

Fordham International Law Journal

Volume 16, Issue 4

1992

Article 3

A Proposal for Protecting the “Cultural” and ”Property” Aspects of Cultural Property Under International Law

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Roger W. Mastalir

Abstract

The central focus of this paper is a proposal for rebalancing protection of cultural property so as to take into account preservation of the cultural as well as property aspects of cultural property. Part I distinguishes between cultural and property aspects of cultural property and demonstrates how both aspects are important to an appropriate resolution of cultural property issues. Objects of cultural property cannot be stripped of their cultural significance. They are not merely items of property any more than children are the property of divorcing parents. Recognition of cultural significance is an integral part of determining the best means of protecting cultural property. This Part considers the property orientation of the generally accepted definition of cultural property. In addition, Part I considers subsidiary issues raised by the dichotomous nature of cultural property. Part II describes the current international legal regime for protecting cultural property and demonstrates the failure of this regime to give adequate consideration to the cultural aspect of cultural property. Part III identifies two schools of thought concerning cultural property. The first school of thought, usually identified as cultural internationalism, is primarily concerned with physical preservation of objects.² This school articulates concerns in terms of property law principles. The arguments of acquisitive nations,³ museums, collectors, and archaeologists, all of whom seek to protect their holding of or access to cultural property for aesthetic, scholarly, educative, or merely possessory purposes, generally belong to this school of thought. The property law principles they espouse include rights of title, possession, conquest, repose, and bona fide purchase. The second school of thought, usually termed cultural nationalism, is primarily concerned with the cultural significance of cultural property.⁴ Its arguments are often framed in terms of principles of human rights law. The demand is for cultural dignity and cultural self-determination. Arguments for repatriation of objects of cultural significance to source nations⁶ or to peoples belong to this school of thought. This paper asserts that the disputes between these schools of thought are really disputes over which aspect of cultural property deserves greater legal protection. Although the common ground between these two camps is concern for preservation of objects of cultural significance, preservation means different things to different interests. Part IV proposes a new legal regime founded on the common ground between these schools of thought. This Part suggests two approaches to the problem of protection of cultural property working in tandem. The first is a reaffirmation of the preeminence of human rights principles in resolving cultural property questions. The second approach, from the model of environmental protection, addresses the problem by reflecting global concern. The proposal is for a program of transfers of funding and technology to protect the “best interests” of cultural property for the benefit of interested groups, as well as the

world community. Part V presents an assessment of the effectiveness of the proposal in protecting both the cultural and property aspects of cultural property and the likelihood that the regime will be acceptable to the world community.

A PROPOSAL FOR PROTECTING THE “CULTURAL” AND “PROPERTY” ASPECTS OF CULTURAL PROPERTY UNDER INTERNATIONAL LAW

*Roger W. Mastalir**

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The protection of cultural property is developing as a fundamental concern of international law. A growing network of bilateral and multilateral treaties addresses the treatment of cultural property during armed conflict, regulates its import and export, and, most recently, governs its repatriation to source countries and peoples. Individual nations have taken measures to protect what they perceive to be their cultural patrimony via state ownership laws and domestic import and export regulations. Indigenous peoples, ethnic and religious groups and organizations, on their own account and through

their national governments, are actively seeking repatriation of objects of significance to their respective cultural identities. Although these treaties, domestic laws, and efforts at repatriation have as their goal protection of objects of cultural significance, the legal regime these sources have produced treat such objects primarily as property.

The central focus of this paper is a proposal for rebalancing protection of cultural property so as to take into account preservation of the cultural as well as property aspects of cultural property.¹ Part I distinguishes between cultural and property aspects of cultural property and demonstrates how both aspects are important to an appropriate resolution of cultural property issues. Objects of cultural property cannot be stripped of their cultural significance. They are not merely items of property any more than children are the property of divorcing parents. Recognition of cultural significance is an integral part of determining the best means of protecting cultural property. This Part considers the property orientation of the generally accepted definition of cultural property. In addition, Part I considers subsidiary issues raised by the dichotomous nature of cultural property. Part II describes the current international legal regime for protecting cultural property and demonstrates the failure of this regime to give adequate consideration to the cultural aspect of cultural property.

Part III identifies two schools of thought concerning cultural property. The first school of thought, usually identified as cultural internationalism, is primarily concerned with physical preservation of objects.² This school articulates concerns in terms of property law principles. The arguments of acquisitive nations,³ museums, collectors, and archaeologists, all of whom seek to protect their holding of or access to cultural property for aesthetic, scholarly, educative, or merely possessory purposes, generally belong to this school of thought. The property law principles they espouse include rights of title, possession, conquest, repose, and bona fide purchase. The

1. The present paper will survey only the protection of cultural property since 1954.

2. See generally John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 *AM. J. INT'L L.* 831 (1986) (labelling and defining these two schools of thought).

3. "Acquisitive nations" are described in other texts as "purchasing nations," "economically-rich nations," or "capital-rich nations."

second school of thought, usually termed cultural nationalism, is primarily concerned with the cultural significance of cultural property.⁴ Its arguments are often framed in terms of principles of human rights law.⁵ The demand is for cultural dignity and cultural self-determination. Arguments for repatriation of objects of cultural significance to source nations⁶ or to peoples belong to this school of thought. This paper asserts that the disputes between these schools of thought are really disputes over which aspect of cultural property deserves greater legal protection. Although the common ground between these two camps is concern for preservation of objects of cultural significance, preservation means different things to different interests.

Part IV proposes a new legal regime founded on the common ground between these schools of thought. This Part suggests two approaches to the problem of protection of cultural property working in tandem. The first is a reaffirmation of the preeminence of human rights principles in resolving cultural property questions. The second approach, from the model of environmental protection, addresses the problem by reflecting global concern. The proposal is for a program of transfers of funding and technology to protect the "best interests" of cultural property for the benefit of interested groups, as well as the world community. Part V presents an assessment of the effectiveness of the proposal in protecting both the cultural and property aspects of cultural property and the likelihood that the regime will be acceptable to the world community.

4. See generally, Merryman, *supra* note 2.

5. See, e.g., Universal Declaration Of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 135, U.N. Doc. A/810 (1948). "Human rights" is an umbrella term embracing all fundamental rights and freedoms. *Id.* Article 1 states that "[a]ll human beings are born free and equal in dignity and rights." *Id.* Subsequent articles define specific rights. *Id.* Among these human rights is the right of self-determination, which has political, economic, social, and cultural aspects. See, e.g., International Covenant On Economic, Social And Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg., art. 1, at 165, U.N. Doc. A/6546 (1967); International Covenant On Civil And Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg., art. 1, at 169, U.N. Doc. A/6546 (1967).

6. "Source nations" are called "art-rich nations," "countries of origin," and "artifact-rich nations" in the extensive literature on cultural property. See Hugues De Varine, *The Rape and Plunder of Cultures: An Aspect of Deterioration of the Terms of Cultural Trade Between Nations*, 139 *MUSEUM* 152 (1983) reprinted in JOHN H. MERRYMAN AND ALBERT E. ELSEN, 1 *LAW ETHICS, AND THE VISUAL ARTS* 46, 49-50 (1987) [hereinafter LEVA].

I. *THE NATURE OF CULTURAL PROPERTY*

John Henry Merryman has rightly identified tensions in the international community between acquisitive nations and source nations over a range of issues concerning protection and repatriation of cultural property.⁷ Tension exists involving the dichotomous nature of cultural property. The tension is played out in concerns over the proper definition of "cultural property." Thus, the question regarding what cultural property should be protected by domestic and international efforts remains unanswered.

A. *Two Aspects of Cultural Property*

An item of cultural property is an object that is of cultural significance. It therefore has two aspects. The first aspect is the property aspect, which derives from the fact that cultural property consists of tangible, movable objects.⁸ The implication of calling something property suggests that it can be owned, or at least possessed and controlled. The second aspect is the cultural aspect, which derives from the cultural significance of the object.⁹ Perhaps the most effective way to

7. See John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1894 (1985) (acknowledging growing international tension).

As the pressure for repatriation grows, the necessity for a framework for discussion of cultural property questions grows with it. Although there are significant exceptions, the topic seems to evoke a tendency to oversimplify, to reach for the facile solution. To some, perhaps, it is not worth the effort: cultural property does not seem important enough to call for deliberate consideration. Sentiment may so overpower others that they become impatient with the argument. Third World/First World politics cloud the discussion.

Id. (emphasis added).

8. See LEVA, *supra* note 6, at 46.

The primary phenomenon [of illicit trade in cultural property]—one that in fact governs the others—is the emergence of the concept of cultural goods or property. Paradoxically, it is only when goods have been divested of their intrinsic purpose, losing their primary functional utility, that they are termed cultural property, providing they are considered worthy to be preserved, admired, i.e. used for another, secondary function.

Id.; see BLACK'S LAW DICTIONARY 1216 (6th ed. 1990), distinguishing between "corporeal personal property, which includes movable and tangible things, such as animals, furniture, merchandise, etc." and "incorporeal personal property, which consists of such rights as personal annuities, stocks, shares, patents, and copyrights." I refer to the former definition here.

9. See, e.g., C. Franklin Sayre, Comment, *Cultural Property Laws In India And Japan*, 33 U.C.L.A. L. REV. 851, 857, n.25 (1986).

demonstrate the two aspects of cultural property is to consider an example of a specific item of cultural property.

The war gods of the Zuni people, a Native American tribe of the southwestern United States, are carved wooden idols usually two or three feet tall. These Ahayu:da (ah-ha-YOO-dah), carved by the tribe's Bear clan, appear to be simple, rather abstract faces. The objects are rare because the clan only carves two per year. The commercial market for these sculptures sets their value between U.S.\$5,000 and U.S.\$10,000.¹⁰ These facts demonstrate the property aspect of cultural property. The objects, tangible and movable, are described in terms of shape, size, rarity, and commercial value. The property aspect may be starkly shown by the fact that documentation dating back to the early 1800s shows that anthropologists, archaeologists, geologists, explorers, and other visitors to the Zuni Pueblo near Santa Fe often took the war gods from the Zuni's tribal shrines.¹¹ Not everything that can be stolen is necessarily property, but most likely these objects were taken because they were valued as property. Thieves foreign to the culture that produced such objects could not understand, or at least did not respect, the cultural significance of the items.

Considering only the property aspect of the Ahayu:da, however, tells only part of the story. The cultural aspect of cultural property is demonstrated in the cultural significance of such items to the people who created them. The Ahayu:da were placed in a shrine where their powers were invoked to protect the tribe. Each Ahayu:da serves as guardian for the tribe until relieved by a new one. The older ones must remain in place, contributing their strength until they decay and return to the earth. The war gods are meant to be exposed to the weather so that they can do their work as religious objects. Disintegration under the force of the elements is necessary to their function. Although they can exist as objects, as property, when displayed in a museum, they cannot serve their cultural purpose.¹² Another part of the cultural aspect of these objects

10. Rebecca Clay, *Who Owns Indian Artifacts?*, *THE CHRISTIAN SCI. MONITOR*, Aug. 28, 1990, at 12.

11. *Id.*

12. 136 CONG. REC. S17,173-77 (Oct. 26, 1990) (statement of Sen. Domenici).

is that they cannot be treated as property in the usual sense because no individual can own them.¹³ The Zuni began retrieving the war gods from institutions and collectors in 1978. The recent return of the carved figures has boosted tribal morale and a sense of cultural identity.¹⁴ This effect on the morale of the tribe flows from the cultural aspect of cultural property. Cultural property is integral to the esteem that people hold for themselves and their past.¹⁵ It is also integral to their identity.¹⁶

Cultural significance gives particular objects value to a culture or to a collector. Cultural property stripped of cultural significance would be merely property, more or less beautiful or rare and more or less valuable on the basis of that beauty or rarity only. Defining cultural property without reference to its culture is not only foolish, but dishonest. It attempts to strengthen claims of ownership while denigrating the very thing that gives an object some of its value to the holder. Nonetheless, recognition of the cultural aspect of cultural property has rarely been apparent in efforts to define or protect it.

13. Clay, *supra* note 10. Edmund Ladd, a Zuni who is curator of ethnology for the Museum of Indian Arts and Culture in Santa Fe, stated that, "Nobody, not even a Zuni, not even the war priest, the rain priest, or the tribal chairman, nobody has the right to them individually. . . . No one can have clear title to them. So when they're removed from the shrine, they're without a doubt stolen objects." *Id.*

14. *Id.*

15. Sayre, *supra* note 9, at 857 n.25. "Art reflects a nation's level of self-respect and the way in which its people view themselves and their past. *The cultural heritage of a nation, as embodied in archaeological artifacts and ancient treasures* (sometimes referred to as a nation's 'patrimony'), stimulates tourism, encourages scholarship, and contributes to the intellectual life of a nation. It is in the interest of every nation to preserve its 'patrimony'" *Id.* (emphasis in original).

16. GEORGES KOUMANTOS, in COUNCIL OF EUROPE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: PROCEEDINGS OF THE THIRTEENTH COLLOQUY ON EUROPEAN LAW 12 (1984) [hereinafter ILPCP]. Professor Koumantos states that [t]he importance of cultural property for individuals, nations or the whole of humanity does not need to be proved. It gives each person his intellectual identity, irrespective of whether he is a creator or simply a user. Cultural property in its entirety constitutes a huge heritage which determines our awareness and inspires new bursts of creativity. Any reduction in this heritage, built up over the centuries and constantly added to, means a loss. The protection of cultural property is rightly considered to be everybody's duty.

Id.

B. *The Definition of Cultural Property*

Perhaps the most widely accepted definition of cultural property is found in Article 1 of the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "UNESCO 1970").¹⁷ The first notable element of this definition is that it consists of a list of categories of property.

The most notable element of the definition of cultural property in UNESCO 1970, however, is that it leaves to the individual states designation of specific items from the various categories as cultural property.¹⁸ The states may restrict the

17. United Nations Educational, Scientific and Cultural Organization Convention [hereinafter UNESCO] on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 4, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 (1971) [hereinafter UNESCO 1970]; *see* SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 224-29 (1978) (discussing UNESCO 1970); UNESCO, *THE PROTECTION OF MOVABLE CULTURAL PROPERTY I (COLLECTION DU PATRIMONIE CULTUREL MOBILIER): COMPENDIUM OF LEGISLATIVE TEXTS* 357-64 (1984) [hereinafter COMPENDIUM] (discussing UNESCO 1970). Article 1 states:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments."

UNESCO 1970, art. 1, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90.

18. *Id.*

definition. The United States, for example, has limited the definition of protected cultural property in the 1983 Convention on Cultural Property Implementation Act ("CPIA").¹⁹ Under the U.S. definition, objects do not become cultural property until they have been removed from or are threatened with removal from their cultural context.²⁰

Although UNESCO 1970 emphasizes the property aspect of cultural property, its definition of cultural property is at least partly in terms of cultural significance and cultural context. Recognizing that cultural property can be defined only partially by its age, provenance, category, or threat of pillage, UNESCO 1970 defines cultural property as "property which, on religious or secular grounds, is . . . of importance for archaeology, prehistory, history, literature, art or science."²¹

The introduction of cultural significance into the definition of cultural property in UNESCO 1970 does not go far

19. 19 U.S.C. §§ 2601-2613 (1988). Under the Cultural Property Implementation Act [hereinafter CPIA] only the import of archaeological or ethnological materials, in danger of being lost to pillage, is prohibited if, and when, the president agrees to restrict import of such items pursuant to a formal request by a nation shown to vigorously protect its own items of cultural importance. *Id.* § 2602. Archaeological material must be: of cultural significance; at least 250 years old; and normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water. *Id.* § 2601. Ethnological materials must be: the product of a tribal or nonindustrial society; at least 50 years old; and, important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of the people. *Id.*; see USIA, *CURBING ILLICIT TRADE IN CULTURAL PROPERTY: U.S. ASSISTANCE UNDER THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT 1, 22* (1989) [hereinafter *CURBING ILLICIT TRADE*].

20. See LEVA, *supra* note 6, at 46. Hugues De Varine recognized a similar anomaly but on a larger scale.

The primary phenomenon [of illicit trade in cultural property]—one that in fact governs the others—is the emergence of the concept of cultural goods or property. Paradoxically, it is only when goods have been divested of their intrinsic purpose, losing their primary functional utility, that they are termed cultural property, providing they are considered worthy to be preserved, admired, i.e. used for another, secondary function. . . . This concept of cultural property is closely linked with those of 'traditional values,' the concern for continuity, the search for 'cultural roots.' It is this very combination that has given rise to most public and private collections, the listing of monuments and the creation of learned historical societies. Moreover, the very rarity of these vestiges of the past leads to their enhancement both in intellectual terms ("what is rare is beautiful") and in economic terms ("what is rare—or scarce—is dear")."

Id.

21. See UNESCO 1970, *supra* note 17, art. 1, 823 U.N.T.S. at 246.

enough because of the final element of the definition of interest here. That element is the definition's preoccupation with the relationship of nation-states to cultural property. Not only do states designate what items are cultural property, as noted above, but they are the only entities competent to do so. The definition does not contemplate the designation by indigenous peoples of objects sacred to them as cultural property. The state-centric element is also apparent in that the cultural significance of objects is determined by "importance for archaeology, prehistory, history, literature, art or science," not by importance to the cultural identity of a people or group. The values stated are largely external to the cultural identity of a people or group. Is the judgment that of a living people, defining for themselves their relationship to the world, or the judgment of external academics applying some sort of absolute criteria? The recognition of "religious or secular grounds" upon which to base the importance of cultural property is insufficient entry for the significance of objects to peoples or groups. The Preamble suggests recognition of the importance of cultural property to cultural identity, but even here the nation-state is the unit of identity, not the ethnic group or indigenous people to whom such objects may have the greatest cultural significance.²²

C. *Who Owns the Past?*

Setting aside the questions of what is to be protected, and who shall define it, concentration on the property aspect of cultural property inevitably raises the question, "Who Owns The Past?"²³ If cultural property can be properly defined, who may own it? Is "ownership" of cultural property even possible? The problem of ownership has several facets.

22. UNESCO 1970, *supra* note 17, pmbl., 823 U.N.T.S. at 232-34, 10 I.L.M. at 289. The Preamble includes the following statement: "Considering that cultural property constitutes one of the basic elements of civilization and *national* culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting." *Id.* (emphasis added). Similarly, Article 4 recognizes the importance of the categories of cultural property identified in Article 1 to the "cultural heritage of each *State*." 823 U.N.T.S. at 236-38, 10 I.L.M. at 290 (emphasis added).

23. LEVA, *supra* note 6, at 74; *see also* WHO OWNS THE PAST? PAPERS FROM THE ANNUAL SYMPOSIUM OF THE AUSTRALIAN ACADEMY OF THE HUMANITIES (Isabel McBryde, ed. 1985) [hereinafter WHO OWNS THE PAST?].

A principal text on art law identifies the major problems in protection of cultural property as (1) illicit trade and (2) repatriation.²⁴ Both problems involve questions regarding who may properly own, or possess, cultural property. Trade cannot be illicit if it does not dispossess someone of the right to licit trade. Similarly, no one may gain return of cultural property unless they can show "better title."

Reflecting the dichotomous nature of cultural property, the question of ownership might be reformulated in two parts. First, should cultural property be returned to source countries or peoples? This is the repatriation issue. Second, who is a legitimate claimant of and who can legitimately release cultural property to the possession of another? This is the replevin issue. A rough way of classifying these issues is that the first is a human rights/self-determination issue, and the second is a property issue. Repatriation is a moral issue concerned with right treatment of diverse cultures and objects significant to them. Accordingly, the focus of this moral inquiry is on the cultural significance, the cultural aspect of cultural property. Replevin is a title issue, based on who has a superior right to possess particular items of cultural property, defined by objective criteria. Its focus is the property aspect of cultural property.

In addition to the possessory interests suggested by the question of who owns the past, there are myriad interests based on use and enjoyment. These interests may be divided into those of the source nations and those of acquisitive nations,²⁵ although there is some overlap between them. For

24. Compare LEVA, *supra* note 6, at 46 with *id.* at 47 (identifying critical phenomena as 1) "the emergence of the concept of cultural property," 2) "circulation" of cultural property, and 3) "artificial acculturation of the exotic" in the course of colonization"). The last phenomenon is

the failure of on the part of the Europeans to understand the real values enshrined in non-European cultures, combined with the ever-more pronounced rejection of these same values by non-Europeans, themselves subjected to an intensive bombardment of concepts and techniques imported in the name of development. This has led to a sudden discovery of 'primitive art' at the very moment when its creators are turning away from it in a search for the symbols of so-called modern civilization. The trend to invest cultural goods with materialistic values, which began in Europe and the United States, is thus spreading rapidly to the rest of the world.

Id.

25. See, e.g., Paul M. Bator, *An Essay On The International Trade In Art*, 34 *STAN. L.*

source nations, the first interest is specific cultural value, or concern over wrenching cultural property away from the culture in which it is embedded. Second, there is an archaeological interest in preventing destruction of the records of civilization. A third interest is in the integrity of the work of art or object of cultural property, which means simply that it should not be dismembered. Fourth is an interest in physical safety of cultural property from deterioration. A fifth interest is an economic one, measured in terms of the price the object would bring on an open market (intrinsic value), and the tourist dollars generated by presence of the object in a nation (extrinsic value). Sixth, cultural property has artistic value independent of its cultural significance. Seventh, is the so-called distribution interest. Cultural property may demonstrate to the world the achievements of the culture of a nation if it is disseminated. Eighth, there is an interest in mere retention, or "hoarding," as the right of source nations and peoples.²⁶ Finally, there is an interest in preserving the national patrimony as a matter of pride and identity, as well as intrinsic and extrinsic economic value.²⁷

The interests of acquisitive nations are equally diverse. First is again the interest in preservation, or the physical safety of the objects above. Second, there is an interest among colonial powers and victorious powers in times of conflict in the humiliation of a conquered people by dispossessing them of their cultural and artistic treasures. Third, there is the interest of "good faith purchasers" that their ownership or possession of objects not be unjustly disturbed, or disturbed without compensation.²⁸ Fourth, acquisitive nations have an interest in enriching their own cultural patrimony by acquisition from external sources. Fifth, like source nations seeking appreciation of their culture abroad, acquisitive nations have an interest in the breakdown of parochialism in a global society.²⁹ Finally, ac-

REV. 275, 294-310 (1982) (republished as monograph by University of Chicago Press, 1982) (examining "relevant values" in protection of cultural property); John H. Merryman & Albert E. Elsen, *Hot Art: A Reexamination Of The Illegal International Trade In Cultural Objects*, 12 J. ARTS MGMT & L. 5, 8-15 (1982) (cataloguing and analyzing interests in this way).

26. Merryman & Elsen, *supra* note 25, at 8-11.

27. Bator, *supra* note 25, at 302-06.

28. Merryman & Elsen, *supra* note 25, at 11-15.

29. Bator, *supra* note 25, at 302-10.

quisitive nations have an interest in maintaining access to cultural property for archaeological purposes.³⁰

D. The "Best Interest" of the Objects

There is a zone of strong agreement among the interests described above. That agreement is on the fundamental importance of preservation of cultural property. The preservation of cultural property requires measures against the destruction, mutilation, or division of sets and collections,³¹ and measures to prevent the deterioration as the result of neglect or environmental damage. This area of agreement reflects the property aspect of cultural property. Preservation is the first principle of protection of cultural property because if cultural property is destroyed the source nations or peoples, as well as the world heritage at large, are divested of valuable objects. Destruction makes any question of allocation moot. Deterioration, vandalism, and accidental damage also diminish the nation's and the world's cultural resources.³²

Preservation presents another set of difficult issues. Protection is given different meanings by different people or by different international instruments.³³ "Protection," it has been suggested, is sometimes used as a euphemism for nationalistic retention of cultural property even if that leads directly to de-

30. LEVA, *supra* note 6, at 62.

31. Bator, *supra* note 25, at 295, 298.

32. Merryman, *supra* note 7, at 1917.

33. See, e.g., Merryman, *supra* note 2, at 833.

While both [UNESCO 1970 and the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (hereinafter "Hague 1954")] purport to protect cultural property, they give the term "protection" different meanings and embody different and somewhat dissonant sets of values. In part, the divergence flows naturally from the diverse subject matters of the two Conventions, one dealing with protection of cultural property from the acts of belligerents in time of war, the other with international traffic in cultural objects. But the differences in outlook that are of interest here are fundamental, transcending such distinctions.

Id. Merryman suggests that Hague 1954 was based on "cultural internationalism," or cultural property protection for the sake of the world heritage, while UNESCO 1970 was based on "cultural nationalism" elevating national hoarding above international protection. *Id.* at 833-45; see Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague 1954]. The Hague 1954 ushered in "modern" efforts to protect cultural property.

terioration or destruction of objects.³⁴ "Protection" may mean that the objects are so much a part of the cultural identity of a people or nation that they must remain in or be returned to that country even if the physical safety of the objects cannot be assured.³⁵ This form of protection stresses the cultural aspect of the object over its physical integrity. In a sense, it is the culture that is being preserved at the expense of the property by this form of protection. In the example of the Zuni war gods,³⁶ physical preservation of the objects is diametrically opposed to their cultural function.

The "best interest" of items of cultural property is not easily determined. It consists of both the physical preservation of the object and the recognition and protection of its cultural significance. The dichotomous nature of cultural property complicates protection of such objects. On the one hand is the demand to treat objects as valuable property that must be preserved from physical destruction and deterioration. On the other hand is the argument that treats objects as culturally significant, the cultural significance of the objects will be lessened or destroyed, as will their culture, by separating these objects from their cultural context. If preservation of cultural property is fundamental, then the proposals offered to accomplish that task must address the dichotomy as well. The following two parts examine how the existing network of international accords seeks to preserve cultural property and the poles of argument within the field, including various proposals offered to resolve the conflicts.

II. *THE HISTORY OF DOMESTIC AND INTERNATIONAL PROTECTION OF CULTURAL PROPERTY*

This century has seen the development of several overlapping efforts to protect cultural property in international and domestic law.³⁷ They are protection of cultural property from

34. *Id.* at 844.

35. See, e.g., Jonathan S. Moore, *Enforcing Foreign Ownership Claims In the Antiquities Market*, 97 *YALE L.J.* 466, 467 (1988) (discussing inability of source nations to protect or preserve objects of cultural significance because of lack of resources, training, and funding).

36. See *supra* note 13 and accompanying text (discussing Zuni War gods).

37. See generally Hague 1954, *supra* note 33, 249 U.N.T.S. 240. The Hague 1954 ushered in "modern" efforts to protect cultural property. See Gael M. Graham, *Pro-*

the effects of armed conflict, protection of historic monuments for the benefit of national or world heritage, state ownership laws, laws regulating the flow of cultural property in and out of states, and the current phase emphasizing repatriation of objects of cultural significance to source nations or peoples.³⁸ This Part surveys these efforts to protect cultural property.

A. *Protection From the Rigors of War*

The first effort in modern cultural property protection was recognition of a duty to protect cultural property during armed conflict. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 ("Hague 1954") defined cultural property,³⁹ established the principle of protection of cultural property during time of war as "comprising the safeguarding of and respect for such prop-

tection And Reversion Of Cultural Property: Issues Of Definition And Justification, 21 INT'L LAW. 755 (1987) (presenting discussions of earlier efforts to protect cultural property from Middle Ages forward, including national and regional regimes); John Moustakas, *Group Rights In Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (discussing concept of protection of cultural property beginning with ancient Greeks).

38. There are several useful sources surveying the development of the international framework for protection of cultural property. See generally COMPENDIUM, *supra* note 17 (containing complete texts of several of principal documents); WILLIAMS, *supra* note 17 (containing complete texts of several of principal documents); Detlev C. Dicke, *The Instruments And The Agencies Of The International Protection Of Cultural Property*, in ILPCP, *supra* note 16, at 17-43 (identifying institutions and instruments for protection of cultural property); Bator, *supra* note 25; P. J. O'KEEFE & LYNDEL V. PROTT, *PREPARING STUDENTS FOR PRACTICE IN INTERNATIONAL LAW* (1984) (detailing legal framework surrounding discovery, excavation, and movement of objects of cultural significance); RIDHA FRAOUA, *LE TRAFIC ILLICITE DES BIENS CULTURELS ET LEUR RESTITUTION* (1985); Angela Joy Davis, *Beyond Repatriation: A Proposal For the Equitable Restitution Of Cultural Property*, 33 U.C.L.A. L. REV. 642, 647-55 (1985); James A. R. Nafziger, *The New International Legal Framework For The Return, Restitution Or Forfeiture Of Cultural Property*, 15 INT'L L. & POL. 789 (1983).

39. Hague 1954, *supra* note 33, art. 1, 249 U.N.T.S. at 240. Article 1 states that the convention covers three classes of property, irrespective of ownership:

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

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

erty,"⁴⁰ provided for the distinctive marking of cultural property to facilitate its recognition,⁴¹ and defined the actions military forces were to take to protect cultural property.⁴² The rationale of the Hague 1954 was to prevent damage to the cultural wealth of both the world community and individual nations.⁴³ Hague 1954 has enjoyed wide, but not universal, ratification.⁴⁴

The United States rejected Hague 1954. The position of the Department of State was that "the major difficulty [with Hague 1954] is that adherence to the Convention would seriously limit the options of the United States in the event of nuclear war or even in some cases of conventional bombardment."⁴⁵ The United States government did not want to sign

shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

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

Id.; cf. UNESCO 1970, *supra* note 17, art. 1, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90 (defining cultural property); CPIA, 19 U.S.C. § 2601 (1988) (defining cultural property).

40. UNESCO 1970, *supra* note 17, art. 2, 823 U.N.T.S. at 236. Protocol I to the 1949 Geneva Convention, produced by the Diplomatic Conference of 1974-77, included in Article 51, paragraph 6, prohibition of reprisals against cultural property. Inclusion of the provisions concerning cultural property was a direct result of Hague 1954. See George H. Aldrich, *Prospects For United States Ratification Of Additional Protocol I To the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

41. UNESCO 1970, *supra* note 17, art. 6, 823 U.N.T.S. at 240.

42. *Id.* arts. 7-19, 823 U.N.T.S. at 240-46, 10 I.L.M. at 291-92.

43. *Id.* pmb., 823 U.N.T.S. at 232-34, 10 I.L.M. at 289. The Preamble states in part:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.

Id. See *supra* note 33 (discussing cultural internationalism).

44. See COMPENDIUM, *supra* note 17, at 355 (listing states that have acceded to or ratified Hague 1954).

45. Letter from Ronald J. Bettauer, Attorney, Office of the Legal Advisor Dept. of State, to Anne Coffin Hanson, President, College Art Association of America, in 31 *ART J.* 488 (1972). The State Department position was presented by Ronald J. Bettauer, Attorney, Office of the Legal Adviser Department of State, in response to a letter urging U.S. ratification of the Convention by Anne Coffin Hanson, President, College Art Association of America. *Id.*

on to a convention unless it could live up to its terms.⁴⁶ Nonetheless, U.S. military personnel have been continually briefed on their responsibility to preserve and protect cultural property since World War II.⁴⁷ According to General Eisenhower, in 1943, "military necessity" justifying destruction of cultural property should be interpreted as narrowly as possible.⁴⁸

In addition to treaty protection of cultural property during times of armed conflict, international law governs the restitution of cultural property looted from conquered countries. Since the time of Napoleon's conquests, the restitution of cultural property looted by victorious armies prevails as a rule of customary international law.⁴⁹ Restitution may be the norm for objects looted during armed conflict, but objects removed by economic or colonial conquest are treated differently. The products of so-called "Elginism," after the man who brought the Parthenon Marbles to England, have often remained in the acquisitive nation.⁵⁰

Hague 1954 balanced protection of both the "physical" and cultural aspects of cultural property, or at least did not significantly elevate protection of one over the other. The physical integrity of the cultural property designated was certainly the goal of the treaty, but the rationale for that protection was recognition of the cultural significance of the things protected to both a specific culture and the world community.

B. *Protection of Monuments and the World Cultural Heritage*

Although this paper is primarily concerned with the protection of movable cultural property, a brief survey of the means of protecting non-movable cultural treasures is appropriate to understanding the legal framework. This effort in the protection of cultural property overlapped all of the other de-

46. *Id.*

47. REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC MONUMENTS IN WAR AREAS 48-49 (1946).

48. *See id.* at 61 (noting military obligation to preserve and protect objects to greatest extent possible).

49. Sayre, *supra* note 9, at 853. Sayre also provides examples of the restitution of cultural property after World War I and World War II. *Id.*

50. *Id.* at 855. In 1801, Lord Elgin, the British Ambassador to Constantinople, claimed to have received permission from the Turkish government to remove the sculptural decoration from the Parthenon in Athens. *Id.*; *see also* LEVA, *supra* note 6, at 12-13.

velopments discussed in this section. The principal modern international instrument for the protection of cultural monuments and sites is the UNESCO Convention for the Protection of the World Cultural and Natural Heritage ("UNESCO 1972").⁵¹ The means of protecting monuments and sites of cultural significance under the UNESCO 1972 involved the creation of a World Heritage Fund financed by contributions from signatory states based on a percentage of their annual UNESCO dues. The funds collected were then used to provide both advice and financing for preservation of sites of cultural significance.⁵²

Various nations have their own programs for the preservation of sites of cultural significance. Two examples will suffice. The government of England provides for the preservation of medieval structures, restricts the exportation of famous paintings, and preserves forests under the National Heritage Act of 1983.⁵³ The protection of culturally significant sites in Japan is founded on the Historic Sites, Places of Scenic Beauty, and National Monuments Preservation Law (1919), the National Treasure Law (1929), and the Important Cultural Property Preservation Act (1933).⁵⁴

A balanced approach to protection of the cultural and property aspects of this non-movable cultural property is again apparent. What these laws and treaties and the treaty protecting cultural property from the rigors of war suggest, however, is that such balance is more easily achieved when movement of the cultural properties is not contemplated. The objects or monuments were to be protected in their cultural context, lo-

51. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter UNESCO 1972]; see Raymond H. Goy, *The International Protection of the Cultural and Natural Heritage*, 4 NETH. Y.B. INT'L L. 117, 128-41 (1973) (discussing UNESCO 1972); Sayre, *supra* note 9, at 837-39 (discussing UNESCO 1972).

52. See UNESCO 1972, *supra* note 51, arts. 16-19, 27 U.S.T. at 45-46, 1037 U.N.T.S. at 158-59.

53. National Heritage Act, 1983, ch. 47 (Eng.), reprinted in 32 HALSBURY'S STATUTES OF ENGLAND AND WALES 391-406 (4th ed. 1987); see Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543, 1551 (1990) (examining English laws).

54. See LLOYD Craighill, *National Treasures*, in 5 KODANSHA ENCYCLOPEDIA OF JAPAN 348 (1983) (concerning Japan's cultural property laws); Kitamura Bunji, *Cultural Properties Law*, in 2 KODANSHA ENCYCLOPEDIA OF JAPAN 52 (1983); Emily J. Sano, *A Passion for Collecting, A Commitment to Preservation*, ARTNEWS, Sept. 1981, at 106.

cated within the cultures that created them. The property aspect becomes preeminent in the regulation of the movement of objects.

C. Laws Establishing State Ownership of Cultural Property

Another effort in the development of a framework for the protection of cultural property that overlapped other developments was the establishment of national ownership laws.⁵⁵ These laws are significant to a discussion of the international framework because of the impact they have had on application of conventions and on domestic case law concerning trade in cultural property. Several states enacted such laws following ratification of UNESCO 1970. As a prerequisite to protection under UNESCO 1970, countries of origin had to take measures consistent with this convention to protect their cultural patrimony.⁵⁶ Those measures often included designation of cultural property as property of the country of origin. Mexico, for example, passed a state ownership law in 1972.⁵⁷

State ownership laws typically establish that all "antiquities" are government property, even if ownership is a concept foreign to the cultural context of such items. Even undiscovered antiquities in which no one has a possessory interest are nationalized. If a developer discovers an object of archaeological interest in the course of a building project, the object is government property regardless of who owns the land and in spite of the fact that no one knew that the object was located on the site prior to the excavation.⁵⁸ The laws generally apply

55. See COMPENDIUM, *supra* note 17, at 30-42 (surveying state ownership laws); see generally Halina Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L. J. 1089 (1976) (surveying state ownership laws); Moustakas, *supra* note 37 (arguing to strengthen state ownership laws). Merryman suggests that citizens of source nations find such laws unacceptable. See John H. Merryman, *The Retention of Cultural Property*, 21 U. C. DAVIS L. REV. 477, 487 (1988) ("The political problem is that citizens in the source nation are likely to oppose implementation of [national ownership] legislation unless unusually generous compensation is provided.") *Id.*

56. UNESCO 1972, *supra* note 51, arts. 5, 12-14, 27 U.S.T. at 41, 44, 1037 U.N.T.S. at 154, 156-58.

57. See *United States v. McClain*, 593 F.2d 988 (5th Cir. 1979). A number of other Latin American countries, including Guatemala, Ecuador, and Costa Rica, have laws declaring state ownership of cultural property. See *LYNDEL V. PROTT & P.J. O'KEEFE*, 1 LAW AND THE CULTURAL HERITAGE 188-97 (1984); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974) (discussing Guatemalan law).

58. Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*,

to objects already in collections as well.⁵⁹

State ownership laws can have an impact on the protection of cultural property apart from their implications under UNESCO 1970. In the case of *United States v. McClain*,⁶⁰ the court based criminal penalties for importing Mexican cultural property on the interplay of the Mexican state ownership law and the United States National Stolen Property Act ("N.S.P.A.").⁶¹ The court applied the N.S.P.A. to dealings in illegally stolen cultural property.⁶² The court in *McClain* held that cultural property designated as owned by a particular nation was incapable of private ownership or conveyance, and, therefore, those trafficking in such items dealt in stolen goods, prohibited by the N.S.P.A.⁶³

D. Regulation of Traffic in Cultural Property

Efforts to establish state ownership worked in conjunction with attempts to regulate the flow of objects of cultural significance in and out of source countries and market countries. The close relationship between ownership laws and import-export laws can be seen in the four kinds of retention laws identified by Professors Merryman and Elsen: (1) total prohibitions on exchanges (Mexico and Guatemala), (2) prohibition of export of designated objects of national importance (Italy and France), (3) laws routinely awarding export licenses (Great Britain and Canada), and (4) laws with no limitations on export

97 *YALE L.J.* 466, 467 n.6 (1988). The premise of Moore's argument is that the United States should recognize such "umbrella" ownership laws. *Id.* at 467.

59. *Id.* at 471-72; see also John H. Merryman, *Thinking About the Elgin Marbles*, 83 *MICH. L. REV.* 1881, 1890 (1985) (discussing purpose of national ownership laws as facilitating replevin claims and raising stolen property liability in importing countries).

60. 545 F.2d 988 (5th Cir. 1977) and 593 F.2d 658 (5th Cir. 1979) (decided in two stages).

61. United States National Stolen Property Act, 18 U.S.C. §§ 371, 2314, 2315 (1988 & Supp. II 1990) [hereinafter the N.S.P.A.]. The N.S.P.A. allows criminal penalties of up to U.S.\$10,000 in fine or five years in prison or both for conspiring to import or trade stolen property. *Id.* It allows penalties of up to US\$10,000 fine or ten years in prison or both for transportation of stolen property into or within the United States. *Id.* Finally, the N.S.P.A. allows penalties of up to US\$10,000 or ten years in prison or both for selling or receiving stolen property. *Id.* § 2314.

62. *McClain*, 593 F.2d at 663-66.

63. 545 F.2d 988 (5th Cir. 1977) and 593 F.2d 658 (5th Cir. 1979) (decided in two stages).

(the United States).⁶⁴

An unsuccessful attempt to marry ownership laws with import-export laws can be seen from the example of New Zealand. New Zealand enacted legislation providing for automatic forfeiture of illegally exported cultural property.⁶⁵ In effect, the New Zealand law would make the state the owner of any illegally exported object, which it could then pursue. In *Attorney-General of New Zealand v. Ortiz*,⁶⁶ a British court held that forfeiture required actual seizure of the object.⁶⁷ Lord Denning, in one of the majority opinions, reasoned that if New Zealand's Historic Articles Act provided for the automatic forfeiture of an historic article illegally exported from New Zealand, then New Zealand could recover that article in any importing country. Denning found that interpreting the Act in this way would "infringe the rule of international law which says that no country can legislate so as to affect the *rights of property* when that property is situated beyond the limits of its own territory. It is a direct infringement of the territorial theory of sovereignty. . . ." ⁶⁸

The primary international instrument regulating trafficking in cultural property is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 May 1970, known as UNESCO 1970.⁶⁹ In pursuit of the purpose of UNESCO 1970, to inhibit the "illicit" international trade in cultural objects, the parties (1) agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and transfer of ownership" of cultural prop-

64. LEVA, *supra* note 6, at 53.

65. Historic Articles Act, 1962 N.Z. Stat. No. 37; Historic Articles Act Amendment, 1968 N.Z. Stat. No. 35 § 100 (New Zealand).

66. *Attorney-General of New Zealand v. Ortiz*, 2 W.L.R. 809 (H.L. 1983), *aff'd* 2 Q.B. 349 (Eng. C.A. 1982).

67. Merryman, *supra* note 7, at 1892.

68. 3 W.L.R. 570, 580 [Eng. C.A. 1982] (emphasis added) (citing *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824)); see Monroe Leigh, *Judicial Decisions*, 3 W.L.R. 570, 77 AM. J. INT'L L. 631 (1983) (analyzing *Attorney-General of New Zealand v. Ortiz*).

69. See UNESCO 1970, *supra* note 17; Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYR. J. INT'L L. & COM. 333 (1983) (concerning international regulation of trafficking in cultural property); P.J. O'Keefe, *Export and Import Controls On Movement Of The Cultural Heritage: Problems At the National Level*, 10 SYR. J. INT'L L. & COM. 352 (1983) (concerning domestic efforts to control flow of cultural property).

erty,⁷⁰ (2) agree that trade in cultural objects exported contrary to the law of the nation of origin is "illicit,"⁷¹ and (3) agree to prevent the importation of such objects and facilitate their return to source nations.⁷² The motivation for drafting UNESCO 1970 was the realization that cultural property of many countries was being stripped to fill major museums and private collections in a few acquisitive nations.⁷³ Only the first agreement of the parties mentioned above is based on a primary concern for the cultural aspect of cultural property. The remaining two agreements treat cultural property as property.

There are several difficulties with UNESCO 1970 in content and implementation. First, of the large importing nations, only the United States and Canada have ratified UNESCO 1970,⁷⁴ and in the United States implementing legislation took until 1983 to pass Congress.⁷⁵ Other major acquisitive nations have been hampered by umbrella agreements concerning free trade. "In the past the effect of the EEC has been to prevent countries especially rich in art treasures, such as Italy, from effectively controlling the export of their cultural property"⁷⁶ Second, the Convention also presents problems for source nations, often lesser developed countries with limited economic resources. The Convention calls for countries to develop awareness of moral obligations to respect cultural heritage and to take measures to inventory and protect cultural property. But,

[A]wareness of moral obligations to respect cultural heritage merely underscores the structural deficiencies of national and international cultural property law. Awareness

70. See UNESCO 1970, *supra* note 17, art. 2, 823 U.N.T.S at 236, 10 I.L.M. at 290.

71. *Id.* art. 3, 823 U.N.T.S. at 236.

72. *Id.* arts. 7, 9, 13, 823 U.N.T.S. at 240, 242, 244.

73. Bator, *supra* note 25, at 280.

74. John H. Merryman, BOOK REVIEW, 85 AM. J. INT'L L. 737, 739 (1991).

75. See *supra* note 19 and accompanying text; see also, Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT'L L. 611 (1982) (describing drafting, passage, and implementation of CPIA). The United States reserved the right to determine whether or not to impose export controls over cultural property, and, *inter alia*, understood the Convention not to alter property interests under the laws of states. *Id.*; see LEVA, *supra* note 6, at 95-96 (recording reservations and "understandings" that accompanied initial U.S. ratification of Convention in 1972)

76. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 139 (1989).

alone does nothing to remedy the underlying socio-economic factors that encourage the international trade in illicit antiquities and art treasures.⁷⁷ The costs of adequate measures, and of pursuing repatriation claims for cultural property around the world, may simply be beyond the means of lesser developed source nations.⁷⁸ A third difficulty with UNESCO 1970 is that it lacks effective means for resolving disputes.⁷⁹

A different kind of criticism has also been leveled at both state ownership laws and import-export controls. The argument is that such laws reflect an invidious "cultural nationalism" that allows large stocks of objects of cultural significance to go undocumented, unhoused, unprotected, and undiscovered, but subject to export control. Furthermore, such laws may actually foster covert and callous excavation and export of cultural property on a black market to circumvent the regulatory framework.⁸⁰

E. *The Movement Toward Repatriation*

Several phenomena suggest that once objects of cultural significance have been protected from the rigors of armed conflict, and from illicit trafficking, the next concern of source na-

77. Sayre, *supra* note 9, at 880.

78. *Id.* at 886-87.

Most developing countries simply do not have the resources to implement the services required to protect cultural property against theft, illegal exportation, and decay, let alone the means to promote related educational exchange programs. The domestic art market in these nations is not able to compete with the inflated prices offered by collectors and dealers in London, New York, or Tokyo, and compulsory purchase provisions usually penalize national owners of registered property.

Id.

79. 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).

The Convention specifically addresses the problem of dispute resolution at only one point. Subsection 5 of article 17 provides that "[a]t the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them."

Id. The Convention provides no further procedure or mechanism for the resolution of disputes. *Id.*

80. See John H. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 *N.Y.U.J. INT'L L. & POL.* 757, 759-60 (1983) (discussing argument); LEVA, *supra* note 6, at 69.

tions and peoples is with repatriation of their cultural patrimony removed abroad.⁸¹ This development suggests a revitalization of awareness of the cultural aspect of such objects. Repatriation is an underlying theme of UNESCO 1970 and of a series of United Nations General Assembly and European Parliament resolutions since adoption of that Convention.⁸² Repatriation in practice may have one of several meanings, including (1) repurchase of objects for return to their source nation or people (repatriation beyond the means of most source nations), (2) theft (on the principle that the end justifies the means, and the property belongs in the source nation), and (3) repatriation by agreement. The third form may be for one or more purposes, which includes altruism, retaining access to the source nation's riches, and preventing legal entanglements.⁸³ UNESCO and the Council of Europe encourage voluntary repatriation.⁸⁴

The recent attempts of New Zealand in *Ortiz*,⁸⁵ and Greece in gaining return of the "Elgin" Marbles taken from the Par-

81. See generally RIDHA FRAOUA, *LE TRAFIC ILLICITE DES BIENS CULTURELS ET LEUR RESTITUTION: ANALYSE DES RÉGLEMENTATIONS NATIONALES ET INTERNATIONALES CRITIQUES ET PROPOSITIONS* 113-210 (1985). The obligation to grant restitution of cultural property, looted during war time, has evolved into an accepted norm of customary international law. See also Sayre, *supra* note 9, at 853.

82. Merryman described this phenomenon, although with disapproval in *Two Ways of Thinking About Cultural Property*. Merryman, *supra* note 2, at 845.

Since the promulgation of UNESCO 1970, the attention of source nations has turned to what is now generally called "repatriation": the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed). Beginning in 1973, the United Nations General Assembly adopted a series of resolutions calling for the restitution of cultural property to countries of origin. In 1978 UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, and in 1983 the Council of Europe Parliamentary Assembly adopted a Resolution on Return of Works of Art. The premises of the repatriation movement are a logical extension of those that underlie UNESCO 1970: cultural property belongs in the source country; works that now reside abroad in museums and collections are wrongfully there (the result of plunder, removal by colonial powers, theft, illegal export or exploitation) and should be 'repatriated.'

Id. (citations omitted).

83. LEVA, *supra* note 6, at 124-25.

84. Merryman, *supra* note 7, at 1893.

85. Attorney-General of New Zealand v. Ortiz, 2 W.L.R. 809 (H.L. 1983), *aff'd* 2 Q.B. 349 (Eng. C.A. 1982).

thenon, were unhappy examples of efforts to seek repatriation. There have been, however, important successes as well. For example, the case of *Autocephalous Church v. Goldberg & Feldman Fine Arts, Inc.*⁸⁶ involved mosaics removed from a Greek Orthodox church in the Turkish-controlled part of Cyprus.⁸⁷ The Turkish government had allowed removal and exportation of the mosaics, which were ultimately imported into the United States by Goldberg & Feldman Fine Arts, Inc. in 1988.⁸⁸ The Greek Orthodox church, a legal citizen of the Greek part of Cyprus, learned of the presence of the mosaics in the United States. The church sought the return of the mosaics as their rightful owner, arguing that Turkey had no right to certify exportation of the mosaics. The United States Court of Appeals for the Seventh Circuit decided in 1990 that the mosaics were the property of the Autocephalous Church, and must be returned to it.⁸⁹

A second example of a successful effort at repatriation of cultural property was the passage of the Native American Graves Protection and Repatriation Act (the "NAGPRA") by the Congress of the United States in 1990.⁹⁰ Section 3 of the NAGPRA defines ownership of Native American remains and objects based on classifications of affiliation, location, and circumstances of discovery.⁹¹ Section 4 prohibits illegal trafficking in objects of cultural significance.⁹² The real achievement of the NAGPRA, however, is that Section 5 requires all museums receiving federal funds to inventory holdings of cultural property and human remains of Native Americans, while Sec-

86. *Autocephalous Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990). The case is technically one of "replevin" under the two-tiered framework because the legal basis for the decision was the "better title" of the Greek Orthodox Church over an art gallery. *Id.* The goal, however, was certainly "repatriation" in the sense of returning property to the source nation because of cultural affiliation. *Id.*

87. *Id.*, 917 F.2d at 280.

88. *Id.*

89. *Id.* at 293-94.

90. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1988 & Supp. III 1991) [hereinafter NAGPRA]. The author has argued that passage of this Act was a manifestation of the right of cultural self-determination. Roger W. Mastalir, *A Model for Recognition of the Right to Cultural Self-Determination of Indigenous Peoples: Native American Graves Protection and Repatriation Act* (Apr. 1992) (on file with the *Fordham International Law Journal*).

91. NAGPRA, *supra* note 90, § 3002 (1988 & Supp. III 1991).

92. *Id.*

tion 7 mandates repatriation of all such items, with limited exceptions, in consultation with Native American organizations.⁹³ In a single act, an entire category of cultural property was mandated for return to source peoples.

What is fascinating about the *Autocephalous* case and passage of the NAGPRA is that repatriation was to be made to a religious organization, in the one case, and to an indigenous people, in the other, rather than to the government of a nation-state. The contrast to the repatriation provisions and state-centered orientation of UNESCO 1970 is interesting. Nations and courts have demonstrated a willingness to return cultural property to groups with whom it has a clear cultural affiliation, but not to governments acting on behalf of such groups, as was the case in *Ortiz*⁹⁴ and with the "Elgin" Marbles. With this in mind, we consider next the poles of the arguments concerning protection of cultural property.

III. THE POLES OF THE ARGUMENT OVER PROTECTION OF CULTURAL PROPERTY: THE CULTURAL ASPECT *v.* THE PROPERTY ASPECT

A concern for protection of cultural property is consistent with the emergence of international laws and institutions protecting human rights.⁹⁵ For many source nations, peoples, and adherents to their cause, the protection and repatriation of cultural property is solely a human rights issue. For many representatives of acquisitive nations, museums, and collectors, it is a property question. For some, arguments linking cultural property with property principles misses the essential nature of the question of protecting and respecting cultural property. For others, arguments linking cultural property and human rights are merely "sentimental."⁹⁶ Under the influence of John Henry Merryman, these two poles of argument are usually described respectively as "cultural nationalism" and "cultural internationalism."⁹⁷ This Part will define the poles of the argu-

93. *Id.*

94. Attorney-General of New Zealand v. Ortiz, 2 W.L.R. 809 (H.L. 1983), *aff'd* 2 Q.B. 349 (Eng. C.A. 1982).

95. See UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS, STUDIES AND DOCUMENTS ON CULTURAL POLICIES (1970).

96. Merryman, *supra* note 7, at 1883.

97. See generally Merryman, *supra* note 2 (labelling and defining "cultural nation-

ment over the "best interests" to be served in protecting cultural property, demonstrate the misconceptions in describing the polar positions in terms of "internationalism" and "nationalism," and survey various proposals for resolution of disputes between the human rights and property law camps.

A. *Internationalism or Preeminence of the Property Aspect?*

Professor Merryman,⁹⁸ the champion of what he calls "cultural internationalism," uses the case of the "Elgin" Marbles, removed from the Parthenon in Athens and now residing in the British Museum, to demonstrate the principles upon which a reasoned resolution of cultural property disputes should be based. He rejects the emotional appeal of the Greek position, that the Marbles were products of Greek culture, were inappropriately removed and must be returned. He rejects "cul-

alism" and "cultural internationalism"); *see also* Merryman, *supra* note 74, at 741 (presenting positions and champions of two camps).

There are two contrasting points of view. One faction, full of passionate intensity, identifies strongly with the preferences of source nations. To these fundamentalists [i.e., "cultural nationalists"], cultural objects (they prefer emotive terms like 'cultural patrimony' or 'cultural heritage') belong within the boundaries of the nation of origin and should stay there. If found abroad, they should be 'repatriated.' Their objective is a system of cultural property law that requires the nation in which a cultural object is found to return it to the source nation.

Others [i.e., 'cultural internationalists'], while they do not lack all conviction, make distinctions between different kinds of cultural objects, between theft and illegal export, between stale and fresh claims, between good and bad faith, and find it difficult to ignore other arguably relevant considerations. In place of the attractive simplicity of the fundamentalist position, these realists offer complication. They contemplate the possibility that in some cases the demand for the return of cultural objects, whatever its nationalist justification, serves no substantial international interest. Cultural internationalists profess that the international art trade is not always inherently evil; that a licit market in cultural objects may under some circumstances better serve the preservation of and access to the human record than rigorous, but unenforceable, national controls which the black market inevitably dominates; that, indeed, in extreme circumstances some cultural objects might better be removed from nations of origin than left there.

Id. Lyndel V. Prott and P.J. O'Keefe are solidly in the fundamentalist camp. *See* LYNDEL V. PROTT AND P.J. O'KEEFE, 3 *LAW AND THE CULTURAL HERITAGE* (1989). The author, however, is in the other.

98. Professor Merryman has formulated most of the vocabulary and issues of "art law" and cultural property. His contributions to the scholarly literature are both rich and varied and always fruitful ground for controversy. An understanding of the issues in the protection of cultural property is incomplete without an awareness of Professor Merryman's writings.

tural nationalism" as a basis for the disposition of the Marbles. Professor Merryman argues that "cultural nationalism" expresses dubious values, such as mere possession by a state which has not housed, protected, or studied the objects adequately.⁹⁹ Further, he argues that the Greek position is founded on "sentiment."¹⁰⁰ He concludes that the Greeks do not have a legal claim to the Marbles and that moral arguments fail to justify the return of the Marbles to Greece.¹⁰¹

Professor Merryman seeks general principles that should govern the allocation of cultural property. Those principles may be found in "cultural internationalism" and property law. The concerns of "cultural internationalism," which he defines as preservation, integrity, and distribution/access, do not clearly support the Greek position.¹⁰² Under the general property law principle of repose, the Elgin Marbles should remain in the British Museum until the Greek government can offer more compelling reasons for their return.¹⁰³ A related property law concept put forward by this school of thought is that those seeking restitution of cultural property must demonstrate due diligence in seeking its return.¹⁰⁴

Professor Merryman's three principles of "cultural internationalism" are essentially property concepts. Property may be physically preserved, its integrity may be maintained, and its distribution may be controlled, for example by customs regulations and property law principles of repose and good faith purchase. Professor Merryman is willing to go so far as to argue that cultural property is a product of the market and should be treated like fungible goods suitable for trade.¹⁰⁵

Where then is the "internationalism" in "cultural internationalism?" It is in the collateral arguments for allowing cur-

99. Merryman, *supra* note 7, at 1891.

100. *Id.* at 1883.

101. *Id.* at 1910.

102. *Id.* at 1917.

103. *Id.* at 1911.

104. See Stephen L. Foutty, Recent Development, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 *VAND. L. REV.* 1839 (1990) (presenting arguments for "due diligence" requirement in cases concerning restitution of art and other cultural property).

105. John H. Merryman, *The Retention of Cultural Property*, 21 *U. C. DAVIS L. REV.* 477, 500 (1988).

rent holders of disputed cultural property, usually economically wealthy nations, to retain possession of the "property." The first principle of internationalism, preservation, lends itself to an internationalist credo based on preservation of cultural property for the "world heritage," or "common heritage of mankind."¹⁰⁶ Wider diffusion of objects of cultural significance throughout the world community then becomes a means of improving cultural understanding.¹⁰⁷

A final proposition of this pole of the argument is that preservation of cultural property can be best effected by acquisitive nations. It is therefore in the best interest of both the world's common heritage and items of cultural property themselves that such property be left in the hands of possessors who can protect them from deterioration or damage.¹⁰⁸ In a number of cases, export has been the only reason items of cultural property have been preserved.¹⁰⁹ Acquisitive nations,

106. This is the language found in the Preamble to Hague 1954 justifying international efforts to spare cultural property from damage and destruction during armed conflict. See Hague 1954, *supra* note 33, pmb., 249 U.N.T.S. at 240; Isabel McBryde, *Introduction*, in *WHO OWNS THE PAST?*, *supra* note 23, at 5-6 (noting that "[i]tems of such supreme achievement [as the Parthenon Marbles] cannot, in this view, be seen as the possessions of any one nation, but of all mankind"); Bernard Smith, *Art Objects and Historical Usage*, in *WHO OWNS THE PAST?*, *supra* note 23, at 83 (noting that absorption into universal heritage can be destructive of technologically weaker source); Moustakas, *Group Rights In Cultural Property*, *supra* note 37 (noting following statements of cultural universalism: Bernard V. Bothmer, Letter to the Editor, N.Y. TIMES, Oct. 19, 1982, at A30 ("We deplore all destruction in situ, most of it caused by the indifference of the very people whose past is involved"); CHRISTOPHER HITCHENS, *THE ELGIN MARBLES* 98 (1987) ("To rip the Elgin Marbles from the walls of the British Museum is a much greater disaster than the threat of blowing up the Parthenon") (quoting British Museum Director Sir David Wilson); T. VRETTOS, *A SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES* 82 (1974) ("All Greeks were peasants. They did not deserve such wonderful works of antiquity.") (quoting Lord Elgin's response to being told by British counsel that certain takings of Eleusian statuary were illegal); C. HITCHENS, *THE ELGIN MARBLES* 26 (1987) ("[T]he moral order dictates that Britain should keep the Elgin Marbles because Britain is the 'true heir of Pericles' democracy'") (quoting recent statement of Roger Scranton, publisher of *Salisbury Review*).

107. Merryman, *supra* note 7, at 1908. Merryman suggests that possession is unnecessary to the enjoyment of cultural value, at least when he is discussing enjoyment by source nations and peoples. *Id.* at 1913. The paradox of his argument is that he thinks it is necessary for cultural property to be distributed to the global community to enhance appreciation of cultures, but individual cultures do not need to possess items of cultural significance to them to enjoy their cultural value.

108. *Id.* at 1908.

109. Bator, *supra* note 25, at 298; John Mulvaney, *A Question of Values: Museums and Cultural Property*, in *WHO OWNS THE PAST?*, *supra* note 23, at 88.

their museums, and collectors must not take a "dog in the manger" attitude, but refuse to condone looting of cultural treasures from lesser developed countries. In addition, they must encourage lesser developed countries to reacquire cultural property on the market.¹¹⁰

What this school of thought is really talking about is not "internationalism" taking pre-eminence over "nationalism," but the pre-eminence of the property aspect over the cultural aspect. The concern is with physical preservation of objects and with their proper ownership. A regime based on the pre-eminence of the property aspect gives short shrift to the cultural significance of objects, rejecting it as mere sentimentality. The position of this school of thought has generally prevailed in the current regime for the international protection of cultural property.

B. *Nationalism or Preeminence of the Cultural Aspect?*

At the other pole in the arguments over the "best interests" to be served in protection of cultural property is the school of thought labelled by Professor Merryman as "cultural nationalism."¹¹¹ Certainly, the arguments of this school of thought are "nationalist" to the extent that they rely on affinity between the objects in question and an identifiable group, people, or nation.¹¹² For this school of thought, the affinity of cultural property with a group makes its protection and repatriation a human rights issue. The claim that cultural property belongs to, or, more properly, should be in the possession of a particular nation or group is founded on the relationship between sites, objects, and cultural identity.¹¹³ The "propinquity of cultural property to group, culture, or nation" is such that it becomes 'property for grouphood,' defining and nurturing a sense of the group.¹¹⁴ Cultural property may be "both a mani-

110. David Wilson, *Return and Restitution: A Museum Perspective*, in *WHO OWNS THE PAST?*, *supra* note 23, at 100, 104-05.

111. See generally LEVA, *supra* note 6, at 129-130; Merryman, *supra* note 7; Merryman, *supra*, note 2.

112. See KOUMANTOS, *supra* note 16.

113. See *WHO OWNS THE PAST?*, *supra* note 23, at 3-4 (introducing concept of possession of cultural property). UNESCO 1970 is an example of a Convention with a tendency toward "cultural nationalism" in its provisions for restitution. *Id.*

114. Moustakas, *supra* note 37, at 1184. The relation of cultural property to culture was also a common theme in the testimony of Native American representa-

festation and a mirror of [a group's] culture."¹¹⁵

In the case of the NAGPRA, the arguments used to support the request for repatriation of cultural property to Native Americans were founded on human rights principles. Recognition of human rights was the basis offered for enactment of the law during public hearings and upon introduction of the bill on the floor of the House and Senate.¹¹⁶ For members of the Panel for a National Dialogue (comprised of representatives from Native American groups and the museum or scholarly community) human rights was the basis for allowing tribal determinations regarding disposition of remains and objects to prevail.¹¹⁷ Keeping such items would be to perpetuate a human rights violation.¹¹⁸ The response of this school of thought to the argument that cultural property be treated like property is that the market is a flawed device for the protection of cultural property.¹¹⁹ On the contrary, cultural property should be strictly inalienable.¹²⁰ This school finds arguments for the free flow of cultural property in the market place to be based on "sophistry."¹²¹ Perhaps for these reasons, the Euro-

tives in support of NAGPRA. Cultural affinity became one of the tests for determining the appropriate recipient of cultural property to be repatriated under the Act. See generally *Native American Grave And Burial Protection Act (Repatriation); Native American Repatriation Of Cultural Patrimony Act; And Heard Museum Report: Hearing on S. 1021 and S. 1980 Before the Senate Select Committee on Indian Affairs*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearing*]; Roger W. Mastalir, *A Model For Recognition Of The Right To Cultural Self-Determination Of Indigenous Peoples: Native American Graves Protection and Repatriation Act (Apr. 1992)* (on file with the *Fordham International Law Journal*) (A copy of *Hearing* was kindly made available to the author by Congressman David Nagle and the staff of the Senate Select Committee on Indian Affairs).

115. Bator, *supra* note 25, at 304.

116. *Hearing, supra* note 114, 1-3 (statement of Sen. Inouye); 136 CONG. REC. H10,985, H10,988 (1990) (statement of Rep. Campbell).

117. REPORT OF THE PANEL FOR A NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS 1-2, 11-13 (Feb. 28, 1990) [hereinafter *HEARD REPORT*] (made available by William Boyd, President of Field Museum in Chicago). The Report was the result of consultations between representatives of the museum community and Native American groups, held at the behest of the 100th Congress, under the auspices of The Heard Museum in Phoenix, Arizona. The Report formed the basis on which consensus legislation was built, resulting in passage of the NAGPRA during the 101st Congress. *Id.*

118. *Hearing, supra* note 114, at 38 (statement of Paul Bender, Trustee, Heard Museum, Phoenix, AZ).

119. Moustakas, *supra* note 37, at 1184-89.

120. *Id.* at 1185.

121. KOUMANTOS, *supra* note 16, at 15.

An attempt is made to justify the illegal transfer of these goods from one

pean Convention on offenses against cultural property rejected defenses based on property law concepts of "good faith" possession.¹²²

This school of thought, then, elevates concern for the cultural aspect over concern for the property aspect of cultural property. Its aim is to ensure that the cultural significance of objects is respected even at the expense of long-standing principles of property law. Members of this school might go so far as to argue that property law principles are simply inapplicable.

C. *Zone of Agreement and Misconceptions of the Issues*

For both the camp preferring the cultural aspect and the camp preferring the property aspect, preservation is the principal concern in protection of cultural property. Preservation figures among the three principles of "cultural internationalism." Preservation motivates human rights arguments, or the "cultural nationalist's" position, because destruction of or damage to cultural property diminishes the strength of its affiliation and value to the culture. The proper question is, "What are the essential qualities of cultural property that must be protected?"

country to another by pleading that this property ought to be allowed to move freely like commercial goods or even ideas. If cultural property belongs to the common heritage of mankind, why should we not have the satisfaction of seeing the mosaics of Daphni displayed in Washington or the treasures of Tutankhamon displayed at Beijing or Lomé? "Free movement" could give ostensible legitimacy to extremely strange and highly illegal removals of property.

Nevertheless, it does not seem difficult to refute this argument based on sophisms. Firstly, free movement, as recommended for goods within the Common Market for example, presupposes legitimate acquisition both on the part of the person making over the property and on the part of the person purchasing it. When this condition is met, no objection can be raised to the free movement of cultural property. Moreover, it increasingly takes the form of international exchanges or loans between museums or other similar institutions. What we would like to prevent is illegal cross-frontier movement. And what is more, would it really be a two-way movement of goods or rather a constant flow in the same direction, that is to say from the poorest to the richest countries? Do you imagine that someone would steal an artistic treasure from a museum in the United States to sell it in Bangladesh or Chad?

Id.

122. M. Evans, *The Relevance Of Good Faith To The Trade In Cultural Property*, in *ILPCP*, *supra* note 16, at 121-23.

The first misconception of the issue of protection of cultural property is to ask instead, "Who owns cultural property?" Focus on ownership tends to emphasize solely physical preservation of items of cultural property as items of "property." The second misconception of the cultural property problem is to find the polarity between the two camps in their supposed "national" or "international" orientation. The question is not one of nationalism versus internationalism, but one of the cultural aspect versus the property aspect. When the "internationalist" school rejects as merely sentimental the arguments for repatriation of cultural property based on cultural affinity, it has missed an essential defining element of cultural property.¹²³ A holder of cultural property who fails to appreciate its significance to the culture from which it was taken, who does not understand its continuing relevance to the identity of that culture, and who dismisses as mere sentimentality the affinity between the object and the culture is an inappropriate custodian of the property.

The "internationalist" school of thought has also mischaracterized the issue, or failed to recognize the implications of the problem, when it suggests that source nations are allowing cultural property to deteriorate rather than allowing objects to find a better home abroad. The suggestion is that such neglect of cultural property results either from a lack of interest in or a lack of appreciation for the objects. Neither is the case. Much of the problem is simply lack of financial resources in source nations to address the problem. When the "internationalists" do acknowledge this, their solution is for such objects freely to flow out of the source nation. A more appropriate solution, explored below, would be for developed nations to provide assistance to source nations for the preservation of cultural property.

In resolving the problems in protection of cultural property, labels must be treated with suspicion. Professor Merryman uses the term "nationalism" as carrying negative implications of sentimental or greedy desire for possession of cultural property while disregarding its value to the international community or its physical safe-keeping. Presumably, Professor Merryman is drawing on the negative implications of the ex-

123. See *supra*, notes 16-20 (defining cultural property).

cesses of nationalism leading to armed conflict and attempts to denigrate or dominate other cultures. Yet he also objects to use of the power of cultural property to "strengthen tribal identity" because it could "impede the process of nation building" in Africa.¹²⁴ If "nationalism" is negative when applied to cultural property questions, why is it positive when applied to attempts to develop a sense of nation in a country with arbitrarily imposed borders? The term "internationalism" for Professor Merryman carries positive connotations of distribution of cultural property to enhance appreciation of the "common heritage of mankind." It is possible that use of the term is little more than a veil behind which to hide the self-interested retention of cultural property by acquisitive nations. Such nations often cannot argue that their acquisition of cultural property was legal, or even moral.¹²⁵ They must find a moral basis upon which to justify their continued possession of such objects. Preservation of the common cultural heritage of mankind is a convenient and emotive basis for their claims.¹²⁶

The term "retention" must be viewed with similar suspicion because it is used as a derogatory label by each camp for the policies of the other. "Internationalists" contrast the term "retention" with "protection" in the circumstances of countries rich in cultural treasures that cannot protect them, house them, or even catalogue them, but refuse to allow duplicate items to be taken abroad.¹²⁷ Proponents of the repatriation of cultural property to source nations and peoples use "retention" as the derogatory term referring to the desire of acquisitive nations to retain possession of cultural property over the

124. Merryman & Elsen, *supra* note 25, at 8.

125. See generally Merryman, *supra* note 7.

126. See *id.* at 1883. Merryman notes the greater emotional power of Greece's claim to the "Elgin" Marbles, and the fact that arguments for Britain's retention of the Marbles lack similar emotional appeal. *Id.*

It could, of course, be argued that using the terms "human rights law" and "property law" is intended to give emotive impact to the arguments of one side over the neutrality of the principles offered in support of the other. This is precisely what Merryman rejected as "sentimentality." Certainly, a call for respect for "human rights" has as much emotional appeal in present circumstances as a call for "internationalism." The difference, the author believes, between the designations of the opposing arguments offered here, lies in the accuracy of the characterization and the reliance upon the respective sources of law cited by proponents of one position or another.

127. LEVA, *supra* note 6, at 59.

human rights claims of source nations.¹²⁸

D. *Proposals for Improving Protection of Cultural Property*

A number of authors have suggested ways to resolve disputes over the possession and protection of cultural property. These proposals fall roughly into four categories. First, some authors call for improved dispute resolution mechanisms. Second, several authors suggest standards or principles that should be applied to resolve conflicts over possession or protection of cultural property. Third, a few authors suggest cooperative solutions. Finally, there are calls for a more comprehensive framework of international protection. The orientation of most of these proposals, however, is still on pre-eminence of the property aspect of cultural property.

1. Dispute Resolution Mechanisms

Suggestions for improved dispute resolution of cultural property controversies call for a tribunal to which parties could bring their dispute for a swift, competent, and prestigious resolution. The International Court of Justice is the logical forum to come to mind, but its prestige is low and its jurisdiction is at the option of the parties.¹²⁹ A second forum is a special tribunal constituted specifically to address cultural property disputes. The tribunal should have subject matter jurisdiction over disputes under the conventions and proceedings on other bases. It should be composed of a large number of qualified members formed into panels to address specific questions. Procedures for access to the tribunal should depend in part on whether bilateral agreements between the parties exist or not. After written submissions and oral arguments, the tribunal should render written opinions, including dissents and concurrences.¹³⁰

The U.S. Native American Graves Protection and Repatriation Act includes dispute resolution provisions that might provide a model for international application. Section 8 of the Act establishes a seven-member review committee composed

128. Moustakas, *supra* note 37, at 1181 n.5.

129. Heidi K. Hubbard, Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 183 (1985).

130. Prunty, *supra* note 79, at 1167-82.

of equal numbers of representatives from Native American organizations and the museum community, with a "tie-breaker" representative chosen by the Secretary of the Interior from a list of nominees acceptable to the two communities.¹³¹ The review committee is to oversee the inventory process, consultations, and the repatriation process, including making specific recommendations for disposition of items. Only this last proposal in this group of suggestions attempts to balance the concerns of those preferring the cultural aspect with those preferring the property aspect.

2. Codification of New Standards

The extremes of the arguments for codification of standards in resolving difficulties in the protection of cultural property are the recognition of umbrella state ownership statutes,¹³² on the one hand, and application of property law "reasoned principles," such as repose, on the other,¹³³ thereby giving precedence to property aspect. The NAGPRA provides an example of codification of presumptive ownership of cultural property by the source peoples.¹³⁴ Clearly, this solution prefers the cultural aspect over the property aspect.

Another proposal is for application of the law of salvage to cultural property.¹³⁵ Application of salvage law to cultural property would work as follows: the source nation or people would take title to cultural property held by another subject to the payment of a salvage award to the present holder. To cal-

131. NAGPRA, *supra* note 90, § 3006 (1988 & Supp. III 1991).

132. Moore, *supra* note 58, at 478.

133. Merryman, *supra* note 7, at 1911.

134. See *supra* notes 90-93 and accompanying text (providing example of presumptive ownership by some peoples).

135. Davis, *supra* note 38, at 658-63.

Deeply ingrained in British and American law, the law of salvage provides a set of principles for rewarding an individual who, at great personal risk, rescues the property of another. Traditionally salvage law has applied exclusively to the disposition of property rescued from navigable waters, including ships, cargo, and goods washed out at sea. The word "salvage" is used both to denote the property rescued and the award due the rescuer. The doctrine of the salvor's right to be rewarded for his or her services resembles the Roman law which grants the volunteer who preserves or improves the property of another the right to compensation from the owner. The roots of salvage law are traceable to Rhodian laws and the maritime codes of ancient Mediterranean seaport cities.

Id. at 658-59 (citations omitted).

culate the appropriate award, the court would consider the personal risks, if any, taken by the present holder, the value of the cultural property itself, the degree of danger facing the rescued property, and the present holder's subsequent conduct (for example, concealment of the cultural property by the holder would diminish the amount). Failure of the source nation or peoples to post the salvage award would result in the present holder taking title to the cultural property. Application of salvage principles to similar situations involving cultural property, it is argued, would produce an outcome that would be both fair to the individuals involved and sensitive to the broader public interest in cultural property.¹³⁶ This solution gives some outlet for concern for the cultural aspect, but only if it can be demonstrated in terms of the property aspect by paying for the interest.

An arbitration panel or awards tribunal would have to be constituted to determine the award if the parties were unable to agree on the amount of the salvage award between themselves. Also, the salvage law proposal leaves open the question of how source nations and peoples would learn of the salvage of their cultural property in order to pursue a claim for its return. The proposal might also be seen as a license to *huaqueros* to engage in covert discovery expeditions in order to collect salvage awards.

Some other proposals suggest new restitutionary standards. The first of these proposals models an international program for restitution of cultural property upon common law principles.¹³⁷ A formulation of the doctrine to be applied which appears in section 128 of the American Law Institute's Restatement of Restitution states that "[a] person who has tortiously obtained, retained, used or disposed of the chattels of another, is under a duty of restitution to the other."¹³⁸ The

136. *Id.* at 661-62.

137. See Sayre, *supra* note 9, at 857, 885.

138. RESTATEMENT OF RESTITUTION § 128 (1937); *id.* at 886. The proposer of the new standards for restitution recognized that there were potential problems:

A number of problems are likely to arise in implementing such a scheme. For example, who would be responsible for equitably compensating bona fide purchasers of illegally exported cultural property? Also, how do we convince the great art-importing nations to accept such a scheme when most of them, including the United States, have never become a party to the 1970 UNESCO Convention?

property orientation of such a proposal is apparent in describing the objects involved as "chattels."

A companion proposal to those establishing new standards for repatriation or restitution is for establishment of a "World Cultural Heritage Fund," similar to the fund established under Articles 15 through 18 of the UNESCO 1972.¹³⁹ Unfortunately, the UNESCO 1972 fund has had a troubled history.¹⁴⁰

3. Cooperative Solutions

Cooperative solutions to cultural property problems might be employed. In 1976, UNESCO suggested development of a systematic exchange program.¹⁴¹ Source and acquisitive nations that encounter problems with the flow of cultural property between them should consider reciprocal agreements.¹⁴² The United States first enacted legislation to control the flow of cultural property at the behest of Central and South American countries.¹⁴³ The most novel form of cooperative solution is one of "joint custody." The de Young Museum in San Francisco shares joint custody of murals from Teotihuacán with the government of Mexico to resolve a tangled web of ownership caused by conflict of U.S. and Mexican law.¹⁴⁴

Id. (citations omitted).

139. See UNESCO, U.N. Doc. 17C/18, (1972).

The monies raised by the fund would be distributed among needy signatory nations to help defray the costs of protecting their national patrimonies, including all service and restitutionary expenses that accrue under the 1970 Convention. The monies also could be used to alleviate some of the pressure placed on developing nations by the world art market by allowing compulsory purchase prices to more closely approximate those offered at auction.

Id. See also Sayre, *supra* note 9 at 887.

140. See Sayre, *supra* note 9 at 887.

141. UNESCO, RECOMMENDATION CONCERNING THE INTERNATIONAL EXCHANGE OF CULTURAL PROPERTY, U.N. Doc. IV.B.8 (1976). The Preamble states: "Recalling that cultural property constitutes a basic element of civilization and national culture," and "[c]onsidering that a systematic policy of exchanges among cultural institutions . . . would . . . lead to a better use of the international community's cultural heritage which is the sum of all the national heritages." *Id.*

142. O'Keefe, *supra* note 69, at 368-69.

143. Law on Importation Of Pre-Columbian Monumental Or Architectural Sculpture Or Murals, 19 U.S.C. § 2091 (1988 & Supp. IV 1992); see H.R. REP. NO. 92-824, 92d Cong., 2d Sess. at 3 (Feb. 7, 1972) (setting forth stimulus for law).

144. LEVA, *supra* note 6, at 131-32.

4. Tighter International Regulation

Finally, there are proposals for tighter international regulation of the flow and ownership of cultural property.¹⁴⁵ A tighter regulatory framework would have to pay greater attention to the relationship between ownership, export, and recovery, and regulate issues of private international law.¹⁴⁶

IV. A NEW PROPOSAL

The premise of this paper is that proper protection requires recognition of both the cultural and property aspects of cultural property. Thus far, this paper demonstrates that both aspects of cultural property are essential to its very nature. Also, it shows that preservation is within the zone of agreement between the opposing factions in the debate over protection of cultural property. Because preservation is the point of agreement, the paper examines the meaning of acting in the "best interest" of items of cultural property. The paper argues that "best interest" involves both cultural and property aspects. The cultural aspect of objects is what gives rise to the human rights element of the debate over cultural property, distinguishing the position of source nations from the property concerns of acquisitive nations. Preoccupation with the property aspect gives rise to disputes over who owns cultural property. A resolution of the problem requires recognition of both cultural and property aspects.¹⁴⁷ It will also go far towards eliminating subsidiary issues. It is time now to explore how both cultural and property aspects might be given adequate recognition in a regime for protection of cultural property.

Because the "best interest" of cultural property involves both its cultural and property aspects, the solution has two facets. The first concerns preservation of the cultural aspect by recognizing human rights principles. The second concerns

145. DICKE, *The Instruments and the Agencies of the International Protection of Cultural Property*, in ILPCP, *supra* note 16, at 27-37.

146. O'Keefe, *supra* note 69, at 369.

147. See James A. R. Nafziger, *Comments On The Relevance Of Law And Culture To Cultural Property Law*, 10 SYR. J. INT'L L. & COM. 323 (1983) (making foray into examining relevance of culture to cultural property law). Nafziger's focus, however, was the legal culture of nations involved in disputes, with the conclusion that it was relevant to cultural property law in marshalling public opinion and evaluating the relative significance of law. *Id.* at 326.

physical preservation of cultural property, thereby protecting its property aspect.

A. Reaffirmation of the Cultural Aspect of Cultural Property

Professor Merryman is right in asserting that a principled basis must be found for resolution of cultural property controversies, no less so for the cultural aspect of cultural property than for the property aspect. Where might such principles be found?

First, the sources of human rights arguments concerning cultural property must be located. These may be found in the international human rights declarations and covenants.¹⁴⁸ Next, particular principles must be extracted from the debate according to which human rights issues can be resolved. A source of such principles is the "Heard Museum Report"¹⁴⁹ that preceded the drafting and passage of the NAGPRA.

The so-called Heard Museum Report was the Report of the Panel for a National Dialogue on Museum/Native American Relations (the "Panel"). The Panel met four times during 1989 to foster dialogue aimed at formulating policy recommendations for the protection and repatriation of Native American cultural property held by museums and other institutions.¹⁵⁰ The Panel had equal representation of Native American people with members of the museum community and anthropologists, and involved ex-officio participation of members of staffs of the Senate Select Committee On Indian Affairs and House of Representatives.¹⁵¹

The dialogue was hailed by participants and observers as demonstrating a sound approach to resolving cultural conflict,¹⁵² as representing a balance of conflicting interests,¹⁵³ and as a "lesson in etiquette" in the respectful treatment of people of diverse cultures.¹⁵⁴ The Report is also a statement of the human rights principles for respecting the cultural as-

148. See *supra* note 5 (listing human rights declarations and covenants).

149. See HEARD REPORT *supra* note 117.

150. HEARD REPORT, *supra* note 117, at 4, 10.

151. HEARD REPORT, *supra* note 117, at 7.

152. *Hearing, supra* note 114, at 594 (setting forth prepared submission by Peter H. Welsh, Chief Curator/Director of Research, The Heard Museum).

153. 136 CONG. REC. H10,985-90 (1990) (statement of Rep. Richardson).

154. *Hearing, supra* note 114, at 46 (statement of Sen. Conrad).

pect of cultural property.¹⁵⁵

The dialogue itself was premised on three principles. The first of those principles was respect for the culture of source nations and peoples.¹⁵⁶ The second implicit principle was apparent in the convening of the Panel itself. That principle is one of consultation with source nations and peoples on the treatment of remains and objects of cultural significance to them. A third principle of cultural self-determination implicit in the work of the Panel for a National Dialogue is one of equality of the participants.¹⁵⁷

Substantive principles embodied in the report include, first, the paramount principle of respect for the human rights of source nations and peoples when a dispute over the disposition of cultural property arises. When cultural affiliation to the objects has been shown, the wishes of the source nation or group regarding the disposition of the materials must be followed.¹⁵⁸ Another substantive principle to address the human rights attribute of cultural property is to guarantee that the right is real and not chimerical. Standards of treatment of items of cultural significance should be enforceable, and appropriate agreements given the force of law.

The practical result of these principles is that the cultural aspect of cultural property dictates its return to source nations or peoples whenever a claim is made by competent representatives with cultural affiliation to the objects. "Competent representatives" and "sufficiently close cultural affiliation" require some further definition. Here again, the NAGPRA provides some guidance. "Cultural affiliation" is defined in Section 1(2) of the Act as the "relationship of shared group identity which

155. HEARD REPORT, *supra* note 117, at 11-13; see A Model For Recognition Of The Right To Cultural Self-Determination Of Indigenous Peoples, *supra* note 114 (examining principles postulated by HEARD REPORT as foundation for realization of right to cultural self-determination).

156. *Hearing, supra* note 114, at 43. The Chairman of the Senate Select Committee, Senator Inouye observed that the issue of treatment of items of cultural significance was not just one of return, but concern that "sacred objects to be treated with respect." *Id.*

157. *Hearing, supra* note 114, at 368. It is this principle of cultural self-determination that the minority of the Panel felt had been violated in the recommendations found in the Panel's report. *Id.* The minority view was that granting what amounted to a veto to Native Americans simply reversed the presumption of dominance, perpetuating the fundamental inequality of the decision-making process. *Id.*

158. HEARD REPORT, *supra* note 117, at 1.

can be reasonably traced historically or prehistorically between a present day [indigenous peoples organization] and an identifiable earlier group."¹⁵⁹ A competent representative would include the government of a source nation, as prescribed by international law, but other representatives of source peoples should also be accepted. For example, extrapolating from NAGPRA's definition of "Indian tribe," a competent indigenous peoples organization would be one recognized by the government of the nation in which the indigenous people reside.¹⁶⁰ The definition of "Native Hawaiian Organization" offers further possible criteria. "Native Hawaiian Organization" means "any organization which . . . serves and represents the interests of [indigenous peoples], . . . has as a primary and stated purpose the provision of services to [indigenous peoples], and . . . has expertise in [indigenous peoples] affairs."¹⁶¹ Similarly, an indigenous person ("Native American" under the Act) "means of, or relating to, a tribe, people, or culture that is indigenous to the" source nation.¹⁶²

B. *Protecting the Property Aspect of Cultural Property*

Protection of the cultural aspect of cultural property requires primarily recognition of a new set of principles, and perhaps of values. Cultural significance, as an integral part of cultural property, must be properly reflected in determining the "best interest" of objects. Protecting the property attribute requires more pragmatic measures. How can the physical safety and integrity of objects of cultural significance be insured?

The answer to this second prong of the cultural property problem lies in examination of success stories of international law developing the means of international cooperation. Despite the differences in their views of the matter, acquisitive nations and source nations agree on a zone of common concern that involves the preservation of cultural property. International protection of the global environment involved similar recognition of a zone of common concern, and produced treaties involving pragmatic solutions to difficult problems. The

159. NAGPRA, *supra* note 90, 25 U.S.C. § 3001 (1988 & Supp. III 1991).

160. *Id.*

161. *Id.*

162. *Id.*

solution required developed countries to recognize the aspirations of lesser developed countries ("LDCs") for economic development, and for LDCs to appreciate the threat continued development posed to the environment. Protective measures were beyond the means of most LDCs. One of the principal means of pragmatic solution to the problem of damage to the environment involved transfer of technology, with other technical and financial assistance, from economically developed countries to LDCs.

To put the argument into its simplest terms, if developed countries wish to impose their standards of protection upon LDCs, and those standards are beyond the means of LDCs, then developed nations must be prepared to provide the necessary assistance to LDCs. The reward to developed countries in the case of the treaties for protection of the global environment was the likelihood of a cleaner, safer environment. Application of a similar solution in the case of cultural property, this paper asserts, is likely to have much more certain, tangible, and immediate benefits for acquisitive nations.

This section turns first to an examination of the problem of and solutions for protection of the ozone layer as a model from environmental protection upon which to build a successful scheme of technology transfer to protect cultural property. Next, the extent to which an analogy between environmental protection and protection of cultural property may be pursued will be examined. The details of a proposal for transfer of technology to protect cultural property will be presented in the following section.

1. Learning From a Success Story of International Law: Measures to Protect the Ozone Layer

The key factor in moving the world community toward a cooperative solution to the problem of depletion of the ozone layer was recognition of a "zone of common concern."¹⁶³ What were the ingredients to recognition of this "zone of common concern?" They were recognition of the immediacy and

163. See, e.g., Solomon et al., *On the Depletion of Antarctic Ozone*, 321 NATURE 755 (1986) (discussing extent of damage to ozone layer); John W. Kindt & Samuel P. Menefee, *The Vexing Problem Of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L. J. 261 (1989) (describing efforts of international community to achieve agreement to address ozone problem).

scope of the problem, the necessity of a global solution, and a willingness to act in concert.

Recognition of the immediacy of the problem of ozone depletion occurred in the mid 1980s when a hole was discovered in the ozone layer over the Antarctic.¹⁶⁴ The scope of the problem became an issue of common concern shortly thereafter with the publication of the likely dire effects of depletion of the ozone layer.¹⁶⁵ Because problems with the ozone layer are far-reaching, serious, and immediate, and because no single nation could solve the problem, a global solution was required.¹⁶⁶ The will to act in concert came as a result of necessity.¹⁶⁷

164. See, e.g., Solomon et al., *supra* note 163, at 755 (discussing extent of damage to the ozone layer); Kindt & Menefee, *supra* note 163 (describing efforts of international community to achieve agreement to address ozone problem).

165. Michael D. Lemonick, *The Heat Is On: Chemical Wastes Spewed into the Air Threaten the Earth's Climate*, TIME, Oct. 19, 1987, at 59-60.

[I]f the ozone layer diminishes over population areas—and there is some evidence that it has begun to do so, although nowhere as dramatically as in the Antarctic—the consequences could be dire. Ultraviolet radiation, a form of light invisible to the human eye, causes sunburn and skin cancer; in addition, it has been linked to cataracts and weakening of the immune system. Without ozone to screen out the ultraviolet, such ills will certainly increase. The National Academy of Sciences estimates that a 1 % drop in ozone levels could cause 10,000 more cases of skin cancer a year in the U.S. alone, a 2 % increase.”

Kindt & Menefee, *supra* note 163, at 265-67.

Theoretically, the complete destruction of the ozone layer would result in the extinction of life on earth. . . . [A] ‘decreasing’ ozone layer would affect life on earth A list of predictions follows including increases in cancers and cataracts, alteration of plants and ecosystems, acid rain, degradation of polymers used in industry, and increased ‘greenhouse warming.’

Id.

166. Kindt & Menefee, *supra* note 163, at 268; Douglas Hunter Ogden, Comment: *The Montreal Protocol: Confronting The Threat To Earth's Ozone Layer*, 63 WASH. L. REV. 997, 997-1001 (1988).

167. Links Between Global Climate Change, Other Environmental Problems Examined, 19 Env't Rep. (BNA) 1577 (Dec. 2, 1988). Ian M. Torres of EPRI said in a paper written for the conference:

[h]owever, this is an area where developed and developing countries have a clearly discernible common interest in a world subject to global warming If climatic warming is confirmed as a global issue, it will be clearly in the industrialized countries' interest to provide developing countries with the ability to minimize the growth of their contribution to atmospheric CO₂.

Id. (emphasis added). Mr. Torres further suggested that “cooperation between government and industry on technology transfer, including channels of the multilateral

The solution hit upon by the global community was to reduce CO₂ emissions from LDCs as well as from developed countries. To assist LDCs with attaining control of CO₂ emissions, developed countries agreed to transfers of control technology, expertise, and funding. After the Bonn Summit in 1985, the leading developed countries stated their intention to bring shared research and resources, and transfer of technologies to bear upon resolution of environmental problems.¹⁶⁸ That pledge was reiterated at the Paris Summit in 1989.¹⁶⁹ The United Nations Environment Program also recommended transfer of technology to address problems of protection of the global environment.¹⁷⁰ More than recommendations for trans-

development banks and international or national development assistance organizations. *Id.*

168. Canada-France-Federal Republic Of Germany-Italy-Japan-United Kingdom-United States-European Community: Documents From The Bonn Summit, 24 I.L.M. 878, 881 (1985). "[R]esearch and technology in major projects should be enhanced to make maximum use of our scientific potential. We recognize that such projects require appropriately shared participation and responsibility as well as adequate rules concerning access to the results achieved, the transfer of technology and the use of technologies involved." *Id.*

169. Canada-European Communities-France-Federal Republic Of Germany-Italy-Japan-United Kingdom-United States: Declaration On Human Rights and Economic Declaration From The Paris Summit, 28 I.L.M. 1292, 1297 (1989).

38) To help developing countries deal with past damage and to encourage them to take environmentally desirable action, economic incentives may include the use of aid mechanisms and specific transfer of technology. In special cases, ODA debt forgiveness and debt for nature swaps can play a useful role in environmental protection.

We also emphasize the necessity to take into account the interests and needs of developing countries in sustaining the growth of their economies and the financial and technological requirements to meet environmental challenges.

39) The depletion of the stratospheric ozone layer is alarming and calls for prompt action.

We welcome the HELSINKI conclusions related, among other issues, to the complete abandonment of the production and consumption of chloro-fluorocarbons covered by the Montreal protocol as soon as possible and not later than the end of the century. Specific attention must also be given to those ozone-depleting substances not covered by the Montreal protocol. We shall promote the development and use of suitable substitute substances and technologies. More emphasis should be placed on projects that provide alternatives to chloro-fluorocarbons.

Id.

170. United Nations Environment Programme: Governing Council Decision On Global Climate Change, 28 I.L.M. 1330, 1334 (1989) [Reproduced U.N.E.P. Governing Council Decision 15/36, adopted May 25, 1989, at its Fifteenth Session] (recommending that "the institution of programmes and measures of assistance, includ-

fer of technology resulted from the common concern for the global environment. Treaties have been concluded between LDCs or organizations of developing nations and organizations of developed nations mandating consultation on environmental matters and transfer of technology.¹⁷¹

The set of treaties, protocols, and declarations that embodies the world community's concerted efforts to protect the ozone layer begins with the Vienna Convention for the Protection of the Ozone Layer, March 22, 1985 (the "Vienna Ozone Convention").¹⁷² The Vienna Ozone Convention established the foundations of a program of exchanges of technology among nations in Article 4.¹⁷³ The process of building on that foundation began with the Protocol on Substances That Deplete The Ozone Layer ("Montreal Protocol"), on September 16, 1987.¹⁷⁴ Article 10 on technical assistance established cooperation in implementing technical assistance and an application process whereby LDCs could seek technical assistance.¹⁷⁵

ing technology transfer, that will make it possible for developing countries to avoid risk to global climate[.]"). *Id.*

171. *See, e.g.*, Minutes of the Signing of the Fourth ACP-EEC Convention, 29 I.L.M. 809 (1990) (addressing environmental concerns).

172. Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, reprinted in 26 I.L.M. 1529 (1985) [hereinafter Vienna Ozone Convention].

173. Vienna Ozone Convention, *supra* note 172, at 1530-31. Article 4, on Cooperation in the legal, scientific, and technical fields, states:

1. The Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II. . . .

2. The Parties shall co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of the developing countries, in promoting, directly or through competent international bodies, the development and transfer of technology and knowledge. Such co-operation shall be carried out particularly through:

(a) Facilitation of the acquisition of alternative technology by other Parties;

(b) Provision of information on alternative technologies and equipment, and supply of special manuals or guides to them;

(c) The supply of necessary equipment and facilities for research and systematic observations;

(d) Appropriate training of scientific and technical personnel.

Id.

174. Protocol on Substances That Deplete The Ozone Layer, Sept. 16, 1987, reprinted in 26 I.L.M. 1550 (1987) [hereinafter Montreal Protocol].

175. Montreal Protocol, *supra* note 174, at 1557. Article 10 states:

1. The Parties shall, in the context of the provisions of Article 4 of the Convention, and taking into account in particular the needs of developing

The dedication of the parties to the Vienna Ozone Convention to transfer of technology to solve the ozone problem was reaffirmed in the Helsinki Declaration On The Protection Of The Ozone Layer, on May 2, 1989.¹⁷⁶ A more direct obligation to transfer technology and assistance is a provision of the recent amendment to the Montreal Protocol.¹⁷⁷

2. Apples and Oranges? Is There a Basis for Analogy Between the Resolution of Environmental and Cultural Property Problems?

The hazards of ozone depletion and loss or destruction of cultural property are clearly not of a comparable degree. The problem of protection of cultural property may, however, be of the same immediacy and its scope appears to have been recognized. It is also almost certainly beyond the capability of any one nation to solve.

Recognition of the scope and immediacy of the problem of protection of cultural property can be seen at an international level in the promulgation of conventions during the past

countries, co-operate in promoting technical assistance to facilitate participation in and implementation of this Protocol.

2. Any Party or Signatory to this Protocol may submit a request to the secretariat for technical assistance for the purpose of implementing or participating in the Protocol.

Id.

176. Helsinki Declaration On The Protection Of The Ozone Layer, May 2, 1989, reprinted in 28 I.L.M. 1335 (1989).

The Governments and the European Communities represented at the First Meetings of the Parties to the Vienna Convention and the Montreal Protocol . . . AGREE to facilitate the access of developing countries to relevant scientific information, research results and training and to seek to develop appropriate funding mechanisms to facilitate the transfer of technology and replacement of equipment at minimum cost to developing countries.

Id. at 1335-36.

177. Montreal Protocol Parties: Adjustments And Amendments To The Montreal Protocol On Substances that Deplete The Ozone Layer, 30 I.L.M. 541 (1991). Article 10A states:

Transfer of technology

Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure:

(a) That the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5; and

(b) That the transfers referred to in subparagraph (a) occur under fair and most favourable conditions.

Id. at 551.

two decades. There has been increasing accession to those treaties, including major acquisitive nations, during recent years.¹⁷⁸ Responsibility to protect cultural property and the cultural heritage seems to be universally acknowledged.¹⁷⁹

Also, the threat to cultural property is receiving increasing attention. Public outcry in support of legislation like the NAG-PRA was stimulated by demonstrations calling attention to the volume of Native American human remains on display in museums or shelved and ignored in the storerooms of the Smithsonian Institution.¹⁸⁰ The deterioration of objects held in the museums of source nations has also received media attention.¹⁸¹

As with the problem of depletion of the ozone layer, the problem of protection of cultural property is beyond the competence of any one nation to resolve.¹⁸² Too many nations and too many interests are involved, and the flow of cultural property is too cosmopolitan for any one nation to control the problems. Furthermore, the problem of cultural property is amenable to solution by means similar to those employed to protect the ozone layer, as shall be explained below.

There is a tension between two interests in both the ozone and cultural property problems. With the problem of ozone

178. Bator, *supra* note 25, at 282-84.

179. Joseph L. Sax, *Heritage Preservation As A Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990). "[T]here is no deep-rooted theory or philosophy of preservation. The idea that there is some collective obligation to identify and protect cultural artifacts is quite modern." *Id.* at 1143 (citation omitted).

180. *Hearing*, *supra* note 114, at 55 (statement of Norbert Hill, Executive Director, American Indian Science and Engineering Society, Boulder, Colo.). In the 1930s, the remains of over 800 Koniag people were excavated from a cemetery still in use under the aegis of the Smithsonian Institution. *Id.* The Smithsonian Institution still retained those remains on the eve of passage of the legislation of interest here. Museum holdings of Native American remains and objects of cultural significance are substantial. *Id.* The Field Museum of Natural History in Chicago holds approximately 1,200 human remains of Native Americans and about 135,000 archaeological objects from all over the United States. *Id.* at 45 (statement of Willard Boyd, President of the Field Museum, Chicago, Ill.). Significant numbers of remains are housed in other museums around the country. *Id.* at 49, 186 (statement of Edward Lone Fight, on behalf of the National Congress of American Indians, Washington, D.C.; prepared statement of Walter Echo-Hawk, Native American Rights Fund, Boulder, Colo.).

181. Edward Schumacher, *Peru's Antiquities Crumbling in Museums*, N.Y. TIMES, Aug. 15, 1983, at 14.

182. William D. Rogers, *Book Review: The International Trade in Art by Paul M. Bator*, 79 AM. J. INT'L L. 847, 847 (1985).

depletion, the tension is between the desire, sometimes stated as a right, of LDCs to continue economic development and the need for a safe environment championed by the developed nations. With cultural property, the tension is between protection of the cultural aspect of cultural property, articulated in terms of human rights law, raised by the source nations (often LDCs) and concern for the property aspect, articulated in terms of property law principles, touted by the acquisitive nations (usually highly developed economically). In each case, it is a resource of the LDCs that is subject to exploitation and technology from the developed nations that is necessary to resolve the problem.

C. *What to Transfer and How?*

This section considers the goals and areas of emphasis of a program of technology transfer to protect the property aspect of cultural property. The goal is physical safety of objects. The question of what to transfer and through what mechanism to achieve that goal may again be answered by recourse to the model of the ozone conventions and related declarations.

1. Funding

The Parties to the Montreal Protocol established the Interim Multilateral Fund, which will operate for three years beginning January 1, 1991, to fulfill the obligations of transfer of technology in the Protocol. The fund will assist with financing LDC's supply of substitutes for ozone-depleting chemicals, use of substitutes (including plant conversions), and costs of modification or replacement of equipment.¹⁸³

The first thing to be transferred by acquisitive nations to source nations to assist in protecting cultural property, then, is funding. The proposal for funding above,¹⁸⁴ focused on funds to assist in prosecuting claims for repatriation of cultural prop-

183. Rene Bowser, *History of the Montreal Protocol's Ozone Fund*, 14 Int'l Envtl. Rep. Current Rep. (BNA) 636 (Nov. 20, 1991). The Noordwijk Declaration calls for funding of technology transfer to combat ozone depletion aim primarily at operating expenses. See The Noordwijk Declaration Of November 7, 1989, On Atmospheric Pollution And Climatic Change, 12 Int'l Envtl. Rep. Current Rep. (BNA) 624 (Dec. 13, 1989).

184. See *supra* note 139 and accompanying text (discussing World Culture Heritage Fund).

erty. The present proposal is for funding to protect the physical safety of cultural property as well. The ozone fund is designed to cover on-site costs of improving protective conditions. Similarly, the funding for cultural property protection would be available for (1) improvement of storage, examination, educational, and display facilities, and (2) personnel needs, both for education of staff and for hiring. The funds required for these purposes are likely to be smaller than the funds necessary for acquisition of objects as part of a program of repatriation by purchase or for expenses of pursuing legal claims for repatriation.¹⁸⁵

2. Expertise

In addition to transferring funds, protecting cultural property calls for transfer of expertise. This should involve direct exchange of museum personnel, archaeologists, anthropologists, preservation specialists, or museum environment specialists. These visiting experts would assist source nations with planning or pursuing programs of cultural property protection. Such protection would involve development of museum facilities, educational programs, preservation programs, cataloguing of objects, or competent discovery, investigation, and removal of cultural property from historic sites.¹⁸⁶

The flow of expertise should not be one way. Experts in source nations might well be able to provide insights in the tasks of identifying and explaining the cultural significance of objects in the collections of museums in acquisitive nations. Educational facilities of museums and academic institutions in the acquisitive nations should also be at the disposal of experts visiting from source countries so that the institution as well as the visitor may be enriched.

185. LEVA, *supra* note 6, at 60-62. The purchase prices of antiquities are out of reach of many LDCs, as is the cost of renovating facilities. *Id.* Relatively small amounts of money would go a long way toward renovation of facilities to prevent deterioration of cultural property in storage or on display, train staff, or fund staff positions at a source nation's or peoples' museum when the entire budget for Peru's national museum was only U.S. \$200,000 in 1983. *Id.* That budget paid the salary of the museum's 89 staff members, including guards and secretaries. At that time, the museum had only one climate-controlled room, but was seeking U.S. \$40 million to build a new facility. *Id.*

186. *Id.* Peru was unable to keep up with the cataloguing and examination of antiquities already in storage at the national museum. *Id.*

3. Technology

The heart of a program of cooperative protection of cultural property, however, would be the transfer of preservative technology. Transfer of technology has had a successful but controversial history in addressing the ozone problem. The necessity of transferring technology to protect the ozone layer, and the will to do so, were recognized in the Helsinki Declaration and other statements of developed countries. The technology that must be transferred to protect cultural property is primarily relatively low-technology, climate-control equipment to protect objects in storage or on display.¹⁸⁷ Even in the case of protection of the Parthenon from environmental damage, the technology required was not sophisticated.¹⁸⁸ If such basic preservative technology and adequate funding for staff and facilities were provided, the whole argument that source nations were inappropriate custodians of their own cultural property would collapse.

4. The Quid Pro Quo

What is to motivate acquisitive nations to become involved in transfer of resources, expertise, and technology to assist source nations in becoming better custodians of their own cultural property? Quite simply, it is the opportunity to retain access to and distribution of cultural property for the world community. Access and distribution are key principles of "cultural internationalism."¹⁸⁹ By providing needed assistance to source nations, acquisitive nations would be in a position to negotiate access to and distribution of cultural property in the form of exchanges, long-term loans, cooperative exhibitions, and cooperative scholarship.

The other principles of "cultural internationalism" would also be served. The goal of the program of transferring funds, expertise, and technology, of course, is preservation. Integrity of the cultural property would also be achieved with such a program as collections of items of cultural property could be maintained instead of being broken up either by deterioration,

187. *Id.* at 61.

188. *Id.*

189. *See supra*, notes 97-107 and accompanying text (discussing "cultural internationalism").

forced or covert sale of items, or the necessity of choosing which among many related objects can be saved.

5. The Mechanism of Transfer

Again, as was demonstrated by the ozone problem, the mechanism of transfer must be acceptable to donors and recipients.¹⁹⁰ There are several competent international agencies available to handle transfer of funds and technology for the protection of cultural property. They include the International Monetary Fund (the "IMF"), UNESCO, the Agency for Cultural and Technical Co-operation (the "ACCT"), and the International Center for the Study of the Preservation and the Restoration of Cultural Property (ICCROM).¹⁹¹ Also in place are the fund and administrative organs of the "World Heritage Fund" and the fund established under UNESCO 1970.

Reorientation or establishment of departments charged with facilitating exchange agreements within one of these competent organizations would be a relatively simple matter. The use of the international preservation funds named above is probably preferable as they are already identified with cultural property protection.

The next question considers who is to be the source of funds, expertise, and technology? There is a willingness on the part of governments to become involved in such a program, as can be seen by the increasing acceptance of the cultural property treaties. However, much of the cultural property that source nations would wish to repatriate is held in collections and museums not directly controlled by the government of acquisitive nations. A program of bilateral exchanges between individual institutions might prove productive, for example the "joint custody" of murals from Teotihuacán by the de Young Museum in San Francisco with the government of Mexico.¹⁹² Current holders and claimants of cultural property could be brought together under the aegis of

190. See Bowser, *supra* note 183, at 636-40. "The largest and most powerful developing countries made clear that they would not sign the agreement until an adequate financial mechanism was established to pay for the added cost of substitutes for ozone-depleting substances." *Id.*

191. *Id.*; see also Dicke, in ILPCP, *supra* note 16, at 29 (listing agencies concerned with cultural property).

192. LEVA, *supra* note 6, at 131-32.

an administering agency to negotiate cooperative arrangements involving repatriation of lost objects, loans and exchanges of items of mutual interest, and transfer of expertise and preservative technology. In this way, a dialogue could be opened between the polar positions that would ultimately lead to resolution of the disputes in the protection of cultural property. Increased respect for the cultural aspect of cultural property forwarded by source nations and peoples would be achieved by cooperation in repatriation and preservation. The goal of preservation based on the property aspect of cultural property would also be achieved.

V. *AN ASSESSMENT OF THE PROPOSAL: CAN IT WORK?*

The assessment of any proposal to resolve disputes over the protection of cultural property must be based on three criteria. The first criterion is whether or not the proposed solution is practicable. The second is whether or not the proposed solution does what it sets out to do. The final criterion is whether or not the proposed solution will be acceptable to the parties involved. The present proposal passes all three of these criteria.

A. *Assessment of the Proposal for Protecting the Cultural Aspect of Cultural Property*

The proposal for protecting the cultural aspect of cultural property was to reaffirm the human rights aspect of the problem. The practical result of this reaffirmation is return of cultural property to source nations or peoples whenever a claim is made by competent representatives with cultural affiliation to the objects in question.

Is it workable or acceptable to mandate repatriation of cultural property as a guiding principle? There is a ready example to demonstrate that the answer to this question is yes. The United States NAGPRA¹⁹³ is that example. NAGPRA mandated the repatriation of a broad category of cultural property, human remains and objects of cultural significance, to source peoples. The repatriation was to be undertaken by all museums receiving federal funds, following an inventory of such

193. See *supra*, notes 90-93, 159-62 (discussing provisions of NAGPRA).

cultural property, and assessment of the cultural affiliation of each object. Both the inventory, and the assessment of cultural affiliation to determine the proper recipient of repatriation were to be carried out in cooperation with the source peoples. Funds were to be made available to assist both source peoples in pursuing claims, and to museums to conduct the inventories, and a dispute resolution panel was established.

The Act was passed by a substantial majority of both houses of the U.S. Congress. Its promulgation followed extensive consultation between the interested parties. These facts suggest that repatriation of cultural property to source peoples is acceptable to a wide spectrum of interests in the largest acquisitive market in the world. Furthermore, the process of consultation addressed the interests of both source and acquisitive parties to ensure that the final provisions of the act were workable, and that they achieved the goals of protection and repatriation of cultural property. I would suggest that if there is the willingness to pursue such a program in the United States, and it has had results satisfying to both source peoples and current holders of cultural property, then acceptance of the same principles on a global scale should meet with similar success.

B. Assessment of the Proposal to Protect the Property Aspect of Cultural Property

In assessing the proposal to protect the property aspect of cultural property in addition to the criteria of assessment applied above there is an additional question to be asked. That question, discussed last in this section, is whether or not the proposals for transfer of funds, expertise, and technology to protect cultural property can avoid some of the pitfalls encountered in transfer programs to protect the environment.

1. Can It Work?

The short answer to this question is that transfers of funding, expertise, and technology have already happened. Furthermore, these transfers have had a beneficial impact on the problem they were designed to address. It was provisions for such transfers that had a substantial influence on the participation of LDCs in programs for protection of the global environ-

ment. The global will to solve the problem was the impetus behind acceptance of such provisions by developed countries.

The need for measures to protect the global environment and the need to assist LDCs to that end were recognized by developed countries.¹⁹⁴ Initially, the U.S. government feared the establishment of a precedent of transfer of funds and technology to address global problems. However, the public support for such measures led to a turn-around in U.S. policy.¹⁹⁵ The United States has now become one of the principal proponents of technology transfer to protect the environment.¹⁹⁶ Other industrialized countries, such as Japan, have also accepted transfer of technology and funding as appropriate means of addressing problems of global concern.¹⁹⁷

Transfer of technology has been a valuable incentive to obtain the involvement of LDCs in protection programs of global concern. The Montreal Protocol assured LDCs that developed countries would provide transfer of technologies and technical assistance to assist them in controlling the ozone problem.¹⁹⁸ The lack of clear provisions for transfer of tech-

194. Bowser, *supra* note 183, at 636-40.

195. *Id.*; see also *U.S. to Finance Research on Global Warming*, UPI, Feb. 27, 1992 available in LEXIS, Nexis Library, UPI File. "Stung by criticism of its opposition to limiting carbon dioxide emissions, the United States offered Thursday to pay for environmental research studies in the developing countries and give them the technology to combat global warming." *Id.*

196. *Soviet Environmental Officials Advise Complete Chlorofluorocarbon Phase-Out*, 13 Chem. Reg. Rep. (BNA) 592 (July 28, 1989):

Technology Transfer

The United States also considers transfer of CFC substitute technology a key part of addressing the ozone depletion problem, according to Eileen Claussen, director of the U.S. Environmental Protection Agency Office of Atmospheric and Indoor Air Programs. Claussen said it will be difficult to overcome the objections developing countries have to being told they cannot use CFCs.

Industrialized nations need to determine how to fill the CFC needs of developing countries, she said. She added, however, that first it has to be determined exactly how much and what kinds of technology they need, as well as how much funding they must have to begin using the technology.

Id.

197. *Highlights*, 14 Int'l Env'tl. Rep. Current Rep. (BNA) 433 (Aug. 14, 1991). "POLLUTION CONTROL TECHNOLOGY will be transferred by Japan to other Asian countries, the Environment Agency announces. As a first step, the agency will examine the technology needs of China, Thailand, and Indonesia, and then transfer relevant Japanese technologies to those countries for as long as 20 years." *Id.*

198. Montreal Protocol, *supra* note 174, art. 10, 26 I.L.M. at 1557.

nology and funding made LDCs slow to accede to the Protocol. Without such assistance, LDCs could do little to address the ozone problem.¹⁹⁹ When the United States reversed its position on technology transfer, issuing a statement supporting the creation of a CFC fund, operated and administered by the World Bank, the announcement undoubtedly spurred the unanimous decision of the parties to the Montreal Protocol, on June 29, 1990, to establish the Interim Multilateral Fund to finance technology transfer to developing nations. The establishment of a fund for technology transfer also was an incentive to the Indian and Chinese environment ministers to recommend ratification to their respective governments.²⁰⁰ Such "selected incentives" are important to obtain the participation of the least enthusiastic relevant parties. The selective incentives commonly used are access to funding, access to resources, access to markets, and access to technology.²⁰¹

There is a direct precedent for transfer of funds, expertise, and technology in the protection of cultural property. UNESCO 1972 provides, in Articles 13 and 19, for financial assistance from the "World Heritage Fund" to support conservation measures for national sites included in a "world heritage list" if states maintain these sites at agreed-upon standards of protection.²⁰² The fund is administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO), and now has an annual budget of \$2.2 million financed by both mandatory and voluntary contributions and split nearly evenly between projects for cultural and natural heritage sites.²⁰³ With 111 member states, UNESCO 1972 is the most widely accepted "environmental treaty" and cultural property treaty today.²⁰⁴

The incentive that is provided to developed nations to provide technology, funds, and other assistance to LDCs in the environmental area is usually access to natural resources.²⁰⁵

199. Bowser, *supra* note 183, at 636-40.

200. *Id.*

201. Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 221 (1991).

202. UNESCO 1972, *supra* note 51, art. 13, 1927 U.S.T. at 44, 1037 U.N.T.S. at 155.

203. Sand, *supra* note 201, at 221-22.

204. *Id.*

205. *Id.* at 222.

As mentioned above, the incentive for acquisitive nations to transfer to source nations technology and funds to protect cultural property is also access to the resources of the source nation, in this case cultural property, archaeological sites and monuments.

Will transfer of funds, technology, and expertise to source nations result in the physical protection of cultural property? It is difficult to see why improving the facilities to preserve and study cultural property in the source nations should not result in as high a degree of preservation as could be achieved in museums and collections in acquisitive nations. The only significant difference between the two places is the availability of resources to address the problem. If the resources are made available to source nations, then the goal of preservation should be met. Indeed, because cultural property is still concentrated in source nations, on-site preservation should result in broader protection of cultural property rather than protection of a few selected pieces that have been exported.

2. Avoiding the Pitfalls of Transfer of Technology in Environmental Protection

Transfer of technology and funds to protect the environment has remained a contentious issue.²⁰⁶ The central problem is the concern of developed countries that they will simply be "giving away" their technological achievements.²⁰⁷ Similar

206. See, e.g., *No Timetable Set For CO₂ Reductions, 'Precautionary Principle' Upheld*, 21 *Env't Rep.* 267 (BNA) (May 25, 1990) (noting U.S.'s continued objection to transfer of technology and funds to control CFCs as dangerous precedent for expectations that developed countries will continue to pay).

207. J. T. Nguyen, *UN-Environment*, UPI, Mar. 2, 1992, available in LEXIS, Nexis Library, UPI File.

The issue of development and environment has transformed the relationship between the Northern and Southern hemispheres into a battleground between rich and poor, each blaming the other for the deteriorating environment.

In advance of the Rio de Janeiro summit, business communities, particularly those in the United States, have been up in arms against an onslaught of Third World demands on sharing high-technology equipment if the meetings bring about strict rules against greenhouse gas emissions.

Industrialized countries want the United Nations to protect patents on use of their technology, particularly in industrial development.

Id. (emphasis added).

concerns should not waylay efforts to transfer technology and funds to source nations to protect cultural property.

The first reason that the opposition to transfer of technology to protect cultural property should not arise is the difference between the technology sought by source nations and that sought by LDCs to address environmental problems. The technology necessary to protect cultural property is largely climate-control devices in common usage in the museums, and even office buildings, of developed countries. There is little unique technology involved, and consequently little prospect of loss of significant royalties from new "high-tech" developments, as is the case with environmental protection technology.

When the concern is over transfer of expertise, there are no significant "trade secrets" to be lost in the protection of cultural property. Most of the expertise required can be gained by training at museums and universities in developed countries. These facilities already exist. What is required is funding to bring people from source nations into these institutions for training, or to provide for exchanges of experts between source and acquisitive nations. This should be part of the enrichment of the academic world that is the goal of university programs of cultural diversity.

Finally, while the results of cooperation to protect the environment are often a speculative improvement in environmental conditions, the results of transfers of funds and technology to protect cultural property are immediate and obvious. The impact of ozone depletion lies years ahead, and so too does the impact of efforts to control the problem. The improvement in preservative conditions that could be wrought by providing a Peruvian museum with adequate climate control devices and assistance with funding and training of adequate staff would be immediate. So too, the benefits of cooperation in exchange of cultural property would be immediate. Instead of retaining access to those pieces of cultural property in its current collection, a museum in an acquisitive nation that negotiates an exchange program with a museum in a source nation as part of a repatriation agreement would gain access to a much wider range of the wealth of cultural property in the source nation.

*C. Avoiding the Worst Controversies in Protection of
Cultural Property*

Perhaps the greatest benefit to be gained by adoption of the proposals in this paper is the avoidance of the worst controversies in protection of cultural property. If the principle of repatriation is established on human rights grounds, then not only will the cultural aspect of cultural property be vindicated, but a new spirit of cooperation and respect between source and acquisitive nations could be achieved. That certainly has been the result of the Heard Dialogue and the NAGPRA. Former holders of cultural property are able to draw upon the resources of Native Americans in identifying the cultural affiliation of objects and gaining access to objects of continuing interest to both communities. Once the fear of dispossession has been removed, the interest in cultural understanding and respect stated by both source and acquisitive communities can be fostered.

The assertion of the preeminence of the property aspect over the cultural aspect, the claim of "cultural internationalism" over "cultural nationalism," has been a divisive element blocking the common goal of preservation of cultural property. It is time to end the division and take steps toward the common goal.

VI. *CONCLUSION*

This paper has distinguished between the cultural and property aspects of cultural property, and identified each as an essential element in the nature of cultural property. The dichotomous nature of cultural property has not been adequately reflected in either the definition of cultural property or efforts to protect it. Instead, the international legal regime has focused on the property aspect of cultural property by asking the question, who owns cultural property? The principal dispute in resolving cultural property issues has been how best to preserve cultural property to protect the "best interest" of cultural property. Two schools of thought have arisen, each elevating one aspect of cultural property over the other. One school of thought, preferring the property aspect, attempts to resolve conflicts on the basis of property law principles. It is primarily concerned with physical safety of objects. The other

school of thought, preferring the cultural aspect, attempts to resolve conflicts on the basis of human rights principles. It is primarily concerned with preserving the cultural significance and affinity of objects to specific peoples. Preservation lies within the zone of agreement between the two schools of thought on protection of cultural property, but it means different things to the two schools.

An appropriate resolution of disputes over preservation must take into account both the cultural and property aspects of cultural property. Objects should not be consigned to deterioration out of neglect or lack of resources unless that deterioration is a part of the cultural function of the objects, as it is with the Zuni war gods. Objects of cultural significance must be treated with respect for that cultural significance. A holder who rejects as sentimental the role an object plays in the cultural identity of a group is not a fit custodian for that object.

The best resolution of the controversies over protection of cultural property is in two parts. First, the cultural aspect of the objects must be affirmed. In theoretical terms, affirmation of the cultural aspect means recognizing human rights principles for disposition of cultural property. In practical terms, the cultural aspect of cultural property can best be preserved by repatriating it to source nations and peoples. Holders of cultural property outside of the source nation or peoples should retain possession only with the consultation and consent of the source. Source nations and peoples would likely accede to desires of outsiders to hold cultural property in cases where they perceive that interests such as preservation, developing cultural education, understanding, and respect can be attained in that way.

The property aspect of cultural property, that which requires its physical preservation, can best be served by developing a program of transfer of funding, technology, and expertise. The model for such transfers is to be found in the international programs for environmental protection. Both environmental protection and protection of cultural property involve common interest of the nations and peoples of the world, involve problems of broad scope, and are beyond the capability of individual nations, peoples, or groups to resolve. Programs of transfers have been accepted, proven workable, and achieved the goal of improving the environment.

Similarly, a comprehensive program of transfers between acquisitive nations and source nations, and between individual peoples, organizations, and institutions, should be established. The goal of the program would be to transfer funding to pursue repatriation claims, but more immediately to enhance facilities and staff in source nations to protect cultural property. It would also involve exchange of experts and cooperation in the training of experts and sharing of information discovered from cultural property. The technology to be transferred under such a program is primarily climate-control equipment, readily available, inexpensive (compared to environmental protection equipment), and unlikely to give rise to concerns of transferring high-tech achievements to LDCs.

The benefits of pursuing the proposed solution to cultural property issues are immediate. Both the cultural and property aspects of the objects will be respected. Cultural property will be preserved, its integrity maintained, and distribution and access to cultural property by acquisitive nations would likely improve and broaden. The divisive debate over elevation of either the property aspect or the cultural aspect over the other, often cloaked in uncomfortable guises as "cultural internationalism" and "cultural nationalism," must come to an end. The problem of protection of cultural property is one of common concern among the peoples of the world. A cooperative solution, balancing concern for both the cultural and property aspects, is most appropriate.