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Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage

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Abstract

This Article is segmented as follows: Part I provides an historical account of the temporal trajectory through which the Kohinoor diamond has evolved over the centuries. The exploration of the legality of repatriation begins in Part II, where it explains the structural difficulties presented by arguments that seek to justify the retention of cultural artifacts. This leads to the discussion of the existing international law framework in Part III. The background presented in these sections provides the foundation utilized to advance a theoretical framework that expands the definition of cultural artifacts to define the legal paradigm for the repatriation of cultural heritage. Finally, Part IV concludes with the affirmation that there is no place for the continuation of colonial blunders by refusing to repatriate cultural artifacts on account of commercial interests and faulty legal reasoning.

REPATRIATION OF THE KOHINOOR DIAMOND: EXPANDING THE LEGAL PARADIGM FOR CULTURAL HERITAGE

*Saby Ghoshray**

It is hardly coincidence that the museums of the most powerful nations have the best collections of international art. Enriched by the spoils of war, colonial occupations and free-lance plundering, these collections are, to put it bluntly, monuments to the maxim that might is right.

Increasingly, however, "victim" countries are refusing to view history as a closed book. Greece has long demanded the return of the Elgin Marbles, the 253 sculptures from the Parthenon that are in the British Museum. Turkey, China, Cambodia, Nigeria, Mali and Bangladesh say their cultural heritage was ransacked. Mexicans lament that the feathered head-dress of the Aztec Emperor Moctezuma is in a Vienna museum.¹

INTRODUCTION

Against the backdrop of war, guns, and an invading colonizer's aggression, a 12-year-old boy is dethroned. The boy king travels alone to a distant, foreign land, his master's land. He stands face-to-face with his conqueror, his sovereign, the Queen of England. He must surrender the Kohinoor Diamond into the hands of his victor, a payment, war booty.

This imagery is not a work of fiction, nor am I trying to tug at the sentimental heartstrings of the masses. This, simply put, is

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1. Alan Riding, *Are Finders Keepers?*, N.Y. TIMES, Mar. 12, 1995, § 4, at 3.

the truth. It is a historical snapshot that exposes the collective consciousness of a nation that struggles with a festering wound. While the story comes alive before our eyes, our mind's eye opens up with questions. Is the wounded civilization still nursing its injuries centuries later? This is not an easy answer.

The answer is complex. Complex because the history of a nation is not only illuminated by the great deeds of its ancestors. It is repeatedly revived by its ancestral moments of greatness. Often times these moments of great remembrance come alive via works of art, literature, excavated sculptures, or pieces of cultural artifacts. Each of these inanimate objects, sometimes individually, sometimes collectively, provides posterity with a window into the historical evolution of a particular nation. These cultural artifacts represent a composite kaleidoscope of unique historical significance that transcends the temporal boundaries of not only the individual race but all of mankind. Unfortunately, the chronological landscape of humanity is also punctuated with plunder, illegal possession, and forced removal of historical artifacts, leaving historical black holes in the vast continuum of a nation's history. How does this process unfold?

A multitude of reasons could be cited for the plunder, illegal export, and deceitful transfer of indigenous cultural artifacts from the countries in which they originated. They include mankind's perpetual lust for precious ornaments, the violent urge to dominate the vanquished, and the satisfaction of individual ego by memorializing conquest via dispossessing the defeated of its most precious relics. Whatever the reason for the transfer of historical valuables from past centuries, the operating principles dictating such transfer did not take into account issues of greater significance. While such objects may hold great significance in the collective history of the country of origin, the trajectory of their transfer highlights the grotesque exhibition of deprivation and detachment exhibited by the conqueror. Therefore, one of the central points of discord in assessing the historical significance of these cultural artifacts is their relative value difference, looking through the diverging lenses of appreciation.

The relative difference of a single object exists in nature for a number of reasons. This can be illustrated by means of some disjointed snapshots. For example, an object of antiquity may be of great value to an explorer or an invader because of prestige or simply because it is a decorative ornament. To the citizens of a

nation, though, the very same artifact could be of far greater value because it might provide a link to the past, a long sought-after missing link that solidifies the existence of an illustrious period of that nation's evolution on the world stage. Therefore, if selected cultural artifacts from one country are held captive in another country, it might become extremely difficult to recreate an historical continuum. Recent developments in international law have led to the recognition of the historical significance of cultural artifacts. Repatriation has thus become an extremely important concept of law. Yet the Kohinoor Diamond ("Kohinoor") continues to sit in a showcase in the Tower of London,² only to be worn by the Queen of England on special occasions³ while the cries of its rightful owners are muted by the plundering nation's political overtures. While it seems only logical that cultural artifacts like the Kohinoor and the Elgin Marbles⁴ should be repatriated to their original owners, the issue seems to be lost in the impotent waste of international law. Why is this?

Despite the strong emphasis on the current discourse regarding customary international law's role in the protection and preservation of objects of historical significance, the legal para-

2. The Tower of London is located in central London. It is a historic monument that was built to act primarily as a fortress and, at times, a royal palace. In addition to housing many important prisoners, the Tower of London served as a zoo and a location for executions. It has also served as a mint. The Tower of London currently houses the Crown Jewels, which includes the Kohinoor. The Crown Jewels includes the regalia and vestments worn by the sovereign of the United Kingdom during special ceremonies. It is believed that the Crown Jewels are one of the largest and most valuable collections in existence. The public can purchase tickets to tour the Tower of London and view the Crown Jewels. See generally *Historic Royal Palaces, Tower of London*, <http://www.hrp.org.uk/TowerOfLondon/Default.aspx> [hereinafter *Historic Royal Palaces*] (last visited Jan. 2, 2008); *The Monarchy Today, The Crown Jewels*, <http://www.royal.gov.uk/OutPut/Page5019.asp> (last visited Jan. 2, 2008).

3. The Kohinoor has only made a few public appearances since its departure from India. In 1937 it was worn by the Queen Mother at the coronation of her husband King George VI. See *Priceless Gem in Queen Mother's Crown*, BBC NEWS ONLINE, Apr. 4, 2002, <http://news.bbc.co.uk/1/hi/uk/1907313.stm>. The Kohinoor was seen again resting upon the Queen Mother's coffin in 2002. See *The Queen Mother: Jewelled Crown a Piece of History*, GLOBE & MAIL (Can.), Apr. 6, 2002, at A10.

4. There are several sources that discuss, in detail, the history and acquisition of the Marbles. See, e.g., JACOB ROTHENBERG, "DESCENSUS AD TERRAM": THE ACQUISITION AND RECEPTION OF THE ELGIN MARBLES (1977); WILLIAM ST. CLAIR, LORD ELGIN AND THE MARBLES (1998); THEODORE VRETTOS, A SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES (1974); Philip Hunt & A.H. Smith, *Lord Elgin and His Collection*, 36 J. HELLENIC STUD. 163 (1916); Frank J. Messman, *Richard Payne Knight and the Elgin Marbles Controversy*, 13 BRIT. J. AESTHETICS 69 (1973).

digm is still primitive in its understanding of true belonging, or, true ownership related to a discourse of cultural artifacts. Unless a sustainable notion of belonging is developed, international law cannot legitimately deal with the issues of repatriation, return, and restitution. As a result, the ability of the existing legal framework to effectively deal with cultural artifacts is severely constrained. I argue, therefore, that the problem with international law is that it still remains at a very rudimentary level. This is evidenced by the existing law's inability to deal with repatriation of ancient civilizations' cultural artifacts. In my view, international law is defective in several ways, which makes it impossible for certain cultures to revitalize their history via their own cultural artifacts. First, international law still suffers from temporal constraint. Most tenets of international law originated after World War II. As a result, the issue of repatriation and restitution is still locked into the frozen inequality of the static elements of the statute of limitations. Second, the existing legal paradigm is governed by the general principle of repose,⁵ which mandates that existing situations continue unless reason is given for changing them. Third, the laws related to repatriation and return of cultural artifacts have been designed to protect the commercial interests of the possessing countries. This is due to the influence of colonial powers in the formation of international law. Fourth, the legal paradigm in question is fundamentally flawed in that it is bent towards property rights doctrine, which is unable to provide due emphasis on cultural heritage. To me, this is the most serious drawback of the current discourse on repatriation of cultural artifacts, which I intend to flesh out in this Article.

Despite its steady development, the international law regarding the repatriation of cultural property has been stymied by true illumination, as it lacks the necessary dimension of cultural heritage. Therefore, the existing law's inability to adequately enforce repatriation emanates from its statutory weakness of not incorporating the rightful definition of cultural artifacts. As a result, the current legal framework is mired in technical impasse over the return of artifacts to their rightful owners. In this Arti-

5. See David J. Bederman, Christopher J. Borgen & David A. Martin, *International Law: A Handbook for Judges*, 35 *STUD. TRANSNAT'L LEG. POL.* 1, 32 (2003) ("In 1903, an international arbitral tribunal ruled that there was sufficient consensus to make [repose] a rule of international claims practice . . .").

cle, I develop a more objective definition of returnable cultural artifacts by linking the artifacts to the history and heritage of their nation of origin. Thus, I highlight an ignored dimension in the current debate surrounding the repatriation of cultural property. In addition, my objective is to place the repatriation debate on a firmer foothold by clearly delineating cultural internationalism and cultural nationalism, thereby refuting the attempt of existing scholarship to obfuscate the true dimension of the repatriation issue.

With this objective in mind, this Article is segmented as follows. In Part I, I provide an historical account of the temporal trajectory through which the Kohinoor has evolved over the centuries. My exploration of the legality of repatriation begins in Part II, where I explain the structural difficulties presented by arguments that seek to justify the retention of cultural artifacts. This leads to my discussion of the existing international law framework in Part III. The background presented in these sections provides the foundation that I utilize to advance a theoretical framework that expands the definition of cultural artifacts to define the legal paradigm for the repatriation of cultural heritage. Finally, Part IV concludes with the affirmation that there is no place for the continuation of colonial blunders by refusing to repatriate cultural artifacts on account of commercial interests and faulty legal reasoning.

I. *KOHINOOR: WHO ARE YOU? WHERE DID YOU COME FROM?*

Here, I want to illustrate why certain historical wrongs, unleashed by the colonial powers during their colonial occupations, have not been righted despite the independence of the nations they enslaved. The retention of historical objects of extreme cultural and existential significance, which had been wrongfully taken from their countries of origin by colonial powers, is a glaring example. As I embark upon developing a different point of view regarding the repatriation of these objects, one might ask: After almost fifty years, why is repatriation still so significant? In other words, why do we care? This Part will provide a historical account of how the Kohinoor has progressed through the hands of time and how it has gone through a multitude of owners, to a point where it has been snatched from its

rightful place in history to where it languishes today. By providing a cultural and temporal context, I intend to develop my argument for its return to its legitimate owner.

A. *History of the Kohinoor Diamond*

Riding the crests and troughs of history, the Kohinoor has been associated with both the rise and fall of human grief and aspirations. In many ways, however, the Kohinoor is quite ordinary. For it is not the largest of the world's diamonds, nor is it the most brilliant. It does not radiate the most brilliance, nor does it have the best color. The diamond has even been described as dull, most likely for its grayish hue. Despite its flaws, the Kohinoor has become synonymous with the very essence of beauty and wealth. Indeed, history has christened it appropriately; in Persian, "Kohinoor" means "The Mountain of Light."⁶

To better grasp the history of the Kohinoor, the hands of time must be turned back some 5000 years. Some scholars believe the Kohinoor was referenced in the ancient Sanskrit writings of India, which describe the "Syamantaka" jewel.⁷ Hindus claim that Lord Krishna wore it around his neck, and that it was stolen from him while sleeping.⁸ According to another account, the Kohinoor was discovered in the Godavari River in central India around 5000 years ago.⁹ The difficulty of determining the Kohinoor's origin has been compounded by the frequency with which it changed hands. Furthermore, because it was never bought or sold, there are no formal records or receipts of sale or purchase, making the Kohinoor both incredibly valuable and more elusive. The following excerpt sets forth the Kohinoor's early chain of possession:

The Koh-i-noor came into the hands of numerous rulers till it was possessed by Porus, the king of Punjab, who retained the

6. See Philip Seff & Nancy R. Seff, *Kohinoor - "Mountain of Light,"* in *OUR FASCINATING EARTH: STRANGE, TRUE STORIES OF NATURE'S ODDITIES, BIZARRE PHENOMENA, AND SCIENTIFIC CURIOSITIES* 133, 133 (1990).

7. See KEVIN RUSHBY, *CHASING THE MOUNTAIN OF LIGHT* 15 (1999) (mentioning the inclusion of the "Syamantaka" jewel in Indian scriptures).

8. See, e.g., Harpreet Kaur, *Koh-i-noor, A Mountain of Light*, <http://www.dancewithshadows.com/society/kohinoor-diamond-india.asp> (last visited Jan. 2, 2008).

9. See EDWIN W. STREETER, *THE GREAT DIAMONDS OF THE WORLD: THEIR HISTORY AND ROMANCE* 119 (Joseph Hatton & A.H. Keane eds., 1882).

diamond after a peace treaty in 325 B.C. when Alexander left India.

Chandragupta Maurya (325-297 B.C.) became the next possessor and passed it on to his grandson Ashoka who ruled from 273-233 B.C. Later it slipped into the hands of Raja Samprati of Ujjain (Ashoka's grandson). This jewel remained in the custody of Ujjain and the Parmar dynasty of Malwa. When Ala-ud-din Khilji (1296-1316 A.D.) defeated Rai Ladhar Deo, the ruler of Malwa in 1306 A.D., he acquired the diamond. From this stage up to the time of Mughal Emperor Babur, the history of this precious stone is lost once more. Koh-i-noor comes to light again in year 1526.¹⁰

For a diamond that was never bought or sold, the Kohinoor captured the hearts and minds of each generation that possessed it. While accounts of the origin of the Kohinoor vary, it is generally understood that it was most likely mined in India.¹¹ The trail of the diamond is traced through the early hands of the Moguls as described in the accounts of the Mogul Emperor Babur.¹² The Kohinoor stayed in the hands of the Moguls until Persian conquerors attacked the Indian city of Delhi and got a hold of it.¹³

It is with the Persians that the diamond was crowned with its

10. Kaur, *supra* note 8.

11. See MARCELL N. SMITH, DIAMONDS, PEARLS AND PRECIOUS STONES: WHERE THEY ARE FOUND, HOW CUT, AND MADE READY FOR USE IN THE JEWELER'S ART, THEIR COMPOSITION AND VALUE 14 (1913) ("[F]rom the ancient Indian mines came many of the famous diamonds of the world: the Kohinoor, the Great Mogul, the Blue Hope, and others."). The diamond mines of India were largely located in the region of Golconda, in the Indian state of Andhra Pradesh. *Id.*

12. See THE BABURNAMA: MEMOIRS OF BABUR, PRINCE AND EMPEROR 328 (Wheeler M. Thackston trans., Modern Library Paperback ed. 2002) (1996). Babur's official name was Zâhir ud-Dîn Mohammad. He lived from February 14, 1483 to December 26, 1530. He was a Muslim Emperor from Central Asia who founded the South Asia dynasty. It is suggested he was a direct descendant of Genghis Khan. In his autobiographical work, the *Baburnama*, he makes observations about society, politics, and economics. He also describes the civilizations and the peoples he encountered. Historical, geographical, and cultural accounts can also be found in his writings. See, e.g., *id.*; HAROLD LAMB, BABUR THE TIGER (1961).

13. See RUSHBY, *supra* note 7, at 260. Most accept the accuracy of the historical accounts of the Kohinoor beginning in the 1500s, which is when the Kohinoor is mentioned in the Babur's memoirs, the *Baburnama*. It describes the diamond as having belonged to a King of Malwa in the early 1300s before it was relinquished as war booty to Alauddin Khilji, the second ruler of the Khilji dynasty in India. Before reaching Babur, the diamond came into the possession of several dynasties that ruled the north-western Indian capital of Delhi. Despite the debate over these accounts of the Kohinoor, it is widely accepted that Babur's diamond was likely the Kohinoor.

legendary nomenclature. After the Persian Emperor Nadir Shah gazed upon the diamond, he reportedly cried out, “koh-i-noor.”¹⁴ As noted above, this translates into “mountain of light.” Emperor Shah carried the gem back with him to Persia, where it remained until his death.¹⁵ The Kohinoor then belonged to various Afghan chiefs, Afghan kings, and Indian kings. Ultimately, however, through various rebellions and clashes, the Kohinoor came into the hands of the Indian king Maharaja Ranjit Singh.¹⁶ It is with the Maharaja’s family that the Kohinoor stayed before it was taken by the British.¹⁷ History dictates that it remained with Maharaja Ranjit Singh and was passed down to subsequent generations. Ultimately, however, the Kohinoor was taken from the twelve-year-old boy king Maharaja Duleep Singh as part of British war booty during the colonization of India.¹⁸

Although the period detailed above stretches over several centuries and is characterized by vacillating accounts of transfer, greed, and violence, it appears that the Kohinoor’s past establishes a fundamental truth—that the Kohinoor rightfully belongs to the Indian subcontinent.¹⁹ This establishes the first fundamental thread of the current enquiry.

B. *Across The Ocean: Journey to England*

The Kohinoor, a part of Britain’s war treasure, was taken at the inception of the colonization of India. The documented ac-

14. See Kaur, *supra* note 8.

15. See RUSHBY, *supra* note 7, at 224.

16. See *id.* at 225.

17. See Vivek K. Hatti, Note, *India’s Right to Reclaim Cultural and Art Treasures from Britain Under International Law*, 32 GEO. WASH. J. INT’L L. & ECON. 465, 487 (2000).

18. See RUSHBY, *supra* note 7, at 235-36.

19. The focus should be on the notion that the Kohinoor was taken out of the Indian subcontinent, and taken from the hands of an Indian King. Indeed, it is worth echoing the reply of Kuldip Nayaer, former High Commissioner to the UK, to remarks made by a British official in Delhi with regard to the Kohinoor:

“Mr Nayar, the Kohinoor does not belong to India. If ever things come to such a pass when we have to return it, we would rather give it to Pakistan.” I said in reply: “By all means, do so. The Kohinoor would at least return to the Indian subcontinent.”

Kuldip Nayar, *I Don’t Think India Will Ever Get the Kohinoor*, TRIB. (India), July 17, 2005, available at <http://www.tribuneindia.com/2005/20050717/spectrum/main1.htm>. However, it is understandable how many get caught up in the argument over whether the Kohinoor belongs to the nation of India or the nation of Pakistan. While that is an important topic, it can be debated and solved once the British have formally agreed to return the Kohinoor to the Indian subcontinent.

count of the Kohinoor's journey out of India begins in the 1800's.²⁰ Under undivided India, the Maharaja Ranjit Singh, ruler of Lahore, Punjab, was the owner of the Kohinoor. Evidence suggests that, while on his deathbed, the Maharaja Ranjit Singh requested that the Kohinoor be taken to the famous temple of Jagganath.²¹ The Maharaja's ministers, though, refused to carry out the request.²²

Maharaja Ranjit Singh had several sons, and the Kohinoor successively passed through their hands. The Kohinoor ultimately came to rest in the hands of the twelve-year-old Maharaja Duleep Singh. Maharaja Duleep Singh took over the throne in 1843.²³ He was the last Indian citizen to own the Kohinoor.²⁴

The deposed Maharaja Duleep Singh did not, to say the least, willingly hand the Kohinoor over to Queen Victoria. Along with the spoils of war, and Britain's victory in the Anglo-Sikh War (1848-1849 A.D.), came the annexation of Punjab under the Treaty of Lahore.²⁵ The twelve-year-old Maharaja Duleep Singh signed the Treaty of Lahore, which not only resulted in the annexation of Punjab but also stripped Maharaja Duleep Singh of his sovereignty, leadership, and wealth, including the Kohinoor. The rest is a soiled history of British occupation and efforts to colonize India.

With the British colonization of India in full swing, Britain proclaimed ownership of the Kohinoor in the formalized Treaty

20. See STREETER, *supra* note 9, at 116-134, for a discussion of the Kohinoor diamond's journey within India and its ultimate removal to Britain. It is important to understand that the Kohinoor's origin has several accounts. The various accounts describe the diamond as appearing in Afghanistan, Pakistan, and various parts of India. However, regardless of the particular region from which the Kohinoor originates, it is clear that the Kohinoor originates from the greater Indian subcontinent. Proving the actual birthplace of the Kohinoor is not a critical point. Rather, it is more important to establish the immediate owner before the British occupying force laid claim to the diamond. That owner has been established. It was the Indian citizen and leader Maharaja Duleep Singh. This piece of history is not disputed and is confirmed by British historians.

21. See RUSHBY, *supra* note 7, at 253.

22. See *id.*

23. See *id.* at 261.

24. See *id.* at 235-36.

25. See Treaty Between the British Government and the State of Lahore, Gr. Brit.-Lahore, pmbi., Mar. 9, 1846, available at <http://www.allaboutsikhs.com/sikh-history/anglo-sikh-treaty-4-1846.html> (stating that "the territories then in the occupation of the Majorajah of Lahore, on the left or British bank of the river Sutlej, were confiscated and annexed to the British Provinces.").

of Lahore in 1849. The Treaty of Lahore contains a specific clause that reads: "The gem called the Koh-I-Noor which was taken from Shah Shuja-ul-Mulk by Maharajah Ranjit Singh shall be surrendered by the Maharajah of Lahore to the Queen of England."²⁶

British parliamentary Marquis Dalhousie, who was in charge of the ratification of this treaty, showed a personal interest in the Kohinoor and ensured that the British took it. It is indisputable that Marquis Dalhousie never considered the Kohinoor a gift. Instead, he considered it nothing other than a spoil of the war. This is evident from his writings to a friend in 1849:

The Court [of the East India Company] you say, are ruffled by my having caused the Maharajah to cede to the Queen the Koh-i-noor; while the 'Daily News' and my Lord Ellenborough [Governor-General of India, 1841-44] are indignant because I did not confiscate everything to her Majesty, and censure me for leaving a Roman Pearl in the Court . . . I was fully prepared to hear that the Court chafed at my not sending the diamond to them, and letting them present it to Her Majesty, They ought not to do so—they ought to enter into and cordially approve the sentiment on which I acted thus. The motive was simply this: that it was more for the honor of the Queen that the Koh-i-noor should be surrendered directly from the hand of the conquered prince into the hands of the sovereign who was his conqueror, than it should be presented to her as a gift—which is always a favour—by any joint-stock company among her subjects. So the Court ought to feel. As for their fretting and censuring, that I do not mind—so long as they do not disallow the article. I know I have acted best for the Sovereign, and for their honour, too.²⁷

It was clear that, under the leadership of Marquis Dalhousie, the conquering British wanted nothing less than the destruction of the very powerful Sikh region in India, which, to the colonizers, included leaving no valuables and no reminiscences of the powerful historical legacy of the Sikhs. Marquis Dalhousie captured this sentiment nicely when he wrote, "The task before me is the utter destruction and prostration of the Sikh power, the

26. See Press Release, Historic Royal Palaces, Factsheet: The Koh-I-Noor Diamond "Mountain of Light", available at <http://www.hrp.org.uk/Resources/Kohi%20Noor.pdf> (last visited Jan. 6, 2008).

27. See Ryan Thompson, The Koh-I-Noor Diamond, <http://famousdiamonds.tripod.com/koh-i-noordiamond.html> (last visited Jan. 2, 2008).

subversion of its dynasty and the subjection of its people. This must be done promptly, fully and finally.”²⁸ Dalhousie also wrote, “It is not every day that an officer of their Government adds four millions of subjects to the British Empire, . . . [a]nd places the historical jewel of the Mughal Emperors in the crown of his Sovereign. This I have done.”²⁹

History, therefore, leaves no doubt that the Kohinoor was not a generous gift, but rather a spoil of war handed over by a boy king to his conqueror, Queen Victoria. Without delay, Marquis Dalhousie orchestrated the transfer of the Kohinoor to Queen Victoria in 1851. Maharaja Dulip Singh traveled to Britain and personally delivered the Kohinoor.³⁰

Since its arrival in Britain the diamond has always been worn by women,³¹ and in the 1930s it was specifically fitted for the crown of Queen Elizabeth.³² In 2002, the crown was placed on top of her casket while she lay in state.³³ The Kohinoor currently resides in the Tower of London, and after undergoing several questionable improvements, it currently weighs about 106 carats.³⁴

28. B.L. GROVER & S. GROVER, *A NEW LOOK AT MODERN INDIAN HISTORY: MEN OF DESTINY* 151 (1998).

29. RUSHBY, *supra* note 7, at 236. Rushby also notes that:

On the 29th March, 1849 the Maharaja Dulip Singh, still only twelve, sat on the golden throne of his father for the last time and signed away his kingdom. Just to make sure, the British took the throne too. It is now in the Victoria and Albert Museum in London.

Id. at 235.

30. See Sanjay Suri, *The Kohinoor and its Many Claimants*, NEWS INDIA-TIMES, Jan. 11, 2002, at 32, (“Duleep Singh was brought up in London and was made to present Ranjit Singh’s prized possession, part of his booty during a foray into Afghanistan, to Queen Victoria. The Kohinoor has since been a part of the British Crown Jewels.”)

31. See C.P. Bellappa, *Quest for the Kohinoor*, HINDU (India), Jan. 21, 2005, available at <http://www.thehindu.com/thehindu/yw/2005/01/21/stories/2005012100200200.htm> (“It is believed that the Kohinoor carries with it a curse and only when in possession of a woman will the curse not work . . . Since Queen Victoria the diamond has always gone to the wife of the male heir to the throne.”).

32. See Kaur, *supra* note 8; Thompson, *supra* note 27.

33. See *The Queen Mother: Jewelled Crown a Piece of History*, GLOBE & MAIL (Canada), Apr. 6, 2002, at A10 (“The crown that sat atop the Queen Mother’s coffin for yesterday’s ceremonial procession to Westminster Hall is a priceless melding of precious metal and jewellery made specially for her in 1937.”).

34. See Rafal Swiecki, *Large and Famous Diamonds*, http://www.minelinks.com/alluvial/diamonds_1.html (last visited Jan. 2, 2008) (“The ‘Koh-i-noor’ is now a stone of considerable beauty, weighing 106 1/16 carats; its new form . . . is, however, too thin for a perfect brilliant; moreover, it is not of the purest water, and the colour is slightly greyish. In spite of these blemishes it is valued at . . . (US\$11,125,244).”).

C. *Recent Efforts to Recover the Kohinoor*

Despite its lackluster brilliance, the Kohinoor is deeply meaningful to many in the Indian subcontinent. Over the last few decades, numerous persons and nations have proclaimed ownership of the diamond. Repatriation of the diamond has been requested by officials in India,³⁵ Pakistan,³⁶ and Afghanistan.³⁷ An individual, Mr. Beant Singh Sandhanwalia, has also claimed ownership.³⁸

Several Members of the Indian Parliament argued that the Kohinoor should be returned to India because the British illegally acquired the diamond during their colonial rule of India.³⁹ Indian historians have argued that the Maharaja that relinquished the Kohinoor to the British was a minor and would not have relinquished the diamond without prompting by the British.⁴⁰

The former Prime Minister of Pakistan, Zulfikar Ali Bhutto, demanded that the Kohinoor be returned to Pakistan because it was in present-day Pakistan, where it was surrendered to the British.⁴¹ Bhutto formally requested the return of the Kohinoor in August of 1976, which coincided with the anniversary of Pakistan's independence from Britain.⁴²

35. See Satish Jacob, *Indian MPs Demand Kohinoor's Return*, BBC NEWS ONLINE, Apr. 26, 2000, http://news.bbc.co.uk/2/low/south_asia/727231.stm.

36. See Rashmee Roshan Lall, *Britain Nixed Pakistan Claim to Kohinoor*, TIMES OF INDIA, Dec. 30, 2006, available at <http://timesofindia.indiatimes.com/articleshow/986002.cms> ("The demand for the Kohinoor's restoration – to Pakistan, not India because it was on Pakistani soil that the gem was surrendered – came in a letter from the then Prime Minister Bhutto to his British counterpart, James Callaghan on the [eve] of Pakistan's independence day ceremonies in August 1976."). According to Bhutto, returning the Kohinoor to Pakistan "would be a convincing demonstration of the spirit that moved Britain voluntarily to shed its imperial encumbrances and lead the process of decolonisation." *Id.*

37. See Kate Clark, *Taliban Demand Gem from UK Crown Jewels*, BBC NEWS ONLINE, Nov. 7, 2000, http://news.bbc.co.uk/2/hi/south_asia/1011468.stm.

38. See *Kohinoor's Ownership to be Fixed Soon*, TRIB. (India), May 24, 1999, available at <http://www.tribuneindia.com/1999/99may24/head3.htm> ("Mr. Beant Singh Sandhanwalia, the last recognised heir of late Maharaja Duleep Singh, who now lives in Amsterdam, claimed the contents of the Swiss safe box would prove that the diamond belonged to him."). Mr. Beant Singh Sandhanwalia has promised to give the diamond to the Sikh Golden Temple of Amritsar, India. See *id.*

39. See Jacob, *supra* note 35.

40. See *id.*

41. See Roshan Lall, *supra* note 36.

42. See *id.*

However, the Indians and Pakistanis are not alone in their demand for repatriation of the diamond. The Taliban, claiming it is the property of Afghanistan, also asked that the Kohinoor be returned.⁴³ Another demand for return of the Kohinoor came from officials of the Jagannath temple in Puri in 2002:

[T]he Jagannath temple in Puri had staked its claim on the Kohinoor, stating that prior to Dalip Singh taking possession of the diamond, it was the temple's property. Its lawyers' claim that they have documentary proof that Maharaja Ranjit Singh had bequeathed the diamond to the temple before his death in 1839. For this, the temple lawyers, quote from a letter preserved in the National Archives of India. This letter was written by the British Political Agent to Ranjit Singh's Court (dated July 2, 1839) and addressed to T.A. Maddock, the officiating Secretary to the Government of India. It says: 'During the last days of his illness, Ranjit Singh is declared to have bestowed to charity—jewels and other property to the supposed value of 50 lakh. Among the jewels, he directed the well-known Kohinoor diamond to be sent to the temple of Jagannath.'⁴⁴

In my view, and in the views of others, Britain welcomes the multitude of claims to the Kohinoor because it complicates the question of who the rightful owner is and thus insulates them from public criticism.⁴⁵ Yet, to me, hiding behind the list of claimants is nothing more than a smokescreen and insincere excuse not to repatriate the Kohinoor to the nation it directly took it from, India.

The list of claimants to the Kohinoor Diamond will never cease. After all, it has a rich legacy which passed many hands of many people in a myriad of locations. But, my focus in this paper is not to prove or disprove those accounts. My intent rather, is to establish a legitimate stream of law which repatriates and

43. See Clark, *supra* note 37.

44. K.R.N. Swamy, *Jewel Chase*, TRIB. (India), July 17, 2005, (Spectrum), available at <http://www.tribuneindia.com/2005/20050717/spectrum/main2.htm>.

45. See *id.*

In fact, the British are cashing in on this controversy to ensure that the diamond is not returned to the subcontinent. In June 2000, as stated by the Rajya Sabha member Kuldip Nayar, the British High Commission in India had expressed its ambiguity over the ownership of the diamond. Most importantly, it said it wasn't sure whether the Kohinoor rightfully belonged to India.

Id.

protects cultural heritage artifacts like the Kohinoor Diamond. These cultural heritage icons are beyond any monetary value, but are weighty on the ethereal value. These cultural heritage artifacts are a linkage of a civilization, a people to their past, present and future. The Kohinoor Diamond, without doubt, is a cultural heritage artifact that links the people of the greater Indian subcontinent. Its history also includes being looted as war booty from a boy ruler from the sovereign Indian nation.⁴⁶

II. *NOT TO REPATRIATE BUT TO RETAIN: DISSECTING THE FLAWED ANALYSIS*

The Kohinoor Diamond's origin and its journey through both the temporal and spatial landscapes, provide us with a prism through which the question of ownership must be resolved. The question of repatriation has been made difficult by the advancing of faulty legal paradigms and scholars' analyses. Against this backdrop, I will present my own analysis to refute the claims of those who believe cultural artifacts like the Kohinoor must not be returned to their original sources. In order to properly establish my reasoning, I want to draw attention to the existing legal rationale espoused by Professor Merryman, who believes that the Parthenon Marbles should not be returned to Greece.⁴⁷ Although no legal analysis surrounding the return of the Kohinoor is currently available, the basic tenets of Professor Merryman's argument are important in understanding the related legal landscape. The legal analysis of the Marbles' repatriation is important in our present discourse due to the contextual relevance it presents to an analysis surrounding the Kohinoor. If we accept the governing legal theory for the Marbles, we are obligated to accept and apply those same theories for the Kohinoor. Therefore, an analysis for presenting a rationale for the repatriation of the Kohinoor Diamond must proceed via refuting the arguments put forward against the return of the Parthe-

46. Here I reference the Indian subcontinent beyond national boundaries, but as a linkage of history which connects the people of these nations. It is well documented that the people of these great nations hold similar histories, which include geography. My emphasis is on finding the legal ground for the conquered nation to rightfully demand its artifacts back from the conquering nation under the definition of cultural heritage.

47. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1921 (1985).

non Marbles.⁴⁸

A. *Property Rights Analysis of Cultural Artifacts*

While developing the legal analysis surrounding the Parthenon Marbles, Professor Merryman states, “The Marbles are a familiar and glamorous example of a class of objects called, with increasing frequency ‘cultural property.’”⁴⁹ This represents, at the fundamental level, the basic fatal flaw of the contemporary legal framework in defining the applicable legal characteristics of some cultural artifacts. Despite their artistic, ethnographic, archaeological and historical value, attaching basic elements of tangible property upon them takes away the main objective of evaluating their place in the history of human civilization. On the contrary, however, if we extract the basic elements of property rights from the objects, the existing legal theory makes it incumbent upon us to determine the legal consequence of repatriation by identifying the legal ownership of these objects.

This framework of legal ownership determination is premised on identifying the trajectory of transference of the legal title of the objects, which does not place reliance upon their historical, cultural and heritage value to humankind. Thus, for all practical purposes, these artifacts only retain the very basic characteristics of tangible property,⁵⁰ a paradigm that has evolved by means of attaching a subject and object relationship. Therefore, as long as an occupier of a cultural artifact is able to produce tangible proof exhibiting some sort of legality into the transfer of these properties, the said occupier can continue to possess objects of immense historical significance. This framework does

48. Understanding Professor Merryman’s analysis is important in recognizing the structural difficulties in contemporary scholarship. Through my analysis, I have established in this Essay that both the Parthenon Marbles and the Kohinoor Diamond belong to the same class of cultural artifacts, bound by the thread of antiquities eternity, histories continuity and its people’s shared destiny. In my view, if a legal argument is made to justify the retention of the Marbles, the proponents of non-repatriation will apply that faulty logic toward the Kohinoor Diamond. Before embarking on developing a more sustainable legal framework, it is of utmost importance to recognize the structural inefficiencies in Merryman’s argument.

49. See Merryman, *supra* note 47, at 1888.

50. I have discussed the basic characteristics of tangible property rights and how property rights can be applied differently in various scenarios, by distinguishing between the tangible and the intangible characteristics. See Saby Ghoshray, *Searching for Human Rights to Water Amidst Corporate Privatization in India: Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19 GEO. INT’L ENVTL. L. REV. 643, 672 (2007).

not take into consideration some of the basic realities of the colonization, occupation, and invasion that took place from the medieval period to the modern era. This legal paradigm does not consider the fact that an occupier was in an advantageous position to compel its vanquished into granting him the legal rights of an object, and as such, may have insulated him from any repatriation demand under the faulty framework discussed here.

The fact pattern and analysis presented here makes it clear that if we apply the legality of transfer under the property rights analysis on the cultural artifacts, we might never be able to disprove the legality of current ownership. This is true partly because the occupier has created the condition of legal property transfer based on the existing norm, and partly because the cultural objects discussed here belonged to a collective humanity, without having the rights of title attached to a specific owner. Unfortunately, basic property rights analysis fails to distinguish between collective ownership and individual ownership. Ironically, therefore, the temporal trajectory of most of the cultural artifacts being displayed in Western museums today may immunize their possessors, and under the existing faulty legal paradigm, the originating country may never attain the legal standing for their repatriation.

B. *Temporal Limitation of Cultural Artifacts*

The existing international law provides the superficial intent of protection and preservation of cultural artifacts, while tacitly hiding the temporal restrictions placed upon their return to the originating country. One such legal hurdle is the statute of limitations placed on the return of these artifacts under various international conventions and statutes.⁵¹ Professor Merryman, in his analysis of repatriation of cultural objects, identifies such an impediment.⁵² His analysis regarding the Parthe-

51. The law on the subject of return and repatriation of cultural objects has been developing for a number of years through various treaties and conventions. Despite the spirit of repatriation and preservation enshrined in these treaties, the return of artifacts is governed by the restraint placed by the statute of limitations. As noted by Professor Merryman, "Unless some unusual exception were made, it seems clear that the Greeks have lost any right of action they might have had for the recovery of the Marbles before an English court, where the applicable statute of limitations is six years." Merryman, *supra* note 47, at 1901.

52. *See id.* at 1900-01.

non Marbles advanced an argument against repatriation based on a statute of limitations of six years.⁵³ The erroneous nature of this analysis presents us with the inherent structural difficulty in dealing with cultural artifacts belonging to several centuries back in time. Clearly, the existing realities surrounding such artifacts evoke emotions of extreme frustration and lack of access to applicable means of redress.

If an object was transferred more than a century prior to the enactment of any elements of existing norms of customary international law, how can a workable and universally acceptable solution be devised based on a statute of limitations based on six years? We must be especially cognizant that, while the object transfer occurred more than a century back, it took more than a few decades to even begin the process of formalizing a legal framework to effectively deal with the repatriation of such objects. Clearly, inserting such a temporally restrictive statute of limitations is ineffective at the most basic level, and as such, the whole paradigm could be considered ineffective.

The incorporation of such a temporal limitation could be understood by delving further into the basic principles of the existing legal paradigm. The statute of limitations emanates from the concept of tangible property rights. Abstracting this, we recognize that if we extend the temporal boundary further, we encounter significant distortion in the deterministic process. This distortion results from the absence of available evidence, which renders the entire transfer of property construct legally inconsequential. This element clearly establishes the flawed nature of the basic property rights analysis as it is applied to cultural artifacts. Besides its applicability restriction to tangible properties and its time constraint, its fundamental precepts are predicated by its reliance on separating the entities from one another. On the contrary, the cultural artifacts in question may inculcate and encapsulate a plethora of intangible characteristics, which the current framework cannot fully comprehend. The separation principle applicable to basic property rights analysis may not fully impart justice in determining the legal ownership of such cultural artifacts. As I shall argue later in this Article, in dealing with such artifacts, it is the collective ownership,

53. *See id.*

not separable and individualized ownership, that must govern the legal decision-making process.

C. *Commercial Interests of the Owners of Cultural Artifacts*

While espousing his strong doctrinal analysis of why the Parthenon Marbles must remain in the confines of the British Museum, Professor Merryman articulates a commercial rationale:

The Elgin Marbles symbolize the entire body of unrepatriated cultural property in the world's museums and private collections. Accordingly, the preservation and enjoyment of the world's cultural heritage and the fate of the world's great museums are all in some measure at stake in a decision about the Marbles.⁵⁴

When commercial trade-off analysis and economic value based judgment occludes the moral view of repatriation, and when the hopes and aspiration of one segment of mankind is dependent upon the commercial gain and loss of another segment, any resulting legal analysis arising out of such discourse must be summarily rejected. As I have established in this Section, the severe flaws and bias in Merryman's analysis makes his legal argument unsuitable for application into our future discourse of repatriation of cultural artifacts.

I must end this Section with questions. Questions that must reverberate through the legal conscience of international law: Can the basic hackneyed commercial interests of museums determine the legality of repatriations of such precious artifacts? Especially, when their origins go beyond centuries? When their historical value stands out as guideposts to our common ancestry? When their temporal trajectories remain a window to our historic past? Obviously, the existing legal framework must be revitalized with more objective illumination; how and why is what I shall detail in the forthcoming sections.

III. *EXTRACTING THE WEAKNESS OF THE INTERNATIONAL LAW OF REPATRIATION*

Repatriation of cultural artifacts depends on both the prevailing framework of international law,⁵⁵ and the governing legal

54. *See id.* at 1895.

55. Several international agreements exist, creating a framework of international law. *See, e.g.*, United Nations Educational, Scientific and Cultural Organization

environment of the country possessing such artifacts at the present time. The target country can be understood as the country in which the cultural artifacts reside after having been transported from their originating country. Therefore, to gauge the difficulty within existing laws of repatriation, we must recognize the legal impediments emanating from both the legal landscape of international law⁵⁶ and the domestic laws of repatriation in the target countries.⁵⁷

A. Framework of International Law

No lawsuit has yet been filed for the repatriation of the Kohinoor Diamond. Neither has any official complaint been filed with any international governing body. Therefore, the fundamental legal question of repatriation begins with the enquiry as to where shall the legal proceedings begin. In any exercise of repatriation for the Kohinoor Diamond, the legal dialogue and subsequent discourse will either begin its journey at, or pass through at some point via repatriation lawsuits, the International Court of Justice ("ICJ")⁵⁸ or the European Court of Justice ("ECJ").⁵⁹ Forum selection or determination of governing judicial mechanism is the fundamental building block in the dis-

("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970 Convention]. For a definition of cultural property, see *id.* art. 1; see also International Institute for the Unification of Private Law ("UNIDROIT") Convention on Stolen or Illegally Exported Cultural Objects art. 2, Annex 2, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Armed Conflict Convention] (providing a broader definition of cultural property).

56. See Merryman, *supra* note 47, at 1890, 1893.

57. See generally Simon Halfin, *The Legal Protection of Cultural Property In Britain: Past, Present and Future*, 6 DEPUAL-LCA J. ART & ENT. L. & POL'Y 1 (1995). The United Kingdom and Ireland follow common law but the rest of Europe follows civil law. See *id.* at 34 n.186.

58. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. 993 [hereinafter ICJ Statute]; see also BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 18 (2d ed. 1995).

59. The European Court of Justice plays a vital role in acting as arbiter for almost all such disputes. For example, legislation related to the return of cultural property will be governed by its rules. For example, article 169 of the Treaty of Rome gives the Court jurisdiction to hear cases where the Court considers that a member state has failed to fulfill an obligation of the Treaty. See Treaty establishing the European Economic Community arts. 169-70, Mar. 25, 1957, 298 U.N.T.S. 11, *amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter Treaty of Rome].

bursement of justice in disputes between members of the international community. Analyzing the factors and statutes influencing the ICJ is important in this context, as this is the foremost forum to adjudicate legal disputes concerning trans-continental sovereign states. The ICJ was designed after World War II to be the principle judicial organ for settling disputes between international parties. It would operate by applying rules established through various international conventions, international customs and the vast body of treaties emanating from the general principle of law, ratified and recognized by civilized nations.⁶⁰ Additionally, Article 93 of the U.N. Charter mandates that the two nations involved in the case of the Kohinoor, the United Kingdom and the Republic of India, are *ipso facto* parties to the statute of the ICJ.⁶¹ Therefore, if India were to bring an actionable lawsuit before the ICJ for the return of the Kohinoor Diamond, the Court would apply the text and statutes of relevant treaties and conventions as part of the legal framework of customary international law.

The specific issue of repatriation of cultural artifacts, like the Kohinoor Diamond, to its original owner does not have any explicitly mandated provision under customary international law, and therefore, ownership must be determined through relevant and applicable doctrinal development in contemporary international law.⁶² There is a clear bent in the emerging arena of contemporary international law towards preservation of cultural heritage and retention of its original state.⁶³ For example, the Convention for the Protection of Cultural Property in the Event

60. See ICJ Statute, *supra* note 58, art. 38; see also CARTER & TRIMBLE, *supra* note 58, at 296-97.

61. The term *ipso facto* comes from Latin and means "by the fact itself." It is an expression which is mainly used in a formal context. In the current context, when a State joins the United Nations, the nation becomes an *ipso facto* party to the International Court of Justice, since the ICJ Statute is embodied in the UN Charter. See U.N. Charter art. 93. The meaning of *ipso facto* becomes clearer by applying this concept to the U.N. Member States. They are not *ipso facto* parties to the ICC, which involves the ratification of the Rome Statute, which is separate from the U.N. Charter.

62. See Karen Goepfert, *The Decapitation of Rameses II*, 13 B.U. INT'L L.J. 503, 520-21 (1995) (discussing rapidly developing emerging norms of customary international law as they relate to repatriation of cultural artifacts); John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property*, 28 ENVIRONS ENV'T'L. L. POL'Y J. 1, 78-86 (2004) (advocating for retroactive application of modern customary international law because it would lead to repatriation of cultural property taken prior to enactment of UNESCO and UNIDROIT).

63. See generally Ann P. Prunty, *Toward Establishing an International Tribunal for the*

of Armed Conflict (“Armed Conflict Convention”),⁶⁴ the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO 1970 Convention”),⁶⁵ the UNESCO Convention Concerning the Protection of the World Cultural and National Heritage (“UNESCO National Heritage Convention”),⁶⁶ and the International Institute for the Unification of Private Law (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”).⁶⁷ Individually, none of these conventions provide an effective mechanism, nor do they explicitly mandate an applicable procedure for the return of objects accumulated by the colonial powers during their colonial occupations. Expanded abstractions of the scope and intent of some of these treaties can clearly show their bias against repatriation of objects transferred during colonial rule, which makes it legally impossible for the suffering country to recoup its cultural artifacts via these international justice mechanisms.

The Armed Conflict Convention is specifically designed for the protection of cultural property transferred from the originating country during a period of armed conflict.⁶⁸ Article 33, section 3 delineates the scope of the Convention by mandating that the protection and repatriation of objects refer to those obtained,⁶⁹ “[e]ither before or after the beginning of hostilities or occupation.”⁷⁰ Attempting to apply this legal framework to the return of the Kohinoor brings out the stark reality of both substantive bias and temporal constraint. We are reminded that the Diamond was transferred out of the then unified, undivided India in the 1840s, over a century before the said Convention came into effect. This technical impasse presents us with a host of im-

Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles, 72 *Geo. L.J.* 1155 (1984).

64. See Armed Conflict Convention, *supra* note 55.

65. See UNESCO 1970 Convention, *supra* note 55.

66. See UNESCO Convention Concerning the Protection of the World Cultural and National Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter UNESCO National Heritage Convention].

67. See UNIDROIT Convention, *supra* note 55.

68. See Armed Conflict Convention, *supra* note 55, pmbl.

69. See *id.* art. 33, §3.

70. *Id.*

portant questions, which we must carefully examine to be able to devise a legitimate and applicable legal mechanism to answer the question of repatriation.

First, is there a statute of limitations that would specifically define the temporal boundaries under which the Armed Conflict Convention is applicable? If there is no temporal restriction in effect, can this Armed Conflict Convention cover the period containing the mid-nineteenth century, the period in which the Kohinoor was taken out of India? Second, assuming there is no temporal restriction, what is the scope of substantive coverage under this treaty? Without specifically becoming a signatory, could a particular country invoke the Armed Conflict Convention? Stated specifically, could India invoke the Armed Conflict Convention and thus argue that any transfer of property as a result of the 1840's Second Anglo-Sikh War comes under the purview of this Armed Conflict Convention? Clearly, the answers are implicit under the *post de facto* principles of law, and as such, we cannot justify covering the conflict under a Convention that was established over 150 years after the conflict.

The UNESCO 1970 Convention prohibits the acquisition of illegally exported cultural property originating in another State Party.⁷¹ However, Article 7(a) of this Convention clearly stipulates the time frame of its applicability, as it only covers items "exported after entry into force of this Convention, in the States concerned."⁷² Therefore, the UNESCO 1970 Convention does not leave room for a country to argue for the repatriation of articles taken 130 years before the Convention existed, even if it can be proven that the property in question was illegally transported.

The language of the UNIDROIT Convention is similarly clear as to the substantive scope of its application.⁷³ The Convention stipulates that it is applicable to claims of an international nature related to "the restitution of stolen cultural objects . . . [and] the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the ex-

71. See UNESCO 1970 Convention, *supra* note 55, art. 7(a).

72. *Id.* Currently, 114 states are members. See UNESCO Organization Legal Instruments, <http://portal.unesco.org/la/convention.asp?KO=13039&language=&order=alpha> (last visited Jan. 2, 2008).

73. See UNIDROIT Convention, *supra* note 55, art. 1; see also LYNDAL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION 22-24 (1997).

port of cultural objects for the purpose of protecting its cultural heritage.”⁷⁴ The temporal restriction based on its statute of limitations makes it legally non-viable for the current discourse regarding Kohinoor. Therefore, unless the text of the existing international treaties regarding cultural property are enhanced, the country of India resides at the precipice of a legal twilight zone as it searches for answers, more than a century after its prized possession was stolen away from its bosom.

The National Heritage Convention was developed explicitly to prevent the participating nations from invoking “deliberate measures which might damage directly or indirectly the cultural and natural heritage” of another State Party, by implementing a bulwark consisting of “a system of international cooperation.”⁷⁵ Clearly, the objective of this convention is to engage in a collective measure premised on cooperation to prevent the damage to cultural heritage.⁷⁶ Of all the conventions or treaties I have listed here, this one has the weakest legal standing for a multitude of reasons. First, the spirit of cooperation is superficially liberating, yet inherently flawed in a contentious issue. The influential members of this Convention are predominantly the owners of some of the established museums and repositories of cultural artifacts. Restricted by the commercial interests of their museums, the participating countries are extremely unlikely to relinquish any cultural artifacts that might remotely jeopardize their domestic economic interests. I draw corroboration of this point in the writings of Professor Merryman, as he eloquently established:

If the principle were established that works of foreign origin should be returned to their sources, as Third World nations increasingly demand in UNESCO and other international fora, the holdings of the major Western museums would be drastically depleted. The Elgin Marbles symbolize the entire body of unrepatriated cultural property in the world’s museums and private collections. Accordingly, the preservation and enjoyment of the world’s cultural heritage and the fate of the collections of the world’s great museums are all in some measure at stake in a decision about the Marbles.⁷⁷

74. See UNIDROIT Convention, *supra* note 55, art. 1.

75. UNESCO National Heritage Convention, *supra* note 66, art. 6(3).

76. See *id.* art. 7.

77. See Merryman, *supra* note 47, at 1895.

Secondly, without legal definitiveness, the spirit of cooperation is a shallow paradigm that has no adjudicatory power of mandating that a participating country return the artifact in question. Third, despite customary international law's encouraging movement towards protecting ancient cultural heritage and cultural properties, the predominant focus remains prospective protection in the modern area.⁷⁸ Finally, the very weak retroactive feature inherent in these norms make recovery almost impossible for any country that has suffered the inglorious fate of having its prized possession removed while invaded or occupied.⁷⁹ In general, these treaties and conventions are premised on a broader sense of camaraderie and goodwill. The practicality of commercially-driven museum operations and vestiges of the imperialistic fervor fosters the converse of this spirit. Without a definitive legal instrument of a binding nature, the spirit of cooperation and goodwill is an untenable paradigm for countries like India, Turkey and Greece, from whose bosom countless treasures have been plundered by the colonizing powers.

Although treaties and conventions respecting the rights of great civilizations of yesteryear to collect their rightful cultural artifacts is a great achievement of international law, the governing legal discourse of repatriation is premised in a primitive, yet dominant theme of basic property rights. This basic property rights doctrine of law is fundamentally flawed on two counts. It places reliance on an economic value-based argument, which has evolved over the centuries under the object-subject relationship, and has limited recovery through temporal restrictions. Therefore, unless the property rights bias is lifted from the existing norms and agreements, the repatriation of the Kohinoor Diamond or the Parthenon Marbles, and countless such treasures, will be a hard road for the countries where civilization first saw its sunrise.

B. *Why Is a Legal Paradigm Premised on Property Rights Untenable?*

As established in the preceding section, repatriation of cultural property is based on a set of legal paradigms. As such, those will form the basis of my argument in favor of revamping the existing legal paradigm of repatriation. Property rights anal-

78. *See id.* at 1893.

79. *See id.* at 1899-1900.

ysis must be seen through the multiple dimensions of the following: (i) economic value judgment,⁸⁰ (ii) object-subject relationship,⁸¹ (iii) temporal restriction,⁸² (iv) lack of tangible property analysis,⁸³ (v) inability to incorporate collective ownership,⁸⁴ and (vi) transfer mechanism based on identification of ownership.⁸⁵

An expansion of the economic analysis of property rights demands that we recognize that a particular property must traverse a trajectory under the guidelines of the theory of economics. Thus, the value of that property must be dictated by a supply and demand mechanism, which indicates the existence of a shaping effect of capitalistic fervor. Under this doctrine, an entity willing to pay the highest market-dictated price is in a position to own such property.

For example, suppose the Kohinoor Diamond is placed in a scenario where a number of potential suitors are able to offer the best available price to the owner at the time the alleged transfer took place. That particular owner could be in a position to transfer the ownership of that diamond due to a plethora of reasons, including but not limited to economic stress. If we are to assume that the transfer has taken place without breaking any applicable law at that time, the transfer must have gone via either one of two paths. The first is by economic analysis-based market mechanism, and the second path is through a non-market driven mechanism of forced transfer. As the historical evidence suggests, it was indeed a forced occurrence of victor's justice where the colonial power imposed a bounty on the vanquished as a condition of release. This transference of property brings us to the second element of the object-subject relationship that I must analyze.

Another norm of fundamental property rights analysis is

80. See *e.g.*, GOTTFRIED HABERLER, *A SURVEY OF INTERNATIONAL TRADE THEORY* (W. Michael Blumenthal trans., Princeton University 1955), *reprinted in* 10 *THE ORIGIN OF INTERNATIONAL ECONOMICS: DEVELOPMENTS IN INTERNATIONAL TRADE THEORY* 107 (Robert W. Dimand ed., 2004).

81. See MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 194-96 (1993).

82. See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 28-30 (2003).

83. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 107-11 (1997); UNDERKUFFLER, *supra* note 82, at 61-63.

84. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 17 (1989).

85. See UNDERKUFFLER, *supra* note 82, at 20.

that a basic tangible property is devoid of any cultural and historical heritage relationship and, therefore, can be governed by the object-subject relationship. Under this scenario, the cultural property is an object existing under the ownership of a subject. At any given time in the life of such property, there exists a specific, identifiable relationship of ownership that governs the temporal trajectory of that object. These elements of inherent property rights are transferable by virtue of having the authority to do so. In most cases of basic property rights doctrine, the objects are subject to specific identifiable ownership that can, in turn, be transferred to others. Unfortunately, the cultural properties and heritage artifacts we are focusing on in this discourse are far removed from the domain of such analysis.

The more fundamental issue before us can be posited as follows. These objects are so precious, their link to humanity's history so profound, their ability to couple the past, present and future so unique, that these objects must be insulated from basic legal paradigm and thus, must be rendered impervious and impenetrable to such hackneyed doctrinal analysis. Therefore, the legal community must recognize that these cultural artifacts cannot be defined, nor their legality determined under such primitive concepts restricted by the object-subject relationship. This limitation of the object-subject relationship opens up other structural inadequacies of existing laws that comes from intangible characteristics and collective ownership.

The ownership question brings us to the very core of the property transfer issue, as it is perhaps the key element in the determination of repatriation. The British argue that the *de facto* King of Punjab, the 12-year old Prince Duleep Singh, has transferred the diamond by bestowing a gift to the Queen of England at that time.⁸⁶ However, this assumption is based on a false and structurally incorrect premise. First, a person can transfer a property or bestow a gift only if that person is the rightful owner of that object. By placing reliance on the object-subject relationship, I bring to the forefront the subject's relationship with the object, define the characteristic of this object, and utilize such relationship in identifying a determination of ownership. Identi-

86. See WILLIAM BUTLER, *LAND OF THE VEDA: BEING PERSONAL REMINISCENCES OF INDIA* 50 (1872). *But see* Cahal Milmo, *The Curse of Koh-i-noor*, *INDEP.* (London), Dec. 29, 2006, at 10.

ifying such relationships also makes us recognize that cultural heritage and cultural artifacts cannot under any circumstances be owned by a single individual. It belongs to a nation, or even to a civilization. It is owned by a heritage, not delimited by a time frame; rather it persists through the passage of time, exists within an unending time, and connects a nation's historical past with its evolving future. This sublime and substantive element is missing from an analysis of the object-subject relationship. By virtue of imposing collective ownership, I would argue that it is the collective demands of the nation that must prevail over any trivial transference of an object that took place in a colonized era under the fear of imperialistic barbarism.

Finally, temporal restrictions placed on cultural artifacts put them beyond the scope of existing customary international law in its current format. Temporal restrictions are premised on a severe lack of retroactivity, constraining the use of legal measures through statutes of limitations. This makes it impossible for the law to encapsulate the national sentiments of the vanquished in determining the legality of a transfer. In my view, cultural artifacts and cultural heritage are such unique treasures that they cannot be restricted within mere boundaries of time, be it five years or two centuries. Based on these structural inefficiencies, I would argue for a summary rejection of the existing norms of international law for determination on repatriation. With this in the backdrop, I shall now present an explication of legal characteristics that cultural artifacts must possess so that posterity can devise meaningful mechanisms for the rightful determination of repatriation.

IV. ILLUMINATING THE LEGAL CONTOURS OF REPATRIATION OF CULTURAL HERITAGE

Thus far, I have established the insufficiency within the existing international legal framework of the return, repatriation and restitution of cultural properties taken during the pre-colonial or colonial era. As has been evident in the above analysis, no particular reason dominates over others in the existing law's inability to ensure a substantive framework for the repatriation of such objects. In this Section, I will delve in finer granularity into the characteristics of cultural artifacts, by expanding on their relationships with the people they represent, the civiliza-

tion and history they embody. My objective is to go beyond the basic property rights analysis and present a more inclusive definition that can assist in overcoming the structural hurdles within contemporary legal framework so as to illuminate the real issues behind repatriation.

A. *Artifacts as Cultural Heritage*

Repatriation of cultural artifacts is based on an adjudication of the legal status of these objects, according to the existing civil and common law doctrines. In moving beyond property rights analysis, we must embrace an enhanced legal definition of cultural heritage that can encapsulate these cultural artifacts. Thus, by incorporating new characteristics of these cultural objects, we can shape the legal adjudication process to be more open to the possibilities of repatriation of cultural artifacts to their countries of origin. Legal certainty of repatriation comes from the recognition that heritage cannot be transferred and possessed like objects and, therefore, must be repatriated to its rightful culture. Therefore, the new definitional paradigm calls for developing a new legal definition for cultural heritage, and bestowing such characteristics upon the cultural artifacts in question.

One of the difficulties in expanding the definition of cultural heritage to cultural artifacts comes from a structural flaw in the existing discourse that at times is unable to delineate between cultural identity and universal culturalism. In my view, cultural universalism must be viewed through the prism of a euro-centric bias in the current discourse, which attempts to dilute the individual cultural traits of ancient civilizations by espousing a faulty paradigm of cultural internationalism, as can be seen in Merryman's analysis.⁸⁷ In this context, cultural internationalism is a flawed concept, as it simply tries to subsume individual cultures by de-recognizing the individual asymmetries and specific characteristics important for the continued vitality of recessive cultures. Historically, dominant entities engage in the symmetrization process to assimilate and subsume smaller cultural entities for the sole purpose of injecting characteristics of dominant culture for various reasons, ranging from commercial interests to political objectives. Quite often, in our current socio-cultural discourse, we are confronted with such scenarios,

87. See Merryman, *supra* note 47, at 1916-23.

in which the dominant entities attempt to thwart the emergence or revitalization of asymmetric cultural norms that are inconsistent with the general framework of established norms.⁸⁸ However, this cultural symmetrization is an efficient mechanism by which some scholars have attempted to trivialize the impact of cultural artifacts on history and instead advanced the objective of continued possession of yesteryears' heritage in the commercial sanctums of museums and offices.

Cultural internationalism does not address the impact that unique cultural heritage has on cultural revitalization and identity retention. Therefore, I seek to define cultural heritage as the class of objects, incidence or events within a continuous spectrum of history that exclusively projects the cultural uniqueness of specific groups of people. In so doing, these objects and events continue to harbor and encase the hopes and aspirations of people belonging to ancestral civilization, such people exclusively separable by their uniqueness with respect to their relationship with the modern world. In this respect, cultural heritage includes those unique specimens that can act as a bulwark against the sweeping tendency of mass globalization, in which all and every cultural trait is being swallowed under the current global norms of mass corporatization.⁸⁹ In the 21st century, imperialism has reincarnated itself, under the guise of advancing civilization, but with the hidden agenda of corporatization. Thus, cultural heritage helps in the retention and revitalization of disappearing cultural norms against the strong tide of globalization, and in the process, helps in the reformulation of identities.

Rewriting the history of ancient societies by the hands of their conquerors is as old as civilization itself. Cultural artifacts occupy such a unique place in history that, often times, they become the right vehicle for the purpose of either rewriting or distorting the historical trajectory of nations. Such cultural artifacts must be insulated from basic property rights analysis and should be established as cultural heritage to prevent their misuse. Pro-

88. I have examined elsewhere how symmetry, dominance and assimilation interact. See Saby Ghoshray, *Symmetry, Rationality and Consciousness: Revisiting Marcusean Repression in America's War on Terror*, in *EROS AND LIBERATION: HERBERT MARCUSE'S VISION FOR A NEW ERA* (forthcoming 2008).

89. See generally Ghoshray, *supra* note 50 (discussing the subsumation of human rights under the sweeping influence of mass corporatization).

fessor Merryman has boldly pronounced that the Parthenon Marbles (which have now become known as Elgin Marbles, by attaching the artifacts to the original plunderer, Lord Elgin) have very much become a part of British history.⁹⁰ Without going into detail, I draw attention to the dissemination of this historical falsehood, in which Merryman is misaligning the medieval periods with the modern era.⁹¹ For example, the Parthenon Marbles belong to medieval era Greece. The very fact that Elgin utilized his colonial power to desecrate and deconstruct the Parthenon and transfer those marbles—and by virtue the marbles have been placed in a British museum, helping the Museum reap commercial benefits for decades—does not mean they have become part of British culture. Thus, invoking the lofty ideals of cultural internationalism by carefully eliminating the plight of suffering civilization, and continuing the wrongful claim on spoils of colonization, is nothing more than misdirection. In this regard, imposing cultural internationalism at the cost of cultural nationalism is nothing more than a continuation of colonialism.

So, what is cultural heritage? The answer to this question can be obtained by first developing a paradigm to differentiate heritage from property. Where property is specifically in the domain of objects, heritage is an entity beyond objects. Moreover, the relationship heritage has with a subject is different than the relationship a mere object has with a subject. A subject has a superior relationship to an object by virtue of the subject having controlling power over the object. This controlling power can be seen through the subject's ability to obtain, collect, transfer, and even destroy the object. On the other hand, a subject-object relationship under a heritage paradigm is far-removed from such ownership structure. Rather I would argue that a subject may even have a subjugator relationship to heritage by virtue of the fact that the very object can enhance the subject. In my view, the object can enhance history by inserting the historical trajectory associated with the object. By bringing new meaning to the subject, the object can incorporate missing links to the subject by making it part of a continuous time spectrum. This differentiation between the property doctrine and heritage doctrine as

90. See Merryman, *supra* note 47, at 1915-16.

91. See generally *id.*

they relate to the subject-object relationship is vitally important in advancing a more substantive definition of cultural heritage.

Existing property rights are predicated on the relationship between subject and object, whereas the heritage relationship allows the subject to act on account of differing values either deriving from the object or being influenced by the object. Therefore, the ownership element is far removed from the contextual definition of heritage because ownership is not the primary element of the object-subject relationship; instead an ethical consideration can introduce a different illumination in determining the legal status of cultural heritage. Thus, by removing both the commercial aspect and economic viewpoint of property rights, the ethical consideration transcends commercial aspirations.

For example, if an artifact is considered to be a cultural object, no matter what the spirit of an existing governing Convention, the over-arching influence of commercial interests cannot be extricated from the legal decision-making process. On the other hand, if the commercial element is removed from the legal decision-making process, the national interests of the originating country and the collective cultural rights of the disenfranchised population are able to overcome the previously imposed legal hurdles. As a result, a legally unattainable consequence could suddenly see some illumination of hope, under the enhanced legal framework.

The discussion here presents cultural artifacts, perhaps for the first time, with a new vista of opportunities. It allows the historical facts from the era of colonization to creep into contemporary discussion more than one century later, and provide a perspective of cultural identity, imperial context and colonial subjugation all of which together, collectively form the very backdrop of cultural heritage. Under basic property rights doctrine, the transfer of property and the legality of actual possession are substantively important. In cultural heritage doctrine, we might question the absolute requirement of established possession because heritage may not be encapsulated within a very specific object-like structure. Therefore, the required element of actual possession might be relaxed under the enhanced legal discourse. We are able to divert from the element of possession to the more fundamental and legally sustainable element of existence. So, the questions should be rephrased. Does the object in question exist in a particular era within a particular civiliza-

tion? Does the artifact in question naturally belong to a cultural identity? If the answer to this question is affirmative, the issue of repatriation is easily solved by reversing the existence of the property in question from the current to the past.

Any discussion of cultural heritage inevitably includes the issues of sustaining cultural wounds and the healing power of reclaiming cultural heritage. If an object is deemed as a basic property, it does not have the other-worldly aspects that cultural heritage items contain. Heritage is so uniquely powerful, yet intensely delicate, that it causes pain in the collective bosom of a nation when it is taken away. The pain is not so intense if the object at the center of deprivation is basic property. The pain caused by the detachment of heritage is so profound that the suffering nation sustains cultural wounds. If the object in question is a basic property, the wound may not have such magnitude. By virtue of assigning heritage to an object, we are going beyond basic characteristics of property rights. The object, by virtue of its intangible qualities becomes alive, becomes vibrant, and becomes part and parcel of the aspirations of the wounded civilization.

B. The Plundering of Cultural Heritage Through Spoils Of Decolonization

The long history of human civilization is replete with the mighty vanquishing the weak, the dominant force plundering the objects from the vanquished. In war, objects are taken, objects are returned in a subsequent war, and life continues on. What differentiates objects that are easily transferable from those objects whose values go far beyond? Cultural heritage is the distinguishing element that falls within that unique spectrum of this latter set of objects. I will argue, therefore, that snatching these objects away as spoils of decolonization or war booty sustains cultural wounds of deep significance to the civilization from which it was taken. We can glean a better understanding of cultural heritage by carefully delineating the aspect of cultural value from the aspect of economic and political value. Enjoyment of economic value can be fulfilled by extracting material satisfaction by the usage of material goods of consumerism. Enjoyment of political value is satisfied by the usurpation of power via the domination of individuals. Enjoyment of cultural

value, however, comes from a much deeper sanctum of the human spirit; it emanates from a sacrosanct need of humanity. This need is premised in finding and forging cultural identity, and refurbishing and vitalizing collective national identity. Therefore, if a historical object possesses the ability to fulfill these needs, it must be considered cultural heritage, and thus it must be repatriated to its rightful owners.

Human rights law dictates that a fundamental right of every human is to seek and fulfill its own cultural identity and attain its human destiny. Therefore, cultural heritage must be viewed as something that must not be desecrated or denigrated as spoils of war or prizes of decolonization. If we do not address the cultural wounds of a civilization, the continuing battle between the cultures, and the long-standing struggle to establish humanity's own identity will continue to rear its ugly head. Introducing an expanded conception of cultural heritage and incorporating enhanced legal protection would be the first step towards addressing the issue of healing such cultural wounds.

C. Deconstructing Cultural Internationalism

Existing scholarship advances the primacy of cultural internationalism over cultural nationalism as a vehicle to justify the non-repatriation of cultural artifacts. In my view, using cultural internationalism to stymie efforts of repatriation of cultural objects is fundamentally flawed for various reasons. First, cultural internationalism can be abstracted to become a surrogate for symmetrization. The ill effect of symmetrization on humanity is too deep of a concept to encapsulate within the confines of this Article, but an area I have illuminated in further detail elsewhere.⁹² Cultural internationalism may convey the meaning of exchanging and commingling the possessions of ancient treasures among the existing nation states. Alternatively, it may imbibe a spirit of cooperation and cultural exchange between the willing participants. However, no willing participant will agree to ignore the deprivation of the past under the premise that it is culturally justified to possess some other nation's treasure as two centuries later we belong to the same global civilization. However, the concept of symmetrization makes a distinc-

92. See Ghoshray, *supra* note 88.

tion in properly understanding restrictions that must be placed on the application of cultural internationalism.

Cultural internationalism carefully orchestrates the assimilation of smaller unique entities into the overwhelming influence of a broader, more powerful entity. The flawed conception of cultural internationalism confuses the smaller yet distinctly unique cultural entity into acquiescing to the wishes of global power. Thus, by wanting to be politically correct and aligned with the more dominant entities, the weaker minority culture loses its unique identity as it gets assimilated into the dominant socio-cultural norms. Under this scenario, an attempt to assert one's own individuality could be seen as an attempt to thwart the high-spirited, broad-minded movement of cultural internationalism. I would argue that this false consciousness causes smaller, less alert entities to become subsumed into the bigger ethno-cultural entities.

The assimilation of smaller, unique cultural entities eventually stymies the cultural needs for revitalization that are so important for the continuation of asymmetric inputs into the kaleidoscope of our distinctly diverse global cultural diasporas. It is also vitally important for the perpetuation of unique historical traits that link humanities past with our ensuing future. Once these individual cultural traits are submerged for lack of revitalization, we may not be able to recreate them and we may never understand segments of humanity's illustrious past. Therefore, the existence of cultural heritage helps us in recreating and reawakening some of humanity's forgotten past, which may be difficult to achieve by placing excessive reliance on cultural internationalism.

In my view, the primacy of cultural internationalism was advanced under a faulty premise of erroneously correlating sentiment with cultural nationalism. In other words, the superiority of cultural internationalism was supported by denigrating the viability of cultural nationalism as a vehicle of determination. This was done by relating cultural nationalism with erroneous assumptions of misplaced sentiments and dramatizing the impact of cultural plunder, without exploring the deeper significance of the repatriation of cultural artifacts. Moreover, by subsuming cultural nationalism within itself, cultural internationalism develops a substantive and enduring framework of non-recognition of

minorities, thereby exacerbating the cultural divide between the minorities and the majorities.

The central enquiry, therefore, is not whether cultural internationalism and cultural nationalism are mutually exclusive, but rather if they can peacefully co-exist with each other. The answer to this query, however, must proceed through three distinct lines of enquiry as follows: Who has the subordinate status, cultural nationalism or cultural internationalism? Who is subsumed within whom? Under what scenario does cultural internationalism benefit cultural nationalism, or vice versa?

In my view, cultural nationalism and cultural internationalism can peacefully coexist within a broader global agenda. However, they may not interfere with the objectives of each other. Rather, each can bolster the agendas of one another that they are individually attempting to develop. While cultural nationalism aspires to excavate the forgotten subsumed cultural traits within the broader spectrum of human civilization, cultural internationalism can enhance our understanding of unique, yet completely different traits. Thus, neither of these cultural movements ought to be subsumed within the other. Rather, the combination and coordination between various cultural nationalisms could enhance a broader framework of cultural internationalism.

Against the backdrop established thus far, I argue for a new framework; a framework intertwined with both cultural nationalism and internationalism, but retaining their own uniqueness as they proceed separately to ensure and propagate the minority cultures and civilizations that humanity has developed since the days of yore.

D. Understanding Cultural Nationalism via the Linkage with International Migration

Here, I briefly introduce the concept of international migration to enhance our collective awareness of cultural nationalism. I have explored elsewhere the broader framework of international migration by establishing the nexus between the viability of international migration and the retention of individual ethno-cultural traits.⁹³ However, under imperialistic attitudes, shaped

93. See Saby Ghoshray, *A Migration Theory For the New Millennium: Embracing a*

by a euro-centric agenda, some of the ex-colonized powers have begun to deny the proliferation of individual cultural traits within a broader spectrum of its own citizens. For example, in France, legislation has been passed banning women from wearing head scarves in public schools.⁹⁴ In Canada, the police/military have banned Sikh minority males from wearing their religious regalia, the turban. I see a broader theme of the denial of cultural traits and heritage within these stubborn determinations of the non-repatriation of cultural artifacts. In my view, this very denial is an expanded form of *de facto* colonization. The 21st century imperialistic impulse is propagated through the continual denial by the British to return the Kohinoor to India or the Marbles to Greece. Comments from the British reflect this very sentiment.

The stark facts are these: we have the Koh-i-Noor diamond, whether or not our possession of it is legally justified. We have made it clear that we are keeping the diamond, adducing the best arguments to support our contention.⁹⁵

The enquiry in this Section centers on an understanding of the western societies' rationale for the denial of cultural traits and how it helps in their broader agenda of sustaining their unique euro-centric culture. On the surface, the retention of the Kohinoor by the British might be misconstrued as a broad-spirited exhibition of multi-culturalism by making us believe that Britain indeed wants to inculcate or accommodate the unique and distinct cultural traits belonging to an alien civilization. I will argue, however, that the deprivation of cultural heritage must be construed as a perpetuation of the colonial legacy of the denial of freedom. Let us take a step back to understand this through an empirical analysis.

If a country has illegally occupied another country, any actions related to the transfer of any objects belonging to the occupied country should have legally definitive consequences that would have only one outcome. The outcome must be the repatriation, restitution and return of all belongings, subjective or

Trans-nationalistic Viewpoint within American Immigration Law, 23 AM. U. INT'L L. REV. (forthcoming 2008).

94. See Law No. 04-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.][Official Gazette of France], July 17, 2004, p. 5190.

95. Milmo, *supra* note 86 (quoting a memo from one senior civil servant).

objective, tangible or intangible to the originate country once the process of occupation has ceased to exist. Since the transfer of the Kohinoor was part of an illegal occupation, not sanctioned under any framework of international law, any possessions that may have been transferred from the land mass of India to the land mass of Britain should result in repatriation.

Again, we take a historical step forward and move to the present. The United States and the Coalition forces have illegally occupied Iraq for the last five years. If during the occupation, any entity belonging to the occupiers transports an artifact to either the United States or the United Kingdom, would at any time in the future that transfer be justified under the paradigm of today's international law? The answer is obvious. Why then, can we not apply the same logic to the repatriation of the Kohinoor Diamond from Great Britain to India?

E. Moral Rights Analysis

Having established various paradigms through which to justify or legally determine the outcome of the claim of repatriation of the Kohinoor Diamond out of Britain, I shall now revisit the morality-laced argument previously advanced by other scholars. The central question in this context is whether we can determine if it is morally justified. In his article, Professor Merryman presented a moral justification for retaining cultural artifacts as he stated, "I conclude that the legality of the removal of the Marbles is clearly established and that its immorality has not been demonstrated. The Greeks do not have a strong legal or moral case against Elgin."⁹⁶ This line of reasoning is severely flawed as I shall detail below.

To address any question of morality, we will proceed in the same framework espoused by Professor Merryman by judging the morality under two distinct threads: motive, and action. However, I will present a different analysis of how motive can be morally justified. First, we must make a delineation, or distinction of whose morality we are judging. Second, the impact of the moral action must be viewed through the prism of an intent-based analysis. In the first, our analysis depends on whether we are trying to determine the morality of the victors or the vanquished. For example, could there be a case where one entity's

96. See Merryman, *supra* note 47, at 1910.

morality supersedes the other entity? Could it be that the morality of those who have actually taken the diamond has superseded those who have been dispossessed? If we are treading on that path, then I would indeed assert we are on the wrong line of reasoning.

The second line of argument is premised on determining the intent of the action. If the intent is for preservation of integrity or distribution, does it then justify non-repatriation of the cultural artifact? The reason we need to develop an analysis between the two moralities is because there could be differences in entities due to origin, culture, language, and philosophy of the participating entities. This in turn will lead us to an analysis of the other dimension of morality, the action of the actors involved. The fundamental step here is to identify whether inaction by some entities can be part of this morality analysis, as we must carefully distinguish between action and inaction. For example, could there be a case of inaction on the part of India, and thus, the transfer is morally justified? In my view, even if there exists an argument for inaction by some entities, it can under no circumstances immunize the illegitimate action and thus stymie the process of repatriation.

CONCLUSION

Your diamond-finders add nothing to the world's wealth; the growers of corn and cotton, the feeders of cattle and weavers of wool, the carriers of Commerce, awakening industry throughout the world, are the wealth-producers. We are none the richer for the diamond, but we are of all the world the richest people in the genius that has made that iron-work, and gathered from every corner of the world harvests for an ever growing multitude; and richer we might be a hundred-fold the value of that world-wonder of a diamond, if, instead of the sword, we had carried to India honor, justice, and industry.⁹⁷

There is something disconcerting about the legitimacy of international law as I ponder over the following scenario. More than a century has passed by since the Kohinoor Diamond has been illegitimately taken out of its country of origin, and yet

97. See *"The Mountain of Light" Diamond*, J. MINING & MFRS., 1851, reprinted in HUNT'S MERCHANT'S MAGAZINE AND COMMERCIAL REVIEW 252-53 (1851).

there has not been a single substantive legal claim advanced for the return of the Kohinoor to its rightful owner. Is it a failure of the governing legal paradigm or the inaction of its claimants caused by apathy towards cultural artifacts? The historical evidence has clearly demonstrated that the Kohinoor Diamond does not legally belong in the museums of London, nor does it justify being adorned by any British royalty. Yet, no one is coming forward to begin the legal proceedings for its repatriation. These paradoxes compel us to broaden the enquiry surrounding the legal parameters of the repatriation of cultural objects.

Human civilization has progressed by means of its evolution through time and place. Along the way, mankind has become intertwined with its cultural artifacts, through their shared temporal trajectory, by attaching historical significance. Each of these artifacts, therefore, became part of a continuum through which individual communities attempt to reformulate and revitalize its roots and trace its destiny. When legal frameworks fail to protect individual communities from holding onto their prized possessions, could we not expect anything but virulent apathy? And, perhaps, it is this frustration in the legitimacy of the legalities, and it is the disenchantment with the process of repatriation, which causes the rightful owners of cultural artifacts to remain silent in despair.

I have illustrated the difficulty in the return and repatriation of cultural artifacts that belong to the ancient civilizations of the world. I have established the reasons behind such difficulties and have identified structural difficulties with both the international legal framework and the contemporary legal analysis. While the structural difficulties to encapsulate the realities of repatriation are a significant hurdle, the broader enquiry must be centered on the extra-legal elements that intersect with the legal environment. In this Article, I sought answers to the effective means of repatriation by going beyond the commonplace legal discourse. Overcoming the legal hurdles require placing the sacrosanct issue of cultural repatriation on a foundation of deeper human values, values that go beyond the commercial interests and property rights discourse. My objective in this work has been to trace the contours of law while straddling the joint paradigm of shared identity and conjoined destiny.

Having established the hollowness of existing legal paradigm, I established a framework that encapsulates all the non-

legal aspects related to cultural repatriation. The first step in this recovery is premised on expanding the definition of cultural heritage, while the second centers on incorporating such definitions within the legal reasoning process. On a grander abstraction, this enhancement will be more effective in the retention and return of cultural artifacts, as the resulting legal process can overcome most of the major structural inadequacies discussed in this Essay.

Finally, I began this discourse by presenting the story of a little boy king, reluctantly, under compulsion, bestowing the diamond to his masters. With the diamond, the boy king was forced to relinquish the collective dignity of his people, and forever altered the historical trajectory of the shared identity of his origin. Unless the Kohinoor Diamond is returned, the historical desecration of his people will not be undone, and the injured dignity will never be restored. It is within this realization, that the legal paradigm of cultural repatriation lies. It is this implicit recognition of all humankind's inherent dignity that remains the essence of equality in law. The future trajectory of the Kohinoor Diamond must be governed by this new realization. If not, the dark pasts of colonization will continue to haunt us in the future.