Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to The Case of The Gold Phiale

Ian M. Goldrich∗

*Copyright ©1999 by the authors. Fordham International Law Journal is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj
Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to The Case of The Gold Phiale

Ian M. Goldrich

Abstract

This Comment explores the various legal methods designed to protect cultural property and to prevent its illegal removal. Part I examines both international and U.S. efforts to prevent illegal removals of cultural property. This Part briefly outlines the history of cultural property protection, focusing upon the first international agreements to contain cultural property protections and their failure during World Wars I and II. Part I also explores post-World War II international efforts to protect cultural property during both peacetime and war. Finally, Part I analyzes U.S. efforts to prevent the importation of illegally removed cultural property through the application of the NSPA. Part II discusses the Case of the Gold Phiale, the first civil forfeiture proceeding against an illegally removed piece of cultural property under the NSPA. Part III argues that civil forfeiture is an improper mechanism for addressing the influx of illegally removed cultural property into the United States because it affords no protection to bona fide purchasers. Instead, the United States should ratify and implement the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property (“UNIDROIT Convention”), which requires the repatriation of illegally removed cultural property while providing fair and reasonable compensation to bona fide purchasers.
COMMENTS

BALANCING THE NEED FOR REPATRIATION OF ILLGALLY REMOVED CULTURAL PROPERTY WITH THE INTERESTS OF BONA FIDE PURCHASERS: APPLYING THE UNIDROIT CONVENTION TO THE CASE OF THE GOLD PHIALE

Ian M. Goldrich*

INTRODUCTION

In early December 1998, Italian authorities raided the Catania, Sicily villa of Vincenzo Cammarata, known in Italian society as Baron Cammarata. Six people were eventually arrested and charged with participating in a criminal enterprise devoted to the illegal sale of archaeological artifacts. Those arrested included Cammarata, who fled the scene but surrendered to the Catania police several hours later, and Dr. Giacomo Manganaro, a professor of ancient history from the University of Catania. In addition, the police seized approximately 10,000 an-

* J.D. Candidate, 2000, Fordham University School of Law. I would like to thank Prof. Daniel Richman for his guidance. I would also like to thank Prof. Patty Gerstenblith of the DePaul University College of Law for providing critical primary sources. Additionally, I would like to thank the editors and staff of the Fordham International Law Journal for their consistent encouragement and assistance. This Comment is dedicated to my grandmother, Mrs. Yoli Fischman, for her unconditional love and support.


3. See Hooper, supra note 1, at A19 (describing arrest of those engaged in clandestine trade of Italian artifacts).

4. See Italian Police, supra note 2, at *1 (depicting Cammarata’s escape through secret tunnel in his villa).

5. See Hooper, supra note 1, at A13 (describing Dr. Giacomo Manganaro as pillar of community); see also John Hooper, Mafia Link to Theft of Ancient Treasures, Guardian, Dec. 9, 1998, at 16 (describing arrest of Cammarata’s additional co-conspirators). The others arrested and charged with conspiracy and handling of stolen goods included a geography professor from the University of Catania, two businessmen, and a coin

cient artifacts, with an estimated worth of US$66 million. Police officials believe that portions of these artifacts are part of the 14,737 items reported missing in Italy in 1997 alone. Those
dealer named Gianfranco Casolari who was arrested in Rimini, on the Adriatic coast.

Mafia Link, supra.


7. See Roberto Conforti Is Part Sleuth, Part Museum Curator, Part Tough Guy, and Genteel Art Lover, LETHBRIDGE HERALD, May 14, 1999, at 19 (noting that artifacts seized were of Greek, Roman, and Phoenician origin).

8. See Hooper, supra note 6, at A19 (describing Cammarata as organizer of illegal enterprise); see also Italian Police, supra note 2, at *1 (describing location of artifacts in Cammarata's home). "An impressive collection of vases, amphoras, gems and coins . . . lined the walls, cupboards display cases and even the walls of the toilets in his villa." Italian Police, supra note 2, at *1. Maria Grazia Branciforti, the Catania cultural works superintendent, upon viewing the videotape the police made of the villa, stated that there were "more precious objects in the house than in some museums." Id.

9. See Hooper, supra note 5, at 16 (estimating value of illegally removed Italian art
14,737 items, in turn, represent a small fraction of the total international trade in illicit cultural property, reaping profits of between US$2-$6 billion annually.

Both the international community and individual nations have taken steps to prevent the illicit trade in cultural property. These steps range from new international conventions requiring the repatriation of illegally removed cultural property, to national cultural property protection laws asserting ownership over new discoveries and regulating the exportation of all local artifacts. U.S. authorities recognize these statutory assertions of ownership and have used them as the basis for criminal charges under the National Stolen Property Act ("NSPA"), which prohibits the movement of stolen property in interstate or foreign commerce, with varying results. In the case of the United States...
v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, C. 400 B.C. ("Case of the Gold Phiale"), the United States expanded this legal mechanism by applying the NSPA—for the first time—in a civil forfeiture proceeding brought against an Italian artifact imported into the United States by a U.S. art dealer for one of his customers.

This Comment explores the various legal methods designed to protect cultural property and to prevent its illegal removal. Part I examines both international and U.S. efforts to prevent illegal removals of cultural property. This Part briefly outlines the history of cultural property protection, focusing upon the first international agreements to contain cultural property protections and their failure during World Wars I and II. Part I also explores post-World War II international efforts to protect cultural property during both peacetime and war. Finally, Part I analyzes U.S. efforts to prevent the importation of illegally removed cultural property through the application of the NSPA. Part II discusses the Case of the Gold Phiale, the first civil forfeiture proceeding against an illegally removed piece of cultural property under the NSPA. Part III argues that civil forfeiture is an improper mechanism for addressing the influx of illegally removed cultural property into the United States because it affords no protection to bona fide purchasers. Instead, the United States should ratify and implement the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property ("UNIDROIT Convention"), which requires the repatriation of illegally removed cultural property while providing fair and reasonable compensation to bona fide purchasers.

18. See Jacob M. Hilton, Note, Keep Him on a Short Leash: Innocence of Owner not a Constitutional Defense to Forfeiture of Property Allegedly Connected to Illegal Conduct: Bennis v. Michigan, 116 S. Ct. 994 (1996), 28 TEX. TECH L. REV. 133, 134-35 (1997) (describing civil forfeiture as civil proceeding in rem, against property itself). If the U.S. government is successful in a civil forfeiture proceeding, then the owner or possessor’s interest in the property will be extinguished and the U.S. government will take possession of the property. Id. Property subject to civil forfeiture will usually be either property that is itself proscribed, known as contraband, or property that is in some way connected to a criminal act. Id.
19. Id.
20. UNIDROIT Convention, supra note 13, 34 I.L.M. 1322.
I. U.S. AND INTERNATIONAL EFFORTS TO PROTECT CULTURAL PROPERTY

The definition of cultural property, once confined to art, artifacts, and antiques, has expanded over time to include historic or architecturally significant buildings, ruins, sunken ships, ecological areas, and religious objects. Similarly, commentators note that the threat to cultural property, once confined to wartime pillage and destruction, has also expanded to include illegal trafficking during peacetime. In response to these threats, both the United States and the international community have developed legal measures to prevent the destruction or illegal removal of cultural property.

A. Development of International Cultural Property Protection

Modern cultural property protection law is based upon theories that have progressed and evolved over centuries. The

21. See Stephanie O. Forbes, Comment, Securing the Future of Our Past: Current Efforts To Protect Cultural Property, 9 TRANSNAT'L LAW. 235, 239-40 (1996) (arguing that varying definitions of cultural property led to lack of uniformity in cultural property protection laws). This lack of uniformity aids smugglers by allowing them to hide or sell illegally removed cultural property in jurisdictions with limited cultural property protection laws. Id. at 260.


23. See Ashton Hawkins, et al. A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 FORDHAM L. REV. 49, 49 n.2 (1995) (estimating profits from art theft at US$2 billion annually); see also Forbes, supra note 21, at 236 (noting major boom in illicit art trade during economic prosperity of 1980s). Art theft is the third most profitable crime in the world today behind the illegal drug trade and arms smuggling. Hawkins, supra, at 49, n.2. This fact is due, in part, to increased demand caused by the expansion of the art buying community during the 1980s. Forbes, supra note 21, at 236. New consumers included investors seeking alternatives to the stock market, criminals attempting to launder proceeds of illegal transactions, and status-seeking business executives. Id.


25. See Williams, supra note 22, at 5-29 (discussing development of cultural property protection from mid-eighteenth century to mid-twentieth century); see also Kifle Jote, International Legal Protection of Cultural Heritage 25-46 (1994) (discuss-
first legal principles devoted to cultural property protection developed within the context of regulating warfare. These initial agreements codified the idea that the destruction or acquisition of cultural property during armed conflicts was not a legitimate wartime goal.

1. Origins of Cultural Property Protection

The concept of cultural property protection originated during antiquity. Nevertheless, scholars note that the unregulated nature of warfare at this time made protecting cultural property difficult. By the time of the Renaissance, the movement to protect cultural property during conflicts gained momentum.

26. See Toman, supra note 22, at 7-10 (discussing cultural property protections enunciated in first codes of military regulations and conventions on laws of war).

27. See Victoria A. Birov, Note, Prize or Plunder?: The Pillage of Art and the International Law of War, 30 N.Y.U. J. INT’L L. & POL. 201, 205-06 (1998) (discussing concern over legality of looting during warfare in nineteenth century); see also Williams, supra note 22, at 5 (noting that laws of chivalry and arms contributed to development of initial instruments on conduct of belligerents during armed conflicts).

28. See Jote, supra note 25, at 43-44 (noting that Greek statesman and historian Polybius opposed cultural destruction of Greece by Roman forces). Polybius was quoted as saying that “future conquerors will learn from these reflections not to plunder the cities they bring into subjection and not to take advantage of the distress of other peoples to adorn their homelands.” Id. at 44. Another early proponent of cultural property protection was Roman Consul Cicero who condemned Roman Praetor Verres for plundering the island of Sicily during the first century B.C. and ordered restitution paid. Id.

29. See id. at 25 (noting that appropriation of cultural property as trophies of conquest was main characteristic of ancient wars); see also Toman, supra note 22, at 3 (describing seizure and destruction of cultural property as inevitable consequence of war); Elizabeth Hallam, Chronicles of the Crusades 59, 221 (1997) (describing looting by crusader forces of Jerusalem during First Crusade in 1101 and Constantinople during Fourth Crusade in 1204); Harvey E. Oyer III, The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is it Working? A Case Study: The Persian Gulf War Experience, 23 COLUM.-VLA J.L. & ARTS 49, 49 (1999) (describing destruction of Islamic sites during Christian Crusades). The promise of plundering a defeated enemy was often used to entice volunteers to serve in military campaigns. Toman, supra note 22, at 3.

30. See 1 James H. Robinson & James T. Shotwell, An Introduction to the History of Western Europe 310-16 (1946) (defining Renaissance as period of prosperity and refinement in Italian cities marked by rebirth of interest in history and culture of Romans and Greeks).

31. See Toman, supra note 22, at 4-5 (describing views of writers on international law on cultural property); see also Jote, supra note 25, at 44-45 (describing views of Italian legal theorist Alberico Gentili on cultural property protection during armed conflicts). In 1589, Genteli, in De Jure Belli, argued that not only must the cause of war
Despite the growing acceptance of cultural property protection, historians note that the plundering of cultural property during wars continued during the nineteenth century, most notably in Europe during the Wars of the First and Second Coalition.

2. Initial Codes and Agreements

The first instruments containing cultural property protec-

be just, but the war must be conducted justly by making sure that temples and other sacred objects of conquered territories were spared. Jôte, supra note 25, at 44. Emmerich de Vattel, THE LAW OF NATIONS 435 (S & E Butler ed. 1805). In 1758, Emmerich de Vattel, in The Law of Nations, argued that

[for] whatever cause a country be ravaged, he ought to spare those edifices which do honor to human society, and do not contribute to the enemy's power; such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? He who acts thus declares himself an enemy to mankind, wantonly depriving them of these monuments art and models of taste.

Vattel, supra, at 435. But see Hugo Grotius, De Jure Belli Ac Pacis, Bk. III, Ch. VI, § II.1, reprinted in William Whewell, Whewell's Grotius 336 (1853) (arguing that pil-
lage of enemies during conflicts was legal consequence of war). Grotius, known as the father of international law, disagreed with Vattel and Genteli, instead stating that "by the Laws of Nations, not only he who for just cause carries on war, but any one, in a regular war, may without limit or measure take and appropriate what belong to the enemy." Whewell, supra.

32. See R. Ernest Dupuy & Trevor N. Dupuy, The Harper Encyclopedia of Mil-
tary History 741-58, 813-41 (4th ed. 1993) (describing Wars of First and Second Coalition as conflicts occurring between 1792-1815 mainly between France and allied Euro-
pean countries including Austria, Britain, Prussia, and Russia); see also Williams, supra note 22, at 6-9 (detailing Napoleon's plunder of European cultural property); Oyer, supra note 29, at 49 (describing Napoleon's looting of Italy and Egypt as "rape"). Dur-
ing campaigns in Northern Europe and Italy, French forces under Napoleon made con-
certed efforts to turn France into the reservoir of Europe's artistic history. Williams, supra note 22, at 7. During the German campaign of 1794, French forces indiscrimi-
nately seized cultural property from galleries, castles, and religious buildings and trans-
ported it back to Paris. Id. at 7-8. During the Italian campaign of 1796-97, transfers of cultural property to France were included in armistice agreements with several Italian States, and with the Pope. Id. at 7. Upon Napoleon's exile to the island of Elba, the French, with the acquiescence of the allied countries, retained the cultural property seized during the conflict. Id. at 8. After Napoleon's defeat at Waterloo in 1815, how-
ever, the Duke of Wellington spearheaded a vigorous repatriation effort. Id. 8-9. But see id. at 9-12 (describing British Ambassador Lord Elgin's removal of cultural property from Constantinople to England). One scholar recounts that through a mixture of bribery and threats, Elgin secured permission to remove large amounts of Greek arti-
facts from Constantinople to exhibit the styles to British artists. Id. at 10-11. In 1816, however, the British Parliament voted to purchase the cultural property removed by Elgin for £35,000. Id. at 11. One scholar notes, with regret, that this action by the British government occurred one year after the allies demanded France return the Eu-
ropean art seized by Napoleon. Id. at 12.
tions were designed primarily to regulate warfare. The central thesis of these initial instruments was that the destruction of cultural property served no military purpose and thus should be prohibited. As one scholar notes, however, these initial instruments had to be reconciled with the exigencies of military necessity.

a. The Lieber Code

Despite the continued plundering and destruction of cultural property during the nineteenth century, this century also marked the first efforts to legislate cultural property protection. In 1864, the United States, in response to the looting occurring during the U.S. Civil War, adopted the Lieber Code. The Lieber Code, compiled by the prominent international lawyer Francis Lieber, was the first military handbook to provide for the protection of cultural property during wartime. Several


34. See JOTE, supra note 25, at 25 (noting that modern warfare excludes indiscriminate destruction of property).

35. See WILLIAMS, supra note 22, at 10 (noting presence of military necessity reservation in initial cultural property protection instruments); see also TOMAN, supra note 22, at 10 (noting that initial instruments balanced cultural property protection with needs of military). The phrase "as far as possible" is known as a military necessity exception, which appeared in most of the initial instruments. TOMAN, supra.

36. See WILLIAMS, supra note 22, at 15-17 (discussing Lieber Code and Brussels Declaration).


38. See WILLIAMS, supra note 22, at 16 (noting that Lieber Code was produced at request of U.S. Secretary of War Edwin Stanton).

39. See JOTE, supra note 25, at 47 (observing that European nations used Lieber Code as guide for drafting their military regulations); see also Lieber Code, supra note 37, art. 35 at 8 (protecting cultural property from damage and destruction during hostilities). Article 35 of the Lieber Code states that "[c]lassical works of art, libraries, scientific collections, or precious instruments such as astronomical telescopes, as well as hospitals must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded." Lieber Code, supra. Article 36 states that

[i]f such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the
European nations eventually adopted military regulations influenced by the Lieber Code.  

b. The Brussels Declaration

Ten years after the United States adopted the Lieber Code, diplomats from fifteen European nations attending the Brussels Conference of 1874, relied upon it as the basis to construct an international agreement governing the laws of war. Although the Conference did not produce a binding agreement, it did adopt a declaration on August 27, 1874 ("Brussels Declaration") that included articles addressing the wartime treatment of cultural property. The framers of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land ("1899 Hague Convention") and the 1907 Hague Convention Respect-
ing the Laws and Customs of War on Land\textsuperscript{44} ("1907 Hague Convention"), the first binding international agreements regulating warfare, added cultural property protection articles based on those found in the Brussels Declaration.\textsuperscript{45}

c. The Hague Conventions of 1899 and 1907

Scholars characterize both the 1899 and 1907 Hague Conventions as attempts to codify existing international law on the subject of land warfare.\textsuperscript{46} Article 56 of the 1899 Hague Convention addressed cultural property, and, like Article 8 of the Brussels Declaration, treated cultural property as private property immune from seizure, damage, or destruction.\textsuperscript{47} In addition, Article 27 mimicked Article 17 of the Brussels Declaration, requiring that attacking forces take steps to spare cultural property during sieges and bombardments.\textsuperscript{48} Furthermore, Article 23(g) prohibited the destruction or seizure of any enemy property unless necessitated by the exigencies of war,\textsuperscript{49} and Articles 28 and 47 ex-

\textsuperscript{44} 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 8, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention].

\textsuperscript{45} See Williams, supra note 22, at 17 (noting that 1899 Hague Convention with Respect to the Laws and Customs of War on Land ("1899 Hague Convention) and 1907 Hague Convention Respecting the Laws and Customs of War on Land ("1907 Hague Convention") relied on Brussels Declaration and Lieber Code when drafting cultural property protection standards).

\textsuperscript{46} See Oyer, supra note 29, at 50 (noting that 1899 and 1907 Hague Conventions pioneered international effort to protect cultural property during wartime); see also Jote, supra note 25, at 49 (describing 1899 and 1907 Hague Conventions as first international agreements adopted for regulating conduct of belligerents).

\textsuperscript{47} 1899 Hague Convention, supra note 43, art. 56, 32 Stat. at 1824. Article 56 states that

\textit{the property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.}

\textit{Id.}

\textsuperscript{48} Id. art. 27, 32 Stat. at 1818. Article 27 states that

\textit{in sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.}

\textit{Id.}

\textsuperscript{49} Id. art. 23(g), 32 Stat. at 1817-18.
pressly prohibited pillage of any kind.\textsuperscript{50}

The 1907 Hague Convention incorporated much of the 1899 Hague Convention.\textsuperscript{51} Unlike the 1899 Hague Convention, however, Article 3 of the 1907 Hague Convention introduced the concept of reparations.\textsuperscript{52} In addition, a greater number of nations participated in the framing of the 1907 Hague Convention than in the 1899 Hague Convention.\textsuperscript{53}

3. Failure of Initial Instruments

Scholars note that while these initial instruments did much to protect cultural property, the primary objective of the agreements was to regulate the general conduct of belligerents during wartime.\textsuperscript{54} In addition, the demands of military necessity expressly limited the cultural property protection afforded by the initial instruments.\textsuperscript{55} Commentators state that these deficiencies, in part, led to widespread destruction of cultural property during World War I and II.\textsuperscript{56} Yet an additional problem, as one

\begin{itemize}
  \item \textsuperscript{50} Id. art. 28, 32 Stat. at 1818. Article 28 states that "[t]he pillage of a town or place, even when taken by assault, is prohibited." Id. Article 47 states that "[p]illage is formally prohibited." Id. art. 47, 32 Stat. at 1822.
  \item \textsuperscript{51} See 1907 Hague Convention, supra note 44, Annex, arts. 23(g), 27, 28, 47, 56, 36 Stat. at 2302-03, 2307, 2309 (incorporating Articles 23(g), 27-28, 47, and 56 of 1899 Hague Convention)
  \item \textsuperscript{52} See id. art. 3, 36 Stat. at 2290 (requiring party that violates regulations of 1907 Hague Convention to pay compensation). Article 3 states that "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Id.
  \item \textsuperscript{53} Compare 1899 Hague Convention, supra note 43 (incorporating views of 26 participating nations), with 1907 Hague Convention, supra note 44 (incorporating views of 44 participating nations).
  \item \textsuperscript{54} See Williams, supra note 22, at 17 (describing 1899 and 1907 Hague Conventions as generally defining rights, obligations, and limits of acceptable behavior during wartime); see also Jote, supra note 25, at 51 (noting that in initial instruments, protection of cultural property was secondary to protecting human life).
  \item \textsuperscript{55} See Brussels Declaration, supra note 42, art. 17, at 29 (stating that belligerents must take all necessary steps to protect cultural property "as far as possible"); 1907 Hague Convention, supra note 44, Annex, art. 27, 36 Stat. at 2303 (requiring signatories to take all necessary steps to spare cultural property "as far as possible"); see also Birov, supra note 27, at 208-09 (noting abuse of military necessity rationale led to failure of 1907 Hague Convention during World War I).
  \item \textsuperscript{56} See Williams, supra note 22, at 18-20 (stating that initial cultural property protection instruments were systematically violated and disregarded during World War I and II); see also Toman, supra note 22, at 14, 20 (stating that initial instruments were both scarcely applied and too narrow to afford sufficient protection to cultural property during World War I and II).
\end{itemize}
The Case of the Gold Phiale

scholar notes, was that the weapons deployed during World Wars I and II unleashed the destructive force of modern weapons, but still lacked their sophistication and accuracy.\textsuperscript{57} During World War I, German attacks against the French city of Rheims,\textsuperscript{58} and the Belgian cities of Antwerp\textsuperscript{59} and Louvain caused heavy damage to cultural property.\textsuperscript{60} International outrage eventually forced the Germans to take steps to protect cultural property during the conflict.\textsuperscript{61}

At the end of World War I, the victors demanded restitution of all cultural property in the Treaty of Versailles.\textsuperscript{62} In addition, the international community attempted to address the deficiencies of the initial instruments with supplementary agreements.\textsuperscript{63} Commentators note, however, that existing cultural property

\textsuperscript{57} See Toman, supra note 22, at 14 (describing World War I weapons as lacking accuracy necessary to protect specific buildings); see also Jote, supra note 25, at 37 (discussing use of aerial bombardment during World War I). World War I was the first time aircraft were employed by belligerents. Jote, supra, at 38. Without previous experience, it was difficult to apply the initial instruments to air attacks. Id.

\textsuperscript{58} See Williams, supra note 22, at 18 (describing German bombardment of Rheims Cathedral); see also Jote, supra note 25, at 38 (describing German assertion of military necessity regarding destruction of Rheims Cathedral). German forces accused the French of stationing troops around the Rheims Cathedral and using its tower for observation purposes. Jote, supra note 25, at 38.

\textsuperscript{59} See Jote, supra note 25, at 38 (describing German aerial bombardment of Antwerp, resulting in destruction of ancient buildings, monuments, libraries, churches, and museums).

\textsuperscript{60} See J.W. Garner, Some Questions of International Law in the European War, 9 Am. J. Int'l L. 72, 101 (1915) (describing destruction of Library of Louvain, resulting in loss of many ancient books, manuscripts, and works of art).

\textsuperscript{61} See Williams, supra note 22, at 18. (describing German use of art officers to protect cultural property under their control in response to outrage over destruction of French and Belgian cultural property).

\textsuperscript{62} See Treaty of Peace Between the Allied and Associated Powers and Germany ("Versailles Treaty"), arts. 245-47, June 28, 1919, 2 Bevans 43, 157-58 [hereinafter "Versailles Peace Treaty"] (requiring restitution of all French cultural property carried away from France by German forces). Article 247 of the Versailles Peace Treaty specifically required that Germany replace the cultural property lost as a result of the destruction of the Library of Louvain. Id. at 158. In addition, Article 245 extended restitution to all cultural property seized by Germany during the Franco-Prussian War of 1870-71. Id. at 157-58.

\textsuperscript{63} See, e.g., Hague Rules Concerning the Control of Radio in Time of War and Air Warfare, art. 25 (1923) reprinted in 32 Am. J. Int'l L. 1, 25 (Supp. 1938) (addressing protection of cultural property during aerial bombardment); Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments ("Roerich Pact"), Apr. 15, 1935, 167 L.N.T.S. 290 [hereinafter Roerich Pact] (codifying first international agreement dedicated solely to wartime cultural property protection); see also Toman, supra note 22, at 16-18 (discussing origin and creation of Roerich Pact). The Roerich Pact, named after Professor Nicholas Roerich who suggested its creation, was drawn up
protection did little to deter the looting of Nazi Germany during World War II.64

Although German forces caused vast damage to cultural property during World War I, scholars agree that during World War II, German forces engaged in a much broader policy of plunder and confiscation.65 Notable examples of German looting occurred in Poland,66 the Soviet Union,67 and France.68 The record of the Allies, perhaps with the exception of the Soviet Union,69 was much better with regard to protecting cultural property.70 At the end of World War II, those responsible for

by the Governing Board of the Pan-American Union and continues to bind 11 nations, including the United States. Id.

64. See Williams, supra note 22, at 19-20 (describing Germany's complete disregard of 1907 Hague Convention during World War II); see also Jote, supra note 25, at 39 (describing organized and systematic plunder of European cultural property by German forces during World War II).

65. See Jote, supra note 25, at 39 (describing special German unit dedicated to collection of enemy cultural property); see also, Williams, supra note 22, at 19 (describing German Minister Alfred Rosenberg's complete disregard of international law prohibiting looting of art galleries, churches, and museums). The German looting campaign was organized and carried out by a distinct umbrella organization, the Einsatzstab. Jote, supra, at 59. Led by Minister Rosenberg, the Einsatzstab was a special unit, kept separate from the regular army, and, therefore, uninhibited by the military policy against looting of cultural property. Id.

66. See Jote, supra note 25, at 40-41 (describing German looting of approximately 200 Polish villages, castles, churches, museums, and libraries). German forces looted famous paintings, sculptures, tapestries, and manuscripts from the National Museums and the Royal Palaces in Cracow and Warsaw. Id. at 41.

67. See id. at 41-42 (noting German looting of 40 railway cars worth of Ukrainian cultural property). German forces were responsible for the destruction of 427 museums, 1670 Greek Orthodox churches, 237 Roman Catholic churches, 67 chapels, and 532 synagogues. Id. at 41.

68. See id. at 42-43 (describing instruction issued by Marshal Herman Göring as basis for looting of France). According to Göring's instructions of November 5, 1940, French cultural property was to be either reserved for Hitler or himself, used for education in German schools, transported to Germany for investment purposes, or auctioned for monetary gain. Id. at 42. French museums in Nantes, Nancy, and Old Marseilles suffered some of the heaviest looting. Id. Confiscated cultural property included works by Boucher, Raphael, Vermeer, Van Dyck, Rubens, and Rembrandt. Id. at 43. One scholar estimates the value of the cultural property removed from France during World War II at approximately DM1 billion. Id.


70. See Toman, supra note 22, at 20 (describing French and British public pledge to safeguard cultural property during World War II). But see B.H. Liddell Hart, History of the Second World War 529-30 (1970) (describing Allied bombing of Abbey at Monte Cassino). Upon entering the war in 1941, the United States took similar steps,
the looting of Europe's cultural property were among the tried, convicted, and executed of the Nuremberg Tribunal.

B. Modern International Agreements

As one scholar notes, the increased destructive capacity of weaponry deployed during World War I and II presented significant threats to cultural property that the initial agreements were unable to counter. In an effort to address these flaws, the post-World War II cultural property protection instruments were narrowly tailored international conventions, and focused solely on cultural property protection during times of both war and peace. One example of a modern international agreement

first organizing the American Commission for the Protection and Salvation of Artistic and Historic Monuments in War Areas. In addition, a special corps, known as the Monuments, Fine Arts and Archives Officers, was organized to help protect cultural property. Lastly, the Commander-in-Chief of the Allied Forces, General Dwight D. Eisenhower, issued two orders containing specific instructions for the safeguarding of cultural property. 

71. See supra note 22, at 29 (noting execution of Minister Rosenberg for plunder and wanton destruction of cultural property not justified by military necessity); see also OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, Nazi Conspiracy and Aggression: Opinion and Judgment 122-23 (1947) (reporting conviction of Minister Rosenberg for war crimes, crimes against peace, and crimes against humanity). In finding Minister Rosenberg guilty, the Nuremberg Tribunal held that

Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler’s orders of January 1940 . . . he organized and directed the Einsatzstab Rosenberg, which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In ‘Action M’ (Mobel), instituted in December 1941, at Rosenberg’s suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of July 14, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the west.

72. See supra note 22, at 29 (discussing new cultural property protection measures developed in response to new methods of warfare practiced during World War II).

73. See supra note 29, at 51 (discussing new cultural property protection measures developed in response to new methods of warfare practiced during World War II).

1. The 1954 Hague Convention

Scholars note that the failure of the initial instruments to deter the looting and destruction during World War I and II demonstrated the need for increased legal protection for cultural property.78 UNESCO, whose Constitution mentions the universal responsibility for protecting the cultural heritage of humanity,79 was called upon to formulate a new agreement.80 In order to fulfill its mandate, UNESCO organized the 1954 Conference of The Hague,81 which met from April 21 to May 14, 1954,82 and was attended by fifty-six nations.83 The 1954 Confer-

---

75. 1954 Hague Convention, supra note 24.
76. Id.
77. UNESCO Convention, supra note 13.
78. See Toman, supra note 22, at 21-22. (asserting that destruction of cultural property during World War II and weakness of legal procedures for protection of cultural property were primary catalysts for new international agreement); see also Williams, supra note 22, at 34 (stating that World War I and II showed inadequacies of 1899 and 1907 Hague Conventions).
79. See Constitution of the United Nations Education, Scientific, and Cultural Organization, art. 1, ¶ 2(c), Nov. 16, 1945, 4 U.N.T.S. 276, 278 (stating goal of U.N. Education, Scientific, and Cultural Organization ("UNESCO") is to contribute to peace by promoting cooperation among nations through education, science, and culture). Article 1, paragraph 2(c) states that UNESCO will achieve its goal, in part, "by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions." Id.
80. See Toman, supra note 22, at 22. (describing UNSECO as most appropriate forum for improving cultural property protection).
81. See id. at 23 (describing steps leading to Hague Convention).
82. Id.
83. Id.
ence of The Hague, in turn, produced the 1954 Hague Convention.84

a. Structure of 1954 Hague Convention

Scholars agree that, although the 1954 Hague Convention was expressly intended to supplement previous cultural property agreements,85 it in fact superseded the initial instruments.86 As one scholar notes, the 1954 Hague Convention recognized that the modernization of warfare made the initial instruments obsolete.87 In addition, unlike the initial instruments, the 1954 Hague Convention viewed each instance of damage to cultural property as a global affront affecting all nations.88

The 1954 Hague Convention introduced the phrase cultural property, which affords protection to a more comprehensive array of property than previous conventions.89 In addition,

---

84. 1954 Hague Convention, supra note 24.
85. See id. pmbl., 249 U.N.T.S. at 240 (supplementing 1899 and 1907 Hague Conventions and Roerich Pact). The Preamble of the 1954 Hague Convention declares that the member states ("Contracting Parties") are "[g]uided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the . . . [Roerich] Pact of 15 April, 1935." Id.
86. See WILLIAMS, supra note 22, at 34 (describing 1954 Hague Convention as first comprehensive international agreement on cultural property); see also, TOMAN, supra note 22, at 24 (noting that 1954 Hague Convention unifies wartime cultural property protection, rather than relying on scattered provisions of initial instruments); JOTE, supra note 25, at 57 (describing 1954 Hague Convention as only international agreement for wartime protection of cultural property).
87. See WILLIAMS, supra note 22, at 34 (stating that new methods of warfare placed cultural property in position of danger not recognized by initial instruments).
88. See 1954 Hague Convention, supra note 24, pmbl., 249 U.N.T.S. at 240 (viewing damage to cultural property as damage to cultural heritage of world, rather than damage only to cultural heritage of nation in which it is located). The Preamble states that the Contracting Parties are "convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." Id.
89. Compare 1907 Hague Convention, supra note 44, art. 56 (limiting cultural property protection to historic monuments and institutions of religion, charity, education, and arts, and science), with 1954 Hague Convention, supra note 24, art. 1, 249 U.N.T.S. at 242 (affording protection to movable and immovable property, monuments of architecture, archaeological sites, manuscripts, books, and buildings exhibiting these works). Article 1 of the 1954 Hague Convention states that the term "cultural property" shall cover, irrespective of origin and ownership:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manu-
unlike the initial instruments, which applied only to conflicts between nations, the 1954 Hague Convention applied to a much broader range of military engagements. Scholars also note that the enforcement mechanisms of the 1954 Hague Convention follow the theory of a single, global cultural heritage. For example, Article 28, which addressed sanctions, required that all member states of the 1954 Hague Convention ("Contracting Parties") prosecute anyone within their jurisdiction who breaches this agreement, regardless of their nationality.

b. Reactions to 1954 Hague Convention

Although the 1954 Hague Convention improved wartime cultural property protection, scholars criticize Article 4(2),

scripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."


90. See, e.g., 1907 Hague Convention, supra note 44, Annex art. 1, 36 Stat. at 2295 (applying laws, rights, and duties of war on armies, militia, and volunteer corps of belligerent nations); see also Birov, supra note 27, at 214 (noting that initial instruments applied only to states of war and international conflict).

91. See 1954 Hague Convention, supra note 24, arts. 18-19, 249 U.N.T.S. at 254-56 (expanding cultural property protection to instances of undeclared war, partial and total occupation, and civil war). Article 18(1) of the 1954 Hague Convention states that "the present Convention shall apply in the event of declared war or any other armed conflict which may arise between two or more of the . . . Contracting Parties, even if the state of war is not recognized by one or more of them." Id. Article 18(2) states that "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance" Additionally, Article 19(1) states that "[i]n the event of an armed conflict not of an international character occurring within the territory of one of the . . . Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property." Id., 249 U.N.T.S. at 256.

92. See Forbes, supra note 21, at 244 (describing Hague Convention as premised upon global cultural view); see also Oyer, supra note 29, at 54-55 (noting that 1954 Hague Convention necessitates international enforcement).

93. See 1954 Hague Convention, supra note 24, art. 28, 249 U.N.T.S. at 261 (requiring that Contracting Parties prosecute or sanction those who breach, or order another to breach, 1954 Hague Convention).

94. See id. art. 4(2), 249 U.N.T.S. at 242-44 (allowing Contracting Parties to waive
which creates an imperative military necessity exception.\textsuperscript{95} One scholar is especially critical of Article 4(2) because it creates an imperative military necessity exception without defining an imperative military necessity.\textsuperscript{96} Nevertheless, nations continue to ratify the 1954 Hague Convention\textsuperscript{97} and it remains the primary tool for protecting cultural property during times of armed conflict.\textsuperscript{98}

2. The UNESCO Convention

Whereas the 1954 Hague Convention focused exclusively on protecting cultural property during armed conflicts, the UNESCO Convention focused almost exclusively on illegal removals of cultural property during peacetime.\textsuperscript{99} By addressing cultural property protection outside the scope of armed conflicts, the UNESCO Convention became the primary tool for combating the illegal art trade.\textsuperscript{100}

a. Structure of UNESCO Convention

As one scholar notes, the UNESCO Convention's definition...
of cultural property is highly specific.\textsuperscript{101} Furthermore, unlike the 1954 Hague Convention, which encompasses international enforcement,\textsuperscript{102} Article 5 of the UNESCO Convention encourages national protection measures.\textsuperscript{103} Article 6 follows this view by mandating that parties to the UNESCO Convention introduce local export controls to curtail the removal of their own cultural property.\textsuperscript{104}

\begin{itemize}
\item \textsuperscript{101} See Williams, \textit{supra} note 22, at 187 (discussing Article 1 of UNESCO Convention); see also UNESCO Convention, \textit{supra} note 13, art. 1, 823 U.N.T.S. 234-36 (defining seven categories, and four sub-categories, of cultural property protected by UNESCO Convention). Article 1 of the UNESCO Convention states that the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
  \begin{itemize}
  \item a. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
  \item b. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
  \item c. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
  \item d. elements of artistic or historical monuments or archaeological sites which have been dismembered;
  \item e. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
  \item f. objects of ethnological interest;
  \item g. property of artistic interest, such as:
    \begin{itemize}
    \item i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
    \item ii. original works of statuary art and sculpture in any material;
    \item iii. original engravings, prints and lithographs;
    \item iv. original artistic assemblages and montages in any material;
    \end{itemize}
    rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments.
  \end{itemize}
\end{itemize}

\textit{Id.}, 823 U.N.T.S. at 234-36.

\textsuperscript{102} See 1954 Hague Convention, \textit{supra} note 24, art. 28, 249 U.N.T.S. at 260 (requiring that Contracting Parties prosecute those within their jurisdiction who breach agreement, regardless of their nationality).

\textsuperscript{103} See UNESCO Convention, \textit{supra} note 13, art. 5, 823 U.N.T.S. at 238 (mandating creation of national services for protection of cultural property within territories of Contracting Parties); see also Forbes, \textit{supra} note 21, at 245 (describing UNESCO Convention as premised on cultural nationalist perspective).

\textsuperscript{104} \textit{Id.} art 6, 823 U.N.T.S. at 240. Article 6 requires that
b. Shortcomings of UNESCO Convention

Commentators note several deficiencies in the UNESCO Convention. Although cultural property is defined broadly in Article 1, it affords a narrow scope of protection, extending only to cultural property specifically designated by the member states.
("State Parties").\footnote{106} This limitation leaves undiscovered or unexcavated cultural property without any protection under the UNESCO Convention.\footnote{107}

Scholars also criticize Article 7 of the UNESCO Convention.\footnote{108} Article 7(a) calls upon all signatories to prevent museums and similar institutions from procuring illegally exported cultural property.\footnote{109} The required steps, however, are limited to those consistent with national legislation.\footnote{110} Critics note that this provision renders Article 7(a) moot in nations such as the United States, where it is possible to legally import an object that was illegally exported from another nation.\footnote{111}

Commentators note that another flaw in the UNESCO Convention is the narrow scope of the import restrictions in Article 7.\footnote{112} Article 7(b)(i) requires only that signatories prohibit the

\begin{footnotes}
\footnote{106. See UNESCO Convention, supra note 13, art. 1, 823 U.N.T.S. 234-36 (limiting protection to specifically designated artifacts of archaeological, historical, literary, artistic, or scientific interest).}

\footnote{107. See JOTE, supra note 25, at 202-03 (noting that in developing nations, cultural property often remains unexcavated); see also Hooper, supra note 5, at 16 (noting that clandestine archaeological expeditions are largest single contributor to illicit trade in Italian cultural property).}

\footnote{108. See JOTE, supra note 25, at 214-15 (criticizing failure of Article 7 to address restitution and recovery of privately-owned cultural property); see also Myerowitz, supra note 69, at 1979 (noting that Article 7 does not provide remedy for private institutions or individuals).}

\footnote{109. UNESCO Convention, supra note 13, art. 7(a), 823 U.N.T.S. 240. Article 7(a) requires signatories to the UNESCO Convention}

\footnote{110. Id.}

\footnote{111. See Nina R. Lenzner, Comment, The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?, 15 U. PA. J. Int'l Bus. L. 469, 484-85 (1994) (discussing failures of UNESCO Convention); see also Bator, supra note 10, at 287 (noting that U.S. law will not disturb cultural property based solely on claim of illegal exportation). Bator notes that in many art-importing nations, like England, France, Germany, Switzerland, and the United States, the "fundamental general rule is clear: The fact that an art object has been illegally exported does not in itself bar it from lawful importation." Bator, supra, at 287.}

\footnote{112. See JOTE, supra note 25, at 212 (stating that UNESCO Convention creates loophole by limiting protection to public institutions); see also Williams, supra note 22,
importation of cultural property stolen from museums and other public institutions. As critics point out, Article 7(b)(ii), which contains the restitution and repatriation mechanisms, can only be exercised in connection with the theft of publicly owned cultural property. Another problem with the UNESCO Convention is that many art-importing nations like Germany, Japan, and the United Kingdom are not signatories. Australia, Canada, and the United States are the only major art-importing nations to ratify the UNESCO Convention.

C. The UNIDROIT Convention

In the early 1980s, in an effort to address the shortcomings of the UNESCO Convention, UNESCO requested the drafting of the UNIDROIT Convention. The UNIDROIT Convention is the most recent international agreement concerning the protec-
tion of cultural property. It addressed two key situations not addressed by the UNSECO Convention. The first situation concerns disputes between original owners and good faith purchasers. The second situation concerns the unauthorized removal of cultural property across national borders.

1. Structure of the UNIDROIT Convention

Commentators note that the UNIDROIT Convention addresses some of the issues surrounding cultural property protection not addressed by the UNESCO Convention. The UNIDROIT Convention affords protection to all publicly and privately owned cultural property, in contrast to the UNESCO Convention's requirement that the State Parties specifically designate all cultural property needing protection. By eliminating this requirement, the UNIDROIT Convention extends protection to undiscovered or unexcavated cultural property.

119. See Forbes, supra note 21, at 246 (detailing development of international agreements on cultural property protection); see also UNIDROIT Convention: Signatures and Ratifications, (visited Oct. 27, 1999) <http://www.unidroit.org/english/impliment.95.htm> (on file with the Fordham International Law Journal) (listing nations who have signed, ratified, or acceded to UNIDROIT Convention). The UNIDROIT Convention went into effect on July 1, 1998 between China, Ecuador, Lithuania, Paraguay, and Romania. Id. Most recently, the UNIDROIT Convention entered into force for Brazil, on September 1, 1999, and Bolivia, on October 1, 1999. Id. The Convention will enter into force in Finland, on December 1, 1999, in El Salvador, on January 1, 2000, and in Italy, on April 1, 2000. Id. Currently, the United States is not a member of the UNIDROIT Convention. Id.

120. See Myerowitz, supra note 69, at 1979-80 (discussing gaps in UNESCO Convention addressed by UNIDROIT Convention).

121. UNIDROIT Convention, supra note 13, arts. 3-4, 34 I.L.M. at 1331-32; Myerowitz, supra note 69, at 1979-80.

122. UNIDROIT Convention, supra note 13, arts. 5, 7, 34 I.L.M. at 1332-34; Myerowitz, supra note 69, at 1980.

123. See Myerowitz, supra note 69, at 1979-80 (noting that UNIDROIT Convention addresses conflicts of ownership between original owner and subsequent good faith purchaser); see also Forbes, supra note 21, at 246-47 (noting that UNIDROIT Convention provides remedy for private owners of stolen or illegally exported cultural property).

124. Compare UNESCO Convention, supra note 13, art. 1, 823 U.N.T.S. at 234-36 (protecting cultural property specifically designated by State Parties), with UNIDROIT Convention, supra note 13, art. 2, 34 I.L.M. at 1331 (protecting cultural objects that are of importance for archaeology, prehistory, history, literatures, art, or science). Article 2 does not require that cultural property be specifically designated by the Contracting State. UNIDROIT Convention, supra. Article 2 only requires that the object belong to one of the categories listed in the Annex to the UNIDROIT Convention, which repeats the categories listed in Article 1 of the UNESCO Convention. Id.

125. See UNIDROIT Convention, supra note 13, art 3(2), 34 I.L.M. at 1331 (stating
The UNIDROIT Convention also addresses the issue of illegally exported cultural property. Article 7 of the UNESCO Convention required that State Parties take steps, consistent with national legislation, to prevent the importation of illegally exported cultural property. Illegally exported cultural property, however, can be lawfully exported out of art-rich nations such as Egypt, India, and Mexico, and into art-poor nations like the United States. Article 5 of the UNIDROIT Convention avoids this situation by requiring repatriation, notwithstanding the laws of the possessor's nation.

The UNIDROIT Convention attempts to strike a balance between common law jurisdictions—where a thief cannot obtain or transfer good title to stolen property—and civil code jurisdictions, which often bestow good title to stolen property on bona

that cultural objects unlawfully excavated or lawfully excavated but unlawfully held are stolen).

126. See id. art. 6, 34 I.L.M. at 1333 (requiring repatriation of illegally exported cultural property).

127. UNESCO Convention, supra note 13, art. 7(a), 823 U.N.T.S. at 240.


129. See id. (describing art-poor nations as those who seek to acquire cultural property for display, study, preservation, rescue, and profit). In addition to the United States, Germany and Great Britain are also examples of art-poor nations. Id.

130. See Bator, supra note 10, at 287 (arguing that Article 7(a) of UNESCO Convention is moot in many art-poor nations).

131. See UNIDROIT Convention, supra note 13, art. 5(1), 34 I.L.M. at 1332 (organizing mechanisms for return of illegally exported cultural property). Article 5(3) requires the return of illegally exported cultural property once the requesting nation demonstrates

that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character;
(d) the traditional or ritual use of the object by a tribal or indigenous community;

or establishes that the object is of significant cultural importance for the requesting State.

Id., art. 5(3), 34 I.L.M. at 1333.

132. See O'Keeffe v. Snyder, 405 A.2d 840, 843 (N.J. 1979) (describing common law tradition regarding stolen property). The general rule in the United States is that "a thief acquires no title to the property stolen by him and can pass none to others regardless of their good faith and ignorance of the theft." Id.
Although premised on the common law tradition that cultural property must be returned to its rightful owner,\(^{134}\) the UNIDROIT Convention contains express limitations on restitution designed to satisfy civil code nations.\(^{135}\) One example of these limitations is that a claim for repatriation can be time barred under Article 3(3).\(^{136}\)

2. Bona Fide Purchasers

Articles 4 and 6 of the UNIDROIT Convention, in another concession to civil code nations, provide some relief for \textit{bona fide} purchasers.\(^{137}\) Article 4(1) entitles a \textit{bona fide} purchaser of stolen cultural objects to return them.\(^{138}\)

\(^{133}\) See Lyndel V. Prott & P.J. O'Keefe, \textit{Law and Cultural Heritage: Movement} 396-416 (1989) (defining \textit{bona fide} purchaser as one who purchased property from seller, honestly believing seller had right to sell property, and absent any dubious circumstances that would put buyer on notice to contrary); see also Forbes, \textit{supra} note 21, at 247-49 (describing differences in cultural property protection between common law and civil code jurisdictions). As Prott and O'Keefe note, in civil code jurisdictions, the \textit{bona fide} purchaser is generally given title to the property in question. Prott & O'Keefe, \textit{supra}, at 405. The most extreme example of this principle is in Italy, where the good faith possessor is given total protection. \textit{Id.} at 408. See Codice Civile art. 1153 (It.). Article 1153 of the Italian Codice Civile (Civil Code), entitled "Effects of Acquisition of Possession," states that

\[\text{[h]e to whom movable property . . . is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of [the] consignment and there be an instrument or transaction capable of transferring ownership . . . . Ownership is acquired free of rights of others in the thing, if they do not appear in the instrument or transaction and the acquirer is in good faith.}\]

\textit{Codice Civile} art. 1153 (It.).

\(^{134}\) See UNIDROIT Convention, \textit{supra} note 13, art. 3, 34 I.L.M. at 1331-32 (stating that possessors of stolen cultural objects shall return them).

\(^{135}\) See \textit{id.} (barring repatriation after specified periods of time); see also Forbes, \textit{supra} note 21, at 248-51 (discussing controversy regarding Article 3(3) time limitations on repatriation); Myerowitz, \textit{supra} note 69, at 1981 (detailing reconciliation of common law and civil code traditions in UNIDROIT Convention).

\(^{136}\) See UNIDROIT Convention, \textit{supra} note 13, art. 3(3), 34 I.L.M. at 1331-32 (limiting claims for repatriation to three years from time claimant knew location of cultural property and identity of possessor and 50 years from time of theft). Article 3(4), however, creates an exemption to the 50 year rule, stating that a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor. \textit{Id.} art. 3(4), 34 I.L.M. at 1331. In addition, Article 3(5) allows a Contracting State to extend the 50 year limitation from the time of the theft up to 75 years. \textit{Id.} art. 3(5), 34 I.L.M. at 1331

\(^{137}\) See UNIDROIT Convention, \textit{supra} note 13, arts. 4, 6, 34 I.L.M. at 1332-33
len cultural property to fair and reasonable compensation when the object is returned to the claimant.\textsuperscript{138} Article 4(2) states, however, that reasonable efforts must be undertaken to make the transferor pay the compensation rather than the claimant.\textsuperscript{139} Yet, if the claimant does remunerate the \textit{bona fide} purchaser, the claimant can later recover the amount paid from the transferor.\textsuperscript{140}

The language of Article 6(1), which addresses repatriation of illegally exported cultural property, is similar to Article 4(1).\textsuperscript{141} The \textit{bona fide} purchaser is entitled to compensation from the requesting nation, but Article 6(3) gives the option of alternate remedies in lieu of compensation.\textsuperscript{142} Provided that both parties agree, the \textit{bona fide} purchaser may retain the object under Article 6(3)(a),\textsuperscript{143} or the \textit{bona fide} purchaser may sell or donate the object to a person residing in the requesting nation under Article 6(3)(b).\textsuperscript{144}

In cases of stolen cultural property, compensation to \textit{bona pro}viding fair and reasonable compensation to good faith possessors of stolen or illegally exported cultural property).\textsuperscript{138} Id. arts. 4(1), 6(1), 34 I.L.M. at 1332-33. Article 4 states that [t]he possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

\textit{Id.}\textsuperscript{139}. See \textit{id.} art. 4(2), 34 I.L.M. at 1332 (requiring reasonable efforts be made to force transferor to pay compensation provided this principle is consistent with law of nation where claim is brought).

\textit{Id.}\textsuperscript{140}. See \textit{id.} art. 4(3), 34 I.L.M. at 1332 (stating that payment of compensation by claimant is done without prejudice to right of claimant to recover it from any other person).

\textit{Id.}\textsuperscript{141}. Id. art. 6(1), 34 I.L.M. at 1333. Article 6(1) states that [t]he possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

\textit{Id.}\textsuperscript{142}. See \textit{id.} art. 6(3), 34 I.L.M. at 1333 (providing alternatives to payment of compensation by requesting nation provided that nation and purchaser agree).

\textit{Id.}\textsuperscript{143}. \textit{id.} art. 6(3)(a), 34 I.L.M. at 1333.

\textit{Id.}\textsuperscript{144}. See \textit{id.} art. 6(3)(b), 34 I.L.M. at 1333 (allowing sale or donation of object to person residing in requesting nation who provides guarantees required by requesting nation). Additionally, Article 6(4) allows the requesting nation to pursue recovery from those responsible for the illegal exportation. \textit{Id.} art. 6(4), 34 I.L.M. at 1333.
fide purchasers is predicated on a finding that they exercised due diligence in investigating the status of the object.\textsuperscript{145} Article 4(4) lists several factors to be examined in deciding whether the purchaser exercised due diligence, including the character of the parties, the purchase price, and whether the purchaser consulted registers of stolen cultural property.\textsuperscript{146} The due diligence requirement, however, is not extended to cases involving illegally exported cultural property.\textsuperscript{147} Article 6(1) predicates compensation on a finding that the purchaser did not know, and could not have reasonably known, the status of the object.\textsuperscript{148} Article 6(2) lists the relevant factors to be considered in determining whether the purchaser satisfies the requirements for compensation, including the lack of the export certificate if one was required by the law of the requesting nation.\textsuperscript{149}

D. U.S. Efforts To Prevent Illegal Removals of Cultural Property

Commentators describe the United States as an art-poor nation, which provides a market for illegally removed cultural property.\textsuperscript{150} In order to stem the flow of illegally removed cultural property through its borders, the United States ratified in-

\begin{enumerate}
\item[145.] See id. art. 4(1), 34 I.L.M. at 1332 (predicating payment of compensation on finding that purchaser neither knew nor ought to have known that object was stolen and exercised due diligence when acquiring object).
\item[146.] Id. art. 4(4), 34 I.L.M. at 1332. Article 4(4) states that \[\text{in determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.}\]
\item[147.] See id. art. 6(1), 34 I.L.M. at 1333 (requiring only that purchaser neither knew nor ought to have known that cultural property was illegally exported).
\item[148.] Id.
\item[149.] See id. (stating that all circumstances of acquisition should be examined when deciding whether purchaser knew or ought to have known object was illegally exported).
\item[150.] See Lindsay, supra note 128, at 167 (discussing changes in relationship between art-rich and art-poor nations during 1980s); see also Jote, supra note 25, at 119 (stating that cultural institutions of developed nations contain large amounts of cultural property illegally removed from developing nations). Jote states that the trend is for illegally removed cultural property to flow from developing nations to developed nations. Id.
\end{enumerate}
ternational agreements,\textsuperscript{151} executed bilateral treaties,\textsuperscript{152} and passed narrowly tailored domestic statutes.\textsuperscript{153} In addition to these measures, the courts of the United States, at the behest of federal prosecutors, expanded the applicability of an already existing law, the NSPA,\textsuperscript{154} to prevent the entrance of illegally removed cultural property.\textsuperscript{155}

1. The National Stolen Property Act

In 1934, Congress enacted the NSPA as an extension of the National Motor Vehicle Theft Act\textsuperscript{156} ("NMVTA").\textsuperscript{157} The NMVTA, enacted in 1919, prohibited the interstate transportation of stolen vehicles.\textsuperscript{158} Like the NMVTA, the NSPA, which prohibits the interstate or international transportation of any stolen property,\textsuperscript{159} helped state authorities arrest thieves who

\begin{itemize}
\item \textsuperscript{153} See Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture of Murals, 19 U.S.C. §§ 2091-2095 (1976) (prohibiting importation into United States of pre-Columbian cultural property illegally removed from country of origin).
\item \textsuperscript{154} 18 U.S.C. § 2314 (1976).
\item \textsuperscript{155} See United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974) (applying NSPA to case involving illegal removal of cultural property from Guatemala); see also McClain I, 545 F.2d 988 (5th Cir. 1977), reh'g denied, 551 F.2d 52 (5th Cir. 1977) on remand, United States v. McClain, 593 F.2d 658 (5th Cir. 1979) ("McClain II"), cert. denied 444 U.S. 918 (1979) (applying National Stolen Property Act ("NSPA") to illegal removal of cultural property from Mexico).
\item \textsuperscript{156} 18 U.S.C. § 2312 (1982).
\item \textsuperscript{157} See Kenneth Adamczyk, Case Note, Copyright—Bootleg Records—Copyright Infringement in the Form of Unauthorized Phonograph Recordings, When Such Records are Shipped Interstate, Does Not Fall Within the Reach of the National Stolen Property Acts: Dowling v. United States, 105 S.Ct. 3127 (1985), 63 U. Det. L. Rev. 843, 845 (1986) (noting that interstate transportation of stolen cars to avoid local prosecution was major problem prior to passage of National Motor Vehicle Theft Act ("NMVTA")).
\item \textsuperscript{158} See id. at 845-46 (noting that NMVTA allowed prosecution of car thieves regardless of where they transported stolen cars).
\item \textsuperscript{159} See 18 U.S.C. § 2314 (1976) (prohibiting interstate or international transportation of all property with value of US$5000 or more).
\end{itemize}
moved between jurisdictions to avoid prosecution.\textsuperscript{160} Two cases in the 1970s expanded the applicability of the NSPA to prohibit the importation of illegally removed cultural property into the United States.\textsuperscript{161}

2. United States v. Hollinshead

U.S. authorities first applied the NSPA to a case involving cultural property in \textit{United States v. Hollinshead}.\textsuperscript{162} Clive Hollinshead was indicted under the NSPA for importing stolen property—a Mayan artifact known as the Machaquila\textsuperscript{163} Stele 2 ("Stele 2")\textsuperscript{164}—out of Guatemala and into the United States.\textsuperscript{165} A jury in the District Court for the Central District of California found Hollinshead and one co-defendant guilty, and the defendants appealed their convictions to the Ninth Circuit.\textsuperscript{166}

On appeal, the Ninth Circuit examined only whether the district court's instruction to the jury that there is a presumption

\begin{itemize}
\item \textsuperscript{160} See Adamczyk, \textit{supra} note 157, at 846 (describing original intent of NSPA).
\item \textsuperscript{161} See Lynn S. Waterman, \textit{Note, Was the Stela "Stolen"?}, \textit{2 Ind. Int'l. & Comp. L. Rev.} 515, 521 (1992) (discussing two cases in which NSPA was applied to illegally removed pre-Columbian cultural property).
\item \textsuperscript{162} 495 F.2d 1154 (9th Cir. 1974).
\item \textsuperscript{163} See Bator, \textit{supra} note 10, at 345 (characterizing Machaquila as Guatemalan archaeological site discovered in 1961).
\item \textsuperscript{164} See \textit{id.} (describing Machaquila Stele 2 ("Stele 2") as "a stunning 7-foot monument intricately carved with reliefs and hieroglyphs").
\item \textsuperscript{165} \textit{Hollinshead}, 495 F.2d at 1155; see Waterman, \textit{supra} note 161, at 522 (describing Guatemalan cultural property law). Under Guatemalan law, all pre-Columbian archaeological artifacts are property of the State and may not be removed without the permission of the government. Waterman, \textit{supra}.
\item \textsuperscript{166} See \textit{Hollinshead}, 495 F.2d at 1156 (affirming defendants' convictions under NSPA); \textit{see also} Bator, \textit{supra} note 10, at 345-46 (describing facts of \textit{Hollinshead} case). The facts of the case begin in 1961 when archaeologist Ian Graham discovered the Machaquila archaeological site, which included the Stele 2. Bator, \textit{supra}, at 345. Sometime between 1968 and 1971, the Stele 2 was cut into pieces and brought to Hollinshead's co-defendant's fish packing plant in Belize, British Honduras. \textit{Hollinshead}, 495 F. 2d at 1155. There, in the presence of Hollinshead, his co-defendant, and some Guatemalan officers who departed after receiving bribes, the pieces were boxed and shipped to Miami, Florida. \textit{Id.} In an effort to sell the Stele 2, Hollinshead's co-defendant showed it to several collectors and museums in Georgia, New York, North Carolina, and Wisconsin without success. \textit{Id.} Thereafter, the Stele 2 was shipped to Hollinshead in California, where he offered it to the Brooklyn Museum in New York for US$300,000. Bator, \textit{supra}, at 345. The curator of the Brooklyn Museum contacted Ian Graham, the archaeologist who discovered the Machaquila site, asking his opinion on the authenticity of the Stele 2. \textit{Id.} Mr. Graham then contacted the authorities, which, in turn, led to Hollinshead's arrest. \textit{Id.}
\end{itemize}
that every person knows what the law forbids, was erroneous. The two co-defendants argued it was the law of Guatemala that considered the Stele 2 stolen property, and there was no presumption that they knew the law in Guatemala. The Ninth Circuit stated that the U.S. Government need only prove the appellants knew the Stele 2 was stolen to satisfy the scienter requirements of the NSPA, not that they knew where or how it was stolen. The court held that there was ample evidence for the jury to find that the appellants knew the Stele 2 was stolen, and that while the district court's instructions may have been erroneous, that fact did not warrant the reversal of the co-defendant's convictions.

3. United States v. McClain

Three years after the Hollinshead decision, the Fifth Circuit addressed the application of the NSPA to the importation of illegally removed cultural property in United States v. McClain. A jury in the District Court for the Western District of Texas convicted the co-defendants in McClain for violating and conspiring to violate the NSPA in connection with the illegal exportation of pre-Columbian artifacts from Mexico. The Fifth Circuit, how-

167. See United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) (stating jury instruction made by district court judge).
168. Id. The Ninth Circuit opinion stated that “[e]ssentially [the appellants’] claim is that the instruction was overbroad and that it should have been supplemented with or limited by an instruction requested by appellants which made it clear that there is no such presumption as to knowledge of foreign law.” Id.
169. Id. at 1156.
170. Id.
171. See id. (holding that trial judge's failure to instruct jury that co-defendant's knowledge of Guatemalan cultural property protection law was relevant to extent that it bore upon issue of knowledge that Stele 2 was stolen was erroneous).
172. See id. (stating that trial judge's instructions, while erroneous, were not prejudicial enough to interests of co-defendants to warrant reversal).
173. McClain I, 545 F.2d 988 (5th Cir. 1977), reh'g denied, 551 F.2d 52 (5th Cir. 1977).
174. See id. at 992 (describing charges against co-defendants); see also McClain II, 593 F.2d 658, 660-63 (5th Cir. 1979) (detailing facts surrounding importation and attempted sale of pre-Columbian artifacts from Mexico). In May 1973, Joseph Rodriguez came to San Antonio, Texas and contacted Alberto Mejangos for the purpose of selling Mejangos pre-Columbian artifacts from Mexico. McClain II, 593 F.2d at 660. Unbeknownst to Rodriguez, Mejangos was Director of the Mexican Cultural Institute ("Institute"), an educational center sponsored by the Mexican government, but located in San Antonio. Id. Mejangos, along with the Institute's librarian, Adalina Diaz-Zambrano, viewed Rodriguez's collection of artifacts. Id. When asked how he had amassed the
ever, reversed their convictions.\textsuperscript{175}

On appeal, the court addressed the question of whether the Mexican government actually owned the artifacts seized by the Federal Bureau of Investigation ("FBI") before the co-defendants removed them from Mexico.\textsuperscript{176} Dr. Alejandro Gertz, a deputy attorney general of Mexico, testified in the District Court that ownership of the artifacts was vested in the Mexican government, by statute, since 1897.\textsuperscript{177} The district court accepted Dr. Gertz's view of Mexican cultural property protection law and used it to instruct the jury.\textsuperscript{178}

The Fifth Circuit upheld the applicability of the NSPA to instances in which cultural property is exported out of a country that has asserted national ownership.\textsuperscript{179} After reviewing the five Mexican statutes concerning cultural property protection,\textsuperscript{180} however, the Fifth Circuit held that Mexico did not assert national ownership over all the artifacts until 1972.\textsuperscript{181} The District

collection, Rodriguez told Mejangos and Diaz-Zambrano that he had five squads working in various Mexican archaeological zones who provided him with pieces, a few at a time. \textit{Id.} Thereafter, in December 1973, Rodriguez departed San Antonio, but left his collection of artifacts with William and Ada Simpson, who were authorized to sell the objects. \textit{Id.} The Simpsons, along with Mike Bradshaw, then attempted to sell the objects to William Maloof, a friend of Bradshaw. \textit{Id.} Maloof, however, felt he was being swindled and contacted the Federal Bureau of Investigation ("FBI"). \textit{Id.} at 661. The FBI launched an investigation and sting operation that eventually led to the arrest of Rodriguez, the Simpsons, Bradshaw, and Patty McClain. \textit{Id.} at 661-63. McClain, in addition to negotiating prices for stolen artifacts, served as an appraiser for the criminal enterprise. \textit{Id.} at 661, 662-63.

\textsuperscript{175} McClain I, 545 F.2d at 1004.

\textsuperscript{176} Id. at 996.

\textsuperscript{177} Id. at 993.

\textsuperscript{178} Id. at 994. The District Court judge instructed the jury that since 1897 Mexican law has declared pre-Columbian artifacts recovered from the Republic of Mexico within its borders to be the property of the Republic of Mexico, except in instances where the Government of the Republic of Mexico has, by way of license or permit, granted permission to private persons or parties or others to receive and export in their possession such artifacts to other places or other countries.

\textit{Id.}

\textsuperscript{179} Id. at 996.


\textsuperscript{181} See McClain I, 545 F.2d 988, 1000-01 (5th Cir. 1977) (stating that laws passed
Court's jury instruction that the Mexican government owned the artifacts possessed by the co-defendants for seventy-five years, therefore, was held to be erroneous and highly prejudicial.\textsuperscript{182} Based on this interpretation of Mexican law, the Fifth Circuit reversed the co-defendants' convictions and remanded the case for retrial at the District Court level.\textsuperscript{183}

On remand, a jury in the District Court for the Western District of Texas again convicted the co-defendants for violating and conspiring to violate the NSPA, and again the co-defendants appealed their convictions to the Fifth Circuit.\textsuperscript{184} The Fifth Circuit prior to 1972 law asserted national ownership over pre-Columbian immovable monuments and movables found in or on immovable monuments). The Fifth Circuit held that

\begin{quote}
only in 1972... did the government declare that all pre-Columbian artifacts were owned by the Republic. We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the National Stolen Property Act.
\end{quote}

\textit{Id.}

\textsuperscript{182} See 1972 Mexican Cultural Property Law, \textit{supra} note 180 (proclaiming state ownership over all pre-Columbian cultural property discovered within Mexico after 1972). The Federal Law on Archaeological, Artistic and Historic Monuments and Zones of May 6, 1972 ("1972 Law") states that "[a]rchaecological monuments, movables and immovables, are the inalienable and imprescriptable property of the Nation." 1972 Mexican Cultural Property Law, art. 27, \textit{supra} note 180. Article 28 further states that "[m]ovable and immovable objects, [that are] product[s] of the cultures prior to the establishment of the Spanish culture in the National Territory... are archaeological monuments. \textit{Id.} art. 28; see McClain I, 545 F.2d at 1000 (describing grounds for reversal of co-defendants' convictions). The Fifth Circuit further held that if "an object were considered 'stolen' merely because it was illegally exported, the meaning of the term 'stolen' would be stretched beyond its conventional meaning." \textit{Id.} at 1002.

\textsuperscript{183} \textit{Id.} at 1004. The Fifth Circuit stated that on remand it was necessary to ascertain when the artifacts were exported out of Mexico. \textit{Id.} at 1003. The court explained that

\begin{quote}
[i]f the exportation occurred after the effective date of the 1972 law, the artifact[s] may have been stolen but only if it were not legitimately in the seller's hands as a result of prior law. If the exportation occurred before 1972, but after the effective date of the 1934 law, it would be necessary to show that the artifact[s] [were] found on or in an immovable archaeological monument. If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican government, and illegal exportation would not, therefore, subject the receiver of the article to the strictures of the National Stolen Property Act.
\end{quote}

\textit{Id.}

\textsuperscript{184} See McClain II, 593 F.2d 658 (5th Cir. 1979) (granting certiorari to determine if NSPA properly applies to illegally imported cultural property and if jury should have decided date that Mexico asserted ownership over artifacts removed by co-defendants).
reaffirmed the applicability of the NSPA to the facts at hand, but again balked at the District Court's jury instructions. During the second trial, the jury heard testimony from experts on the relevant Mexican cultural property law. The U.S. government's expert witnesses agreed with Dr. Gertz's testimony from the first trial, stating that the Mexican government owned all the artifacts since 1897. Rather than rule, as a matter of law, on whether and when the Mexican government actually asserted full ownership over the artifacts in question, the trial judge gave that responsibility to the jury.

The Fifth Circuit disagreed, ruling that the trial judge should have determined when Mexico adequately asserted ownership over the cultural property in question. The court held that, based on the evidence presented at trial, the jury would likely believe that Mexico declared itself owner of all the artifacts as early as 1897. Such a belief, the Fifth Circuit held, would lead to convictions based on laws that were too vague to satisfy U.S. legal standards.

Based on this finding, the Fifth Circuit

185. Id. at 663-65.
186. See id. at 670 (stating that allowing jury to determine when Mexican statutes actually asserted ownership over cultural property removed by co-defendants was reversible error).
187. Id. at 667-68.
188. See id. (noting that co-defendants rebutted expert testimony of U.S. government witnesses with testimony from Mexican attorney). The Mexican attorney, Ignacio Gomez Palacio, agreed with the Fifth Circuit's opinion in McClain I, and testified that Mexico did not assert national ownership over all pre-Columbian artifacts until 1972. Id.
189. Id. The judge instructed the jury that
[w]hat the United States must prove to your satisfaction beyond a reasonable doubt is that the defendants knew that the artifacts were in fact stolen under the laws of Mexico regardless of where they came or from where they were stolen. And that the Mexican government had in fact effectively adopted valid laws acquiring ownership of such artifacts, if any, which were in existence at the time of such theft, if any, and that the defendants knew and understood such laws and that such laws had been violated.
190. Id. at 669 n.15.
191. See id. at 670 (holding that Mexico did not statutorily assert ownership over all pre-Columbian cultural property with sufficient clarity until 1972 Law).
192. See id. at 670-71 (noting that 1972 Law clearly and unequivocally asserts Mexican ownership over all pre-Columbian cultural property). Based on the evidence presented at trial, the Fifth Circuit stated that we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards. It may well be, as testified so emphati-
THE CASE OF THE GOLD PHIALE

reversed the defendants' convictions on the substantive counts.\textsuperscript{193}

II. THE CASE OF THE GOLD PHIALE

On November 14, 1997, the District Court for the Southern District of New York (the "District Court") applied the holdings in *Hollinshead* and *McClain I* and *II* to a civil forfeiture proceeding brought against a Sicilian artifact known as the Gold Phiale Mesomphalos ("Phiale").\textsuperscript{194} The District Court held that an Italian law asserting dominion over all newly-discovered cultural property within its borders\textsuperscript{195} gave Italy title to the Phiale.\textsuperscript{196} Accordingly, the District Court held that the Phiale was stolen property and that its subsequent importation into the United States violated the NSPA.\textsuperscript{197} This case was the first time that a U.S. court applied civil forfeiture to a situation involving the sale of illegally removed cultural property.\textsuperscript{198}
A. The District Court

Between 1980 and 1995, the Phiale, a fourth century B.C. gold platter of Sicilian origin,\(^{199}\) was owned by two Italian art collectors and one Swiss art dealer, and was eventually sold to a U.S. art collector named Michael Steinhardt.\(^{200}\) The Italian government, alleging the sale of the Phiale violated Italian cultural property protection law, requested that the United States assist it in securing the return of the Phiale to Italy.\(^{201}\) After locating the Phiale, the U.S. government instituted civil forfeiture proceedings against the Phiale, which Michael Steinhardt opposed.\(^{202}\) The District Court held that the Phiale was stolen property, subject to forfeiture under the NSPA, regardless of whether Steinhardt knew the Phiale was stolen at the time he purchased it.\(^{203}\) Upon Steinhardt's appeal of the District Court's judgment, the U.S. Court of Appeals for the Second Circuit affirmed on separate grounds,\(^{204}\) refusing to address the propriety of applying civil forfeiture to cases involving illegally removed cultural property imported into the United States.\(^{205}\)

1. Background

The known history of the Phiale begins in Italy in 1980 when Vincenzo Pappalardo, a private antique collector from Catania, Sicily, traded the Phiale\(^{206}\) to another art collector named

---

200. See id. at 224-26 (detailing known history of ownership of Phiale).
201. See id. at 226-27 (relating Italian request for assistance under U.S.-Italy Mutual Legal Assistance Treaty); see also Treaty on Mutual Legal Assistance in Criminal Matters, November 9, 1982, U.S.-Italy, 24 I.L.M. 1539 (1985) [hereinafter U.S.-Italy M[AT] (creating mechanisms for legal assistance between United States and Italy in criminal investigations and proceedings).
203. Id. at 231-32.
205. Id.
206. See Law No. 1089 of June 1, 1939, art. 26 (1939) (It.) (regulating all transfers of title of cultural property defined in Article 1). Article 26 requires that sellers notify the Ministry of National Education ("Education Ministry") before executing transfers of title of artifacts defined in Article 1. Id. art. 26. In addition, Articles 30 and 32 give the state the right of first refusal in the sale of any artifact covered by Article 1 for two months after the Education Ministry is notified of a pending sale. Id. arts. 30, 32. Parties may, under Article 32, execute a contract of sale for the artifact, but the terms of
Vincenzo Cammarata. In 1991, Cammarata traded the Phiale to a Swiss art dealer, William Veres. Soon after, Veres contacted Robert Haber, who met with Veres and expressed interest in the Phiale for one of his clients, Michael Steinhardt.

Thereafter, Steinhardt, using Haber as an intermediary, agreed to buy the Phiale for a total price of approximately US$1.2 million. A sales contract ("Terms of Sale") was executed between Veres and Haber, providing, inter alia, a refund for Steinhardt if the Phiale was confiscated or impounded by customs agents or claimed by any country or governmental agency. On December 10, 1991 Haber flew to Switzerland where, on December 12, Veres provided him with the Phiale

the contract do not bind the state if it chooses to exercise its right of first refusal. Id. art. 32. Additionally, under Article 34, the state "may prohibit the sale of collections and series of objects of private property . . . when damage may derive to their conservation or the public may be deprived of [their] enjoyment." Id. art. 34.

207. See Case of Gold Phiale, 991 F. Supp. at 224 (S.D.N.Y. 1997) (noting Papalardo's sale of Phiale in exchange for works with value of approximately US$20,000); see also Hooper, supra note 1, at A13 (noting Cammarata's recent arrest for involvement in illicit trade of cultural property).

208. See id. at 224-25 (relating William Veres acquisition of Phiale in exchange for objects worth approximately US$90,000). Veres is the owner of the Stedron art dealership, based in Zurich, Switzerland. Id. at 225.

209. See id. (describing Robert Haber as owner of New York based Robert Haber & Co. Ancient Art).

210. See id. (detailing Haber's November 1991 trip to Sicily to view Phiale). Prior to the transaction involving the Phiale, Michael Steinhardt had purchased 20 to 30 objects from Robert Haber totaling US$4-$6 million in sales. Id. Haber informed Steinhardt that the Phiale was the twin of one owned by the Metropolitan Museum of Art in New York and that a Sicilian dealer owned it. Id.

211. See id. (stating Steinhardt's agreement to pay approximately US$1 million for Phiale and US$162,364 commission to Haber). Payment for the Phiale was to be made in two equal installments, the first of which was wired to Credit Suisse, New York in favor of Veres' Stedron account at Bank Leu in Zurich, Switzerland on December 6, 1991. Id.

212. Id. The sales contract ("Terms of Sale") stated that "if the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." Id. The Terms of Sale also state that "a letter is to be written by Dr. Manganaro that he saw the object 15 years ago in Switz." Id. Haber, however, changed the clause involving Dr. Manganaro by hand. Id. at 225 n.14. The original typed language read, "a letter is to be written by Dr. Manganaro which is an unconditional guarantee of the authenticity and Swiss origins of the object." Id. Dr. Manganaro, in a Report of Information for Testimonial Evidence, denies agreeing to certify that the Phiale was authentic, that it was of Swiss origin, or that he had seen it in Switzerland. Id.; see Hooper, supra note 1, at A13 (noting recent arrest of Dr. Manganaro for involvement in illicit trade of cultural property).

and a commercial invoice. On December 13, 1991, Haber, still in Lugano, Switzerland, faxed the customs invoice and his returning flight information to Larry Baker of Jet Air Service, Inc., Haber’s customs broker at John F. Kennedy International Airport (“J.F.K. Airport”) in New York. On December 15, Haber flew from Geneva to J.F.K. Airport and officially entered the United States with the Phiale in his possession. For the next three years, the Phiale resided in Steinhardt’s New York apartment.

2. Procedural History

On February 16, 1995, pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters, the Italian government submitted a Letters Rogatory Request to the U.S. government requesting assistance in reclaiming the Phiale. On November 9, 1995, after an investigation by the U.S. Customs Service, cus-

---

214. Id. The commercial invoice described the object as “ONE GOLD BOWL—CLASSICAL . . . DATE—C. 450 B.C. . . . VALUE U.S.$250,000.” Id. at 226.

215. See id. at 226 (describing steps taken by Haber and Jet Air to import Phiale). Jet Air prepared two Customs forms for the Phiale. Id. Customs Form 3461, an Entry and Immediate Delivery Form, provided for the release of the Phiale by a Customs inspection team prior to formal entry by Haber. Id. Customs Form 7501, the general Entry Summary Form, listed the Phiale’s value as U.S.$250,000. Id. On both forms, Haber was listed as the importer of record and Switzerland was listed as the country of origin. Id.

216. Id.

217. See id. (detailing final payments made by Steinhardt in exchange for Phiale). On January 6, 1992, Haber or Steinhardt consigned the Phiale to the Metropolitan Museum of Art in New York to determine its authenticity. Id. On January 24, the Phiale was declared authentic and returned to either Steinhardt or Haber. Id. Thereafter, on January 29, Steinhardt wired the second installment of the purchase price to Veres. Id. The transaction was completed on March 11, 1992, when Steinhardt paid Haber’s commission of US$162,364. Id.

218. U.S.-Italy MLAT, supra note 201; see Case of the Gold Phiale, 991 F. Supp. at 226 (describing Italian government’s request that U.S. authorities confiscate Phiale and return it to Italy).

219. See BLACK’s LAW DICTIONARY 905 (6th ed. 1990) (defining Letters Rogatory as “[t]he medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter’s control, to assist the administration of justice in the former country”).

toms agents, acting pursuant to a seizure warrant, entered Steinhardt’s New York apartment and confiscated the Phiale. On December 13, 1995, the U.S. Government filed a civil forfeiture action in the District Court. The U.S. government’s complaint alleged that due to the misstatements on the Forms 7501 and 3641, the Phiale was subject to civil forfeiture under 18 U.S.C. §§ 545 and 981(a)(1)(C). As an alternative basis,

221. See id. at 227 (detailing warrant issued pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a). Chief Magistrate Judge Naomi Reice Buchwald issued the warrant based on her finding that the U.S. government had probable cause to believe that the Phiale was subject to civil forfeiture. Id.

222. Id.

223. See David Pimental, Forfeiture Procedures in Federal Court: An Overview, 183 FED. RULES DECISIONS 1 (1999) (describing steps involved in civil forfeiture proceeding). Civil forfeitures proceed in rem against the property in question, rather than against the possessor. Id. at 8. Once the property is seized, which allows the court to exercise jurisdiction, the object will be forfeited to the U.S. government unless one or more parties claim a right to it. Id. If claimants enter the proceedings, then the initial burden of proof is on the U.S. government to show that there was probable cause to believe the property was subject to forfeiture due to its involvement in a prior criminal act (“predicate crime”). Id. at 15. Once this is established, the burden of proof shifts to the claimants, who must prove by a preponderance of the evidence that their interests in the property are not subject to a declaration of forfeiture. Id. Claimants satisfy this burden by proving that the predicate crime never occurred, or that the property lacks a sufficient nexus to the predicate crime to warrant forfeiture under the applicable statute. Id. In addition, claimants often assert the innocent owner defense, arguing that since they have a legitimate interest in the property, and they did not participate in the predicate offense, the property should not be forfeited to the U.S. government. Id. at 15-16. In the absence of an express innocent owner limitation in the applicable forfeiture statute, however, U.S. courts have held that the innocence of an owner is not a valid defense to civil forfeiture. Id. at 16; see also, Bennis v. Michigan 516 U.S. 442 (1996) (denying innocent owner defense in case where applicable forfeiture statute lacked express innocent owner exception); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (holding that, generally, innocence of owner is not a viable defense to forfeiture); Hilton, supra note 18 (arguing against holding in Bennis).

224. Case of the Gold Phiale, 991 F. Supp. at 227; see Confiscation Cases, 74 U.S. (7 Wall.) 454, 456 (1868) (holding that civil forfeiture proceedings are civil suits brought in name and for benefit of United States).

225. See Case of the Gold Phiale, 991 F. Supp. at 227 (characterizing statements on customs forms that Phiale was worth US$250,000 and of Swiss origin as material misstatements).

226. Id. 18 U.S.C. § 545, in pertinent part, states:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—[s]hall be fined under this title or imprisoned not more than five years, or both . . . . Merchandise introduced into the United States in violation of this section, or the value thereof, to be
the U.S. government alleged that the Phiale was subject to forfeiture pursuant to 19 U.S.C. § 1595a(c),228 because it was stolen property under Italy’s Law No. 1089 of June 1, 1939 (“Law of 1939”),229 and thus its importation into the United States violated the NSPA.230

On December 26, 1995, Steinhardt entered the proceedings as a claimant and filed a motion for summary judgment against the U.S. Government,231 asserting that the Phiale was not subject to forfeiture under either 18 U.S.C. §§ 545, 981(a)(1)(C), or 19 U.S.C. § 1595a(c).232 On May 16, 1996, the U.S. Government filed its opposition to Steinhardt’s motion and cross-moved for summary judgment on its complaint.233 On November 14, 1997,
Judge Barbara Jones granted summary judgment to the U.S. government on all grounds.\textsuperscript{234}

3. The District Court Opinion

The District Court, citing \textit{McClain II} and \textit{Hollinshead}, held that cultural property may be considered stolen under the NSPA when it is removed from a nation that has asserted ownership through domestic legislation.\textsuperscript{235} The District Court relied entirely on Article 44 of the Law of 1939\textsuperscript{236} in concluding that Italy had asserted ownership over the Phiale.\textsuperscript{237} Once the District Court found that Italy adequately asserted ownership over the Phiale, the analysis shifted to whether the U.S. government had probable cause to believe that the importer, Haber, knew the Phiale was stolen at the time he imported it from Switzerland.\textsuperscript{238}

The District Court noted several factors that led to the conclusion that Haber knew the Phiale was stolen.\textsuperscript{239} These factors

\textsuperscript{234} See \textit{id.} at 233 (granting summary judgment to U.S. government based on material misstatements on customs forms and importation of stolen property under NSPA).

\textsuperscript{235} \textit{id.} at 231.

\textsuperscript{236} See Law No. 1089 of June 1, 1939, art. 44, (1939) (It.) (asserting state ownership over all cultural property discovered within Italian borders). Article 44 of the Law of 1939 states, \textit{inter alia}, that objects "discovered belong to the State." \textit{id.} In addition, the Education Ministry may, under Article 43, execute state-led archaeological research, or may, under Article 45, license entities or private individuals to conduct archaeological research on both public and private property. \textit{id.} arts. 43, 45. Both the property owner and the discoverer are compensated for discovered works by the State. \textit{id.} arts. 44, 45. Compensation may be paid in cash or through the release of some of the discovered objects, but in either case, the price may not exceed one-fourth of the value of the discovered works as a whole. \textit{id.}


[a] party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

\textit{Fed. R. Civ. P. 44.1, also quoted in Fed. R. Crim. P. 26.1.}


\textsuperscript{239} \textit{id.}
included the fact that Haber saw the Phiale in Sicily in 1991,\textsuperscript{240} that Haber told Steinhardt that the owner of the Phiale was a Sicilian coin dealer, that the Terms of Sale included a full refund for Steinhardt in the event the Phiale was seized by Customs or claimed by a country or governmental agency,\textsuperscript{241} and that Haber changed the clause pertaining to Dr. Manganaro's guarantee in the Terms of Sale.\textsuperscript{242} Based on these determinations, the District Court ruled that the U.S. government had probable cause to believe Haber knew the Phiale was stolen property and, thus, the Phiale was subject to forfeiture under 19 U.S.C. § 1595a(c).\textsuperscript{243} The District Court found that Steinhardt offered no evidence to imply that the Phiale was not subject to forfeiture, and, since § 1595a(c) contains no express innocent owner provision, it granted the U.S. government's motion for summary judgment.\textsuperscript{244} Steinhardt immediately filed an appeal with the U.S. Court of Appeals for the Second Circuit, but the appellate court affirmed the District Court's ruling on July 12, 1999.\textsuperscript{245}

\textsuperscript{240} See id. (stating that Haber viewed Phiale in November 1991, when visiting Veres in Sicily).

\textsuperscript{241} See id. (quoting text of Terms of Sale providing refund in event of seizure or forfeiture).

\textsuperscript{242} See Case of the Gold Phiale, 991 F. Supp. at 232 (detailing changes to Terms of Sale allegedly made by Haber). In addition, the District Court pointed out that Haber made sure the Phiale was exported from Switzerland, rather than Italy, and that Haber imported the Phiale into the United States using two materially false Customs forms. \textit{Id.} The District Court also noted that, following the seizure of the Phiale, Haber invoked his Fifth Amendment right against self-incrimination at a deposition and refused to answer any questions regarding the purchase and sale of the Phiale. \textit{Id.} The District Court, based on Haber's invocation of the Fifth Amendment, drew the adverse inference that Haber knew the Phiale was stolen at the time he imported it into the United States. \textit{Id.; see also} Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that Fifth Amendment does not prohibit adverse inferences against participants in civil actions when participants refuse to testify in response to probative evidence proffered against them).


\textsuperscript{244} \textit{Id.}

\textsuperscript{245} See Case of the Gold Phiale II, No. 97-6319, 1999 WL 498582 (2d Cir. July 12, 1999) (affirming summary judgment for U.S. government in civil forfeiture proceeding). The U.S. government reiterated its position that the Phiale was subject forfeiture under 18 U.S.C. § 545 for the misstatements on the customs forms and under 19 U.S.C. § 1595a for violations of the NSPA. \textit{Id.} The Second Circuit affirmed the forfeiture under § 545, but did not reach the issue of the applicability of the NSPA, instead holding that the district court found that summary judgment was proper on either of two independent bases. We hold that importation of the Phiale violated 18 U.S.C.
III. THE UNITED STATES SHOULD RATIFY AND IMPLEMENT THE UNIDROIT CONVENTION, WHICH ENCOURAGES THE REPATRIATION OF ILLEGALLY REMOVED CULTURAL PROPERTY WHILE PROTECTING THE INTERESTS OF BONA FIDE PURCHASERS

The District Court's decision in the *Case of the Gold Phiale* demonstrates that civil forfeiture is an improper mechanism for addressing the importation of illegally removed cultural property into the United States. The equitable differences between prosecuting cultural property smugglers under the NSPA, as the U.S. government did in *Hollinshead* and *McClain*, and using violations of the NSPA as the predicate crime in a civil forfeiture proceeding against an artifact possessed not by a smuggler, but by a subsequent U.S. purchaser, are distinct. U.S. civil forfeiture law strips illegally removed cultural property from all U.S. purchasers—without compensation—regardless of whether they demonstrated good faith when acquiring the artifact. The only instance when this situation will not occur is where the applicable U.S. civil forfeiture statute contains an innocent owner provision, which, in turn, frustrates the claims of original owners by allowing the purchaser to retain possession of the artifact. The UNIDROIT Convention, which requires repatriation of all illegally removed cultural property, but which also mandates fair and reasonable compensation for purchasers who acted with due diligence while investigating the status of the artifact, strikes the proper balance between the noble cause of repatriation and the interests of bona fide purchasers.

A. Differences Between the Case of the Gold Phiale and Hollinshead and McClain

There are important differences between the prior decisions in *Hollinshead* and *McClain* and the recent decision in the *Case of the Gold Phiale* that explain why the U.S. government

---

§ 545 because of the false statements on the customs forms. We need not, therefore, address whether the NSPA incorporated concepts of property such as those contained in the Italian patrimony laws.

*Id.*

246. *See supra* notes 218-27 and accompanying text (discussing District Court's grant of summary judgment to U.S. government based on violations of NSPA).

247. *See supra* note 223 (discussing use of innocent owner defense in civil forfeiture proceedings).
chose—for the first time—to pursue forfeiture of a piece of cultural property for violating the NSPA.\textsuperscript{248} Both \textit{Hollinshead} and \textit{McClain} were criminal prosecutions under the NSPA involving smugglers of illegally removed cultural property.\textsuperscript{249} The applicable statutory language of the NSPA requires that a defendant must know that the property he or she is transporting in interstate or international commerce is stolen.\textsuperscript{250} There was ample evidence that the co-defendants in both \textit{Hollinshead} and \textit{McClain} knew beyond a reasonable doubt that the artifacts involved were stolen,\textsuperscript{251} thus making a criminal conviction under the NSPA probable. In reviewing the District Court's findings of fact in the \textit{Case of the Gold Phiale}, however, there was little evidence to support an assertion that Steinhardt knew—beyond a reasonable doubt—that the Phiale was stolen,\textsuperscript{252} The only person involved in the \textit{Case of the Gold Phiale} who satisfied the knowledge requirements of the NSPA and, thus, qualified for criminal charges was Steinhardt’s intermediary, Michael Haber.\textsuperscript{253} This may be the reason that Haber refused to answer any questions related to the importation or sale of the Phiale.\textsuperscript{254}

Additionally, in \textit{Hollinshead} and \textit{McClain I} and \textit{II}, the co-defendants were arrested before they sold the illegally removed artifacts.\textsuperscript{255} Criminally prosecuting the co-defendants in those cases served the dual purpose of punishing the smugglers and

\textsuperscript{248} See \textit{supra} note 198 (discussing new tools employed by U.S. government to address importation of illegally removed cultural property into United States).

\textsuperscript{249} See United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) (describing attempts by co-defendants to sell illegally removed Guatemalan cultural property to various collectors and museums in United States); McClain II, 593 F.2d 658, 660 (describing methods used by smugglers to obtain and sell illegally removed Mexican cultural property); see also Bator, \textit{supra} note 10, at 345-50 (describing facts of \textit{Hollinshead} and \textit{McClain}).

\textsuperscript{250} See 18 U.S.C. § 2314 (1976) (predicating liability under NSPA on defendant knowing property was stolen and that property was worth US$5000 or more).

\textsuperscript{251} See \textit{supra} note 166 (describing actions of co-defendants in \textit{Hollinshead}); see also \textit{supra} note 174 (describing facts leading up to arrest of co-defendants in \textit{McClain} case).

\textsuperscript{252} See \textit{supra} notes 205-12 and accompanying text (discussing facts surrounding purchase of Phiale by Steinhardt).

\textsuperscript{253} See \textit{supra} notes 207-12 and accompanying text (describing Haber's role in importation of Phiale).

\textsuperscript{254} See \textit{supra} note 242 (discussing Haber's assertion of his right against self-incrimination at deposition).

\textsuperscript{255} See United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) (stating that co-defendants were unsuccessful in attempts to sell Stele 2 prior to their arrest); McClain II, 593 F.2d 658, 663 (5th Cir. 1979) (noting arrest of co-defendants while trying to sell illegally removed Mexican cultural property to undercover FBI agents).
providing for the return of the illegally removed artifacts. In the Case of the Gold Phiale, Steinhardt secured possession of the Phiale from Haber three years before the U.S. Customs Service began its investigation.\(^{256}\) Criminally prosecuting Haber under the NSPA alone would not help Italy reclaim the Phiale.

B. Applying the UNIDROIT Convention to the Case of the Gold Phiale Balances the Need for Repatriation with the Need To Protect Bona Fide Purchasers

Civil forfeiture is an unwieldy mechanism when applied to illegally removed cultural property. In this context, civil forfeiture proceedings either strip possessors of illegally removed cultural property, thereby punishing _bona fide_ purchasers, or, if the applicable forfeiture statute contains an innocent owner exception, allow any possessor to retain ownership of the artifact, to the detriment of the original owner. Conversely, the UNIDROIT Convention requires compulsory repatriation of illegally removed cultural property, but furnishes the dispossessed purchaser with fair and reasonable compensation, provided he or she performed due diligence in investigating the status of the artifact prior to purchasing it.

1. Problems With Applying Civil Forfeiture in the Case Involving Illegally Removed Cultural Property

The main problem with applying civil forfeiture in cases involving illegally removed cultural property is that the civil forfeiture statutes provide either too little or too much protection to _bona fide_ purchasers. According to the U.S. Supreme Court, absent a statutory declaration to the contrary,\(^ {257}\) the innocence of an owner of property subject to civil forfeiture is not a defense.\(^{258}\) Civil forfeiture is too extreme because it does not pro-

\(^{256}\) See _supra_ text accompanying notes 196-98 (discussing Italy’s Letters Rogatory Request for help in securing return of Phiale).

\(^{257}\) See, e.g., 18 U.S.C. § 981(a)(2) (limiting forfeiture of property involved in money laundering to interests of those with knowledge of criminal activity). 18 U.S.C. § 981(a)(2) states that “[n]o property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner of lienholder to have been committed without the knowledge of that owner or lienholder.” _Id._

\(^{258}\) See, e.g., Bennis v. Michigan, 516 U.S. 442 (1996) (holding that car owned by both husband and wife was subject to forfeiture even though only husband violated Michigan indecency law); _see also_ Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S.
vide protection to *bona fide* purchasers. In civil forfeiture actions, the good faith efforts of a *bona fide* purchaser to ascertain the status of an artifact will not effect the proceedings. If the applicable statute does not contain an express innocent owner provision, then the artifact will be forfeited to the U.S. government. It is not hard to conceive of a situation in which a piece of cultural property changes hands so many times that it is nearly impossible for a purchaser to ascertain the circumstances under which it was first removed from its country of origin. Under the holding in the *Case of the Gold Phiale*, however, that artifact would still be subject to civil forfeiture, regardless of the purchaser's good faith. Although *bona fide* purchaser status should not prevent repatriation of illegally removed cultural property, it also should not be ignored.

In addition to issues of fairness, enforcement poses other potential problems when relying on civil forfeiture in cases involving illegally removed cultural property. Civil forfeitures are civil suits instituted by the U.S. government at the discretion of federal prosecutors under the Attorney General. When provisions punish innocent owners, enforcement agencies and federal prosecutors may be less likely to employ them, thus resulting in fewer repatriations of illegally removed cultural property.

One way to protect the interests of *bona fide* purchasers would be to amend statutes like 19 U.S.C. § 1595a(c) to include innocent owner provisions. This method, however, creates too much protection for *bona fide* purchasers. If an innocent owner provision were added, then the *bona fide* purchaser would be allowed to retain the artifact. This step shifts the balance too far in favor of the *bona fide* purchaser and completely frustrates the interests of the rightful claimant.

---

663 (1974) (holding that innocence of owner of property subject to forfeiture is not viable defense).

259. See *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 456 (1868) (stating that civil suits, in name and for benefit of United States, are under control of prosecutor and Attorney General); see also Hilton, supra note 18, at 155 (arguing that *Bennis* decision encourages reliance on prosecutorial discretion to protect innocent owners in forfeiture proceedings rather than including innocent owner provisions in forfeiture statutes).
2. Benefits of Applying the UNIDROIT Convention in Cases Involving Illegally Removed Cultural Property

It is important to note that the UNIDROIT Convention is predicated on the concept of repatriation.\(^\text{260}\) Under the UNIDROIT Convention, stolen or illegally exported cultural property will be returned to the rightful claimant regardless of whether the possessor is a \emph{bona fide} purchaser or not.\(^\text{261}\) Unlike civil forfeiture actions under 19 U.S.C. § 1595a(c), however, the UNIDROIT Convention balances compulsory repatriation with financial compensation for \emph{bona fide} purchasers. In addition, it is important to note that the UNIDROIT Convention does not force the rightful claimant to pay the compensation outright.\(^\text{262}\) Before a claimant must pay compensation to a \emph{bona fide} purchaser, reasonable efforts must be made to exact compensation from any prior transferor when doing so is consistent with the law of the nation in which the claim is brought.\(^\text{263}\) This measure properly places liability for compensation on the wrongdoer, but does not do so at the expense of the \emph{bona fide} purchaser, who will be paid by the claimant if the wrongdoer cannot be located.\(^\text{264}\)

3. Applying the UNIDROIT Convention to the Case of the Gold Phiale

In the \textit{Case of the Gold Phiale}, Article 4 of the UNIDROIT Convention would require that Steinhardt return the Phiale to Italy. Unlike civil forfeiture actions, however, under the UNIDROIT Convention, Steinhardt would be given the opportunity to prove that he was a \emph{bona fide} purchaser who deserved compensation.\(^\text{265}\) According to Article 4(1), compensation will

\begin{footnotesize}
\begin{itemize}
  \item \(^{260}\) See UNIDROIT Convention, supra note 13, art. 3, 34 I.L.M. at 1331 (stating that possessors of stolen cultural objects shall return them).
  \item \(^{261}\) Id. Under the UNIDROIT Convention, the only instance in which cultural property will not be returned to the original owner when a nation requests the return of an illegally exported object. Id. art. 6(3), 34 I.L.M. at 1333; see supra notes 131-33 and accompanying text (discussing exception to repatriation of illegally exported cultural property).
  \item \(^{262}\) See supra note 139 (discussing Article 4(2) requirement that reasonable efforts be made to make seller of stolen artifacts pay compensation owed to \emph{bona fide} purchaser).
  \item \(^{263}\) Id.
  \item \(^{264}\) See supra note 140 and accompanying text (noting that claimant may later recover compensation paid to \emph{bona fide} purchaser from prior transferor).
  \item \(^{265}\) See supra note 146 (discussing application of Article 4(4) of UNIDROIT Convention to stolen cultural property).
\end{itemize}
\end{footnotesize}
be withheld if the purchaser fails to exercise due diligence while investigating the status of the object. Steinhardt, however, failed to satisfy the due diligence requirement. There is no evidence that Steinhardt contacted any authorities to request information on the status of the Phiale, consulted any register of stolen cultural property, or took any other steps that Article 4(4) suggests would be consistent with a finding of due diligence. Additionally, the provision in the Terms of Sale awarding Steinhardt a refund if customs agents seized the Phiale would further damage Steinhardt's claim of bona fide purchaser status. These facts preclude a finding of due diligence. Steinhardt's only remedy, therefore, would be a civil suit against Haber seeking enforcement of the refund provision in the Terms of Sale.

CONCLUSION

The UNIDROIT Convention accomplishes three important goals when applied to cases involving subsequent sales of illegally removed cultural property. Under the UNIDROIT Convention, illegally removed cultural property must be returned to the original owner, but, when subsequent possessors are bona fide purchasers, the UNIDROIT Convention provides them with fair and reasonable compensation. This compensation comes primarily from the prior transferors who are more likely to have knowingly trafficked the stolen artifacts. Conversely, civil forfeiture is a cumbersome and overly-punitive mechanism that penalizes subsequent bona fide purchasers of illegally removed cultural property. Equity demands that a system be developed in the United States that defends the rights of both the original owners and subsequent bona fide purchasers. The U.S. government should ratify and implement the UNIDROIT Convention, the only current legislation that adequately balances the interests of both bona fide purchasers and original owners of illegally removed cultural property.

266. See id. (listing factors to be examined in determining whether purchaser exercised due diligence).

267. See supra note 212 (discussing provision in Terms of Sale guaranteeing refund for Steinhardt in event Phiale was confiscated by customs agents).