Vanderbilt Journal of Transnational Law

Volume 7
Issue 3 *Summer 1974*

Article 7

1974

The Protection of Art in Transnational Law

Alan Marchisotto

NOTES

THE PROTECTION OF ART IN TRANSNATIONAL LAW

I. INTRODUCTION

The works of great craftsmen have been prized throughout history both for their inherent beauty and for their representation of man's highest creative talent. The artist, drawing inspiration from societies past and present, contributes to that collective store of genius which comprises man's cultural heritage. In so doing, he performs the vital function of preserving and transmitting to future generations the accumulated accomplishments of his own civilization and those that preceded it. In this sense, art is universal in nature and expresses the diverse origins of man's common creative achievement. It is a medium of intellectual exchange to which all peoples of the world may claim access.[1]

The importance of great works of art to the cultural life of modern societies gives these societies a special interest in the preservation and in the custody of art, often to the subordination of conventional property concepts. Thus, for some purposes, art is accorded the characteristics of private property while for other purposes, it assumes the character of public or quasi-public property. The property characterization of art is further complicated because art, unlike many national assets, is frequently in the hands of private individuals who would ordinarily be entitled to treat their collections in the same way that they treat any other chattel. But the peculiar nature of art and its place in the cultural scheme of society has often led to the imposition of restrictions on the traditional rights of private ownership. For example, the unrestricted alienation of culturally important works may no longer be automatically assumed.

With the rise of the nation state have come attempts to chisel

1. A people's cultural heritage is comprised of more than art and artifacts alone. This paper is primarily concerned with the protection and preservation of art and to the extent that it considers the larger area of cultural heritage, it does so in the context of art. Much of what is said applies equally, however, to manuscripts, antiques, architecture and the other component elements that together comprise a nation's cultural heritage.

off pieces of Western civilization and claim them for a particular country or people. Often these claims are based on the mere physical presence of a work in the claiming country. Western culture has become no less cosmopolitan, but there has arisen a greater consciousness of national development within that culture. In the name of the people, the state has become the owner of many great works of art and has emerged as an ever more vigilant guardian of privately owned works. The nineteenth and twentieth centuries have thus been marked by significant attempts by individual states to control the free flow of art and to preserve and protect existing works of particular importance to the cultural heritage of the nation. States are responsible, however, not only to their own people, but also to the broader civilization of which they are a part. This dual accountability serves to temper national claims and to promote that continued cultural interchange that is so necessary to world understanding.

Over the years, governments have been faced with preservation problems posed by war, theft and uncontrolled access to cultural sites. In addition, they have become increasingly sensitive to the unrestricted exodus of culturally important works of art. Their attempts to deal with these problems have raised serious questions about the nature of state responsibility in this field, about the criteria employed to define a particular cultural heritage and to classify certain work as falling within it, and about the right of nations to claim exclusive control of designed works of art. The difficulty in answering these questions has been compounded by the greatly accelerated pace of market transactions caused in part by the conversion of art into a vehicle for investment as well as for cultural enrichment. These market forces have often created disproportionate demands on the cultural stores of certain nations. Consequently, faced with the prospect of widespread loss of cultural treasures, some states have simply refused to permit a continued art exodus. Allowing for a legitimate state interest in this area, the question of the permissible extent of state control remains, especially in light of the universal nature of art and its importance in the development of numerous societies.

This article will survey various attempts by states in the nineteenth and twentieth centuries to preserve and protect great works of art and to define the nature and extent of a national cultural heritage. It will also examine current national and international preservation mechanisms in light of the need for cultural interchange.

II. The Evolution of Attempts to Protect Works of Art During Periods of Belligerency

Attempts by Western states to arrive at some agreement concerning the protection of art often have been intertwined with efforts to codify the rules of war, especially since, until recent times, wars presented the single greatest threat to the existence and ownership of art. History is replete with examples of victorious armies carrying off as plunder the greatest cultural achievements of their foes.[2] War was a total endeavor; the sack a common military practice. Often, what was not looted was destroyed. This proved to be one of the least desirable methods of cultural interchange.

Attitudes concerning the waging of war began to change in the eighteenth century. The writings of Vattel, for one, stressed more purely military means of conducting warfare, emphasizing the need for channeling the efforts of the nation into the destruction of a foe's armed forces.[3] In this regard, he sought to distinguish between belligerent and nonbelligerent elements in society.[4] His writings represent an early attempt to define the permissible extent of war related activities and to designate certain components of society that should, so far as possible, remain exempt from the ravages of armed conflict. These efforts reached their peak in the latter part of the nineteenth century.[5]

That these ideas had not totally taken hold by the beginning of the nineteenth century is amply demonstrated by the widespread looting that occurred during the Napoleonic wars. The spoilation perpetrated by the French was marked by its organization and thoroughness. What occurred was not a wholesale pillage by soldiers on the rampage, although there were undoubtedly such incidents, but rather an organized effort by the French Government

2. For a full treatment of this subject see Muntz, *Les Annexions De Collections D'Art Ou De Bibliothèques*, 8 Revue D'Histoire Diplomatique 481 (1894). Subsequent installment articles appear at 9 Revue D'Histoire Diplomatique 375 (1895), and at 10 Revue D'Histoire Diplomatique 481 (1896).

3. E. de Vattel, The Law of Nations 368 (Chitty ed. 1844).

4. *Id.* at 369.

5. *See* discussion of the Hague Conventions of 1899 and 1907, notes 30 and 31 *infra* and accompanying text. A parallel situation arose with regard to archives and public records. *See* Posner, *Public Records Under Military Occupation*, 49 Am. Hist. Rev. 213.

to transport to France the great artistic achievements of Europe.[6] This plunder was not justified in terms of war success alone but rested as well on the concept that revolutionary France, as the center of liberty, was the most appropriate repository for these important works.[7] French artists of the period viewed the military campaign as a means of elevating the quality of French arts by providing them with the greatest examples of achievement from past civilizations.[8] The world would then look to France for cultural inspiration in the same way that it would look to her for political regeneration.

Much of the Napoleonic art acquisition occurred in Italy and was legitimized by armistice treaties with the Pope and with various princely states in which the victor was given the specific right to seize and transport to France large quantities of art objects.[9] Although the art acquisition clauses in the treaties were perhaps *pro forma* in nature, Napoleon's efforts to cloak his acquisitions in legality betray a certain sensitivity to the implications of his plunder. This was not a course that Napoleon uniformly followed in confiscations elsewhere in Europe. This selectivity may have reflected a recognition that in Italy, more than in most other areas of Europe at that time, great monuments and art works were more closely connected in the popular mind with a glorious past, which all inhabitants of the Peninsula shared. The Renaissance and especially the Roman past formed a cultural heritage that was plainly visible and in many respects uniquely Italian.[10]

---

6. *See* Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437 (1945) [hereinafter cited as Quynn].

7. Napoleon commendably recognized that all Europeans shared a common culture, but in the nationalistic spirit of the era, he denominated it French. He stated, "[A]ll men of genius, all those who have attained distinction in the republic of letters, are French no matter in what country they may have been born." *Id.* at 439.

8. These sentiments were contained in a petition sent to the Directory in 1796 and signed by almost all of the great French artists of the day. General de Pommereul echoed those thoughts when he stated, "Real conquests are those made in behalf of the arts, the sciences and taste and they are the only ones capable of consoling for the misfortune of being compelled to undertake them from other motives." *Id.* at 438-39.

9. These concessions were granted in a Treaty of Tolentino (1797) and in the Bologna Armistice Convention (1796) among others.

10. A then contemporary view of art confiscations held: "Civilisation has served as a safeguard for the world in the terrible career that it has run: through

It is not surprising that with the final defeat of Napoleon, there were widespread demands for the return of confiscated art works. An attempt by the French to protect their new found treasures by inserting a clause into the Convention of Paris (1815) that would guarantee the integrity of museums and libraries was rejected.[11] The Allies who had defeated Napoleon were faced with two classes of art—that which had been simply confiscated, and that which had been taken pursuant to treaties concluded with defeated states. The first situation presented few problems, but the latter raised significant issues concerning title of ownership.

The question of restitution considerably agitated the French populace, who equated museum adornment with national power. The Duke of Wellington equated it, on the other hand, with national vanity and, in promoting restitution, sought to teach the French a "great Moral lesson."[12] Both confiscated art and art acquired pursuant to treaty was ordered restored. To have required less would have been to invite legitimization of booty in the future by the imposition of sham treaties. Fortunately, the Allies refrained, for the most part, from seizing art treasures in France that antedated Napoleon. Curiously enough, the demand for restitution was not included in either of the peace treaties concluded with France by the Allies;[13] rather, restitution occurred before the treaties were signed. This may have been a concession to political realities: the Allies not wishing to confer on Louis XVIII the onus of having given up such treasures. Nevertheless, Wellington argued that the restitution demanded by the Allies was lawful as Napoleon had systematically looted the objects from the rest of Europe contrary to the principles of jusice and the rules of modern war.[14]

---

it and with the assistance of beneficient arts . . . the scythe of death . . . has been in a small measure blunted . . . . It is to obey the dictates of civilisation, that men have been uniformly engaged in impelling their battalions on their enemies, calling forth the arts, raising monuments, appropriating those of genius to the decoration of their country-destroyers on the one hand, restorers on the other. On one side they appear to labour to efface the outrages which, on the other, they committed against civilisation; and thus acknowledging that they could not support themselves without its assistance." M. DE PRADT, THE CONGRESS OF VIENNA 36 (1816).

11. *See* F.H. TAYLOR, A TASTE OF ANGELS 572 (1948).

12. Letter from the Duke of Wellington to Lord Castlereagh, Sept. 23, 1815, in 12 THE DISPATCHES OF THE DUKE OF WELLINGTON 641 (Gurwood ed. 1837).

13. *See* I. VASARHELYI, RESTITUTION IN INTERNATIONAL LAW 29 (1964).

14. *Id.* at 30; Letter from the Duke of Wellington, *supra* note 12.

Thus, the Allies decided that the treaties concluded by Napoleon as victor did not confer upon France valid title to the seized objects. Implicit in this decision is the recognition of the concept of cultural heritage as a principle that will negate the transfer of art treasures to a victorious foe under threat of force, even when that transfer is outwardly legitimized by treaty.[15] This decision by the Allies, Wellington's reference to principles of modern war, and Napoleon's resort to the use of treaties for acquisition purposes all pointed, in varying degrees, to a recognition that wholesale plunder would not be tolerated and that states have a special claim to the art treasures situated within their borders.

The action of the Allies at Paris proved to be persuasive evidence that the ideas of Vattel in the eighteenth century would not die with the coming of the nineteenth century. Indeed, by mid-century, the idea of placing limits on warfare seems to have been sufficiently accepted, leading Henry Wheaton to comment: "By the ancient law of nations, even what was called *res sacrae* were not exempt from capture and confiscation. . . . But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war."[16] As this statement demonstrates, the obvious beneficiaries of attempts to limit the scope of warfare to purely military operations were the public museums, monuments and art centers of belligerent states. Theodore D. Woolsey, in his treatise on international law, emphasized the importance of the Allies' response to Napoleon's art collecting activities:

> The older practice made little distinction between public and private property, little between public property of different kinds. That which had the least relation to military affairs, as libraries, works of art, public buildings for peaceful purposes, might be plundered or destroyed . . . . When the Allies entered Paris after the

15. This view was less than universal. Stendhal, for one, observed, "The Allies have taken eleven hundred fifty pictures. I hope I may be permitted to observe that we acquired them by a treaty, that of Tolentino . . . . On the other hand, the Allies have taken our pictures without treaty . . . ." Quynn at 459.

16. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 395 (3d ed. 1846).

> battle of Waterloo, they recovered the works of art which the emperor had robbed them of . . . . The recovery of the works of art was an act of simple justice, not precluded by previous treaty.
>
> The rule is now pretty well established, that while all military stores and buildings are lawful plunder, and while every edifice in the way of military movements—whether indeed public or private—may be destroyed, whatever does not contribute to the uses of war, ought to remain intact.[17]

An early attempt to codify the above rule for the United States army was contained in the Lieber Code,[18] issued in 1863. These regulations governing army field activities explicitly recognized the right of a victorious army to seize all public movable property,[19] with the question of title to be held in abeyance pending complete conquest. However, property belonging to churches, to institutions of a charitable or educational nature, and to museums of fine arts was not considered to be public property for these purposes,[20] even though taxation of such property was permitted.[21] Further, the Code provided that works of art in a war zone could be removed by the conquering state, if to do so would further their protection. Thus, ultimate ownership of the art was to be settled by the ensuing peace treaty.[22] In no event were the seized works to be privately

17. T.D. WOOLSEY, INTERNATIONAL LAW 230 (5th ed. 1879).

18. Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, April 24, 1863 in L. FRIEDMAN, THE LAW OF WAR 158 (1972).

19. *Id.* art. XXXI: "A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete."

20. *Id.* art. XXXIV: "As a general rule, the property belonging to churches, hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph XXXI: but it may be taxed or used when the public service may require it." This represents an early codification of the practice whereby certain kinds of public property, which would not ordinarily be involved in the war effort, are accorded the status of private property in order to exempt them from requisition by an enemy.

21. *Id.*

22. *Id.* art. XXXVI: "If such works of art, libraries, collections or instruments [contained in a fortified place] belonging to a hostile nation or government can

appropriated, sold, destroyed, or given away before ownership was ultimately determined by treaty.[23] The Code thus recognized, without fully embracing, the evolving international rule that a nation's art treasures were to be considered inviolable by the conquering state. While exempting from seizure certain movable public property, the Code permitted seizure of art in certain instances, with title to be decided by an ensuing peace treaty. In this regard, the Code adopted the French position of 1815 on the validity of peace treaties in determining national claims to ownership of art work, rather than the position of the Allies, and was thus somewhat out of step with prevalent international thinking. It should be remembered, however, that the major portion of a conquered nation's art work was protected under the Code.

One of the first attempts to codify rules for the protection of art work on an international scale occurred at the Conference of Brussels in 1874. Its Declaration,[24] which was never ratified, contained several provisions dealing with art protection that served as models for the great Hague Peace Conference 25 years later. The Declaration stated that establishments devoted to the arts, whether or not belonging to the state, should be treated as private property and that seizure or destruction of such establishments should be prosecuted by the competent authorities.[25] Private property could not be confiscated,[26] and pillage was prohibited.[27] Additional articles

---

be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing peace treaty.

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

23. *Id.*

24. Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, Aug. 27, 1874, *reprinted in* 1 AM. J. INT'L L. SUPP. 96 (1907).

25. *Id.* art. VIII: "The property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property.

"Every seizure, destruction of, or willful damage to, such establishments, historical monuments, or works of art or science, should be prosecuted by the competent authorities." How this prosecution was practically to proceed is somewhat of a mystery but, nonetheless, emphasizes the strength of the conviction that art was peculiar to the state in which it was situated.

26. *Id.* art. XXXVIII.

27. *Id.* art. XXXIX.

provided for physical protection of art from the ravages of war.[28] Although never adopted by the states attending the Conference, the Declaration probably reflected the prevailing international sentiment on the question of art protection that had evolved in the 60 years since the defeat of Napoleon. From a purely military viewpoint, the movement to spare cultural centers and works of art was justified on grounds that they were outside the sphere of military activity and concern. An additional factor, however, must have been a realization that such treasures were finite in nature and once destroyed, were irreplaceable. This idea was linked to an appreciation of the intrinsic worth of art not only to the country in which it was situated but to all countries. Yet, even though a particular work of art was important to all peoples, it could not be seized or otherwise taken by a conquerer from a defeated foe. The physical presence of a work of art in a particular nation for some period of time conferred upon the host state some special claim to the work. By reason of being situated in a state, art work formed part of that state's cultural heritage, a heritage that it shared with other nations but which in some respects was peculiarly its own.[29] The respect accorded national claims to art work in time of war impliedly led to a recognition of the concept of cultural heritage on which those claims were mainly based.

The Hague Conventions of 1899[30] and 1907[31] represented at-

28. *Id.* art. XVII: "[A]ll necessary steps should be taken to spare, as far as possible, buildings devoted to religion, arts, sciences and charity, hospitals and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes.

"It is the duty of the beseiged to indicate those buildings by special visible signs to be notified beforehand by the beseiged."

29. The flow of art during peace time, especially that in private hands, was still relatively unhindered at that time and market forces had not yet combined to place extraordinary demands on certain nations. Thus, this reasoning was appropriate for wartime purposes. As peace time circumstances changed in the twentieth century, and governments began to impose greater restrictions on the flow of art, questions arose regarding the criteria to be used to denominate one's cultural heritage. These and related questions are discussed *infra*.

30. Convention with Certain Powers on the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1902), T.S. No. 403 [hereinafter cited as Hague Convention].

31. Convention with Other Powers on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1909), T.S. No. 539 [hereinafter cited as Hague Convention].

tempts by the major nations of the world to compile a comprehensive code that would establish the limits of acceptable behavior within which warring nations were expected to operate. Insofar as they dealt with the protection of art, the Conventions are almost identical and borrow heavily from the work of the Brussels Conference of 1874. An invading army was prohibited from pillage,[32] was expected to enforce the existing laws of the country it was occupying,[33] was prohibited from confiscating private property,[34] and could take possession only of cash, funds and property liable to requisition belonging strictly to the state.[35] The occupying power was further charged to protect the capital of public buildings and administer them according to the rules of usufruct.[36] In the case of a public museum, this would prevent the depletion of its holdings by an occupying power. Most importantly, however, buildings dedicated to the arts, even when state property, were to be treated as private property and thus exempt from confiscation.[37] Any confiscation or intentional damage directed at museums, historical monuments, or works of art were to be made the subject of proceedings. Thus, the Conventions attempted to provide a comprehensive regime to shield works of art from damage or seizure in time of war and to provide continuity in the administration of a nation's cultural treasures. It is interesting to note that in protecting against seizure, the Conventions provided that publicly owned art was to have the status of privately owned property. Many national laws regulating the peacetime alienation of privately owned art confer upon it the status of public or quasi-public property to prevent its export. Art, then, often assumes a changeable legal character depending on the type of protection sought to be invoked.

The rules established by the Hague Peace Conference were put to the test during the First World War. Two acts of the Central Powers that particularly aroused public opinion were the burning of the great library at Louvain and the bombardment of the Rheims Cathedral. Thereafter, beginning in 1914, art officers were attached to German military units and to governments of occupa-

32. Hague Convention arts. 28 and 47.
33. Hague Convention art. 43.
34. Hague Convention art. 46.
35. Hague Convention art. 53.
36. Hague Convention art. 55.
37. Hague Convention art. 56.

tion for the express purpose of protecting art treasures and monuments under their control.[38]

Under the terms of the Treaty of Versailles,[39] Germany and her allies accepted full responsibility for the losses incurred by the victorious Allies and by their nationals[40] and further agreed to return objects of every nature that had been seized or sequestrated during the War.[41] In addition, several articles of the Treaty of Versailles dealt specifically with the return of art treasures and antiquities. Germany agreed to restore to France trophies, archives, historical souvenirs and works of art carried away from France not only during the most recent War but during the Franco-Prussian War (1870-71) as well.[42] Apparently, the 50-year presence in Germany of art work originally taken from France was not considered a sufficient interval of time for a work to become a part of the German cultural heritage. France could strongly argue that international sentiment on the issue was sufficiently formulated by 1870 so that the original German taking could be considered contrary to international law and hence support a claim for its return 50 years later. Apparently, the Allies considered any German claims of laches or cultural incorporation to be ineffectual; of course, the French demand was rather strengthened by having won the war. Nevertheless, the Treaty of Versailles raises interesting questions about the intensity and duration of claims for confiscated art work.[43]

An even more extraordinary demand was made at the end of the War by Belgium. It requested the return of the missing panels of the Van Eyck brothers' "Mystic Lamb" and of Bouts' "Last Supper."[44] The Van Eyck panels had been acquired by German

38. Posner, *Public Records Under Military Occupation*, 50 AM. HIST. REV. 213, 215-16 (1945).

39. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 112 BRIT. & FOREIGN STATE PAPERS 1. Also for a text of the Treaty see 3 H.W.V. TEMPERLEY, A HISTORY OF THE PARIS PEACE CONFERENCE 1 [hereinafter cited as Treaty of Versailles].

40. Treaty of Versailles, art. 231.

41. Treaty of Versailles, art. 238.

42. Treaty of Versailles, art. 245.

43. For the record it should be noted that Britain, ever mindful of her colonial responsibilities, requested only the return of the skull of Sultan Mkwawa, which had been taken by the Germans from East Africa. Treaty of Versailles, art. 246.

44. Treaty of Versailles, art. 247. The Treaty of St. Germain (Treaty of Peace Between the Allied and Associated Powers and Austria, Sept. 10, 1919, 112 BRIT.

museums not through seizure, but by regular channels on the open market. Thus, the Germans were owners by purchase of the panels. The Belgian demand seems primarily based on the idea that the panels were part of a complete work of art, a work of peculiar importance to Belgium. Thus, the Belgian Government claimed the right to require that the work be made whole. To this end, it felt justified in overriding any legitimate property rights of the German museums that had purchased the panels. In the absence of a war successfully concluded, it is difficult to envision how the Belgian Government could enforce such a right. Its claim, however, raises the issue of the integrity of works of art that consist of several parts. The Belgian position that a major work should not be broken up has proved to be persuasive and durable and is currently incorporated in the export regulations of several nations.

Evolving international law concerning the protection of art in time of war had little noticeable affect on Nazi confiscations dur-

---

& FOREIGN STATE PAPERS 317), concluded by the Allied and Associated Powers with Austria, contained provisions calling for the return of art work that closely paralleled those of the Treaty of Versailles. Many of the demands for return were made by parts of the Austrian empire that became independent at the end of the War and included objects that were removed to Austria by the Hapsburgs as early as 1718.

The works in question, however, had mainly been purchased by the Monarchy with revenues contributed for general use by those newly independent member states of the empire. As a result, the Arbitration Commission set up after the War held that many of the works were the property of the Monarch, not of the claiming state. The Commission stated, " 'The Treaty does not create, and international law does not recognise, any right of States whose union, whether federal or otherwise, is dissolved, to share in property acquired by the former common sovereign out of revenues contributed by those States, whether in proportion to their several contributions or otherwise . . . .

" 'It has not been established that works of art purchased by the [Austrian] sovereigns out of their Bohemian revenues became the property of the "Public Domain," "Crown," or "State" of Bohemia or that there existed at any material time a rule of Bohemian constitutional law prohibiting the sovereign of Bohemia from removing permanently from the country all or any part of the works of art or other movable property so purchased.' " *International Arbitrations Under the Treaty of St. Germain*, 1923-24 BRIT. Y.B. INT'L L. 124, 126-27. This opinion indicates that the state must take some initiative in identifying works of art important to the national patrimony and must further take certain legal steps to prohibit their removal from the country before state claims will be recognized in international law.

ing the Second World War.[45] Germany established the most comprehensive and organized collection effort since Napoleon. Although several German agencies were charged with the seizure and sequestration of art objects, which were then often transferred to Germany,[46] the umbrella organization in charge of confiscation was Minister Rosenberg's *Einsatzstab*.[47] The success of German efforts to seize for themselves the cultural treasures of all Europe is evidenced in the indictment of the major war criminals at Nuremberg. That indictment states that from 1940-44 there were plundered from the Western countries "works of art, artistic objects, pictures, . . . furniture, textiles, antique pieces and similar articles of enormous value to the number of 21,903."[48] If anything, plunder in Eastern Europe may have been even more extensive. The indictment states that over 427 museums were destroyed, including important centers in Leningrad, Smolensk, Stalingrad and Novgorod.[49]

In its brief[50] before the Nuremberg Court concerning the plunder of art work, France pointed out three advantages that Germany had hoped to gain by confiscation. First, it would gain a cultural advantage as repository for the artistic and literary products of Western civilization, and thus an important extra measure of power and prestige. This, one might add, was the same advantage sought to be gained by France under Napoleon. Secondly, it would gain an economic advantage, a reserve of securities that would be both instantly negotiable on world markets and relatively immune from price and currency fluctuations. This recognized the growing position of art as an investment vehicle, a fact that later would

45. There was an attempt to cloak the seizures in legality. Nominal consideration was often paid and official proclamations stated that publicly owned art was being sequestered for its protection. The art holdings of Jews and hostile enemies, however, were seized outright. But regardless of the appearance of legality, the substance of the Nazi program was tantamount to confiscation in contravention of the Hague Convention.

46. Testimony of Arthur Seyss-Inquart, 16 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 71-75 (1947) [hereinafter cited as Nuremberg Trials].

47. 7 Nuremberg Trials 52. This was a Nazi Party agency, not technically a government organization.

48. 1 Nuremberg Trials 56.

49. 1 Nuremberg Trials 59.

50. 7 Nuremberg Trials 65.

profoundly influence national regulation in the areas of export and alienability. Finally, confiscation would provide Germany with political capital, an extra lever that could be applied in Germany's behalf during any future treaty negotiations. Of this last advantage, there can be little doubt. History has provided numerous examples of the importance attached by nations to certain objects of unique artistic and historical interest. Except in a total military defeat, possession of these objects could provide a valuable weapon with which to exact political concessions from a foe.

After the War, the Allies attempted to be as thorough in returning art treasures to their rightful owners as had been the Germans in seizing them. This task was further complicated because the Nazis had not retained all the seized art but had sold or exchanged some of the seized art for other works. Thus, at the end of the War, numerous works of art that had been seized by the Germans, especially from private collections, were in the hands of bona fide purchasers.[51] This situation was dealt with by the New York courts in the case of *Menzel v. List*.[52] Plaintiff sued to recover a Chagall that he had left behind in his apartment when he fled Belgium and which had subsequently been seized by the Nazis. The whereabouts of the painting from 1944 until 1955 was unknown, but it had been purchased by defendant art dealer from another art dealer. In permitting the plaintiff to recover the work, the court observed that the painting could not be considered booty and, as private property, is exempt from seizure under the Hague Convention. Furthermore, the court stated, property of citizens absent from a country during war remains inviolable.[53] Regarding the defendant's bona fide purchaser status, the court followed the policy enunciated in Law 59, United States Military Government of Germany 10 Nov. 1947, which stated: "Provisions of law for the protection of purchasers in good faith which would defeat restitution [of

51. This was especially true of modern art works, which were not favored by Nazi officials. Accordingly, these works would often be traded after seizure for more classical works of art.

52. 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd per curiam*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (App. Div., 1967).

53. The court cited two foreign cases for this proposition: Mazzoni c. Finanze dello Stato, LII Il Foro Italiano 960 (Tribunale di Venezia, 1927; Collac c. Etat Serb-Croate-Slovene [Yugoslavia], IX Recueil des Decisions des Tribunaux Arbitraux Mixtes 195 (Tribunal Arbitral Mixte hungaro-serbe-croate-slovene, 15 Mai 1929). 49 Misc. 2d at 307, 267 N.Y.S.2d at 811, 812.

Nazi confiscations] shall be disregarded."[54] Restitution with regard to art ownership was evidently regarded as sufficiently important to override traditional property concepts that protect the bona fide purchaser.

The defense of a bona fide purchaser, however, is not always cast aside in situations of belligerency. A successful assertion of bona fide purchaser status may occur in conjunction with an act of state defense. The *Menzel* court rejected this defense because the actions of Germany took place in Belgium while the Belgian Government still existed, albeit in exile,[55] and because the organization charged with overseeing the confiscations was officially associated with the Nazi Party, not with the German Government. However, in the case of a revolution when art work is seized by a group that ultimately assumes power and is recognized, a subsequent sale of the confiscated art to third parties by that government may not be challenged by the original owner in the courts of a country that has recognized the seizing government.[56] The seizure is protected from judicial enquiry by the act of state doctrine and, therefore, third party purchasers are protected from the claims of original owners.

Following the Second World War, a major effort was initiated to re-establish and more precisely define the protection to be afforded art treasures during periods of belligerency. This effort resulted in the adoption, in 1954, of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.[57] Recognizing that

54. 49 Misc. 2d at 315, 267 N.Y.S.2d at 819.

55. More precisely, in rejecting the act of state defense, the court found, based on the Nuremberg trials, that the actual confiscations were carried out by the Nazi Party and not by the German Government. It went on to state in dicta, however, that an act of the German Government in this case would still be cognizable by the courts because it occurred in another state, Belgium, whose government was still in existence, although in exile. But for limitations on the power of governments in exile to effect title of assets within occupied territory see State of Netherlands v. Federal Reserve Bank, 99 F. Supp. 655 (S.D.N.Y. 1951).

56. Paley Olga v. Weisz, [1929] 1 K.B. 718. Plaintiff, a member of the Russian nobility whose property was seized by decree after her flight from the country, contested the sale of the confiscated property to third parties by the revolutionary government. The English court declined to inquire into the acts of the seizing government on the ground that recognition by the British Government, legitimized the confiscatory acts retroactive to its coming to power. *Accord*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

57. Convention on the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature*, May 14, 1954, 249 U.N.T.S. 240 (effective Aug. 7,

advances in technology had rendered art work even more vulnerable to the ravages of war, the Convention sought to expand upon the pronouncements of the Hague Conference. The Convention covers all property, irrespective of origin or ownership, that is of great importance to the cultural heritage of every people.[58] The signatories agreed to safeguard and protect this property within their own territory as well as within the territory of other parties.[59] Further, the parties agreed to prevent requisitioning of movable art treasures[60] and to support the national authorities of occupied territories in safeguarding and preserving cultural property.[61]

The Convention applies to a broader range of conflicts than did previous agreements by including acts of war, even if not declared,[62] and purely internal conflicts not of an international nature.[63] The Convention emphasizes the importance of a nation's artistic treasures not only to that nation but to the entire world,[64] and in so doing recognizes that each state holds and administers its treasures at least in part for a common good. Thus, as a state may exercise certain extraordinary controls over privately owned art within its borders, there exists in this Convention the clear implication that the world community may expect certain minimum protective acts by each of its member states.

In addition, the Convention represents an attempt to define the kind of property that is sought to be protected. The definition, "property of great importance to the cultural heritage of every people," is employed.[65] This general phrase presents a number of difficulties. No criteria are suggested for determining what is of great importance or what may be included in the realm of cultural heritage. Read broadly, the clause could envelop almost every work of art in the country; interpreted narrowly it might include only a few of the most important works. Considering the goal of the Convention, the protection of art work in wartime, it would seem that

1956). The reader's attention is called also to the accompanying regulations, 249 U.N.T.S. 270 [hereinafter cited as 1954 Convention].

58. 1954 Convention, art. 1.
59. 1954 Convention, art. 4(1).
60. 1954 Convention, art. 4(3).
61. 1954 Convention, art. 5(1).
62. 1954 Convention, art. 18(1).
63. 1954 Convention, art. 19(1).
64. 1954 Convention, arts. 4(1), 19.
65. 1954 Convention, art. 1(a).

a most liberal interpretation is warranted. In other contexts, however, such as export control, the employment of a similar phrase would dictate a more restricted reading.

Finally, the Convention seeks to define the rights of bona fide purchasers of confiscated art. The Protocol to the Convention[66] reaffirms the duty of each party to prevent the exportation of cultural property from the territory within which it is situated.[67] In addition, it charges each party importing cultural property from occupied states to eeize and retain it antil the cessation of hostilities, at which time it is to be returned to the territory previously occupied.[68] The party whose duty it was to prevent exportation from the occupied state is charged with indemnifying any good faith purchaser of returned works.[69] In this way, an added incentive is placed on an occupying power to insure the integrity of art collections under its control. Thus, the Convention attempts to meet a number of problem areas in the protection of art, which were highlighted during the Second World War, by expanding both the scope and application of its protective measures and the duties and accountability of belligerent and neutral states.

III. National Attempts to Control the Flow of Art

Many states have enacted laws designed to identify and prevent the export of works of particular importance to the national heritage. Most of these laws are grounded in a concept of national cultural patrimony and assume that the state has a special responsibility, often to the detriment of property rights, to preserve and physically retain designated objects of cultural importance. There is, however, no agreement concerning the criteria to be employed in evaluating each work and its place in the cultural hierarchy. Additionally, some states feel more threatened by market factors and by the lure of the attractive abundance of antiquities located within their borders than do other states. The United States, for example, as primarily an importer of classical art, has a less catastrophic view of the art market than does Italy or Mexico.[70]

66. 249 U.N.T.S. 358 [hereinafter cited as 1954 Protocol].
67. 1954 Protocol, art. 1.
68. 1954 Protocol, arts. 2, 3.
69. 1954 Protocol, art. 4.
70. The United States is not immune from these concerns, however, as is evidenced by the recent controversy concerning the deaccessioning of certain works of art by the Metropolitan Museum of Art.

In some respects, art may be analogized to natural resources. Resource rich nations are becoming increasingly concerned about the rate at which they are being asked to supply raw materials to high consumption industrial economies. Pressures to charge higher prices or to slow rates of production are based on numerous calculations, not the least of which is the realization that the product involved is finite in nature and nonrenewable. This produces an inherently more cautious state of mind than does belief in an inexhaustible supply. Similarly, art of the kind here considered is finite in nature. Although not generally subject to consumption in the manner of natural resources, a work that is stolen or destroyed is similar to a barrel of oil burned away, but with infinitely more devastating effect; the work of art cannot be replaced. In addition, that body of work that constitutes one's cultural heritage is renewable only in the longest term and at a rate often invisible to the contemporary eye. When combined with intense market pressures, these facts precipitate efforts to provide protection that is often indiscriminate and that fails to separate what is truly essential to the cultural well-being of society from what is merely desirable. This situation leads to the illicit movement of art and to a denial of the legitimate aspirations of other societies to augment their cultural holdings. As was recognized in the Convention for the Protection of Cultural Property in the Event of Armed Conflict,[71] in the administration of their cultural treasures, nations have a duty not only to their own people but to mankind as well. That duty exists in peacetime as well as in war. A brief survey of some of the basic laws regulating the protection of cultural property in selected source nations will illustrate various approaches to the issue.

A. *France*

For the protection of French cultural stores, France relies on a system of classification and export control. The basic legislation in this field is the Law on Historical Monuments of December 31, 1913.[72] Movable and immovable articles whose conservation from

71. *See* note 57 *supra* and accompanying text.

72. THE LIBRARY OF CONGRESS (EUROPEAN LAW DIVISION), PROTECTION OF ART TREASURES AND ANTIQUITIES IN VARIOUS EUROPEAN COUNTRIES. (unpublished) [hereinafter cited as Library of Congress Summary].

the point of view of history, art or science would be in the public interest may be so classified by the Minister of Culture,[73] who is assisted in his decision by the Superior Committee on Historical Monuments.[74] The exportation of these classified articles is prohibited.[75] The classification procedure for property owned by the State, by municipalities, or by public institutions and the right of appeal to the *Conseil d'Etat* are set out in the *Decret du* 18 *Mars* 1924.[76] Privately owned property also may be classified in accordance with the above criteria after an appropriate investigation by the Superior Committee.[77] Thereafter, a record is kept of the object, the place where it resides, and the name of the owner.[78] The owner must notify the government of any proposed sale of the object and is obliged to inform prospective buyers that the work has been designated by the government as being of exceptional interest to the history of artistic heritage of the nation.[79] In this way, the government is able to monitor the whereabouts of important works in private hands and, through the classification system, to identify those works of art that may not be removed from the country. As always, the danger in this kind of system is the natural tendency to overclassify and thus unduly constrict the flow of art both within and without the country.

B. *Italy*

Italian legislation provides for extensive state involvement in the protection, preservation and alienation of both publicly and privately owned art treasures of artistic, historic, or archaeological

73. Law on Historical Monuments, Dec. 31, 1913, art. 14. *See* Library of Congress Summary.

74. The Committee was established by the Decree of April 24, 1945 *as amended* Decree of May 21 and Decree No. 68-477 of May 24, 1968. The Committee is divided into five sections: Historical Monuments, Classified and Registered Immovables, Articles of Art, Scientific Collections, and Historical Organs. *See* Library of Congress Summary.

75. Law on Historical Monuments, Dec. 31, 1913, art. 21. *See* Library of Congress Summary.

76. J.O. du 29 Mars 1924, arts. 14-16.

77. Decret du 13 Janvier 1940, J.O. du 18 Janvier 1940, art. 17, *formerly* Decret du 18 Mars 1924, J.O. du 29 Mars 1924.

78. *Id.* art. 18.

79. *Id.* art. 19.

interest.[80] It is the responsibility of the Ministry of National Education to identify all movable and immovable objects of importance to the nation because of their association with political or military history, literature, art or culture in general. This includes works in private hands.[81] Art objects belonging to any public authority, state or municipal, may not be demolished, removed, modified or restored without the consent of the Ministry; nor may they be appropriated for a use incompatible with their artistic or historic character.[82] The Ministry provides directly for necessary conservation measures on all property, including private property,[83] identified as of interest to the nation. Private owners are expected to reimburse the state for conservation measures that it undertakes,[84] but if the owner cannot afford the upkeep, the burden is taken over by the state.[85] In such instances, the Ministry has the right to acquire the work after duly compensating the owner.

Works identified as of importance to the nation are inalienable when they belong to the state or to any public entity.[87] In the case of alienation of privately owned works of designated importance to the state, the Ministry has the right to preempt any sale and acquire the work for the nation.[88] The export of works of designated importance is prohibited when such export would result in a significant loss to the national patrimony.[89] In all cases, an export license is required and all permitted exports are subject to a tax.[90] Finally,

80. The basic law in the field is Law No. 1089 of June 1, 1939, [1939] Rac. Uff. 3403 [hereinafter Law 1089].

81. Law 1089, arts. 2-4.

82. Law 1089, art. 11.

83. Law 1089, arts. 14, 15.

84. Law 1089, art. 17.

85. Law 1089, art. 16.

86. Law 1089, art. 17.

87. Law 1089, art. 23. Certain exceptions are provided for, such as duplicate works or those works of lesser importance.

88. Law No. 1089, art. 31.

89. Law No. 1089, art. 35.

90. Law No. 1089, art. 36; Letter from the Director General, Instituto Nazionale per il Commercio Estero (I.C.E.) to the author, January 14, 1974:

"Export of art objects and antiques from Italy, from the merely economic and currency control point of view, are allowed directly by the Customs Authorities . . . subject to the usual currency regulations.

"However, exports are also subject to the production to the Customs of a permit issued by the Export Department of the Superintendent of Antiquities and Fine

any art or archaeological objects found within the state are considered to be property of the nation.[91] The finder and the owner of the property where the object is found are both reimbursed for a portion of its value.

The Italian law provides for a high degree of state involvement in the administration of art treasures and portrays the state as guardian, not only of public works but of privately owned objects as well. The state may take steps to appropriate works of art and to provide for the upkeep of works in private hands, in cases when the owners are unable to do so. This places ultimate responsibility on the state for the welfare of all important cultural objects within its jurisdiction, and centralizes that function in one state ministry. This is, perhaps, the most ambitious protection regime in the world; however in order to succeed, it requires a responsive and technically expert bureaucracy, aggressive employment of the powers conferred by the law, and a high level of funding. There is considerable evidence that the commendable intentions of the government suffer somewhat in practice[92] and that the export of lesser objects is too strictly controlled. Nonetheless, the law provides in theory for that level of state involvement that may be necessary for adequate preservation of works of special importance to the nation.

Arts, under the Ministry of Public Education (Soprintendenza alle Antichità e Belle Arti-Ministero della Pubblica Istruzione-Roma). Moreover, exports towards countries not belonging to the European Economic Community of objects having a Historical, archaeological, paleontological, artistic or numismatic character, with *the exclusion of art objects by living artists and executed not earlier than 50 years ago*, are subject to the payment of a progressive export tax, cleared and cashed by the above Export Department.

"The tax rates are as follows: [a] up to a value of Lire 1,000,000: eight per cent, [b] from Lire 1,000,000 to Lire 6,000,000: fifteen per cent, [c] from Lire 6,000,000 to Lire 21,000,000: twenty-five per cent, and [d] from Lire 21,000,000 upwards: thirty per cent."

Thus, attempting to take a work of art out of Italy can be an arduous and an expensive task. The tax rates imposed may add significantly to the acquisition costs, although those rates are applied only to non-EEC nations. Thus, these regulations seek not only to control the export of art work but to discourage it as well.

91. Law No. 1089, art. 49.

92. *See generally* 49 THE NEW YORKER No. 7 at 96 (April 7, 1973).

C. *Mexico*

Mexico, like Italy the descendant of a great civilization, has seen its store of pre-Columbian art depleted by tourists as well as by more professional looters.[93] The kind of art that Mexico is seeking to protect is more in the nature of statuary than canvas. Accordingly, Mexico has established a comprehensive regime of state control over designated zones containing art centers and archaeological sites considered of importance to the cultural patrimony of the state.[94] Primary control of these zones, as well as of diggings and scientific investigations, is vested in the National Institute of Anthropology and History.[95] Artistic,[96] historic[97] and archaeological[98] monuments are separately defined, with archaeological monuments considered to be inalienable property of the nation[99] and are listed in a national register.[100] Export requirements are stringent. Artistic or historic monuments may be exported with the permission of the National Institute, but the export of archaeological objects, which have been of paramount interest to the art world,

93. For an appraisal of the plight of pre-Columbian art see Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Culture*, 1 SMITHSONIAN 8 (1970); Coggins, *Illicit Traffic in Pre-Columbian Antiquities*, 29 ART J. 94 (1969).

94. Ley Federal Sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, D.O. 6 de Mayo 1972 [hereinafter cited as Ley Federal].

95. The control of these zones is vested in the National Institute of Anthropology and History pursuant to Ley Orgánica del Instituto Nacional de Anthropologia e Historia. Letter from Sr. Alberto Sierra, Embajado de Mexico, Washington, D.C., to the author, May 11, 1973.

96. Ley Federal art. 33: "Son monumentos artísticos, las obras que revisten valor estético relevante.

"Salvo el muralismo mexicano, las obras de artistas vivos no podrán declararse monumentos.

"La obra mural relevante será conservada y restaurada por el Estado."

97. Ley Federal, art. 35: "Son monumentos históricos los bienes vinculados con la historia de la nación, a partir del establecimiento de la cultura hispánica e· el país, en los términos de la declaratoria respectiva o por determinación de la Ley."

98. Ley Federal, art. 28: "Son monumentos arqueológicos los bienes muebles e inmuebles, producto de culturas anteriores al establecimiento de la hispánica en el territorio nacional, así como los restos humanos, de la flora y de la fauna, relacionados con esas culturas."

99. Ley Federal, art. 27: "Son propiedad de la Nación, inalienables e imprescriptibles, los monumentos arqueológicos muebles e inmuebles."

100. Ley Federal, art. 21.

is, with small exceptions, forbidden.[101] Fines and prison sentences of up to twelve years are prescribed for offenders.[102]

The Mexican law states explicitly that archaeological objects are inalienable. This attempt to cut off the flow of such objects abroad was, no doubt, prompted by the Mexican experience with the wholesale dismemberment of its ancient pre-Columbian sites. A total ban on exports, however, is likely to encourage and make more profitable the smuggling of such objects. Mexico has sought to deal with this problem in part by concluding a treaty with the United States providing for the return of stolen cultural properties.[103] The Treaty defines these cultural properties as art objects and artifacts of outstanding importance to the national patrimony that is the property of federal, state or municipal governments or their instrumentalities.[104] In light of domestic Mexican legislation, this is likely to include almost anything taken out of the country. The Treaty provides for independent determination of whether a stolen object is of sufficient cultural value to require the requested state to initiate legal action for its return.[105] Finally, the Treaty contains no explicit language providing for the compensation of good faith purchasers whose acquisitions are returned to Mexico.[106] Presumably, lack of compensation for such purchasers is designed to dampen the market in pre-Columbian art, but at the same time, it increases the risk for all purchasers of such objects and places a heavy burden on art dealers to insure that their inventory has been legally acquired from the source.

---

101. Ley Federal, art. 16.

102. Ley Federal, arts. 47-55.

103. Treaty of Cooperation with Mexico for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, [1971] 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter cited as Treaty of Cooperation].

104. Treaty of Cooperation, art. 1.

105. Treaty of Cooperation, art. 1(2).

106. Treaty of Cooperation, art. 3 governs the return: "Each party agrees to use the legal means at its disposal to recover and return from its territory . . . stolen . . . cultural properties."

Lack of compensation to holders of stolen cultural property, even to good faith purchasers, is included in the recommendations of a panel of experts considering a draft inter-American treaty designed to safeguard the Hemisphere's cultural heritage. Final Report of the Meeting on Identification, Protection, and Safeguarding of the Archaeological, Historical and Artistic Heritage, [1972] O.A.S. Ser. J/II.14; CIECC/doc. 4, at 8 [hereinafter cited as Draft Inter-American Treaty].

D. *The United Kingdom*

The essence of the preservation system employed by the United Kingdom is set forth in the so-called Waverly Report, issued by a special government committee in 1952.[107] After a detailed examination of the exodus from Britain of art, artifacts, archives, armor and antiques, the Waverly Committee concluded that export controls, which are relied on by so many nations as a primary means of preserving their cultural stores, should be employed only to retain objects of the very highest importance to the nation. To retain desirable but less important objects, the Committee recommended to the government that it increase its contribution to museum purchase funds.[108] This reliance on the open market for the supply of a large portion of future acquisitions was justified largely because the Committee found that British institutions were generally given a right of first refusal by owners and dealers on outstanding domestic works put up for sale. Increased funding would maximize the ability of British institutions to acquire these first-offered works. Nevertheless, it was conceded and accepted that some desirable works could well be lost to foreign buyers under the system of restricting export controls to only the most important works. The continued need for trade in art among nations offsets the disadvantage of such losses.

The Waverly Report suggested several criteria for evaluating the relative importance of an art object sought to be exported. An initial determination of the age and value of the object is made since the government will not impose export controls on any object that is not at least 100 years old and valued at more than £4,000.[109] Those works that are of sufficient age and monetary value to merit the possible imposition of export controls are then subjected to three criteria designed to determine their importance to British culture. First, is the object so closely associated with British history and national life that its departure would be a

107. CHANCELLOR OF THE EXCHEQUER, THE EXPORT OF WORKS OF ART (1952) [hereinafter cited as Waverly Report].

108. *Id.* at 54.

109. *Id.* at 32. Objects lesser in value or age are free from official scrutiny although in exceptional cases, the government may intervene. The original report recommended a monetary limit of £ 1,000. This has gradually been raised until it now stands at £ 4,000. THE DEPARTMENT OF TRADE AND INDUSTRY, NOTICE TO EXPORTERS, EXPORT OF WORKS OF ART AND ANTIQUITIES (1972).

misfortune?[110] The Committee listed in this category such items as the Domesday Book, Kneller's Kit-Kat Club portraits, and the Velazquez paintings given by the King of Spain to the Duke of Wellington after his Iberian campaign. Thus, this category includes items of foreign as well as British origin, emphasizing again the cosmopolitan nature of each nation's perceived heritage. Secondly, is the object of outstanding aesthetic importance?[111] Included in this category would be the many works of both domestic and foreign origin that grace the great homes and museums of England—the Elgin marbles, works by Rembrandt, Rubens, Titian and others, and important statuary. Finally, is the object of outstanding significance for the study of some particular branch of art, learning or history?[112] This category would include certain rare books, early scientific apparatus and particular collections of furniture, glass, etc., the unity of which should be maintained. This categorization recognizes the importance of maintaining the unity of certain kinds of works susceptible to dispersal; this is similar to the concept advanced earlier by Belgium in its attempt to recover the missing Van Eyck panels after the First World War.[113]

Thus, in order for the state to intervene and prevent the exportation of an item, that item must rank high in one or more of the above categories. If so classified, attempts will be made to seek an English buyer, most likely either Parliament or one of the major museums. The success of this approach depends on numerous informal contacts between the government and the art world. Officials working in this field keep in touch with the owners of outstanding works and are often sufficiently forewarned of a coming sale that arrangements can be made to purchase it for Britain. Another noteworthy characteristic of the export control system is the provision that art works imported into the country may be reexported as of right within 50 years, regardless of their value.[114] This recognizes that inherent artistic or cultural value is not of itself sufficient to render a work of art part of the British cultural heritage. Rather, some physical association with the nation for a period of years is also required. The Western nations share a com-

110. Waverly Report at 36.
111. Waverly Report at 37.
112. Waverly Report at 38.
113. *See* note 44 *supra* and accompanying text.
114. Waverly report at 35. This does not apply to works on loan.

mon culture, all of whose achievements are of interest and influence to all nations. For a variety of reasons, including accidents of history, certain works become situated in certain countries, and by reason of their physical presence there, become associated with and exercise a special influence over that nation's intellectual and artistic growth. As a result, that nation claims that work as being of special importance to its society. This is a process that can develop only with time. It is not a denial of the importance of that work to the cultural development of other nations, but rather a realization that by reason of its physical presence in a particular country for many years, a work has exercised a special influence on the development of its host country and thus affords that state a special interest in its preservation.[115] Britain apparently recognizes this process.

In all of the states surveyed, export control plays a crucial role in state efforts to maintain national possession of certain cultural property. Only Great Britain, however, has limited this means of control to a defined and limited category of works, and in so doing has taken the initiative in identifying those objects of supreme importance ot its cultural heritage. The possibility that some very desirable objects may be lost through sale abroad is recognized in Britain, but a vigorous two-way trade in art is considered of greater importance both in terms of augmenting British holdings of foreign works and in diffusing elements of British culture abroad.[116] The

115. It is obviously difficult to guage when this special relationship takes hold, and it will vary with the work of art. The British approach is a reasonable attempt to allow a work to "settle in" before any national claims attach to it. That not all nations share Britain's view can be seen in the demands for the return of works of art that were included in the treaties that ended World War I. Other factors were, of course, involved there, but it is unlikely that the claiming nations would have recognized claims of cultural incorporation by Germany or Austria. *See* notes 40-44 *supra* and accompanying text.

116. Waverly Report at 32: "[W]e think that many of the objects mentioned to us above must be regarded as outside the scope of the system altogether. We quite realize how desirable it is that many should be retained. But we are convinced that the machinery cannot successfully be used for that purpose—indeed much of the criticism of the existing system derives from the fact that it has attempted too much. To be workable it should be confined to limited and well-defined categories of objects of high importance . . . .

. . .

"We are in favour of an age-limit, and we recommend that in all cases the minimum should be fixed at 100 years. We realise that there are national treas-

other nations surveyed rely on export laws as general prophylactic measures. In some cases, these export laws developed against a backdrop of severe depletion of cultural resources. In this regard, it should be pointed out that even Britain applies export licensing requirements to all archaeological objects regardless of value sought to be taken out of the country.[117]

Emphasis on the role of export licensing procedures may lead to a neglect of important national cataloging efforts and to a failure to identify objects of supreme importance to the nation. Requiring export review of almost all objects in a country poses grave administrative problems and may often lead to either superficial consideration or uniform denial of export applications. It also tends to impede that free flow of art that will enable national collections to fill in gaps in their present holdings. Finally, broad prophylactic export laws may serve to encourage the illicit movement of art by unduly constricting the legitimate source of supply to the world market. Export laws are thus most profitably employed to protect selected categories of cultural property. National efforts to retain less important, but perhaps equally desirable, objects should center on purchase efforts or on effective use of the tax power to encourage private citizens to dispose of their holdings domestically. This is essentially the approach adopted by the United Kingdom and appears to be the most sensible in light of the nation's cultural requirements as well as its responsibilities to recognize the international character of art.

Export controls, moreover, are primarily inner-directed in that they seek to control the movement of art treasures at the source. Once export takes place, however, state efforts to obtain restitu-

---

ures less than 100 years old, but they are relatively few in number, and we are convinced of the general undesirability of trying to safeguard them in this way. To do so greatly increases the number of objects to be scrutinised, for very little result. It offers scope for much greater difference of opinion as to whether particular objects are or are not national treasures. Above all it discourages the vigorous two-way traffic that we should like to see, bringing recent works of importance into the country to fill the many notable gaps in our collections."

It should be noted that measures taken by signatories to protect art treasures are specifically exempted from the requirements of GATT. Multilateral General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI(f), 61 Stat. A61 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948).

117. DEPARTMENT OF TRADE AND INDUSTRY *supra* note 109.

tion are often unsuccessful in the absence of proven theft[118] or in the absence of a special treaty with the receiving nation that provides for the recovery of illegally exported items. In *The King of Italy v. DeMedici*,[119] the Italian Government brought an action in the English courts to recover the Medici archives, which had been shipped to England by the Marquis DeMedici for purposes of sale on the open market. The archives contained many valuable Italian state papers as well as numerous historical documents and papers of the Medici family, which had long held a position of prominence in the political and cultural life of Italy. All of the papers were in the possession of the Marquis although he owned only the family papers. He shipped the entire lot to England despite the fact that both the state papers and the family documents were specifically prohibited from export.[120] A motion by the Italian Government to enjoin sale of the state papers contained in the exported archives was granted by the court on the ground that the Marquis merely held them on behalf of the state. A similar motion by the Italian Government to enjoin sale of the Medici family papers, which were privately owned, was denied, the court holding that the Italian laws prohibiting their export applied only so long as the papers remained in Italy.[121] The court thus recognized an important distinction between publicly and privately owned property in the application of a state's export regulations. A state may, of course, recover public property illegally taken out of the country, but it may not recover privately owned property taken out of the country by or with the consent of the owner contrary to the export laws of the nation. Thus, insofar as privately owned works are concerned, export laws will be accorded a strictly territorial effect, and state claims to them based on protection of the nation's cultural patrimony will not be recognized.

Despite its drawback, export control remains the primary method by which nations seek to protect and maintain possession of their cultural heritage. As the Italian law demonstrates, how-

118. The problems of illicit movement of art treasures are considered in Part IV. *See* note 133 *infra* and accompanying text.

119. The King of Italy v. DeMedici, 34 T.L.R. 623 (ch. 1918).

120. The reporter notes: "All these documents were of historical and archaeological importance, and Italy was very jealous about the exportation of such documents." 34 T.L.R. at 623.

121. 34 T.L.R. at 624.

ever, there are numerous other areas ripe for government initiative in the field of preservation, even when private ownership is involved. It is likely, as world opinion becomes more alarmed at the continued physical deterioration and theft of important monuments and works of art, that ways will be sought to forge cooperation agreements between governments and private owners and preservation groups. This will be necessary to provide both the funds and the expertise necessary to maintain permanent national holdings and to insure minimum preservation efforts for those works included in private hands and in the art trade. If this kind of cooperative approach is utilized, primary reliance on export laws may lessen.

IV. Multilateral Attempts to Protect Cultural Works in Peacetime

The concept that nations have a duty to protect not only their own cultural property but that of other nations as well has led to increased international cooperation in the field of preservation. A major impetus has been the increasing concern over the nature and volume of illicit traffic in art treasures and antiquities.[122] The art market is voracious, combining as it does artistic pretension and financial speculation. As discussed earlier, some states have found themselves in possession of great stores of cultural property, which has made them natural targets of plunder, in peacetime as well as in war. Their response has more often than not taken the form of strict export controls, but these export controls have not always been accompanied by properly funded cataloguing efforts or by adequate measures to preserve and protect historical sites, archaeological diggings, and artistic centers. While eliminating free and unrestricted access to cultural stores on the one hand, many states have failed to provide for an adequate and controlled compensating flow of art to a growing world market. This has resulted not only in the increased fabrication of art but in increased smuggling as well. While international police action certainly is called for, it is submitted that more enlightened national export laws, coupled with discerning selections of cultural objects whose presence is of paramount importance to the nation and a more efficient

122. *See generally* 49 The New Yorker No. 7 at 96 (April 7, 1973).

and better funded administration of cultural sites, would better protect the artistic heritage of nations and better serve the needs of cultural interchange.

Nonetheless, significant areas for international cooperation exist. These include monitoring and channeling the flow of cultural works, increasing cultural exchange through exhibition and foreign study, and providing needed financial, scientific and technical assistance to nations whose cultural stores are endangered.

The European Cultural Convention[123] is important for the emphasis that it places on the cultural interrelationship among the nations of Europe. In pursuance of greater European unity, the Convention seeks to promote common action and policies to safeguard and promote the study and development of European civilization. To this end, each party undertakes to safeguard and develop "its national contribution to the common cultural heritage of Europe,"[124] to "facilitate the movement and exchange of persons [and] objects of cultural value,"[125] and to encourage the study of the history and civilization of all member states.[126] Most importantly, however, the Convention provides that "[e]ach Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto."[127] This article should be a guide for every nation of the world in the administration of its artistic resources. It emphasizes the dual role that each nation must assume in accounting to its own people and to all people for its preservation efforts. The Convention also stresses the need for reasonable access to the cultural holdings of each state. As has been demonstrated in every major war since the time of Napoleon, no nation may arrogate to itself and for its exclusive use those works that are the common heritage of all. So, in peacetime, a nation may not secrete its holdings but must, consistent with its responsibilities to preserve and protect them, provide reasonable access for scholars and for the general public.

123. Dec. 19, 1954, 218 U.N.T.S. 139 (effective Jan. 8, 1955) [hereinafter cited as European Cultural Convention].

124. European Cultural Convention, art. 1.

125. European Cultural Convention, art. 4.

126. European Cultural Convention, art. 2.

127. European Cultural Convention, art. 5.

The Convention might serve also as a guide for developing nations, where art preservation often ranks low on the hierarchy of social needs. There are many outstanding cultural centers around the world that are in danger of being lost through conflict, neglect or plunder. It would appear desirable for groups of nations that share a common heritage to pool their respective resources and through cooperative efforts on a regional basis, save at least the most important examples of earlier civilizations.

Many of the attitudes expressed in the European Cultural Convention are present also in the European Convention on the Protection of the Archaeological Heritage.[128] This Convention recognizes that moral responsibility for protecting archaeological history rests with the state concerned but is also the concern of the European states as a whole. The Convention calls for the application of scientific methods to archaeological research and for the elimination of illicit excavation as first steps toward the preservation of archaeological heritage.[129] Further, the parties undertake to define and protect archaeological sites,[130] to control access to and excavation of historical sites[131] and to encourage the exchange of information.[132] Finally, the parties agree to develop art acquisition policies for state-owned museums that will prevent the procurement of objects derived from clandestine excavations.[133] Private museums will be encouraged to develop similar policies. This Convention requires rather more from national states than they have been doing in the past. The delimitation and control of archaeological sites is the area of utmost urgency. One problem in the past has been a lack of funds for adequately protecting and exploring the sites. As a second step to the Convention, the European states might consider establishing an archaeological protection fund to assist national states in meeting their responsibilities. It is likely that certain states, such as Italy and France, might draw more heavily on such a fund than would Germany or Great Britain, but if protection of archaeological sites is truly the concern of the Euro-

128. 8 INT'L LEGAL MATERIALS 736 (1969) [hereinafter cited as European Heritage Convention].

129. European Heritage Convention, Prologue.

130. European Heritage Convention, art. 2.

131. European Heritage Convention, art. 3.

132. European Heritage Convention, art. 5.

133. European Heritage Convention, art. 6.

pean states jointly, then they should be willing to contribute to their protection, especially when some states may contain a disproportionate number of sites.

Illicit traffic in stolen art and cultural properties has increased dramatically in recent years and has captured the attention of governments and of numerous writers in the field.[134] It has prompted international action in the form of the UNESCO Convention on the Illicit Movement of Art Treasures.[135] The UNESCO Convention recognizes the responsibility of every nation to protect its cultural heritage and to assist in the protection of other nations' cultural property.

The parties to the UNESCO Convention agree to cooperate in the institution of necessary measures to prevent the export of stolen property from source nations and to prevent its importation into other nations. Furthermore, source nations may request another state to take appropriate legal steps to recover and return cultural property that was illegally taken from the source nation and re-located in the requested state, provided that the source nation pays just compensation to innocent purchasers or to persons with valid title.[136] The states also agree to take emergency action in behalf of nations whose cultural patrimony is in immediate danger of despoliation from plunder.[137] The Convention places significant responsibilities on source nations to control the flow of art leaving their country. Many of these states have not in the past exercised that control, particularly in the Third World, because of lack of funds or expertise, or because of indifference. It is hoped that the Third World will now take a more active interest in practical efforts to safeguard their own heritage. One step that these nations should take pursuant to the Convention is the identifica-

134. *See* Coggins, *supra* note 93; Hamblin, *The Billion Dollar Illegal Art Traffic—How it Works and How to Stop it*, 3 SMITHSONIAN 16 (1972); N.Y. Times, April 28, 1974, § 1, at 3, col. 3.

135. 10 INT'L LEGAL MATERIALS 289 (1971) [hereinafter cited as Convention on Illicit Transfer]. For a discussion of the Convention on Illicit Transfer see Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. J. INT'L L. 537 (1971).

136. Convention on Illicit Transfer, art. 7. *Compare* these provisons *with* the United States-Mexico Treaty of Cooperation note 103 *supra* and accompanying text and *with* Draft Inter-American Treaty *supra* note 106.

137. Convention on Illicit Transfer, art. 9.

tion of certain cultural property as inalienable.[138] This right is recognized by the Convention and has been employed by a number of countries for many years.[139]

The Convention contains a detailed definition of cultural property as property that is designated by the state as important for archaeology, prehistory, history, literature, art or science, and which belongs to certain enumerated categories.[140] However, to come within the ambit of the Convention, property must also be considered a part of the cultural heritage of the state.[141] This recog-

138. Convention on Illicit Transfer, art. 13: "The States Parties to this Convention also undertake, consistent with the laws of each State: . . . (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."

Similar sentiments are expressed in the proposed inter-American treaty designed to safeguard the Hemisphere's cultural heritage: "4. The preservation and defense of its cultural heritage is the responsibility of each state, and this tutelage shall be exercised by means of the following: [a.] Administrative laws and regulations that can effectively protect it against destruction through abandonment or conservation work that was poorly executed or undertaken for reasons of prestige, and against its impoverishment due to illegal exportation. [b.] Technical agencies specifically charged with its protection and safeguarding, staffed with experienced professional personnel and endowed with financial resources to be established as a percentage of the national budget of each state. [c.] Preparation of an inventory and establishment of a register of cultural property subject to maximum protection, which will make it possible to identify and locate such objects. [d.] The requirement that conservation work on movable and real property subject to maximum protection be done by experts holding certificates of ability and of recognized experience. [e.] Measures for the protection of monuments, their content, and their surroundings. [f.] The establishment of archaeological zones reserved for future research. . . . 15. The State's ownership of its cultural heritage as well as all corresponding actions for recovery are not subject to prescription." Draft Inter-American Treaty *supra* note 106, at 5-6, 8.

139. *See* discussion of national laws *supra*, Part III.

140. Convention on Illicit Transfer, art. 1.

141. Convention on Illicit Transfer, art. 4: "The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory; (c) cultural property acquired by archaeological, ethnological or natural

nizes that the presence of cultural property in a particular state need not automatically be considered part of the cultural heritage of that state.[142] However, the definition of cultural property in the Convention is broad and is likely in practice to be read to include any work of art legally in the country. There is, for example, no requirement that a particular work of art reside in a country for some specified length of time before it may be legitimately claimed for that nation's cultural patrimony. Rather, a work need only be created or found or legitimately entered in a country to be claimed.

The Convention makes no apparent distinction between publicly and privately owned property that would be the subject of restitution demands by a source state. The Convention speaks only in terms of cultural heritage and, as we have seen in examining various national laws, that can include any property, regardless of ownership, that is situated in the country. The right of the nation to possess its cultural heritage is further strengthened by the agreement to allow reclamation from good faith purchasers of illicitly transported cultural property.[143] Although compensation is required, this provision recognizes the superior right of the nation to physical possession of certain property and is a logical extension of the state's right under the Convention to declare its heritage inalienable.

In seeking to provide a means of controlling the international flow of art, the Convention contemplates an export certification program in which the exporting state would certify that each work of art leaving the country is authorized to do so.[144] In effect, this

science missions, with the consent of the competent authorities of the country of origin of such property; (d) cultural property which has been the subject of a freely agreed exchange; (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property."

142. This approach is also incorporated into Great Britain's regulatory regime. *See* note 114 *supra* and accompanying text. Note, however, the different criteria applied.

143. Convention on Illicit Transfer, art. 7: "The States Parties to this Convention undertake: . . . (b)(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. . . ."

144. Convention on Illicit Transfer, art. 6.

seeks to provide art on the market with an authenticated provenance and to place purchasers of noncertified works on their guard. It is safe to assume, however, that there will be buyers for art objects whether or not they carry such certificates. The greatest danger posed by such a system would be its amalgamation with existing export licensing procedures, which, as noted above, are often designed to prevent the export of almost everything. Too many states use their export laws as broad prophylactic measures. If the licensing operation proposed by the Convention is viewed solely as a means for limiting cultural exodus, as opposed to channeling and controlling it, then the goal of continued cultural interchange, which the Convention itself recognizes as essential to international understanding, will be further interrupted. Nations must first choose what is truly important to their heritage with due regard to the legitimate needs of other nations. They must then free the remainder of their holdings, remembering that their art outflow may provide the means to secure a corresponding inflow of foreign owned art.

This process may be particularly difficult for Third World countries that see precious little art flowing in their direction. But, by more strictly controlling access to their cultural sites, even these nations might find an improved return on the outflow of their art. It is undeniable, however, that many nations, especially in the Third World, that are subjected both to illicit trade and legitimate market demands on their cultural property feel threatened with impoverishment in much the same way that resource rich nations feel threatened by the rapid consumption of their mineral deposits. This tends to produce a protectionist attitude not wholly devoid of xenophobia. It should be remembered that the art market is primarily centered in the Western industrialized nations; this market situation renders developing nations susceptible to the same kind of psychology that presently marks economic relations between the Third World and the West. To insure continued access to the artistic products of these societies, Western nations and their major museums should act now to allay the fears of those who see their art flowing to the West with no appreciable return. Western nations should make available the requisite scientific and technical assistance to allow developing nations to identify, catalogue, and physically protect their native works. Additionally, greater efforts should be made to compensate for imbalanced art flows by

arranging for loans and exhibitions to the national museums of Third World states. This should be accompanied by increased efforts to train nationals of these states in art history, restoration, museum administration and related fields. Finally, the Western nations should ratify the Convention on Illicit Transfer of Cultural Property and do all within their power to prevent the wholesale dismemberment of cultural sites.

V. Conclusion

Works of art have seemingly always suffered a precarious existence, rendered the more so by their irreplaceable nature. Nations have made significant attempts to protect great works of art from the ravages of war, from seizure by invading armies, from theft and physical deterioration. There has also developed a more defined sense of national claims to certain works of art and a greater recognition of the role of art in the formation of both a nation's and the world's cultural heritage. This has placed on the state a responsibility to two constituencies, one national and the other universal, to safeguard the works residing within its borders. As new dangers have presented themselves, nations have sought to extend individually and in concert the nature and scope of their protective efforts. Any attempt to fashion solutions for the many dangers besetting the world's cultural stores must take into account, however, the continued need for cultural interchange. The consequences to world understanding of diminishing that interchange may be infinitely more serious than any immediate danger sought to be alleviated. Despite past preservation efforts, much remains to be done and new threats, such as the danger to art posed by pollution, wait to be confronted. Much of the world's cultural heritage today remains in danger of destruction or dismemberment. The need for vigorous national and international action by governments, by private groups, and by individuals has never been more evident if, in face of the rigors of modern life, we are to save what, in the final analysis, is our most precious international asset.

Alan Marchisotto