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Michael J. Kelly

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# Conflicting Trends in the Flourishing International Trade of Art and Antiquities: *Restitutio in Integrum*\* and *Possessio animo Ferundi/Lucrandi*\*\*

Michael J. Kelly, Esq.\*

## I. Introduction

The illicit, international trade in art and antiquities is flourishing.<sup>1</sup> In fact, this trade currently runs second only to the international drug trade in the volume of business transacted.<sup>2</sup> The old way of doing business was for art-hungry nations to either buy or otherwise acquire much sought-after art and antiquities from art-rich nations.<sup>3</sup> Historically, this has been achieved through force or bribery. Today, in the face of increased efforts by countries to reclaim their cultural heritage, museums have become more cautious about checking the origins of artifacts before a purchase

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\* BLACK'S LAW DICTIONARY 1313 (6th ed. 1990). Restoration/restitution to previous condition.

\*\* *Id.* at 87, 1163. Possession with intention to steal/gain or profit.

\* Mr. Kelly is an attorney residing in Washington, D.C. B.A. '90, J.D. '94, Indiana University; LL.M. Candidate in International and Comparative Law '96, Georgetown University. Thanks to Jim Torke, Professor of Law, Indiana University - Indianapolis for supplying several items of source material for this article.

1. Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609 (1992).

2. Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 472-73 (1994). "Although it is inherently difficult to calculate the magnitude of the illicit international trade in art, the consensus is that this illicit trade is worth billions of dollars per year, second only to international drug trafficking in the amount of money involved."

3. Throughout this paper, economically challenged or developing nations with large reserves of significant art and antiquities are referred to as "art-rich," while those nations importing and consuming these antiquities (collectors and museums, generally Western and Japanese) are referred to as "art-hungry."

is made. However, collectors and investors have yet to display such concern about the origin of artifacts.

Two trends have recently developed in this international trade, the first trend tends to drive the second. In an effort to both recapture much of their lost cultural property<sup>4</sup> and preserve that which is still intact, many art-rich countries are pursuing replevin claims<sup>5</sup> abroad as well as passing more restrictive export and

4. "Cultural property" is defined by the United Nations Educational, Scientific and Cultural Organization [UNESCO] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property as

[P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of 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 material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historic, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

UNESCO Convention 1970, art. I, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90 [hereinafter UNESCO Convention 1970].

5. See, e.g., Mark Rose & Ozgen Acar, *Turkey's War on the Illicit Antiquities Trade*, *ARCHAEOLOGY*, Mar./Apr. 1995, at 45-46. "Turkey has used fundamental principles of Anglo-American common law as the basis for its cases in the United States by claiming that the antiquities involved are stolen property and that a thief cannot convey title." See also Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 *LOY. L.A. INT'L & COMP. L.J.* 427, 429 (1990). "Once a stolen piece of art is located, however, the true owner's principal

national cultural property laws at home.<sup>6</sup> Concurrently, the demand for antiquities grows, the supply is choked off. As the value of these goods increases, so does the incidence of their illegal excavation, exportation and sale on the international black markets.<sup>7</sup>

The net effect of this dynamic yields conflicting trends, thus, the ends sought to be accomplished by both are defeated. While more intense regulation drives the growth of clandestine excavations and the black markets,<sup>8</sup> many of the illicit goods are eventually recovered and restored to the country of origin through the increased recovery efforts of those countries.<sup>9</sup> Yet, these artifacts may be in poor condition upon their repatriation because of the hasty and inexperienced extraction and handling during the various illegal transactions that inevitably occur before the piece finally comes to rest in a collector's hands or a museum's vault.<sup>10</sup>

This article offers an historical perspective on the international trade in art and antiquities, a brief overview of relevant domestic and international legal regimes, and an analysis of the current conflicting trends, as well as sources of the continued black market

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means of obtaining possession is through a civil action in replevin."

6. Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1034 (1993). "Individual nations have taken measures to protect what they perceive to be their cultural patrimony via state ownership laws and domestic import and export regulations."

7. Margules, *supra* note 1, at 610. "Turkey is the West's major supplier of classical antiquities. The Western market for classical antiquities from Turkey combined with Turkey's strict laws prohibiting the export of all antiquities has instigated an entire network of organized smugglers." (citing Partington & Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?*, 12 *COLUM.-VLA J.L. & ARTS* 395, 396 (1988); Acar & Kaylan, *The Turkish Connection*, *CONNOISSEUR*, Oct. 1990, at 130).

8. See, e.g., Jamison K. Shedwill, *Is the "Lost Civilization" of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 *CAL. W. INT'L L.J.* 227, 251 (1992). "By attempting to stop the flow of *all* pre-Columbian artifacts out of Latin America and by restricting the flow of artifacts into the United States, the demand for and thus the monetary value of such goods increases. The high price attainable for these goods encourages violations of the law."

9. Prior to the emergence of the repatriation trend, the recovery rate for stolen art was minimal. See Margules, *supra* note 1, at 609-10. However, as this article demonstrates, more aggressive repatriation efforts by art-rich countries is yielding increased recovery of lost art.

10. See Shedwill, *infra* note 121 and accompanying text. Because illegal excavations are performed under clandestine circumstances by non-archaeologists using improper tools, the probability of the objects sustaining damage during the extraction is high.

expansion. A comprehensive comparison of the various domestic laws of affected nations is beyond the scope of this review, however, citations are given where appropriate for further research. Additionally, the discussion concerning case law focuses upon American jurisprudence.

## II. The Trade in Historical Context: Acquisition at all Costs

### A. A Case Study: *The Infamous Looting of the Elgin Marbles*

During my first tour of Greece, I had the inexpressible mortification of being present when the Parthenon was despoiled of its finest sculpture, and when some of its architectural members were thrown to the ground. I saw several metopae at the south east extremity of the temple taken down. They were fixed in between triglyphs as in a groove; and in order to lift them up, it was necessary to throw to the ground the magnificent cornice by which they were covered. The south east angle of the pediment shared the same fate; and instead of the picturesque beauty and high preservation in which I first saw it, it is now comparatively reduced to a state of shattered desolation.

- Edward Dodwell, British traveller cir. 1802.<sup>11</sup>

Historically, nations, collectors, and museums of the West cared little for the cultural context of rare and beautiful antiquities.<sup>12</sup> The goal was to possess as much as possible. In the case of the Elgin Marbles, Great Britain shamelessly looted and exported much of the sculptured integrity of the Parthenon on the Acropolis in Athens.<sup>13</sup> This story is typical of such behavior by art-hungry nations until the recent past.

Thomas Bruce, 7th Earl of Elgin and member of the House of Lords,<sup>14</sup> was appointed by the King to serve as Ambassador to Turkey in 1801.<sup>15</sup> His mission was to participate in the British effort to expel Napoleon from Egypt and keep the Turks on friendly terms with England.<sup>16</sup> Lord Elgin noticed the unique and

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11. JOHN HENRY MERRYMAN & ALBERT E. ELSEN, 1 LAW, ETHICS AND THE VISUAL ARTS: CASES AND MATERIALS 1-14 (1979).

12. This practice developed simultaneously with the spread of colonization. As new lands are conquered, the treasures of those subjugated peoples were shipped back to the conquering state as spoils. Shedwill, *supra* note 8, at 227.

13. MERRYMAN & ELSEN, *supra* note 11, at 1-4, Acquisition of the Marbles.

14. *Id.* (1766-1841).

15. *Id.* at 1-5.

16. *Id.* at 1-4.

fantastic sculptures in Athens and was persuaded to send artists and engineers to make casts of them.<sup>17</sup> This later turned to outright looting and the destruction of large segments of the Parthenon's architecture.<sup>18</sup> The Turks, who occupied Greece at the time, had no cultural interest in preserving Greek heritage and, therefore, were open to bribery and favors in exchange for permission to sack the Acropolis, so long as the foundations remained intact to provide them with a defensible military fortress.<sup>19</sup>

Lord Elgin used the Crown's warships and transports to carry home his treasure, which Great Britain subsequently purchased from him in 1816 for £25,000.<sup>20</sup> Interestingly, one conscientious Member of Parliament questioned the propriety of such a proposal on the floor of the House of Commons during debate on the bill of purchase:

Mr. Hammersley said, he should oppose the resolution on the ground of the dishonesty of the transaction by which the collection was obtained. As to the value of the statues, he was inclined to go as far as the honourable mover, but he was not so enamoured of those headless ladies as to forget another lady, which was justice.<sup>21</sup>

However, the motion to purchase Elgin's Marbles carried on a vote of 82 in favor and 30 against.<sup>22</sup> The treasure now resides in the British Museum, in London, despite periodic protests by the current Greek government.<sup>23</sup>

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17. *Id.* at 1-5 to 1-9.

18. *Id.* at 1-9 to 1-20.

19. *Id.* at 1-4 to 1-20.

20. *Id.* at 1-20 to 1-24.

21. *Id.* Lord Elgin's response to such allegations of injustice was that "[a]ll Greeks were peasants. They did not deserve such wonderful works of antiquity." Mastalir, *supra* note 6, at 1061, n.106 (citing T. VRETTOS, *A SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES 82 (1974)* (quoting Lord Elgin's response to being told by British counsel that certain takings of Eleusian statuary were illegal)).

22. MERRYMAN & ELSEN, *supra* note 11, at 1-24.

23. Burke, *supra* note 5, at 427, n.2. "Much, perhaps most, of the antique art in Western museums was brought there in questionable ways from countries whose current governments would like it back. The best known example is the Greek government's long-standing demand that the British Museum return the Parthenon's Elgin marbles." (quoting from the WASH. POST, Aug. 10, 1989, § A, at 24.)

### B. *Museums as Co-conspirators*

National governments have not been the only participants in the conspiracy to strip art-rich countries of their cultural wealth. To a large extent, museums, both national and private, have historically supported a thriving black market in art and antiquities. Supporting this assertion, Thomas Hoving, former director of the Metropolitan Museum of Art, admitted in his book *King of Confessors*, that until recently directors of major museums have purchased art and artifacts that they had good reason to believe were stolen and smuggled illegally into the country.<sup>24</sup> Museums that hold such artifacts are finding themselves increasingly under attack by the countries of origin.

For instance, the Art Institute of Chicago has settled a dispute with Thailand over a stone carving of Vishnu that it has displayed since 1967 by agreeing to return the carving in exchange for one of equal value from a private collector.<sup>25</sup> The Menil Foundation of Houston also agreed in 1988 to return a set of Byzantine frescos which were discovered to have been stolen from a Greek Orthodox church in Cyprus.<sup>26</sup> Finally, the J. Paul Getty Museum was accused by the Italian government of receiving and displaying a 6th century B.C. Greek statue that had been illegally excavated in Sicily.<sup>27</sup>

These are but a few examples of the intentional and unintentional complicity of museums in the illicit international trade of art and antiquities. A recent article in the trade publication *Archaeology* openly declares that: "America's museums have been the partners of thieves, smugglers, and unethical dealers and collectors . . . ."<sup>28</sup> Such ringing indictments, together with efforts of art-rich nations to repatriate their lost treasures, have prompted museums to be more careful about where and from whom they acquire art collections.

Consequently, it is much more common today for a museum to inquire into the donor or dealer's identity before accepting an

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24. Alexander Stille, *Was this Statute Stolen?*, NAT'L L.J., Nov. 14, 1988, 1 at 32.

25. *Id.*

26. *Id.*

27. *Id.*

28. Rose & Acar, *supra* note 5, at 46.

object of suspect origin.<sup>29</sup> Museums have a vested interest in maintaining a clean reputation so they do not turn away members of the public or the donation of major financial grants.<sup>30</sup> Museum directors and curators have finally made the determination that the short-term benefits of dealing with questionable sources in order to acquire outstanding pieces do not outweigh the long-term costs of legal hassles which stem from conflicting claims of ownership and the bad press associated therewith.

### III. Relevant Legal Regimes

There is currently no comprehensive legal regime covering the international trade of art and antiquities. Instead, there exists a patchwork of various domestic law, case law, and treaty law attempting to cover most aspects, both legal and illegal, of the trade.<sup>31</sup>

#### A. Domestic Laws

Most domestic law of art-hungry nations centers on export-import provisions.<sup>32</sup> However, much of this law in art-rich nations centers on claiming national sovereignty over all cultural property originating within the national borders.<sup>33</sup> Because of these patrimony statutes, the art-rich nation may lay claim to any object,

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29. Stille, *supra* note 24, at 32.

Now when a major acquisition is contemplated, lawyers are quickly consulted. The museums try to get information about the objects' provenance or history. If a dealer will not provide adequate documentation, the museum will make the dealer sign a warranty, guaranteeing that the title to the object is good and that the dealer will repay the museum for the object in the event there is a challenge to its ownership. Also, if the museum is uncertain about an object's origin, it will contact the countries where it may have come from, provide them with photographs of it and allow them a chance to claim it.

30. In today's journalistic climate of heightened awareness, scandal sheets, and probing to uncover questionable dealings, common sense dictates that museums can no longer afford to ride rough-shod over acquisitional ethics.

31. Lenzner, *supra* note 2, at 479, n.44 "All of the major art importing countries — and exporting countries as well — have what has been called an international hodgepodge of laws [that] can be a tremendous advantage to people who wish to move and sell stolen art . . ." quoting Robert Adams, *Smithsonian Horizons*, SMITHSONIAN, July 1993, at 10.

32. See, e.g., Margules, *supra* note 1, at 622-26 (discussing import restrictions of the United States).

33. Shedwill, *supra* note 8, at 241-42.



wherever it may surface, which was excavated within the territory of that nation.<sup>34</sup>

*1. Statutory Law.*—Both art-hungry and art-rich nations rely on domestic statutory law to control the flow of art and antiquities. Art-hungry states with common-law jurisdictions rely upon both case law and statutes. Art-hungry countries with no common-law jurisdictions, *e.g.* France, Germany and Brazil, rely exclusively upon statutes to control the trade. Art-rich countries, almost all of which are civil code states, can rely upon a combination of their own domestic statutes and the statutes or case law of art-hungry countries to claim recovery of lost artifacts in the courts of the art-hungry states where the antiquities are located.

For example, the Republic of Turkey, an art-rich nation, has used this combination successfully in its repatriation of the Lydian Horde from the Metropolitan Museum of Art in New York.<sup>35</sup> Turkey is using the same combination attack in efforts to recover a statue of Herekles of the Late Antonine period (A.D. 170-192) from the Museum of Fine Arts in Boston, as well as a marble statue of the Empress Domitia, carved circa A.D. 90, on loan to the San Antonio Art Museum.<sup>36</sup>

In the United States, while there are no all-inclusive “umbrella” statutes designed to guard against the illicit international trade in art and antiquities, there are a significant number of statutes with specific protection provisions.<sup>37</sup> Additionally, the U.S. relies

34. *Id.*

35. Rose & Acar, *supra* note 5, at 46.

36. Two art dealers are reportedly attempting to sell it for \$1.8 million. *Id.* at 48-49.

37. *Chronologically:*

The Antiquities Act of 1906 (16 U.S.C. §§ 431-33m (1988)) (protects historical sites and monuments in partnership with the states and the private sector);

The Historic Sites, Buildings and Antiquities Act of 1935 (16 U.S.C. §§ 461-67 (1988));

The National Historic Preservation Act of 1966 (16 U.S.C. §§ 470a-470w-6 (1988, amended 1991));

The Pre-Columbian Art Act of 1972 (19 U.S.C. §§ 2091-95 (1988));

The Arts and Artifacts Indemnity Act of 1975 (20 U.S.C. §§ 971-77 (1988)) (provides for exchanges of exhibits between museums of different nations);

The Archeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa-470mm (1988)) (protects archeological sites and resources located upon public and Native American lands);

The Abandoned Shipwreck Act of 1987 (43 U.S.C. §§ 2101-06 (1988));

The National Film Preservation Act of 1988 and 1992 (2 U.S.C. §§ 178-781 (1988) and 2 U.S.C. §§ 179-179k (Supp. IV 1992) (1992 act is part of the Copyright Act and repeals the 1988 act);

upon statutes of other nations that support the rulemaking authority of the U.S. Customs Service to regulate the flow of goods in and out of the country.<sup>38</sup> In Mexico and Peru, the respective legislatures have passed comprehensive statutes that vest all property rights to discovered or undiscovered cultural property in the state.<sup>39</sup> Furthermore, exportation of pre-Columbian artifacts from these two countries is absolutely forbidden.<sup>40</sup>

However, these export limitations alone have had little effect in the jurisdictions of the art-hungry nations, beyond driving up the demand for antiquities by bottlenecking the source. Generally, with the exception of pre-Columbian artifacts coming into the U.S., importing countries such as the United States will not preclude an artifact from being legally imported based solely on the fact that it was illegally exported.<sup>41</sup> Thus, it is much more effective for art-rich nations seeking recovery of their cultural property in the courts of art-hungry nations, to use a combination of their domestic statutes. This is achieved by first laying claim to the objects and then relying either on the commercial or property cases and statutes of that art-hungry nation to actually recover the artifacts.<sup>42</sup>

2. *Case Law.*—Case law is only controlling in common-law jurisdictions such as the United States, Canada, and England. All of the common-law nations are also art-hungry nations. Therefore, when an art-rich nation seeks to recover its lost treasures in the courts of a common-law country, it must rely upon cases that deal with personal property, bona-fide purchasers and commercial codes.<sup>43</sup>

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The Architectural Works Copyright Act of 1990 (17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990));

The Visual Artists Rights Act of 1990 (17 U.S.C. § 106A (Supp. II 1990));

The Native American Graves Protection and Repatriation Act of 1991 (25 U.S.C. §§ 3001-13 (Supp. III 1991)).

38. Margules, *supra* note 1, at 625-26. In the case of the illicit importation of pre-Columbian artifacts, the U.S. Customs Service has issued a Customs Directive which allows customs agents to seize art which is "improperly declared or undervalued" or if the country of origin claims property rights in the object. See SEIZURE AND DETENTION OF PRE-COLUMBIAN ARTIFACTS, POLICIES & PROCEDURES MANUAL SUPP. NO. 3280-01, U.S. Customs Service (Oct. 5, 1982).

39. Shedwill, *supra* note 8, at 242.

40. *Id.*

41. *Id.*

42. See *supra* note 5 and accompanying text.

43. Burke, *supra* note 5, at 441-42.

In the United States, there are a string of cases that deal with controversies surrounding ownership of title to various artworks and antiquities. Most of these are based on title disputes generated by looting of both public and private art collections during the Second World War.<sup>44</sup> The bedrock principle in common-law that many art-rich nations rely upon in order to recover their cultural treasures rests on the theory of stolen property. At common-law, one who purchased title from a thief, regardless of the buyer's good faith in the transaction, acquired no title to the property.<sup>45</sup> In other words, once property had been stolen, the subsequent buyer could not obtain good title even though he or she enjoyed exclusive possession. Thus, title remained in the true owner.<sup>46</sup>

This general principle was codified over time into statutes of limitation. Under such statutes, the purchaser of a stolen item held no title to the item until the statute expired. The original owner could bring a replevin claim recovering the item within the statutorily provided time period.<sup>47</sup> Usually, the statutes commenced from the date of the theft, regardless of whether or not the victim knew that the theft had occurred. However, the New Jersey Supreme Court in *O'Keefe v. Snyder*<sup>48</sup> refined this process by instituting the discovery rule. Under this rule, the applicable statute of limitations for replevin claims begins when the true owner knows or reasonably should know that a cause of action exists and discovers the identity of the possessor of the chattel.<sup>49</sup>

The discovery rule articulated in *O'Keefe* was applied by the District Court for the Southern District of Indiana to decide a case involving mosaics stolen from the Church of Cyprus, *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*<sup>50</sup> The court recognized that because the artwork was stolen, the purchaser had never obtained good title and that the Church had only recently discovered the identity of the possessor. Thus, the court held that the applicable statute of limitations had not yet

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44. Deborah DePorter Hoover, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 451 (1983). See S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY, A COMPARATIVE STUDY* 19 (1978).

45. Marilyn Phelan, *A Synopsis of the Laws Protecting our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 99 (1993).

46. *Id.*

47. Margules, *supra* note 1, at 630-31.

48. 416 A.2d 862 (N.J. 1980).

49. *Id.* at 874.

50. 717 F. Supp. 1374 (S.D. Ind. 1989), *affirmed*, 917 F.2d 278 (7th Cir. 1990).

run.<sup>51</sup> The court referred to *O'Keefe* in ruling that where a chattel is fraudulently concealed, the statute is tolled. Therefore, the court ordered that the artwork be returned to the Church of Cyprus.<sup>52</sup>

A second, older, line of case law offers an alternative to the discovery rule approach. Beginning with the same principle that a purchaser of stolen goods cannot pass title to a subsequent purchaser, because he or she has no title to pass during the period of the statute of limitations, a New York state court defined the demand and refusal rule. In *Menzel v. List*,<sup>53</sup> the defendant raised the statute of limitations defense against the plaintiff's replevin action to recover a Chagall painting stolen from her and her husband twenty-one years before, during the German invasion of Belgium in World War II.<sup>54</sup>

The court rejected the defense by reasoning that the owner's demand was a prerequisite to the commencement of an action in cases of conversion or replevin. The court determined that the statute of limitations did not begin to run until a demand had been made and a refusal to return had occurred.<sup>55</sup> By finding that such demand and refusal had occurred and the statute had not yet run, the court was able to order the return of the painting to the plaintiff.<sup>56</sup>

Subsequently, in *Kunstsammlungen zu Weimar v. Elicofon*,<sup>57</sup> the Second Circuit Court of Appeals applied the demand and refusal rule to restore several paintings by Albert Dürer to a German museum.<sup>58</sup> The defendant purchased the paintings in 1946 from a former American soldier who had looted them from Schwartzburg Castle during the American occupation of Germany. The statute of limitations was subsequently raised as a defense.<sup>59</sup> Finding that a demand and refusal had occurred in 1966 and that the German museum had filed a replevin action in 1969, the court rejected the defense and ordered the return of the paintings to the museum.<sup>60</sup>

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51. *Id.* at 1386.

52. *Id.* at 1391-92.

53. 267 N.Y.S.2d 804 (Sup. Ct. 1966).

54. *Id.*

55. *Id.* at 809.

56. *Id.* at 820.

57. 678 F.2d 1150 (2d. Cir. 1982).

58. *Id.* at 1161.

59. *Id.* at 1160.

60. *Id.* at 1160-66.

More recently, in *Deweerth v. Baldinger*,<sup>61</sup> the Second Circuit Court of Appeals expanded the demand and refusal rule significantly. In that case, a Monet painting was stolen by American soldiers during the occupation of Germany after World War II.<sup>62</sup> A New York art gallery later sold the painting to the defendant in 1957.<sup>63</sup> In 1982, the plaintiff discovered that the defendant was in possession of the Monet, and demanded its return.<sup>64</sup> The defendant refused.<sup>65</sup> The plaintiff successfully brought a replevin action in the New York District Court, which was overturned on appeal.<sup>66</sup>

The higher court, in applying the demand and refusal rule, enlarged the duty of the original owner seeking to recover by adding, "a duty of reasonable diligence in attempting to locate the stolen property."<sup>67</sup> The court found that the plaintiff did not use reasonable diligence to locate the Monet, and, therefore, reversed the lower ruling holding and applied the statute of limitations as a bar to the plaintiff's recovery.<sup>68</sup>

The principle gleaned from these cases is evident. Although *stare decisis* is generally adhered to in United States courts, the application of case law is not nearly as predictable as the application of statutory law. Nonetheless, art-rich countries stand a better chance of recovering their lost goods by using these common-law principles in the courts of art-hungry states, than by using the relatively weak and unenforceable international legal regimes that have developed.

### B. *International Legal Regimes*

International customs and treaties generally are considered the two most important controlling sources of international law.<sup>69</sup> No customs have come to be recognized among nations concerning the international trade of art and antiquities. Treaties and conventions are the only existing legal regimes in this area of international law. However, it should be noted that such international agreements are only binding upon those nations that are signatories. Thus, no

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61. 836 F.2d 103 (2d. Cir. 1987).

62. *Id.*

63. *Id.* at 105.

64. *Id.*

65. *Id.*

66. 836 F.2d at 106.

67. *Id.* at 108, 112.

68. *Id.* at 112.

69. BLACK'S LAW DICTIONARY, *supra* note \*, at 816.

comprehensive scheme exists to regulate the international trade in this area.

Efforts to protect the works of beauty of other countries in the context of warfare date back to 1758 when Emheric de Vattel, a legal scholar of the Enlightenment, authored *The Law of Nations*.<sup>70</sup> In his treatise, de Vattel stated, "For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, . . . such as temples, tombs, public buildings, and all works of remarkable beauty. . . ." <sup>71</sup> One hundred years later, these sentiments were again expressed in the Leiber Code, which was commissioned by President Lincoln during the Civil War in 1863.<sup>72</sup> The Code provided that artworks were not to be "seized, sold, given away, wantonly destroyed, damaged, or privately appropriated until such time as a peace treaty determined the ultimate ownership of the property."<sup>73</sup>

However, de Vattel's work did little to stop Napoleon from looting every culture that the French Imperial armies conquered, and Leiber's code did not prevent Union troops from sacking Confederate mansions. Likewise, the Hague Conventions of 1899<sup>74</sup> and 1907<sup>75</sup> on the Laws and Customs of War on Land, which expressly forbade the taking of spoils, failed to prevent extensive looting, damage, and destruction of artworks during both world wars.<sup>76</sup> After World War II, another attempt was made to control wartime looting with the passage in 1954 of the Convention

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70. Karl Meyer, *Who Owns the Spoils of War?*, *ARCHAEOLOGY*, July/Aug. 1995, at 51.

71. *Id.*

72. Instructions for the Government of Armies of the United States in the Field General Order No. 100, Adjutant General's Office, Department of the Army, Apr. 24, 1863 (Leiber Code), 2 F. Leiber, *Contributions to Political Science, Including Lectures on the Constitution of the United States and other Writings* 245 (1881); see also Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 *SYRACUSE J. INT'L L. & COM.* 281, 285 (1983).

73. *Id.*

74. *Id.* Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1899), T.S. No. 403, 26 *Martens Nouveau Recueil* (2d) 949 [hereinafter 1899 Hague Convention].

75. Burke, *supra* note 5, at 432. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 *Martens Nouveau Recueil* (3d) 461 [hereinafter 1907 Hague Convention].

76. 1899 Hague Convention, *supra* note 74; 1907 Hague Convention, *supra* note 75.

for the Protection of Cultural Property in the Event of Armed Conflict.<sup>77</sup>

Although several attempts were made to protect art and antiquities during wartime, it was not until 1970, with the adoption of the UNESCO Convention,<sup>78</sup> that the protection of artworks during peacetime was seriously addressed on the international stage. Although this treaty seeks to curb the illicit international trade in cultural property, it is widely viewed as weak, cumbersome and an unenforceable jumble of rhetoric.<sup>79</sup> The United States is the only nation of seventy-three signatories that is a significant, art-hungry state.<sup>80</sup> The rest are art-rich countries seeking to protect their national heritage.<sup>81</sup>

Another element of the inherent weakness of the UNESCO Convention is that it specifically allows each signatory state to define the "cultural property" that is to be protected.<sup>82</sup> This leaves each member state free to expand or limit its definition accordingly.<sup>83</sup> Even more disturbing is the fact that because the national governments are charged with defining what is to be protected, objects of great cultural significance to indigenous people, unrepresented in the government, may be left out with impunity.<sup>84</sup> Consequently, the Turkish definition of cultural property may leave out items sacred to the separatist Kurdish people who reside within Turkey. Similarly, the Spanish definition of cultural property may omit objects of historical or religious importance to the Basque, militant minority in northern Spain.

Because of the ineffectiveness of the UNESCO Convention, a new effort at international lawmaking to control the illicit trade in art and antiquities is underway and has produced a draft treaty known as the UNIDROIT Convention.<sup>85</sup> The UNIDROIT

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77. Burke, *supra* note 5, at 433-34. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.

78. See UNESCO Convention 1970, *supra* note 4.

79. Lenzner, *supra* note 2, at 478.

80. *Id.*

81. *Id.* at 478-79.

82. See UNESCO Convention 1970, *supra* note 4.

83. Mastalir, *supra* note 6, at 1040-41.

84. *Id.* at 1042.

85. International Institute for the Unification of Private Law [UNIDROIT] Convention on the International Return of Stolen or Illegally Exported Cultural Objects. The text of the draft convention appears in its entirety as appendices to Lyndel V. Prott, *The Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 41 INT'L & COMP. L.Q. 160, 168-70 (1992), and Lenzner, *supra* note 2, at 501-04. UNIDROIT is a group of fifty countries working to harmonize the laws of various nations.

Convention contains very little rhetoric and will likely result in the preemption of member states and the promulgation of a single source of law concerning the illegal international trade.<sup>86</sup>

It is unlikely that the UNIDROIT Convention will fare better than the UNESCO Convention in controlling the flow of illegal artworks unless the art-hungry nations of the West sign onto the agreement. This is because, the UNIDROIT Convention defers to the definition of cultural property contained in the UNESCO Convention.<sup>87</sup> Therefore, the lack of protection for the cultural heritage of unrepresented or oppressed indigenous peoples that exists under the UNESCO Convention remains under the UNIDROIT Convention.

It is because of largely ignored or unenforceable international agreements such as UNESCO and UNIDROIT that art-rich nations realize a greater degree of success at repatriating their cultural treasures by using their own domestic patrimony statutes, in combination with the domestic laws of art-hungry states, instead of relying on international legal regimes. Nonetheless, efforts at drafting meaningful international legislation governing this area of law should be encouraged. Until an international legal regime exists, the plight of art-rich nations attempting to reclaim their heritage will continue.<sup>88</sup>

#### IV. Conflicting Trends

##### A. *Restitutio in Integrum*

The movement toward repatriation of national treasures by art-rich countries is a growing trend of the 1990's. By considering arts and antiquities as part of their national patrimony, art-rich countries are realizing the dual scientific and economic justifications for expending resources to recover their plundered past. From a

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86. Lenzner, *supra* note 2, at 491-92.

87. *Id.* at 501. The draft UNIDROIT Convention defines cultural property in Article 2 as:

[C]ultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

88. *Id.* at 479. "Without the presence of some international source of law binding the [art-hungry] nations, however, [art-rich] countries have little chance of combatting the problem of the illicit trade in works of art."



scientific standpoint, returning art and artifacts to their place of origin puts them in the correct geographic and sociological context to better interpret their meaning and significance.<sup>89</sup> From an economic standpoint, these repatriated antiquities land in national museums and increase the tourist trade, which supports many of the economies of the art-rich countries.<sup>90</sup> This growing movement is doggedly led by the Republic of Turkey, which made great strides by recovering its Lydian Hoard.

Of Turkey's victories so far, the most impressive has been the repatriation of the Lydian Hoard . . . . The return ended a 25-year effort to recover the material and a six-year legal struggle with New York's Metropolitan Museum of Art. Consisting of 363 artifacts - gold and silver vessels and jewelry, a pair of marble sphinxes, and wall paintings - the "hoard" came from several sixth-century B.C. burial mounds in the Manisa and Usak regions of Turkey that were plundered in early 1966. . . . The Metropolitan purchased the antiquities between 1966 and 1970 for \$1.5 million.<sup>91</sup>

As previously noted, these art-rich nations use a combination of their own statutory domestic law, declaring national property rights over all artifacts within their territory, and the civil law of art-hungry code jurisdictions, or the case law of art hungry common-law jurisdictions to pursue lawsuits in the art-hungry court

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89. See Shedwill, *supra* note 8, at 228, n.12. For example, mayan stela, which are large stone slabs carved with hieroglyphics, are usually placed in religious or ceremonial centers. This would facilitate the process of interpreting their meaning and significance. What was happening, however, was that thieves would hack and saw the mayan stela into pieces because their size and weight prevented the easy theft of the stela in one piece. As a result, the hieroglyphics, which are rare and essential to understanding to the mayan civilization would be mutilated . . . . *Id.*; Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969).

90. See John Otis, "Ecotourism" Takes Off in Belize Featuring Sea, Jungle, Ancient Archaeological Sites, L.A. TIMES, Apr. 28, 1991, at A8. "In an effort to boost the economy but preserve the environment, Belize is pushing 'ecotourism.' Instead of surfing and theme parks, tourists explore the Caribbean Sea, the jungle and ancient archeological sites." Tourism is the fastest-growing sector of the Belize economy. *Id.* See also Editorial, *Pyramid Schemes*, WASH. POST, Jan. 11, 1993, at A16. "[A] team of archaeologists cleaning the ancient [pyramids] has racked up a string of spectacular discoveries. . . . Such discoveries normally would make this the best of times for pyramid fans, and by extension for an Egyptian economy that relies more heavily on tourism than on any other single industry (tourism passed oil as the top revenue source a few years back)." *Id.*

91. Rose & Acar, *supra* note 5, at 46.

systems to recover the artifacts. Turkey has found this to be of considerable use to its repatriation efforts.<sup>92</sup>

Of course, half the battle in recovering the artifacts is determining which museums or collectors in these art-hungry nations possess the objects sought to be repatriated. Italy has announced this year, that it will begin searching for 2,356 objects believed to have been stolen by the Nazis.<sup>93</sup> An inventory was compiled in the 1960s,<sup>94</sup> but in deference to maintaining good relations with West Germany during the Cold War, Italy did not pursue its claims.<sup>95</sup> However, Germany's recent claims against Russia for artworks looted by the Soviets during their occupation of Germany have emboldened Italy to revive efforts to recover its own lost art.<sup>96</sup> Professor Luciano Bellosi, a compiler of the original list stated, "The difficulty in most cases, of course, will be quite simply finding them."<sup>97</sup>

Once the artifacts are located, the real work of repatriation may commence. An anthropologist recently traced several antiquated linens, illegally taken from Bolivia, to a San Francisco based art dealer.<sup>98</sup> North American art dealers hired Bolivian middlemen to bribe members of the Coroman community to sell the objects and then the middlemen smuggled the textiles out of the country.<sup>99</sup> Upon discovery in 1992, the U.S. Customs Service seized the 48 ceremonial garments, worth \$400,000, which were taken from the village of Coroma and quickly repatriated them.<sup>100</sup>

Sometimes, when a lost treasure surfaces, there are several claimants scrambling to repatriate the artifacts. A good example is the Sevso Treasure. With the announcement by Sotheby's of an auction to sell fourteen Roman silver pieces crafted during the fourth or fifth century B.C., known as the Sevso Treasure,

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92. See *supra* text accompanying note 5.

93. John Tagliabue, *Armed with List, Italy Pursues Art Works Looted by Nazis*, N.Y. TIMES, May 28, 1995, at A 11.

94. *Id.* After the war, the Italian list was drawn up after the war by experts employed by an art recovery agency authorized by the Italian Foreign Ministry.

95. *Id.*

96. *Id.*

97. Tagliabue, *supra* note 93, at A 11.

98. A.M.H.S., *Sacred Bolivian Textiles Returned*, ARCHAEOLOGY, Jan./Feb. 1993, at 20, 21. The attorney representing the people of Coroma stated, "The purchase of the textiles from those who did not have the right to sell them was like paying the janitor at the National Archives to give you the *Declaration of Independence*—not exactly a legitimate sale."

99. *Id.*

100. *Id.* The U.S. government pressured the art dealers to give up the textiles.

Lebanon, Croatia and Hungary all came forward to claim property rights in the horde.<sup>101</sup> The treasure was owned by the Marquess of Northampton<sup>102</sup> who acquired it during the 1980s.<sup>103</sup>

Lebanon based its claim on the allegation that the treasure was unearthed in Lebanon in the 1970s and, to support its claim, cited a Lebanese law which vested in the government the absolute right to purchase antiquities discovered within Lebanon.<sup>104</sup> Meanwhile, Croatia claimed that the trove was found on its soil, and cited its own national patrimony law.<sup>105</sup> Hungary also argued that it was the place of origin and, pursuant to Hungarian law, artifacts of archaeological significance become property of the state as soon as they are either unearthed or found.<sup>106</sup>

Lebanon sued for, and was granted, a preliminary injunction on the sale or transfer of the Sevso Treasure, which was subsequently upheld on appeal.<sup>107</sup> A New York state trial court determined in 1993 that the Marquess of Northampton was the rightful owner of the trove.<sup>108</sup> The decision of the trial court has remained due to the refusal of the appellate court to hear an appeal on the matter.<sup>109</sup> Thus, repatriation actions have not been successful in all instances, especially where there are conflicting claims from several competing art-rich nations.

Another instance which involves several claimants is currently heating into an international controversy. The evolving dispute surrounding the booty which was looted by Heinrich Schlieimann a century ago, known as the Treasure of Priam,<sup>110</sup> serves as a metaphor to crystalize the conflict inherent in the two trends.

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101. Barbara Hoffman, *The Spoils of War*, *ARCHAEOLOGY*, Nov./Dec. 1993, at 37, 38.

102. *The Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566, 567 (1990).

103. Hoffman, *supra* note 101, at 38.

104. 561 N.Y.S.2d at 568.

105. Hoffman, *supra* note 101, at 38.

106. *Id.* (citing Hungarian law, Art. 1320 (1959)).

107. 561 N.Y.S.2d at 567. The pre-sale value of the treasure was estimated by Sotheby's to be \$70,000,000. A bond in the sum of \$1,000,000 was ordered by the appellate court, reducing the \$14,000,000 bond previously ordered by the trial court.

108. Lenzner, *supra* note 2, at 469, n.1. The court found that the treasure had not been illegally exported from either Hungary or Croatia. Lebanon withdrew from the case on the first day of trial due to the prohibitive costs of litigation. *Id.* at 470, n.11.

109. *Id.* at 469, n.1.

110. Hoffman, *supra* note 101, at 39. "Priam's Treasure, a collection of gold and silver vessels and jewelry, was excavated at Troy by Heinrich Schlieimann and brought by him to Germany in 1875."

Excavated in Asia Minor by the German archaeologist and then presented as a gift to Germany in 1881,<sup>111</sup> the trove has been claimed by Germany, Russia and Turkey.

The objects were displayed in Berlin until 1945 when General Zhukov's Red Army shipped them back to the Soviet Union.<sup>112</sup> Eventually, they ended up in the vaults of the Pushkin Museum in Moscow.<sup>113</sup> In 1990, Germany and the Soviet Union agreed to exchange all artworks in their possession expatriated during World War II.<sup>114</sup> This agreement was confirmed two years later by Boris Yeltsin, the president of the Russian Federation.<sup>115</sup>

However, Russia has since retreated from this agreement. Popular sentiment in Russia is that all loot seized from Germany in 1945 rightfully belongs to the Russian people as reparation for the horrors Russians suffered at the hands of Nazi forces.<sup>116</sup> This widely held feeling has led to a legal opinion by Mark M. Boguslavsky, a legal adviser to the Russian Ministry of Culture, that

[A]ll art removed from Soviet soil during World War II was taken illegally. "On that we can agree," he said, but as for the art removed from Germany by the Red Army, "we cannot agree it was illegal." He reasoned that with Hitler's defeat there was no German state, and since the Soviet Union was the legitimate governing authority in its occupation zone, it had every right to remove cultural property. . . . [Russia] had indeed pledged to return what had been illegally removed from Germany, but since everything was legally removed, Russia was not obliged to return anything.<sup>117</sup>

In an effort to diffuse the international tension building around this controversy, Russia asserts that Priam's Treasure is not the property of any one nation, but rather the collective cultural property of humankind.<sup>118</sup> To that end, Boris Yeltsin has announced that following an exhibition in Moscow in early 1996, the

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111. Karl E. Meyer, *The Hunt for Priam's Treasure*, *ARCHAEOLOGY*, Nov./Dec. 1993, at 27.

112. *Id.* at 28.

113. *Id.* at 32. A 1956 inventory by the Curator of the Pushkin Museum revealed that some key objects may be lost. It is possible that some of the Trojan treasure was removed from the crates before the Red Army arrived.

114. Meyer, *supra* note 70, at 46.

115. *Id.*

116. *See id.* at 47-49.

117. *Id.* at 47.

118. Hoffman, *supra* note 101, at 39 (*quoting* interview with Valery Kulishov, member of Russia's State Commission on Restitution, by *MOSCOW TIMES* reporter Anne Barnard).

trove will be exhibited in Greece.<sup>119</sup> However, the claims of both Germany and Turkey have gone unanswered.<sup>120</sup> Thus, the trends of repatriation and possession are both driving and clashing against one another with much international flare in the case of Heinrich Schlieimann's legacy.

### B. *Possessio animo Ferundi/Lucrani*

During the latter half of this century, ancient art and antiquities have become a major source of financial investment.<sup>121</sup> Because of the inherent ability of works of art to hold and appreciate in value through time, it is not uncommon for them to be used as collateral<sup>122</sup> for both legal and illegal international transactions. In these instances, the artwork is simply stored in a bank depository until the controlling statute of limitations has run, thereby vesting a right to possession in the particular creditor.<sup>123</sup>

While financial considerations are important motivating factors in the acquisition of art, the most common demand which sustains the black market has always been the voracious desire of collectors to possess as many rare items of beauty as possible. Nor is this desire limited to private collectors. Often, the intense rivalry among museums of national and international standing is so fierce it drives them to great lengths to outdo one another in the area of specialized or comprehensive collections.<sup>124</sup> However, as noted earlier, in the case of museums, such behavior is becoming more of the exception than the rule.<sup>125</sup> Private collectors, unconcerned

119. Rose & Acar, *supra* note 5, at 56.

120. *Id.*

121. Shedwill, *supra* note 8, at 227. See also Burke, *supra* note 5, at 428. The stock market crash of 1987 spurred corporate investors to seek more stable investments, such as art.

For archaeologists, the crack of the auctioneer's hammer sounded an alarm. They have been at war with the marketplace for 25 years, but the entry of corporate investors brings new intensity to the conflict. Archaeologists fear that dirt will fly everywhere from Peru to Iran as picks, shovels and bulldozers go to work digging for treasure — and destroying sites.

*Id.* at n.8 (quoting antiquities dealer Edward H. Merrin, N.Y. TIMES, July 16, 1989, § 6, at 17).

122. Margules, *supra* note 1, at 612, n.15. Such practices have been known to occur in Switzerland, Liechtenstein, and the Cayman Islands. *Id.*; Hennesse, *Why Great Art is Stolen (And Not Found)*, CONNOISSEUR, July 1990, at 43.

123. Margules, *supra* note 1, at 612, n.15.

124. See Mark Rose, *Flattery Will Get You Everywhere*, ARCHAEOLOGY, Mar./Apr. 1995, at 51.

125. See *supra* text accompanying note 19.

with the bad press which today tends to prevent a museum from purchasing illegally exported artworks, may provide the actual funds necessary to carry out the crime.

According to most experts, a considerable number of art thefts are commissioned.<sup>126</sup> Unfortunately, there is an explicit current example supporting this assertion. The temple at Angkor in Cambodia is being systematically stripped of its sculpture.<sup>127</sup> Looters first go onto the grounds and take pictures of various artifacts which are easily portable and then present the photographs to collectors in Thailand. The collectors make their selections and the thieves then return to Cambodia making the heist and returning with the goods.<sup>128</sup> The Thai military is complicit in this illegal international trade which is pillaging Cambodia's cultural heritage.<sup>129</sup> An archaeologist at the site remarked, "Angkor has survived invasion, civil war, and teams of well meaning conservators; one hopes it will survive the depredations of the greedy."<sup>130</sup>

While commissioned thefts constitute the driving cause for many of these crimes, a significant source of illegal excavations, grave robberies, and thefts which lead to illicit exportation, are the native people of art-rich countries.<sup>131</sup> The motivating factors for participation in such activities can range from a blatant desire for profit to a deep-seated love for the object that is exported.

The people of Italy are extremely charitable in their attitudes toward antiquities thieves and art collectors,<sup>132</sup> despite the Italian government's official legislative position of patrimonial preservation. This is illustrated by the love of art which prompts illegal excavation:

Italians love their art treasures, but are discouraged because acres of medieval and renaissance paintings and frescoes are mouldering away on the walls of churches with no one to care for them, and hundreds of archaeological sites go

126. MERRYMAN & ELSÉN, *supra* note 11, at 2-101.

127. Russell Ciochon & Jamie James, *The Glory that was Angkor*, *ARCHAEOLOGY*, Mar./Apr. 1994, at 38, 40. "[A]rt thieves are looting Angkor so relentlessly that in time there may be little left to conserve."

128. *Id.* at 49. "When we returned to Angkor, the extent of the looting that had taken place since our previous visit was heart-breaking. Everywhere we found scores of headless statues. . . . UNESCO estimates that art works are being stolen from Angkor at a rate of one per day. . . ."

129. *Id.*

130. Ciochon & James, *supra* note 127, at 49.

131. See MERRYMAN & ELSÉN, *supra* note 11, at 2-42 to 2-45. See also Shedwill, *supra* note 8, at 231.

132. MERRYMAN & ELSÉN, *supra* note 11, at 2-44.

unexploited because of both the limited supply of "qualified" archaeologists, and government red tape in granting permits for new expeditions. . . . Church robbers reasonably argue that the paintings they steal end up in the hands of people far more ready and able to care for them than the church. . . .<sup>133</sup>

Another example refers to a roadside shrine which contains a fresco by a student of Giotto that was succumbing to the elements. An article published in *La Nazione* by the chief engineer for the city of Florence stated, "Please someone steal it!"<sup>134</sup> This emphasizes the attitude that, despite the love of their cultural antiquities, native Italians do not want to possess them so much as to see them ruined. From such a perspective art thieves are facilitators in the preservation process.

This sentiment also surfaces as an argument by museums, dealers and collectors in supporting more lenient export controls. "They contend that many pieces would be ignored or ruined if left in place and that by allowing it to leave, the piece is saved and is made available for study."<sup>135</sup> However, when this argument is made by collectors from art-hungry nations, it becomes disingenuous because complete ruin is sometimes the intent of the native culture that produced the rare and beautiful object.

For example, the war gods, Ahayu:da,<sup>136</sup> of the Zuni people, a southwestern Native American tribe, are placed in outdoor shrines where their powers are believed to protect the tribe that produced them. These Ahayu:da must remain in place until they are completely decayed by the elements so that they may return to the earth. They are purposely exposed to the elements so they can perform their jobs as religious objects. Disintegration is necessary to their function. Because the value of these Ahayu:da is estimated at \$5,000 to \$10,000, the war gods are constantly stolen before they can complete their intended work.<sup>137</sup>

While love of the artifacts is a considerable influence from a native perspective, so too is the desire to seek profit. In Peru, there is a correlation between the country's economic collapse and the increase in illegal excavations and grave robberies feeding the

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133. *Id.*

134. *Id.*

135. Shedwill, *supra* note 8, at 232; Stanley Meisler, *Art & Avarice: In the Cutthroat Art Trade, Museums and Collectors Battle Newly Protective Governments over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989 (magazine), at 8.

136. Pronounced [ah-ha-YOO-dah], as stated by Mastalir, *supra* note 6, at 1038.

137. Mastalir, *supra* note 6, at 1038.

high demand for pre-Columbian artifacts in the art-hungry nations.<sup>138</sup> Native "huaqueros"<sup>139</sup> claim a right to take whatever their ancestors have buried and sell it for profit.<sup>140</sup> Thus, from this native "profit" viewpoint, artifacts and antiquities are yet another natural resource waiting to be exploited. When an art-rich country is in a fiscal downturn, it is simply not economically efficient to allow such resources to be unused.<sup>141</sup>

Yet another alarming source which feeds the trend of siphoning antiquities into the expanding black market for resale to collectors is academia. A theft recently occurred at the Vatican Library as an "inside job."<sup>142</sup> When an art-history professor from Ohio State University, with unlimited access to the Vatican Library attempted to sell several illuminated pages from a 14th century manuscript by Petrarch to a dealer in Akron, the suspicious dealer faxed a copy to another medieval scholar at Princeton, who in turn identified the pages and contacted the Vatican.<sup>143</sup>

Officials in Rome checked the volume from which the Princeton scholar reported missing pages and, indeed, discovered that the identified pages had been cut out of the volume.<sup>144</sup> Had the Akron dealer sold the manuscript pages, they may have brought in \$500,000.<sup>145</sup> Two of the inherent difficulties with controlling institutional theft are first discovering that it has occurred and second, eradicating the scholarly trust that institutions place in their academic colleagues.<sup>146</sup>

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138. Shedwill, *supra* note 8, at 231.

139. *Id.* "Huaqueros" is the term used throughout Latin America for "grave robbers." *Id.* at 231, n.42.

140. *Id.*

141. See Douglas W. Bailey, *The Looting of Bulgaria*, *ARCHAEOLOGY*, Mar/Apr. 1993, at 26, 27. The extensive looting of Bulgaria's cultural heritage has claimed five thousand icons from churches throughout the country in 1992 alone. "Dire economic times provide fertile climate for the looting and selling of artifacts. . . . One night's work with a spade and flashlight can buy five years' worth of food and drink, and a Volkswagen to boot."

142. Laura Shapiro et al., *A Heist at the Vatican*, *NEWSWEEK*, June 5, 1995, at 37.

143. *Id.*

144. *Id.* The volume was a copy of two Roman treatises on war and agriculture. The thief cut right through the annotations in the manuscript by the poet Petrarch.

145. *Id.*

146. Shapiro et al., *supra* note 142, at 37.

Constance Lowenthal, executive director of the International Foundation for Art Research . . . , says theft by staff members and trusted visitors occasionally occurs at libraries, but may go unreported. "If people slice up the books it's very difficult to know, unless they check every fragile manuscript that has just been examined. . . . You make the assumption



Thus, drawing from all of the sources identified above, the international black market in art and antiquities grows daily. It is driven by the motivation to collect or invest and the trend is to illegally accumulate artistically or archaeologically significant objects in contravention of strict export controls that have closed the legal acquisition option.

## V. Conclusion

To staunch the exodus of art and antiquities from beyond their borders, art-rich nations have enacted stricter export controls as well as patrimony laws that nationalize all such cultural property.<sup>147</sup> Additionally, greater resources have been brought to bear in the effort to repatriate items of archeological significance which are currently residing apart from their nations of origin. This trend of *restitutio in integrum* is gaining momentum and, encouraged by the success at repatriation of such countries as Turkey, more art-rich nations are laying claim to lost treasures residing in the museums and private collections of art-hungry nations.

However, the *restitutio* trend is also driving the *possessio animo ferundi/lucrari* trend. The growth in the antiquities black market is a backlash effect of the actions of art-rich nations to terminate exports of antiquities and to reclaim those found abroad. Conversely, the growth in the black market causes the art-rich nations to clamp down harder on controlling the export of their cultural heritage and to step up efforts to recover artifacts located in art-hungry nations. Thus, the combined effects of these two conflicting trends are circular.

Ultimately, the greatest loss is neither to the possessor who is deprived of his rare and beautiful object nor to the art-rich country that fails to repatriate an item from its past. Unfortunately, the greatest loss in the entire scenario is to science. As more mosaics are torn from their walls by torchlight, more artifacts are looted from burial chambers by moonlight and more paintings and tapestries are ripped from their mountings by thugs and thieves, science loses the ability to place the piece in its historical context, thus, never adding to the world's knowledge information about the lost civilization that produced it.<sup>148</sup>

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that the person coming to study is a scholar who respects and loves the material."

147. Mastalir, *supra* note 6, at 1034.

148. Shedwill, *supra* note 8, at 230.

Meanwhile, the trends feed off of each other, conflicting and driving the other to grow. Absent a strong and meaningful international legal regime supported and adhered to by both art-rich and art-hungry nations, the trends will continue to flourish. Archeological sights will continue to be plundered at alarming rates and artifacts will continue to be repatriated in sometimes damaged condition, or completely without scientific context and, thus, without significant educational value. Clearly, at some point, the madness must be stopped. But when? And by whom?

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When looters remove an artifact from its archaeological setting and sell it in the international market, even if it is later recovered, it is generally impossible to ascertain the area or archeological site of origin. Knowing the area a piece came from, and thus, its archaeological context is the key to understanding ancient civilizations. Therefore, when an artifact is illegally excavated or removed from a site, it may lose most of its educational value. It is important not only to protect cultural property from exportation, destruction, and mutilation, but also to preserve archaeological sites and keep the treasures "*in situ*" until they can be properly excavated. *Id.* at 231 (citations omitted).

