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Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments

CAROL A. ROEHRENBECK*

Should cultural property taken by a stronger power or nation remain with that country or should it be returned to the place where it was created? Since the 1990s this question has received growing attention from the press, the public and the international legal community.¹ For example, prestigious institutions such as the J. Paul Getty Museum of Art in Los Angeles and the Metropolitan Museum of Art in New York have agreed to return looted or stolen artwork or antiquities.² British smuggler Jonathan Tokeley-Parry was convicted and served three years in prison for his role in removing as many as 2,000 antiquities from Egypt.³ Getty director Marion True defended herself

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¹ Konstantin Akinsha and Grigorii Kozlov, *The Spoils of War: The Soviet Union's Hidden Art Treasures*, 90 ARTnews 130-141 (1991) and *Beautiful Loot: The Soviet Plunder of Europe's Art Treasures* (1995) revealed the systematic looting of German sites by Soviet trophy brigades for the first time. For a detailed discussion of Russian stolen art see, Amelia Borrego Sargent, *New Jurisdictional Tools for Displaced Cultural Property in Russia: From "Twice Saved" to "Twice Taken,"* YEARBOOK OF CULTURAL PROPERTY LAW 2010, 167, 171 (Sherry Hutt ed., 2010); Lynn Nicholas, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Vintage Books, 1994); Kenneth D. Alford, *The Spoils of World War II: The American Military's Role in the Stealing of Europe's Treasures* (1994). A number of restitution cases were also in the headlines. See, e.g., *Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (Lydian artifacts from the 7th Century B.C. were returned to Turkey in 1993 after the Met admitted it had known the objects were stolen when they had purchased them).

² In 2007 the Getty pledged to repatriate 40 artifacts to Italy and the Met returned 21 objects. Eti Bonn-Muller, *A Tangled Journey Home*, 60 ARCHAEOLOGY no. 5, Sept./Oct. 2007. In addition to these voluntary actions other repatriations resulted in protracted litigation. See *Turkey v. Metropolitan Museum of Art*, *supra* note 1.

³ ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 400 (Barbara T. Hoffman, ed., 2006).

against charges that she knowingly bought antiquities that had been illegally excavated from Italy and Greece.⁴ New books on the issue of repatriation of art and antiquities have captured the attention of the public.⁵ A documentary based on one of these books was shown in theaters and aired on public television.⁶ The first international academic symposium on the topic was convened in New York City in January 1995.⁷

These events signify a shift away from the historic tradition of plunder and theft, and evidence a move to protect and repatriate cultural property. However, efforts to reclaim and return stolen or looted artifacts face complex issues. First, there is ongoing debate about what approach should be taken with respect to a country's ownership of cultural property. Second, the process itself requires delicate cooperation among government, law enforcement, museums, and antiquities dealers and frequently includes transactions where there are gaps in historical records. Finally, there is a tangled web of both local and international laws covering the subject.

What follows is a brief introduction to the topic and a list of resources. The summary is by no means exhaustive: it is based on a talk given at the International Association of Law Librarians in Istanbul, Turkey in 2010.

Terminology

Art repatriation generally refers to the return of cultural objects to their country of origin. The Oxford English Dictionary defines "repatriate" as "to return again to one's native country."⁸ Restitution is defined as the "action

⁴ Elisabetta Povoledo, *Getty Ex-Curator Testifies in Rome Antiquities Trial*, N.Y. TIMES, March 21, 2009, at C3.

⁵ See, e.g., James Cuno, *Who Owns Antiquity: Museums and the Battle Over Our Ancient Heritage* (2008); Sharon Waxman, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* (2008).

⁶ Nicholas, *supra* note 1.

⁷ In January, 1995, the first international academic symposium was convened in New York and the symposium papers were published in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH - THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Elizabeth Simpson ed., 1997). A discussion of the first international academic symposium appears in John Henry Merryman et al., *Law Ethics and the Visual Arts* 22 (5th ed. 2007).

⁸ THE OXFORD ENGLISH DICTIONARY, Vol. VIII 460 (1933).

of restoring or giving back something to its proper owner,” and is generally used to refer to the return to an individual.⁹

The term “cultural property” is more difficult to define, although many experts and numerous treaties have tried. A leading author in the field, John Henry Merryman, says the term “cultural property” refers to objects that have “artistic, ethnographic, archaeological, or historical value.”¹⁰ However, this definition covers a potentially endless amount of objects, as today almost anything can be considered art.

Treaties and conventions provide their own, more specific, definitions.¹¹ The 1954 Hague Convention defines the term broadly: “For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people.”¹² Two recent conventions from the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Institute for the Unification of

⁹ *Id.* at 551.

¹⁰ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831 (1986).

¹¹ For a list of post World War II treaties and conventions *see*, <http://www.Savingantiquities.org/heritagetreaties.php> (last visited October 31, 2010).

¹² Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. 215, Chap. I, Art. I:

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments."

Private Law, (UNIDROIT), spell out the definition in more specific detail and share similar definitions of the term¹³

In the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [hereafter UNESCO 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 [specific] categories.”¹⁴

These categories include antiquities more than one hundred years old, such as:

- inscriptions;
- coins and engraved seals;
- objects of ethnological interest;
- property of artistic interest, such as pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
- original works of statuary art and sculpture in any material;
- original engravings, prints and lithographs ;
- original artistic assemblages and montages in any material;
- rare manuscripts and incunabula, old books, documents and publications of special interest (e.g., historical, artistic, scientific, literary, etc.) either singly or in collections.

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, uses the same definition but refers to “cultural objects” rather than cultural property.¹⁵ The European Union legislation is even more specific. It uses the

¹³ Leonard D. Duboff et al., *ART LAW: CASES AND MATERIALS* 115 (Hein Pub., 2004).

¹⁴ 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* 1970 Art. 1, Nov. 14, 1970, No. 11806, 823 U.N.T.S. 231 (May 9, 1972), *available at* http://portal.unesco.org/en/ev.phpURL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁵ International Institute for the Unification of Private Law (UNIDROIT), *Convention on Stolen or Illegally Exported Cultural Objects*, June 24, 1995, No. 43718, 34 I.L.M. 1322, (March 31, 2007). The items are detailed in the Annex as:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

age of the item to determine whether it is considered a cultural good and covered under the legislation.¹⁶

Two other terms often appear in literature on the topic. For example, a “source country” is a country that produces a high volume of valuable cultural property. In many instances source countries lack the resources to adequately protect their borders against invading countries or individual looters. A “market country” is a country (e.g., the United States) that buys cultural property.

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- (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 (historical, artistic, scientific, literary, etc.) singly or in collections;
 - (i) postage, revenue and similar stamps, singly or in collections;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

¹⁶ Council Regulation 3911/92, On the Export of Cultural Goods 1992 O. J. (L 395), 1, *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:00-01:0007:EN:PDF>; Council Directive 97/7/EEC, *On the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* 1993 O.J. (L 074), 74, *available at* http://europa.eu/legislation_summaries/culture/l11017b_en.htm.

Approaches to Ownership

Approaches to ownership are based on a variety of philosophies and often vary depending on whether nations are at peace or at war.¹⁷ Two common but contentious philosophies are Cultural Internationalism, on one end of the spectrum, and Cultural Nationalism on the other.¹⁸

Adherents of Cultural Internationalism support the idea that everyone has an interest in the preservation and enjoyment of all cultural property wherever it is located. Thus, the cultural property belongs to the global community, and the country with the better resources to care for another country's cultural property should retain possession.¹⁹ In this view, treasures such as Neffertiti's Bust in the Neues Museum in Berlin and the Elgin Marbles in the British Museum should remain in those respective museums since they are allegedly in a location where they are protected, cared for and available for all the world to see. James Cuno, director of the Art Institute of Chicago is a leading proponent of this view and argues that the "nationalist retentionist cultural property laws conspire against our appreciation of the nature of culture."²⁰

Cultural Nationalists believe that a nation's cultural property belongs within the borders of the nation where it was created. Nationalists emphasize national interests, values, and pride. They argue that such artifacts are important to cultural definition and expression, to shared identity and community.²¹ This philosophy gained greater recognition with the ratification of the 1970 UNESCO Convention.²² Internationalists think that human beings have a common heritage and that cultural property is of interest to everyone where ever it is located. The 1954 Hague Convention embodies the Internationalist attitude. This battle over who should keep ancient treasures – the source country or the market country – is contentious because, "at its base,

¹⁷ For a full discussion on early wartime approaches see Margaret Miles, *ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY* (2008).

¹⁸ See, e.g., Nicole Klug, Note, *Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise Between the Conflicting Ideologies of Cultural Property*, 42 CASE W. RES. J. INT'L L. 711 (2010).

¹⁹ See Merryman, *supra* note 10.

²⁰ Cuno, *supra* note 5; See also Merryman, *supra* note 10, at 831.

²¹ Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN 241, 242 (2008).

²² UNESCO, *supra* note 14.

[it is] a conflict over identity, and over the right to reclaim the objects that are tangible symbols of that identity.”²³

History

“To the victor belong the spoils” has been a rule of war throughout most of history.²⁴ Some early accounts tell us that Ramses II (who is thought to have ruled Egypt for 66 years from 1279 BC to 1213 BC), enriched his kingdom with treasures from his military expeditions north into Mediterranean countries.²⁵ The practice continued during the Greek and Roman periods.²⁶ The Romans glorified plunder and systematically carried off works of art belonging to subjugated peoples. Art objects ranked first among spoils, and the Romans conducted triumphal processions with their loot.²⁷

In the third century, the Visigoths continued the Roman practice of taking and displaying artistic treasures as symbols of strength as did the Vandals in the fifth century. By the end of that century, the great works of art at one time under Roman domination could be found in cities from Carthage to Constantinople.²⁸

²³ Waxman, *supra* note 5, at 3.

²⁴ Leonard D. DuBoff et al., *ART LAW: CASES AND MATERIALS* 533 (Aspen Pub., 2nd ed. 2010). In the United States, however, the phrase is tied to political corruption and attributed to William L. Marcey. See Henry F. Woods, *AMERICAN SAYINGS: FAMOUS PHRASES, SLOGANS AND APHORISMS* 17 (1949).

²⁵ DuBoff, *supra* note 24.

²⁶ Miles, *supra* note 17. Miles discusses the philosophy of the Romans and highlights the speeches of Cicero that were written to prosecute Verres, governor of Sicily. These early speeches lay the ground work for later philosophies of restraint and repatriation. For example, Miles notes that Verres was guilty of numerous wrongdoings but one of particular interest to Cicero was his confiscation of art during his rule. Cicero’s speeches set a tone praising legitimate military actions but condemning Verres’ illegitimate private thefts. Miles also shows how Cicero’s speeches and anecdotes served to influence later generations in developing philosophies on plunder during war and repatriation. Miles points out that even ancient Romans believed in restrictions on plunder of some public art and all religious art after the defeat of the enemy. *Id.*

²⁷ DuBoff, *supra* note 13, at 31.

²⁸ Cultural looting was carried out for a variety of purposes. For a discussion see Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 *CARDOZO PUB. L. POL’Y & ETHICS J.* 677 (2009).

During the Dark Ages and the Middle Ages, looting lost much of the significance it held during the Roman Empire. By the Renaissance, however, it had regained its former status. Plunder for cultural enrichment became a primary purpose, and there was a renewed taste for artistic and literary treasures. In 1622, the Palatine Library at Heidelberg, the most important library of the German Renaissance, was sacked by a military leader in the employ of Maximilian of Bavaria.

During the eighteenth century, Napoleon took the seizure of art to new heights. In Italy, for example, he took some of the most distinguished works including the Laocoon, the Appolo Belvedere, the Medici Venus, and the Horses of San Marco. He planned to build a national museum in Paris, filled with the best art of Europe.²⁹ Napoleon's looting was so extensive that Hitler used him as a model.

Throughout the nineteenth century, Britain, France and other European powers raced to strip artifacts from conquered countries and add them to their own museums. In the early nineteenth century, Thomas Bruce, the seventh Earl of Elgin, became a household name when he removed approximately half of the remaining sculptures and decorative relief-carvings of the Parthenon in Athens and had "the Elgin Marbles" transported to Britain.³⁰

During the twentieth, and the twenty first century, theft and plunder continued on a grand scale. Like Napoleon, Hitler planned to construct a grand museum, the cultural center at Linz, filled with the finest art in the world.³¹ He gathered art by the trainload and established the Einsatzstab Rosenberg as the official department in charge of "protecting" the art of other countries.³²

Unfortunately, art theft and destruction did not end after World War II. During the Great Proletarian Cultural Revolution of the 1960s in China, there was widespread destruction of ancient artistic properties, including books.³³ During the 1970s war in Southeast Asia, both American troops and Southeast Asian troops were guilty of destruction of cultural patrimony.³⁴

²⁹ Margaret Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT'L J. OF CULTURAL PROPERTY 28, 41 (2002).

³⁰ Klug, *supra* note 18, at 723.

³¹ DuBoff, *supra* note 24, at 552.

³² *Id.*

³³ *Id.* at 575.

³⁴ *Id.* at 578-79.

More recently in Kuwait, Iraq and Afghanistan, news accounts of rampant looting have captured the attention of the world. In the 1990s, Iraq invaded Kuwait and plundered the National Museum.³⁵ Ten years later, during and after the U.S.-led invasion of Iraq, the National Museum of Antiquities was pillaged and thousands of artifacts carried away by thieves.³⁶ From 1979 through 2001, Afghanistan's National Museum, archeological sites and ancient monuments suffered looting and destruction under successive regimes.³⁷

International Protections

While recent events might suggest that nothing has changed regarding plunder, there has actually been a gradual shift away from the "spoils-of-war" philosophy. This change has taken place in spurts over centuries.³⁸ Despite their early reputation for looting, the Romans developed some principles "for the behavior of a conquering army, the size of booty that could be taken, and what should be done with it."³⁹ However, many scholars trace the origin of such principles to the mid-eighteenth century work of the Swiss jurist Emmerich de Vattel and the publication of the *Law of Nations* in 1793.⁴⁰ Many of Vattel's ideas (which did not initially receive broad international support) were incorporated in the Lieber Code of 1863, drafted by Francis Lieber and published in a United States military field manual during the Civil War.⁴¹ The following are the major conventions governing art and cultural property. They set forth basic principles for preservation and return of cultural property.

³⁵ *Id.* at 578.

³⁶ *Id.*

³⁷ Roberta Smith, *Silent Survivors of Afghanistan's 4000 Years of Tumultuous Years*, N. Y. TIMES, May 23, 2008, <http://www.nytimes.com/2008/05/23/arts/design/23afgh.html?scp=1&-sq=+afghanistan+AND+looting+AND+museum+OR+art&st=nyt> (last visited October 31, 2010).

³⁸ Miles, *supra* note 17, at 286.

³⁹ Gerstenblith, *supra* note 28, at 678-79.

⁴⁰ DuBoff, *supra* note 13, at 44.

⁴¹ Miles, *supra* note 17, at 286.

Lieber Code of 1863

*Instructions for the Government of Armies of the United States in the Field (General Order No. 100. Known generally as the "Lieber Code.")*⁴²

The Lieber Code was the first codification of provisions governing the protection of cultural property during armed conflict.⁴³ These army regulations were drafted at the request of President Abraham Lincoln for use by Union military commanders in the Civil War. They provided for a determination of ownership of cultural property by treaty after the war in situations where the code allowed seizure of art objects. They also provided additional protection for art and libraries which were to be protected from damage.⁴⁴

Hague Convention of 1899

*Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land.*⁴⁵

This convention and the 1907 convention "constituted the first formal establishment of guidelines for the 'Protection of Cultural Property in the Event of Armed Conflict and Protocol Conflict.'"⁴⁶ Of particular interest are Articles 23, 28, and 47 which prohibit pillage and seizure by invading forces.

Hague Convention of 1907

*Hague Convention Respecting the Laws and Customs of War on Land.*⁴⁷

As in the 1899 Convention, the Annexes are of particular interest. For example, Article 56 spells out the obligation to protect property belonging to institutions of religious, charitable, educational, historic and artistic character from intentional damage.

⁴² Francis Lieber, *available at*

<http://www.icrc.org/ihl.nsf/73cb71d18dc43727412567390-03e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument> (last visited Oct. 31, 2010).

⁴³ Gerstenblith, *supra* note 28, at 681.

⁴⁴ DuBoff, *supra* note 13, at 44.

⁴⁵ Hague Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. 1803, *available at* <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>.

⁴⁶ DuBoff, *supra* note 13, at 45.

⁴⁷ Hague Convention (IV) with Respect to the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277 *available at* <http://www.icrc.org/ihl.nsf/FULL/195>.

The Hague Convention of 1954

*Convention on the Protection of Cultural Property in the Event of Armed Conflict.*⁴⁸

This is the first comprehensive international agreement on the protection of cultural property. It was adopted after the large-scale cultural looting and destruction of World War II. The Convention established principles for protecting cultural property including sites, monuments, and repositories of cultural objects during armed conflict and for preventing looting and smuggling of such objects from occupied territory. It discusses military necessity in connection with cultural property but, unfortunately, it fails to define the term.⁴⁹

The Protocols are of particular importance. The First Protocol prohibits the illegal export of cultural objects from occupied territories and facilitates the return of these objects at the end of the occupation. The Second Protocol – finalized at The Hague on March 26, 1999 – clarifies and strengthens several sections of the 1954 convention.⁵⁰ The Second Protocol places cultural property under enhanced protection if it is not used for military purposes.

1970 UNESCO Convention

*Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.*⁵¹

This convention is the primary instrument addressing the international movement of cultural materials, the problem of illicit trade in antiquities and the strong incentive for pillage of archaeological sites. It attempts to protect such property by preventing its export from source countries and import into other countries. Most nations that have ratified the convention grant cross-

⁴⁸ Hague Convention, 1954, *supra* note 12, available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁴⁹ *Id.* at art. 4, 11.

⁵⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999, 38 I.L.M. 769; see *Introduction*, INT'L COMMITTEE OF THE RED CROSS, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999, available at <http://www.icrc.org/ihl.nsf/INTRO/590> (last visited Oct. 31, 2010).

⁵¹ UNESCO, *supra* note 14.

the-board recognition of other States Parties' export controls on cultural materials. This means that nations require an export license from the country of origin before permitting the importation of those cultural materials that are subject to export control. The law is prospective only and requires implementing legislation by state parties. Initially, museums were not big supporters, because they wanted to insure the flow of antiquities. Other criticisms included the allegation that the Convention favored source countries at expense of market countries.

1995 UNIDROIT Convention

*Convention on Stolen or Illegally Exported Cultural Objects.*⁵²

At the beginning of the 1980s, UNESCO recognized that the principles in the UNESCO Convention of 1970 failed to respond sufficiently to private law issues, and they requested a uniform body of private law rules for the international art trade to complement the public law provisions of the 1970 UNESCO Convention.

The 1995 UNIDROIT Convention attempts to deal with the problems in the 1970 Convention. It allows private individuals to bring claims for the return of stolen cultural property that has ended up in a foreign country, and it attempts to clarify the extent to which importing countries are obliged to respect other countries' export-control laws. The convention sets uniform rules for claims. Claims requests are brought before a court or other competent authority of the party where the objects are located. The parties may agree to arbitration. The period of limitations on a claim for restitution or return amounts to three years relatively (i.e., from the date when the claimant first had knowledge of the cultural object's location and possessor) and 50 years absolutely.

One advantage of this convention is that it is self executing—it does not have to be implemented into national law. The disadvantage is that it is not retroactive; that is, for each state, it applies only from the date that the state ratified it.

European Union

One of the goals of the European Union is to allow for the free trade in all goods within the internal market. Over time, the EU realized that this

⁵² UNIDROIT, *supra* note 15, available at <http://www.unidroit.org/english/conventions/1995-culturalproperty/main.htm>.

principle had to be reconciled with that of protecting the cultural and artistic heritage of individual countries. To prevent the illegal movement of art from one country to another, the EU developed the following rules.

European Union Regulation on the Export of Cultural Goods

*Council Regulation No. 3911/92 of 9 December 1992 (as amended 1996, 2001, 2003).*⁵³

Amended by Council Regulation 2496/96 of 16 December 1996, Council Regulation 974/2001 of 14 May 2001, and Council Regulation 806/2003 of 14 April 2003.

Council Regulation 3911/92 was passed to harmonize export controls for cultural goods at the Community's external frontiers. It restricts the export of cultural goods to non-EU countries, provides for uniform export controls for cultural goods and subjects them to presentation of an export license that is valid throughout the union. A license may be refused if the goods in question fall into the category of national treasures covered by national legislation. The regulation also requires that each member prepare a list of items covered and develop categories defining value below which the measure does not apply.

European Union Directive on the Return of Cultural Objects

*Council Directive 93/7/EEC of 15 March 1993*⁵⁴

The directive seeks the return of national treasures of artistic, historic or archaeological value that were been unlawfully removed from the territory of an EU member on or after January 1, 1993, and includes a mechanism for return. Members may broaden the scope of the directive to include objects which have been unlawfully removed from their territory before 1 January 1993.

To apply the directive, states must class an object as a national treasure (even if they do so after it has left their territory). If the possessor refuses to release the cultural object, only a court of the member state where the cultural object was found has the authority to order its return.

⁵³ Council Regulation 3911/92, *supra* note 16.

⁵⁴ Council Directive 93/7/EEC, *supra* note 16.

Voluntary Measures

After the 1970 UNESCO Convention was adopted, many museums took more aggressive positions to ensure that the art they acquired came through legal channels. Specific references to the UNESCO Convention and provenance research began appearing in the policy manuals and press releases of major associations and organizations.

Association of Art Museum Directors (AAMD)

In 2008, the AAMD recognized the 1970 UNESCO Convention and issued new guidelines stating that buying unprovenanced antiquities encouraged their illicit trade. The association recommended that its members purchase only antiquities that could be proven to have been legally exported after 1970 or removed from their country of origin before that date. Museum members are now expected to trace ownership history back to 1970 for potential acquisitions, and to make their acquisition policies and all information regarding new acquisitions publicly available.⁵⁵

The British Museum and the J. Paul Getty Museum in Los Angeles have adopted the 1970 cutoff date. The Metropolitan Museum of Art quietly followed suit, although it has barely made that fact known.

Association of American Museums (AAM)

Since 2008, the AAM has required that its members rigorously research provenances before acquisition.

International Council of Museums (ICOM)

In 2007 ICOM took an additional step and finalized a formal mediation process so museums don't have to resort to litigation over cultural objects.

Restitution and Repatriation

There are many examples of successful repatriation and restitution of artifacts. These have been made by museums, individuals and governments.

⁵⁵One AAMD guideline on the identification and restitution of Nazi-looted art is available at http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf (last visited October 31, 2010).

Many were voluntary; some were the result of litigation. Below are a few examples of recent successes.

The Jewish Museum in Prague restituted 32 paintings and drawings to the heirs of Emil Freund, acting on a proposal of the National Gallery in Prague.⁵⁶

The Minneapolis Institute of Arts restituted Ferdinand Leger's painting *Smoke Over Rooftops* to the heirs of Alphonse Kann.

The Netherlands returned ownership of dozens of ancient artifacts to Iraq, stolen from the country during and after the US-led invasion of 2003.⁵⁷

In 2010, in one of the most famous cases, *Portrait of Wally* was returned to the Leopold Museum when the Bondi Jaray estate, the US government and the Leopold Museum in Vienna reached a settlement. The museum paid the Bondi Jaray estate \$19 million, and in exchange, the Bondi Jaray estate released its claim to the painting. The US government dismissed the civil forfeiture action and released the painting to the Leopold Museum.⁵⁸

Norway, Denmark, Switzerland and the United States have returned about 13,000 artifacts to Afghanistan, and Britain has returned about 2,000 artifacts that were smuggled into the country over the years of war in Afghanistan.⁵⁹

⁵⁶ *Restituted Works of Art – The Collection of Dr. Emil Freund*, JEWISH MUSEUM IN PRAGUE, <http://www.jewishmuseum.cz/en/aobrazy.htm> (last visited October 31, 2010).

⁵⁷ *Dutch Hand Back Looted Iraqi Art*, BBC News, July 9, 2009, <http://news.bbc.co.uk/2/-hi/8143479.stm> (last visited October 31, 2010).

⁵⁸ Randy Kennedy, *With the End of a Legal Dispute, a Schiele Comes to Manhattan*, N. Y. Times, July 29, 2010, http://tinyurl.com/38w68yoWITHTHEENDOF_BRF.html?scp=1&sq=%22-portrait+of+wally%22+schiele&st=nyt (last visited October 31, 2010).

⁵⁹ Sabrina Tavernise, *Returned Artifacts Displayed in Kabul*, N. Y. TIMES, Oct. 6, 2009, http://www.nytimes.com/2009/10/07/world/asia/07afghan.html?_r=2&ref=world (last visited October 31, 2010).

Conclusion

Despite recent events that might suggest that nothing has changed regarding plunder and theft of cultural property, there has been a gradual shift away from the “spoils-of-war” philosophy. Each year, more countries recognize the need for protection of their cultural property and decide to join the international treaty regime. As of 2009, 122 nations have signed the main 1954 Hague Convention; 121 nations have signed the 1970 UNESCO Convention and 22 nations have signed the 1995 UNIDROIT Convention.⁶⁰

⁶⁰ Patty Gerstenblith, *International Cultural Property*, 2010 YEARBOOK OF CULTURAL PROPERTY LAW 127,128(Sherry Hutt ed.); <http://portal.unesco.org/la/convention.asp?KO=130-39&language=E>; <http://www.cino.org/page/2298> (Last visited October 31, 2010).