early work. One of the four large-scale projects undertaken by UNESCO in 1947 was the "reconstruction and rehabilitation of . . . cultural life" in war-ravaged European countries, catering to each state's declared needs in deference to its individual expression of its cultural heritage. From about 1950 UNESCO's services extended beyond the

47. Id. art I(3).
48. See [1946-47] U.N.Y.B. 712, U.N. Sales No. 1947.1.18, preamble, paras. 4-6; art. 1. See also UNESCO Doc. 3C/Sixth Plenary Mtg. at 80 (1948) (remarks by the delegate from Lebanon); UNESCO Doc. C/Fourth Plenary Mtg. at 42 (1946-47) (remarks of the Greek delegate).
49. UNESCO Constitution, supra note 46, art. 1, para. 2(a).
50. For authorization to establish the Division of Cultural Heritage, see id. art. 1, para. 2(c).
war-ravaged areas and beyond the European ambit; the common cultural heritage doctrine became multicultural and activist. In the words of the Egyptian delegate: "It was UNESCO's duty to impress upon States that their monuments should be preserved at all costs, for, though situated on their territory, they belonged to all mankind; it should place technical facilities at the disposal of certain Member States to assist them in preserving their monuments."

2. Conventions Adopted by UNESCO

a. The 1954 Hague Convention

The force of recent circumstances moved UNESCO to direct its first legal efforts to the further development of the law of war, in order to rectify the failings of the 1899 and 1907 Hague Conventions. After several years of preparatory work, an International Conference of States convened at the Hague in 1954 to adopt the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), the first truly international agreement on the subject. Backward-looking in offering its protection only during armed conflict, the Convention nonetheless was the first ever adopted that treated cultural property as its primary subject, rather than as but one element in an otherwise comprehensive instrument regulating conduct under the law of war. The widespread acceptance of the Convention suggests that, beyond its direct force, it also is declaratory of customary international law.

The 1954 Convention, which is supplementary to the earlier Hague Conventions and to the Roerich Pact and thus carries forward their terms except to the extent expressly modified, applies equally to any hostilities between contracting states and to any hostile occupation, whether or not militarily resisted. The core provisions are also declared to apply directly to all factions in fighting internal to one signatory state. The convention makes no distinction between public and private property. The central article prohibits any direct attack or reprisal against, or any requisition of, cultural property; it does assume the right of use by the home state or usufruct by the enemy embodied in previous treaty regimes, but limits it by prohibiting endangerment of cultural property. Extending the parties' matter of UNESCO's undertakings were: books, works of art and monuments of history and science, museums, libraries and other cultural institutions—a fortiori, structure and contents thereof, science, art, and historical museums, as well as zoological gardens and nature reserves, and reproductions of works of art.

53. UNESCO Doc. 5C/Proceedings at 294-95 (1950).
obligations beyond periods of active hostilities, the terms require them in peacetime to prepare their own cultural property to survive foreseeable warfare and to instruct and structure their armed forces to respect the property of all other cultures in time of war, and when occupying enemy territory to support, or if necessary supplant, the local authorities in conserving cultural property.\textsuperscript{56}

The delegates, determined to create a workable legal regime,\textsuperscript{57} settled after much debate upon a definition of cultural property that pulled together the welter of precedents and was sufficiently broad to embrace interpretations unfamiliar to the Western European tradition and types of cultural property not yet fully appreciated, or undiscovered due to technical and scientific shortcomings. They recognized, however, that breadth commonly translates into vagueness; officials called upon to apply the provisions might well feel uncomfortable or insufficiently qualified to exercise broad discretion.\textsuperscript{58} Hence, a compromise was reached, in which a very general primary definition was qualified by a nonexhaustive listing of examples. The controlling general definition provides that "the term 'cultural property' . . . cover[s] irrespective of origin or ownership: . . . movable or immovable property of great importance to the cultural heritage of every people. . . ."\textsuperscript{59} The exemplary definitions that follow list six categories of items: (1) monuments; (2) archaeological sites; (3) groups of buildings; (4) works of art; (5) manuscripts, books, archives; and (6) other objects. Items (or reproductions of them) within these categories are further qualified by a standard of architectural, artistic, archaeological, historic, or scientific interest.\textsuperscript{60}

The conferees agreed that "every people" is to determine on its own terms those items of "movable or immovable property" covered by the Convention.\textsuperscript{61} The conference discussions suggest that a state, faced with

\textsuperscript{56} Convention for the Protection of Cultural Property in the Event of Armed Conflict, with Regulations for the Execution of the Convention, as well as the Protocol to the Convention and the Conference Resolution, adopted at the Hague on May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention]. On these points, see id. at preamble, para. 4, art. 18, art. 19(1), art. 4, arts. 3, 7 and art. 5.


\textsuperscript{58} See, e.g., Actes, supra note 57, at 129-30 (remarks of the United States delegate).

\textsuperscript{59} 1954 Hague Convention, supra note 56, at art. 1(a).

\textsuperscript{60} 1954 Hague Convention, supra note 56, at art 1.

\textsuperscript{61} See, e.g. Actes, supra note 57, at 129 (remarks of the Belgian delegate). He stressed a necessary hierarchy in the designation of cultural property. The idea of cultural heritage, he noted, does not cover all cultural property but implies a selection, which is best made by each state individually.

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this admittedly difficult task, could best defend its rights under article 3 by drawing up a national inventory of covered property. In the event of occupation or armed conflict, the Convention can only be effective if all parties concerned are able quickly and clearly to exchange relevant information. Moreover, the provisions of the annexed Protocol dealing with preventing the export and securing the return of misappropriated cultural property necessitate fairly precise identification, if administrative and judicial measures are to be possible.

Indeed, the two major deficiencies of the Convention are first, that it does not adequately recognize the issue of inventorying, and second, that it makes only the most cursory mention of actions under private law for the restoration of cultural property removed in violation of the Convention. Despite early and continuing support within UNESCO for the project of compiling universal inventories, in which states lacking the professional or financial means were to be assisted by the establishment of a supranational fund, such hyperprecision of definition and cataloguing was not, and is not today, a practical proposition. To be truly effective, it would have to be mandatory, and such a provision would surely run afoul of the diversity of domestic legislation. Indeed, many states, especially federal ones, might be reluctant to ratify a document containing such a provision. The drafters were therefore obliged to leave each state to find its own means of identifying a body of national patrimony and, more particularly, those selected categories of items within it which were to be the subject of international concern.

Representing the culmination of a long series of state acts practically exhausts the possible development of the protection of cultural property under the law of war. The next convention was to be a new departure.

62. The utility of the inventory was first suggested to UNESCO in connection with its 1947 rehabilitation project, for which it was urged to coordinate the compilation of an inventory of all cultural property damaged or destroyed during the war, 1 UNESCO O.R. (3d Mtg.) annex I, UNESCO Doc. C/30 (1946).


64. See UNESCO Doc. CBC/6 (1954) (Observations de l'Institut pour l'unification du droit privé concernant la restitution des biens culturels qui ont changés de mains pendant une occupation militaire).


66. See Actes, supra note 57, para. 1304; 1954 Hague Convention, supra note 60, art. I(a).

b. The Convention on Illicit Movement of Cultural Property

Even during the drafting of the 1954 Hague Convention, there were calls for a regime to protect cultural property in peacetime. Before long, new African and Asian states, supported from 1960 by the Economic and Social Council (ECOSOC), began to demand the return of cultural property that embodied their national heritages. In most cases such property had been exported, licitly or illicitly, from the territories in question during a period of colonial domination. In parallel to the developing law of state succession for the post-colonial era, which was increasingly provided in various devolution treaties for cultural cooperation between the new state and the former colonial power, UNESCO tackled the issue directly under the developing law of cultural property. After ten years of work, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Convention on Illicit Movement of Cultural Property) was adopted by the General Conference of UNESCO in 1970. Largely foreshadowed by two UNESCO Recommendations, dealing initially with archaeological plundering and then with illicit transactions in general, the Convention became the first major instrument to mandate active, continuous interstate cooperation to protect cultural property.

68. See generally E. GHAZALI, CONTRIBUTION A L'ETUDE DES ACCORDS CULTURELS 182, 244, 284 (1977). The International Law Commission (ILC) has been working since 1968 on the topic of succession of states. As part of the draft articles being produced on this larger topic, draft articles dealing, inter alia, with state property were adopted by the General Conference of UNESCO at its 25th and 27th to 30th sessions; commentaries are attached thereto. Report of the Commission to the General Assembly, [1975] 1 Y.B. INT'L L. COMM'N 111-12, U.N. Doc. A/10010/Rev.1.


72. See Convention on Illicit Movement of Cultural Property, supra note 69, arts. 2, 5-8, 10, 12-14, 16. A number of delegates hoped that the instrument would be interpreted to encourage spontaneous returns of cultural property. See UNESCO Doc. SHC/MD/5, annex 1, at 4 (1970) for the remarks of the delegates from China, Greece, Mexico, and the USSR. Most notably it was remarked: "[A] State Party which, when the Convention comes into force, is in possession of an important item of cultural property, illicitly acquired, and, inalienable to, and inseparable from, the history and civilization of another State, shall, in the interest of goodwill, endeavor to restitute the same to the latter." In fact, restitutions of this nature are being effected ever more frequently, primarily by means of bilateral agreement. See generally UNESCO Doc. CC- 81/Conf. 203/10 (1982); UNESCO Doc. CLT-83/Conf. 216/8 (1983). Prompted by a series of illicit transactions on the United States art
The treaty regime obliges states to establish, publicize, and periodically report to UNESCO import-export controls—backed up by national cultural protection and education services and by any necessary (and constitutionally acceptable) internal regulation of museums, dealers, and other traders—sufficient to prevent traffic in illicitly obtained cultural property. Illicit acquisition results from export without a certificate of authorization—a key device of the regime, which states are required to design and use—and from movement of cultural property out of a state by “compulsion arising directly or indirectly from the occupation of a country by a foreign power.” It further requires parties to do everything possible to circulate information about trade in smuggled goods, to facilitate the restitution of any illegally exported property, and especially to return items stolen from public institutions. (The Division of Cultural Heritage collects and disseminates this information, among others, to the International Criminal Police Organization (INTERPOL).) In line with these activist provisions, any party threatened by pillage of its patrimony is empowered to call on the other parties to take individual and collective measures to suppress the specific traffic. UNESCO is given a considerable place in the overall scheme: it is to oversee national implementation and suggest further measures, to serve as an information clearinghouse, to provide any needed technical assistance, and to help resolve disputes when so requested.  


73. See Convention on Illicit Movement of Cultural Property, supra note 69, at art. 7, para. (b), cl. (i), cl. (ii) (the obligation to repatriate stolen public property is conditioned on compensation to bona fide purchasers and owners), art. 9, art. 11, art. 13, arts. 16-17.
Despite the widespread support for the overall project evidenced by the vote in the General Conference, the Convention’s definition of “cultural property” caused controversy.\textsuperscript{74} One may fairly assume that the delegates to the Hague Conferences at the turn of the century shared a general understanding of what constituted “cultural property.” In the intervening years, as the most fundamental conviction—the importance of a common cultural heritage—had gained strength, the understanding of the components of that heritage had become more diffuse. The 1954 Hague Convention had already adopted a definitional structure that consisted largely of an authorization to each state to designate the things it considered important, plus the institutional means to do so. The self-interpreting definitions of the earlier Hague Conventions had disappeared.\textsuperscript{75} Any new definition would now also have to be able to embrace

\textsuperscript{74} UNESCO Doc. 16C/Res./38 (1970). The Convention was adopted by the General Conference by a vote of 77:1:8 on Nov. 14, 1970. The controversial definitional provision, article 1, reads:

For 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, minerals and anatomy, and objects of paleontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

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

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

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

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

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

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

(iii) original engravings, prints and lithographs;

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

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

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

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

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

The length of the article was criticized by the delegates of the Federal Republic of Germany, France, Japan, the United States and the United Kingdom. UNESCO Doc. SCH/MD5, Add. 1, at 5, 7, 12, 21 and Add. 2 at 2 (1970).

\textsuperscript{75} The self-interpreting character of those definitions appears from the fact that there are no mechanisms in the 1899 and 1907 Hague Conventions for parties to designate affected property. They were unneeded.
the types of property that were the subject of restitutionary claims by former colonial possessions of European states, and that were still hemorrhaging out in a traffic that they could not control without cooperation from the developed countries. Only a definition capable of continuously assimilating new content would satisfy the very purposes of the new convention.

Definitional issues became more crucial than even before precisely because the substantive purposes and implementation mechanisms of the new trend in cultural property law were more controversial than those of its traditional role in the law of war. The conventions on warfare would come into operation only irregularly, and even then primarily imposed negative duties to refrain from acts of rape and destruction that few people would be found to praise. Their positive remedies were all predicated on prior egregious wrongdoing. The Convention on Illicit Movement of Cultural Property, by contrast, was intended to operate from day to day; the definitions settled upon would have to be interpreted and applied continuously for, among other things, the not universally popular purpose of regulating trade in art and similar objects. Many of the duties so continuously imposed were positive and quite onerous from the outset. The only way to reconcile the strong belief in a multicultural heritage and the need for administrable definitions was to amplify the structure of the 1954 Hague Convention. The new Convention thus combined a formal definition that, for all its complexity, is little more than an authorization for states to provide their own operative definitions and by purely technical means—inventories and export certificates—to make those definitions effective. The drafters, recognizing that Western standards of commercial value may provide no measure of the indigenous cultural importance of an artifact, intended the opening definition to embrace far more than the traditional catalogue of cultural property.

Another justifiable criticism of the Convention was that it undertook to define the cultural heritage of each state by means of a territoriality test, which recognized an object-territory link on the basis of either the nationality of the creator or of the situs of the creation. This multiple

76. Convention on Illicit Movement of Cultural Property, supra note 69, art. 5, para. (b), art. 6, para. (a).
77. See Convention on Illicit Movement of Cultural Property, supra note 69, art. 4:

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons

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standard introduced a textual basis for multiple claims to the same object, while doing nothing to guide resolution of the conflicts.

The Convention has not been notably effective. It is, however, the leading instrument of a series in which the member states of UNESCO have declared their understanding of the importance of cultural property and of the need to be content on the international plane with open-textured definitions of it, to be fleshed out by the states concerned. The Convention recognizes that state initiatives are indispensable: in a savings clause that is actually a transparent plea, it leaves the issue of restitution of cultural property taken before the effective date of the Convention as between given parties to bilateral agreements between them. Since the adoption of the Convention in 1970, a number of such agreements have been concluded. The Convention has been more effective as example than it has been as law.

c. The Heritage Convention

The Convention Concerning the Protection of the World Cultural and Natural Heritage (Heritage Convention) was adopted by the General Conference of UNESCO in 1972. Its terms cover only immovable cultural property; a detailed analysis therefore lies beyond the scope of this article. In one crucial respect, however, it limits the future course of the general law of cultural property. For the first time a major instrument speaks in

resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

78. Few of the developed states that form the chief markets for movable cultural property have ratified or acceded to the Convention, while the many source countries that have done so commonly lack the enforcement resources to prevent illicit export. It has been argued that lack of effective export controls, which the source states are obligated by the Convention to provide, see id., arts. 5-6, voids or suspends the obligation of the market state to control imports or facilitate the return of any illicitly transferred property that does happen to turn up on its territory. Although this argument has some practical force—it is hard to ask customs officials to sort through unfamiliar goods without a system of paperwork provided at the point of origin—it is legally weak. All states are presumed to subscribe to the norm of respect for each other's cultural heritage, which is the object of the Convention. The instrument is most plausibly read as a set of covenants, not as a matrix of conditions.

79. Convention on Illicit Movement of Cultural Property, supra note 69, at art. 15. For discussion regarding contemporary reversionary arrangements, see infra section III.B.2.


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terms of "cultural heritage" rather than "cultural property." The change in terminology involves not a change in the content of the class of protected items, but rather a shift in the manner of approaching the question. In place of the traditional focus on the rights of a political sovereign over its national property, the sense of a "heritage" looks to the nexus between the culture or cultures found within the territory of a given state and its or their expression in concrete objects. This approach, less dependent on abstract canons of sovereignty, is able to accommodate the association of multiple cultural groups within a single statal entity.

Furthermore, the Convention makes explicit the relationship between the primary responsibility of the territorial state to the international community for safeguarding the items of the common heritage lying within its boundaries and the subsidiary duty of all other states to cooperate with the custodial state in its task. It thus gives the force of conventional law to an ideal dating back at least to Vattel and widely endorsed in the interwar period. The most immediate source was the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, which had been prompted by the imminent flooding of Egyptian temples upstream of the Aswan Dam. The Recommendation urged a set of practical measures of national preparation to carry out each state's obligation to ensure the "adequate preservation and accessibility of cultural property" forming part of the heritage of mankind. The Heritage Convention empowers impoverished states to call on others to render the financial, artistic, scientific, and technical assistance needed to discharge its responsibilities.

Bilateral arrangements initiated formally independently of the Convention have, in fact, accomplished many of the aspirational aims with respect to aid and advice afforded for the purpose of the construction and operation of cultural institutions. It is likely that the Convention, at a min-

81. Id. art. 1. The predominance of the notion of cultural heritage may well have been suggested by the Declaration of the Principles of International Co-operation, UNESCO Doc. 14C/Res. (1966). The latter is directed at the concept of culture in general. It stresses the need for respect of national expressions of culture, while at the same time, acknowledging and working to improve the "common heritage belonging to all mankind." See also UNESCO Doc. 17C/Res. at 3.312 (1972); UNESCO Doc. 21C/Res. at 4/05 (1980).

82. Heritage Convention, supra note 80, arts. 4-7 (Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage), part IV, arts. 15-18 (Fund for the Protection of the World Cultural and Natural Heritage), part V, arts. 19-26 (Conditions and arrangements for international assistance), part VI, arts. 27-28 (Educational programs). Concurrently with the Convention, the General Conference issued an associated Recommendation for national implementation, which formally differs only in including a slightly looser definition of the items covered. UNESCO Doc. 17C/Res. (1972).

83. UNESCO Doc. 15C/Res., preamble, para. 9, sec. II (arts. 3-12) (general principles), sec. III, arts. 13-34 (preservation and salvation measures), preamble, para. 11 (1968).

84. Heritage Convention, supra note 80, arts. 6(1), 7, parts III-VI.
3. Recommendations Adopted by UNESCO

In addition to its Conventions, UNESCO has issued a number of Recommendations on cultural property for implementation through national legislation. Several of these have been mentioned in connection with the Conventions to which they contributed or were linked; others treat topics beyond the scope of the three Conventions.

The early Recommendation on International Principles Applicable to Archaeological Excavations, apart from its role in inspiring the Convention on Illicit Movement of Cultural Property, exhorts states, acting within a framework of "freely accepted international cooperation," to designate and protect movable and immovable "remains" associated with archaeological sites.

The Recommendation Concerning the International Exchange of Cultural Property (Recommendation on International Exchange) was adopted by the General Conference in 1976 to mediate an emerging conflict between blocs of states. In connection with the 1964 Recommendation and 1970 Convention on Illicit Movement of Cultural Property, many exporting and transit states had met the call to devise internal legislative and administrative remedies by passing blanket restrictions on the export of cultural property. Some importing states protested that international art markets were beginning to suffer from shortages of goods and consequent black marketeering. Exporting and transit states, meanwhile,

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85. Recommendations are "norms which are not subject to ratification but which Member States are invited to apply. [They possess] great authority [and] are intended to influence the development of national laws and practices." UNESCO, STANDARD-SETTING INSTRUMENTS (rev. 1, 1982).


88. For a complete explanation of these items, see UNESCO Doc. CLT-83/WS/16, L. PROTT & P. O'KEEFE, NATIONAL LEGAL CONTROL OF ILICIT TRAFFIC IN CULTURAL PROPERTY (1983) [hereinafter PROTT]. Exporting countries are primarily developing countries generally rich in cultural property, but with inadequate policing facilities. Importing states are net importers of cultural artifacts—predominantly the North America and European states. Transit states include the latter, and additional states through which goods pass for ultimate purchase. The authors point out that this classification scheme, while not wholly accurate, provides a convenient framework for discussion.

89. See UNESCO, STANDARD-SETTING INSTRUMENTS, supra note 85, at IV.13.8. Introduction (1982). A less disruptive policy for the exporting states would have been to release selected so-called duplicate or minor items onto the art markets. See, e.g., Bator, An Essay on the International Trade in Art. 34 STAN. L. REV. 275, 297-98 (1982).
saw little exchange afoot, only a one-way traffic. Four decades had passed since the Western European states had begun to conventionalize the principle of a common cultural heritage and the law remained, in many respects, stalled. Frustrated, the source countries grew more strident in their demands for the return or restitution of cultural property, regardless of traditional property rights.  

The Recommendation opens with a re-statement of the dual national and common character of cultural property. The preamble laments the failure to make good the principle of a common cultural heritage and concludes with a series of suggested ways of reversing this trend. These include the highly controversial proposal to develop unilateral operations of loans, deposits or donations designed to restore—temporarily, indefinitely, or permanently—cultural property to its places of origin, and the more palatable suggestion to foster bilateral or multilateral exchanges.

The Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas (Historic Areas Recommendation) concentrates upon the identification, protection, conservation, restoration, maintenance and revitalization of historic or traditional areas and their environment. Eschewing the traditional exclusive focus on state responsibilities, the Recommendation proposes a series of concrete measures to be taken by and for the benefit of all levels of government, together with both public and private institutions and associations, as well as research, education, and information measures, and proposals for international cooperation.

In part to facilitate the international exchange of cultural property urged in the 1976 Recommendation discussed above, the General Conference adopted in 1978 a comprehensive Recommendation for the Protection of Movable Cultural Property. It proposes coordinated means of reducing the risks of theft, vandalism, deterioration, illegal excavations, and illicit exports of cultural property. It also prescribes a program of risk-management directed at bargaining for optimal insurance terms and the institution of a system of government guarantees against risks in temporary exhibitions or other loans of cultural items. The Recommendation sets forth measures applicable to property in private collections, in reli-

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90. See U.N. Doc. Res./3187 (XXVIII) (1973). See in particular, art. 1 thereof which: 
   "Affirms that the prompt restitution to a country of its objects d'art, monuments, museum pieces, manuscripts and documents by another country without charge, is calculated to strengthen international co-operation in-as-much as it constitutes just reparation for damage done. . . ."

91. Recommendation on International Exchange, supra note 87, at preamble, paras. 3-9, 11, 12.

92. Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, adopted at Nairobi, on Nov. 26, 1976, preamble, para. 15, arts. 2, 9, 14, 18, 35.
gious buildings, and at archaeological sites. Even more broadly than the Historic Areas Recommendation, this latest Recommendation urges the enlistment, within the limits set by each nation's constitutional structure, of all public and private officials, curators, dealers, collectors—in short, everyone involved in the art and cultural worlds—as well as the viewing public.93

In its recent body of Recommendations, UNESCO has sought to shift the relationship of both state and society to their movable cultural property away from a self-oriented concern toward a moral responsibility owed to the common cultural heritage of mankind. These pronouncements have evidently served at least to prompt diplomatic discussion of questions of reversion of cultural property. A number of bilateral arrangements have been concluded in recent years, for the most part between states formerly in a colonial relationship, to restore items of national patrimony and to provide for their management after return.94

B. The Intervention of the General Assembly

Although UNESCO has primary competence over cultural issues, developing countries dissatisfied with its accomplishments have increasingly taken their case to the United Nations General Assembly, most commonly by way of the Economic and Social Council (ECOSOC).95 Since 1973, the General Assembly has adopted annually a series of hortatory resolutions.96 The initial pair of these, which set the pattern for all to follow, were Resolution 3148 (XXVIII)97 and Resolution 3187 (XXVIII).98

93. Recommendation for the Protection of Movable Cultural Property, adopted at Paris, on Nov. 28, 1978 [hereinafter Movable Cultural Property Recommendation]. The categories of cultural property adverted to in the Resolution include: products of archaeological exploration—terrestrial and submarine; various antiquities; items dismembered from historical monuments; anthropological and ethnological materials; various items related to history; artistic items, including hand-rendered paintings and drawings, original prints, posters, photographs, original artistic assemblages, montages, statues, sculpture, and applied art; various forms of manuscripts and books; numismatic and philatelic materials; archives, including textual records, maps, and other cartographic materials, such as photographs, cinematographic films, sound recordings, and machine-readable records; items of furniture, tapestries, carpets, dress, and musical instruments; and zoological, botanical, and geological specimens. Id. art 1(a).

94. See generally infra Sec. III.B.2.

95. ECOSOC Resolution 803 and the subsequent Cultural Cooperation Declaration established the foundation for the demands made, for the most part, by developing countries. Resolution 803 advocated that UNESCO consider "formulating principles which could serve as guiding lines for bilateral, regional and international action regarding relations and exchanges in the field[s] of culture." Over a decade later, nothing has been done. U.N. Doc. E/Res./803 (XXX) art. 2 (1960).

96. U.N. Docs. GA Res. 3026A (XXVII) (1972); GA Res. 3148 (XXVIII) (1973); GA Res.
The first, adopted by a vote of 123 to null, with 5 abstentions, did little more than follow UNESCO practice. Taking the common cultural heritage principle as a given, while simultaneously enjoining respect for national sovereignty, it stressed the preservation and development of that cultural heritage at the national and regional levels. All the more controversial issues were thrust back onto UNESCO, which was asked to cooperate with member states to study the legal implications of national protective legislation and the problems of exchange and voluntary return of certain cultural works.99

Far more contentious was the succinct Resolution 3187, commonly known under the title "Restoring Works of Art to Countries Victims of Expropriation." Proposed by Zaire and sponsored by eleven other African countries, it was adopted by a vote of 113 to null, with 17 abstentions. The Resolution, which was addressed directly to the State Members of the United Nations, represents the high water mark of demands made by countries deprived of their cultural property in the past, and as such embodies their view of the global goal of cultural property law and practice.

The most controversial provisions of Resolution 3187 are, first, a demand for restitution of items of cultural property on the basis of reparation for past damage, and second, a call for a prohibition on further expropriation of cultural property from states under colonial or alien domination. Although these aims might be regarded as but a universalization of the rules and principles developed under the law of war between 1815 and 1954, a more realistic political and legal analysis reveals them to be presently impractical if not impracticable. The Resolution wholly failed to recognize that in the states on whose territory the "expropriated" items were now located, (1) private property rights could not be ignored or overridden, (2) public organs were constitutionally incompetent to interfere with or regulate much of the activity, and (3) any application of the existing law of expropriation, reparation, and restitution was highly questionable, as existing collections were considered legally held, either by virtue of the validity, under settled law, of the original acquisitions or by operation of the integrity of collection doctrine. Most of the major importing states registered their abstentions from the Resolution.100

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The General Assembly Resolutions since 1973 have followed the two-track approach introduced by Resolutions 3148 and 3187, with complementary provisions for progressive change and immediate change. They have affirmed the salutary effects of international cooperation to restore cultural property to its country of origin; invited states to adopt measures sufficient to prevent illicit trafficking in *objets d'art*, requested that states prepare national inventories, invited states to accede to the UNESCO Convention on the Illicit Movement of Cultural Property, and called on states to strengthen their museum infrastructures and marshall professional expertise, the media, and public opinion in favor of programs of restitution.\(^1\)

The form and content of the resolutions have shifted from an emphasis on immediate change toward a more politically realistic provision for gradual change. In the 1983 resolution, for example, the earlier phrase "prompt restitution of cultural property, without charge, as just reparation for damage" was softened into a "reaffirm[ation]" that "restitution" of cultural property "contributes to the strengthening of international cooperation and to the preservation and flowering of universal cultural values through fruitful cooperation between developed and developing countries."\(^2\)

The General Assembly Resolutions and UNESCO Recommendations reflect a recognition by the United Nations and its organs of the need to work by degrees, building a body of law and practice through national, bilateral, and regional initiatives informed by general U.N. guidance. There have, in fact, been a number of promising developments in these smaller compasses.

### III. Regional and National Regimes of Cultural Property

#### A. INSTRUMENTS OF REGIONAL ORGANIZATIONS

Regional organizations, increasingly prominent since the 1950s, share broadly coherent cultural understandings—in reference to which, indeed, they commonly first were established—yet are sufficiently multifarious to highlight the existence and claims of cultural diversity. They are, therefore, often ideal settings for the development of cultural property pacts.

Regional cooperation in the field began in the 1930s with the Roerich Pact of the Pan-American Union, which was inspired by contemporary initiatives of the interwar Commission of Jurists, and which, in turn,
influenced later instruments drafted at the behest of the League of Nations. More recently, the successor Organization of American States, while urging its members to join the UNESCO Convention on Illicit Movement of Cultural Property, provided in 1976 a regional supplement to that instrument: the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (Convention of San Salvador). The Convention emphasizes the role of a national patrimony in creating the national character of a people and declared that regional cooperation offers the best means to protect that patrimony from plunder.

The Convention divides cultural property into five categories, the normal criteria for protection within a category being various time-oriented tests. This clear scheme allows customs officials to identify fairly readily items subject to regulation by the Convention. The Convention further designates a forum and procedure to resolve any interstate disputes on the applicability of the provisions. Each state is required to identify, register, protect, and preserve its cultural heritage. Property qualifies for inclusion by virtue of its territorial nexus to the state, established by a strict interpretation of the territorial principle. The Convention of San Salvador is more clearly drawn, more coherently assembled and, therefore, more readily enforceable than the UNESCO Convention on Illicit Movement of Cultural Property.

In 1970 the Andean Region countries adopted the Andrés Bello Convention. Its pervasive theme is promoting communication, and hence understanding and integration, between the signatory states, on the basis of a Latin American cultural heritage common to them. The Convention is devoted to establishing the foundation for cultural cooperation and exchange; its protective clause describes cultural property only very generally as "historic and cultural patrimony," relying for specifics on the device of state designation by inventory.

Preliminary frameworks for the treatment of cultural property on a regional basis have been created in Africa and Asia. The Organization of African Unity established its Educational, Scientific, Cultural and Health Commission in 1961. Under the Charter mandate to further African sol-
idarity, regional concerns are elevated over the promotion of purely domestic needs in the cultural field.\textsuperscript{107} The Asian states followed in 1968, establishing the Cultural and Social Center for the Asian and Pacific Region to promote "friendly relations and mutual understanding among the peoples of the Asian and Pacific Region through the furtherance of collaboration in cultural and related social fields," including measures aimed at the "preservation of the cultural heritages" of the Member States.\textsuperscript{108}

The Council of Europe concerned itself with the question of a common European cultural heritage as early as 1954. The European Cultural Convention, the most forceful of all regional pacts, exhorts States Members to safeguard cultural objects for the joint benefit of the "common cultural heritage of Europe."\textsuperscript{109} To implement the organic Convention, the Member States adopted the European Convention on the Protection of the Archaeological Heritage in 1969. It protects a great range of remains of archaeological interest. Each state is responsible for identification and mutual communication of information relating to defined objects. The Convention calls for the establishment of national inventories and scientific catalogues, to include publicly owned and, where possible, privately owned objects. The parties undertake varying enforcement responsibilities over museums and similar institutions, the most stringent attaching when an institution's acquisition policy is under state control.\textsuperscript{110}

Between 1963 and 1970, the Consultative Assembly and the Committee of Ministers of the Council of Europe passed a series of recommendations and resolutions dealing with the preservation and rehabilitation of the common European cultural heritage as incarnated in various ancient buildings, monuments, and sites of historic and artistic interest.\textsuperscript{111} These efforts culminated in the adoption by the Council in 1975 of the European Charter of the Architectural Heritage (Amsterdam Charter) and the related Declaration of the Congress on the European Architectural Heritage


\textsuperscript{111} See EUR. CONSULT. ASS. RES. 432 (1970); EUR. CONSULT. ASS. REC. 591 (1970); EUR. CONSULT. ASS. REC. 589 (1970); EUR. CONSULT. ASS. REC. 408 (1969); EUR. CONSULT. ASS. REC. 497 (1967); EUR. CONSULT. ASS. REC. 366 (1963); EUR. CONSULT. ASS. REC. 365 (1963); EUR. CONSULT. ASS. RES. 249 (1963); see also EUR. CONSULT. ASS. RES. (68) 16 (1968); EUR. CONSULT. ASS. RES. (68) 12 (1968); EUR. CONSULT. ASS. RES. (68) 11 (1968); EUR. CONSULT. ASS. RES. (66) 20 (1966).
The Parliamentary Assembly of the Council of Europe has regularly issued implementing resolutions and recommendations. In addition, the Council widened the traditional notion of movable cultural property in its 1978 Recommendation on the Underwater Cultural Heritage, calling for the drafting of a European Convention dealing with underwater sites. The 1979 Recommendation on Industrial Archaeology introduces the appropriately European notion of national patrimony in the form of industrial monuments and objects. Successful in implementing the provisions of the Amsterdam Charter, the European states are mounting fresh efforts to “explore new fields of European cooperation.”

B. NATIONAL LEGISLATION AND BILATERAL ARRANGEMENTS

1. National Legislation

Individual countries can contribute to the development of cultural property law through the fundamental task of defining the property. States are more likely than are international institutions to consider their peculiar requirements and the immediate practicalities of enforcement. Many of the fullest definitions now available occur in fairly recently enacted national legislative schemes to control the illicit movement of cultural property. Largely inspired at the outset by UNESCO instruments, some of these regimes have now surpassed their models and can in turn influence international developments.

112. Committee of Ministers: European Charter of the Architectural Heritage. (Congress of the European Architectural Heritage), Oct. 21-25, 1975. Council of Europe: Congress of the European Architectural Heritage, Oct. 21-25, 1975. Insofar as these instruments are directed toward the regulation of immovable cultural property, an analysis thereof lies beyond the scope of this paper. Nevertheless, two general observations are in order: (1) the European states have described and executed a policy of promotion and preservation of the regional cultural heritage; and (2) the Amsterdam documents are a fitting tribute to and realization of the policy of “zones of protection” for cultural property first introduced in 1919 by the Netherlands Archaeological Society.

113. EUR. PARL. Ass. RES. 709 (1979); EUR. PARL. Ass. RES. 708 (1979); EUR. PARL. Ass. RES. 707 (1979); EUR. PARL. Ass. RES. 667 (1977); EUR. PARL. Ass. REC. 617 (1976); EUR. PARL. Ass. RES. 598 (1975); EUR. PARL. Ass. REC. 579 (1974); EUR. PARL. Ass. REC. 880 (1979); EUR. PARL. Ass. REC. 872 (1979); EUR. PARL. Ass. RES. 849 (1978); EUR. PARL. Ass. RES. 848 (1978); EUR. PARL. Ass. RES. 788 (1976); EUR. PARL. Ass. REC. 750 (1975); see also Council of Europe: Symposium on Rural Architecture in Regional Planning, Oct. 26-29, 1977; The Granada Appeal: Conclusions of the Symposium (1977) and European Architectural Heritage Congress, Resolutions, Mar. 27-29, 1980.

114. EUR. PARL. Ass. REC. 848 (1978) (on underwater cultural heritage).

115. EUR. PARL. Ass. REC. 872 (1979) paras. 6, 7 (on industrial archaeology). This independent regional initiative coincidentally gives some concrete meaning to the category “objects of technical interest.” Recommendation on International Exchange, supra note 87, art. 1; Movable Cultural Property Recommendation, supra note 93.
Most definitions combine enumeration of types of items with a specification of the cultural interests affected: one or the other of these systems generally provides the primary definitions, qualified or exemplified by the other.\textsuperscript{116} Item-oriented schemes, prevalent in jurisdictions in the common-law tradition, inherently suffer from underinclusiveness—not cured by inadministrable catch-all clauses—but the simple familiarity of a single government with its own country's culture means that such tests can be more thoroughly and specifically drafted on the national than on the international plane.\textsuperscript{117} Definitions couched primarily in terms of interests, notoriously vague in international instruments, may be amplified somewhat at the national level to embrace matters peculiar to the state concerned.\textsuperscript{118}

Among the other criteria created by states to meet their individual needs are standards of age and local origin. A number of jurisdictions join an age-based test to item- or interest-oriented schemes. Under the fixed-date method, all objects in existence before a certain date are protected. The alternative rolling-date system, recommended by UNESCO, avoids the need for periodic revision of the legislation. These methods may be supplemented by administrative discretion to adopt more stringent date restrictions where circumstances warrant it, for example, where national legislation normally leaves unprotected works of living artists.\textsuperscript{119}

The function of a local-origin clause is to justify the choice of items included in a designated corpus of national patrimony. Most local-origin

\textsuperscript{116} An item-oriented definition enumerates a series of items. As a rule, the items describe categories rather than particular instances of items. The interest-oriented test, by contrast, classifies the protected item of cultural property according to its interest. Within that interest, further categories of items are enumerated.

\textsuperscript{117} See, e.g., the definition of "ethnographical article(s)" contained in the cultural property legislation of Gambia, \textit{reprinted in PROT, supra}, note 88, at 6-7. They are defined, in part, as "any work of art or craftwork, including any statue, modelled clay figure, figure cast or wrought in metal, carving, housepost, door ancestral figure, religious mask, staff, dram, bowl, ornament, utensil, weapon, armour, regalia, manuscript or document. . . ."

\textsuperscript{118} See, e.g., the cultural property legislation of Mauritania, \textit{reprinted in PROT, supra} note 88, at 7. Protected property includes: "Movable and immovable property which has national interest because of pre-history, pre-Islamic history, philosophy, art, archaeology, which exist on or in the soil of the property of the public and private domain of the state, of territorial units or of public institutions."

\textsuperscript{119} Examples of the age-based test include: Belize (150 years), Federated States of Micronesia (30 years), Iceland (100 years), Indonesia (50 years), Kuwait (40 years), Luxembourg (100 years or 51 years from the creator's death). \textit{PROTT, supra} note 88, at 10-11. For examples of administrative discretion clauses, see, e.g., the legislation of Algeria, France, Senegal and Zaire, \textit{reprinted in id.} at 10-13. See also Iraqi legislation, \textit{reprinted in id.} at 10-11, which directs: "The Directorate shall be entitled to consider as antiquities movable and immovable objects which are less than two hundred years old, if the public interest requires its protection, due to its historical, national, religious or artistic value." Most jurisdictions do not expressly treat the products of living artists under cultural property legislation. Those that do include the Honduras, India, and Mexico. \textit{See id.} at 11.
clauses in national legislation parallel one or more of the five criteria of article 4 of the UNESCO Convention on Illicit Movement of Cultural Property, which itself is a pastiche, a compromise of inclusion. The concept of "local origin" is typically based on either a creator-territory nexus or an object-territory nexus. The former may be analogized to the nationality principle, the latter to the territoriality principle, in the law of personal status. The creator-territory nexus raises difficulties, in particular, when applied to objects either in existence or created during a period of colonial rule and removed, directly or indirectly, by members of the colonial regime. The object-territory nexus is problematical insofar as, if applied absolutely, it covers every object found in the territory of the state, irrespective of ownership—even those brought in for the purpose of re-export. To avoid such a draconian effect, some states exempt items expressly declared to be subject to re-export. (The exemption is usually time-limited.) A further saving provision may exempt items brought in from another country, if they are declared upon entry.

National inventory systems that classify, register, or list cultural property are in use in about half of the states that exercise export controls.

120. See Convention on Illicit Movement of Cultural Property, supra note 77, art 4(a) (creator-territory nexus); id. art. 4(b), (c), (d), (e) (object-territory nexus).

121. Analogous to the nationality principle binding object to state is the jus sanguis principle; analogous to the territoriality principle binding object to the state is the jus soli principle.

122. Direct removal signifies removal of the cultural property from the state by the colonizing power and its legal representatives; indirect removal signifies the removal of the cultural property from the territory of the state by all categories of persons—other than those representative of the colonizing power—where such removal was the result of non-fulfillment of guardianship of trustee responsibilities. Members of the regime include natural and juridical persons employed by or representative of the colonial regime. See generally Prott, supra note 88, at 11. Illustrative of imprecisely worded legislation is that of Brazil. Under the designation "former colonial objects" fall those which may be described as being of Portuguese origin.

123. For examples of time-limited legislation, see id. at 11-12. Exemption clauses are cited id. at 12. See, e.g., the cultural property legislation of the Sudan. Administrative discretion clauses are found in the national legislation of various legal systems. These clauses are of two types: they may direct a competent authority to decide finally upon the inclusion or noninclusion of particular items in accordance with the legislatively prescribed definition. More often, however, they empower a named official to add additional items to the existing list. Illustrative of these points is the cultural heritage legislation of India, Sierra Leone, and Syria. Id. at 12-13. Many national regimes are, of course, defective; old legislation is commonly underinclusive, whereas modern definitions may be administratively broad. See, e.g., respectively, the legislation of Jordan and Chad. Id. at 13-14. Even more conscientious attempts to qualify sweeping definitions by an enumeration of items may unintentionally catch, for example, objects brought into the country as the personal property of transient visitors. See, e.g., the cultural property legislation of Turkey. Id. at 14-15. The separate problem of notice to third parties (public and private) attaches to administrative regulations designed to breach legislative gaps and guide enforcement officers. See, e.g., the legislation of Canada, reprinted in id. at 14.

124. See id. at 16-18.
Some states mandate the registration of certain types of cultural property. Failure to do so may result in their forfeiture to the state. Other countries require the maintenance of records by the individual owners.¹²⁵ UNESCO and the International Council of Museums have been requested to assist states with advice on the substantive requirements of an inventory system and the procedures for establishing one.¹²⁶

Where a regulatory regime is created on an international level, calls for harmonization of definitions¹²⁷ are theoretically gratifying but practically worthless. The most effective definition is not one, but many. Global instruments do have a role to play: only they lend nearly unassailable, internationally effective authority to the several states to define the nature of their own heritage and sustain it against external rapacity; only they can give overall legal form to the ideal of cooperation in diversity.

2. Bilateral Arrangements

The impetus behind and structure of many recent bilateral cultural property arrangements concluded in the cultural property regime derive from contemporary international instruments and pronouncements. Informational and technical expertise made available by the International Council of Museums (ICOM),¹²⁸ and by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (Intergovernmental Committee) and the Museums Exchange Program (MEP), established at the suggestion of ICOM,¹²⁹ have contributed directly to many of the bilateral

¹²⁵ See, e.g., the legislation of Iraq, Libya, Tanzania, and Romania, reprinted in id. at 18.
¹²⁸ The International Council of Museums (ICOM) is the successor to the League of Nations body, the International Museums Office.
¹²⁹ In 1973, ICOM set up the Museums Exchange Program (MEP). Its four primary functions are: (1) collecting information and relevant practical details about museums willing to exchange or loan objects or to receive loans; (2) proposing different forms of contracts for the adoption of bilateral agreements between museums; (3) offering technical and legal advice for solving any problems that may arise in carrying out the exchanges; and (4) acting as a negotiator between institutions concerned. See Nafziger, Regulation by the ICOM: An example of the role of non-governmental organizations in the transnational legal process, 2 DEN. J. INT'L POL. 233 (1972). Upon the suggestion of ICOM, the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation was established in 1976. Its guidelines include: (1) serving as a documentary depository for programs of return or restitution, as well as negotiations concerning the same; (2) providing technical and logistical assistance to such programs and negotiations by means of a special fund financed through voluntary contributions; and (3) contribution to the financing of the acquisition of cultural property. See Records of the Meeting of Experts, Venice, April, 1976. Adoption of the recommendation
initiatives undertaken. In addition, wholly independent programs instituted at the national level and intended to staunch illicit flows of cultural property and to effect reversions of national patrimony deemed to be critical to a nation's self-understanding have been advanced.

As for the former, the MEP has encouraged national groups to adopt or better implement codes of ethics. A number of prominent cultural property associations, which wield considerable influence in the United States and international art markets, have issued various forms of self-policing guidelines. The MEP has also thus obtained an indirect link to the United States Congress, which consults the views of a number of these associations when considering legislation bearing on the issues of the illicit movement of cultural property.

More than half of the States Members of UNESCO regulate the movement of their cultural property through embargo, by which export of all cultural property designated as protected is prohibited. Exportation of


130. Nafziger, supra note 129. Associations adopting guidelines include: International Council of Museums, American Association of Museums, Association of Art Museum Directors, College Art Association, Association of Science Museum Directors, Association of Science-Technology Centers, Society for American Archaeology, Archaeological Institute of America, and American Anthropological Society. The American Association of Museums (AAM), Washington, D.C., maintains an informal file of self-policing guidelines adopted by public and private museums in the United States. In order to receive accreditation by the AAM the museum must have a formal acquisition policy. Additionally, many museums are members of ICOM. In 1986 ICOM adopted a comprehensive Code of Ethics addressing, among other things, institutional ethics, acquisitions, and disposal of collections. International Council of Museums, Code of Professional Ethics, adopted by the General Assembly of ICOM, 15th session, Buenos Aires, Nov. 4, 1986, Doc. No. 86/AD.15. The Code recommends that museums uphold the standard favored by the original draft of the Convention on Illicit Movement of Cultural Property with respect to acquisition of illicit material: "A museum should not acquire...any object unless...it has not been acquired in, or exported from, its country of origin and/or any intermediate country in which it may have been legally owned (including the museum's own country), in violation of that country's laws." Id. at 3.2 (Acquisition of Illicit Material). It further exhorts member museums to observe, to the greatest extent possible, the aims of the Convention on Illicit Movement of Cultural Property and to respect fully the terms of the 1954 Hague Convention. Id. at 4.4 (Return and Restitution of Cultural Property). These requirements must be read, however, in the context of the requirement imposed on museums on both sides of a return or restitution of cultural material that "all of the collections...are adequately housed, conserved and documented." Id. at 2.1 (Minimum Standards for Museums).

such property is per se illegal. Customary international law has never so interpreted the importation of cultural property. In fact, the general rule subscribed to by most art importing countries, including the United States, is that cultural property illegally exported from its country of origin does not, of itself, bar lawful importation. The Secretariat Draft of the Convention on Illicit Movement of Cultural Property advocated a radical change in custom, proposing adoption of a rule by which importation of illegally exported cultural property was illicit. The United States, among others, objected strongly and declared that it opposed such a blank check rule, preferring instead to evaluate independently the policy and content of the various state laws. Rejection of the blank check rule was all the more justifiable, it was felt, since the draft definition of cultural property, which the Convention adopted substantially unchanged, was so encompassing. Despite this seemingly inflexible stance, the United States has demonstrated that, in fact, it is prepared to impose import restrictions when these are needed.

132. Nearly all exporting and some transit states—predominantly third world countries and those with a centrally planned economy—regulate the movement of their cultural property by means of embargo. Most of these states, however, except items for purposes of exchange or exhibition (e.g., Romania, Senegal), by executive action in the public interest (e.g., Czechoslovakia, Senegal), temporarily (Nicaragua, Malagasy Republic, Poland) or where the items released are of secondary importance (e.g., Yemen, New Zealand). As a policy of loss prevention, the embargo is only effective in states which have tight border controls and enjoy a low volume of traffic in cultural property (e.g., most Eastern European states; note that this practice is ineffective in the PRC where the volume of property subject to trade is heavy). See Prot, supra note 88, at 37-38; Bator, supra note 89, at 315.

133. See, e.g., S. Williams, The International and National Protection of Movable Cultural Property 106-08 (1978). Among the major importing states, England, France, Germany, and Switzerland also subscribe to this rule.

134. See Convention on Cultural Property, supra note 131, §§ 2602-2606, which implements article 9 of the Convention on Illicit Movement of Cultural Property. The provisions reject the blank check rule, prescribing instead a procedure whereby, upon a determination by the President that the "cultural patrimony of [a] . . . State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party," a bilateral or multilateral agreement may be entered into. Id. § 2602. The provisions are hedged with restrictions, among others, that parallel actions should be taken by other states—whether or not parties to the Convention—that have a significant import trade in the item or items affected. Importation of a stolen article documented as belonging to the inventory of certain cultural movements is illegal. Id. § 2607. Finally certain cultural property is exempt from the title on the basis of the bona fide purchaser rule, coupled with publication of the property. Id. § 2611. The appropriate customs officers are charged with enforcement of the chapter. Id. § 2613. Unfortunately, the Congress has chosen to define the cultural property subject to the implementing legislation—described as "archaeological or ethnological material of the State Party"—in a much narrower sense than appears in the Convention. Id. § 2601, requiring further, prior designation of the property subject to importation controls. Id. § 2604. As far as concerns its other obligations under the instrument, the definition of cultural property unrestricted by the conventional designation requirement, applies. Id. § 2601; see also Bator, supra note 89, at 370-74.
Arrangements intended to facilitate reversions of cultural property have been concluded between various combinations of the following entities: states, public institutions, quasi-public institutions, and private persons, both juridical and individual. The methods employed have been shown by practice to fall into four categories: (1) exchange loans for a limited period, which can be renewed; (2) exchange or long-term loans, the duration of the loan being specified; (3) exchange loans for an indefinite period; and (4) exchange of donations, a method seldom utilized. Finally, such loans are often combined with the conferral of exo- and infrastructural support resulting in a package deal of, for example, the transfer of cultural property plus the construction of or assistance in the construction of a cultural institution, often coupled with the training of indigenous staff or the temporary posting of foreign staff to accommodate temporary deficiencies. Permutations in the components of the arrangements may result in the trading-off of objects for support or the combining of more with less important objects, compensating for the deficit in the quality of the cultural property transferred by the awarding of generous assistance packages. When initiated by the former colonial parent, as are most such bilateral arrangements, the initiating state enjoys the advantage of selection, thus shaping its remaining collections according to rational plan. Nevertheless, as bargaining proceeds, the receiving state may press its entitlement by insisting, at a minimum, upon the return of property critical to its national self-understanding. It can further trade off certain demanded items for varying degrees of structural assistance. Unfortunate from the standpoint of legal precedent, however, most of the reversionary arrangements heretofore initiated have described the transfers effected as ex gratia.

At the level of program institution and implementation of reversionary policy, the MEP has been successful in assisting in restitutionary efforts by nonpublic entities in the United States, Australia, and the Republic of Ireland. On their own initiative, two private United States museums, the Semitic Museum of Harvard University and the Oriental Institute of Chicago, have taken joint measures to restore to the National Museum of Iraq a considerable number of cuneiform tablets. In an attempt to

136. Five private cultural institutions in the United States have returned various items of importance to the cultural heritage of peoples in Mexico, Panama, and Peru. The Australian Museum Trust facilitated the transfer of seventeen objects of fundamental importance to the Art Gallery of Papua, New Guinea, and two such objects to the Solomon Islands Museum. A museum in the Republic of Ireland has offered to return some aboriginal pieces to Australia. Specht, The Australian Museum and the Return of Artefacts to Pacific Island Countries, 31 Museum 28, 28-31 (1979).
encourage transjurisdictional collaboration, a private museum in the United States and a public museum in the Federal Republic of Germany have been requested to return fragments of a marble sarcophagus to the Government of Turkey. To date, only the former has complied. A private Australian museum returned to Vanatu a ceremonial slit drum and the Wellcome Institute of London repatriated a collection of archaeological items to Yemen.137 Two instances of returns by individuals are also worthy of note. A Swiss citizen responded positively to a request made by the Turkish Directorate of Museums to return a piece of Hellenistic bronze sculpture and a British subject voluntarily repatriated a ceremonial sword acquired by her husband to the National Museum of Colombo.138

Most notable among the bilateral agreements concluded between states formerly in a colonial relationship, resulting in the return to the former colony of select cultural property are: France and Laos as early as 1950, France and Algeria again in 1968, the Netherlands and Indonesia in 1976, and, most recently, Italy and Ethiopia.139

On a less formal level, diplomatic channels have been utilized to communicate requests for the return of cultural property.140 Ongoing are negotiations between several importing states and Nigeria and Sri Lanka141 for the return or restitution of various items. On the nongovernmental level, the Australian Museum Trust is mediating a request lodged with it by a private United States museum for the return of an unusual ritual object originating with the Chumash nation.142

Bilateral cooperation agreements, comprehending programs of reversion in addition to broader cultural initiatives, have been arranged between France and several African states.143 The Berlin State Museum and the

138. For further examples, see UNESCO Doc. CLT-83/Conf.216/8 at 6 (1983); Silva, Sri Lanka, 31 MUSEUM 22, 23 (1979).
140. Amidst a flurry of press attention, Cameroon formally petitioned the United States for assistance in the return of the Afo-A-Kom, a wooden carving sacred to the Kom people. It surfaced eventually in a New York art market and following further convolutions was returned. The United States Government was again approached in the early 1970s by the Indian Government to investigate the whereabouts of the Swapuram Nataraja. An agreement was reached between the private owner and the Indian Government for its return. Finally, a request by Ecuador to Italy for the restitution of a collection of pre-Columbian ceramics illegally exported to Italy in 1984 did not yield direct results, although subsequent court action resulted in the return of the items. See UNESCO Doc. CLT-83/Conf. 216/8 at 14 (1983); L. DUBOFF, THE DESKBOOK OF ART LAW 122-24 (1977).
143. UNESCO Doc. CLT-83/Conf. 216/8 at 11 (1983). These agreements include: (1) assistance in the construction of the National Museum at Bumako; (2) organization of a
National Museum of Cairo have concluded long-term loan contracts and long-term ripening into permanent acquisition. Most notable among the objects affected is the Nefertiti head which is to be shown alternatively in Berlin and Cairo. A program of interchanging exhibits was also arranged. Tentative cooperation and reversionary arrangements have been essayed as well between the Republic of Iran and Turkey. Still outstanding are several calls by Nigeria, Iran, and Turkey. Greece has attempted without success to open bilateral negotiations with the United Kingdom, most notably for the return of the Elgin marbles.

The various arrangements effecting the above-described transfers and proposed transfers need not dwell upon defining the subject property as cultural property. Mere designation of the object or objects in the operative instrument suffices to evidence this understanding. The range of objects subject to such reversions testifies to the expanded understanding of the property classified as protected under the cultural property regime, bearing witness thus to the value and propriety of the expansive inclination of the definitional segments of recent instruments and pronouncements in the cultural property regime.

IV. Conclusion

Cultural property was defined by content and described as a concept first under the law of war. Recognizing that the cultural property of a people is the intimate and irreplaceable expression of its moral and spiritual character, and acknowledging further that belligerent operations targeted against the embodiment of these qualities serves no necessary military end and, hence, is reprehensible, scholars and jurists defended its inviolability. More initially out of personal mutual respect, one suspects, than out of an overarching doctrinal concern, sovereigns began to accord cultural property special treatment under seventeenth and eighteenth century treaty regimes, returning many items to the territories of their origin. A well-articulated notion of national patrimony had developed by the early nineteenth century grounding the returns and restitutions demanded by the 1815 Congress of Vienna settlement. Still, however, the enjoyment and protection of cultural property were regarded as the exclusive priv-

campaign with Mali to collect cultural property; (3) assistance in the creation of the Historical Museums in Ouida; (4) assistance with the restoration of the Royal Palace of Omnes at Porto Novo, Benin; and (5) cooperation with Burundi in various programs dealing with the protection of cultural heritage.

146. Id. at 6, 14.
ilege and obligation of the nation state. Even the turn-of-the-century Hague Convention reflected this view.

Somewhat in the nineteenth century, although more overtly in the interwar years of the twentieth century, the definition of cultural property and the rationale therefor shifted from negative to affirmative obligations owed by states for its protection. A sense of universal trusteeship, administered by international, regional, and national units, was to be charged with overseeing the protection and maintenance of cultural property not only during periods of hostility but also in time of peace. States' obligations run to the community in general for the care of the common cultural property and to protection and preservation of their own share of the commons for the benefit of the rest.

Decolonization diversified and expanded the contours of the international community. Multiple understandings of the definition of cultural property were incorporated into instruments and declarations describing the rights and duties of states collectively and individually vis-à-vis properties that, consolidated, were appreciated as a common cultural heritage. A number of predominantly Third World countries, most of which were former colonies of states rich in variegated holdings of cultural property, began to demand the return to their territories from that common heritage of those items of cultural property that uniquely express their identity. The underlying rationale therefor, grounded in the law of war, was not being invoked in the context of the law of peace. Such fundamental and often overriding legal constructs as the contract and the integrity of collection doctrine make it difficult under law readily to accede to these reversionary claims. Where such demands are being attended to, the programs are, more often than not, self-described as _ex gratia_.

Although the pace of change has not been as rapid as many states and scholars would wish, progress is, in fact, being made. Technical projects sponsored by UNESCO, designed to preserve various expressions of national patrimony, continue to receive support from states otherwise critical of the more politicized undertakings of the Organization. Regional bodies and national legislatures have contributed to the definition of a culture through more careful specification of cultural property; bilateral and unilateral arrangements have been established under which cultural property has been moved back to its territory of origin, usually accompanied by cultural assistance packages.

The international law of cultural relations is formed and informed by rules, principles and norms shaped at the international, regional, and national levels. Given that this is one of the few areas in which cooperation relatively free of the divisive and retarding forces of politics is possible, one can only hope that international, regional, and national contributions to its development will continue.