



5-27-2014

# The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention

Zsuzsanna Veres

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**The Fight Against Illicit  
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Property: The 1970  
UNESCO Convention  
and the 1995 UNIDROIT  
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Zsuzsanna Veres

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## **I. Introduction**

The illicit trafficking of cultural property is a growing concern as the black market trade in cultural objects continues to flourish.<sup>1</sup> The illegal trade of cultural property threatens not only the physical integrity of the items themselves, and the sites they came from, but also the cultural heritage of the affected nations.<sup>2</sup> The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (“UNESCO Convention”) and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”) are the two most important bilateral international agreements concerning the protection of illicitly traded cultural objects.<sup>3</sup> Although neither Convention is without flaws, they have established an international dialogue about cultural property and have provided a framework for the protection and recovery of cultural objects.<sup>4</sup>

This comment focuses on the roles of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention in protecting cultural property from illicit trafficking, and the reasons why a greater number of nations have not become parties to the Conventions. The comment begins by providing a background to art crimes, including why and how the theft of cultural property occurs, and the consequences of such illicit activity. Next, the comment addresses the general provisions of both the UNESCO and UNIDROIT Conventions. The comment will then present the legal problem of why the UNESCO and UNIDROIT Conventions have not been ratified by more countries, and will also discuss the possible shortcomings of these Conventions that prevent states from adopting them. Further, the comment analyzes certain inadequacies of the conventions, such as: the definition of cultural property, the problems of illegal exportation, the role of source and market nations, the differences between cultural nationalism and cultural internationalism, the rights of bona fide purchasers, and any applicable statutes of limitation. Finally, a Proposal explores possible solutions to the shortcomings of the Conventions and provides methods for motivating nations to sign onto a convention protecting cultural property from illicit trafficking.

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1. Edward M. Cottrell, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 632 (2009).
  2. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y. J. 1, 7 (2004).
  3. Jane Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 245 (2005).
  4. Cohan, *supra* note 2, at 47.

## II. Background

### A. Art Crimes

The illegal trafficking of cultural property is a lucrative underground market, falling only behind illegal drugs, arms trafficking, and money laundering.<sup>5</sup> The FBI has estimated that illicit trade in art generates an approximate revenue of six billion dollars a year.<sup>6</sup> Cultural property is often taken from private museums, collectors, churches and archaeological sites—both discovered and undiscovered—and then sold on the black market.<sup>7</sup> Of these objects, only about five to ten percent are ever recovered, and on average the time for recovery takes more than thirteen years.<sup>8</sup> The illicit trade in cultural property continues to increase and expand because of steady demand.<sup>9</sup> Further, political instability, inconsistent laws regarding ownership and repatriation of cultural property, improved methods of transportation, and permeable borders allow illegal trafficking to flourish.<sup>10</sup>

The theft of cultural property tends to occur under two circumstances.<sup>11</sup> The first circumstance is during periods of war, military occupation, or colonial rule.<sup>12</sup> During these times, cultural property is plundered, taken as spoils of war, or “transferred pursuant to capitulation agreements that are often coerced” by the occupying nation.<sup>13</sup> Second, cultural property is looted during times of peace, stolen from collections, or illegally excavated and smuggled out of the country in order to be sold on the international market.<sup>14</sup>

In general, the theft of cultural property occurs from four categories of origin: private or public owners, known archaeological sites, undiscovered sites, and illegal exportation of objects from countries of origin.<sup>15</sup> Cultural property is stolen from public or private owners because insurance is often extremely costly, resulting in inadequate security and increased opportunity for thieves.<sup>16</sup> Discovered and undiscovered archaeological sites often serve as targets for subsistence looters, as well as organized thieves.<sup>17</sup> Subsistence

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5. David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT'L L. 829, 833 (2006).

6. Alexandra Love Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 BROOK. J. INT'L L. 751, 755 (2011).

7. Chang, *supra* note 5, at 832.

8. *Id.*

9. *Id.*

10. *Id.*

11. Cohan, *supra* note 2, at 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. Chang, *supra* note 5, at 834.

16. *Id.*

17. *Id.*

looters are impoverished citizens who “can easily and profitably sell their nation’s cultural patrimony on the black market,” often making far more money than through legal employment.<sup>18</sup> Lastly, objects can be exported illegally from the country of origin due to weak export laws.<sup>19</sup> Countries of origin, or source nations, often cannot afford to protect national monuments or archaeological sites.<sup>20</sup> Instead, these countries create export laws in an attempt to prevent the transport of cultural property.<sup>21</sup> Such laws, however, are often ineffective because of a lack of enforcement or inadequate customs screenings.<sup>22</sup>

Perhaps the most devastating consequence of cultural property theft is the destruction of the objects or the archaeological sites themselves.<sup>23</sup> Persons who illegally excavate objects are often unskilled and do not use proper excavation techniques.<sup>24</sup> Looters often search for objects that they believe will sell for a high price on the black market, or objects that are aesthetically pleasing. In the process, they often destroy either the site itself or objects that they deem to not have enough value.<sup>25</sup> Many items that would have great scientific and archaeological value, however, are those that seem relatively commonplace or not well preserved, and thus, are more likely to be destroyed by looters.<sup>26</sup> Even if items are not destroyed, they may be damaged due to improper transportation or handling techniques.<sup>27</sup> Further, looters destroy the contextual evidence<sup>28</sup> of the sites.<sup>29</sup> “Those who illegally excavate artifacts often must strip them of as much contextual

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18. “Subsistence looting is endemic where a class of impoverished citizens can easily and profitably sell their nation’s cultural patrimony on the black market ... Moreover, in the absence of financial incentive for reporting discovered artifacts on their property, landowners often opt to liquidate objects on the black market rather than risk loss of development value due to government excavation upon discovery of artifacts. In light of the strong allure of looting and the impracticability of physical protection, many art-rich nations have enacted legislation claiming ownership and prohibiting the export of antiquities.” Chang, *supra* note 5, at 835-36.

19. Chang, *supra* note 5, at 835.

20. *Id.*

21. *Id.*

22. *Id.*

23. Cohan, *supra* note 2, at 7.

24. Patrick J. O’Keefe, *Trade in Antiquities: Reducing Destruction and Theft*, in LAW, ETHICS AND THE VISUAL ARTS 163, 164 (John Henry Merryman and Albert E. Elsan eds., Kluwer Law Int’l 4th ed. 1998).

25. O’Keefe, *supra* note 22, at 164.

26. *Id.*

27. *Id.*

28. “The looting of archaeological sites is significant not so much for the loss of the artifacts themselves, but for the loss of information about the civilizations or human settlements they represent, as the real value of the looted items actually rests with what they say about the context, or ancient site, in which they were found.” *Study Reveals Looting of Archaeological Sites as Massive Global Problem*, POPULAR ARCHAEOLOGY (Jan. 4, 2013), <http://popular-archaeology.com/issue/december-2012/article/study-reveals-looting-of-archaeological-sites-as-massive-global-problem>.

29. Cohan, *supra* note 2, at 8.

information as possible in order to sanitize their entry into the marketplace.”<sup>30</sup> The contextual evidence is often most important to archaeologists, and losing information about the origin of cultural artifacts is devastating.<sup>31</sup>

The theft and illegal trade of cultural property can also negatively affect the cultural heritage of source nations.<sup>32</sup> Cultural objects are often times closely linked with the history and culture of the nation they belong to, and “the loss of an artifact ... creates a significant gap in the source group’s collective sense of identity.”<sup>33</sup> The illicit trade of cultural property not only has a physical effect on the objects and sites themselves, but can also have a moral impact on the culture and country of origin.

### ***B. International Conventions***

International conventions would be effective in protecting art and cultural property if enough countries ratified and followed the agreements.<sup>34</sup> Countries are often reluctant, however, to ratify such treaties because they interfere with individual state interests.<sup>35</sup> Even so, international conventions provide a valuable framework and beneficial guidelines when legal issues arise concerning art and cultural property.<sup>36</sup>

The first multilateral international agreement aimed at the protection of cultural property was the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict.<sup>37</sup> The convention was drafted following the destruction and plundering of artwork that occurred during World War II, and focused on preserving cultural property during times of armed conflict and military occupation.<sup>38</sup>

The most important international agreement for preventing the illicit trafficking of cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and it focuses primarily on conduct that occurs during times of peace.<sup>39</sup> The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was drafted to complement and expand on the UNESCO Convention in order to afford further protection for cultural property.<sup>40</sup> Together, the UNESCO and UNIDROIT Conventions are two

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30. *Id.*

31. *Id.*

32. Cohan, *supra* note 2, at 7.

33. *Id.*

34. Marilyn E. Phelan, *Cultural Property: Who Owns It and What Laws Protect It?*, 74 TEX. B.J. 202, 204 (2011).

35. *Id.*

36. *Id.*

37. Warring, *supra* note 3.

38. *Id.*

39. Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 33 (1998).

40. *Id.* at 36.

essential agreements for the protection of cultural property.<sup>41</sup> Both agreements, however, have shortcomings and neither has been ratified by enough States to reach its potential in preventing illicit trafficking.<sup>42</sup>

***1. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property***

The 1970 UNESCO Convention was one of the first conventions to provide solutions for the protection of cultural property.<sup>43</sup> During the 1960s, concerns arose regarding the importation of cultural property into various countries that had been illegally removed from the country of origin.<sup>44</sup> This illicit trade in cultural property was seen as significantly diminishing the cultural heritage of the countries of origin and international cooperation was the best solution to curb illegal trafficking.<sup>45</sup>

The UNESCO Convention provides measures preventing the import and trade of stolen artifacts by creating restitution provisions, inventories, and export certifications, monitoring trade, promoting scientific and technical institutions, promulgating rules of ethics for those who deal with cultural artifacts, imposing penal or administrative sanctions, and creating a general international cooperation framework between States party to the Convention.<sup>46</sup> To date, 125 Member States have ratified it.<sup>47</sup>

The UNESCO Convention itself does not prohibit the exportation of cultural property.<sup>48</sup> Rather, it creates non-self-executing obligations which require nationally

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41. Phelan, *supra* note 36, at 36.

42. Cohan, *supra* note 2, at 8.

43. Levine, *supra* note 6, at 757.

44. Phelan, *supra* note 34, at 205. In 1960, the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples. In the following years, the “newly independent States were anxious to recover important items from their cultural heritage, many of which were to be found in museums of the former colonizing states. The newly independent States feared the further loss of cultural heritage, due to looting and inadequate funds for protection. Although few legal remedies existed for the return of already stolen cultural items, the means existed to halt any further losses. Through these actions, the beginnings of the 1970 UNESCO Convention took hold. LYNDEL V. PROTT, *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After its Adoption* (2011).

45. Phelan, *supra* note 34, at 206.

46. Christian Manhart, *UNESCO’s Fight Against Illicit Traffic of Cultural Property, Questions Relating to Restitution and Needs of Museums in Developing Countries*, [http://www.mutec.de/de/\\_downloads/UNESCO\\_fight\\_illicit\\_traffic.PDF](http://www.mutec.de/de/_downloads/UNESCO_fight_illicit_traffic.PDF) (last visited Dec. 7, 2012); Warring, *supra* note 3, at 250.

47. *Illicit Traffic of Cultural Property*, UNESCO.COM, <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property> (last visited Dec. 3, 2012).

48. Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1075 (2005).

implemented legislation by the States party to the Convention; if such legislation is not implemented, the Convention does not work properly.<sup>49</sup> These obligations call for States “to protect the cultural property within [their] territor[ies] against dangers of theft, clandestine excavation and illicit export.”<sup>50</sup> States are asked to undertake practices with whatever means they have at their disposal to assist in making necessary reparation, and to prevent the illicit import, export, and transfer of ownership of cultural property.<sup>51</sup> International cooperation between Member States can be furthered by mutual assistance.<sup>52</sup> States may call upon other State Parties for assistance if their cultural patrimony is in jeopardy by pillage to archaeological or ethnological materials.<sup>53</sup>

The Preamble of the Convention expounds the importance of cultural property, as it “constitutes one of the basic elements of civilization and national culture, and its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”<sup>54</sup> It further states that the “protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation.”<sup>55</sup>

Article 1 of the Convention concerns the definition of “cultural property,” and provides for States to designate items that are of cultural importance.<sup>56</sup> These items have to be of importance in either archaeology, prehistory, history, literature, art or science and belong to at least one of numerous categories listed.<sup>57</sup> This limits protected items to those that

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49. *Id.* at 1076.

50. 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.

51. *Id.* art. 2.

52. *Id.* art. 9.

53. *Id.*

54. *Id.* pmbl.

55. *Id.*

56. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art.1, Nov. 14, 1970, 823 U.N.T.S. 231.

57. *Id.* The UNESCO Convention lists, in Article 1, broad categories into which an item of cultural property can belong:

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

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

have already been discovered, and does not apply to objects that are as yet undiscovered or unexcavated.<sup>58</sup>

States are instructed to set up “national services” for the protection of cultural heritage, by conducting inventories of protected property.<sup>59</sup> The Convention also encourages the development of institutions, such as museums and libraries, for the preservation of cultural property, as well as the supervision of archaeological excavations and creation of ethical guidelines for curators and collectors.<sup>60</sup> Antique dealers are also required to maintain records of the origin of each item of cultural property, the names and addresses of the supplier, a description and price for each item, and to inform purchasers of any export prohibitions.<sup>61</sup>

Import and export controls for cultural property are provided in Articles 6 and 7.<sup>62</sup> Under Article 6, cultural property must be subject to an export certification and without such a certification exportation is prohibited.<sup>63</sup> Article 7 prohibits States party to the Convention from importing cultural property that has been stolen from museums, religious or secular monuments, or other similar institutions.<sup>64</sup> Further, Article 7 allows parties to seek recovery and return of illegally exported cultural property.<sup>65</sup> The requesting party, however, has to provide documentation to establish a claim for recovery and return, and also provide “just compensation to an innocent purchaser or to a person who has valid title to [the] property.”<sup>66</sup>

The UNESCO Convention defines “illicit” as any import, export, or transfer of ownership of cultural property that is “contrary to the provisions adopted under the

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

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

(iii) original engravings, prints and lithographs ;

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

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

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

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

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

58. Chang, *supra* note 5, at 855.

59. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 5, Nov. 14, 1970, 823 U.N.T.S. 231.

60. *Id.*

61. *Id.* art. 10.

62. *Id.* art. 6-7.

63. *Id.* art. 6.

64. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 7, Nov. 14, 1970, 823 U.N.T.S. 231.

65. *Id.*

66. *Id.*

Convention by States party to it.”<sup>67</sup> It further instructs States to “recognize the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”<sup>68</sup> Thus, any object “exported in violation of a nation’s export laws will automatically be considered illicit under the Convention.”<sup>69</sup> The Convention allows source nations to define “illicit” in any terms they wish, and Member States must enforce the export laws of foreign States.<sup>70</sup>

Dispute resolution between States party to the Convention is limited to a “good offices” arbitration clause. The Convention itself does not make it clear whether this is applicable to disputes over property or rather just implementation of the Convention.<sup>71</sup> Penalties or administrative sanctions may be imposed, but parties are left to oppose practices prohibited by the Convention with the means they have at their disposal.<sup>72</sup>

## **2. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property**

The UNIDROIT Convention, adopted in Rome in 1995, complements the 1970 UNESCO Convention by attempting “to reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects can be sought, and by widening the scope of objects subject to its provisions.”<sup>73</sup> The UNIDROIT Convention includes civil law provisions and also focuses on issues from a private law perspective and so significantly improves the chances for restitution.<sup>74</sup> To date, it has been signed by thirty-three countries.<sup>75</sup> Unlike the UNESCO Convention, the UNIDROIT Convention “allows no reservations except those expressly stated within the treaty.”<sup>76</sup> Therefore, States must implement all of the provisions provided in the Convention, thereby creating a uniform law that has comprehensive regulation.<sup>77</sup>

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67. *Id.* art. 3.

68. *Id.* art. 13.

69. Warring, *supra* note 3, at 251.

70. *Id.*

71. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 17, Nov. 14, 1970, 823 U.N.T.S. 231.

72. *Id.* art 2.

73. Cottrell, *supra* note 1, at 643 (quoting Harold S. Burman, *Introductory Note to the UNIDROIT Convention*, 34 ILM 1322, 1322 (1995)).

74. Manhart, *supra* note 46.

75. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 2, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter Convention on Stolen or Illegally Exported Cultural Objects], available at <http://webcache.googleusercontent.com/search?q=cache:http://www.unidroit.org/en/instrument/cultural-property/1995-convention>.

76. Levine, *supra* note 6, at 753.

77. Levine, *supra* note 6, at 768.

Under the UNIDROIT Convention, a cultural object is defined as one “which, on religious or secular grounds, [is] of importance for archaeology, prehistory, history, literature, art or science” and belongs to one of the listed categories.<sup>78</sup> Therefore, since States do not have to specifically designate items as cultural property, protection is extended to undiscovered or unexcavated items.<sup>79</sup> Also, protection is not limited to inventoried objects.<sup>80</sup> Further, the Convention creates separate categories for cultural objects that have been stolen, and those that have been illegally exported.<sup>81</sup>

Parties to the UNIDROIT Convention can request the court of another State party to the Convention to order the return of a cultural object illegally exported from the territory of the requesting nation.<sup>82</sup> The burden of proof is placed on the claimant state. The claimant state must prove a violation of its laws “regulating the export of cultural objects for the purpose of protecting its cultural heritage”<sup>83</sup> and then prove that the removal of the object significantly impairs one or more of the listed State interests<sup>84</sup> or is of significant cultural importance.<sup>85</sup> The UNIDROIT convention, however, is not limited to States in instances of theft, but rather to any claimant, including private parties.<sup>86</sup>

The UNIDROIT Convention contains a statute of limitations, requiring that claims be brought “within a period of three years from the time the claimant knew of the location of the cultural object and the identity of the possessor, and in any case within a period of fifty years.”<sup>87</sup> States are permitted to extend the statute of limitations to seventy-five years, or longer periods if so provided in the national law.<sup>88</sup> For a cultural object that forms an integral part of an identified monument or archaeological site, only the initial three year time period applies.<sup>89</sup>

The Convention also creates a duty on the part of the possessor of a stolen cultural object to return it to the source nation.<sup>90</sup> Therefore, there is no assumption that a bona fide purchaser will attain good title.<sup>91</sup> A bona fide purchaser, however, is entitled to fair

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78. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 2.

79. Chang, *supra* note 5, at 858.

80. Manhart, *supra* note 46.

81. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 1.

82. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 5.

83. *Id.*

84. *Id.* These state interests include the physical preservation of the object or of its context, the integrity of a complex object, the preservation of information of, for example, a scientific or historical character, and the traditional or ritual use of an object by a tribal or indigenous community.

85. *Id.*

86. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 3; Chang, *supra* note 5, at 858.

87. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 13.

88. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 3.

89. *Id.*

90. *Id.*

91. Levine, *supra* note 6, at 770.

and reasonable compensation if it can be proven that they had no knowledge of the object's stolen status, and were thus truly a bona fide purchaser.<sup>92</sup>

The Convention does not act retroactively, and only applies "in respect [to] ... cultural object[s] that [were] stolen after" the Convention entered into force, provided that the objects were stolen from, or located in "a Contracting State after entry into force" of the Convention.<sup>93</sup>

### III. Legal Problem

The UNESCO and UNIDROIT Conventions serve as protection against the theft and illegal exportation of cultural property, but would be more efficient at reaching proposed goals if more States were parties to the conventions.<sup>94</sup> Market states are reluctant to become signatories because they view the conventions unfavorably.<sup>95</sup>

Disagreements and problems arise in a few areas within these two conventions, and finding a solution could be the key for establishing uniform regulation of cultural property law and increasing the number of supportive States. First, the definition of cultural property has to be addressed clearly, being neither too narrow nor too broad.<sup>96</sup> The concept of what constitutes illegal exportation also must become clear and uniform.<sup>97</sup> Further, if a convention focuses too heavily on source or market nations, countries may be reluctant to ratify it.<sup>98</sup> Similarly, a balance has to be struck between cultural nationalism and cultural internationalism.<sup>99</sup> The rights of bona fide purchasers must also be taken into account, as well as agreeable statutes of limitation.<sup>100</sup> Until a convention is drafted that is clear, uniform, and beneficial to both source and market nations, it is unlikely that enough countries will become parties to make the fullest possible impact in the preservation and protection of cultural property.

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92. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 4.

93. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 10.

94. Cottrell, *supra* note 1, at 644.

95. *Id.*

96. Cottrell, *supra* note 1, at 634.

97. Levine, *supra* note 6, at 757.

98. Cottrell, *supra* note 1, at 640.

99. Warring, *supra* note 3, at 246-47.

100. Patrick O'Keefe, *Using UNIDROIT to Avoid Cultural Heritage Disputes: Limitation Periods*, 14 WILLAMETTE J. INT'L L & DISP. RESOL. 227, 228 (2006).

## IV. Analysis

### A. Definitions of Cultural Property

Defining cultural property is extremely important because it can significantly impact the effectiveness of a convention and what objects are protected by it.<sup>101</sup> “Cultural property” is a vague term, but both broad and narrow definitions of it can pose problems.<sup>102</sup> Overbroad definitions afford protection to a wide range of items, which can lead to difficulty in enforcement, or even classification.<sup>103</sup> Narrow definitions, however, run the risk of not protecting items that should otherwise be protected.<sup>104</sup> Further, all States may not support narrow definitions of cultural property because the types of cultural property that are valued by nations varies significantly, and thus the risk of exclusion would be high.<sup>105</sup> Also, due to this fact, a narrow definition would be better suited for “regional, rather than global, agreements, in which only cultural property with a certain origin is protected.”<sup>106</sup> A careful balance must be found between broad and narrow definitions of cultural property.

The definition of “cultural” in the UNESCO Convention is extremely broad, a “maximalist solution that includes any object of any possible present or future cultural value.”<sup>107</sup> States are allowed to designate what falls within their definition of “cultural property,” which leaves a great amount of discretion to the State.<sup>108</sup> Objects have to be important on religious or secular grounds to archaeology, prehistory, history, literature, art or science.<sup>109</sup> This is an extremely broad spectrum, however, and virtually any item can be included.<sup>110</sup> This leads to subjective definitions and does not provide a framework that can be consistently applied internationally.<sup>111</sup>

The UNIDROIT Convention uses language similar to that of the UNESCO Convention, including objects “which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science.”<sup>112</sup> States are not free, however, to designate specific items as important.<sup>113</sup> This one main difference between

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101. Chang, *supra* note 5, at 838.

102. Cottrell, *supra* note 1, at 632.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Phelan, *supra* note 36, at 42.

108. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 823 U.N.T.S. 231.

109. *Id.*

110. Levine, *supra* note 6, at 758.

111. *Id.*

112. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 2.

113. Levine, *supra* note 6, at 759.

the definitions creates a uniform classification that can be applied equally to determine if a particular cultural property item fits within the Convention.<sup>114</sup>

### ***B. The Problems of Illegal Exportation***

One of the greatest problems with illegal exportation is defining what constitutes an illegal export or import of cultural property.<sup>115</sup> The definition and concept of “theft” varies widely between countries, which creates great difficulty when applying a particular State’s classification to the international trafficking of cultural property.<sup>116</sup> The UNESCO and UNIDROIT Conventions attempt to create a unified framework for a consistent definition of illegal exportation and importation of cultural property.

Under the UNESCO Convention, States are only required to prohibit the import of cultural property that has been stolen from a museum, public monument, or similar institution, and that has been properly inventoried prior to illegal exportation.<sup>117</sup> Thus, States are not required to return cultural property that has been illegally exported if it did not originate in a museum or other similar institution, or if it had not been featured in an inventory.<sup>118</sup> This excludes any undiscovered or unexcavated items.<sup>119</sup> Protection under the UNESCO Convention is limited to a narrow range of items, and does not shield nearly enough cultural property from illegal trafficking.

The UNIDROIT Convention attempted to remedy this by providing protection for a broader range of cultural property.<sup>120</sup> Under Article 3, the UNIDROIT Convention states, “for the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”<sup>121</sup> Unlike the UNESCO Convention, the UNIDROIT Convention affords protection even to those objects that are yet to be discovered or excavated and essentially remedies what was lacking previously.

### ***C. Bona Fide Purchasers***

Bona fide purchasers are also a problem addressed by both conventions. Bona fide purchasers are those “who conduct reasonable due diligence but have no reason to believe that objects purchased or obtained gratuitously are protected as cultural property.”<sup>122</sup>

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114. Levine, *supra* note 6, at 759.

115. Cottrell, *supra* note 1, at 634.

116. *Id.*

117. Cohan, *supra* note 2, at 49-50.

118. Cohan, *supra* note 2, at 50.

119. *Id.*

120. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 3.

121. *Id.*

122. Cottrell, *supra* note 1, at 636.

Protection needs to be afforded to bona fide purchasers, otherwise the legitimate international trade in art could be adversely affected.<sup>123</sup> If such purchasers are not protected, then legitimate buyers, or sellers, may be dissuaded from trading art because they could stand to lose large sums of money.<sup>124</sup> Further, the fear of prosecution for theft would also be a strong deterrent if no protection is afforded.<sup>125</sup>

Under the UNESCO Convention, cultural property can only be returned upon payment of just compensation.<sup>126</sup> This provides protection for the bona fide purchaser, but could cause potential problems for the source nation.<sup>127</sup> Many source nations are financially limited, and may not be able to pay the purchase cost of a cultural item that had been illegally exported.<sup>128</sup> Therefore, a country may not be able to have an object returned to them.

The UNIDROIT Convention has a better solution for the problem of the bona fide purchaser, by placing the burden of proof on the purchaser.<sup>129</sup> As under the UNESCO Convention, a good faith buyer or possessor who neither knew nor reasonably should have known that the object was stolen is entitled to compensation.<sup>130</sup> The possessor, however, must prove that due diligence was exercised when acquiring the object.<sup>131</sup> Due diligence in this instance consists of the circumstances of the acquisition, such as the character of the parties, the price paid, whether a register was consulted, and if an export certificate existed.<sup>132</sup> Although it would still potentially be difficult for poorer countries to provide just compensation under the UNIDROIT Convention, the burden of proof falls on the purchaser. This way, there is at least the chance that the purchaser is unable to meet the due diligence requirement and the source nation can regain possession of the cultural object without the need for financial compensation.

#### ***D. Statutes of Limitation***

Statutes of limitation are essential in cultural property disputes because objects were sometimes taken decades, or centuries prior.<sup>133</sup> Without statutes of limitation, States may be hesitant to enter into an agreement because of possible risks of losing cultural

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123. *Id.*

124. *Id.*

125. *Id.*

126. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 7, Nov. 14, 1970, 823 U.N.T.S. 231.

127. Cohan, *supra* note 2, at 49.

128. *Id.*

129. Phelan, *supra* note 39, at 54.

130. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 4.

131. *Id.*

132. Phelan, *supra* note 39, at 54.

133. Cottrell, *supra* note 1, at 638.

objects they had acquired previously under a different law or different value system.<sup>134</sup> Problems can also arise in contrary situations, for example if there is not enough time allotted to regain possession of an item.

The UNESCO Convention does not contain a specific statute of limitations.<sup>135</sup> Rather, the Convention only applies after a State has become party to it.<sup>136</sup> This holds true for both States that import and export cultural objects.<sup>137</sup> This lack of a statute of limitations could pose a problem, as cultural property is only protected beginning in 1970. Under the UNESCO Convention, national laws concerning statutes of limitation are applied, which are not always uniform or in harmony with one another.<sup>138</sup>

The UNIDROIT Convention, unlike the UNESCO Convention, provides statutes of limitation for bringing a claim for restitution. Like the UNESCO Convention, it is not retroactive, and statutes of limitation will come into play only after States become parties to the Convention.<sup>139</sup> Under the UNIDROIT Convention, a claim for stolen cultural objects must be made in a State that is party to the Convention at the time of theft.<sup>140</sup> If the theft occurred in the territory of a State party to the Convention, it must have transpired after entry into force of the Convention for both States.<sup>141</sup> If the object was stolen from the territory of a State not party to the Convention, then the object must have been located in a contracting State after that State became a party.<sup>142</sup> Where illegally exported cultural objects are concerned, both the claimant State and the State where the claim is made must have been party to the Convention at the time of illegal export.<sup>143</sup>

The general statute of limitations for the UNIDROIT Convention states that “any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of theft.”<sup>144</sup> Although a statute of limitations is in place, three years seems like a relatively short amount of time, especially when theft could have occurred many years prior.<sup>145</sup> Although the three years is counted from when discovery of the item is made, claimants may be slow in organizing

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134. *Id.*

135. *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

136. *Id.* art. 7.

137. *Id.*

138. O’Keefe, *supra* note 100, at 228.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 3.

145. O’Keefe, *supra* note 100, at 230.

or putting forward demands.<sup>146</sup> On the other hand, fifty years from the time of theft is a long period of time, where practicality is concerned.<sup>147</sup> Evidence may not be kept for such an extended length, and circumstances of theft may be difficult, if not impossible, to establish. Stolen cultural objects, however, are often not discovered until decades after the theft, and a short limitation period would only decrease the chances of return to the country of origin.

The UNIDROIT Convention has special limitation periods for cultural objects that form “an integral part of an identified monument or archaeological site, or [that belong] to a public collection.”<sup>148</sup> In those instances only the three-year period applies.<sup>149</sup> States may, however, declare a time limitation of seventy-five years or longer, as provided by national law, to such objects.<sup>150</sup> This limitation was created in order to deal with inalienability.<sup>151</sup> Some states, such as France, hold all objects in the national collection as inalienable, and would have preferred no statute of limitations in the Convention.<sup>152</sup> Unfortunately, this was not acceptable to countries that did not have any inalienable objects, and so an extended exception was created as a compromise.<sup>153</sup>

### ***E. The Role of “Source” and “Market” Nations***

The role of “source nations” and “market nations” is extremely important in the protection of cultural property.<sup>154</sup> “Source” nations are nations where a given cultural object originated, while other nations are considered “market” or “transit” nations.<sup>155</sup> Source nations are often seen as having the right to determine which objects are classified as cultural property and thus subject to export and import restrictions.<sup>156</sup> Leaving such discretion solely to source nations, however, allows them to completely restrain trade in cultural property, or specific objects, and so defining what constitutes cultural property might be better left to the international community.<sup>157</sup> The role of source and market nations is crucial to international conventions, as both types of nations want to sign onto a convention that is beneficial to them; and not focused solely on source or market nations.

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146. *Id.*

147. *Id.*

148. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 3.

149. *Id.*

150. *Id.*

151. O’Keefe, *supra* note 100, at 235.

152. *Id.*

153. *Id.*

154. See Chang, *supra* note 5, at 842-843.

155. Chang, *supra* note 5, at 843.

156. *Id.*

157. *Id.*

The UNESCO Convention “permit[s] individual countries to maintain their own import and export regulations as well as laws regarding restitution of stolen property.”<sup>158</sup> This lack of a unified framework allows nations to create inconsistent legislation regarding cultural property and is thus difficult to apply internationally.<sup>159</sup>

More countries have not yet joined the UNESCO Convention as the Convention is favoring source nations over market nations.<sup>160</sup> The Convention calls for source nations to protect their cultural heritage, such as through creating laws, generating inventories of cultural property, supervising archaeologists, and establishing institutions to preserve cultural property.<sup>161</sup> While these are not unreasonable requests, it may be difficult for poorer countries to comply with them.<sup>162</sup> Market nations, however, are required to take necessary measures to prevent museums from acquiring illicit cultural property—and are required to recover and return such property.<sup>163</sup> Further, antique dealers must keep comprehensive lists of imported items, and will be sanctioned if they fail to do so.<sup>164</sup> The provisions of the UNESCO Convention are aimed at source nations – the source nations are tasked with protecting their own cultural property while market nations are responsible for protecting the source nations.<sup>165</sup> Source nations have to define and certify their cultural property, but it is the market nations that are responsible for preventing illicit trafficking with import restrictions and the threat of sanctions.<sup>166</sup>

Unlike the UNESCO Convention, the UNIDROIT Convention requires States to implement all treaty provisions.<sup>167</sup> As such, States are not free to pick and choose what aspects of the Convention they prefer.<sup>168</sup> While States may find it problematic to commit to all provisions without the option of elimination, this is the only way uniformity can be reached.<sup>169</sup> This is a likely reason why many countries have declined to ratify the UNIDROIT Convention.

The UNIDROIT Convention, although still favoring source nations, does offer some protections for market nations.<sup>170</sup> Market nations are obligated to return illegally

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158. Levine, *supra* note 6, at 762.

159. *Id.*

160. *Id.*

161. Janene Marie Podesta, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations*, 16 *CARDOZO J. INT’L & COMP. L.* 457, 473 (2008).

162. *Id.*

163. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 7, Nov. 14, 1970, 823 U.N.T.S. 231.

164. *Id.* art. 10.

165. Podesta, *supra* note 161, at 474.

166. *Id.*

167. Levine, *supra* note 6, at 772.

168. *Id.*

169. *See* Levine, *supra* note 6, at 772-773.

170. Levine, *supra* note 6, at 774.

excavated cultural property to source nations, but are not obligated to return objects that fall within “the terms of a source nations’ generic ownership law.”<sup>171</sup> The Convention “draws a distinction between theft and illicit export.”<sup>172</sup> By the terms of the Convention, not all illegally exported objects are stolen, just those that have been stolen and illegally exported.<sup>173</sup> The UNIDROIT Convention still shows strong favor towards source nations because of the emphasis on returning cultural objects.<sup>174</sup> As stated in the Preamble, the Convention “is intended to facilitate the restitution and return of cultural objects.”<sup>175</sup> Further, by requiring bona fide purchasers, rather than source nations, to show due diligence, the return of cultural objects is favored.<sup>176</sup>

### ***F. Cultural Nationalism and Cultural Internationalism***

Cultural nationalism and cultural internationalism are two conceptual approaches that have significant impacts on international agreements regarding cultural property.<sup>177</sup> Cultural nationalism focuses on the idea that cultural property should remain in its country of origin.<sup>178</sup> It emphasizes a link between objects and cultural heritage and demands the repatriation of cultural property.<sup>179</sup> “The theory is rooted in the principle of State sovereignty, which recognizes a state’s right to exercise control over or govern those activities, people or objects within its territorial boundaries.”<sup>180</sup> Cultural internationalism, on the other hand, sees cultural property as belonging to the cultural heritage of all people.<sup>181</sup> It creates a global interest in cultural property, as humans as a whole have a common, universal heritage.<sup>182</sup> Both the UNESCO and UNIDROIT Conventions are nationalistic in view, which has the effect of favoring source countries and perhaps deterring market countries from becoming parties to the treaty.<sup>183</sup>

The UNESCO Convention, in its Preamble, first declares “that the interchange of cultural property among nations ... enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”<sup>184</sup> This appears to embrace the theory of cultural internationalism, but the Preamble continues, stating “that cultural property

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171. *Id.*

172. Warring, *supra* note 3, at 254.

173. *Id.*

174. Warring, *supra* note 3, at 257.

175. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, pmbl.

176. Warring, *supra* note 3, at 257.

177. Warring, *supra* note 3, at 246-247.

178. Phelan, *supra* note 34, at 205.

179. Warring, *supra* note 3, at 247.

180. *Id.*

181. Warring, *supra* note 3, at 248.

182. *Id.*

183. Podesta, *supra* note 161, at 462.

184. 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.

constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”<sup>185</sup> The majority of the text of the UNESCO Convention continually refers to a “national cultural heritage” and emphasizes keeping cultural property within the source country, through definitive actions such as export measures and continuing education towards the preservation of cultural property.<sup>186</sup> Under the Convention’s definition of cultural property – allowing States to designate what does and does not fall within the category – source nations are essentially free to limit the export of any object, whether it truly is cultural property or not.<sup>187</sup> Thus, the Convention does often meet its objectives: “to restrain the flow of cultural property from source nations by limiting its importation by market nations,” which is why a great majority of market nations have not signed the convention.<sup>188</sup>

The UNIDROIT Convention, like the UNESCO Convention, follows a theory of cultural nationalism.<sup>189</sup> The Preamble states “that this Convention is intended to facilitate the restitution and return of cultural objects,” implying that recovery and restitution play exceedingly important roles.<sup>190</sup> Further, the Convention favors the original owner over a bona fide purchaser, even though compensation can be provided when the bona fide purchaser proves due diligence.<sup>191</sup> As the burden of proof is on the purchaser to prove due diligence, source nations are more likely to regain possession of illegally exported property.<sup>192</sup> The UNIDROIT Convention furthers the ideas of the UNESCO Convention, focusing on cultural property belonging to, and eventually being returned to, source nations.<sup>193</sup> As with the UNESCO Convention, due to this cultural nationalism, market nations were reluctant to become parties to the UNIDROIT Convention.<sup>194</sup>

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185. *Id.*

186. Warring, *supra* note 3, at 251.

187. Podesta, *supra* note 161 at 471.

188. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 843 (1986). (Merryman describes in his article how the UNESCO Convention limits the export of cultural property from source nations, which essentially justifies national retention policies and thereby furthers cultural nationalism. He states, “The basic purpose of UNESCO 1970, as its title indicates, is to inhibit the “illicit” international trade in cultural objects . . . the Convention’s purpose [is] to restrain the flow of cultural property from source nations by limiting its importation by market nations. It is true that the Convention applies only to the “illicit” international traffic in cultural property, but since many source nations have policies that, in effect, prohibit *all* export of cultural property, the distinction as to them is not significant. By ratifying UNESCO 1970, a market nation commits itself to forgo the further importation of some kinds of cultural property from those source nations that are parties.”).

189. Phelan, *supra* note 36, at 205.

190. Warring, *supra* note 3, at 253.

191. *Id.*

192. *Id.*

193. Warring, *supra* note 3, at 259.

194. Merryman, *supra* note 182, at 832.

## V. Proposal

While the UNESCO and UNIDROIT Conventions provide an excellent framework, modifications must be made for a convention to be appealing to both source and market nations. The UNIDROIT Convention would be excellent, but it only has a small number of signatory parties.<sup>195</sup> A hypothetical convention is the best solution to determine what framework a convention should follow – something that appeals to both source and market nations and can be ratified by a large number of countries.

One main issue is whether countries that ratify the convention would have to adopt all of the provisions, like the UNIDROIT Convention, or be able to exclude parts, as with the UNESCO Convention.<sup>196</sup> Although countries are less likely to accept a convention where no provisions may be excluded, such an agreement would provide a uniform framework. If countries are able to only implement parts of the convention, then discrepancies are likely to exist between nations, making application of the agreement more difficult. A convention that is internationally consistent, on the other hand, would allow the focus to be on the protection of cultural property, rather than disputes about the application of national laws.

Careful definitions would have to be employed in the convention for “cultural property.” It would be imperative to take into account what other criteria needed to be met for an object to qualify. The UNIDROIT definition is excellent, as it allows for a broad range of items to be included,<sup>197</sup> but does not leave to the discretion of the States to designate what can fall within the definition of cultural property.<sup>198</sup> This would create a uniform framework that could be applied equally to all countries.

The determination of what “illegal exportation” constitutes also must be clarified. The UNIDROIT definition allows for undiscovered and unexcavated objects to be protected.<sup>199</sup> This is essential, as a country cannot possibly know what objects are hidden within its territory. Limiting the definition to cultural property items that have already been discovered and inventoried impedes the protection offered by the convention. Although an inventory would be extremely useful, and should be employed by all States in order to keep track of their cultural property, it should not be a requirement for an object to fall within the boundaries of the convention. Therefore, a functional definition would employ the UNIDROIT definition by protecting both discovered and undiscovered objects, and apply to both inventoried and non-inventoried objects, so there is no limitation on what can be protected.

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195. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75.

196. Levine, *supra* note 6, at 752-753 n.13.

197. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 2.

198. *Id.*

199. *Id.*

The UNIDROIT Convention reversed the civil law presumption that bona fide purchasers of stolen objects receive good title.<sup>200</sup> This, once again, seems like a good solution. Good faith purchasers do receive compensation, so they are not losing money on the transaction.<sup>201</sup> If bona fide purchasers were able to keep stolen or illegally exported cultural objects, it would be nearly impossible for source nations to regain possession of them. Although bona fide purchasers are essentially innocent victims, so are the original source nations. It is understandable that some countries would be reluctant to enter into an agreement that is against their legal presumptions. A convention, however, cannot exclusively take either a civil or common law approach. Countries with both legal traditions would become parties to the convention, and although disagreements over the best rules to apply will cause controversy, it is the protection of cultural property that is being sought. It should not matter whether civil law or common law is employed, as long as it is in the interest of the protection of the cultural objects. Employing the UNIDROIT guidelines would be in the best interest of cultural property, as stolen and illegally exported works would be returned to their countries of origin, where they rightfully belong.

The same holds true for statutes of limitation. Statutes of limitation are necessary, and thus need to be included within the convention, but it will be difficult to reach an agreement because national statutes of limitations vary greatly.<sup>202</sup> A careful balance of time needs to be found – enough to allow parties to pursue a claim for the return of stolen objects, but not so much as to allow for evidence to be forgotten or misplaced. Thus, as above, time periods need to be chosen with regard to the protection of cultural property and not according to national laws. A period longer than three years needs to be afforded to allow claims to be brought, ideally somewhere between five and seven years. Further, a longer statute of limitation from the time of theft should be implemented, at least one hundred years. Fifty, or even seventy-five years is not necessarily a long enough period of time to discover the location of stolen works, and source nations should have an opportunity to regain possession of their cultural property.

The ultimate goal of the hypothetical convention would be universal ratification. As can be seen from the UNESCO and UNIDROIT Conventions, source nations are more likely to become parties because the conventions are in their favor. That being said, market states also play an integral part in the illicit trafficking of cultural property, and thus need to ratify the convention. Often, market states do not see an incentive to become party to such a convention, and in such instances incentives for other market states are lowered as well.<sup>203</sup>

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200. Cottrell, *supra* note 1, at 644.

201. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 75, art. 4.

202. Cottrell, *supra* note 1, at 638.

203. Cottrell, *supra* note 1, at 644.

In order for both market and source nations to have incentive to sign and ratify, it would be imperative for the convention not to favor source nations over market nations. It would also mean that a strong distinction should not be made between cultural nationalism and cultural internationalism. When such a strong distinction is made, certain states might not find it in their best interest to join. Cultural internationalism, however, is not necessarily incompatible with cultural nationalism.<sup>204</sup> Cultural internationalism encompasses cultural nationalism, as “a nation’s cultural property can ‘belong’ to all humankind while still being best appreciated within the context of its place, origin, history and traditional setting.”<sup>205</sup> “[I]f preservation is the key value in balancing the interests of source nations and the rest of the world, other solutions should be explored that do not involve the economic consequences of a possessory transfer.”<sup>206</sup> A convention that calls for the return of cultural property to source nations will most likely not appeal to market nations, while a convention that allows stolen or illegally exported cultural objects to remain in market states will not appeal to source nations. An agreement where exchanges of cultural property were possible would be the best solution and serve the greater international good. Consensual, ongoing exchanges, such as between museums, or traveling exhibits, would allow source nations to retain ownership rights over cultural property, but would allow market nations access to the objects as well. The items would be protected, but at the same time would be visible and accessible without the promulgation of illegal activity. Cultural property is a beneficial tool for education and communication; it serves as an ambassador between nations. Through sharing such valuable cultural objects, knowledge and generosity would be increased between the countries involved.

## **VI. Conclusion**

The protection of cultural property must be addressed in a manner that is effective and acceptable to the international community. The two agreements on the topic, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, provide an excellent framework but fail because of a lack of ratification. The creation of a new convention, one that caters to both source and market nations, would be the best means to providing adequate protection against the illicit trafficking of cultural property. Both the UNESCO and UNIDROIT Conventions are nationalistic in their approach, prompting many market nations not to ratify them. A new convention, however, does not necessarily have to be internationalist in its approach, but rather provide solutions that accommodate both source and market nations, through solutions such as ongoing exchanges and

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204. Chang, *supra* note 5, at 847.

205. *Id.*

206. Chang, *supra* note 5, at 849.

traveling exhibits. Only when a majority of countries ratify such a convention will it become truly capable of protecting cultural property.