American University International Law Review

Volume 9 | Issue 1 Article 11

1993

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property

Claudia Fox

THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS: AN ANSWER TO THE WORLD PROBLEM OF ILLICIT TRADE IN CULTURAL PROPERTY

Claudia Fox*

INTRODUCTION

Recent media reports have brought to the forefront of the public's attention the worldwide problem of illegal trade[1] in stolen art.[2] By some accounts the problem has grown to critical proportions,[3] and is

---

* J.D. Candidate 1994, Washington College of Law, The American University.

1. *See* PAUL BATOR, THE INTERNATIONAL TRADE IN ART 10 (1981) (distinguishing between those objects stolen and smuggled out of the country of origin, and property exported in violation of a foreign state's export laws). For the purposes of this Comment, "illegal trade" will include both stolen objects and those which are exported in contravention of a foreign state's export laws.

2. *See* Suzanne Possehl, *Russian Art Objects Vanishing to the West in Smugglers' Bags*, N.Y. TIMES, Mar. 17, 1993, at C15 (reporting that Russia's changing borders and economic crisis have led to a significant increase in the number of Russian art objects being smuggled across the borders); Paul Rambali, *Booming Chronicle of Stolen Art*, INDEPENDENT, Sept. 13, 1992, at 14 (reporting that, according to the European Council, 60,000 works of art are stolen each year in Europe); Nick Nuttall, *Computer Listing Aims to Tighten Net on Art Thieves*, TIMES, Jan. 16, 1991, *available in* LEXIS, Nexis Library, CURRNT File. *See also* Kate Dourian, *Art Theft to be Major Problem when Borders Come Down in 1992*, REUTER LIBR. REP., Sept. 16, 1991, *available in* LEXIS, Nexis Library, OMNI File (stating that thieves will simply cross the borders with their stolen goods while police will be required to seek special permission to follow up on a theft).

3. *See* RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, DEALERS AND ARTISTS 50 (1981) (stating that the International Foundation for Art Research estimates that billions of dollars worth of stolen and smuggled art is currently in circulation); Ann Guthrie Hingston, *Preserving Mandind's Heritage, U.S. Efforts to Prevent Illicit Trade in Cultural Property*, UNITED STATES INFORMATION AGENCY (1991) (stating that as the commercial value of cultural property continues to increase, so does the illicit trade and art thievery); *see also* Mark Palmer, *Focus on Art Theft: Antiques Rogue Show Mark Palmer Goes on the Trail of a New Genera-*

linked to the illicit drug trade.[4] The high value of art, combined with a low recovery rate and few arrests, has made illicit trade in art an attractive business for criminals.[5] Worldwide, trade in stolen art is estimated to total between $860 million and $2.6 billion annually.[6]

Pillaging, theft and destruction of cultural property also continues to be a problem during war despite international agreements which prohibit such action.[7] During both World Wars, invading soldiers destroyed or stole many movable art treasures.[8] Such was the case of the

---

tion of Artful Dodgers - The Gangs Who Have Discovered a Fast Road to Serious Riches With the Easy Pickings of the Creme de la Crime, SUNDAY TELEGRAPH, Sept. 29, 1991, at 10 (quoting Philip Davies of English Heritage as saying that the international crime of stolen art trade is reaching "epidemic" proportions). *But see* Interview with Harold Burman, Office of the Legal Adviser, State Department, in Washington, D.C. (Nov. 2, 1993) (disagreeing with media portrayal of the magnitude of trade in stolen art).

4. Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the World of Art*, 81 J. CRIM. L. & CRIMINOLOGY 1067 (1991). *See also* Milton Esterow, *Confessions of an Art Cop*, ART NEWS, May 1988, at 134, 137 (noting that an expert on security for art museums claims art thievery is the second largest international criminal activity); Palmer, *supra* note 3 (stating that illegal trade in art is the third largest international crime after trade in drugs and arms trafficking).

5. *See* Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 345 (1983) (stating that "the publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities and to attract illicitly acquired goods to the auction and sales rooms of the 'art market' states"). *See also* Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 920-21 (1991) (reporting that the art market is inflated); Carol L. Morris, *In Search of a Stolen Masterpiece: The Causes and Remedies of International Art Theft*, 15 SYRACUSE J. INT'L L. & COM. 59, 73 (1988); Esterow, *supra* note 4, at 137 (observing that even when arrests are made, the punishments are too lenient to deter further thefts).

6. Kate Dourian, *Art Theft to be Major Problem when Borders Come Down in 1992*, REUTER LIBR. REP., Sept. 16, 1991, *available in* LEXIS, Nexis Library, OMNI File.

7. *See infra* notes 139-56 and accompanying text (noting that the Hague Convention bans such activity).

8. M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 291-92 (1983). *See also* Stanislaw E. Nahlik, *International Law and the Protection of Cultur-*

Quedlinburg treasures,[9] a valuable[10] collection of medieval art[11] stolen from a German church at the end of World War II.[12] When the treasures resurfaced last year in the possession of an American soldier's heirs,[13] Germany filed suit in the United States for their recovery.[14]

---

al Property in Armed Conflicts, 27 HASTINGS L.J. 1069, 1076 (1983) (stating that during World War II the Nazis destroyed whole towns, causing tremendous damage to cultural heritage); Meredith Van Pelt, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: A Case for the Use of Civil Remedies in Effecting the Return of Stolen Art*, 8 DICKINSON J. INT'L L. 441, 442 (1990) (noting that owners of movable treasures hid their valuables to avoid destruction by invading soldiers but often the treasures were found and subsequently destroyed or stolen); Bob Edwards, *German Art Stolen by G-Is During WWII* (National Public Radio Show's Morning Edition broadcast, Apr. 15, 1992) (reporting that vast quantities of art objects disappeared from German museums and churches during World War II, many of which are still missing). Experts believe that much of the art came to the United States with returning GIs who, during post-victory celebrations, insisted on collecting "souvenirs." *Id.*; Glen Collins, *New Hopes of Finding Lost and Looted Art*, N.Y. TIMES, June 20, 1991, at 11 (reporting that a compilation of missing art work at the end of the Nazi years included 4,000 paintings and adding that Allied soldiers stole some of the work).

9. *See* William H. Honan, *It's Finally Agreed: Germany to Regain A Stolen Trove*, N.Y. TIMES, Feb. 26, 1992, at 15 (reporting that during World War II, the German Government hid the treasures in a mineshaft near Quedlinburg, Germany for safekeeping).

10. *See id.* (reporting that the attorney instrumental in negotiating the return of the treasures described them as "one of the most important collections of religious art of the early Middle Ages"); *see also* Marcia Chambers, *One Theft That Brought Big Rewards; German Art Theft Becomes a U.S. Civil Matter*, NAT'L L.J., Mar. 25, 1991, at 13 (stating that in 1980, the treasure was valued at approximately $240 million).

11. *See* Stiftskirche-Domgemeinde of Quedlinburg v. Meador, No. CA3-90-1440-D (N.D. Texas, *filed* June 18, 1990) [hereinafter Complaint] (stating that the fourteen items, which include a comb and a reliquary covered with precious stones, are believed to have belonged to Henry I); *see also Stolen Treasures Returning to German Church; Art: The Heirs of a Soldier Who Found the Priceless Objects and Sent them to Texas at the End of WWII Receive a Total of $2.75 Million*, L.A. TIMES, Jan. 8, 1991, at 10 (quoting Dietrich Kowtzche, an expert in German art who called the objects "among the three most significant medieval church treasures in Germany"). *See generally* Honan, *supra* note 9 (reporting that a study by Charles T. Little, curator at the Metorpolitan Museum of Art, stressed the importance of the missing collection).

12. *See* Peter Gillman, *The Gospel Story*, INDEPENDENT, Mar. 30, 1991, at 20-28 (describing the story of an American soldier who discovered the Quedlinburg treasures). *See also* Chambers, *supra* note 10, at 13 (noting that Germany's discovery of the treasure involved a series of unusual circumstances).

13. *See* Chambers, *supra* note 10, at 3 (stating that a West German foundation

Despite the fact that American property law favors the original owner,[15] Germany settled out of court, paying the heirs close to $3 million for the entire collection.[16] The art world has expressed profound dissatisfaction with the settlement, warning that it sets a dangerous precedent.[17]

---

established to recover stolen art discovered the whereabouts of the treasures); Gillman, *supra* note 12 (reporting the events leading to Germany's discovery of the treasures).

14. *See* Complaint, *supra* note 11 (stating that on June 18, 1990, the Quedlinburg Church filed suit against the heirs of the thief, and against the First National Bank of Whitewright, Texas for the recovery of the "Quedlinburg Treasures"). The complaint also requested declaratory and injunctive relief and damages. *Id.*

15. *See* Autocephalous Greek Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg & Feldman Fine Arts, 717 F. Supp. 1374, 1376 (1989) (finding for the plaintiff, whose property had been stolen and sold to a bona fide purchaser) [hereinafter *Autocephalous*]; Guggenheim Foundation v. Lubell, 569 N.E.2d 426 (noting that the burden of proving that the painting was not stolen is on the possessor, not the original owner) [hereinafter *Guggenheim*]; Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (requiring that the possessor deliver the paintings to the original owner). *But see* DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987) (finding that the owner had not used due diligence in investigating missing art). *See generally infra* notes 68-138 and accompanying text (noting that the general application of common law rules and equitable principles in replevin cases supports the original owner's property rights).

16. *See* Compromise Settlement Agreement and Mutual Release, section 4.06, signed by the heirs of the alleged thief on Feb. 25, 1992, and by the German government on Mar. 2, 1992 [hereinafter Compromise Settlement] (stating that the $912,500 settlement amount was stipulated in the settlement as monies to reimburse the heirs "for their costs and expenses, and to avoid the delay, expense and uncertainty of further litigation"). *See also* Chambers, *supra* note 10, at 13 (observing that the Foundation discovered the artwork when the heirs sold one of the missing pieces, a manuscript, to the Foundation for $1.75 million. When the heirs tried to sell another piece to the Foundation, Germany became fearful that the heirs would attempt to sell the collection piecemeal, and filed suit in a district court in Texas to recover the entire collection); Honan, *supra* note 19, at 15 (noting that Germany also sent letters to American authorities, stating that Germany would not seek criminal prosecution but these letters were not included in the settlement because the heirs did not want to violate the law or be understood as bringing pressure to silence witnesses) (on file with The American University Journal of International Law and Policy).

17. *See* William H. Honan, *With Stolen Treasures, Generosity Has Its Price*, N.Y. TIMES, Mar. 1, 1992, at 6 (quoting Constance Lowenthal, Executive Director of the International Foundation for Art Research, as equating the settlement to "paying ransom for your baby"). *See also* William H. Honan, *Deal on Stolen German Art Meets With Mixed Reaction*, N.Y. TIMES, Jan. 9, 1991, at C13 (quoting Robert T. Buck, director of the Brooklyn Museum, who called the settlement "blackmail"). Buck

Others, however, insist that the agreement represents a practical solution for the restitution of stolen property.[18] While in principle it may seem unjust for the rightful owners of stolen property to pay for its return, the Quedlinburg settlement may be better understood when viewed in the framework of the law that governs stolen artwork cases.[19]

International efforts to curb the illicit trade in art have been largely unsuccessful.[20] Competing national policies of art-importing and art-exporting countries have weakened attempts to gain world support for international agreements governing stolen property cases.[21] Furthermore, rules of common law nations, such as the United States, which protect the rights of the original owner, conflict with the civil law of other na-

---

argues that the settlement sends the message that "theft pays" and sets bad precedent. *Id. See also Kuwait Asks UNESCO Help To Prevent Sale of Stolen Art Objects*, AGENCE FRANCE PRESSE, June 10, 1991, *available in* LEXIS, Nexis Library, CURRNT File (noting that Kuwait has asked for help from UNESCO to prevent sales of artifacts stolen during the Gulf War); Gillman, *supra* note 12, at 26 (reporting that John Collin, an expert in medieval art who looked at the Quedlinburg treasures in 1986, told the heirs that the treasures were obviously stolen and should be returned). When the suit between Germany and the heirs became public, Collins was "outraged." *Id.* at 28.

18. *See* Honan, *supra* note 9, at 15 (reporting that Germany settled out of court to avoid an uncertain outcome at trial); Chambers, *supra* note 10, at 13 (reporting that the German government settled because of concern over lengthy and costly litigation).

19. *See infra* notes 68-138 and accompanying text (noting that there are problems with the application of equitable principles, judicial inconsistencies, and the ineffectiveness of statutes and common law remedies). *See generally* Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long Will the Market Continue to Benefit From Ineffective Laws Governing Cultural Property?*, 13 BROOK. L. REV. 55, 61 (1987) (discussing the reasons that theft of cultural property is not successfully regulated); Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179 (1992).

20. *See* George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 80 (1978) (stating that international efforts have failed to control the movement of illicit materials). *See also* LERNER & BRESLER, *supra* note 3, at 299-300 (stating that legal remedies available to the United States and foreign nations are cumbersome and inadequate due to problems of proving title, statutes of limitations, and treaty limitations); *infra* notes 139-213 and accompanying text (noting that international agreements governing stolen property are ineffective).

21. *See infra* notes 193-213 and accompanying text (noting that the national interests of art-importing nations and art-exporting nations are at odds and prevent formulation of an internationally acceptable agreement governing stolen property).

tions which favor the rights of the bona fide purchaser.[22] In an effort to strike a balance between these competing interests, the courts have created inconsistencies in the body of law governing stolen cultural property.[23]

The competing policies and inconsistent standards governing stolen property cases have created roadblocks to international cooperation.[24] Some scholars, therefore, have advocated uniform standards which would provide for more equitable application of existing law,[25] and which would be accepted by a large number of both civil and common law nations.[26]

In response to problems of the illicit trade in art and antiquities, the International Institute for the Unification of Private Law (UNIDROIT or the Convention) is in the process of drafting a model convention. UNIDROIT's Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects[27] is an attempt to reconcile differences within the national policies and domestic law of various nations.[28] By creating

---

22. *See infra* notes 207, 213 and accompanying text (explaining that civil law countries protect bona fide purchasers).

23. *See infra* notes 90-138 and accompanying text (noting that various jurisdictions interpret the due diligence requirement differently, leaving purchasers and the original owners of stolen artwork unsure of the standards to use when investigating the provenance of a work of art).

24. *See infra* note 193-213 and accompanying text (discussing the competing interests among nations which have prevented international cooperation in the regulation of stolen art).

25. *See* Maritza F. Bolano, Note, *International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention*, 15 FORDHAM INT'L L.J. 129, 156-57 (1991) (calling for the United States to develop a uniform standard of adjudicating complex cultural property disputes in order to effectuate the UNESCO Convention's goals of deterring the illegal art trade and aiding signatory nations in the recovery of stolen or illegally exported property).

26. *See* Explanatory Report of the Draft UNIDROIT Convention prepared by the UNIDROIT Secretariat Study LXX - Doc. 19, 10, Aug. 1990 [hereinafter Explanatory Report] (explaining the compromises made by the study group to attract greater acceptance by the international community).

27. Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Study LXX - Doc. 40, 1990 (original in French) [hereinafter 1990 Draft Convention]; Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Study LXX - Doc. 40, 1993 (original in English) [hereinafter 1993 Draft Convention].

28. *See infra* notes 214-74 and accompanying text (discussing the provisions of the UNIDROIT Convention that attempt to provide a workable set of rules acceptable to countries whose laws offer greater protection to bona fide purchasers and to those

a workable set of uniform rules and private litigation rights, the drafters of the UNIDROIT Convention seek to harmonize antithetical aspects of common law and civil law jurisprudence on the issue in order to attract a large number of signatory nations.[29] The UNIDROIT Convention is broader in scope[30] than existing agreements and takes much-needed steps toward balancing the interests of original owners and bona fide purchasers.[31] Among other provisions the Convention establishes a right of return of stolen objects, thereby protecting the property rights of the original owner.[32] At the same time, it provides for an equitable remedy of compensation to be paid to good faith purchasers who have taken appropriate steps to ensure that the art has good title.[33]

This Comment analyzes the global need for a uniform standard in view of existing problems of international law and to determine whether the UNIDROIT Convention successfully addresses those problems. Part I highlights the application of United States domestic law to cases of stolen international cultural property. This section focuses on the National Stolen Property Act and the civil action in replevin and examines the inadequacies preventing effective remedies. Part II examines the principal international agreements for the protection of stolen international property, the UNESCO Convention and the Hague Convention of 1954, and examines their limitations. Part III discusses the policy considerations and competing values of nations that have thus far prevented the adoption of an international agreement acceptable to a large number of nations. Part IV discusses the UNIDROIT Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects and its compatibility

---

whose laws favor the original owner).

29. Memorandum from Harold S. Burman, Office of the Legal Adviser, State Department, to Advisory Committee Members and Commentators on the Proposed UNIDROIT Convention of the International Protection of Cultural Property (Dec. 5, 1991) [hereinafter Burman Memorandum] (on file with The American University Journal of International Law and Policy).

30. *See infra* notes 214-25 and accompanying text (explaining that, unlike previous international agreements, the UNIDROIT Convention expands litigation rights of governments and provides for restitution of the stolen object to the original owner).

31. *See infra* notes 226-74 and accompanying text (discussing articles 3 and 4 of the UNIDROIT Convention which seek to provide an equitable solution to good faith purchasers while preserving the property rights of the original owners).

32. *See* 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 3.

33. *See* 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 4.

with United States common law. Part IV argues that the United States should lead the way in adopting the UNIDROIT Convention because it offers an equitable solution to art theft cases.

The UNIDROIT Convention, if ratified, would protect the rights of both the original owners and bona fide purchasers of art. Moreover, it would significantly deter illicit art trade without damaging free trade in art, and it is compatible with United States law and existing international agreements.

I. UNITED STATES DOMESTIC LAW CONCERNING STOLEN CULTURAL PROPERTY

A. THE NATIONAL STOLEN PROPERTY ACT

The National Stolen Property Act (NSPA)[34] makes it a federal crime to transport goods[35] in foreign commerce which are known to be stolen.[36] Because the NSPA is a criminal statute, however, it does not provide for the restitution of a stolen artifact.[37] Also, since the NSPA is a criminal statute,[38] courts tend to interpret it strictly, requiring all elements of the crime to be proven.[39] Under the NSPA, this involves a

---

34. National Stolen Property Act, 18 U.S.C. §§ 2311-2318 (1976) [hereinafter NSPA].

35. *See* BATOR, *supra* note 1, at 10 (differentiating between stolen and illegally exported cultural property). Exportation of an object from a foreign country contrary to that country's law is not actionable in the United States unless the object is stolen. *Id.* An object may be illegally exported from a foreign country and lawfully imported into the United States. *Id.; see also* Nowell, *supra* note 20, at 87 (stating that the NSPA does not reach cultural property illegally exported but not stolen).

36. *See* 18 U.S.C § 2314 (providing that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to be stolen, converted or taken by fraud . . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both").

37. LERNER & BRESLER, *supra* note 3, at 302.

38. *See* United States v. McClain, 545 F.2d 988, 994 (5th Cir. 1977) (stating that Congess' intent in enacting stolen property statutes was to aid the states by discouraging local and interstate traffic in stolen goods); *see also* Nowell, *supra* note 20, at 89 (using legislative history to show that the NSPA was not enacted to cover foreign archaeological theft).

39. *See McClain*, 545 F.2d at 995 (providing authority which holds that United States jurisprudence interprets penal laws strictly in order to protect individuals' rights).

required showing of "scienter": the defendant's state of mind indicating that he had knowledge that the goods were stolen.[40] Proving scienter in stolen art cases is normally more difficult than for other commercial goods.[41] This difficulty is a function of the nature of the art transaction itself. Often, the exchange of art objects is made through art dealers and auction houses who take very few measures to verify the provenance of the artwork. This lack of procedural safeguards makes it difficult to show a legitimate chain of title.[42] Thus, more often than not, stolen artwork resurfaces on the legitimate market with the purchaser unaware of its illicit background.[43]

Until the early 1970s, because of the difficulty in proving the scienter element, the prosecution of possessors of stolen art was only a theoretical deterrent to art theft.[44] In 1974, however, the Ninth Circuit Court of Appeals in *United States v. Hollinshead*[45] upheld a criminal conviction under the NSPA. The *Hollinshead* defendants had stolen and imported

---

40. *See* 18 U.S.C. § 2315 (requiring knowledge that the article was "stolen, unlawfully converted or taken"); *see generally McLain*, 545 F.2d at 1002 (noting that because defendants did not have knowledge that the articles were technically considered "stolen" under Mexican law, they could not be liable under the NSPA); Nowell, *supra* note 20, at 88-91 (discussing the statutory interpretation problems with the NSPA).

41. *See* Nowell, *supra* note 20, at 98 n.106 (remarking that fences destroy evidence of theft by selling to unsuspecting buyers who in turn serve to convert and legitimize the stolen item). *See also* Van Pelt, *supra* note 8, at 448 (stating that the majority of stolen art work resurfaces in the legal art market only after it has been purchased several times, creating an apparently legitimate chain of title); Prott, *supra* note 5, at 348 (stating that the world's largest auction houses are not subject to control, allowing illegally acquired goods to be marketed).

42. *See* Prott, *supra* note 5, at 345 (stating that many dealers and art experts do not take steps to determine the origins of artwork). *See also* LERNER & BRESLER, *supra* note 3, at 49 (observing that because it is unique and irreplaceable, art is often purchased on a whim by an uninformed buyer); Jore, *supra* note 19, at 76 (discussing that there are no requirements that auction houses determine prior ownership of art).

43. *See Kunstsammlungen Zu Weimar*, 536 F. Supp. at 833 (explaining that the defendant purchased the object from an American ex-serviceman without knowing it was stolen); *see also DeWeerth*, 835 F.2d at 103 (explaining that defendant purchased the missing paintings for value and in good faith from an art gallery that had acquired the painting on consignment from a Swiss art dealer); Nowell, *supra* note 20, at 95 (calling for a legal tool to address stolen art objects with minimal or no scienter requirement).

44. *See* BATOR, *supra* note 1, at 68-69 (noting that difficulties in proving that an object was stolen hindered the prosecution of art thieves).

45. 495 F.2d 1154 (9th Cir. 1974).

to the United States rare pre-Columbian artifacts from Guatemala. The circuit court held that even if the defendants did not know Guatemalan law as they claimed, they were aware that the objects were technically stolen.[46] The court further stated that once a nation declares ownership of cultural property, the subsequent unapproved taking of that property is sufficient to render it "stolen" under the NSPA.[47]

The Fifth Circuit Court of Appeals followed broad interpretation of the NSPA three years later in *United States v. McLain*.[48] In *McLain*, the court upheld an NSPA conviction for conspiring to receive and transport unregistered pre-Columbian artifacts through interstate commerce.[49] The Fifth Circuit, like the *Hollinshead* court, held that under the NSPA, where a nation's law clearly declares national ownership of art objects, an item illegally exported in contravention of such a law would be considered stolen.[50] This decision has eroded the critical distinction between "stolen" and "illegally exported,"[51] a distinction usually

---

46. *See Hollinshead*, 495 F.2d at 1156 (upholding NSPA conviction of co-conspirators who removed pre-Columbian art in contravention of Guatemalan law).

47. *Id.* The *Hollinshead* court upheld the conviction of a dealer in pre-Columbian art for stealing and conspiring to transport a rare Guatemalan stela worth thousands of dollars. *Id.* at 1155. The defendants had cut the stela into pieces for shipment to the United States where they attempted to sell it. *Id.* The defendants argued that they did not know that under Guatemalan law the artifacts were classified as stolen property. *Id.* The court, however, held that the government only needed to prove that the defendants knew the article was stolen, not *from where* it was stolen, or the specific laws of the country of origin. *Id.* at 1156 (emphasis added).

48. 545 F.2d 988, *reh'g denied*, 551 F.2d 52 (5th Cir. 1977). The case was remanded to determine whether the Mexican law in effect at the time the article was exported clearly declare national ownership of the article. *See* United States v. McLain, 593 F.2d 658, 671 (1979) (concluding that "the National Stolen Property Act . . . cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature").

49. *See id.* at 995 (rejecting appellants' argument that the NSPA does not apply to artifacts exported in contravention of Mexican law).

50. *Id.* at 1000. The lower court convicted the defendants under the NSPA and instructed the jury that the Mexican law declaring state ownership of all pre-Columbian artifacts in its jurisdiction had been in place since 1897. *Id.* at 991. The circuit court reversed the decision, finding that the Mexican law was not enacted until 1972. *Id.* The court, however, upheld the lower court's broad interpretation that a declaration of national ownership is sufficient to create ownership in a state. *Id.* at 1000. *But see* Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989) (holding that Peru had not met its burden of establishing ownership at the time the item was exported.)

51. *See* BATOR, *supra* note 1, at 74-75 (explaining that exportation of cultural property from a foreign country in contravention of that country's laws is not per se

made in international agreements.[52]

The *McLain* decision contradicts U.S. policy which strongly opposes agreements that allow a country to prosecute according to blanket legislation vesting title of cultural property in that government.[53] *McLain* recognizes a nation's right to claim ownership of all cultural objects within its jurisdiction, making exportation without permission illegal.[54] This recognition leaves open questions about the fate of collections in American museums[55] and the liability of bona fide purchasers who acquire art without knowledge of its origins.[56]

Commentators have criticized the NSPA as an inadequate response to art theft on several grounds. First, the scienter element is so difficult to prove that it is ineffective as a deterrent to art theft.[57] Second, strict application of the NSPA in prosecuting all cases in which a foreign government claims blanket ownership of all cultural property in its jurisdiction would create chaos in determining title.[58] Finally, the NSPA focus-

---

actionable in the United States).

52. *See McLain*, 545 F.2d at 996 (discussing the draft provisions of the UNESCO Convention which called for signatories to criminalize under their laws the importation of cultural property that was exported without certification from the country of origin); *see also infra* notes 157-88 and accompanying text (discussing the UNESCO Convention provisions regulating illegal export of cultural property).

53. *See McLain*, 545 F.2d at 996 (discussing the United States' opposition to provisions that call for blanket legislation covering illegally imported artwork and the substituted provisions which would include import controls only in crisis situations); *see also* Nowell, *supra* note 20, at 95-96 (stating that the interpretation of the *McLain* court conflicts with current approaches to archaeological thefts and may conflict with future approaches in negotiating an international solution to the problem of stolen property); *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97 (1976) (stating that the United States was "not prepared to give the rest of the world a blank check in that [the United States] would not automatically enforce through import controls, whatever export controls were established by the other country except as narrowly limited by Article 9 which calls for controls during a time of crisis").

54. *McLain*, 545 F.2d at 988.

55. BATOR, *supra* note 1, at 76.

56. BATOR, *supra* note 1, at 77.

57. William D. Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y IN INT'L BUS. 932, 940 (1973) (asserting that the effectiveness of penal laws has been all but erased by the scienter requirement).

58. Nowell, *supra* note 20, at 108. *See* BATOR, *supra* note 1, at 78 (stating that criminal prosecution should be reserved only for the most "egregious" stolen art

es on criminal conduct[59] and does not provide for the restoration of stolen art to its proper owner, which is a major shortcoming. Because victims usually seek recovery given the unique characteristics of art and its irreplacability, the focus on criminal conduct is misplaced.[60] For these reasons, many advocate the practicality of civil remedies.[61]

B. CIVIL ACTION OF REPLEVIN

Victims of art theft usually seek to recover the missing object by bringing an action in replevin, which provides for the recovery of the property and incidental money damages.[62] Advocates of civil remedies argue that such actions are a more efficient mechanism for dealing with stolen art cases, and provide a better deterrent to potential thieves than does the NSPA.[63] They argue that civil remedies can be more broadly applied without the constitutional concerns of criminal prosecution and the need to prove scienter.[64] Civil remedies, however, may also have a disadvantage in that the nature of stolen art transactions makes determination of title difficult.[65] Title disputes involve complex issues[66] calling

---

cases).

59. 18 U.S.C. § 2314.

60. *Autocephalous*, 717 F. Supp. at 1389.

61. *See* Van Pelt, *supra* note 8, at 443 (stating that civil remedies are more efficient than criminal prosecutions for four reasons: first, owners are more apt to sue, deterring theft by the cost of litigation; second, civil sanctions can be more broadly applied; third, constitutional protections of the defendant are not a concern; fourth, the legislative history would not be scrutinized as it often is when a criminal statute is involved).

62. *See Autocephalous*, 717 F. Supp. at 1395 (defining replevin as a statutory remedy that allows an owner to recover property wrongfully taken as well as damages incidental to its detention); *see also* BLACK'S LAW DICTIONARY 1299 (6th ed. 1990) (defining replevin as an "action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels").

63. *See* Nowell, *supra* note 20, at 103 (arguing that civil suits are preferable to criminal actions for several reasons: civil sanctions encourage wronged owners to sue, deterring potential thieves with the threat of litigation; the broad application of civil sanctions reaches individuals not reached by criminal sanctions; the plaintiff is favored because a defendant is not allowed the constitutional protections mandated in criminal prosecution).

64. *See supra* notes 34-47 and accompanying text (considering the difficulty of satisfying the NSPA's scienter requirement and the concern over constitutional rights).

65. *See supra* notes 41-43 and accompanying text (discussing the difficulty of proving title in art dispute cases).

66. *See infra* notes 68-138 and accompanying text (examining the difficulties of

for a balance of common law rules and equitable principles. The result has been inconsistent court decisions and a lack of unified standards.[67]

1. Statute of Limitations

In an action for replevin in which the owner seeks to recover personal property, the general rule is that a thief cannot pass good title to a purchaser.[68] One who purchases stolen art, however, may use a statute of limitations defense against the original owner.[69] The statute of limitations serves to prevent stale claims and to ensure a good faith purchaser eventual security in the right to title.[70] Normally, the statute of limitations begins to run at the time a thief steals the property.[71] Strict application of the statute of limitations, however, would allow a thief or even a dishonest purchaser of art with dubious provenance to simply conceal it until the statute of limitations has expired.[72] On the other hand, good faith purchasers must have security of title or the art market would be devastated.[73] The courts, therefore, have applied several other doctrines

---

reconciling title disputes).

67. *See infra* notes 90-138 and accompanying text (examining the application of the discovery rule and requirements of due diligence which have been applied inconsistently in art theft cases).

68. *Autocephalous*, 717 F. Supp. at 1398; *Kunstsammlungen Zu Weimar*, 536 F. Supp. at 833; O'Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980). *See* Charles D. Webb, Jr., *Whose Art is it Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883, 885 (1991) (discussing Uniform Commercial Code provisions allowing thieves to transfer only void title).

69. U.C.C. § 2-403 (1989). *Kunstsammlungen*, 536 F. Supp. at 846; *DeWeerth*, 836 F.2d at 103. *See Autocephalous*, 717 F. Supp. at 1385 (stating that courts favor statutes of limitations because they are firmly based upon public policy considerations).

70. *See DeWeerth*, 836 F.2d at 109 (stating that the purpose of the statute of limitations is to provide a purchaser with security that he or she will not have to defend unreasonably old claims in which the evidence may have been lost or witnesses may have disappeared); *see also O'Keeffe*, 416 A.2d at 868 (stating that the purpose of a statute of limitations is to "stimulate to activity and punish negligence" in pursuing claims, and to "promote repose by giving security and stability to human affairs" (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

71. *DeWeerth*, 836 F.2d at 106.

72. *Kunstsammlungen Zu Weimar*, 536 F. Supp. at 849. *See O'Keeffe*, 416 A.2d at 872-73 (discussing the general rule that a thief who fraudulently conceals a stolen object will be estopped from asserting a statute of limitations defense).

73. *See* LERNER & BRESLER, *supra* note 3, at 82 (asserting that a purchaser's feeling of security promotes free trade of art).

in an attempt to mitigate the harshness of the statute of limitations.[74]

2. Demand and Refusal

Courts in the State of New York follow the "demand and refusal" rule which holds that the statute of limitations does not begin to run against a good faith purchaser until the original owner demands return of the property and the purchaser refuses to comply.[75] A purchaser of stolen art is not considered to be in wrongful possession until he or she refuses a demand for return.[76] The claimant's demand is considered a substantive condition for bringing the action.[77] The claimant, however, must make the demand without unreasonable delay. The claimant, then, is obligated to use due diligence in searching for stolen property.[78]

3. Adverse Possession

Prior to the New Jersey Supreme Court's pivotal decision in *O'Keeffe v. Snyder*,[79] an art purchaser/defendant could use the doctrine of adverse possession to establish title by "hostile, actual, visible and exclusive and continuous possession."[80] At least one commentator argues that adverse possession affords better protection to the original owner because it puts a greater burden on subsequent possessors.[81] Whether pos-

---

74. *O'Keeffe*, 416 A.2d at 869. *See* Eisen, *supra* note 4, at 1075-81 (describing the discovery rule as one of the equitable doctrines used to mitigate the strict application of the statute of limitations).

75. Menzel v. List, 253 N.Y.S.2d 43, 44 (1964); *Kunstsammlungen Zu Weimar*, 536 F. Supp. at 848-49.

76. *Kunstsammlungen Zu Weimar*, 536 F. Supp. at 848. *See Guggenheim*, 569 N.E.2d at 426 (commenting that a replevin action against a good faith purchaser does not accrue until the claimant demands the return of the property and the possessor refuses). The court stated that and the need to preserve the rights of original owners, and discourage illicit traffic was particularly important in New York, an important cultural center. *Id.*

77. *Guggenheim*, 569 N.E.2d at 426.

78. *See DeWeerth*, 836 F.2d at 107 (finding that the owner had not taken sufficient measures to locate the missing artwork); Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 179 (1990) (analyzing the due diligence requirements in fine art requirements); *see also* notes 90-138 and accompanying text (demonstrating inconsistent judicial application of the due diligence standard).

79. 416 A.2d 862 (N.J. 1980).

80. *O'Keeffe*, 416 A.2d at 870 (citing Redmond v. New Jersey Historical Soc'y, 28 A.2d 189 (N.J. 1942).

81. *See* Eisen, *supra* note 4, at 1077 (stating that the doctrine of adverse pos-

session is in fact "open and notorious,"[82] however, is difficult to determine.

Adverse possession is particularly difficult to define as it relates to art.[83] Admirers often purchase art for private, personal enjoyment.[84] The adverse possession doctrine has the effect of forcing owners to display their art in public exhibits in order to satisfy the "open and notorious" requirement.[85] In *O'Keeffe*,[86] the New Jersey Supreme Court found the doctrine of adverse possession inappropriate because it placed too heavy a burden on art purchasers and did not give them freedom to use their property according to their desires.[87] The court found that there was no satisfactory means by which the purchaser could have determined the object's provenance.[88] It concluded that the discovery rule is the more appropriate rule in art theft cases.[89]

4. The Discovery Rule and Due Diligence

The New Jersey Supreme Court's shift to the discovery rule in *O'Keeffe*[90] reversed the trend toward the adverse possession doctrine by shifting the focus to the conduct of the plaintiff.[91] Under this rule, fol-

---

session places a heavier burden on the possessor).

82. *See id.* (commenting that courts originally applied adverse possession only to title disputes involving land but later applied it to chattels as well). It is difficult to prove adverse possession of movable property, however, because such property can be easily concealed. *Id.*

83. *Id.* at 1078.

84. *O'Keeffe*, 405 A.2d at 871.

85. *Id.*

86. *Id.* at 862.

87. *See id.* at 871-72 (discussing the difficulty of showing adverse possession by the art owner who displays the art in the privacy of his or her own home). The stolen paintings had been displayed privately, in the home of the possessor and had been exhibited publicly. *See also* Eisen, *supra* note 4, at 1078 (discussing the conflict between application of the adverse possession doctrine, which requires the purchaser to display the art publicly, and non-application of the doctrine which gives the theft victim the impossible task of finding art displayed privately).

88. *See O'Keeffe*, 416 A.2d at 872 (suggesting that an efficient registry of artwork might assist good faith purchasers and owners in determining the provenance of a painting).

89. *Id. See also* Eisen, *supra* note 4, at 1078 (suggesting that the *O'Keeffe* court did not want to set the standard for adverse possession as "open and notorious" possession and therefore shifted to the discovery rule).

90. *O'Keeffe*, 416 A.2d at 862.

91. *See* Eisen, *supra* note 4, at 1078-81 (explaining that many courts have fol-

lowed in the majority of jurisdictions,[92] the statute of limitations will not begin to run until the owner knows or should have known the location of the missing artwork.[93] Thus, the burden shifts to the plaintiff to show he or she used due diligence in locating the stolen property.[94] The exercise of due diligence becomes a question of fact, and must be examined on a case-by-case basis.[95]

The Second Circuit Court of Appeals examined due diligence in *Kunstsammlungen Zu Weimar v. Elicofon*,[96] a case involving paintings stolen from a German museum by an American soldier during World War II.[97] The court scrutinized the museum's efforts[98] to find the paintings as well as the alleged deficiencies[99] in its search, and found that the museum had exercised due diligence.[100] The District Court for the Southern District of New York addressed the issue five years later

---

lowed the *O'Keeffe* reasoning and no longer apply the adverse possession doctrine).

92. *See Acquiring Title to Stolen Art*, TEXAS BAR J., Mar. 1992 (stating that in the majority of jurisdictions, the demand and refusal rule is unnecessary); *see also* Eisen, *supra* note 4, at 1081, 1084 (noting the expanding use of the discovery rule).

93. *DeWeerth*, 836 F.2d at 103; *Autocephalous*, 717 F. Supp. at 1374. *See also O'Keeffe*, 416 A.2d at 872 (reasoning that the rule permits an owner to retain his or her right to possession and title as long as the claimant uses reasonable efforts to recover the missing artwork).

94. *O'Keeffe*, 416 A.2d at 872.

95. *See id.* at 873 (stating that the courts should weigh the equitable concerns of the parties and that the meaning of due diligence will vary in each case). *See infra* notes 96-138 and accompanying text (comparing the factors courts have used to determine due diligence).

96. *Kunstsammlungen Zu Weimar*, 678 F. Supp. at 829.

97. *See id.* at 837 (finding that, as a matter of law, the paintings were stolen from the castle where they were placed for safekeeping, and noting that their disappearance coincided with the American troops' departure).

98. *See id.* at 850 (explaining that the museum's efforts to locate the missing paintings included correspondence to the Land Office of Education, United States military authority, the Soviet military authority, Harvard University, and the United States Department of State).

99. *See id.* (rejecting the defendant's argument that because the museum had failed to consult the Central Collection Points established to catalogue and store artwork until the end of the war, the museum's search did not meet the due diligence requirement). The court held that in light of the other efforts made to locate the artwork, the museum's failure to notify the CCP did not constitute lack of diligence. *Id.* at 852.

100. *Id.* at 849-50. The court further held that any delay in bringing the suit was reasonable given the Cold War tensions existing between the United States and Germany at the time. *Id.* at 852.

in *DeWeerth v. Baldinger*.[101] The German owner of a Monet painting which disappeared at the end of World War II, sued an American who had purchased the painting in 1957 in New York.[102] The district court found for the owner, stating that she satisfied the due diligence requirement with her recovery efforts.[103] The appeals court reversed, however, finding the owner's efforts to have been minimal.[104] The appeals court focused on what the owner failed to do and listed several steps she should have taken to locate her painting.[105] Given her wealth and sophistication as an art collector, the court concluded, the owner could have hired someone to carry out the search.[106]

In contrast, the New York Court of Appeals in *Guggenheim Foundation v. Lubell*,[107] emphasized New York's adherence to the demand and

---

101. 836 F.2d 103 (2d Cir. 1987).

102. *See id.* at 104 (explaining that during World War II, the owner sent the painting to her sister's castle for safekeeping). Americans were quartered in the castle at the end of the war, and the Monet was missing following the soldiers' departure. *Id.* at 105. The owner filed a report with the military government listing the painting as missing and requested her lawyer's assistance in locating it. *Id.*

103. 658 F. Supp. at 694 (ruling that sufficient efforts had been made because: she had reported the loss of the painting to the military government, she had solicited assistance of her lawyer, she made inquiries to art experts, and she reported the Monet as missing to the Bundeskriminalant—the West German national investigation agency). The court excused her cessation of the search from 1957 to 1981, when she finally located the painting, because of her advanced age. *Id.* at 694-95. The court distinguished DeWeerth's search and the due diligence required in *Kunstsammlungen Zu Weimar*, stating that a government-owned museum had more resources available to pursue a search. *Kunstsammlungen Zu Weimar*, 678 F. Supp. at 829.

104. *See* 836 F.2d at 111 (holding that writing letters and notifying the military police was a standard procedure and that the letter written to her lawyer requesting assistance may have been simply an insurance matter, given the fact that DeWeerth never pursued the matter).

105. *See id.* at 111-12 (finding that the owner: (1) failed to make use of the Central Collecting Points established by the Allied forces at the end of the war; (2) failed to publicize the theft in available listings made to notify museums; (3) failed to continue her search between 1957 and 1981; and (4) failed to consult the Catalogue Raissone, a definitive accounting of an artist's works which showed that the painting had been exhibited in 1970). Furthermore, the court did not excuse her failure to search for the missing Monet after 1957, indicating that age was not an important factor since she was 63 years old when she last attempted to find the painting. *Id.* at 112.

106. *Id.*

107. 569 N.E.2d 426 (N.Y. 1991).

refusal rule,[108] and refused to consider due diligence.[109] The court reasoned that an original owner's failure to meet the due diligence burden would foreclose that owner's right to recover property, and would encourage the illicit sales of stolen art.[110] The court held, therefore, that the burden of investigating provenance of artwork is more properly placed on the potential purchaser.[111]

The Indiana case of *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*[112] incorporates some of New York's *Guggenheim* principles. *Autocephalous* expands the due diligence rule to include an obligation on the part of the purchaser to exercise due diligence in investigating the provenance of artwork prior to purchase.[113] Thus, the *Autocephalous* decision sets the standard for efforts required of both plaintiffs and defendants.[114]

In *Autocephalous*, Goldberg, an art dealer, bought ancient mosaics which had been stolen from a church in Cyprus.[115] The country of Cy-

---

108. *See id.* at 430 (noting that the New York legislature rejected the discovery rule because it did not adequately protect original owners). The court quoted from a message given by the Governor of New York when he vetoed a bill which would have modified the demand and refusal rule. *Id.* The Governor stated that the bill would make New York "a haven for cultural property stolen abroad since objects [would] be immune from recovery under the limited time periods established by the bill." *Id.*

109. *Id.* The Solomon R. Guggenheim Foundation sought to recover a Chagall gouache which was missing from its museum, believed to have been stolen in the late 1960s by a mailroom employee. *Id.* The museum did not realize the painting was missing until it did a complete inventory in 1969-1970. *Id.* at 428. The Lubells had purchased the painting from a gallery, displayed it in their home, and exhibited the painting twice. *Id.* at 427-28. The Lubells claimed that the museum had not used due diligence in searching for the Gouache and that the statute of limitations had therefore expired. *Id.* The museum asserted that it purposefully declined to notify authorities and openly investigate the missing gouache for fear that the publicity would drive the painting further underground. *Id.* at 428. The court did not find it necessary to settle the due diligence issue, stating that it was unfair to place such a heavy burden on the purchaser of stolen property. *Id.* at 431. The court recognized, however, that due diligence may be considered when evaluating the laches defense. *Id.*

110. *Id.*

111. *See id.* at 431 (reasoning that New York is a center for the art trade and the better rule would protect owners and deter theft by placing the burden of investigation on the purchaser).

112. *Autocephalous*, 717 F. Supp. at 1374.

113. *Id.* at 1375.

114. *See infra* note 123 and accompanying text (explaining that art dealers should more carefully investigate the provenance of artwork before purchasing it).

115. *See Autocephalous*, 717 F. Supp. at 1377-79 (explaining that four Byzantine

prus initiated an action in replevin after discovering the location of the mosaics when Goldberg attempted to sell them.[116] The court applied the discovery rule and concluded that the statute of limitations did not begin to run until the plaintiffs, using due diligence, knew or should have known the identity of the wrongful possessor.[117] The court scrutinized Cyprus's actions and determined that it had exercised due diligence in searching for the mosaics.[118] It further noted that if the discovery rule did not apply, as defendants argued, there was sufficient evidence to indicate the mosaics had been fraudulently concealed for nine years, thus estopping Goldberg from using the statute of limitations defense.[119] The court referred to a principle of Swiss law which presumes that a purchaser acts in good faith when purchasing property without knowing it is stolen.[120] Finally, the court examined Goldberg's actions and held that she did not purchase the mosaics in good faith.[121] Tradi-

---

mosaics created in the early sixth century A.D. were inappropriately removed from the Kankaria church during the Turkish occupation of Cyprus in the 1970s).

116. *Id.* at 1385. Goldberg had purchased the mosaics from a middleman in Switzerland who told her that the mosaics had been found in an "extinct" church. *Id.* at 1383. Goldberg contacted several art dealers in an attempt to sell the mosaics. *Id.* at 1384. The dealers then contacted the Getty Museum in California to see whether the museum would be interested in purchasing them. *Id.* Cyprus became aware of the mosaics' whereabouts through its connections with the Getty Museum and the United States Department of State. *Id.*

117. *Id.* at 1389 (reasoning that it is inconsistent to limit the time in which a plaintiff can bring suit if he or she could not be aware that a cause of action exists).

118. *See id.* at 1389 (finding that Cyprus mounted an "organized and systematic effort" to notify organizations that might have known of the mosaic's existence). Cyprus had contacted agencies of the United Nations, museums around the world, and various scholars. *Id.*

119. *See id.* at 1392 (discussing the doctrine of fraudulent concealment and stating that the evidence showed that Cyprus could not reasonably have known the whereabouts of the mosaics from the time they were stolen until it commenced the action in 1988). *See also Kunstsammlungen*, 536 F. Supp. at 852 (stating that a thief who conceals his possession of a stolen object, making it impossible for the owner to institute a suit within the limitations period, may be estopped from asserting the statute of limitations as a defense).

120. *See Autocephalous*, 717 F. Supp. at 1400 (stating that under Swiss law, a purchaser "acquires superior title to that of an original owner only if he purchases the property in good faith"). To determine that a purchaser does not act in good faith, the court must find that the purchaser knew that the seller's title was void or that the purchaser should have had doubts as to the validity of title. *Id.*

121. *See id.* at 1402 (concluding that suspicious circumstances of the sale should have sent up "red flags" alerting Goldberg as to the mosaics' dubious background).

tionally, art dealers are presumed to have acted in good faith,[122] but *Autocephalous* sets a new standard which requires art dealers to more thoroughly investigate an artwork's provenance.[123]

In trying to achieve an equitable approach to the application of the statute of limitations, courts have applied various rules which favor either the plaintiff or the defendant.[124] The discovery rule, like the adverse possession and demand and refusal rules, favors one litigant over the other.[125] Critics of the demand and refusal rule argue that it favors original owners because they can bring suit without regard to the passage of time.[126] If a purchaser could never be secure in her possessory rights, the free flow of art in the commercial market would be interrupted.[127] On the other hand, the discovery rule favors the possessor by placing the burden on original owners to maintain a continual search.[128]

The circumstances were: (1) Goldberg testified that she was suspicious about the origins of the mosaics; (2) the nature of objects themselves—being of a spiritual nature should have caused a purchaser to check into their provenance; (3) there was a disparity between the value of the mosaics and the price paid; (4) the fact that the seller, an "archaeologist," was selling antiquities should have led Goldberg to question the validity of his claim; (5) the fact that Goldberg knew that the middlemen had previous criminal convictions; (6) the fact that the sale was consummated very hastely. *Id.* at 1400-02.

122. *See* Explanatory Report, *supra* note 26, at 24 (stating that there is a greater likelihood of a judicial finding of good faith where art is purchased through an antique dealer).

123. *See* Van Pelt, *supra* note 8, at 448 n.74 (citing Constance Lowenthal, executive director for the International Foundation for Art Research in New York City, as saying that the significance of the *Autocephalous* decision is that it sets a new standard for the purchase of antiquities).

124. *See* Eisen, *supra* note 4, at 1091 (stating that the discovery rule fails to provide an equitable solution to stolen art cases because it favors one litigant over another).

125. *Id.* However, courts in the United States do not exhibit preferential treatment of litigants, but rather attempt to encourage free trade in art while simultaneously protecting the rightful owners. *Id.* at 1092.

126. *See* John G. Petrovich, Comment, *Recovery of Stolen Art: Of Painting Statutes and Statutes of Limitations*, 27 U.C.L.A. L. REV. 1122, 1140 (1980) (stating that the demand and refusal rule reduces the repose of innocent purchasers to a nullity).

127. *See* Webb, *supra* note 68, at 894 (stating that prospective purchasers will not buy if they cannot rely on dealers to pass good title).

128. *See* Eisen, *supra* note 4, at 1091 (stating that if the original owner carries the burden of due diligence, he may be required to investigative excessively to recover his property or forfeit his claim to title). *See also* Webb, *supra* note 68, at 892

Courts, in trying to create flexibility, have created inconsistency and uncertainty.[129]

Ultimately, the applicable law and statute of limitations will be determined by the jurisdiction that adjudicates the dispute.[130] The dishonest may have an incentive to "shop" for jurisdictions that would likely rule in their favor and that have shorter statutory periods.[131] Additionally, the courts have not agreed on a standard for the required intensity of a search to satisfy the due diligence standard.[132] Unclear standards place a tremendous burden on claimants by forcing them to spend inordinate amounts of money and time on potentially fruitless investigation.[133] Furthermore, a rule that burdens the original owner is inconsistent with the thief rule,[134] which states that a thief cannot pass good title, even to a good faith purchaser.[135] In such a case, if a good faith purchaser has paid for stolen property, he or she would not have a claim to valid title.[136]

The *Autocephalous* case reconciles these differences by closely exam-

---

(stating that a continual, repetitive search which has proved fruitless over a number of years creates a burden that few owners are willing to bear).

129. *Compare* DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (finding that contacting authorities and a lawyer was insufficient to meet the due diligence burden) *with* Guggenheim v. Lubell, 569 N.E.2d (N.Y. App. Div. 1991) (rejecting the need for any investigation). *See also* Eisen, *supra* note 4, at 1091 (indicating that claimants do not know the standards of diligence the court will place on their searches).

130. *Compare DeWeerth*, 836 F.2d at 103 (holding that the owner, a prominent art collector, failed to take the necessary steps to locate her property) *with O'Keeffe*, 416 A.2d 862 (N.J. 1980) (holding that the owner's mere discussion of the missing art with other art collectors met due diligence standards).

131. *See* Van Pelt, *supra* note 8, at 461-62 (describing how illicit dealers "launder" stolen art in jurisdictions which favor purchasers).

132. *Compare O'Keeffe*, 416 A.2d at 868 (indicating that the claimant did not conduct an active search) *with DeWeerth*, 658 F. Supp. at 688 (noting that the claimant gave up the search after several years). *See generally* Pinkerton *supra* note 78 (discussing applicable standards of due diligence in fine art transactions).

133. *See* Webb, *supra* note 68, at 892 (stating that most art owners are unwilling to maintain a prolonged search).

134. Eisen, *supra* note 4, at 1099.

135. *O'Keeffe*, 416 A.2d at 867.

136. *See* Eisen, *supra* note 4, at 1098-99 (noting that under the thief rule, a thief cannot pass good title to a purchaser). *See also*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 173 (3d ed. 1988) (quoting U.C.C. § 2-403 1989).

ining both the actions of the plaintiffs and those of the defendants.[137] With both parties required to establish good faith through the exercise of due diligence, the law comes closer to providing an equitable remedy. A uniform set of rules is nonetheless needed, not only in the United States where there is inconsistent application of rules among the states, but also internationally, where the civil laws of some nations conflict with the common law of others.[138]

II. CURRENT INTERNATIONAL LAW AND ITS LIMITATIONS

A. THE HAGUE CONVENTION OF 1954

Legislative concern for the protection of cultural property originated in the sixteenth century in Europe.[139] Yet, destruction and plundering of art treasures was commonplace and considered legitimate in wartime until the mid-eighteenth century.[140] At that time, a rule of war emerged which prohibited the wanton destruction of cultural property and called for the preservation of artistic treasures during war.[141] Although rulers and military leaders of the time ignored the rule,[142] it eventually evolved into a legal principle embodied in international agreements regulating armed conflicts.[143]

---

137. *Autocephalous*, 717 F. Supp. 1374 (S.D. Ind. 1989).

138. *See* Bolano, *supra* note 25, at 131 (calling for uniform standards to overcome the inconsistencies in the application of law and equity in United States courts).

139. Prott, *supra* note 5, at 333 n.1.

140. Jore, *supra* note 19, at 61. *See also* Bassiouni, *supra* note 8, at 288 (explaining that the ancient Romans considered "booty" to be a legitimate by-product of war).

141. *See* Bassiouni, *supra* note 8, at 288 (quoting Emheric de Vattel who, in 1758, stated that art treasures should not be subjected to the ravages of war because they "do honour to human society").

142. *See id.* (explaining that during the Napoleonic Wars, occupying French forces systematically removed art treasures of other nations). After the wars, France tried to retain the confiscated property. *Id.* Dispossessed nations, however, required the repatriation of confiscated property, stating that it was contrary to the rules of war to keep it. *Id.* at 288.

143. *See* Bassiouni, *supra* note 8, at 288-89 (examining subsequent international agreements for the protection of cultural property in the event of armed conflict). Since the Napoleonic Wars, a fundamental rule has evolved that seeks "to preserve what can now be called the inalienable right of all peoples to their natural cultural heritage"). *See also* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, *reprinted in* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS, 28-29

The primary treaty for the protection of cultural property in wartime is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[144] The 1954 Hague Convention, ratified by seventy-two nations,[145] rests on the premise that cultural property is a valuable possession of humankind.[146] It follows earlier agreements, The Hague Conventions of 1899 and 1907, which forbid the destruction or seizure of enemy property unless necessary in times of war.[147] The goal of the 1954 Convention is to protect more specifically a nation's cultural property during armed conflict.[148] The Preamble to the Hague Convention states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[149]

Article 3 of the 1954 Hague Convention requires each nation to take protective action in peacetime to protect cultural property within its territory in case of war.[150] Article 4 provides that each nation must respect cultural property in its own territory and in the territory of other nations. Also, in wartime, occupying forces must protect cultural property in the subject territory regardless of whether that territory has taken protective measures.[151] Article 7 of the Hague Convention requires signatories to promote rules necessary "to foster in the members of their armed forces a spirit of respect" for the culture of all peoples.[152]

While the 1954 Hague Convention is broad enough to promote re-

---

(1987).

144. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention]. *See* Edwards, *supra* note 5 (discussing the historical development of the Hague Convention).

145. Edwards, *supra* note 5, at 939.

146. *See id.* at 945 (stating that the 1954 Hague Convention attempts to codify the principle that cultural property deserves protection for the good of humankind).

147. The Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. 403, The Convention regarding the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539. Both Conventions provide that "[t]he property of communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property." *Id.*

148. Edwards, *supra* note 5, at 946; Hague Convention, *supra* note 144, at Preamble.

149. Hague Convention, *supra* note 144, Preamble.

150. *Id.* art. 3.

151. *Id.* art. 4.

152. *Id.* art. 7.

spect for cultural property during armed conflicts,[153] it is not specific enough to address the question of restitution.[154] This shortcoming leaves dispossessed owners to search for other options to regain their stolen property.[155] Furthermore, the Convention calls for each party to prosecute and impose penal sanctions against violators but leaves each nation to create its own penal sanctions.[156] The Hague Convention attempts to protect cultural property during war, but it does little to provide a coherent body of law to assist in combatting the illicit trade in art.

B. THE UNESCO CONVENTION

In response to the growing international concern about the extensive pillaging of archaeological and ethnological material in source countries,[157] and the influx of stolen antiquities on the art market,[158] the United Nations Educational, Scientific, and Cultural Organization (UNESCO) promulgated the Convention for Prohibiting and Preventing the Illicit Import, and Export and Transfer of Ownership of Cultural Property in 1970.[159] The UNESCO Convention is the major international treaty[160] for the protection of cultural property during peacetime and

---

153. *See* Edwards, *supra* note 5 (stating that the Hague Convention is very broad in scope in that it applies to all forms of armed conflict between contracting parties regardless of whether a party recognizes the state of war).

154. *See* Nahlik, *supra* note 8, at 1082.

155. *See id.* at 1083 (stating that the International Institute for the Unification of Private Law attributes the difficulty of formulating acceptable provisions for restitution to the differences between civil and common law countries).

156. *Id.* at 1081. The 1954 Hague Convention, however, differs from the Conventions of 1899 and 1907 in that it calls for the criminal prosecution of violators. Hague Convention *supra* note 144, art. 56.

157. LERNER & BRESLER, *supra* note 3, at 304; BATOR, *supra* note 1, at 6. *See supra* notes 1-6 and accompanying text (discussing the international scope of the illicit art trade).

158. BATOR, *supra* note 1, at 6.

159. Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

160. *See* Bassiouni, *supra* note 8, at 299 (terming the 1970 UNESCO Convention a "multilateral treaty of primary significance"); Prott, *supra* note 5, at 338 (describing the 1970 UNESCO Convention as a "major international legal agreement"). *See also* LERNER & BRESLER, *supra* note 3, at 304 (noting the comprehensive nature of the UNESCO Convention).

is a cornerstone[161] of United States policy regarding stolen international art. The UNESCO Convention prohibits the importation of cultural property illegally exported or stolen from a foreign nation.[162] Although there are seventy signatory members to the treaty,[163] the United States is the first and only major "market nation"[164] to implement it.[165] The preamble to the UNESCO Convention, like that of the Hague Convention, propounds the legal principle that cultural property belongs to humankind and invokes the "moral" obligation of all nations to protect human cultural heritage.[166] Also, like the Hague Convention, it requires member states to protect their property internally.[167]

Article 6 of the UNESCO Convention requires that each exporting country provide an appropriate certificate to accompany all cultural property exported and to prohibit exportation of items that have no certificate.[168] Article 7(a) requires members, consistent with their national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property "illegally removed from another country."[169] Article 7(b) prohibits member countries from importing cultural property stolen from a museum, religious or public monument or similar institution.[170] The UNESCO Convention, unlike the Hague Convention, provides for restitution of the illegally exported object.[171] Article 7(b)(ii) requires the importing country to take steps to recover and return the property to the requesting state provided that the bona fide purchaser receives just compensation.[172]

---

161. Hingston, *supra* note 3, at 1.

162. UNESCO Convention, *supra* note 159, art. 3.

163. Hingston, *supra* note 3, at 10 (setting forth a list of parties to the UNESCO Convention). *See* Burman Memorandum, *supra* note 29, at 4 (explaining that the United States supported the UNESCO Convention for foreign policy reasons and because it was sensitive to the pillaging of art-source nations).

164. *See infra* notes 189-213 and accompanying text (discussing the competing values of source and market nations).

165. *See* Hingston, *supra* note 3, at 10 (explaining that the United States' withdrawal from UNESCO did not alter its commitment to the policies set forth in the 1970 Convention).

166. UNESCO Convention, *supra* note 159, Preamble.

167. UNESCO Convention, *supra* note 159, Preamble.

168. UNESCO Convention, *supra* note 159, Preamble.

169. UNESCO Convention, *supra* note 159, art. 7(a).

170. UNESCO Convention, *supra* note 159, art. 7(b).

171. UNESCO Convention, *supra* note 159, art. 7(b)(ii).

172. UNESCO Convention, *supra* note 159.

After lengthy delay, the United States ratified the UNESCO Convention in 1983[173] with implementing legislation.[174] This legislation modified the original UNESCO Convention and severely limited its application.[175] First, the implementing legislation narrowly defines the types of articles and situations covered.[176] An object will not be considered cultural property under these definitions unless it is of cultural significance, at least 250 years old, discovered in an excavation, and a product of tribal or non-industrial society.[177] Second, for the import restrictions to apply, these objects must have been inventoried in public institutions.[178] Third, the implementing legislation severely restricts emergency application of the UNESCO Convention.[179] These reservations took much of the bite out of the UNESCO Convention, making it largely ineffective.[180]

---

173. *See* LERNER & BRESLER, *supra* note 3, at 304-05 (attributing the eleven-year delay to the fact that the United States is an art-importing country).

174. Convention on Cultural Property Implementation Act, 19 U.S.C.S. § 2601 (1983) [hereinafter Implementation Act].

175. *See* Prott, *supra* note 5, at 339 (discussing the amendments to the Convention made by those countries, particularly the United States, which had problems with its original wording). *See also* Douglas N. Thomason, *Rolling Back History: The United Nations General Assembly and the Right to Cultural Property*, 22 CASE W. RES. J. INT'L L. 47 (1990) (discussing the General Assembly debate surrounding the amendments to the original Convention).

176. 19 U.S.C. § 2601 (1983). The legislative history, however, indicates that the term "cultural property" was meant to include other articles falling outside the categories listed in Article 1. *See* S. REP. NO. 564, 97th Cong., 2d Sess. 4, *reprinted in* 1982 U.S.C.C.A.N. 4078, 108 (stating that cultural property is defined to include the categories of objects listed in article 1 of the UNESCO Convention, whether or not the object is specifically designated by the state party for this purpose). The term thus is broader than, but includes "archaeological or ethnological material." *Id.* Items outside of the definition in article 1 are not required to be accompanied by a certificate of authorization. Edwards, *supra* note 5, at 928.

177. 19 U.S.C. § 2601 (1983).

178. 19 U.S.C. §§ 2607, 2610 (2)(A) (1983). This may be a difficult condition to impose on any country because of the enormous amount of time and resources required to inventory vast amounts of art. Prott, *supra* note 5, at 341.

179. *See* 19 U.S.C. § 2602 (1983) (limiting the President's power to enter into a bilateral or multilateral agreement with a state under article 9 of the UNESCO Convention by requiring requests to be made in writing, measures to be taken to protect the property, agreements to be limited to five years, and other importing nations must apply the same restrictions).

180. Edwards, *supra* note 5, at 929. *See also* S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 17 (1972) (declaring that the UNESCO Convention is understood to

Furthermore, the UNESCO Convention does not include any binding provisions for resolving problems.[181] The language is vague[182] throughout the text, possibly in an effort to gain signatures to the treaty.[183] This vague language[184] promotes inconsistency both at the level of incorporation into domestic law and in the courtroom where it is subject to judicial interpretation.[185] Although the preamble, like the Hague Convention, asserts the policy that cultural property belongs to humankind,[186] most art market states are unwilling to cooperate at an international level to permit repatriation of acquired cultural property without modifications to the UNESCO Convention.[187] Significantly absent from UNESCO signatories are most Western European countries and Japan. These nations believe that the convention lacks adequate protection for good faith purchases of art.[188]

III. ILLICIT WORLD TRADE IN STOLEN CULTURAL PROPERTY AND COMPETING POLICIES THAT PREVENT INTERNATIONAL AGREEMENT

Many commentators and experts in the art world are concerned with the continuing problem of illicit art trade and warn that the practice of plundering of archaelogical sites is growing at an alarming rate.[189]

---

apply only to institutions under federal control).

181. Edwards, *supra* note 5, at 929. In fact, article 7(b) conflicts with common law principles because it does not take into account the rule that a good faith purchaser cannot take title from a thief.

182. *See* Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, 72 GEO. L.J. 1155, 1159-60 (1984) (noting the ambiguous character of the Convention's terms).

183. Prott, *supra* note 5, at 339.

184. *See* UNESCO Convention, *supra* note 159, art. 7 (requiring parties to "undertake: (a) [t]o take the necessary measures, *consistent with national legislation* . . . ." (emphasis added)).

185. Prott, *supra* note 5, at 339-44.

186. UNESCO Convention, *supra* note 159, Preamble. *See also* Hague Convention, *supra* note 144.

187. *See* Prott, *supra* note 5, at 339-40 (noting the reluctance of countries to ratify the UNESCO Convention without modifications).

188. Jerome M. Eisenberg, *UNIDROIT, the EC, and the International Trade in Antiquities*, MINERVA, Sept.-Oct. 1993, at 19; Burman Memorandum, *supra* note 29, at 9.

189. *See* BATOR, *supra* note 1, at 13 (stating that experts generally agree that

They argue that there are few effective controls[190] and that the illegal trade in stolen cultural property is beyond the ability of any one state to control.[191] They call for a concerted effort by all nations to protect the world's cultural heritage.[192]

To date, however, competing values and differing philosophies among art-importing and art-exporting nations[193] have prevented international cooperation.[194] The world can be generally divided into two groups of

---

looting at archaeological sites is occurring more frequently, but noting the lack of systematic studies on the matter). *But see* Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, ART J. (1969) (reporting the systematic plundering of national art treasures).

190. *See* BATOR, *supra* note 1, at 34 (asserting that the three methods of preventing stolen art from moving freely in the international market: (1) physical protection at the site of the property; (2) deterrence through fear of punishment; and (3) elimination of economic incentives); *see also* Van Pelt, *supra* note 8, at 443 (outlining the three avenues for recovery of stolen cultural property available under United States Law: (1) international treaties that call for the physical protection of cultural property, (2) the National Stolen Property Act which attempts to deter theft through punishment, and (3) civil litigation whereby the original owner may sue the possessor of his stolen property and demand restitution—this, in theory, should diminish economic incentives). The United States is one of the few countries that does not have laws which regulate or restrict the sale or export of national cultural objects. Memorandum, *supra* note 29 at 6. The United States has two statutes which seek to protect archeological resources on public or Indian Lands: Archeological Resources Protection Act of 1979, 16 U.S.C. § 470 (1988); and Native American Graves Protection and Repatriation 25 U.S.C. § 3001 (1988). These statutes focus on preventing the removal of artifacts from certain protected sites and do not focus on exportation of the objects. *Id.*

191. *See* Rogers, *supra* note 57, at 933 (stating that the economically poor, antiquities-rich source nations do not have adequate resources to stop the flow of their cultural property to capital-rich nations); *see also* Eisen, *supra* note 4, at 1068 (explaining that many source countries lack the economic and political power to protect their property).

192. *See* Prott, *supra* note 5, at 337 (claiming that all countries share an interest in preventing theft of artwork); *see also* Hingston, *supra* note 3, at 1 (describing the message of the Chairman of the President's Cultural Property Advisory Committee which calls upon the international community to join the United States in a concerted effort to protect the world's cultural heritage).

193. *See* BATOR, *supra* note 1, at 26-31 (discussing the values of nations espousing the theory of national patrimony); *see also* Rogers, *supra* note 57, at 936 (discussing the values of art-importing nations).

194. *See* Van Pelt, *supra* note 8, at 460 (noting that many countries are willing to implement legislation to curb illicit traffic in stolen art); *see also* Jore, *supra* note 19, at 68-74 (discussing the various roadblocks to enforcement of illegal export of cultural property).

countries, source nations and market nations.[195] Historically, these two types of nations have had competing interests that determine which international agreements they have been willing to ratify.[196]

Source nations are those whose supply of cultural property exceeds internal demand for the property.[197] Source nations espouse the doctrine of "cultural patrimony" often seeking repatriation of their cultural property because they believe that it constitutes part of their cultural heritage.[198] These nations are often poor and lack adequate resources to protect their property from looters and physical deterioration.[199] They often seek the repatriation of articles removed in violation of their export laws.[200] Most nations, however, are unwilling to enforce another country's laws absent a treaty or internal laws prohibiting such action.[201]

Market nations seek to protect the free market of trade and generally oppose repatriation.[202] These nations believe that cultural artifacts be-

---

195. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986). *See also* Explanatory Report, *supra* note 26, at 10 (discussing market theory and cultural nationalism). However, some countries may be both source and market nations, promoting the free market in art as a method to adjust a monetary imbalance, or to effect social or political purposes. Interview with Harold S. Burman, Office of the Legal Adviser, Department of State, in Washington D.C. (Nov. 2, 1993).

196. *See generally* Thomason, *supra* note 175 (discussing the United Nations General Assembly debate concerning the repatriation of cultural property). *See also* LERNER & BRESLER, *supra* note 3, at 65 (explaining that source countries wish to protect cultural heritage whereas market nations favor the free flow of the art trade).

197. Merryman, *supra* note 195, at 832.

198. *See* Rogers, *supra* note 57, at 935-36.

199. *See* BATOR, *supra* note 1, at 21 (explaining that some Western collectors and museum officials have argued that because capital-rich countries often have expertise not available in many antiquity-rich countries, the practice of exporting antiquities has "materially aided the preservation of the artistic patrimony of mankind").

200. Rogers, *supra* note 57, at 935-36. The division is not always clear-cut, however. In some countries, exportation of resources is acknowledged as a method of shoring up a failing economy. Thus, sometimes art is exported from Third World countries with the complicity of government officials. Interview with Harold S. Burman, Office of the Legal Adviser, Department of State, in Washington, D.C. (Nov. 2, 1993).

201. *See* Jore, *supra* note 19, at 69; *see also infra* notes 211-13 and accompanying text (discussing the lack of jurisdictional provisions in international agreements governing cultural property).

202. *See* Explanatory Report, *supra* note 26, at 10 (stating that capital-rich countries seek to promote free trade in art because of the economic investment oppor-

long to "common human culture,"[203] and that they should be available for the world community to enjoy.[204] These countries have noted their concern that source nations may not have an infrastructure by which the articles can be properly safeguarded and displayed.[205] More recently, the political debate based on these two doctrines has merged and all nations recognize the legitimacy of both positions.[206] Nonetheless, several unresolved issues have prevented the formulation of an international solution.

First, many civil law countries believe that protecting the bona fide purchaser is an essential element of free commerce while statutes in the United States and common law prevent a thief from passing good title even to a good faith purchaser.[207] Furthermore, art dealers, eager to protect the art market, have successfully lobbied against legislation that would impose stricter controls on the market.[208] Additionally, museums in these nations are full of cultural property of unknown provenance.[209] They fear that requiring repatriation of all cultural property would result in an exodus of art out of the world's great museums, and would limit the free flow of art in the international market.[210] These competing values must be considered by policymakers in the United States as they formulate a national position concerning stolen artwork.

---

tunities and because of the belief that the circulation of cultural art throughout the world will promote dialogue among cultures and ultimately lead to peace among nations).

203. Merryman, *supra* note 195, at 831.

204. Explanatory Report, *supra* note 26, at 10.

205. *See* Rogers, *supra* note 57, at 936 (noting that some antiquities which would deteriorate or be destroyed if left in a source country may be preserved if moved to a capital-rich country).

206. Thomason, *supra* note 175.

207. Interview with Harold S. Burman, Office of the Legal Adviser, Department of State, in Washington, D.C. (Nov. 2, 1993). *See* WHITE & SUMMERS, *supra* note 136 (discussing the U.C.C. provisions which prohibit a good faith purchaser from taking good title from a thief). *See also infra* notes 211-14 and accompanying text (explaining choice of law issues between civil and common law countries).

208. Jore, *supra* note 19, at 74.

209. *See* Rogers, *supra* note 57, at 936 (quoting a commentator who describes United States museums as "omnivorous").

210. *See* United States v. McLain, 545 F.2d 988 (1977) (reasoning that although the court recognizes a foreign country's sovereign right to declare ownership of its cultural property, giving effect to such declaration of all art exported since 1897 would put art dealers out of work and threaten museum collections in the United States).

Choice of law issues further complicate international art theft cases. Courts apply their own domestic laws[211] because international agreements lack provisions explicitly delineating jurisdictional authority in international disputes. Common law nations tend to protect the rights of the original owner, while civil law countries favor the bona fide purchaser over the original owner.[212] Some commentators argue that civil laws, which make it easier for a purchaser to acquire valid title of stolen property, may actually encourage theft by allowing thieves to "launder" stolen art.[213]

IV. THE UNIDROIT CONVENTION: ANALYSIS OF A POSSIBLE SOLUTION TO COMPETING INTERESTS

Facing the ineffectiveness of article 7(b) of the UNESCO Convention,[214] UNESCO requested that the Institute for the Unification of Pri-

---

211. *See* Bassiouni, *supra* note 8, at 286-87 (noting that conflict of laws issues—questions concerning which nation's law governs in a given dispute—frustrate the international cooperation needed to control illicit traffic in cultural artifacts).

212. *See* Explanatory Report, *supra* note 26, at 19 (reporting that common law countries follow the "thief" rule—one cannot give what one does not have—while most civil law nations give greater protection to the bona fide purchaser); *see also* Bolano, *supra* note 25, at 165 (describing the conflicting interests of common law countries which follow the principle that a thief cannot pass good title to a purchaser and civil law countries which follow the general rule that a purchaser can acquire good title from a thief on a showing of good faith).

213. *See* Van Pelt, *supra* note 8, at 461 (stating that civil courts in many nations protect the bona fide purchaser thereby encouraging theft by allowing thieves to launder stolen art (citing Winkworth v. Christie's Ltd., 1 All ER 1121 (1980)). Artwork was stolen from the Plaintiff in England and taken to Italy and sold under Italian contract law which allows defective title to convey as good title provided the purchaser is not aware of the illegality of the sale. *Id. See also* Jason Bennetto, *Loophole Lets Markets Sell Stolen Goods*, INDEPENDENT, Aug. 9, 1992, at 6 (reporting that Britain still has an antiquated law on the books which allows people who buy goods from an open market ("market overt") to acquire good title to the items, even if they are stolen). This fifteenth century law was instituted to protect innocent buyers from incurring liability. *Id.* Defendants, therefore, will often argue that they have good title under foreign law. *See generally Autocephalous*, 717 F. Supp. 1374 (S.D. Ind. 1989) (defendant arguing that Swiss law applied); *Kunstsammlungen Zu Weimar*, 678 F.2d 1150 (2d Cir. 1982) (defendant arguing that German law applied). When given a choice of law issue, United States courts apply domestic law, usually in favor of the original owner. *DeWeerth*, 836 F.2d 103 (2d Cir. 1987); *Autocephalous*, 717 F. Supp. 1374 (S.D. Ind. 1989); *Kuntsammulungen Zu Weimar*, 678 F.2d 1150 (2d Cir. 1982).

214. *See* Burman Memorandum, *supra* note 29 (stating that to date, the United States and Canada are the only major market nation members of the UNESCO Con-

vate Law (UNIDROIT) draft a new convention concerning stolen cultural property.[215] UNIDROIT's purpose is to establish a new framework[216] to govern the restitution of stolen cultural objects[217] and to reconcile differences between civil and common law nations, thereby gaining significant number of signatory members.[218] The UNIDROIT Convention differs from the UNESCO Convention in important ways. The UNESCO Convention is premised on each sovereign's right to apply import restrictions on cultural property and seize illegally imported articles.[219] It is also discretionary in its application[220] and litigation is

---

vention and the absence of other market countries like Japan, the United Kingdom, France, and Switzerland has limited the effectiveness of the UNESCO Convention); *see also*, Explanatory Report, *supra* note 26 (attributing the unacceptability of UNESCO Article 7(b) to its incompatibility with many countries' national laws).

215. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27. Prompted by organizations like UNESCO, UNIDROIT first undertook to study the international protection of cultural property at its 65th session in April 1986. *Id.* The study, by Gerte Reichelt, of the Vienna Institute of Comparative Law, examined civil law, private international law, and public law aspects of the problem and submitted recommendations to UNIDROIT and to UNESCO in 1987. *Id.* Following a second study by Reichelt, the UNIDROIT Governing Council established a study group to determine the possibility of drafting uniform rules to address the international protection of cultural property. *Id.* At the conclusion of its third meeting in January 1990, the study group had drafted the text of the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Property. Interview with Rosalia J. Gonzales, Executive Assistant, Office of the Assistant Legal Adviser for Private International Law, in Washington, D.C. (July 14, 1992).

216. *See* Explanatory Report, *supra* note 26 (stating that "the principal aim of the future Convention is to establish as clear and simple a regime as possible to govern the restitution of stolen cultural objects to the dispossessed person and the return of an object exported in violation of a prohibition of the State whose laws have been contravened").

217. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27. The Conventions set out separate provisions for the return of stolen cultural property and for the return of illegally exported cultural property. This Comment limits its discussion to the restitution of stolen cultural property and its impact on United States domestic law.

218. *See* Burman Memorandum, *supra* note 29, at 3 (stating that the biggest obstacle is striking a balance between common law systems which follow the thief rule and the civil law countries which protect good faith purchasers).

219. Burman Memorandum, *supra* note 29, at 4.

220. *See* Burman Memorandum, *supra* note 29, at 4 (stating that countries must request a federal agency to intervene on their behalf; the agency therefore has discretion as to whether it will restrict importation).

usually not successful.[221] The UNIDROIT Convention, on the other hand, is not discretionary.[222] It greatly expands the rights of foreign governments seeking the return of illegally exported property[223] by providing them with private litigation rights without United States government intercession.[224] Furthermore, it attempts to balance the interests of dispossessed owners and bona fide purchasers by requiring restitution of the stolen object and compensation to purchasers when they have exercised the necessary due diligence.[225]

A. RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3 of the UNIDROIT Convention requires the possessor of a stolen cultural object to return it.[226] Article 3 stipulates that a claimant must bring an action for restitution within three years or five years[227] of the time he knew or should reasonably have known[228] the location or identity of the possessor or object, and proposes a maximum time period in which a claim can be brought of six, ten, thirty, or fifty years.[229] This provision is not concerned with the good faith of the purchaser/possessor; return of the object is mandatory.[230] It also insures some security for the possessor by setting the limitations period at a

---

221. Burman Memorandum, *supra* note 29, at 4.

222. Burman Memorandum, *supra* note 29, at 4.

223. Burman Memorandum, *supra* note 29, at 4.

224. Burman Memorandum, *supra* note 29, at 4.

225. *See supra* notes 90-138 and accompanying text (discussing the due diligence standard).

226. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 3(1).

227. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 3(1). The 1990 Draft Convention proposed that restitution be brought within a period of three years. The 1993 Draft Convention contains language which the committee is still debating; it has been proposed that the restitution period be extended to five years. *Id.*

228. 1993 Draft Convention, *supra* note 27, art. 3(3). The language "or ought reasonably to have known" is still being debated.

229. 1990 Draft Convention, *supra* note 27, art. 3(2) (providing that "any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of thirty years from the time of the theft"). *Id.* The 1993 Draft Convention, however, includes possible maximum periods of either six, ten, thirty, or fifty years from the time of the theft. 1993 Draft Convention, *supra* note 27, art. 3(2).

230. Explanatory Report, *supra* note 26, at 19.

maximum time in which the original owner can bring a claim.[231]

By setting a maximum time limit, article 3 of the UNIDROIT Convention attempts to provide a compromise which will provide a purchaser a certain degree of security when purchasing an art object in good faith. This compromise should appeal to the legal systems of Western Europe which are built on the fidelity of the commercial transaction.[232] Some commentators, however, fear that a time limitation will encourage fraudulent concealment.[233] Artwork, unlike most movable objects, increases in value over time.[234] Arguably, therefore, a thief or dishonest investor who is not concerned about the provenance of an object could conceal it for thirty years and a day and then reap a high profit after the statute of limitations expires. Article 11, however, allows nations the flexibility to extend the limitations period according to its own "national law" when it is beneficial to the claimant.[235] Thus, in the situation where a thief or possessor has concealed an object in bad faith, article 11(a)(ii) would allow an adjudicating body to apply a longer limitations period if its national law would permit such an extension.[236] This provision could apply to situations similar to the *Quedlinburg* case, where

---

231. Burman Memorandum, *supra* note 29, at 10. During debate on the 1990 Draft Convention, two statutory time limits were included: the shorter period seeks to acquire more signatures of importing nations, the longer period seeks to gain the signatures of art-exporting nations. *Id. See also* Explanatory Report, *supra* note 26, at 21 (stating that the longer limitation period was included because of the speculative nature of art). The 1993 Draft Convention proposes three possible time periods. 1990 Draft Convention, *supra* note 27, art. 3(2).

232. Burman Memorandum, *supra* note 29, at 9.

233. *See* Burman Memorandum, *supra* note 29, at 9 (stating that some art-importing countries as well as some American commentators and courts oppose this provision because it may encourage thefts by those who are in a position to conceal art objects).

234. *See supra* note 2 and accompanying text (describing the rapid increase in art values that have apparently led to the illicit trade).

235. *See* UNIDROIT Convention, *supra* note 33, art. 11 (providing that "[e]ach Contracting State shall remain free in respect of claims brought before its courts or competent authorities: (a) for the restitution of a stolen cultural object: (i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object; (ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under article 3(2); (iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by article 4(1)).

236. *See supra* notes 72 and 119 and accompanying text (discussing the doctrine of fraudulent concealment).

the treasures were hidden for more than forty years,[237] if the claimant could show that the property had been fraudulently concealed. Thus, although article 3 will arguably not cover all circumstances where a thief will fraudulently conceal a piece of artwork, it is designed to cover the largest number of situations possible.

Article 3 of the UNIDROIT Convention, therefore, can be reconciled with the U.S. common law doctrine of fraudulent concealment if "national law" can be interpreted to mean United States common law.[238] A U.S. court could then excuse a claimant's delay in bringing a suit because the doctrine of fraudulent concealment would estop the possessor from invoking the statute of limitations.[239]

An interpretation of article 11, however, that permits courts to focus on the good or bad faith of the possessor is contrary to the intent of article 3, which requires restitution regardless of the good faith of the possessor.[240] On the other hand, such an interpretation would support one of the overall goals of the UNIDROIT Convention: deterring bad faith acquisitions of illicitly obtained cultural property.[241] Although this interpretation of article 11 would bring article 3 and its strict limitations period provision in line with United States common law, it would undermine the uniformity of the Convention.[242] To the extent that the limitations period would be enforced differently in the various countries, dishonest purchasers who can afford to wait thirty years may be encouraged to forum shop for a jurisdiction where domestic law favors the purchasers with a strict adherence to the thrity-year limitations period.[243]

---

237. *See supra* notes 9-17 and accompanying text (discussing the title dispute over stolen artwork that had resurfaced after forty years of concealment).

238. *See Autocephalous*, 717 F. Supp. 1374, 1391-92 (S.D. Ind. 1989) (applying common law rules of discovery and the doctrine of fraudulent concealment).

239. *Id.*

240. *See supra* notes 226-31 and accompanying text (explaining that article 3 of the UNIDROIT Convention is not concerned with a purchaser's good or bad faith).

241. *See supra* notes 90-138 (discussing the equitable considerations of a good faith purchaser and the effect of these considerations on the art market); *see also* Jore, *supra* note 19, at 79 (arguing that tighter controls on purchasers of art would devastate the art market).

242. *See* Explanatory Report, *supra* note 26, at 38 (discussing the careful drafting of Article 11 to balance competing interests without compromising, to too great an extent, the uniformity sought).

243. *See supra* notes 211-23 and accompanying text (discussing art "laundering" in jurisdictions with more lenient laws towards the bona fide purchaser).

Article 3(4) may present an obstacle to ratification by the United States of the UNIDROIT Convention. This proposed provision provides that a separate rule for restitution be applied to public collections, granting an extention of time for bringing a claim to seventy-five years.[244] The United States is one of the few countries where relatively little cultural property is held by governmentally funded institutions. As a result, it opposes granting additional rights of return to governmentally held cultural property.[245] Rather, the United States would prefer to broaden the protection for private collections, a proposal which is opposed by Western European countries.[246]

B. COMPENSATION TO THE GOOD FAITH PURCHASER

Under article 4, the good faith of a purchaser/possessor is a factor in determining whether he or she would receive compensation upon return of the object.[247] This provision states that a purchaser who is required to return an object is entitled to "fair and reasonable" compensation if he can show that he exercised due diligence in discovering the piece's provenance when acquiring it.[248] The due diligence is determined by circumstances surrounding the purchase, including the character of the parties, the price paid for the object, and whether a register was consulted.[249]

---

244. 1993 Draft Convention, *supra* note 27, art. 3(4).

245. Request for Comments on the Revised Draft UNIDROIT Convention on the International Protection of Cultural Property: U.S. Positions for the Fourth UNIDROIT Meeting, from Harold S. Burman, Office of Legal Adviser, Department of State (Aug. 26, 1993) [hereinafter Request for Comments].

246. *Id.*

247. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27. Article 4 provides: (1) The possessor required to return a stolen cultural object shall be entitled to fair and reasonable compensation by the claimant provided that the possessor exercised the necessary diligence when acquiring the object; (2) In determining whether the possessor exercised such diligence, the court shall consider the relevant circumstances of the acquisition, including the character of the parties, the price paid, and whether the possessor consulted any accessible register of stolen cultural objects which it could reasonably have consulted. (3) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor. *Id.*

248. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27.

249. Explanatory Report, *supra* note 26, at 23 (explaining that the UNIDROIT study group considered the question of burden of proof several times and ultimately decided to place the burden on the possessor).

Although the concept of compensation to the possessor of a stolen object is new to the United States,[250] the principles behind article 4 are consistent with recent developments in United States common law.[251] In the most recent cases, *Guggenheim v. Lubell*[252] and *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*,[253] the courts shifted the burden of investigation to the purchasers, requiring them to take significant steps to determine the legitimacy of the object's title.[254] Article 4 of the UNIDROIT Convention incorporates the principles of the discovery rule and due diligence considerations when determining whether the purchaser is entitled to compensation.[255] Article 3 expects due diligence of the original owner by requiring him or her to make a claim within three or five years of locating the object and by setting a maximum claim period of six, ten, thirty, or fifty years.[256] Together, articles 3 and 4 balance the rights of good faith purchasers and the rights of the owners and are consistent with common law principles.

The provision requiring the claimant to compensate the good faith purchaser upon return of an object does not have an equivalent in Unit-

---

250. *See* Burman Memorandum, *supra* note 29, at 10; Edwards, *supra* note 5, at 165-71 (reconciling the concept of compensation provided for within the UNESCO Convention with United States common law). In a common law action of replevin, in order to protect the property rights of the original owner, a court may compel an innocent purchaser to return the stolen item without compensation. *Id.* A treaty permitting compensation to the purchaser would be compatible with common law principles if it focuses on whether the purchase was in good faith. *Id.* It would permit the item to be returned without compensation if the purchaser did not acquire it in good faith. *Id.* United States courts have reached this same result in recent replevin cases where the focus has been on the good faith of the purchaser. *See also supra* notes 90-138 and accompanying text (discussing courts' shift toward focusing on whether the purchaser exercised due diligence).

251. *See supra* notes 90-138 and accompanying text (discussing the development of the due diligence rule to require purchasers to investigate the provenance of artwork).

252. 569 N.E.2d 426 (N.Y. 1991).

253. 253. 717 F. Supp. 1374 (S.D. Ind. 1989).

254. *See Guggenheim*, 569 N.E.2d at 431 (holding that placing the burden of investigation on the wronged owner is inappropriate and that placing this burden upon the potential purchaser provides greater protection for the owner). *See also Autocephalous*, 717 F. Supp. at 1374 (holding that suspicious circumstances of the sale should have alerted the purchaser to the dubious background of the mosaics).

255. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 4.

256. 1990 Draft Convention and 1993 Draft Conventions, *supra* note 27, art. 3.

ed States law.[257] The UNIDROIT drafters included it to attract more civil law countries,[258] which generally provide more protection to the bona fide purchaser.[259] The UNIDROIT Convention does not give much guidance in determining the amount of compensation to be paid. The Convention's language is intentionally vague[260] to allow judicial discretion in assessing the factors which may determine a fair and reasonable amount.[261]

A weakness of article 4 is its necessary diligence standard, requiring purchasers to consult with "any accessible register of stolen cultural objects which could reasonably have been consulted."[262] Several international foundations have registries for stolen artwork.[263] In its current

---

257. Burman Memorandum, *supra* note 29, at 10. *See supra* notes 19 and 250 and accompanying text (discussing the concept of compensation and its compatibility with United States common law).

258. Burman Memorandum, *supra* note 29, at 10.

259. Explanatory Report, *supra* note 26, at 20.

260. *See* Explanatory Report, *supra* note 26, at 22 and accompanying text (discussing the various objections to this provision and the UNIDROIT study group's conclusion that this language allows judicial discretion according to each case).

261. Explanatory Report, *supra* note 26, at 22. The language does not state whether the value paid should be the purchase price, the fair market price, or the intrinsic value or whether it should include other costs, i.e., insurance, transportation costs, etc. *Id.* Some members of the study group, particularly concerned about poorer countries' ability to pay, complained that the language allows judges too much discretion. *Id.* However, the study group concluded that the language would permit a judge to take a nation's resources into consideration. *Id.*

262. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 4.

263. *See* Hingston, *supra* note 3, at 5 (noting that the International Foundation for Art Research (IFAR) and INTERPOL, the inter-European police investigation agency, maintain registries of stolen art); *see also* Prott, *supra* note 5, at 346 (calling for purchasers to check a central international registry as a precaution to buying artwork of unknown provenance); Nick Nuttall, *supra* note 2 (discussing the new computer registers opened in 1991 by the International Art Loss Register, and Lasernet Theft Line which log images and descriptions of art on a computer base); Morris, *supra* note 5, at 75 (arguing that an international art registry is necessary to immediately provide custom officials with an accurate description of the stolen artwork). The author suggests that owners of art be required to provide a central registry with a photograph-like image of the art taken with a digital camera. Morris, *supra* note 5, at 74. The image can be stored in the computer, providing officials with an instant description of the object. Morris, *supra* note 5, at 74-75. *See also* Harriet Crawley, *Hi-tech Sleuths Who Take Art Off the Fence: Harriet Crawley Visits the Belgravia Border from which Brigadier Emson Traces Stolen Art*, FIN. TIMES, Sept. 19, 1992, at 14-15 (reporting that the computerized system is increasingly used by police and has had extraordinary success in tracking down stolen art). *But see* Explanatory Report,

form, the UNIDROIT Convention does not require that a specific registry be consulted.[264] Instead, it simply lists consultation as one of the factors courts should consider in determining whether the purchaser exercised good faith.[265] The term "any registry" is vague enough to allow a dishonest dealer to consult an obscure registry unknown to the original owner. Some critics have argued that the agreement should be specific enough to provide for uniform interpretation of the provisions.[266] For practical and political reasons, however, it would be impossible to propose one central registry.[267]

Article 4 may present another difficulty for the United States' implementation of UNIDROIT. Article 4 alters, as a matter of a treaty obligation, the burden of proof required by the possesor in establishing that he or she exercised due diligence when purchasing artwork. These burden of poof requirements may need to be reconciled with those already established in the Uniform Commercial Code.[268]

Article 4(3) imputes a predecessor's conduct on a possessor who acquires the object by inheritance or gift.[269] Drafters included this provision in response to concerns over acquisitions of museums from donors without title.[270] This article would also provide protection against an individual passing stolen artwork through his or her estate.[271] This

---

supra note 26, at 24 (expressing concerns about the inaccessibility and ineffectiveness of currently available registers).

264. *See* Franklin Feldman & Bonnie Burnham, *An Art Theft Archive: Principles and Realization*, 10 CONN. L. REV. 702 (1978) (noting the need for an art-theft archive); *see also* Deborah D. Hoover, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443 (1983) (discussing the resources available for investigating stolen art and calling for a requirement that art dealers use the existing registries).

265. 1990 Draft Convention and 1993 Draft Conventions, *supra* note 27, art. 4.

266. *See* Michael J. Bonnell, *International Uniform Law in Practice: Or Where the Real Trouble Begins*, 38 AM. J. COMP. L. 865 (1990) (discussing the problems of applying uniform law to international disputes, i.e., each party involved in a dispute will interpret the law differently and apply it selectively).

267. Interview with Harold S. Burman, Office of the Legal Adviser, Department of State, in Washington, D.C. (Nov. 2, 1993); Pinkerton, *supra* note 78 at 12.

268. Interview with Harold S. Burman, Office of the Legal Adviser, Department of State, in Washington, D.C. (Nov. 2, 1993). *See also* WHITE & SUMMERS, *supra* note 136, at 172-74, 421-28 (discussing the good faith purchaser and warranties of title established under the U.C.C.).

269. 1990 draft Convention and 1993 Draft Convention, *supra* note 27, art. 4(3).

270. Burman Memorandum, *supra* note 29, at 11.

271. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art 4.

provision would, therefore, cover situations similar to the *Quedlinburg* case where the heirs received the stolen articles through the thief's estate.[272] The heirs' case turned on the argument that even though their deceased brother never acquired legal title, they received valid title when the art passed to them through his estate.[273] Article 4 of the Convention would impute the deceased's wrongful conduct to the heirs, thereby negating the original owner's obligation to pay compensation upon restitution of the object.[274]

C. JURISDICTIONAL AUTHORITY

The UNIDROIT Convention also seeks to address jurisdictional problems.[275] Article 9(1) provides that a claimant may bring an action before the "courts or other competent authorities."[276] It also provides two jurisdictional bases: one may bring an action in the state of residence of the possessor, or in the state where the object is located at the time the claimant files.[277] The Convention specifies place of habitual residence

---

272. *See supra* notes 9-19 and accompanying text (discussing the background of the *Quedlinburg* case).

273. *See* Chambers, *supra* note 10 (reporting that the heirs argued that even though their brother's estate could not be taxed because he did not have valid title to the treasures he stole, they could claim valid title because the statute of limitations had expired).

274. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 4(3).

275. *See* Bassiouni, *supra* note 8, at 286 (noting that the lack of jurisdictional provisions in the extant international agreements governing stolen art limits the scope of jurisdiction and leaves unanswered the question of which country can assert jurisdiction over the controversy). Existing international agreements do not contain clear language as to jurisdiction because art theft is not recognized as an international crime except in the context of war. *Id.* at 286. Since most nations are unwilling to enforce the laws of another in the absence of an international agreement that requires them to do so, they apply domestic laws. *Id.* at 306. Thus, current international agreements implicitly express the territoriality theory of jurisdiction with each nation applying domestic laws. *Id.* at 306. The result is a conflict between those common law nations who follow the thief rule, providing greater protection to original owners, and the civil law nations which protect bona fide purchasers. Explanatory Report, *supra* note 26, at 192. A thief may thus launder stolen art through a civil law country. *Id.* at 192.

276. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 9(1).

277. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 9(1).

over place of domicile because cultural objects can generally be moved easily.[278]

The second jurisdictional foundation, which provides jurisdiction in the nation where the object is located, adds flexibility by allowing courts to settle a dispute over the object when unable to assert jurisdiction over the possessor.[279] Article 9(2) allows the parties to submit their disputes to another forum or to arbitration.[280] The drafters added this provision to create procedural freedom and to attract a greater number of signatory states.[281] While these provisions offer parties greater flexibility in asserting jurisdiction, they do not eliminate the uncertainties of choice of law conflicts.[282] Outside of the specific provisions called for in the Convention, states would apply their domestic law as afforded by the exceptions of article 11(a). This would result in the same choice of law problems.[283]

D. RETROACTIVE APPLICATION OF THE CONVENTION

Although the UNIDROIT Convention is able to reconcile many source/market nation differences, retroactive application of the Convention remains a great obstacle. Article 11(c) of the Convention allows any contracting state to apply the Convention to cases of illegal exportation or theft of cultural objects which occured before the entry into force of the Convention for that nation.[284] Source nations that wish to recover cultural objects that have been taken from them over the years favor retroactivity.[285] Retroactive application of the Convention to al-

---

278. Explanatory Report, *supra* note 26, at 36.

279. Explanatory Report, *supra* note 26, at 36.

280. 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 9.

281. Explanatory Report, *supra* note 26, at 36. Private international law recognizes choice of forum. *Id.*

282. *See supra* notes 211-13 and accompanying text (noting that the lack of jurisdictional provisions in international agreements impede international cooperation in preventing illicit trade in art).

283. *Supra* notes 211 and accompanying text.

284. *See* 1990 Draft Convention and 1993 Draft Convention, *supra* note 27, art. 11(c) (providing that "each Contracting State shall remain free in respect of claims brought before its courts or competent authorities to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State").

285. *See* Burman Memorandum, *supra* note 29, at 7 (pointing out that some countries argue that non-retroactive application would sanction illegal conduct which occurred prior to the Convention's acceptance).

ready-acquired artwork, however, would threaten museum collections not only in market nations like the United States but all over the world, leading to market nations' reluctance to sign the Convention.[286]

CONCLUSION

While the UNIDROIT Convention is not perfect, the United States should take the lead in adopting it for several reasons. The UNIDROIT Convention would provide an equitable solution to the complex issues involved in art theft cases. It would deter art thefts without disturbing the art market. The Convention is also consistent with existing international law and United States domestic law.

First, the draft UNIDROIT Convention provides equitable solutions to art theft cases and takes significant steps toward reconciling existing tensions between market and source nations, and between the civil and common law countries by protecting both the rights of the original owner and of the bona fide purchaser. Restitution of stolen property prevents the original owner's property rights from being extinguished when the thief sells the art to an innocent purchaser. Likewise, the good faith purchaser is protected by the requirement of compensation. Second, the Convention would deter illicit trade in stolen art without crippling the free trade in art. Knowing that failure to investigate the provenance of artwork may cause a purchaser to forfeit both the artwork and compensation, potential buyers would more readily investigate each piece, making it difficult for thieves to unload stolen art. Once the buyer makes the necessary efforts to establish that the seller has legitimate title, he will be more confident that his investment will be protected. The result will be an unhampered market in art trade.

Third, the United States should adopt the Convention because it is compatible with current international agreements and United States domestic law. The UNIDROIT Convention greatly expands on the terms of the UNESCO Convention by including privately owned artwork and by creating an avenue for private litigation independent from government action. It also provides a jurisdictional basis and standards to be used in dispute resolutions—provisions which are absent in other international agreements. Furthermore, the UNIDROIT Convention is consistent in most respects with recent United States case law governing art theft cases. Where it is not consistent with existing U.S. law, it allows for greater recovery. Articles 3 and 4 provide the balance sought in recent

286. Burman Memorandum, *supra* note 29, at 7.

court decisions by placing the burden of investigation on the purchaser. Article 11 allows the flexibility necessary to enable courts to apply United States law in order to achieve greater fairness.

Given the continuing problem of illicit trade in stolen cultural property which to date has been unchecked because of the lack of international agreement, the nations of the world need to make a concerted effort to reach a compromise. The UNIDROIT Convention embodies such a compromise. The United States should take the lead in solving this immense problem by supporting the ratification of the UNIDROIT Convention.