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## Protecting Cultural Property During a Time of War: Why Russia Should Return Nazi-Looted Art

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# Protecting Cultural Property During a Time of War: Why Russia Should Return Nazi-Looted Art

Elissa S. Myerowitz

## Abstract

This Comment argues that prior international treaties protecting cultural property should be used as a guide to settle the dispute between Russia and Germany as to which is the rightful owner of cultural property looted during World War II. Part I of this Comment examines the more recent developments in the international protection of cultural property up to the International Institute for the Unification of Private Law's Final Act of the Diplomatic Convention on the International Return of Stolen or Illegally Exported Cultural Objects of 1995 ("UNIDROIT Convention"). Part II discusses the evolution of the present conflict between the Russian and German Governments regarding ownership of cultural property taken during World War II. Part III of this Comment argues that the UNIDROIT Convention should be applied to the cultural property stolen during WWII and used as a guide to arriving at an equitable solution. This Comment concludes that the cultural property originally stolen by the Nazis during World War II that is presently in Russian museums should be returned to the German Government or its other original owners.

## COMMENT

### PROTECTING CULTURAL PROPERTY DURING A TIME OF WAR: WHY RUSSIA SHOULD RETURN NAZI-LOOTED ART

Elissa S. Myerowitz\*

#### INTRODUCTION

“Ah dear boy, since you call back such memories,  
such living hell we endured in distant Troy-  
we headstrong fighting forces of Achaea-  
so many raids from shipboard down the foggy sea,  
cruising for plunder, wherever Achilles led the way”

Homer, *The Odyssey*<sup>1</sup>

Since the dawn of civilization, powerful nations have plundered and pillaged whatever cultural property<sup>2</sup> they could carry from the nations that they conquered.<sup>3</sup> The history of cultural looting dates back to the Roman Empire in 400 B.C.<sup>4</sup> The Ro-

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\* J.D. Candidate, 1998, Fordham University. I would like to thank my friends and family who always encouraged me to follow my dreams and supported me along the way.

1. HOMER, 3 THE ODYSSEY 110, ln. 114 (Robert Fagles trans., 1996). Homer describes the plunder that was common in ancient times as King Nestor recounts the sack of Troy to Telemachus. *Id.*

2. See Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235, 239 (1996) (discussing various conflicts between definitions of cultural property). There is a lack of uniformity when it comes to defining cultural property. *Id.*; see also Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 284-85 (1982) (explaining problem of defining cultural property as preliminary matter). As Paul Bator notes, "I will ignore these technicalities and will use the term 'work of art' or 'art treasure' loosely to include all objects that are in fact prized and collected, whether or not they were originally designed to be useful, and whether or not they possess 'scientific' as well as aesthetic value." Bator, *supra*, at 285.

3. LEONARD D. DUBOFF & SALLY HOLT CAPLAN, *THE DESKBOOK OF ART LAW*, SECOND EDITION: BOOKLET D D-3 (1996) [hereinafter DUBOFF, DESKBOOK].

4. *Id.*; see HOMER, *supra* note 1, at 77, ln. 1 (telling story of Odysseus's travels). Homer explains: "Sing to me of the man, Muse, the man of twists and turns/driven time and again off course, once he had plundered/the hallowed heights of Troy." *Id.* See also LEONARD D. DUBOFF, *ART LAW IN A NUTSHELL*, SECOND EDITION 30 (1993) [hereinafter DUBOFF, NUTSHELL] (explaining historical examples of armies' looting). The first sentence in THE ODYSSEY references the common occurrence of plunder in ancient times. *Id.*

mans did not display their loot for its artistic value, but rather to demonstrate the prowess of their own victories.<sup>5</sup> After the fall of the Roman Empire,<sup>6</sup> the resulting political chaos increased the destruction of cultural property.<sup>7</sup> From the Crusades<sup>8</sup> and the Spanish search for gold,<sup>9</sup> to the European Thirty Years' War<sup>10</sup> and the French Revolution,<sup>11</sup> armies continually ransacked cultural property.<sup>12</sup> The Nazis' reign during World War II also involved the plunder of cultural property.<sup>13</sup> The Nazis seized art from conquered nations as a symbol of their strength.<sup>14</sup> Any art that did not fit their vision of the superior Aryan race the Nazis deemed degenerate and destroyed.<sup>15</sup>

The United States first attempted to set limits on wartime

5. DuBOFF, *DESKBOOK*, *supra* note 3, at D-3.

6. BERNARD GRUN, *THE TIMETABLES OF HISTORY* 28 (3d ed. 1991). The Roman Empire effectively ended in 285 A.D. when it split into eastern and western halves. *Id.*

7. See DuBOFF, *DESKBOOK*, *supra* note 3, at D-4 (discussing history of cultural destruction caused by war). Although the immediate power struggles that followed the fall of Rome resulted in a high mortality rate for artifacts, such cultural destruction usually resulted from negligence and mishandling. *Id.*

8. *Id.* The Crusades of the early thirteenth century were the first systematic plunder of cultural property. *Id.* The soldiers of the Crusades quickly developed an unrelenting thirst for spoils. *Id.*

9. *Id.* at D-5. During the Middle Ages, Spanish explorers set off to discover riches in gold. *Id.* Most of the ensuing conquered nations made their religious and cultural objects out of gold. *Id.* In the explorers' zeal for riches in gold, these cultural objects were destroyed to create new Spanish gold coins. *Id.*

10. GRUN, *supra* note 6, at 276-294. During the period of 1618-1648, German Protestant princes and foreign powers, such as Sweden and France, battled the House of Hapsburg and its allies. *Id.* at 284-86. The apogee of the Thirty Years' War was the fall of Prague. DuBOFF, *DESKBOOK*, *supra* note 3, at D-6. The Queen of Sweden commanded her army to transport all of the cultural property previously confiscated back to Stockholm. *Id.* The Swedes took countless treasured art objects of the German Republic from their resting places in efforts to appease the Queen. *Id.*

11. DuBOFF, *DESKBOOK*, *supra* note 3, at D-6. At the time of the French Revolution, in 1789, the masses of France viewed private property as "a symbol of the hated aristocracy." *Id.* Mobs of angry French citizens raided grand palaces, such as Versailles. *Id.* Some of this loot ended up in Paris, but countless objects disappeared forever. *Id.*

12. *Id.* at D-3-D-8.

13. DuBOFF, *NUTSHELL*, *supra* note 4, at 30.

14. *Id.*; see LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 10-11 (1995) (discussing seizure and destruction of cultural property during World War II). The Nazi's seized artwork in their attempt to create a super museum designed to reflect Hitler's personal tastes and at the same time glorify Hitler's views of the superior Aryan race. NICHOLAS, *supra*, at 10-11.

15. See NICHOLAS, *supra* note 14, at 10-25 (discussing Nazi's methods for eliminating degenerate art and artists from Germany).

ravages of cultural property in the Lieber Code of 1863.<sup>16</sup> Moreover, the Hague Conventions of 1899<sup>17</sup> and 1907<sup>18</sup> established the first formal international guidelines for the protection of cultural property during war.<sup>19</sup> Despite these safeguards, the advances in technology that led to World War I also launched the destruction of cultural property.<sup>20</sup> It was not until after World War II that the international community took further steps to protect cultural property.<sup>21</sup> Today conquering nations do not generally pillage cultural property.<sup>22</sup>

This Comment argues that prior international treaties protecting cultural property should be used as a guide to settle the dispute between Russia<sup>23</sup> and Germany as to which is the rightful

16. See RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR 1* (1983) (discussing revolutionary ideas in Lieber Code). The Lieber Code of 1863 was a set of U.S. Army field regulations to set codes of conduct during war. HARTIGAN, *supra*, at 1. The Lieber Code was one of the earliest documents to recognize the need for protection of cultural property during war. *Id.* at 16-17. See also DuBOFF, *DESKBOOK*, *supra* note 3, at D-9 (explaining early attempts at protecting cultural property).

17. Convention with Certain Powers on the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

18. Convention with Other Powers on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Convention on the Laws of War].

19. See DuBOFF, *DESKBOOK*, *supra* note 3, at D-10-D-11 (explaining Hague Convention's early attempts to protect cultural property). The guidelines of the Hague Conventions of 1899 and 1907 include a general rule prohibiting the confiscation of private property and a rule imposing legal proceedings on any destruction, damage, or confiscation of private property. Convention on the Laws of War, *supra* note 18, arts. 46 and 56, 36 Stat. at 2306-07, 2309. All of the major political powers signed the two conventions. DuBOFF, *DESKBOOK*, *supra* note 3, at D-10-D-11. In practice, however, the conventions proved ineffectual. *Id.*

20. See DuBOFF, *DESKBOOK*, *supra* note 3, at D-11 (explaining that introduction of mechanized war machines made distinction between legitimate and illegitimate methods of combat difficult to discern).

21. See Forbes, *supra* note 2, at 244 (reasoning that "[t]he Hague Convention was the first significant international agreement dedicated solely to the protection of cultural property."); see also Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995) (stating that Hague Convention was "first international agreement to protect art").

22. See Claudia Fox, Notes and Comments, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 246 (1993) (discussing current international laws protecting cultural property). The protection of cultural property began in sixteenth century Europe. *Id.* Countries did not begin to respect these first efforts to protect cultural property, however, until the mid-eighteenth century. *Id.* Cultural property really gained protection when countries embodied laws protecting cultural property into international legislation at the beginning of the twentieth century. *Id.*

23. See George Bunn & John B. Rhineland, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 323-25 (1993) (noting breakup of Soviet

owner of cultural property looted during World War II. Part I of this Comment examines the more recent developments in the international protection of cultural property up to the International Institute for the Unification of Private Law's Final Act of the Diplomatic Convention on the International Return of Stolen or Illegally Exported Cultural Objects of 1995<sup>24</sup> ("UNIDROIT Convention"). Part II discusses the evolution of the present conflict between the Russian and German Governments regarding ownership of cultural property taken during World War II. Part III of this Comment argues that the UNIDROIT Convention should be applied to the cultural property stolen during WWII and used as a guide to arriving at an equitable solution. This Comment concludes that the cultural property originally stolen by the Nazis during World War II that is presently in Russian museums should be returned to the German Government or its other original owners.

### I. THE DEFINITION, IMPORTANCE, PROBLEMS, AND PROTECTIONS OF CULTURAL PROPERTY

In the past, the spoils of war belonged to the victors.<sup>25</sup> Napoleon plundered cultural objects throughout his campaigns to conquer the world.<sup>26</sup> In the twentieth century, during World

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Union into fifteen independent republics, one of which is Russia). Prior to the breakup of the Soviet Union, the Soviet Union was also commonly referred to as Russia. See Viktor Knapp, *Socialist Federalism - A Legal Means to the Solution of the Nationality Problem: A Comparative Study*, 82 MICH. L. REV. 1213, 1214 (1984) (using Soviet Union and Russia interchangeably). In the context of this Comment, the former Soviet Union was responsible for the confiscation of cultural property during World War II, while the newly created Russian Government is involved in the present dispute over ownership. See Bunn & Rhineland, *supra*, at 325 (stating breakup of Soviet Union resulted in independent republic called Russia).

24. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT Convention].

25. See David Mazie, *Spoils of War Display of Art Seized in Battle Sparks Debate*, CHI. TRIB., Feb. 19, 1995, at 21 (describing conflict between Russian and German Governments as to which rightfully owns cultural property looted during World War II). Historically, the victors in battles would return to their countries with art treasures to signify the glory of their country. *Id.*

26. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS, ACTS AND PROCEEDINGS 21 (1995) [hereinafter Explanatory Report].

War II, the Nazis stole,<sup>27</sup> rerouted,<sup>28</sup> and destroyed<sup>29</sup> countless cultural objects.<sup>30</sup> Recent history, however, shows some progress by the art world towards protecting cultural property.<sup>31</sup>

#### A. *The Nature of Cultural Property*

There are two immediate problems to consider when discussing the international protection of cultural property.<sup>32</sup> The first difficulty lies with defining what is meant by the term cultural property.<sup>33</sup> The second hurdle involves explaining why cultural property is important enough to warrant protection.<sup>34</sup>

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27. NICHOLAS, *supra* note 14, at 38-40. The Nazis launched an extensive campaign of anti-Semitism which included looting Jewish cultural property. *Id.* at 38. Jews who managed to escape Nazi occupied countries like Austria had to abandon most of their possessions. *Id.* at 39. The Nazis forced Jews who remained in occupied countries to register all of their possessions with the Nazis. *Id.* This registration system provided a near perfect accounting of the identity and location of cultural property available for the Nazis to confiscate. *Id.*

28. *See id.* at 38-41 (explaining how Jews who fled Austria and shipped their possessions afterwards risked possibility of customs officers ripping open their packages and confiscating anything that seemed valuable); *see also* Jo Ann Lewis, *The Art Sleuths Who Struck Gold; Two Muscovites Uncover Treasures Hitler Stole and the Russians Hid*, WASH. POST, Jan. 20, 1995, at D1 (discussing how looting of art during World War II was most systematic and extensive campaign ever seen).

29. *See* Jamey Gambrell, *Displaced Art*, ART IN AM., Sept. 1, 1995, at 88 (describing Nazi's destruction of cultural property as "so massive as to be inconceivable"); KONSTANTIN AKINSHA AND GRIGORII KOZLOV, *BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES* (1995) (detailing Russia's World War II plunder of cultural objects and how world learned of Russia's secret cache of cultural objects).

30. *See* HECTOR FELICIANO, *THE LOST MUSEUM - THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 16* (Tim Bent & Hector Feliciano trans., BasicBooks 2d ed. 1997) (1995) (discussing how Hitler's interest in art led to one of greatest displacements of cultural property). In a period of five years, the Nazis displaced hundreds of thousands of cultural objects from across Europe. *Id.*

31. Forbes, *supra* note 2, at 246. The 1995 UNIDROIT Convention is the most recent development in the international attempt to fight illegal trafficking of cultural property. *Id.*

32. *See* SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY 1* (1978) (introducing problems with protection of cultural property by explaining why it is important and what it comprises).

33. *See* Forbes, *supra* note 2, at 239-40 (discussing problems with defining cultural property as background to international cultural property protection).

34. *Id.* at 241-43. There are different reasons why cultural property is important. *Id.* at 241. One viewpoint looks at protection of cultural property from a national perspective. *Id.* at 242. This viewpoint looks at cultural property as part of a nation's cultural heritage in that it gives specific nations, as opposed to the international community at large, an identity. *Id.* The other perspective looks at the protection of cultural

## 1. Cultural Property Defined

The main problem facing international protection of cultural property is answering the threshold question of what objects constitute cultural property.<sup>35</sup> Depending upon the country or international agreement, the definition of cultural property varies greatly.<sup>36</sup> A general definition, however, would

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property on an international level. *Id.* at 243. According to this view, the protection of cultural property is a global interest. *Id.*

35. See Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 *EMORY INT'L L. REV.* 457, 465 (1993) (explaining need to define cultural property before analyzing laws regarding cultural property). One problem with protecting cultural property is that cultural property cannot be defined solely by objective terms. *Id.* at 466. The committee charged with drafting a definition of cultural property for the UNIDROIT Convention ultimately decided to use both an enumerative and an exhaustive approach. Explanatory Report, *supra* note 26, at 24 (explaining discussions of participating countries regarding definition of cultural property). The definition sets a general limitation as to what situations the UNIDROIT Convention may apply to in the future. *Id.* The UNIDROIT Convention then proceeds to set out specific examples of cultural property. *Id.*

36. See Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1040 (1993) (discussing accepted definition of cultural property). The 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property is widely accepted as providing a workable definition of cultural property. *Id.*; see The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 *U.N.T.S.* 231, 234-36, 10 *I.L.M.* 289, 289-90 [hereinafter UNESCO Convention] (defining what is meant by term cultural property). This definition, however, leaves the duty of designating specific items as cultural property to member states. Mastalir, *supra*, at 1040. The definition provided by the UNESCO Convention defines cultural property as:

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

- (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:



include art, artifacts, antiques, significant architecture, artificial landscapes, religious objects and sites, and native peoples' objects.<sup>37</sup> Although this list is not exhaustive, it is broad enough to cover most objects that could be considered cultural property.<sup>38</sup>

## 2. Importance of Cultural Property

Cultural property is unique in that once cultural property is destroyed or stolen it cannot be replaced.<sup>39</sup> Cultural property is important because it offers scholars unique insight into the minds of the people and the nations who created the cultural objects.<sup>40</sup> Furthermore, protecting these original cultural objects assists historians in understanding the past.<sup>41</sup> Beyond these intellectual and educational reasons, cultural property enhances a country's sense of its present and future.<sup>42</sup> For some people, cultural property can be a reminder of the creativity of the

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

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

(iii) original engravings, prints and lithographs;

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

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

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

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

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

UNESCO Convention, *supra*, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90.

37. See Forbes, *supra* note 2, at 239-40 (explaining variety of definitions for cultural property due to lack of uniformity in laws protecting cultural property).

38. *Id.*

39. See 1 JOHN H. MERRYMAN & ALBERT E. ELSER, LAW, ETHICS, AND THE VISUAL ARTS xvi (2d ed. 1987) (explaining that irreplaceable nature of cultural property justifies its importance and proper protection).

40. See *id.* (explaining some reasons why people chose to study art).

41. *Id.*

42. *Id.*; see Forbes, *supra* note 2, at 241-42 (stating that cultural property enhances every country's "quality of life, economy, and cultural environment"). Cultural property helps a nation define its identity and origin. Forbes, *supra*, at 241-42; see Bator, *supra* note 2, at 304 (discussing relevant values involved in protection of cultural property). The existence of a common culture is closely tied with the awareness of a sense of community. Bator, *supra*, at 304. Protecting cultural property fosters a community's awareness of a common culture and helps people to remain aware of how each individual in a community is really intertwined. *Id.*

past,<sup>43</sup> or a symbol of quality,<sup>44</sup> while for others it serves as an inspiration to create new cultural objects.<sup>45</sup>

### B. *The Laundering of Cultural Property*

As the international market for cultural property expands, so does the amount of illegal trade in cultural property.<sup>46</sup> On an international level the *bona fide* purchaser rule is one reason why illegal traffic in cultural property remains so strong.<sup>47</sup> The *lex locus situs* rule is another reason why the illicit market in cultural property continues to thrive.<sup>48</sup>

#### 1. *Bona fide* Purchaser Rule

Most European countries developed some measures for the protection of cultural property.<sup>49</sup> International protection of

43. See MERRYMAN & ELSÉN, *supra* note 39, at xvi (explaining various reasons why art is important to people).

44. *Id.*

45. *Id.* Often past creations can inspire contemporary artists to create new works. *Id.*; see KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 19 (1994) (emphasizing that cultural property must be protected so that future generations have "information, knowledge and identity"); see also Bator, *supra* note 2, at 306 (examining why cultural property should be protected). A country with a strong history of appreciation for cultural property is attractive and inspirational to contemporary creators of cultural property. Bator, *supra*, at 306.

46. See Borodkin, *supra* note 21, at 377 (discussing economic incentives for increasing illegal art market).

47. See Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21-22 (1993) (discussing common law and civil law differences in treatment of personal property).

48. See Steven F. Grover, Note, *The Need For Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1456 (1992) (discussing why abandonment of *lex locus situs* rule would create more protection for cultural property).

49. See Kimberly A. Short, Note, *Preventing the Theft and Illegal Export of Art in a Europe Without Borders*, 26 VAND. J. TRANSNAT'L L. 633, 650-55 (1993) (explaining different national laws protecting cultural property). Most European Union countries have some laws regulating the export and import of cultural property. *Id.* at 650. The most common form of export control is screening regulations. *Id.* Screening regulations are criteria implemented and used by a country when determining whether or not to export a certain piece of art. *Id.* Examples of screening regulation criteria include "age, economic value, historic importance, and country of origin." *Id.* This screening process fosters an open art market while at the same time discouraging illegal sales. *Id.* Although embargoes are also forms of export control, in practice embargoes often merely divert art to the black market. *Id.* In comparison to export regulations, fewer countries have import regulations. *Id.* Import regulations usually involve the imposition of duties or even general prohibitions on importing illegally exported or stolen art. *Id.*

cultural property, however, is difficult to achieve through national legislation.<sup>50</sup> On an international level, the basic differences between civil law<sup>51</sup> and common law<sup>52</sup> countries and how each views a *bona fide* purchaser,<sup>53</sup> complicates any international protection of cultural property.<sup>54</sup>

a. Divergent Treatment of the *Bona Fide* Purchaser

Common law dictates that a thief generally never transfers property with good title.<sup>55</sup> This principle derives from the Latin

50. See Karen Theresa Burke, Note, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit From Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 440 (1990) (discussing problems and loopholes in international protection of cultural property).

51. See Short, *supra* note 49, at 637 (explaining reasons why differing laws protecting cultural property cause problems on international level). Most Western European nations follow a civil code. *Id.*; see BLACK'S LAW DICTIONARY 246 (6th ed. 1990) (defining civil law as "[t]hat body of law which every particular nation, commonwealth, or city has established peculiarly for itself; more properly called 'municipal law'. . . . [T]he system of jurisprudence held and administered in the Roman empire, particularly as set forth in the compilation of Justinian and his successors").

52. See Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 637 (1996) (discussing differences between common law and civil law countries). Common law jurisdictions include the United States and the United Kingdom. *Id.*; see BLACK'S LAW DICTIONARY 276 (6th ed. 1990) (explaining that common law "compromises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgements and decrees of the courts recognizing, affirming, and enforcing such usages and customs").

53. See BLACK'S LAW DICTIONARY 177 (6th ed. 1990) (defining bona fide purchaser as "[o]ne who has purchased property for value without any notice of any defects in the title of the seller"); Grover, *supra* note 48, at 1445 (explaining that growing consensus among commentators is that lack of uniformity in national laws increases amount of cultural property thefts).

54. See Olivier, *supra* note 52, at 640-41 (describing differing laws protecting cultural property). Even though there are numerous regulations imposed by individual countries to protect their respective cultural property, a country is not required to follow another country's restrictions. *Id.* at 641. The result of this lack of uniformity is that "the illegal export from one country generally does not bar lawful import into the major art market nations." *Id.*

55. See Grover, *supra* note 48, at 1445 (examining differences between common law and civil law countries' protection of cultural property). Common law countries follow the general rule that original owners retain superior title to stolen property regardless of whether a subsequent purchaser is innocent. *Id.* There are, however, exceptions to this rule. *Id.* Under English law a *bona fide* purchaser has "void" title. *Id.* at 1446. This void title means that if an original owner succeeds in a replevin action, he or she does not have to reimburse a *bona fide* purchaser for the value of the property. *Id.* However, according to English law, if a *bona fide* purchaser acquired the property during "daylight hours in a public market or in a shop in the City of London" then he or

*nemo dat qui non habet*,<sup>56</sup> which means that sellers of property can not transfer better title than they have themselves, and applies regardless of whether a subsequent purchaser knows of any illicit history of the property.<sup>57</sup> On the other hand, civil law countries<sup>58</sup> follow the opposite rule in which a thief of cultural property can pass good title to a subsequent purchaser.<sup>59</sup> These divergent legal principles create uncertain results as to which owner has good title when protection of cultural property reaches an international level.<sup>60</sup>

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she acquires good title. *Id.* This exception usually revolves around whether a purchaser had the slightest knowledge of the property's illicit history. *Id.* If a purchaser has any suspicion that an object has an illegal past the purchaser is required to investigate the object to some extent. *Id.*; see LYNDEL V. PROTT & P.J. O'KEEFE, 3 LAW AND THE CULTURAL HERITAGE, MOVEMENT, 402 (1989) (discussing treatment of *bona fide* purchasers in United States). A second exception to the general common law rule that a thief can never pass on good title is found in the United States. PROTT & O'KEEFE, *supra*, at 402. If a *bona fide* purchaser bought property from a seller who used deception, undue influence, or misrepresentation to obtain the property from an original owner, the *bona fide* purchaser has "voidable" title. *Id.* This voidable title becomes good title if an original owner intended to transfer the property to a person, even if a person used gross fraud to obtain the owner's consent. *Id.* Also, if an owner of the property "consents to the transfer or somehow misleads a buyer into thinking that he will receive valid title," a *bona fide* purchaser may receive good title. Grover, *supra* note 48, at 1445. Additionally, statutes of limitations or the doctrine of adverse possession sometimes allows a *bona fide* purchaser to remain in possession of a stolen object. *Id.* at 1447.

56. See Collin, *supra* note 47, at 21 (explaining differences between common law and civil law countries). This Latin principle prohibits anyone who can trace their chain of title in property through a thief from obtaining good title. *Id.*; PROTT & O'KEEFE, *supra* note 55, at 396 (discussing differences in treatment of *bona fide* purchasers in common law and civil law jurisdictions). The Latin principle *nemo dat qui non habet* means that sellers of property can never transfer better title than they have themselves. PROTT & O'KEEFE, *supra*, at 397.

57. Grover, *supra* note 48, at 1445.

58. *Id.* at 1432. Civil law countries include most of Western Europe and many Central and South American countries. *Id.*

59. *Id.* at 1448. In a civil law country, a thief can pass good title if a subsequent purchaser is a *bona fide* purchaser who is acting in good faith with no notice of any defects in a seller's title. *Id.* There are varying degrees of protection among civil law countries. *Id.* Generally, Swiss, German, French, and Italian law allow *bona fide* purchasers to obtain good title after a limitation period expires, even if they bought the property from a thief. *Id.* at 1448-49. The limitation periods vary between these countries with Germany's being the longest, lasting ten years. *Id.* On the opposite end of the spectrum, Italy grants a *bona fide* purchaser immediate title. *Id.*

60. Collin, *supra* note 47, at 22. It is this difference in the law's treatment of a subsequent purchaser that creates "safe havens by which thieves and traffickers may pass good title to stolen property." *Id.* Usually, a thief will smuggle stolen cultural property out of a country and then sell it in a Western European country that has lenient *bona fide* purchaser laws. *Id.* at 19. This way the cultural property can be sold

b. Use of the *Bona Fide* Purchaser Rule in Civil Law Countries  
Propels Laundering of Cultural Property

The laundering of cultural property occurs when a thief takes a stolen cultural object to a country that follows civil law and then sells it to an unaware purchaser to create a valid transfer of title.<sup>61</sup> This general certainty that a purchaser will receive good title to any cultural object purchased in a civil law country increases the price for cultural objects and thus perpetuates the cycle of illegal traffic in cultural property.<sup>62</sup> Even an honest purchaser in many instances will be unable to completely avoid the possibility of contributing to this type of international trafficking in cultural property.<sup>63</sup>

Regardless of whether a jurisdiction applies common law or civil law, there is still an unfair hardship placed on one of the innocent parties.<sup>64</sup> The lack of uniformity in treatment of a *bona*

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again and again at higher and higher profits and still retain proper bills of sale or transfer which most major auction houses require to prove that good title exists. *Id.*

61. Grover, *supra* note 48, at 1441. This process is called art laundering. *Id.* The basic conflict in treatment of a *bona fide* purchaser not only leads to this art laundering, but also creates inflated prices for art in countries which favor the *bona fide* purchaser. *Id.*

62. *Id.* If buyers know they will have good title to a cultural object, and therefore not have to risk being forced to return a cultural object to its rightful owner, then buyers will pay more money for a cultural object. *Id.* This in turn creates an incentive for thieves to sell stolen cultural objects in civil law countries because the thieves know they will be able to get more money for stolen cultural objects. *Id.*; see Burke, *supra* note 50, at 463 (explaining conflicting treatments of *bona fide* purchasers in different countries). The creation of consistent laws favoring original owners would decrease the amount of illegal cultural property because consistent laws favoring original owners would create an incentive for buyers to investigate their cultural property purchases. Burke, *supra*, at 463.

63. See Grover, *supra* note 48, at 1444 (discussing how differing national laws contribute to illegal trade of cultural property). Some cultural objects may be laundered several times which makes it more likely that a subsequent purchaser will have no knowledge of the illicit history of a cultural object, and moreover, will not have to work as hard to prove the lack of such knowledge. *Id.*; see also Kinderman, *supra* note 35, at 478 (explaining how differing national laws contribute to problems of illicit traffic in cultural property). It is not just the difference between civil law and common law jurisdictions' treatment of *bona fide* purchasers which contributes to illicit traffic in cultural property, but this difference in treatment perpetuates the illicit market in cultural property. Kinderman, *supra*, at 478-79.

64. See Kinderman, *supra* note 35, at 491 (explaining how differing national laws treatment of *bona fide* purchasers creates unfairness to one party). The difference between civil law and common law jurisdictions' treatment of *bona fide* purchasers is based on differing policy considerations. *Id.* Common law countries that favor original owners support the protection of property. *Id.* Whereas civil law countries that favor *bona fide* purchasers support commercial transactions. *Id.* Kinderman explains that in order

*fide* purchaser creates a situation where one party must always unfairly relinquish possession of a cultural object.<sup>65</sup> Whether a relinquishing party is a *bona fide* purchaser or an original owner, one innocent party will be forced to give up possession of a cultural object which it believed was rightfully its own.<sup>66</sup> Given the irreplaceable nature of cultural property, to relinquish possession is an especially unfair hardship.<sup>67</sup>

## 2. The *Lex Locus Situs* Rule

The second problem presented by international protection of cultural property concerns the inherent inequities associated with the application of the *lex locus situs* rule<sup>68</sup> to disputes in ownership that arise from the illicit art market.<sup>69</sup> The *lex locus situs* rule requires that a court apply the law of the place where the transfer of a movable object occurred whenever there is a conflict of laws.<sup>70</sup> The effect of the *lex locus situs* rule is to put an already vulnerable dispossessed cultural property owner at an even greater disadvantage.<sup>71</sup>

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to create a comprehensive and workable set of international protections for cultural property there must be a balance between these two valid policy interests. *Id.* According to Kinderman, a uniform approach would eliminate any unfair denial of recovery to original owners as well as eliminate perpetual uncertainty of ownership to *bona fide* purchasers. *Id.*

65. Collin, *supra* note 47, at 22.

66. *Id.*

67. See MERRYMAN & ELSÉN, *supra* note 39, at xvi (explaining why cultural property is so valuable).

68. See WILLIAMS, *supra* note 32, at 86 (describing *lex locus situs* rule as "the law of the place where the movable object is situated at the time of the transfer").

69. See *id.* (discussing *lex locus situs* rule's application and acceptance); Grover, *supra* note 48, at 1456-58 (explaining scholars' views that abandoning *lex locus situs* rule would help original owners of cultural property). See generally Bator, *supra* note 2, at 289-94 (examining facts behind illicit trade in cultural property). There is little information available concerning the illicit art market. *Id.* at 289. What is known about the illicit art market comes directly from those involved. *Id.* at 290. There are many levels of involvement to this problem. *Id.* at 292. Some illicit markets are well run and complex in organization while others are amateur in scope and operation. *Id.*

70. See WILLIAMS, *supra* note 32, at 86 (examining arguments for and against use of *lex locus situs* rule). The *lex locus situs* rule is used in both civil law and common law jurisdictions. *Id.*

71. See Grover, *supra* note 48, at 1456 (addressing problems with application of *lex locus situs* rule). The application of the *lex locus situs* rule would be unfair to original owners. *Id.* Original owners never consented to having their cultural property stolen or to having a foreign law apply to any resolution of the cultural property's ownership. *Id.* But cf. WILLIAMS, *supra* note 32, at 87 (advocating use of *lex locus situs* rule because of its inherent stability). The *lex locus situs* rule places some hardships on original own-

Although the *lex locus situs* rule is widely accepted<sup>72</sup> and used,<sup>73</sup> it is not without critics.<sup>74</sup> The main reason for criticism of the *lex locus situs* rule revolves around a dispossessed owner's lack of consent to the application of any foreign law to a possible future dispute in ownership.<sup>75</sup> Scholars assert that innocent owners should be allowed to have the law that they originally chose apply.<sup>76</sup>

Scholars also argue that the confusion to commerce resulting from forgoing the *lex locus situs* rule makes its abandonment unlikely.<sup>77</sup> If the *lex locus situs* rule were abandoned the result would be uncertainty in a market accustomed to certainty.<sup>78</sup> According to scholars, it would be even more inequitable for a country to regain cultural property when there are no strong ties to a cultural object or when a country used little diligence to trace a cultural object's whereabouts.<sup>79</sup>

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ers. *Id.* Any other resolution, however, would cause commercial problems because the *lex locus situs* rule adds stability to an international market by making it clearly known what rule of law applies. *Id.*

72. See WILLIAMS, *supra* note 32, at 86-87 (explaining why *lex locus situs* rule should not be disregarded). The *lex locus situs* rule is the fairest and most practical answer when questions arise regarding ownership between citizens of countries with differing laws. *Id.* Accordingly, both civil and common law countries have adopted some form of the *lex locus situs* rule to add stability to the marketplace. *Id.*

73. See Grover, *supra* note 48, at 1457-58 (discussing different countries' use of *lex locus situs* rule). England is not likely to abandon its use of the *lex locus situs* rule. *Id.* at 1457. There are two main reasons for the widespread acceptance of the *lex locus situs* rule in England. *Id.* First, the *lex locus situs* rule promotes reliable commercial transactions because buyers only have to investigate the laws of the country where the property is located. *Id.* Second, the *lex locus situs* rule maintains relations among countries by allowing each country to determine how property is transferred within the country's own borders. *Id.* The United States also uses the *lex locus situs* rule when there are disputes involving the sale of property. *Id.* at 1458.

74. *Id.* at 1456. Several scholars suggest that a fairer way to treat original owners of stolen property would be to abandon the *lex locus situs* rule. *Id.*

75. *Id.* In addition, dispossessed owners never consented to having their work stolen in the first place. *Id.*

76. See *id.* (explaining why application of *lex locus situs* rule can be unfair).

77. See WILLIAMS, *supra* note 32, at 87 (discussing importance of *lex locus situs* rule).

78. See Grover, *supra* note 48, at 1456-57 (explaining various countries' use of *lex locus situs* rule). Many scholars argue that because so many countries follow some version of the *lex locus situs* rule, it has become a codified international law. *Id.* at 1457.

79. *Id.*; see Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 16-17 (1990) (discussing reasons why *lex locus situs* rule should not be discarded). A better solution to the difficulties with the *lex locus situs* rule is to combine it with a more limited recognition of a *bona fide* purchaser. Pecoraro, *supra*, at 17.

### C. *International Protection of Cultural Property*

The international community made two major attempts at protecting cultural property.<sup>80</sup> The first attempt culminated soon after World War II ended, in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention").<sup>81</sup> The second attempt occurred more than fifteen years later in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("UNESCO Convention").<sup>82</sup>

#### 1. The Hague Convention

The Hague Convention marked a concerted international step to protect cultural property.<sup>83</sup> It dealt exclusively with protection of cultural property during wartime.<sup>84</sup> The Hague Convention sought to prevent damage to cultural property<sup>85</sup> of indi-

80. See Forbes, *supra* note 2, at 244 (discussing UNESCO Convention as complementing Hague Convention of 1954).

81. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 (1956) [hereinafter Hague Convention].

82. UNESCO Convention, *supra* note 36, 823 U.N.T.S. 231, 10 I.L.M. 289.

83. See WILLIAMS, *supra* note 32, at 34 (discussing background of Hague Convention). The cultural destruction during the first and second world wars demonstrated the inadequacies of the Hague Conventions of 1899 and 1907. *Id.* Consequently, the international community united to create a higher level of protection for cultural property. *Id.*

84. See Hague Convention, *supra* note 81, art. 18, 249 U.N.T.S. at 254 (stating that for purposes of Hague Convention, war exists even when not officially recognized by both countries embroiled in armed conflict). See David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 355 (1993) (explaining Hague Convention's improvement upon previous international agreements protecting cultural property). The Hague Convention increased international protection of cultural property by expanding such protection to any kind of armed conflict. *Id.*; see also WILLIAMS, *supra* note 32, at 34 (discussing reasons for enactment of Hague Convention). Prior attempts at international protection of cultural property during wartime did not define what was meant by war. WILLIAMS, *supra*, at 42. The absence of any definition of what constituted a war created problems for the application of former international cultural property protections because countries were never sure what circumstances prompted the application of the international protections. *Id.* The Hague Convention provides a description of "armed conflict" to alleviate any possible confusion as to when it applies. *Id.* The occurrence of hostile actions is enough to signal an "armed conflict" under the Hague Convention. *Id.* No formal declaration of war or length of time of a conflict is necessary for the Hague Convention to apply. *Id.*

85. See WILLIAMS, *supra* note 32, at 36 (discussing Hague Convention's division of



vidual nations and of the world as a whole.<sup>86</sup> It aimed to accomplish this goal by explicitly prohibiting countries from damaging and stealing cultural property during a war.<sup>87</sup>

The Hague Convention built upon, but did not replace, previous international agreements.<sup>88</sup> Moreover, the Hague Convention specifically provides for cooperation with the United Na-

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cultural property into three main groups). Article 1 of the Hague Convention defines cultural property as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

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

Hague Convention, *supra* note 81, art. 1, 249 U.N.T.S. at 242.

86. See Hague Convention, *supra* note 81, pmb., 249 U.N.T.S. at 240 (setting forth reasoning for Hague Convention's enactment). "Being convinced that damage to the 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". Hague Convention, *supra*, 249 U.N.T.S. at 240. See also WILLIAMS, *supra* note 32, at 36 (explaining aims of Hague Convention).

87. See Hague Convention, *supra* note 81, art. 4, 249 U.N.T.S. at 242-44 (explaining Hague Convention's general prohibition against destruction of cultural property); see also WILLIAMS, *supra* note 32, at 36-37 (detailing Hague Convention's attempts to prevent pillaging cultural property). The Hague Convention prohibits any act of hostility against cultural property. *Id.* Included in this general prohibition are any acts of theft, pillaging, or vandalism of cultural property. *Id.* The Hague Convention states that:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

Hague Convention, *supra*, 249 U.N.T.S. at 242-44.

88. See Hague Convention, *supra* note 81, art. 36, 249 U.N.T.S. at 264-66 (explaining Hague Convention's relation to previous international conventions is not meant to replace previous conventions but merely expand them). See also WILLIAMS, *supra* note 32, at 34 (explaining reasons for enactment of Hague Convention). After the international community realized that mechanized warfare put cultural objects at an extreme risk that previous agreements simply could not protect, the international community organized and implemented the Hague Convention. *Id.*

tions if necessary.<sup>89</sup> It also requires an international register of any cultural objects that need special protection,<sup>90</sup> distinctive markings to protect cultural objects,<sup>91</sup> and, if necessary, technical assistance from the United Nations Educational, Scientific and Cultural Organization ("UNESCO").<sup>92</sup>

Although the Hague Convention was a useful step to protect cultural property, scholars agree that the Hague Convention has not been effective in application.<sup>93</sup> The Hague Convention's main weaknesses result from its vague language,<sup>94</sup> the low percentage of ratifications,<sup>95</sup> and the reluctance of countries to completely enforce its provisions.<sup>96</sup> Nevertheless, the Hague Convention remains the primary means of international protection of cultural property during war.<sup>97</sup>

89. Hague Convention, *supra* note 81, res. 1, 249 U.N.T.S. at 236.

90. See WILLIAMS, *supra* note 32, at 35. (explaining Hague Convention's registration system established to protect especially fragile cultural property); see also Hague Convention, *supra* note 81, art. 8, 249 U.N.T.S. at 246-48 (stating guidelines for determination which cultural property deserves special protection and how to undertake such special protection).

91. See Hague Convention, *supra* note 81, arts. 6, 16, 17, 249 U.N.T.S. at 244, 252, 254 (explaining what distinctive emblem must look like and when emblem can be used); see also Meyer, *supra* note 84, at 355 (describing emblem as blue and white shield as insignia or as flag to indicate presence of cultural property).

92. See Hague Convention, *supra* note 81, art. 23, 249 U.N.T.S. at 258 (stating that "[t]he High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the present Convention or the Regulations for its execution.").

93. JOTE, *supra* note 45, at 314. One legal scholar argues that the Hague Convention needs to be amended in order to become more effective. *Id.* One solution would be an amendment of the vague provisions to clear up their uncertainty. *Id.* Another possible solution would be the creation of a new international entity to oversee the Hague Convention's effective implementation. *Id.*

94. *Id.* There are some parts of the text of the Hague Convention that resulted in problems with its application. *Id.* Article 6 does not give any specific guidance as to where or how cultural property should be marked. *Id.* Also, the sanctions meant to be a deterrent that are espoused in Article 28 have no real effect due to loose wording. *Id.*; see Meyer, *supra* note 84, at 357 (explaining problems with sanctions of Hague Convention). The sanctions mentioned in the Hague Convention are ineffective because the actual creation and application of any sanctions are left to the parties to impose depending upon the situation. Meyer, *supra*, at 357. This lack of specificity leaves much room for individual discretion or the lack thereof. *Id.*

95. See JOTE, *supra* note 45, at 314 (noting that as of 1992 only 76 of 163 UNESCO members ratified Hague Convention).

96. *Id.*

97. See Borodkin, *supra* note 21, at 388 (mentioning Hague Convention's use in Iraqi-Persian Gulf Conflict of 1991); see also Meyer, *supra* note 84, at 356 (stating Hague Convention's status as customary international law).

## 2. The UNESCO Convention

In 1970, the UNESCO Convention<sup>98</sup> supplemented the Hague Convention of 1954 and became the primary means of regulating the illegal art market.<sup>99</sup> The UNESCO Convention increased international protection of cultural property by extending such protection beyond times of war.<sup>100</sup> By relying on both administrative law<sup>101</sup> and public international law,<sup>102</sup> the UNESCO Convention sought to create a true set of international rules to protect cultural property.<sup>103</sup>

The UNESCO Convention requires any country exporting cultural property to provide adequate ownership documentation with an exported object.<sup>104</sup> It further provides that all signatory

98. UNESCO Convention, *supra* note 36, 823 U.N.T.S. 231, 10 I.L.M. 289.

99. See Olivier, *supra* note 52, at 642 (explaining that first major international attempt to destroy illegal art market was UNESCO Convention); see also Kinderman, *supra* note 35, at 469 (stating that UNESCO Convention is most important international treaty protecting cultural property).

100. See Borodkin, *supra* note 21, at 388 (explaining strengths and weaknesses of current protections of cultural property).

101. See Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIFORM L. REV. 59, 69 (1996) (discussing basis for enactment of UNIDROIT Convention). The UNESCO Convention imposes several administrative obligations on its signatories. *Id.* Article 6, for example, requires a country to initiate an export control system. UNESCO Convention, *supra* note 36, art. 6, 823 U.N.T.S. at 240, 10 I.L.M. at 290-91. Article 7(b)(i) is also administrative in nature since it prohibits the importation of objects stolen from a museum, and religious or secular monuments, if the object in question is documented inventory. UNESCO Convention, *supra*, art. 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 291.

102. See Prott, *supra* note 101, at 70 (describing relationship between UNESCO Convention and UNIDROIT Convention as partnership).

103. Marina Schneider, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Explanatory Paper* (visited June 24, 1997) <<http://www.city.ac.uk/artspol/schneider.html>> (also on file with the *Fordham International Law Journal*); see ETIENNE CLJMENT, *THE UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY* (1970), reprinted in *ILLICIT TRAFFIC IN CULTURAL PROPERTY - MUSEUMS AGAINST PILLAGE*, 45, 51 (Harrie Leyten ed., 1995) (discussing improvements in international protection of cultural property resulting from UNESCO Convention). An important effect of the UNESCO Convention is the change in the international community's attitude toward protection of cultural property created by the UNESCO Convention's enactment. CLJMENT, *supra*, at 51. The UNESCO Convention is the international community's attempt to create a moral obligation for countries to protect cultural property, whether or not they are signatories to the UNESCO Convention. *Id.*

104. UNESCO Convention, *supra* note 36, art. 6, 823 U.N.T.S. at 240, 10 I.L.M. at 290-91. Article 6 requires the introduction of an export certificate for any object, that the object not be exported unless it has such a certificate, and that the restriction be publicized. *Id.*

nations should enact legislation prohibiting collecting institutions<sup>105</sup> from possessing any illegally obtained cultural property.<sup>106</sup> The UNESCO Convention limits this prohibition on the possession of illegal cultural property, however, by any requirements imposed by national legislation.<sup>107</sup> Furthermore, the UNESCO Convention places the burden on the importing country to facilitate the return of any stolen property to the requesting country.<sup>108</sup>

The UNESCO Convention does contain some drawbacks.<sup>109</sup> Some scholars note that not enough art importing countries are signatories to the UNESCO Convention for it to be effective.<sup>110</sup> Although over eighty nations ratified the UNESCO Convention, the lack of widespread support by art importing nations renders the agreement ineffective.<sup>111</sup> The lack of widespread accept-

105. See UNESCO Convention, *supra* note 36, art. 7(a), 823 U.N.T.S. at 240, 10 I.L.M. at 291 (stating that signatory nations take necessary steps consistent with their national legislation). Collecting institutions are museums and similar institutions that have acquisition policies. PROTT & O'KEEFE, *supra* note 55, at 745. The obtainment of cultural property, or acquisition policy, is generally viewed as a museum's main purpose. KARL E. MEYER, *THE PLUNDERED PAST* 49-54 (1973). Problems arise, however, when acquisition policies and conservation policies conflict. *Id.* at 50. This conflict between policies often arises when money obtained through the sale of cultural objects, or de-accessioning, is used for the acquisition of new cultural objects. *Id.*

106. UNESCO Convention, *supra* note 36, art. 7(a), 823 U.N.T.S. at 240, 10 I.L.M. at 291.

107. *Id.* art. 7(a), 823 U.N.T.S. at 240, 10 I.L.M. at 291. Article 7 of the UNESCO Convention states:

The States Parties to this Convention undertake:

(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;

*Id.*

108. *Id.* art. 7(b)(ii), 823 U.N.T.S. at 240, 10 I.L.M. at 291.

109. See Prott, *supra* note 101, at 69-70 (discussing shortfalls of UNESCO Convention and how UNIDROIT Convention complements UNESCO Convention rather than being replacement).

110. 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, 478 (1994) (explaining that main weakness of UNESCO Convention is that few art importing nations have signed and implemented UNESCO Convention).

111. *Id.* at 479. The United States is one of the few major art importing nations to ratify the UNESCO Convention. *Id.* at 478. The United States ratification followed

ance<sup>112</sup> of the UNESCO Convention occurred in part because the UNESCO Convention does not provide recourse for a private institution or individual.<sup>113</sup> Another criticism of the UNESCO Convention is that it places more importance on national accumulation of art rather than international protection of art.<sup>114</sup> Furthermore, the UNESCO Convention fails to unify the varying national laws with respect to who has the burden of proving the existence of title in a cultural object.<sup>115</sup>

#### D. The UNIDROIT Convention

The International Institute for the Unification of Private Law's 1995 convention<sup>116</sup> ("UNIDROIT Convention") concentrated on two specific situations that the UNESCO Convention left unresolved.<sup>117</sup> The first situation involves the conflict of ownership between an original owner of stolen art and a subse-

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more than ten years of Congressional debate. *Id.* at 486. However, the United States only ratified Articles 7 and 9 of the UNESCO Convention. *Id.* at 487. Legal scholars argue that this delay in enactment combined with the narrow implementation by the United States weakens the UNESCO Convention's possibility of having a positive impact on the illicit art market. *Id.* at 485-87; see Barbara Hoffman, *How UNIDROIT Protects Cultural Property: Part I*, N.Y. L.J., Mar. 3, 1995, at 5, 7 (examining UNIDROIT Convention's protections of cultural property). Only six art importing nations have become signatories to the UNESCO Convention: Argentina, Australia, Canada, Italy, the United States, and Switzerland. Hoffman, *supra*, at 7. Most art importing countries feel that the UNESCO Convention's inadequate protection of the *bona fide* purchaser makes it ineffective and, therefore, have not ratified the agreement. *Id.*

112. See Olivier, *supra* note 52, at 642-47 (discussing difficulty with UNESCO Convention); Kinderman, *supra* note 35, at 470 (explaining that despite UNESCO Convention's acclaimed purpose it has not proven successful in practice).

113. UNESCO Convention, *supra* note 36, art. 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 291; see Prott, *supra* note 101, at 62 (discussing scope of UNESCO Convention). The UNESCO Convention does not help private owners because it is founded on the principle of government action. Prott, *supra*, at 62. Accordingly, unless the government of a requesting party designates a privately owned object as belonging to the state, the UNESCO Convention would not apply. *Id.* Many countries do not advocate governmental involvement in cultural affairs, therefore, there was no reason for those countries to ratify the UNESCO Convention. *Id.*

114. See Olivier, *supra* note 52, at 646 (examining shortfalls of UNESCO Convention).

115. See Hoffman, *supra* note 111, at 7 (explaining how UNIDROIT Convention complements UNESCO Convention). The UNESCO Convention failed to create a uniform law which specified the substantive and procedural rules for determining which party had the burden of proof when an object's title was in dispute and the parties involved were from countries with contradictory rules of law. *Id.*

116. UNIDROIT Convention, *supra* note 24, 34 I.L.M. at 1322.

117. Explanatory Report, *supra* note 26, at 21. The UNIDROIT Convention specifically addresses the confusion that resulted from Article 7(b)(ii) of the UNESCO Con-

quent good faith purchaser.<sup>118</sup> The second situation concerns the illegal removal of cultural property across national borders.<sup>119</sup>

### 1. Background on the UNIDROIT Convention

The UNIDROIT Convention is the most recent step forward in the protection of cultural property.<sup>120</sup> UNESCO requested the formation of the UNIDROIT Convention in the early 1980s.<sup>121</sup> The reasons for this request included the failure of the UNESCO Convention to solve the private law questions involved in the protection of cultural property,<sup>122</sup> the vague language in the UNESCO Convention,<sup>123</sup> and the unclear scope of the

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vention. *Id.* The UNIDROIT Convention's birth from the UNESCO Convention limited the objectives of the UNIDROIT Convention. *Id.*

118. *Id.* The UNIDROIT Convention sought merely to introduce some sort of minimum standards for countries to deal with the conflict between civil law and common law systems that allowed laundering of cultural property. *Id.* By introducing a baseline rule, the drafters of the UNIDROIT Convention thought that the UNIDROIT Convention could gain greater acceptance. *Id.*

119. *See* Short, *supra* note 49, at 650 (discussing national attempts at regulating international trade in cultural property). Most countries have some degree of export laws. *Id.* Problems arise, however, when importing countries are unaware of any such laws and there is no international regulation to enforce any such national legislation outside of the country's borders. *See* Explanatory Report, *supra* note 26, at 21 (discussing problems that UNESCO Convention left unresolved).

120. *See* Forbes, *supra* note 2, at 246 (discussing development of international protection of cultural property).

121. Explanatory Report, *supra* note 26, at 18. In 1974, UNIDROIT drafted a Uniform Law on the Acquisition in Good Faith of Corporeal Movables. *Id.* This draft provided the genesis for UNESCO's asking UNIDROIT to study the rules regarding the prohibition of illegal traffic in cultural property. *Id.* The intent behind the project being that any product of UNIDROIT became a supplement to the UNESCO Convention. *Id.*

122. *See id.* (explaining why UNESCO approached UNIDROIT to solve problems of international protection of cultural property). One of the problems with international protection of cultural property is that different national laws treat *bona fide* purchasers unequally. *Id.* The UNESCO Convention left open a loophole between civil law and common law countries which allowed art thieves to create a valid title to a stolen cultural object. *See* Prott, *supra* note 101, at 60-61 (discussing development of UNIDROIT Convention). Reports on the efficacy of the UNESCO Convention indicated that aspects of private law might noticeably impact the illegal art market. *Id.* at 60.

123. *See* Explanatory Report, *supra* note 26, at 18 (explaining drawbacks to UNESCO Convention). Article 3 of the UNESCO Convention called for the general respect of export control laws of other countries. *Id.* Articles 7 and 9, however, only provided regulations with respect to inventoried objects stolen from collecting institutions or archaeological sites. *Id.* The requirement that an object be documented as inventory of a public institution further reduces the already limited scope of the

UNESCO Convention.<sup>124</sup>

The UNIDROIT Convention is based on the common law philosophy advocating that cultural property must be returned to its true owner.<sup>125</sup> In order to appease civil law countries, the UNIDROIT Convention provides that any dispossessed owner of cultural property who was a *bona fide* purchaser shall receive compensation for the return of the cultural property to its original owner.<sup>126</sup> According to the UNIDROIT Convention, in order to receive compensation, possessors of stolen cultural objects must have exercised due diligence to be certain that a cultural objects were not stolen when they first obtained possession.<sup>127</sup> This due diligence requirement creates an incentive for dealers

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UNESCO Convention. See Kinderman, *supra* note 35, at 473-75 (discussing treatment of stolen cultural objects under Article 7 of UNESCO Convention).

124. Explanatory Report, *supra* note 26, at 18. Some countries interpreted Article 3 of the UNESCO Convention to mean that every signatory country must return all cultural objects found to be stolen or illegally exported. See Prott, *supra* note 101, at 62 (comparing scope of UNESCO Convention to that of UNIDROIT Convention). Countries with a great deal of trade in cultural objects, such as the United States, were unwilling to sign a convention with such a seemingly extensive scope. *Id.* The United States managed to avoid Article 3 altogether by interpreting Articles 7 and 9 of the UNESCO Convention to create restrictive prohibitions on imports if a requesting country proves that there is a specific danger. *Id.* at 62-63. These regulations implemented by the United States according to its interpretation of the UNESCO Convention are generally limited by a time period as well as the specific type of object restricted from a certain country or region. *Id.* at 63.

125. UNIDROIT Convention, *supra* note 24, art. 3, 34 I.L.M. at 1331.

126. *Id.* art. 4, 34 I.L.M. at 1332; see Barbara Hoffman, *How UNIDROIT Protects Cultural Property: Part II*, N.Y.L.J., Mar. 10, 1995, at 5, 11 (discussing UNIDROIT Convention's protection of cultural property). Article 4 of the UNIDROIT Convention requires compensation for possessors who must return a cultural object if the possessors prove that they took adequate precautions before purchasing the object. See Explanatory Report, *supra* note 26, at 30 (explaining how UNIDROIT Convention helps protect cultural property). The UNIDROIT Convention sought to balance the opposing parties by including this provision. *Id.* The reasoning behind the inclusion of Article 4 was that the weakened position of good faith purchasers, a significant political and philosophical change in many countries, would be more acceptable by providing for compensation of good faith purchasers. *Id.*

127. UNIDROIT Convention, *supra* note 24, art. 4.4, 34 I.L.M. at 1332. Article 4.4 states that:

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.

*Id.*

to provide ownership documentation for any cultural objects they sell.<sup>128</sup>

Although the international community agrees that cultural property needs more international protection, the initial reception to the UNIDROIT Convention has been mixed.<sup>129</sup> One area of controversy surrounding the UNIDROIT Convention is that its definition of what constitutes a stolen object differs from that of the UNESCO Convention.<sup>130</sup> Some critics feel this new definition is too broad and would create an unnecessary sense of anxiety throughout the art market.<sup>131</sup> Another source of controversy regarding the UNIDROIT Convention is the requirement that any requesting country may retrieve its stolen cultural objects.<sup>132</sup> Although the UNIDROIT Convention strives to protect the integrity of a country's cultural heritage,<sup>133</sup> the fear among

128. See Hoffman, *supra* note 126, at 11 (noting potential problems with UNIDROIT Convention's due diligence requirement). The due diligence requirement could backfire and create a stronger black market by leading to an increased number of forged documents to fulfill the due diligence standard and avoid controversy over who possesses actual title. *Id.* In addition, those involved in the art trade argue that this due diligence requirement, by making it more cumbersome to remove objects, creates an unfair burden that could lead to the destruction of cultural objects from warring nations. *Id.*

129. See Georgina Adam, *Art Sales: They're Out to Steal Our Stolen Art*, *Georgina Adam Has No Love for the Latest Scheme From UNESCO*, DAILY TEL. LONDON, May 22, 1995, at 16 (explaining general fear that UNIDROIT Convention will result in removal of art hanging on private citizens' walls if they cannot prove they are rightful owners); cf. Hoffman, *supra* note 126, at 11 (explaining that involvement of United States in UNIDROIT is imperative to reaffirm United States' commitment to protection of cultural property). See generally Alexandra Peers, *Art World Shaken by Nations Seeking to Reclaim Items*, WALL ST. J., June 21, 1994, at C1 (providing diverse views on UNIDROIT Convention, including art dealers' fears that it would result in end of their livelihood).

130. UNIDROIT Convention, *supra* note 24, art. 3.2, 34 I.L.M. at 1331. Article 3.2 defines a stolen object as "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place." *Id.* This differs from the UNESCO Convention which did not apply to the problems caused by the looting of undocumented excavations. See Hoffman, *supra* note 111, at 7-8 (discussing implications of UNIDROIT Convention for international protection of cultural property).

131. See Hoffman, *supra* note 126, at 11 (explaining people's fears about UNIDROIT Convention).

132. UNIDROIT Convention, *supra* note 24, art. 5, 34 I.L.M. at 1332. Article 5.1. states that "[a] Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State." *Id.*

133. *Id.* app., 34 I.L.M. at 1330. The Appendix of the UNIDROIT Convention explains that the parties involved acknowledged purpose includes protecting the cultural heritage of countries for the good of humanity. *Id.*



its critics is that requesting countries might abuse the UNIDROIT Convention's provision requiring the return of stolen cultural property.<sup>134</sup>

## 2. Scope of the UNIDROIT Convention

Article 1 of the UNIDROIT Convention establishes its scope of application.<sup>135</sup> The United States requested that the UNIDROIT Convention address the problem of protecting cultural property during wars,<sup>136</sup> but eventually dropped this as an option.<sup>137</sup> In addition, there was much discussion during the Convention about possible retroactive implications.<sup>138</sup> Last min-

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134. See Olivier, *supra* note 52, at 661 (explaining critics fear that UNIDROIT Convention's vague criteria for what constitutes significant cultural objects means that U.S. courts will have to enforce every countries' export and cultural property laws); UNIDROIT Convention, *supra* note 24, art. 5, 34 I.L.M. at 1332 (describing possible interests requesting countries may use to have stolen cultural objects returned). Article 5.3 states:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes 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.

UNIDROIT Convention, *supra*, art. 5, 34 I.L.M. at 1333.

135. See Schneider, *supra* note 103, at 3 (discussing implications of Article 1 of UNIDROIT Convention). A main point of importance regarding Article 1 is that it only applies to claims that are international in character. *Id.* Secondly, Article 1 establishes application of the UNIDROIT Convention to claims made by any Contracting State no matter where an original theft of a cultural object occurred. *Id.* Also, the UNIDROIT Convention's rules only apply to thefts of cultural property that contravene rules enacted to protect a Contracting State's cultural heritage. *Id.*

136. UNIDROIT Convention, *supra* note 24, 34 I.L.M. at 1324. The UNIDROIT Convention did not resolve any issues that may arise from objects taken during wartime. *Id.*

137. *Id.*

138. See Explanatory Report, *supra* note 26, at 42 (discussing drafters' reasoning behind adoption of final convention articles). Originally, the UNIDROIT Convention contained a provision in Article 10 applying to a theft occurring before the institution of the Convention. *Id.* The draft UNIDROIT Convention at that point also included a specific article making the UNIDROIT Convention proactive in effect. *Id.* When the UNIDROIT Convention deleted the proactive clause as a result of negotiations between representatives, it became unclear whether the Convention remained proactive. *Id.* The end result is the same as if the UNIDROIT Convention still contained the proactive clause. *Id.* One of the most debated aspects of the UNIDROIT Convention was the possibility of a retroactive effect. See Schneider, *supra* note 103, at 13-14 (discussing

ute negotiations settled this controversy and created a purely proactive agreement that strongly condemned prior acts.<sup>139</sup>

### 3. The Principle of Return (Article 3)

Article 3 of the UNIDROIT Convention explicitly states that anyone possessing stolen cultural property must return that property to its rightful owner.<sup>140</sup> The drafters of the UNIDROIT Convention intentionally made Article 3 clear because, in reality, it is an important change for some countries.<sup>141</sup> This section specifies time limitations for the return of a cultural object depending upon the nature of the stolen object as well as the nature of the theft.<sup>142</sup>

The time limitations of the UNIDROIT Convention revolve around the idea that a statute of limitations should not begin until an original owner knows, or should have known, the location of a stolen object.<sup>143</sup> If the identity of a possessor of a stolen cultural object is unknown, the drafters of the UNIDROIT Convention allowed a general grace period of three years for an original owner to request a cultural object's return once the posses-

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general provisions of UNIDROIT Convention). A last minute compromise arranged between opposing factions allowed the UNIDROIT Convention to remain proactive. *Id.* Supporters of retroactivity compromised by including the language of both the Preamble and Article 10. *Id.* The Preamble of the UNIDROIT Convention explicitly states that "the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions whatever kind which may have taken place before the entry into force of the Convention." See UNIDROIT Convention, *supra* note 24, pmbl., 34 I.L.M. at 1330 (setting forth objectives of UNIDROIT Convention).

139. See Schneider, *supra* note 103, at 14 (discussing retroactive implications as one of most controversial aspects of UNIDROIT Convention).

140. UNIDROIT Convention, *supra* note 24, art. 3.1, 34 I.L.M. at 1331 (explaining what is meant by restitution of cultural objects for UNIDROIT Convention). Article 3.1 reads: "[t]he possessor of a cultural object which has been stolen shall return it." *Id.*

141. See Schneider, *supra* note 103, at 4-5 (explaining philosophical basis for Article 3 of UNIDROIT Convention); see also Kinderman, *supra* note 35, at 505-08 (discussing UNIDROIT Convention's approach to stolen cultural property in Article 3).

142. UNIDROIT Convention, *supra* note 24, arts. 3.3-3.5, 34 I.L.M. at 1331. The UNIDROIT Convention's time limitations vary depending upon the nature of the stolen object, the possessor of the object, and the rightful owner of the object. *Id.* Generally, a claimant is allowed three years from the knowledge of the identity of the possessor to request an object's return. *Id.* An overall time limitation of fifty to seventy-five years may also apply to a request for the return of an object. *Id.*

143. See Kinderman, *supra* note 35, at 506 (explaining reasoning behind time limitations of UNIDROIT Convention).

sor's identity becomes known.<sup>144</sup> The UNIDROIT Convention further includes an overall time limitation of fifty years for a *bona fide* purchaser to possess a stolen cultural object before a *bona fide* possessor can lawfully own a stolen cultural object.<sup>145</sup> Article 3 of the UNIDROIT Convention also provides that no overall time limitation, besides the three year limitation for claims beginning when an original owner has actual knowledge of the identity of the stolen cultural object's possessor, should apply for a claim based on the length of possession if a stolen cultural object is important to a country's monument, archaeological site, or public collection.<sup>146</sup> The final clause in Article 3 of the UNIDROIT Convention allows a country to place a cap of seventy-five years on claims for return of cultural property, to avoid the possibility of having such lawsuits left open indefinitely.<sup>147</sup> This cap on when claims may be raised adds greater flexibility to the contracting states' situation.<sup>148</sup>

#### 4. The Principle of Compensation (Article 4)

Article 4 of the UNIDROIT Convention provides guidance for determining whether a possessor of a stolen cultural object should receive compensation.<sup>149</sup> This idea of compensation is the counterpart to Article 3 of the UNIDROIT Convention.<sup>150</sup> The drafters of the UNIDROIT Convention realized that Article

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144. UNIDROIT Convention, *supra* note 24, arts. 3.3-3.4, 34 I.L.M. at 1331.

145. *Id.* art. 3.3, 34 I.L.M. at 1331.

146. *Id.* art. 3.4, 34 I.L.M. at 1331.

147. *Id.* art. 3.5, 34 I.L.M. at 1331.

148. See Prott, *supra* note 101, at 66 (examining reasons why UNIDROIT Convention included time limitations). Neither the Hague Convention nor the UNESCO Convention established time limits under which claims must be made. *Id.* The time limitations for claims contained in the UNIDROIT Convention resulted from last minute compromises made by the contracting parties. *Id.*

149. See UNIDROIT Convention, *supra* note 24, art. 4.1, 34 I.L.M. at 1332 (explaining requirements for compensation). Article 4.1 states:

The 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.

*Id.*

150. See Kinderman, *supra* note 35, at 507 (discussing *bona fide* purchaser's receipt of compensation).

3 weakened the position of *bona fide* purchasers.<sup>151</sup> The inclusion of Article 4 made the UNIDROIT Convention more acceptable for countries with civil law jurisdictions.<sup>152</sup>

Article 4 of the UNIDROIT Convention also determines what constitutes just compensation.<sup>153</sup> The UNIDROIT Convention calls for the exercise of due diligence by possessors if they want to receive compensation when parting with stolen cultural property.<sup>154</sup> Article 4.4 of the UNIDROIT Convention specifies the circumstances a court may look to when considering whether a possessor of a stolen cultural object exercised due diligence when purchasing the cultural object, and if so, whether a possessor should be compensated.<sup>155</sup>

## II. CURRENT CONFLICT WITH THE DISRUPTION OF CULTURAL PROPERTY FROM WORLD WAR II

During World War II the Nazis pillaged cultural property to an extent never before witnessed.<sup>156</sup> The pillaging, however, did

151. See Explanatory Report, *supra* note 26, at 30 (explaining Article 4 of UNIDROIT Convention).

152. *Id.* The drafters of the UNIDROIT Convention realized that favoring original owners of cultural property would be a drastic change for civil law countries. *Id.* The payment of compensation to *bona fide* purchasers became a compromise position for the opposing sides. *Id.* The inclusion of the compensation provision, however, does not necessarily mean that countries with laws providing for return of stolen cultural property without compensation must alter their existing laws. *Id.*

153. See UNIDROIT Convention, *supra* note 24, art. 4.1, 34 I.L.M. at 1332 (referring to compensation as "fair and reasonable"). In order for purchasers to be compensated when they are forced to return cultural property to its original owners, purchasers must show that they had no knowledge, or suspicion, of the cultural property's illegal past. Explanatory Report, *supra* note 26, at 30 (discussing what requirements for compensation are for UNIDROIT Convention). This requirement is referred to as an exercise of due diligence and is meant to be judged by a court. *Id.* at 31-32.

154. See Explanatory Report, *supra* note 26, at 30 (discussing UNIDROIT Convention's use of due diligence requirement instead of good faith requirement).

155. UNIDROIT Convention, *supra* note 24, art. 4.4, 34 I.L.M. at 1332. Article 4.4 states that:

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.

*Id.*

156. Lewis, *supra* note 28, at D1.

not end when the Nazis surrendered.<sup>157</sup> The Russian Government is also guilty of pillaging thousands of cultural objects at the end of World War II.<sup>158</sup> These recently discovered acts of pillaging created chaos in the international community.<sup>159</sup>

#### A. Russian Possession of Looted Cultural Property

Hitler began the confiscation of cultural property shortly after he attained political power in Germany.<sup>160</sup> The Russian Government continued confiscating cultural objects even after the Allies defeated Hitler.<sup>161</sup> Only a few years ago, however, the Russian Government admitted to possessing secret caches of cultural objects.<sup>162</sup>

#### 1. The Looting of Cultural Property During World War II

When Hitler rose to power in Germany, he implemented a campaign of cultural confiscation.<sup>163</sup> Hitler began by suppressing art he deemed degenerate.<sup>164</sup> As Hitler slowly cleared

157. See Gambrell, *supra* note 29, at 88-89 (describing Soviet plans to create their own super museum out of Nazi-looted cultural property).

158. See Amei Wallach, *What a Steal*, *NEWSDAY*, Mar. 28, 1995, at B4 (detailing Russian Government's confiscation of cultural property directly after World War II).

159. See Michael R. Gordon, *Hot Issue For Russia: Should It Return Nazi Plunder?*, *N.Y. TIMES*, Apr. 17, 1997, at A3 (discussing Russia's current struggles whether or not to return World War II plunder).

160. See NICHOLAS, *supra* note 14, at 9 (discussing enactment of Reich Chamber of Culture following Hitler's election to Chancellor of Germany).

161. See AKINSHA & KOZLOV, *supra* note 29, at 43-45 (describing Soviet enactment of Trophy Brigades).

162. See Robert Hughes, *The Spoils of War (Art Treasures)*, *TIME*, Apr. 3, 1995, at 64, 65-66 (explaining Hermitage Museum Director's announcement in October of 1995 that several thousand looted objects from World War II remained in Russian possession).

163. See NICHOLAS, *supra* note 14, at 16-17 (explaining how Reich Chamber of Culture confiscated and destroyed cultural property). Hitler's plan for world domination rested upon the idea of complete devastation of conquered nations. *Id.* at 61. Hitler commanded his military leaders to be merciless during invasions. *Id.* Cultural property fared no worse than its owners under Hitler's reign. *Id.* Although some destruction of cultural property is inevitable during any armed invasion, Hitler's invasion of Poland in 1939 was unusual because of the extraordinary amount of cultural devastation based on inside knowledge of locations of cultural objects. *Id.* Hitler's plan required the 'Germanization' of vanquished territories such as Poland. *Id.* at 63. Nothing but complete devastation of all aspects of a nation's cultural heritage would suffice to accomplish Hitler's goal. *Id.*

164. *Id.* at 11-24. Franz Marc, Paul Klee, and Emil Nolde are a few examples of the type of artists Hitler proclaimed degenerate artists. *Id.* Hitler forced most degenerate artists out of Germany. *Id.* Those degenerate artists that remained were prohibited

out any art he found offensive, he started collecting works that satisfied his artistic tastes.<sup>165</sup> Hitler's seizure of art escalated as his power increased.<sup>166</sup> Hitler efficiently planned and executed his campaign to create a "universal" Aryan society.<sup>167</sup> Once the Nazis' campaign to create a "universal" Aryan society was well underway,<sup>168</sup> every work of art was within the Nazis' reach.<sup>169</sup>

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from even purchasing paints or canvases. *Id.* at 13. By the end of the Hitler's campaign, the Nazis confiscated nearly 16,000 works by degenerate artists from public collections in Germany. *Id.* at 23.; see ROBERT ATKINS, *ART SPOKE - A GUIDE TO MODERN IDEAS, MOVEMENTS, AND BUZZWORDS, 1848-1944* 146 (1993) (discussing various art movements incorporated within Nazi art). Hitler's category of degenerate art included styles from Impressionism to Expressionism. ATKINS, *supra*, at 146. Depictions of the poor and bohemian lifestyles were examples of suppressible subjects. *Id.* Artists could only paint scenes that "glorified the Nazi ideals of the Aryan superman and superwoman" in a representational style. *Id.*; see also MERRYMAN & ELSEN, *supra* note 39, at 259 (explaining Nazi confiscation and destruction of degenerate art). The Nazis did not prepare any specific definition of degenerate art. MERRYMAN & ELSEN, *supra*, at 259. Certain principles of what constituted degenerate art, however, could easily be recognized. *Id.* Specifically, any works by Jewish artists or depicting Jewish subjects, anti-war works, expressions of socialism or Marxism, works depicting people who the Nazis deemed inferior, German Expressionism, and Abstract art were considered degenerate. *Id.* at 259-60.

165. See NICHOLAS, *supra* note 14, at 11 (describing artwork Hitler found appealing). Hitler wanted idealistic artwork without any modern expressive elements. *Id.*; see also JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 234 (1989) (discussing destruction of cultural property during World War II). Hitler had a plan to build a model city and giant art museum in Linz, Austria. GREENFIELD, *supra*, at 234. If built, the city and museum would have symbolized the glory of the Nazis. *Id.* After the end of the war, the Allies discovered thousands of treasured cultural objects hidden in mansions, castles, and even salt mines. *Id.*

166. See NICHOLAS, *supra* note 14, at 65 (stating "[t]he ruins of Warsaw were still smoking when the SS and other Nazi agencies and individuals began zealously carrying out Hitler's exhortation to 'eliminate' Polish culture"). Hitler soon realized that the overflow of confiscated cultural property had to be dealt with in a more systematic fashion. *Id.* at 44. In the early summer of 1939, Hitler appointed Hans Posse in charge of the operation. *Id.* The task was already so monumental by 1939 that Posse's subordinates had to be divided into specific curatorial positions, for example, armor, coins, or books, in order to organize the stockpile of cultural property already in Nazi possession. *Id.* at 45.

167. See DUBOFF, *DESKBOOK*, *supra* note 3, at D-17 (describing Nazis' plunder during World War II). The Einsatzstab Rosenberg was the official department whose purpose included assembling and disposing of the cultural property that met Hitler's requirements. *Id.*

168. See NICHOLAS, *supra* note 14, at 41-44 (discussing Hitler's super museum plan). While the stacks of confiscated cultural objects began to stockpile, Hitler had sketches drawn for his super museum and various other buildings he planned to build in Linz. *Id.* The plans for Hitler's super museum quickly expanded from a museum dedicated solely to nineteenth-century German art to an enormous arrangement of several museums each dedicated to a different discipline. *Id.* at 45.

169. *Id.* at 38-44. The Nazis forced both the wealthy and the poor to flee. *Id.* at

In 1941, the Nazi occupation moved from France to Russia,<sup>170</sup> and continued seizing and destroying cultural treasures as it went from country to country.<sup>171</sup> In efforts to protect their cultural property from looting by the Germans, major museums' curatorial staffs carefully wrapped their cultural objects and moved them to safer storage houses.<sup>172</sup> In 1945, the Allied forces<sup>173</sup> halted Hitler's crusade to conquer the world.<sup>174</sup> Despite the fact that the Allies found, and eventually returned, much of the Nazi confiscated cultural property, thousands of cultural objects remained lost until recently.<sup>175</sup>

## 2. Russian Display of Looted Cultural Property

Although the Allied forces returned a portion of the cultural objects seized by the Nazis,<sup>176</sup> many important works were

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38-39. In their haste to save their own lives, those fleeing abandoned their valuable objects. *Id.* The Nazis were open about the seizure of private cultural property, and required the rightful owners to follow the legal formalities implemented by the Nazis for the expropriation of their property. *Id.* at 39.

170. See Susan H. Rothstein, *All's Not Fair for Art in War: A Proposal for the Equitable Exchange of Soviet and German Art Pillaged in World War II*, 4 DEPAUL J. ART & ENT. LAW 35, 36 (1993) (discussing German and Russian confiscation of cultural property during World War II). Germany invaded Russia in June of 1941 with no formal declaration of war. *Id.*

171. See NICHOLAS, *supra* note 14, at 185-20 (noting that when Russian army returned to recently Nazi occupied territories they found nothing of value left). The Nazis burned, looted, or otherwise destroyed nearly every building and cultural object. *Id.* at 200. See generally Sylvia L. Depta, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany*, 10 TEMP. INT'L & COMP. L.J. 371, 373-76 (describing Nazi's plunders of cultural property across Europe).

172. See NICHOLAS, *supra* note 14, at 188 (stating "the Russian museums had, like all others in Europe, long since ranked their objects and prepared packing materials"). The French began planning evacuation routes for their cultural objects as early as 1937. *Id.* at 50-51. British museums also began planning the removal of their cultural objects to remote parts of the country by 1938. *Id.* at 51. If cultural objects were too fragile to be moved then the museum's curatorial staff built protective structures in the existing museum galleries. *Id.*

173. See GRUN, *supra* note 6, at 516-18, 522-24 (noting that in 1941, Allies included France, Britain, Russian, and United States).

174. See NICHOLAS, *supra* note 14, at 273-326 (detailing Nazi defeat by Allied forces). The Allies final successful efforts at defeating the German army came at the end of 1944 when the Allies finally took over Northern Europe. *Id.* at 321-22.

175. See Wallach, *supra* note 158, at B4 (explaining how Russia secretly kept more than 500,000 stolen cultural objects); see also Carol J. Williams, 'Gold of Troy' at Heart of Controversy, L.A. TIMES, Apr. 16, 1996, at F1, F9 (explaining that only two years ago Russian authorities admitted possessing fabled "Gold of Troy" artifacts).

176. See Dan Fesperman, *Tracking Down the Spoils of War*, BALTIMORE SUN, Nov. 16, 1995, at 1E, 8E (discussing how "monuments officers" employed by British and U.S.

lost and believed to have been destroyed.<sup>177</sup> Then, in 1991, when Russian President Boris Yeltsin visited Germany, he confirmed the art world's suspicion that the Russian Government possessed cultural property taken immediately after the end of World War II.<sup>178</sup> Shortly thereafter two major Russian museums confessed that they possessed secret collections of cultural objects.<sup>179</sup> The rumor circulated that, at the end of World War II, the Russian army confiscated planes full of the Nazi's stolen artwork previously thought to have been destroyed.<sup>180</sup>

Ultimately, in January of 1995, the Russian Government confirmed the rumor that it had confiscated cultural objects partly as revenge, and partly as restitution, for the destruction of Russian cultural property during the Nazi invasion of Russia.<sup>181</sup> In that same year, the Hermitage Museum opened an exhibition entitled "Hidden Treasures Revealed"<sup>182</sup> and the Pushkin Museum showed a similar exhibition entitled "Twice Saved."<sup>183</sup> The following year the Pushkin Museum revealed another exhibit ti-

forces aided in return of stolen artwork). The Russians refused to return stolen cultural property after World War II ended. Hughes, *supra* note 162, at 66 (explaining Allies attempt at immediate restoration of stolen cultural objects to their rightful owners).

177. See Suzanne Muchnic, *Art: On the Trail of Spoils of War*, L.A. TIMES, June 4, 1995, at Calendar 10, Calendar 53 (explaining recent realization that Russians actually possessed artwork long thought destroyed).

178. See Rothstein, *supra* note 170, at 38-39 (discussing Russia's acknowledgment of possession of cultural property taken after World War II). President Yeltsin's actions confirmed the Russians' commitment to a 1990 German-Soviet Friendship Treaty calling for the return of stolen or missing cultural property. *Id.* at 39; see also Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R., art. 16, 30 I.L.M. 504, 512 [hereinafter German-Russian Cooperative Treaty] (stating countries' intentions to return cultural property to its original owners).

179. See Wallach, *supra* note 158, at B4 (discussing looted art on exhibit at Hermitage Museum). In 1991, the Soviet Union dissolved, creating chaos in a country which had routinely kept secrets for decades. *Id.*

180. *Id.* The Soviet army had trophy brigades. *Id.* Trophy brigades were divisions of the Soviet army whose sole purpose was to capture artwork from German museums and bunkers and return it to Russia. *Id.*

181. *Russia's Stolen Art*, BOSTON GLOBE, Jan. 28, 1995, at 10. The Russian Government only recently confirmed that it was in possession of cultural property originally taken by the Nazis during World War II. *Id.* The Russian Ministry of Culture admitted that Russia possessed the cultural property since the end of World War II. *Id.* Most of the cultural property was about to be displayed at the Pushkin Museum in Moscow. *Id.*

182. See ALBERT KOSTENEVICH, HIDDEN TREASURES REVEALED - IMPRESSIONIST MASTERPIECES AND OTHER IMPORTANT FRENCH PAINTINGS PRESERVED BY THE STATE HERMITAGE MUSEUM, ST. PETERSBURG 7 (1995) (cataloguing previously hidden works that were thought destroyed since World War II).

183. See Gambrell, *supra* note 29, at 88, 93-94 (discussing fate of art taken by Russian Government after World War II).



tled "Gold of Troy."<sup>184</sup>

The revelation that the Russian Government confiscated and hid thousands of stolen cultural objects resulted in chaos throughout the art world.<sup>185</sup> European nations are demanding that the Russian Government return their national treasures.<sup>186</sup> Private individuals who lost cherished cultural objects as a result of World War II are also looking to the Russian exhibits to determine if any of their heirlooms are involved.<sup>187</sup>

### B. Arguments

Although the German and Russian Governments began negotiations in 1990 to return the cultural property to its rightful owners,<sup>188</sup> these discussions recently stalled.<sup>189</sup> One of the main problems in resolving the situation is that the Russian's stolen

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184. See Williams, *supra* note 175, at F1 (explaining controversy with Pushkin Museum's exhibit). The problems with the ownership controversy surrounding the "Gold of Troy" exhibit are extremely complex. *Id.* The German archaeologist who discovered the ancient treasure, Heinrich Schliemann, promised some of the objects to Greece, Russia, England, France, and the United States, but in 1881 gave the most valuable items to Germany. *Id.*

185. See Alexandra Peers, *Spoils of War: Cries For Return of Booty Unnerve the World of Art*, ASIAN WALL ST. J., Feb. 21, 1995, at 11 (explaining that possibility of lawsuits over artwork purchased some fifty years ago has museums, dealers, and private individuals deeply concerned).

186. *Id.* Despite the fact that taking war booty is specifically prohibited by the Hague Conventions of 1907 and 1954, Americans and Russians alike are guilty of major World War II thefts. *Id.*

187. See Richard Beeston, *War Booty Row Over Russian Exhibition*, TIMES OF LONDON, Mar. 30, 1995 (explaining that daughter of German art collector is claiming that artwork displayed at Hermitage Museum is actually part of her father's stolen art collection).

188. See Gambrell, *supra* note 29, at 88, 93 (discussing possibilities for solution to problem of where art taken during World War II should remain). In 1992, Russia and Germany formed a committee to investigate claims from both Russia and Germany. *Id.* at 90.; see also German-Russian Cooperative Treaty, *supra* note 178, art. 16, 30 I.L.M. at 512 (stating that both Russian and German Governments agree to return any cultural property illegally taken to its territory).

189. See Gambrell, *supra* note 29, at 88, 90 (examining reasons why negotiations between Russian and German Governments stalled). One of the reasons for the stalling of the negotiations was Russia's refusal to reveal war archives which also included details of other Russian wartime activities. *Id.* The Russian Government presently contends that much of the works were removed legally and therefore are not subject to the Hague Convention's rules. *Id.* at 90-91; see Christopher Knight, *Displaying the Spoils of War*, L.A. TIMES, Mar. 20, 1995, at A1, A11 (describing further complications of settlement situations which could result after Russia's Parliament passes pending legislation giving Russian Parliament and not Russian President jurisdiction to nationalize trophy art).

cultural objects fall into many different categories of original ownership.<sup>190</sup> This variety of ownership claims makes the task of sorting out the rightful owners formidable.<sup>191</sup> Until the Russian and German Governments reach a solution, the cultural objects will remain in limbo, waiting in Russian museums for news of a consensus indicating in whose possession they will remain.<sup>192</sup>

### 1. The Russian Government's Arguments to Keep Cultural Property

The Russian Government has several arguments supporting its retention of the stolen cultural property.<sup>193</sup> In general, it is difficult to argue with the Russian Government, whose country the Nazis' occupation so clearly devastated.<sup>194</sup> Furthermore, the Russian Government claims that there is no reason to return the cultural objects because it is displaying and preserving them properly.<sup>195</sup>

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190. See Gambrell, *supra* note 29, at 88, 93-94 (discussing complexity of situation between Russia and Germany). A variety of possessors originally owned Russia's looted cultural property, including German museums, private German citizens, and countries such as Holland and Hungary. *Id.* at 93. The Nazis purchased some of the cultural objects legally. *Id.* at 93-94. The Nazis confiscated some of the cultural objects from Jewish families by force. *Id.* at 94. Some of the cultural objects have living heirs. *Id.* There are also some cultural objects whose origin is unknown to this day. *Id.* One problem the International Court of Justice is likely to come across if it is asked to settle this World War II dispute is the problem of necessary third parties not before the court. S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed From Occupied Germany*, 18 *HOUS. J. INT'L L.* 59, 66 (1995) (explaining preliminary objections to referring Russia and Germany dispute, regarding ownership of cultural property stolen during World War II, to International Court of Justice).

191. See Gambrell, *supra* note 29, at 88, 93-94 (describing fears of Russian Government). Russian Government officials are fearful that any negotiations with individual German families would lead to an onslaught of lawsuits against the Russian Government. *Id.* There is also the possibility that any return of the cultural property could create a precedent that would create turmoil in the art world by leaving museum collections highly vulnerable to suit. *Id.*

192. See Stephens, *supra* note 190, at 110 (explaining complications of possible resolution to conflict between Russia and Germany).

193. See *id.* at 61 (summarizing Russia's position as to which country should possess World War II cultural property).

194. See *id.* at 109 (explaining that principle of equity favors objects remaining in Russia); see also Rosemary Yardley, *Who Owns the Art Loot?*, *GREENSBORO NEWS & REC.*, Mar. 31, 1995, at A11 (explaining why Russians have deeper reasons for wanting art objects to remain in their country).

195. Stephens, *supra* note 190, at 107-08. The Russians argue that because they rescued and preserved the art objects from Germany when it could not adequately care for or return the objects, Germany's present claim for return based on cultural nation-

a. The Russian Government's Taking of Cultural Objects After World War II Was Lawful

One theory supporting the Russian Government's continued ownership of the cultural objects is that the Russian Government acted properly in taking the cultural objects from occupied German territory.<sup>196</sup> The Russian Government maintains that it lawfully obtained the cultural objects after World War II, according to the Act of State Doctrine,<sup>197</sup> because the Russian Government was, for all intents and purposes, the legal German Government when it took the cultural objects.<sup>198</sup> This Act of State Doctrine argument is often applied in situations where property is taken by a foreign sovereign government.<sup>199</sup>

Several U.S. cases reflect the use of the Act of State Doctrine.<sup>200</sup> *Menzel v. List*<sup>201</sup> provides an example of a court's rea-

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alism is unfounded. *Id.* Not only would the return threaten the future care and preservation of the objects, but also it likely would result in the complete dispersal of the objects. *Id.*; but cf. Knight, *supra* note 189, at A1 (discussing Hermitage Museum's exhibit of art taken during World War II). The Hague Convention of 1954, which essentially restated the Hague Convention of 1907 to which Russia and Germany are both signatories, explicitly forbids the taking of war booty from occupied territories. Knight, *supra*, at A10.

196. See Stephens, *supra* note 190, at 93-99 (discussing argument of Russia's sovereignty over Germany). After the Allied defeat of Germany the Allies, specifically Russia, became the state successors to the occupied German territory. *Id.* at 93-94.

197. See MERRYMAN & ELSÉN, *supra* note 39, at 25-26 (discussing application of Act of State Doctrine to protection of cultural property). The Act of State Doctrine requires a jurisdiction to enforce a foreign sovereign's actions regardless of whether or not the actions were valid under the jurisdiction's laws. *Id.* at 26.

198. See Gambrell, *supra* note 29, at 88, 90-91 (explaining Russian Government's reasons for keeping stolen cultural property during World War II). The Russian Government claims that anything taken to Russia by order of the Russian military from an occupied zone was removed legally because the Russian military was the legal German Government at the time. *Id.*

199. See MERRYMAN & ELSÉN, *supra* note 39, at 26 (describing use of Act of State Doctrine). The Act of State Doctrine applies when "[t]he foreign government is recognized by the United States at the time of the lawsuit and . . . when the taking of the property occurred within the foreign sovereign's own territorial boundaries." *Id.*

200. See *id.* at 25-28 (discussing reasoning and application of Act of State Doctrine). The general concept of the Act of State Doctrine is predicated on principles of equality and independence of states concerning matters of international law. *Id.*

201. 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966). In *Menzel v. List*, the plaintiff, Erna Menzel, and her deceased husband abandoned a Marc Chagall painting while fleeing Belgium during World War II. *Id.*, 49 Misc. 2d at 301, 267 N.Y.S.2d at 806. The couple returned several years later to find their painting missing. *Id.*, 49 Misc. 2d at 301, 267 N.Y.S.2d at 807. The Chagall painting eventually surfaced in the hands of a New York art dealer, Albert A. List. *Id.* Erna Menzel sued to recover her lost painting from Mr. List. *Id.*, 49 Misc. 2d at 301, 267 N.Y.S.2d at 806.

soning regarding why the Act of State Doctrine would not apply.<sup>202</sup> The court held that in *Menzel* the plaintiff was the sole owner of a Chagall painting because the Nazis were not a foreign sovereign recognized by the United States at the time they took the Chagall painting.<sup>203</sup> The court also held that the confiscation did not occur within the territorial limits of the German Government.<sup>204</sup> Therefore, the seizure was ruled an unlawful pillage and the painting was ordered to be returned to the plaintiff.<sup>205</sup>

#### b. Russia's Taking of Cultural Objects Was a Legitimate Reprisal

Some scholars also believe that the Russian Government took cultural property as reparations for the Russian losses at the hands of the Nazis.<sup>206</sup> At the close of World War II, several countries involved in the war suggested that the German Government should be forced to reimburse other countries for the destruction of their cultural property using Germany's own cultural property.<sup>207</sup> Today, many Russians adamantly voice this

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202. See *Menzel*, 49 Misc. 2d at 308, 267 N.Y.S.2d at 813 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). The New York court used the *Sabbatino* Court's analysis to determine whether of the Act of State Doctrine applies. *Id.* The four factors include "(A) the taking must be by a foreign sovereign government; (B) the taking must be within the territorial limitations of that government; (C) the foreign government must be extant and recognized by this country at the time of suit; (D) the taking must not be violative of a treaty obligation." *Id.*

203. *Menzel*, 49 Misc. 2d at 311, 267 N.Y.S.2d at 815.

204. *Menzel*, 49 Misc. 2d at 311, 267 N.Y.S.2d at 815-16. The Court held that military occupation of a territory does not, in and of itself, indicate that the occupying party is a sovereign. *Id.*, 49 Misc. 2d at 311, 267 N.Y.S.2d at 816. Specifically, the Court found that the government of Belgium continued to exist despite its exiled status during World War II. *Id.*, 49 Misc. 2d at 311, 267 N.Y.S.2d at 815.

205. See *Menzel*, 49 Misc. at 316, 267 N.Y.S.2d at 820 (holding that Nazi plundering and pillaging of Chagall painting did not convey valid title to subsequent purchasers); cf. *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976) (holding that Act of State Doctrine applied because Russian Army appropriated works pursuant to governmental decree and U.S. Government recognized Russian Government).

206. See Lewis, *supra* note 28, at D5 (discussing discovery and debate surrounding Russia's possession of cultural objects taken during World War II). Russian nationalists argue that there is nothing to debate because the art objects are rightfully theirs. *Id.*; see also Stephens, *supra* note 190, at 98 (stating that Russian ownership of World War II cultural property is justified because cultural objects were taken as war reparations).

207. See MERRYMAN & ELSÉN, *supra* note 39, at 40 (discussing reparations in context of World War II). The Russian Government claims that the Allied Control Council gave Russia permission to take cultural reparations from Germany shortly after World War II ended. AKINSHA AND KOZLOV, *supra* note 9, at 253-54 (discussing disagreement between

view in support of the Russian Government retaining control of the cultural objects in question.<sup>208</sup>

### c. Return of Cultural Objects Is Improper

Proponents for keeping the cultural property under Russian control also base their arguments on the cultural destruction that the German army unleashed on Russia during its siege<sup>209</sup> as well as the Nazis' general plunder of cultural property in other conquered nations.<sup>210</sup> Many Russians feel that the cultural property taken after World War II is rightfully theirs as the victors of the war.<sup>211</sup> In addition, according to many Russians, their country's proper care for, and display of, the cultural objects in dispute for an international audience indicates that the Russian Government is the rightful owner.<sup>212</sup>

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Russia and Germany as to whether cultural objects from World War II were taken unlawfully by Russia or were taken as legal reparations). The Russian Government prepared a legal document in 1994 explaining Russia's position on the conflict as to ownership of the cultural property. *Id.* at 253. This document states that directly after World War II ended, countries looted by the Nazis during World War II retained the right to take German cultural property as compensation. *Id.*

208. See Gambrell, *supra* note 29, at 88, 90 (discussing problems of Russia's possession and display of art). At "The Spoils of War" symposium, held in 1995 at the Bard Graduate Center for Decorative Arts, Irina Antonova, Director of the Pushkin Museum, gave a passionate speech in which she espoused exactly this rationale. *Id.*

209. See NICHOLAS, *supra* note 14, at 185 (explaining Hitler's instructions of annihilation for Russia's invasion). The basic tactics of the Nazis were similar to those applied in Poland, however, in Russia the Nazis "did not bother with velvet gloves." *Id.* Hitler wanted Russia completely devastated culturally, racially, and ideologically. *Id.* When the Nazis reached Leningrad, the soldiers plundered whatever they possibly could. *Id.* at 192. Lynn Nicholas explains how:

[m]irrors were smashed or machine-gunned, brocades and silks ripped from the walls. At Peterhof, just outside Leningrad, the machinery controlling the famous cascading fountains was destroyed, and the gilded bronze statues of Neptune and Samson upon which the waters played were hauled off to the smelting furnace in full view of the distraught townspeople.

*Id.*

210. See Stephens, *supra* note 190, at 109 (discussing Nazis' unethical efforts to acquire cultural property).

211. See Knight, *supra* note 189, at A10 (explaining Russian Government's arguments in favor of retaining possession of cultural property). Although international law does not allow emotional reasoning as a basis for pillaging cultural property, Russian citizens are having a hard time comprehending why they should be forced to relinquish cultural property that they believe is rightfully theirs. *Id.*

212. See Stephens, *supra* note 190, at 105-08 (explaining cultural property taken by Russians after World War II is part of mankind's cultural heritage). Russia preserved and cared for the cultural objects after World War II when Germany did not have the same ability. *Id.* at 107. Furthermore, the present Russian museum exhibits of the

## 2. The German Government's Arguments for Return of Cultural Property

The German Government is opposed to the Russian Government retaining cultural objects originally taken during World War II.<sup>213</sup> Their arguments are grounded in the general international prohibition of pillaging.<sup>214</sup> The German Government also argues that allowing the cultural objects to remain in Russia is inequitable.<sup>215</sup>

### a. The Russian Army's Removal of Cultural Objects From Germany After World War II Was Unlawful

One reason that the Russian Government should return the cultural property to the German Government is the international law that does not allow pillaging.<sup>216</sup> The Act of State Doctrine does not apply to the Russia Army's actions because the Russian occupation of German territory after World War II did not eliminate the German Government's status as a sovereign government.<sup>217</sup> Furthermore, the doctrine of prescription<sup>218</sup>

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cultural property fulfill Russia's obligations to the international community to allow as many people as possible access to the cultural property. *Id.*; but see Lisa Dickey, *Looking After the Treasure*, *RUSSIAN LIFE*, July 1, 1996, at 18, 20-21 (detailing poor condition of Russian museums and lack of public funds available to restore and maintain facilities adequately).

213. See Stephens, *supra* note 190, at 68 (discussing German Government's arguments for return of cultural property to Germany).

214. See Gambrell, *supra* note 29, at 88, 90 (explaining German viewpoint that international law requires Russia return stolen cultural objects).

215. See Stephens, *supra* note 190, at 89-91 (describing German Government's argument that allowing Russian Government to retain stolen cultural property would be unfair).

216. See Gambrell, *supra* note 29, at 88, 90 (explaining German Government's response to recent Russian decree that cultural property should be kept as war reparations); see also Stephens, *supra* note 190, at 70-71 (stating Germany's argument that Russia's actions violated international law because taking sovereign government's property is only allowed in certain exceptions such as when conquerors take property from defeated nation to prosecute war effort).

217. See Stephens, *supra* note 190, at 68 (discussing Germany's position on return of cultural objects taken by Russia). Even if some executive powers are legitimately exercised by an occupying government, once a legitimate government regains power all of the legitimate government's property must be returned. *Id.* at 71-72.

218. See BLACK'S LAW DICTIONARY 1183 (6th ed. 1990) (defining international law of prescription as "[a]cquisition of sovereignty over a territory through continuous and undisputed exercise of sovereignty over it during such a period as is necessary to create . . . the general conviction that the present condition of things is in conformity with international order").

does not apply because once the German Government learned that the Russian Government possessed the cultural property, the German Government initiated discussions between the two governments in an attempt to rectify the situation.<sup>219</sup>

#### b. It Is Inequitable for Cultural Objects to Remain in Russia

Another possible German argument in favor of returning the cultural property is based on the concept of cultural nationalism.<sup>220</sup> Specifically, the cultural nationalism argument is that whenever possible, cultural property should be returned to its country of origin.<sup>221</sup> Therefore German nationalists argue that because their government presently has the ability to care for the contested cultural property properly, the Russian Government must return the cultural objects to Germany.<sup>222</sup>

### 3. Third Party Arguments

Other nations<sup>223</sup> and individual citizens<sup>224</sup> who recognize

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219. See Depta, *supra* note 171, at 386 (discussing Germany's and Russia's bilateral agreements concerning cultural property); see also Stephens, *supra* note 190, at 80-83 (explaining that recent bilateral agreements between Russia and Germany require return of contested cultural property).

220. See MEYER, *supra* note 105, at 180-87 (discussing history of nationalist views of cultural property and its link to Lord Byron); see also John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845-48 (1986) (distinguishing cultural nationalism from cultural internationalism). A cultural nationalist generally believes that any cultural property that is not in its source country should be returned to that source country. Merryman, *supra*, at 845. The UNESCO Convention represents this idea of cultural nationalism with the term "repatriation". *Id.*

221. See Merryman, *supra* note 220, at 845 (describing widespread acceptance of cultural nationalism). Cultural nationalism predominates the international view towards protection of cultural property. *Id.* at 846; see Forbes, *supra* note 2, at 241-43 (discussing differing perspectives on protection of cultural property).

222. See Stephens, *supra* note 190, at 90 (stating argument that Russia must return cultural objects based on principles of equity). The Russian Government has a duty to return the cultural objects to Germany because the cultural objects are a part of Germany's cultural heritage and Germany has the resources to protect and preserve these cultural objects. *Id.* Germans have a right to protect and enjoy their national cultural heritage. *Id.* at 89-90.

223. See Gregory Katz, DALLAS MORNING NEWS, Mar. 28, 1995, at 1A, 9A (describing reaction to Russia's recent unveiling of stolen cultural objects). The French and Dutch are pressuring the Russians to uphold their agreement with Germany that forces Russia to return the cultural property taken during World War II. *Id.*

224. See Beeston, *supra* note 187 (noting individual's reactions to seeing family's cultural property appear at opening of exhibit at Hermitage Museum). Daniela Brabner-Smith, a daughter of a private German art collector, claimed that two of the eleven masterpieces stolen from her family's house were on exhibit at the Hermitage.

some of the works displayed in the Russian museums as their own argue that military occupation and seizure does not eliminate an original owner's title to a cultural object.<sup>225</sup> These outside groups have diverse histories and legal issues.<sup>226</sup> Generally, however, before any of the cultural property is returned to Germany these outside groups should be given an opportunity to intervene.<sup>227</sup>

#### 4. Proposal to Resolve This Problem in the International Court of Justice

One scholar argues that the parties should resolve the question of ownership of the cultural property taken during World War II by using the International Court of Justice<sup>228</sup> ("ICJ") for a few reasons.<sup>229</sup> First, negotiations between the Russian and German Governments have stalled.<sup>230</sup> In addition, the dispute involves two parties both of whom would like the question of ownership settled.<sup>231</sup> Also, the ICJ's ability to use experts to settle complex disputes such as the present debate over ownership of cultural property, makes it adept at creating an equitable solution to the problem.<sup>232</sup>

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Museum in Russia. *Id.* Grandsons of the collector Otto Gerstenberg claim ownership of the Degas painting on exhibit. James Meek & Sarah Jane Checkland, *Who Keeps the Spoils of War?*, *THE GUARDIAN*, Feb. 11, 1995, at 023 (discussing recent Russian exhibition of trophy art).

225. See Rothstein, *supra* note 170, at 46 (discussing private actions for recovery of cultural property taken during World War II); see also *Menzel v. List*, 49 Misc. 2d 300, 311, 267 N.Y.S.2d 804, 816 (N.Y. Sup. Ct. 1966) (explaining that Nazis' military occupation of Belgium did not eliminate plaintiff's title to painting).

226. See Borodkin, *supra* note 21, at 399-405 (discussing problems with legal protections when stolen cultural property problems reach international levels).

227. See Stephens, *supra* note 190, at 65-67 (explaining preliminary objections that must be settled before Russian and German conflict in ownership of cultural property can be brought before International Court of Justice [hereinafter ICJ]).

228. U.N. CHARTER art. 92 (stating that ICJ "shall be the principal judicial organ of the United Nations").

229. See Stephens, *supra* note 190, at 110-12 (describing ICJ as ideal method for settlement of dispute between Russia and Germany).

230. See *id.* at 60-61 (explaining that failure of Russian and German Governments to reach independent consensus as to ownership of cultural objects creates situation applicable for ICJ); see also Amei Wallach, *Russia, Art and Spoils of War*, *NEWSDAY*, Jan. 24, 1995, at B7, B9 (stating Irina Antonova's, director of Moscow's Pushkin Museum, opinion that cultural property from World War II is Russia's and Russia's position on subject is not negotiable).

231. See Stephens, *supra* note 190, at 110 (describing Russia and Germany as two parties who would like dispute in ownership settled).

232. *Id.* at 111-12. There are various factors to the situation between Russia and



III. *THE ICJ SHOULD USE THE UNIDROIT CONVENTION AS  
A GUIDE TO COMPEL THE RUSSIAN GOVERNMENT  
TO RETURN THE CULTURAL PROPERTY  
STOLEN DURING WORLD WAR II  
TO GERMANY*

The ICJ is the appropriate forum for resolving the dispute in ownership between Russia and Germany.<sup>233</sup> The ICJ should take advantage of the UNIDROIT Convention and apply it as a guide to settle the dispute.<sup>234</sup> The UNIDROIT Convention does not directly apply to the disagreement between the Russian and German Governments regarding ownership of the cultural property stolen during and directly after World War II, but the UNIDROIT Convention would serve as a useful guide to resolve the conflict.<sup>235</sup>

A. *The Russian and German Governments Should Use the ICJ to  
Return the Stolen Cultural Objects to Their Rightful Owners*

The ICJ is designed to settle exactly this sort of ownership dispute.<sup>236</sup> The Russian and German Governments agreed, under the provisions of the 1990 German-Russian Cooperative Treaty,<sup>237</sup> that both countries would return any cultural objects in their possession originating from either forced sales or pillages, but there has been little action to that effect.<sup>238</sup> The result

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Germany which make the ICJ a likely vehicle to find a solution. *Id.* The ability of the ICJ to use experts increases the likelihood that the Court could resolve Russia's and Germany's conflict over ownership of the stolen cultural objects. *Id.* The ICJ would be able to use experts to trace the complex chains of ownership of the cultural objects in question. *Id.*

233. See *supra* notes 229-32 and accompanying text (explaining one scholar's proposal for Russia and Germany to use ICJ to settle dispute regarding ownership of stolen cultural property).

234. See *supra* notes 135-39 and accompanying text (discussing scope of UNIDROIT Convention).

235. *Id.*

236. See *supra* notes 230-32 and accompanying text (examining arguments for taking situation between Russian and German Governments to ICJ).

237. See *supra* note 178 and accompanying text (discussing Russian and German Governments' attempts at reaching a solution to dispute in ownership of cultural property stolen during World War II).

238. See *supra* notes 178-85 and accompanying text (describing revelation of Russia's possession of looted cultural property from World War II and lack of resolution as to question of which country is rightful owner of looted cultural property); *supra* notes 189-92 and accompanying text (examining lack of advancement in efforts to resolve conflict in ownership of looted cultural property).

is a situation that appears impossible to settle voluntarily. From the Hague Convention of 1954 to the UNESCO Convention of 1970, and most recently to the UNIDROIT Convention of 1995, the clear trend is toward protecting cultural property in its country of origination and this policy should apply to the Russian and German Governments' dispute.<sup>239</sup>

*B. The ICJ Should Apply the UNIDROIT Convention as a Guide to Returning the Stolen Cultural Property to its Original Owners*

The UNIDROIT Convention should act as a guide to settle the dispute in ownership of cultural property between the Russian and German Governments.<sup>240</sup> A main purpose underlying the formation of the UNIDROIT Convention involved clearing up some of the confusing problems as to who has the burden of proving ownership of stolen cultural property.<sup>241</sup> The secrecy of the Russian Government,<sup>242</sup> combined with the passage of over fifty years since the end of World War II,<sup>243</sup> and the irreplaceable nature of cultural property<sup>244</sup> makes discovering exactly who the art objects belong to a burdensome task.<sup>245</sup>

Article 3 of the UNIDROIT Convention bears immediate relevance to the situation between Russia and Germany.<sup>246</sup> When used as a guide, it justifies the German Government's fifty year-old claim for the return of the stolen cultural property. Article 3 sets a time limit for claims which depend upon the nature

239. See *supra* notes 83-88 and accompanying text (describing Hague Convention as expansion of previous attempts at protecting cultural property); *supra* notes 100-106 and accompanying text (discussing advances of UNESCO Convention); *supra* notes 125-28 and accompanying text (detailing advancements in international protection of cultural property made by UNIDROIT Convention).

240. See *supra* notes 140-55 and accompanying text (explaining Articles 3 and 4 of UNIDROIT Convention).

241. See *id.* (explaining UNIDROIT Convention's principles of return and compensation).

242. See *supra* notes 218-20 and accompanying text (stating Germany's argument that cultural property should not remain in Russia because Russian Government's secrecy prohibits application of doctrine of prescription).

243. *Id.*

244. See *supra* notes 39-45 and accompanying text (detailing importance and uniqueness of cultural property).

245. See *supra* notes 185-87 and accompanying text (discussing complicated ownership questions involved in dispute between Russian and German Governments created because of involvement of variety of third parties).

246. See *supra* notes 140-48 and accompanying text (detailing principle of return as set forth in Article 3 of UNIDROIT Convention).

of the theft and the nature of the stolen cultural object. Article 3 also allows a court to determine which dispossessed owner should receive the stolen cultural objects when there are competing claims for the same cultural object. The Russian Government's concealment of the location of the valuable cultural objects, therefore, does not preclude the German Government from requesting any object's return.<sup>247</sup> Indeed, the Russian Government's vehement denial of possession of stolen cultural property supports the German Government's argument that a more relaxed statute of limitations under Article 3 of the UNIDROIT Convention applies to the situation.<sup>248</sup>

Moreover, Article 4 of the UNIDROIT Convention would aid in alleviating the staggering problem of calculating just compensation for return of the artwork. The Russian Government could argue, under the UNIDROIT Convention, that it confiscated the cultural objects with the good faith belief that the confiscation was a legitimate reprisal for the Nazis' actions during World War II, and thus the principle of just compensation found in Article 4 would apply. However, the reality that the German Government survived and thrived for over fifty years with the cultural property hidden in Russia,<sup>249</sup> combined with the realistic costs associated with compensation for the cultural property's return, makes the decision of what monetary amount equals just compensation a difficult task.<sup>250</sup> The additional possibility that the Russian Government is still hiding countless cultural objects makes the return of the fraction presently on display in Russian museums a potential disaster to the art world and to the Russian

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247. See Lewis, *supra* note 28, at D1. The Soviets returned some of their spoils to East Germany in 1953 and 1957. *Id.* They returned the Pergamon Altar and approximately five hundred paintings that originally resided in Germany. *Id.* When the Russians were questioned by their then ally, East Germany, about other possessions; however, the Russians denied possession of any other objects. *Id.*

248. See *supra* note 176-84 and accompanying text (explaining world's recent revelation of Russian possession of cultural property looted during World War II); see also *supra* note 219 and accompanying text (discussing German Government's immediate attempts at settling dispute with Russian Government as to which country is rightful owner of looted cultural objects as soon as German Government became aware of cultural objects stolen during World War II location in Russia).

249. See *supra* notes 176-82 and accompanying text (explaining how entire world believed for over fifty years that World War II activities destroyed cultural property now confirmed as remaining secretly within Russian Government's possession).

250. See *supra* notes 190-91 and accompanying text (discussing how ownership issues become complicated because of quantity and diversity of works stolen).

Government. The return of some cultural objects leaves the art world in an infinite state of chaos and the Russian Government open to the never ending threat of lawsuits.<sup>251</sup>

### *CONCLUSION*

If the UNIDROIT Convention is applied to the dispute in ownership between Russia and Germany, the Russian Government would relinquish their possession of the cultural objects stolen during World War II to the German Government. Although this might seem unjust given the history of World War II, the UNIDROIT Convention properly supports the modern principle of returning cultural property to its original owners. The German Government would then bear the burden of attempting to return any of the stolen cultural property to its rightful owners. Additionally, the Russian Government would be entitled to receive just compensation for returning the stolen cultural objects. Because of the large amount of German cultural property in Russia, however, the German Government may be required to pay huge sums for the return of the stolen objects. If the German Government is required to compensate the Russian Government for the true value of the cultural objects as opposed to merely the cost of the return of the cultural objects, it is most likely that the cost of the objects' return will be too high and the stolen cultural objects will remain in Russia.

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251. See *supra* note 185 and accompanying text (describing art world's fears of massive lawsuits over art long thought destroyed).

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