

IS THE "LOST CIVILIZATION" OF THE MAYA LOST FOREVER?: THE U.S. AND ILLICIT TRADE IN PRE-COLUMBIAN ARTIFACTS

INTRODUCTION

The unauthorized taking of artwork and the cultural treasures of another country is an ancient practice most often carried out by conquering armies.¹ Historical examples abound of this process best described as "to the victor go the spoils."² For instance, the streets of Rome are lined with Egyptian obelisks shipped home by Caesar's conquering armies; the Louvre in Paris is filled with treasures from Napoleon's excursions into Italy and Egypt; and Lord Elgin's marbles, the pride of the British Museum, are marble friezes taken from the Parthenon in Athens by the British ambassador Lord Elgin in the 19th century.³

The systematic looting of Latin America for its pre-Columbian treasures⁴ began with the Spanish conquest in the 16th century.⁵ The conquistadors and colonials pillaged ancient temples, tombs, and pyramids for the wealth they contained.⁶ More recently, the large scale exportation of antiquities and art work from the art-rich countries of Central and South America has not been facilitated by conquering armies, but instead by the almighty dollar.⁷ Within the last thirty years, ancient art work has become a major source of investment.⁸ American museums and private collectors began to purchase large quantities of pre-Columbian artifacts having little regard for whether the work was legally excavated and exported out of its country of origin or whether it was stolen from an archeological site or grave

1. Alexander Stille, *Was This Statue Stolen?*, NATIONAL L.J., Nov. 14, 1988, at 1.

2. M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 288 (1983).

3. Stille, *supra* note 1.

4. Pre-Columbian artifacts are items of native American culture that date prior to 1500 A.D.

5. Gary Marx, *Looters dig up Peru's past Plundering graves big business in wake of economy's collapse*, TORONTO STAR, July 12, 1991, at A21, available in LEXIS, Nexis Library, PAPERS File.

6. *Id.*

7. William D. Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y INT'L BUS. 932, 933 (1973).

8. The increased interest in art as investment was due to a lack of confidence in the U.S. stock market in conjunction with an understanding of the tax benefits to be gained from donations to museums. This increase in art and artifact purchases led to an increase in looting for artifacts in the countries of origin to supply the increased demand. *Cultural Property Treaty Legislation: Hearings on H.R. 3403 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 34 (1979) (statement of Ian Graham) [hereinafter *Hearings on H.R. 3403*].

and smuggled out of the country.⁹ This blind desire for pre-Columbian archeological pieces encouraged the growing black market in such works.

Public awareness of the seriousness of the problem began in 1969 with the publication of Dr. Clemency Coggins' article¹⁰ in *Art Journal* entitled, "Illicit Traffic of Pre-Columbian Antiquities."¹¹ The article described the marked increase in the number of Mayan monuments in Mexico and Guatemala that were being mutilated, stolen, and then exported out of the country in pieces.¹² The publication of this article marked a change in attitude toward cultural property that was taking place around the world.¹³

Subsequently, many countries in Central and South America have instituted stricter laws and export restrictions in an attempt to protect their cultural heritage.¹⁴ These countries have found a strange ally in the United States¹⁵ who has signed agreements to help facilitate the return of any pre-Columbian artifacts imported into the U.S. contrary to the laws of its country of origin.¹⁶ However, strict export restrictions in art-rich countries and tough U.S. laws and import regulations have done little to stem the tide of illegally exported pre-Columbian artifacts.¹⁷ The illicit¹⁸ trade in pre-Columbian works remains second only to drugs, and the world wide illicit trade in all cultural property is valued at over \$1 billion.¹⁹

The effect of the strict U.S. and Latin American laws has been to make the legal trade and transfer of pre-Columbian artifacts in the United States a

9. Rogers, *supra* note 7, at 933-34.

10. PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 1-2 (1983).

11. Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 *ART J.* 94 (1969).

12. *Id.* The monuments in question were mayan stela which are large stone slabs carved with hieroglyphics and usually placed in religious or ceremonial centers. Because of their size and weight, the thieves would hack and saw the stela into pieces to allow for easier transportation. As a result, the hieroglyphics, which are rare and essential to understanding the mayan civilization would be mutilated along with the rest of the monument. *Id.*

13. The best example of this change in attitude is the 1970 UNESCO Convention. See *infra* note 59 and accompanying text.

14. 1 LYNDEL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION* 80-81 (1989). Many Latin American countries have passed laws claiming ownership over all discovered and undiscovered cultural artifacts in their country. Further, these countries have passed export laws and regulations that completely bar or severely limit the exportation of such artifacts. See *infra* note 121 and accompanying text.

15. The United States is the most lucrative market for illegally excavated objects in the world, and had previously shown little interest in protecting other countries cultural property from illegal exportation. *Black Market Flourishes Despite Law on Relics*, CHI. TRIB., Nov. 28, 1985, at 14D.

16. Treaty of Cooperation with the United Mexican States Providing for Recovery and Return of Stolen Archeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter U.S./Mexico Treaty]. Similar agreements have been signed with Peru on Sept. 14, 1981, Ecuador on Nov. 17, 1983, and Guatemala on May 21, 1984. See *infra* note 100 and accompanying text.

17. Stille, *supra* note 1.

18. "Illicit" in this context means that an item was exported contrary to another countries export laws, whereas "illegal" means that its importation was contrary to United States law. BLACK'S LAW DICTIONARY 747-48 (6th ed. 1990).

19. *Id.* This figure represents a 1988 estimate.

guessing game.²⁰ Museum curators and private collectors contend they have a valid interest in the free flow of ancient American cultural property,²¹ and argue that the uncertain and confusing state of the law has made it difficult to ascertain whether a certain piece is "legal" or whether it is illicit and thus subject to confiscation by U.S. customs.²²

The real tragedy, however, is the present legal system is not preventing the pillage and destruction of important archeological sites in Central and South America. Grave robbers have left tens of thousands of holes in the Peruvian landscape as evidence of the rampant looting of pre-Columbian treasures.²³ In the Peten district of Guatemala, the number of Mayan sites looted between 1984-1988 rose from 45 to 83 percent.²⁴ And in Mexico, museum officials estimate that the number of pre-Columbian pieces smuggled into the art market daily is as high as three hundred.²⁵ As a result of this pillage and destruction, our opportunity to learn about ancient civilizations such as the Maya and pre-Inca may be lost forever.

This comment will discuss the development of the laws and treaties protecting cultural property in Latin America. It will focus on the competing interests involved in regulating the free flow of such cultural property, the

20. *Id.* "Right now we have three levels of policy which are often conflicting" says John Henry Merryman, Sweitzer Professor of Law at Stanford.' The three levels of policy spoken of are made up of 1) the Cultural Property Act, 2) the *McClain* decision, and 3) the Customs Directive and procedures. The Cultural Property Act (discussed *infra* at section II.F), allows for the U.S. to take measures to protect another countries cultural property only under a limited set of circumstances (e.g. emergency). Under this Act, cultural works are not prohibited from being imported in the U.S. merely because they have been exported in violation of the home countries export laws. In contrast, the *McClain* decision (discussed *infra* at section II.G.2) prohibits the importation of artwork and artifacts that have been illegally exported from countries that have claimed national ownership of such works. Individuals who knowingly import, purchase, or transport in interstate commerce such goods are subject to prosecution under the National Stolen Property Act. The U.S. Customs service has gone one step beyond this and has declared the authority to seize or detain any pre-Columbian work that is lacking proper export certification or is otherwise suspected of illegal exportation.

The Cultural Property Act is theoretically the governing law on the subject. In working out the compromise to pass the Cultural Property Act, there was an understanding in Congress that legislation to overturn the *McClain* decision would be forthcoming. However, no such legislation has been passed. Therefore, the *McClain* decision is also governing law despite its apparent conflict with the Cultural Property Act. Also, the Customs Service continues to seize and detain imported pre-Columbian goods despite its conflict with the Cultural Property Act.

21. Stanley Meisler, *Art & Avarice: In the Cutthroat Art Trade, Museums and Collectors Battle Newly Protective Governments over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989, (Magazine), at 8. A valid interest frequently put forward is the preservation of artifacts that would have laid ignored and forgotten in the country of origin. *Id.*

22. Stille, *supra* note 1. A good example which demonstrates the uncertainty on the part of dealers and collectors to purchase such works is provided by an auction of Maya antiquities at Sotheby's in London. At the auction, the U.S. dealers and collectors purchased very little because of the fear and uncertainty surrounding the *McClain* decision. *Hearings on H.R. 3403*, *supra* note 8, at 34.

23. Marx, *supra* note 5, at A21.

24. Norman Hammond, *U.S. Acts to Halt Plunder of Guatemala's History*, THE TIMES (London), May 6, 1991, available in LEXIS, Nexis Library, PAPERS File.

25. Dan Williams, *U.S. Bill on Stolen Art Under Fire; Mexicans Say Proposed Measure would 'Protect Thieves'*, L.A. TIMES, Feb. 15, 1986, at 6.

specific problems inherent in the present system, and possible alternative solutions to the pre-Columbian crisis. It is the premise of this comment that the blanket export prohibitions employed by certain Latin American countries and the strict import regulations imposed by the United States may not be the most effective way to deal with the illicit trade in pre-Columbian artifacts.

I. THE COMPETING INTERESTS²⁶

There is little debate concerning the extreme importance of a nation's cultural property and heritage. The international debate, however, centers around who is entitled to "own" or possess a nation's cultural property and to what extent international trade should be allowed. Most archaeologists and the art-rich countries²⁷ advocate strict export and import laws to prevent any important cultural works from leaving the country of origin. On the opposite side are the developed countries,²⁸ the art dealers and art collectors who desire an open international trade in cultural works of art.

A. *The Perspective of the Art-Rich Countries and Archaeologists*

The uncovering of archeological artifacts and ancient treasures provides evidence of a country's cultural heritage making these objects a part of its national "patrimony."²⁹ In studying their national art, citizens learn who they are.³⁰ From this identity comes a feeling of continuity with the past and also a community with the present.³¹ The continued removal of a nation's cultural heritage deprives that nation of its historical identity and symbolizes its past subservience to the European nations and the United States.³²

With this understood, it is easy to see why it is important to nations that they retain their cultural treasures within their own borders. Almost every nation in the world protects its cultural patrimony through export restrictions.³³ The most extreme forms of protection are imposed by countries such as Mexico and Peru who claim national ownership over all of their

26. This assessment of the competing interests is based on Professor Bator's detailed discussion. BATOR, *supra* note 10, at 18-32.

27. The term "art-rich" is used to refer to countries that are rich in cultural art work and artifacts. In Latin America, such countries include: Argentina, Bolivia, Brazil, Columbia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Peru, and Uruguay.

28. The major art consuming nations include: the United States, Great Britain, France, Germany, Switzerland, and Japan.

29. Rogers, *supra* note 7, at 935. "Patrimony" is defined as an inheritance from ancestors, BLACK'S LAW DICTIONARY, *supra* note 18, at 1127.

30. BATOR, *supra* note 10, at 27.

31. Rogers, *supra* note 7, at 935.

32. Lawrence J. Persick, Comment, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 93 (1985).

33. BATOR, *supra* note 10, at 38.

cultural art work and artifacts and have imposed virtual export bans on such objects.³⁴

Professional archaeologists have sided with the art-rich countries in arguing for strict export controls. When looters remove an artifact from its archeological setting and sell it in the international market, even if it is later recovered, it is generally impossible to ascertain the area or archeological site of origin.³⁵ Knowing the area a piece came from, and thus, its archeological context is the key to understanding ancient civilizations.³⁶ Therefore, when an artifact is illegally excavated or removed from a site, it may lose most of its educational value.³⁷ It is important not only to protect cultural property from exportation, destruction, and mutilation, but also to preserve archeological sites and keep the treasures "in situ" until they can be properly excavated.³⁸

This is no easy task. The culturally rich Latin American nations are among the world's poorest economically and do not have the resources necessary to protect the vast number of archeological sites within their borders.³⁹ Even more troubling is that it is their own citizens who contribute most to the plunder.⁴⁰ In Peru, for example, there has been a dramatic increase in illegal excavations and grave robberies due to Peru's economic collapse and the high demand for pre-Columbian artifacts in the United States and Europe.⁴¹ The "huaqueros,"⁴² as they are called, claim that everyone is an amateur archeologist and that they have a right to take what their ancestors have buried and sell it for profit.⁴³ In the face of this pillage, art-rich countries feel their only means of protecting their cultural patrimony is through strict export controls.⁴⁴

B. The Perspective of the Developed Nations, Collectors, and Dealers

The problem of illicit traffic in ancient American cultural property has reached such proportions that it is beyond the control of the art-rich countries

34. *United States v. McClain*, 545 F.2d 988, 997-1000 (5th Cir. 1977); see also 1 PROTTE & O'KEEFE, *supra* note 14, at 55-62.

35. BATOR, *supra* note 10, at 25.

36. *Id.*

37. Rogers, *supra* note 7, at 936-37.

38. *Id.*

39. Persick, *supra* note 32, at 92.

40. Marx, *supra* note 5, at A21.

41. *Id.*

42. "Huaqueros" is the term for grave robbers in Peru and other Latin America countries. They often work in teams of two or three and pillage grave sites at night, or they may even be organized by wealthy dealers in teams of a dozen or more and are paid a minimum wage for their efforts. *Id.*

43. *Id.*

44. SHARON WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTIES* 127 (1977).

alone.⁴⁵ For export restrictions to be effective, cooperation from the art-importing nations is essential.⁴⁶ However, these developed countries have been reluctant to enforce what are, in effect, export bans because of perceived legitimate interests in the free flow of art.⁴⁷

One of the legitimate interests put forward is the visibility of cultural works of art.⁴⁸ Presumably, one of the purposes of art is to be seen.⁴⁹ All societies have an interest in the visibility and accessibility of artifacts and art work to appreciate and learn about their own and other cultures.⁵⁰ This educational process is the function of museums. To restrict the flow of all cultural pieces is to limit the ability of individuals and societies to learn about other societies and cultures.

It is further argued that culturally rich countries can benefit from the export of their artifacts and art work. It has been said that "art is a good ambassador."⁵¹ It stimulates interest and understanding in the export country and brings foreign students, tourists, and scholars to learn more, which in turn adds to the home country's intellectual life.⁵² The imposition of strict export restrictions, therefore, deprives a country of the benefits that can be gained by using art as an ambassador.

Another legitimate interest is the need to preserve artifacts for study, research, and appreciation.⁵³ Museum curators, dealers, and art collectors argue that the art-rich countries do not have the resources to adequately preserve and exhibit the vast stores of archeological material in their countries.⁵⁴ They contend that many pieces would be ignored or ruined if left in place and that by allowing it to leave, the piece is saved and is made available for study.⁵⁵

It is also believed that despite the purpose of protecting cultural property, strict export laws in fact perpetuate the black market and increase the theft and pillage of objects because export bans have increased their value and desirability.⁵⁶

45. Karen S. Jore, *Illicit Movement of Art and Artifacts: How Long Will the Art Market Continue to Benefit From Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 58-59 (1987).

46. *Id.*

47. Rogers, *supra* note 7, at 934.

48. BATOR, *supra* note 10, at 23.

49. *Id.*

50. *Id.*

51. *Id.* at 30.

52. *Id.*

53. *Hearings on 3403*, *supra* note 8 (statement of Andre Emmerich, American Association of Dealers in Ancient, Oriental and Primitive Art).

54. *Id.*

55. Meisler, *supra* note 21.

56. *Hearings on H.R. 3403*, *supra* note 8, at 34.

II. THE LEGAL FRAMEWORK

International agreements and the United States laws designed to protect cultural property are a relatively recent phenomenon. The legal framework for the protection of pre-Columbian artifacts essentially began in 1970 and has since grown rapidly. It includes multilateral treaties, regional agreements, bilateral treaties, national legislation, court cases, and customs procedures.

A. *The UNESCO Convention*

Until 1970, the international protection of cultural property was limited to protection in times of war.⁵⁷ It was common for victors in war to destroy or take, as the spoils of conquest, cultural art and monuments from the defeated nations.⁵⁸ However, the first and most significant multilateral treaty to address the protection of cultural property in times of peace is the United Nations Educational Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export, and Transfer of Ownership of Cultural Property (UNESCO Convention).⁵⁹

The goals of the 1970 UNESCO Convention were to greatly reduce the theft of cultural property,⁶⁰ help facilitate the speedy return of such objects

57. James A. Nafziger, *Protection of Cultural Property*, 17 CAL. W. INT'L L.J. 283, 283-84 (1987). The most prominent agreements include the Hague Conventions of 1899, 1907, and Protocols I and II Additional to the 1949 Geneva Conventions. These agreements generally call for refrainment from the willful seizure of or causing damage or destruction to culturally or historically significant monuments or objects in the course of executing a war. Further, states are urged to limit such damage or destruction to that which is justified by the Rule of Necessity. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 T.S. No. 403; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 34 Stat. 2277 T.S. No. 539; Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocols I & II), *opened for signature* Dec. 12, 1977, 16 I.L.M. 1442.

58. Stille, *supra* note 1.

59. UNESCO Convention, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention].

60. As provided in article 1:

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 palaeontological interest;
- b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

to their rightful owners,⁶¹ and foster international cooperation in responding to an emergency request by another party whose cultural property is reportedly in jeopardy.⁶² The final draft of the Convention reflected an attempt to balance the strong nationalistic interests in retaining cultural property within the country of origin and the desire to allow the free flow of cultural art in the spirit of cultural exchange between nations.⁶³ Over sixty

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- 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.

Id. art. 1.

61. *Id.* art. 7. Article 7 provides for member states "To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories" from acquiring cultural property that had been illegally exported from its country of origin. It further provides for member states "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument" and to "take appropriate steps to recover and return any such cultural property" when there has been a request for such return from the country of origin. "All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party." *Id.*

62. *Id.* art. 9. Article 9 provides that "Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected." Under these circumstances, Party states pledge to participate in a concerted international effort to determine the appropriate measures to be taken to address the emergency. Further, "each State concerned shall take remedial provisional measures to the extent feasible" to prevent continued injury to the cultural heritage of the requesting State. *Id.*

63. *Hearings on H.R. 3403, supra* note 8, at 17 (statement of Paul M. Bator). The final draft which was adopted as the text of the UNESCO Convention has been described as a "compromise." The position held by the Soviet bloc countries and many Third-World countries would have ended all international trade in cultural objects. The U.S. assumed a leadership position in the latter stages of the drafting and persuaded a majority of UNESCO to adopt a more moderate position which provides for the encouragement of action to contain crisis situations where a particular category of artifacts are specifically threatened. *Id.*

nations are currently parties to the Convention.⁶⁴ The United States signed the convention and it was ratified by the Senate in 1972.⁶⁵

However, it was not until January 12, 1983, with the enactment of the Cultural Property Implementation Act, that the United States became a full signatory party to the UNESCO Convention.⁶⁶ Legislation to implement the UNESCO Convention had been introduced in the 93rd Congress and each successive Congress until its final passage by the 97th Congress.⁶⁷ The ten year delay in the passage of implementing legislation was due to the inability of the opponents and proponents of the proposed legislation to reach a compromise. Opponents of earlier legislation claimed the proposals went beyond the scope of the UNESCO Convention because they required the United States to impose import restrictions and other protective measures unilaterally, while the UNESCO Convention itself called for a "concerted international effort" to deter theft and pillage. The bill finally passed by Congress was a compromise that included amendments agreed to by both sides.⁶⁸ The Cultural Property Act is the comprehensive statement of U.S. policy regarding the importation of cultural properties.⁶⁹ A detailed

64. Party States as of January 1, 1990 include: Algeria, Argentina, Bolivia, Brazil, Bulgaria, Burina Faso, Byelorussian Soviet Socialist Rep., Cambodia, Cameroon, Canada, Central African Rep., Colombia, Cuba, Cyprus, Czechoslovakia, Dominican Rep., Ecuador, Egypt, El Salvador, German Dem. Rep., Greece, Guatemala, Guinea, Honduras, Hungary, India, Iran, Iraq, Italy, Jordan, Korean Dem. People's Rep., Korea Rep., Kuwait, Libya, Mali, Mauritania, Mauritius, Mexico, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Poland, Portugal, Qatar, Saudi Arabia, Senegal, Spain, Sri Lanka, Syrian Arab Rep., Tanzania, Tunisia, Turkey, Ukrainian Soviet Soc. Rep., Union of Soviet Socialist Reps., United States, Uruguay, Yugoslavia, Zaire, and Zambia. TREATIES IN FORCE 299-300 (1992).

65. The Senate ratified the Convention without opposition but with a list of reservations on August 11, 1972. 118 Cong. Rec. 27925 (1972). The most important of the reservations being that the Conventions terms would not be in force as to the United States until Congress passed enabling legislation. *Id.*

66. The Cultural Property Implementation Act, 96 Stat. 2351 (1985) (codified at 19 U.S.C. §§ 2601-2613 (1983)) [hereinafter Cultural Property Act].

67. The original proposed legislation from the State Department came in 1973. S. 2677, 93d Cong., 1st Sess. (1973). This bill was not acted on and new legislation was proposed to the next Congress. H.R. 14171, 94th Cong., 2d Sess. (1976). A new bill was introduced in the next Congress. *Hearings on H.R. 5643 Before the Subcomm. on Trade of the Comm. on Ways and Means, 95th Cong., 1st Sess. (1977)*. The House Committee favorably reported a revised version of the bill and it later passed a vote in the House. *See* 123 Cong. Rec. 33,929-33 (1977). The Senate also held hearings on this bill, however, the Senate subcommittee failed to take further action and the bill died. *Hearings on H.R. 3403, supra* note 8. A new bill was introduced in the next Congress and hearings were held, but again no further action was taken. *Hearings on H.R. 3403, supra* note 8. What became know as the Cultural Property Act finally passed both Houses of Congress in the 97th Congress. *See* S. Rep. No. 564, 97th Cong., 2d Sess. 24 (1982). This process is explained in James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U.J. INT'L L. & POL. 857, 857 n.2 (1983).

68. Cultural Property Act, *supra* note 66. *See infra* note 158 and accompanying text for a fuller discussion of the Cultural Property Act.

69. Fitzpatrick, *supra* note 67, at 859. The United States is, in fact, no longer a member of UNESCO. The U.S. terminated its membership on December 31, 1984 and stopped making payments because of a belief that the organization was mismanaged and its political disposition anti-American. Persick, *supra* note 32, at 98.

discussion of the provisions and workings of the UNESCO Convention is beyond the scope of this Comment which focuses on the measures taken by the United States and Latin America to protect cultural property.

It should be noted that, overall, the UNESCO Convention has failed to achieve its purported goals. Several factors have contributed to this failure, the most important of which is the United States is the only major art-importing country to sign it.⁷⁰ Therefore, the cooperation of the art-importing countries, which is essential to the success of any international Convention of this sort, is severely lacking.

Another shortcoming has to do with the specific text of the Convention. Most of the language of the Convention is in the form of recommendations and does not incorporate any sanctions or penalties for noncompliance.⁷¹ The text contains strong language and clear declarations of purpose, yet allows the strict enforcement of the Convention to be avoided.⁷² This is best seen by the use of ambiguous phrases such as, "as appropriate for each country,"⁷³ "to the extent feasible,"⁷⁴ and "consistent with national legislation."⁷⁵ In using such qualifying phrases in conjunction with important provisions, art-rich countries are allowed to retain their strict export regulations, and the art importing countries are allowed to maintain lax import restrictions.⁷⁶ As a result, the Conventions effectiveness in controlling and ending the illegal trade in cultural property is severely undermined.

It is largely believed that the looting of archeological sites can only be diminished through international cooperation.⁷⁷ The UNESCO Convention's attempt to foster such international cooperation has fallen short and the Convention has had little effect on the illicit trade in pre-Columbian artifacts. This Comment, therefore, will focus on regional agreements, treaties and the national efforts within the United States and Latin America that address the problem.

70. The major art-importing states are considered to be the United States, Great Britain, France, Japan, Germany, and Switzerland. *Written Comments on H.R. 14171 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 29, 20 (statement of the American Association of Dealers in Ancient, Oriental, and Primitive Art). Of the above list only the United States has signed the UNESCO Convention. Canada and Italy have also signed the Convention which marginally could be considered to be "major" art-importing countries.

71. BATOR, *supra* note 10, at 94-95.

72. *Id.*

73. UNESCO Convention, *supra* note 59, art. 5.

74. *Id.* art. 9.

75. *Id.* art. 7.

76. BATOR, *supra* note 10, at 94-108.

77. *Hearings on H.R. 3403*, *supra* note 8, at 17 (statement of Paul M. Bator).

B. Regional Arrangements

Until 1948, the International Union of American Republics (Pan American Union) was the major regional association of States in the Americas.⁷⁸ In 1935, the Pan American Union established the Treaty on the Protection of Moveable Property of Historical Value (1935 Convention), which was ratified by Chile, El Salvador, Guatemala, Mexico, and Nicaragua.⁷⁹ The United States was not a party to the treaty.⁸⁰

The 1935 Convention classified moveable property into four categories relating to time periods such as pre-Columbian and colonial, and types of objects such as artifacts, weapons, art work, manuscripts, and even zoological specimens.⁸¹ The states that were party to the Treaty were required to legislate so as to forbid export of these moveable properties without a permit.⁸² Permits were only to be granted if a duplicate existed or when items of similar cultural value were to remain in the home country.⁸³ The party states were to require valid export permits for any such items imported into their country.⁸⁴ Items without a valid export permit were to be returned to the country of origin.⁸⁵ The Convention's impact has been minimal due to the absence of the United States as a party state.⁸⁶

Also in 1935, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (The Roerich Pact) was established.⁸⁷ It was designed to afford respect and protection to national cultural treasures in times of war; however, it also provided that such protection should be extended in times of peace as well.⁸⁸ The Treaty was ratified by Brazil,

78. 3 LYNDEL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: MOVEMENT* 688 (1989). The Pan American Union was established by the First International Conference of American States (1889-1890). *Id.*

79. *Id.*

80. Prior to 1970, the United States had shown little interest in aiding other countries in the protection of their cultural property, and therefore was rarely a party to any treaties or conventions designed for that purpose. However, conditions in the late 1960's such as the loss of U.S. control within the U.N. and the growing U.S. drug problem caused officials in the U.S. State Department to seek the political cooperation of Latin American countries. Measures such as the 1972 Pre-Columbian Monuments Act and the U.S.-Mexico treaty (see sections II(c) and II(d)) can be viewed as an effort by the U.S. to gain cooperation from Mexico and other Latin American countries to control drug smuggling into the U.S. Rogers, *supra* note 7, at 956-57.

81. 3 PROTT & O'KEEFE, *supra* note 78, at 688.

82. *Id.* at 689.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Protection of Artistic and Scientific Institutions and Historic Monuments (Inter-American), April 15, 1935, 49 Stat. 3267, T.S. No. 899.

88. 1 PROTT & O'KEEFE, *supra* note 14, at 689. However, despite treaty text extending protection in peace time, the Roderich Pact has only been used to afford protection in times of war. *Id.*

Chile, Columbia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, Venezuela and the United States.⁸⁹

On April 30, 1948, the Charter of the Organization of American States (OAS) was signed, reconstituting the Pan American Union.⁹⁰ In 1969, the OAS established a Regional Program for Cultural Development which sought to foster cooperation in preserving and protecting archeological, historical, and artistic monuments.⁹¹ Out of this program grew the Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations (Convention of San Salvador).⁹²

Under the Convention of San Salvador, cultural property is defined broadly and is similar to the 1970 UNESCO Convention definition.⁹³ Party states are encouraged to: establish records and inventories of their cultural treasures;⁹⁴ refuse the importation of cultural properties lacking proper export authorization;⁹⁵ use "effective" measures to prevent unlawful exportation, importation, and removal of cultural properties;⁹⁶ and use necessary measures to return such objects to their state of origin.⁹⁷

The Convention of San Salvador has had little impact on the problem of illicit trade in cultural artifacts. This is partly attributable to the absence of the United States as a party.⁹⁸ Of further significance is that only nine of the thirty-two member states of the OAS have ratified the Convention.⁹⁹

C. *Bilateral Treaties and Executive Agreements*

On March 24, 1971, a treaty of cooperation between the United States and Mexico (U.S.-Mexico Treaty), entered into force.¹⁰⁰ Its purpose is to provide a mechanism for the "recovery and return" of stolen properties that are of "archeological, historical or cultural importance" to each nation.¹⁰¹ "Archeological, historical, or cultural properties are defined by the treaty as:

89. *Id.*

90. *Id.* at 688.

91. *Id.*

92. Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350.

93. *Id.* art. 2.

94. *Id.* art. 8.

95. *Id.* art. 7.

96. *Id.* art. 10.

97. *Id.*

98. 1 PROTTE & O'KEEFE, *supra* note 14, at 693.

99. *Id.*

100. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, July 17, 1970, U.S./Mexico Treaty, *supra* note 15. The Mexican government requested that the cooperation extended by Mexico to help the U.S. regain stolen vehicles be reciprocated by United States cooperation in helping Mexico regain their stolen cultural treasures imported into the U.S. 3 PROTTE & O'KEEFE, *supra* note 78, at 669.

101. *Id.*

1) pre-Columbian objects and artifacts that are of "outstanding importance to the national patrimony" of each nation;¹⁰² 2) objects and artifacts of the colonial periods of both nations that are of "outstanding importance;"¹⁰³ and 3) official documents from archives dating up to 1920 that have important historical value.¹⁰⁴ Such items are only protected if they are "the property of federal, state, or municipal governments or their instrumentalities."¹⁰⁵ Therefore, it is absolutely essential that the state, through the government, own the object in question for the treaty to apply. Although this requirement appears narrow and stringent, it is, however, quite broad in its application to Mexico where the ownership of all archeological material is vested in the "Nation."¹⁰⁶

According to the treaty provisions, each party agrees, when requested by the other, to use all legal means at its disposal to help recover and return "stolen" cultural property that is within its territory but which is owned by the other state.¹⁰⁷ As will be discussed later, this is most often accomplished here by U.S. Customs seizing the artifact. Requests for aid are to be made through diplomatic channels and the requesting party is required to furnish, at its expense, the evidence necessary to support its claim of ownership.¹⁰⁸ If the requested party is unable to recover the object and facilitate its return, the Attorney-General of that state is "authorized" to institute a civil action for its return.¹⁰⁹ Once the legal authority to return the object has been achieved, the requested state is required to do so promptly, and the receiving state is to bear all of the costs and expenses of its delivery.¹¹⁰

The United States has entered into similar arrangements with Peru, Ecuador, and Guatemala, termed executive agreements, in 1981, 1983, and

102. U.S./Mexico Treaty, *supra* note 15, art. I(1)(a).

103. *Id.* art. I(1)(b).

104. *Id.* art. I(1)(c).

105. *Id.* art. I.

106. Mexico declared national ownership of its cultural and pre-Columbian treasures in 1897, and did so again in 1970 and 1972. *United States v. McClain*, 545 F.2d at 997-1000 (citing Law on Archaeological Monuments, May 11, 1897 (IV ANNUAL OF LEGISLATION AND JURISPRUDENCE (1897)), Federal Law Concerning Cultural Patrimony of the Nation, Dec. 15, 1970, 303 DIARIO OFICIAL [D.O.] 8, Federal Law on Archaeological, Artistic and Historic Monuments and Zones, May 6, 1972, 312 D.O. 16). However, the United States courts were unable to conclude that there had been an unequivocal declaration of national ownership by Mexico of all of its artifacts until the 1972 declaration. *McClain*, 545 F.2d at 997-1000) Under the 1972 declaration, the exportation of *all* pre-Columbian artifacts is forbidden, with a few minor exceptions for gifts and exchanges to foreign governments and scientific institutions. *Id.*

107. U.S./Mexico Treaty, *supra* note 15, art. III(1).

108. *Id.* art. III(2).

109. *Id.* art. III(3).

110. *Id.* art. IV.

1984 respectively.¹¹¹ In these executive agreements, like in the U.S.-Mexico treaty, the parties agree to use the legal means at their disposal to recover and return "stolen" archeological or cultural properties that are in its territory, to the country of origin.¹¹² Request for return must be made through diplomatic channels and evidence to prove the claim of ownership must be provided.¹¹³ The categories of objects and artifacts covered by the executive agreements are essentially the same as those in the U.S.-Mexico Treaty, with the exception that the items need not be of "outstanding importance to the national patrimony."¹¹⁴ Also, the category of pre-Columbian artifacts is more specific and inclusive than in the U.S.-Mexico Treaty, including such items as "architectural features, sculptures, pottery pieces, metalwork, textiles and other vestiges of human activity".¹¹⁵

There is no requirement in the Executive Agreements that the requested party institute judicial proceedings to recover the stolen objects. When there is reason to believe that an artifact covered by the Agreement has been "stolen" and will likely enter international trade, the party who owns the object and is seeking its return must notify the other and give sufficient information and a description to aid in its recovery.¹¹⁶ The requested party must then take appropriate action, usually through customs procedures, to detect its entry and location.¹¹⁷ Once the object is located, the requested party must supply the other state with the information necessary to gain the objects return.¹¹⁸

Some commentators believe that bilateral agreements, such as the treaty between the United States and Mexico, and the Executive Agreements with Peru, Ecuador, and Guatemala, may be the most effective method of combating the illegal flow of archeological and cultural property, because each can be tailored to meet the specific needs of each party.¹¹⁹ What is significant about the U.S.-Mexico treaty, in particular, is it seeks to balance

111. Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, September 15, 1981, 33 U.S.T. 1607, U.S.-Peru, T.I.A.S. No. 10136; Agreement between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11075; Agreement Between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, U.S.-Guatemala, T.I.A.S. No. 11077 [hereinafter Executive Agreements]. Executive agreements are like treaties with the exception that the agreement cannot change existing law within either country and Senate approval is not required. BLACK'S LAW DICTIONARY, *supra* note 18, at 569.

112. Executive Agreements, *supra* note 111, art. II.

113. *Id.*

114. Compare U.S./Mexico Treaty, *supra* note 15, art. I with Executive Agreements, *supra* note 111, art. I.

115. Executive Agreements, *supra* note 111, art. I.

116. *Id.* art. II.

117. *Id.*

118. *Id.*

119. Rogers, *supra* note 7, at 948-49.

the competing interest involved in the trade in art: the interests of the art-rich country and archaeologists versus the interests of the art-importing country, museums, dealers and collectors.¹²⁰ The Treaty protects the Mexican national patrimony by providing a means for recovery and return of important cultural objects. It seeks to promote legitimate excavations by U.S. and Mexican archaeologists and to stop the illicit plunder of important archeological sites. It further seeks to promote a cultural exchange of art and artifacts between the two nations and to allow a legitimate trade in cultural objects of lesser significance.

Unfortunately, as will be discussed in the text below, United States agreements with the art-rich nations of Latin America have failed to produce the desired effects.

D. National Legislation

Confronted with the rampant pillage of their national cultural heritage, the first line of defense for the art-rich countries of Latin America is their domestic laws regarding the ownership and exportation of cultural property. However, the overall success in enforcing export restrictions depends, largely, upon the domestic laws and import regulations of the major art importing countries such as the United States.

1. Laws of Exporting States

One method utilized by many Latin American nations is the registration and inventory of all pre-Columbian and cultural artifacts.¹²¹ These records are used to identify artifacts in the event of their disappearance.¹²² Also, it is used to rank works of art considered to be the most important to the nation's cultural heritage.¹²³ Despite the soundness of the inventory principle, its effectiveness has been severely undermined by the lack of funding and expertise necessary to do a competent job.¹²⁴ Also, many of the objects smuggled out of the country are from remote, clandestine excavations, having never been registered.

A second method used by several Latin American countries to protect their cultural property is to declare some or all of their pre-Columbian and cultural artifacts as property of the state.¹²⁵ In so doing, the state becomes the owner of the pre-Columbian works within its borders, and any unautho-

120. *Id.*

121. WILLIAMS, *supra* note 44, at 108-09.

122. *Id.* at 109.

123. *Id.*

124. *Id.*

125. 1 PROTTE & O'KEEFE, *supra* note 14, at 55-62. The countries that have claimed national ownership over their cultural works include: Argentina, Costa Rica, Ecuador, Guatemala, Mexico, Peru, and Venezuela. *Id.*

ized excavation or exportation of such objects is considered "stealing."¹²⁶ As will be shown later, this method has important implications to United States laws such as the National Stolen Properties Act.¹²⁷

The best examples of national ownership claims and the most stringent export restrictions are those of Mexico and Peru:

Mexico: In 1897, Mexico passed legislation declaring all archeological monuments as the property of the state.¹²⁸ This declaration was expanded by laws passed in 1970 and 1972 to include *all* pre-Columbian artifacts.¹²⁹ After the 1972 law, all pre-Columbian artifacts whether undiscovered, in a private collection or in a museum, are considered the property of the state.¹³⁰ Further, all exportation of pre-Columbian artifacts is absolutely forbidden.¹³¹

Peru: The earliest announcements of state ownership over archeological or pre-Columbian artifacts was in 1822.¹³² However, it was not until 1929 that a legal basis for Peru's ownership claim was formulated.¹³³ In 1985, new laws were passed repealing the 1929 law and provided that all archeological sites belong to the state, and that the removal of any pre-Columbian artifacts from the country is forbidden.¹³⁴

2. U.S. Law and Import Regulation

Cooperation from importing states is essential for any system of export restrictions to be effective.¹³⁵ The general rule in art-importing countries, such as the United States, is that if an artifact has been illegally exported out of its country of origin, this fact alone will not preclude it from lawful importation.¹³⁶ This continues to be the rule in most art-importing countries, including the United States.¹³⁷ However, there is an exception to this rule in the U.S. where, in the category of pre-Columbian artifacts, the United States has enacted some very prohibitive legislation.

126. *Id.* at 57.

127. *See infra* note 171 and accompanying text.

128. *McClain*, 545 F.2d at 997.

129. *Id.* at 999-1000.

130. *Id.* at 1000.

131. *Id.*

132. *Peru v. Johnson*, 720 F. Supp. 810, 812 (9th Cir. 1989).

133. *Id.* at 813.

134. *Id.* at 814.

135. *Jore*, *supra* note 45, at 58-59.

136. *Hearings on H.R. 3403*, *supra* note 8, at 19 (statement of Paul M. Bator).

137. *WILLIAMS*, *supra* note 44, at 130.

E. Act Preventing Import of Pre-Columbian Sculptures and Murals

In 1972, the U.S. unilaterally¹³⁸ passed an Act prohibiting the importation of pre-Columbian sculptures and murals.¹³⁹ This Act was prompted by the pillage of ancient archeological sites and Mayan stela in Mexico and Central America.¹⁴⁰ Its enactment was an attempt to attack the problem of illicit art trafficking at the point of entry into the United States.¹⁴¹

The Act prohibits the importation into the United States of pre-Columbian stone carvings or wall art that were once a part of or affixed to ancient monuments or architectural structures, and have subsequently been exported in violation of the laws of their country of origin.¹⁴² For the act to apply, the country of origin must have export controls restricting the flow of such objects.¹⁴³ As of 1989, thirteen Latin American countries have such export restrictions.¹⁴⁴ Therefore, in respect to these objects, the United States has based its import policy and regulations on the export laws of many Latin American countries.

Under the Act, illegally imported pre-Columbian stone carvings or murals are seized by customs upon entry into the United States.¹⁴⁵ The item is first offered back to the country of origin, who can regain the object by bearing all the expenses of its return.¹⁴⁶ If for some reason the country of origin declines to regain the object, it is disposed of according to customs laws.¹⁴⁷

Importation of pre-Columbian sculptures and murals into the United States is allowed if proper documentation can be produced demonstrating that the object was properly exported;¹⁴⁸ if "satisfactory evidence" can be produced demonstrating that the sculpture or mural was exported on or before the effective date of the regulation;¹⁴⁹ or if it can be "satisfactorily" demonstrated that the object in question does not fall under the list of

138. No other state in the international community passed similar legislation addressing the pillage of Mayan sites. This is significant because the strong opposition that the United States had expressed against the first draft of the UNESCO Convention was based largely on the provision requiring unilateral actions to be taken by States to protect the cultural property of another. *Hearings Before the Subcommittee on International Trade of the Committee on Finance, 97th Cong., 2d Sess. (1982)* (written testimony in support of S. 1723).

139. 19 U.S.C. §§ 2091-2095.

140. 3 PROTTE & O'KEEFE, *supra* note 78, at 598.

141. Rogers, *supra* note 7, at 940.

142. 19 U.S.C. § 2092.

143. Rogers, *supra* note 7, at 940-41.

144. Belize, Bolivia, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, and Venezuela. 3 PROTTE & O'KEEFE, *supra* note 78, at 598.

145. 19 U.S.C. § 2093.

146. *Id.* § 2093(b)(1).

147. *Id.* § 2093(b)(2).

148. *Id.* § 2092(a).

149. *Id.* § 2092(b)(2).

protected items.¹⁵⁰ When an object is seized by customs, the consignee is given ninety days to produce the proper export documentation, or to otherwise demonstrate why this object should not be subject to the Act.¹⁵¹ If this is not done, the object is considered illegally imported and steps are taken to initiate its return to its home country.¹⁵²

The Act is considered to have been largely successful in diminishing the flow of Mayan stela and similar objects into the United States.¹⁵³ The pillage of Mayan sites for such treasure was not greatly reduced, however, because the trade merely shifted to Europe where no such stringent controls existed.¹⁵⁴ This phenomenon demonstrates several things. First, a complete end to the illegal trade in cultural property is only possible through international cooperation. Second, strong unilateral action serves only to divert the trade to less stringent importers, or to drive up prices on the black market providing additional incentives for looters.

F. Cultural Property Act

With the enactment of the Cultural Property Act on January 12, 1983, the U.S. became a full signatory state to the UNESCO Convention.¹⁵⁵ The battle to pass this legislation was a long drawn out process finally resulting in a workable compromise.¹⁵⁶

Most significant to the opponents of previous legislation, the Cultural Property Act limits U.S. measures to restrict the importation of specific cultural properties to situations where there is a concerted, multinational response to a severe instance of pillage.¹⁵⁷ The United States does not restrict the import of a cultural work merely because it is illegally exported.

However, strict unilateral measures can be taken by the U.S. against the import of another country's cultural property in "emergency"¹⁵⁸ situations,

150. *Id.* § 2092(b)(3).

151. *Id.* § 2092(b).

152. *Id.* § 2093(b)(1).

153. Rogers, *supra* note 7, at 969. The flow has diminished but has not halted. *Id.*

154. *Id.*

155. 19 U.S.C. § 2601.

156. Fitzpatrick, *supra* note 67, at 859. The Act is a reflection of the effort by Congress to balance the interests of all the interested parties: "archaeologists and anthropologists, art dealers and collectors, museum directors, the academic community, and the bureaucrats from the State and Justice Departments, the United States Information Agency and the Customs Service." *Id.*

157. 19 U.S.C. § 2602(c)(1)-(c)(2).

158. An "emergency condition" has been defined by the Act as:

- "1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;
- 2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

when there has been an official request for such help from the art-rich country, and when that country has taken steps on its own to protect its cultural heritage.¹⁵⁹ For import restrictions to apply, the archeological object must be of the type normally discovered in scientific excavations, accidental diggings or exploration, must be culturally significant and must be over 250 years old.¹⁶⁰

The first request under this legislation came from Canada in 1985 concerning the pillage of ancient indian relics.¹⁶¹ No determination has yet been made on this application.¹⁶² A second and more successful request under the Cultural Property Act came from El Salvador concerning pre-Hispanic objects in the Cara Sucia region of El Salvador.¹⁶³ The matter was studied by the Cultural Property Advisory Committee (which was established by the Cultural Property Act), and upon its recommendations, emergency import restrictions were imposed in the United States on September 11, 1987.¹⁶⁴ Now pre-Hispanic objects from the Cara Sucia region of El Salvador cannot be imported into the U.S. without a valid El Salvador export certificate.¹⁶⁵ Those lacking proper export documentation are seized by customs and returned to El Salvador. A third request under this legislation has come from Peru whereby the U.S. imposed import restrictions on May 7, 1990, with regard to pre-Columbian treasures coming from the Sipan region of Peru.¹⁶⁶

Despite these favorable examples, most countries avoid using the Cultural Property Act because it is a "complex and cumbersome instrument."¹⁶⁷ Applications take a year to review and there are many grounds upon which an application can be rejected.¹⁶⁸ Further, the United States will only act unilaterally in extreme emergency situations.¹⁶⁹ However, it has also been argued that the Act is crucial in establishing U.S. policy in this area and demonstrates good faith to other countries.¹⁷⁰

3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal or fragmentation which is, or threatens to be, of crisis proportions."

Id. § 2603(a).

159. This section's purpose was to provide for a "limited exception" to the concerted national effort requirement. S. Rep. No. 564, *supra* note 65, at 28.

160. 19 U.S.C. § 2061.

161. 3 PROTTE & O'KEEFE, *supra* note 78, at 600.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. John Robinson, *U.S. bans imports from Peruvian tombs*, THE BOSTON GLOBE, May 8, 1990, at 3.

167. *Black Market Flourishes Despite Law on Relics*, *supra* note 15, at 14D.

168. *Id.*

169. *Id.*

170. *Id.*

G. National Stolen Properties Act¹⁷¹

Under the National Stolen Properties Act (NSPA), the transportation “in interstate or foreign commerce of any goods” having a value of \$5000 or more, and which are known to have been “stolen, converted, or taken by fraud” is prohibited.¹⁷² The meaning of the word “stolen” is the key¹⁷³ element in using NSPA for customs intervention and in prosecuting individuals possessing goods illegally exported from Latin America.¹⁷⁴ The two U.S. cases discussed below have used NSPA as a basis for criminal prosecution, and both have held that pre-Columbian artifacts which have been unlawfully exported out of their country of origin are considered “stolen” when the home country has claimed national ownership over the artifacts.

1. *U.S. v. Hollinshead*¹⁷⁵

This case involved the theft and attempted sale of a Mayan stela from a known Guatemalan site. The seven foot monument was traced in detail, cut into pieces, and smuggled out of Guatemala via Honduras, into the United States.¹⁷⁶ Once in the United States, Clive Hollinshead, a California Art dealer, attempted to sell the stela to dealers and collectors.¹⁷⁷ It was then offered for sale to the Brooklyn Museum whose curator sought advice about the stela from the archeologist, Ian Graham.¹⁷⁸ As it so happened, Graham was the archeologist who excavated the Guatemalan site from which the stela had been stolen.¹⁷⁹ He recognized it in the photo included in the curator’s letter as “machaquila stela 2.”¹⁸⁰ The proper authorities were then notified, an elaborate smuggling ring was uncovered, and Hollinshead and two co-conspirators were arrested.¹⁸¹

Uncontroverted evidence was given at trial that machaquila stela 2 and other pre-Columbian artifacts were the property of the government of Guatemala and could not be removed without permission.¹⁸² Also, “overwhelming evidence” was presented establishing that defendants knew removal

171. 18 U.S.C. §§ 2314-2315.

172. *Id.*

173. 3 PROTT & O’KEEFE, *supra* note 78, at 373.

174. BATOR, *supra* note 10, at 68.

175. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

176. *Id.* at 1155.

177. *Id.*

178. BATOR, *supra* note 10, at 69.

179. *Id.*

180. Graham named the site Machaquila and numbered the stela that were discovered there.

Id.

181. *Id.* at 69-70.

182. 495 F.2d at 1155.

of the stela was contrary to Guatemalan law.¹⁸³ Therefore, the court found that the objects were "stolen" under the meaning of the National Stolen Property Act.¹⁸⁴ All defendants were convicted of transporting and conspiring to transport stolen property in interstate and foreign commerce, and the convictions were affirmed on appeal.¹⁸⁵

It should be noted that the circumstances of the Hollinshead case was a "fluke,"¹⁸⁶ in that, the stela was known and published and was thus easily proven to be the property of Guatemala.¹⁸⁷ Further, it was shown to the one person who could easily identify it.¹⁸⁸ The Hollinshead case does not address situations in which the ownership of pre-Columbian objects is based solely on a governments general claim of State ownership over all discovered and undiscovered artifacts.¹⁸⁹ This issue was addressed in the *McClain* case.

2. *U.S. v. McClain*¹⁹⁰

This case concerned a number of pre-Columbian artifacts that were smuggled out of Mexico and into the United States. McClain and three others were involved in a smuggling ring created for this purpose.¹⁹¹ They were attempting to negotiate the sale of Mexican artifacts (terracotta figures and pottery, beads and a few stucco pieces) that they held in San Antonio, when they were arrested by undercover agents.¹⁹² The artifacts in question were not registered and thus were not known to the Mexican authorities.¹⁹³ It was also unknown when and how the artifacts were brought into the United States.¹⁹⁴ During the negotiations for sale, it became clear that McClain and the others knew their actions were illegal under Mexican law and that Mexico had claimed ownership of such objects.¹⁹⁵

The defendants were tried in a Texas district court for conspiracy and violation of the National Stolen Property Act.¹⁹⁶ The theory put forward by the prosecution was the artifacts were "stolen" because Mexico had

183. *Id.*

184. *Id.* at 1156.

185. *Id.*

186. BATOR, *supra* note 10, at 70.

187. *Id.*

188. *Id.*

189. 3 PROTTE & O'KEEFE, *supra* note 78, at 374.

190. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) [hereinafter *McClain I*]; and *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) [hereinafter *McClain II*].

191. *McClain II*, 593 F.2d at 660-63.

192. *McClain I*, 545 F.2d at 992.

193. *McClain II*, 593 F.2d at 660-63.

194. *Id.*

195. *Id.*

196. *Id.* at 658.

“declared itself owner of all pre-Columbian artifacts within its borders.”¹⁹⁷ The defendants were convicted on both counts and appealed to the Fifth Circuit. On appeal, the court reversed and remanded principally on the grounds of prejudicial jury instructions.¹⁹⁸ The case was retried and again the defendants were convicted. Defendants appealed the second conviction and the court affirmed in part and reversed in part.¹⁹⁹

Out of this confusing process of trials and appeals, the *McClain* case established two things. First, it was held that an unambiguous claim to ownership of all pre-Columbian artifacts was not established by Mexico until May 6, 1972.²⁰⁰ Because it could not be established that the artifacts were exported after this date, the defendant’s conviction was reversed on this count.²⁰¹ Defendants were, however, convicted on the conspiracy count.²⁰²

More importantly, however, *McClain* holds that an unambiguous claim of national ownership is sufficient grounds to prosecute under NSPA.²⁰³ It is not necessary that the artifacts in question be reduced to possession by the government or that the items be registered.²⁰⁴ The court, however, clearly rejected the proposition that unlawful exportation alone renders an artifact “stolen” under the meaning of NSPA.²⁰⁵ It is the illegal export after the declaration of state ownership that renders such artifacts “stolen.”²⁰⁶

This decision has been criticized as offering a “blank check” to states wishing to protect their cultural property.²⁰⁷ By declaring national ownership over all cultural objects, a state can insure U.S. enforcement of NSPA, and it is argued that this method of protection is too rigid and the rule is over inclusive.²⁰⁸ All artifacts exported from Mexico after 1972 would be considered stolen regardless of whether the item had been legally acquired many years prior to 1972 or was recently pillaged from a site.²⁰⁹ The general fear is that indiscriminate enforcement of *McClain* will create a regulatory regime which is over inclusive, extremely rigid, and which overshadows the legitimate interests in cultural exchange and trade.²¹⁰

197. *Id.* at 659.

198. *McClain I*, 545 F.2d at 1003-04.

199. *McClain II*, 593 F.2d at 658.

200. *McClain I*, 545 F.2d at 997-1000.

201. *McClain II*, 593 F.2d at 671.

202. *Id.*

203. *McClain I*, 545 F.2d at 1001-02.

204. *Id.*

205. *McClain I*, 545 F.2d at 1002.

206. BATOR, *supra* note 10, at 74.

207. *Id.* at 75.

208. *Id.*

209. *Id.*

210. *Id.* at 78.

The legal principle established in *McClain* has not been challenged directly in U.S. courts. The rule remains law, and its reach has been further expanded by the U.S. Customs Service.

H. U.S. Customs Service Practices

Prior to 1970, there were no specific import restrictions targeting pre-Columbian artifacts, nor special mechanisms available for the recovery and return of such works. The ability of Customs to prevent the trafficking in pre-Columbian artifacts was limited to the standard practice of seizure on the basis of smuggling,²¹¹ fraud and false statements,²¹² and failure to declare.²¹³ However, starting in 1972 with the passage of the Pre-Columbian Monuments Act,²¹⁴ the Customs Service received the authority to seize pre-Columbian "sculpture or murals" lacking proper export documentation.²¹⁵ The *McClain* decision granted additional authority by allowing Customs to use the National Stolen Properties Act as a means of preventing the importation of artifacts considered "stolen" by virtue of the laws and export policies of the country of origin. And, further authority was derived from the bilateral agreements the U.S. entered into with Mexico, Peru, Guatemala and Ecuador.

The Customs Service used the legislation, case law and treaties described above as the basis for issuing a bold statement on Customs procedures in the area of pre-Columbian artifacts.²¹⁶ In 1982, the U.S. Customs Service implemented the Manual Supplement on Seizure and Detention of Pre-Columbian Artifacts (Customs Directive), which declared that Customs has the authority to detain, and when necessary, to seize all pre-Columbian artifacts entering the United States, regardless of origin, which are lacking the proper export documentation.²¹⁷

There are three facets to the enforcement of the Customs Directive. First, Customs officials will seize any pre-Columbian artifact that is improperly declared or undervalued and will attempt to determine its country of origin.²¹⁸ If the country of origin is one that has passed legislation

211. 18 U.S.C. § 545.

212. *Id.* § 1001.

213. 19 U.S.C. § 1497.

214. *Id.* §§ 2091-2095.

215. *Id.* § 2091.

216. CUSTOMS SERVICE, U.S. DEP'T OF TREASURY, POLICIES AND PROCEDURES MANUAL SUPP. NO. 3280-01, SEIZURE AND DETENTION OF PRE-COLUMBIAN ARTIFACTS (1982) [hereinafter *Customs Directive*].

217. *Id.* In claiming this authority the Customs Service has accepted the position that the unauthorized excavation and exportation of cultural works constitutes theft when the home country has declared national ownership. Fitzpatrick, *supra* note 67, at 867.

218. Fitzpatrick, *supra* note 67, at 867 (explaining Customs Directive). *See* Seizure and Detention of Pre-Columbian Artifacts, Policies & Procedures Manual Supp. No. 3280-01, U.S. Customs Service (Oct. 5, 1982).

declaring national ownership of such artifacts, the cultural attache is notified.²¹⁹ If the attache requests the return of the artifact, the request will be granted provided there is no criminal proceeding or challenge to the foreign country's ownership claim.²²⁰ If a criminal proceeding is involved, the home country must await the outcome before the artifact can be returned.²²¹ If there is a challenge to the foreign country's claim of ownership, then ownership will be decided in a forfeiture or interpleader proceeding.²²²

Second, the Directive authorizes seizure of properly declared and valued pre-Columbian artifacts if there is "evidence of a crime."²²³ As a prerequisite to prosecution, the home country must have passed legislation nationalizing such objects and provide some evidence the importer had knowledge that the artifact was claimed by the state.²²⁴ Even if a prosecution is not brought, the artifact is detained subject to a foreign ownership claim.²²⁵

Finally, the Directive authorizes that properly declared pre-Columbian artifacts should nonetheless be detained "pending a determination of lawful ownership."²²⁶ When the country of origin is determined, the cultural attache is to be notified and asked whether his country claims ownership of the artifact.²²⁷ If the importer contests the country's claim, ownership is to be determined in an interpleader proceeding.²²⁸

The effect of the Customs Directive and subsequent Customs practice has been, arguably, to create an embargo against all pre-Columbian goods.²²⁹ It is believed that this procedure further extends the "blank check" approach embodied in the U.S./Mexico treaty and legitimized in *McClain*; and, in effect, ignores all legitimate interests in cultural exchange.²³⁰ Export regulations are enforced regardless of their effectiveness and desirability and regardless of whether they serve the interests of the United States.²³¹ Additionally, the Customs Directive runs directly contrary to the Cultural Property Act, which is considered to be the comprehensive statement on U.S. policy regarding the importation of cultural properties.²³² In response to

219. Fitzpatrick, *supra* note 67, at 687

220. *Id.* at 867-68.

221. *Id.* at 868.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 868-69.

227. *Id.* at 869.

228. *Id.*

229. BATOR, *supra* note 10, at 52-54.

230. *Id.*

231. *Id.*

232. Fitzpatrick, *supra* note 67, at 859. The Cultural Property Act specifically provides that it is not the policy of the United States to enforce the export laws of other countries. See *supra* note 155 and accompanying text.

such criticisms, the Customs Service contends its procedures are merely the enforcement of legitimate claims of ownership by foreign governments and are thus no different from the standard customs procedures of enforcing legitimate ownership claims.²³³

III. AN ALTERNATIVE TO STRICT EXPORT AND IMPORT RESTRICTIONS

The current legal regime established by the United States and Latin America attempts to protect pre-Columbian artifacts from pillage and unauthorized exportation through strict laws and agreements designed to virtually eliminate all international trade in such objects. Many Latin American countries have claimed national ownership over all their pre-Columbian works and only allow them to be exported in special situations and only with an export certificate. The United States Customs Service has made an exception to the general rule that illegal exportation alone will not prevent lawful importation into the United States, and has reciprocated in honoring the strict export laws of the art-rich countries of Central and South America. Using the 1972 Pre-Columbian Monuments Act, the *McClain* decision, the U.S.-Mexico treaty and other Executive Agreements, the Customs Service detains or seizes any pre-Columbian item suspected of having been exported contrary to the laws of its country of origin.²³⁴ This can even include the seizure of items that have been in the United States for some period of time.

Yet, despite these strict measures the large scale pillage of pre-Columbian sites throughout Latin America continues, and the fruits of these clandestine digs continue to be smuggled into the United States and Europe. The existing regime has not worked because the strict nature of the laws and agreements has resulted in the immense growth of an already existing black market. By attempting to stop the flow of *all* pre-Columbian artifacts out of Latin America and by restricting flow of artifacts into the United States, the demand for and thus the monetary value of such goods increases. The high price attainable for these goods encourages violations of the law.²³⁵

Further, enforcement of these strict measures is inadequate at almost every level.²³⁶ The first problem is policing the vast number of archaeological sites that are often in extremely remote areas. Most countries do not have the money necessary to establish an elaborate system for the protection of important artifacts and sites. In addition, enforcement is greatly hindered

233. Persick, *supra* note 32, at 116.

234. Stille, *supra* note 1.

235. Persick, *supra* note 32, at 170.

236. James A.R. Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 DENV. J. INT'L L. & POL'Y 231, 232-33 n.6 (1972).

by the prevalent practice of bribing guards, customs inspectors, and even judges to look the other way.²³⁷

The existing system is flawed in two respects. First, by being overly inclusive and attempting to protect *all* pre-Columbian artifacts from theft and exportation, no such artifact is adequately protected. The available resources for protection as well as preservation are spread too thinly. An alternative solution would be to allow a legitimate trade in less important works.²³⁸

Archeologists estimate that ninety percent of the objects found in digs are duplicates that have no great value.²³⁹ There is, therefore, no compelling reason why a legitimate trade in duplicates should not be allowed. The national patrimony is not threatened by the exportation of an object which is identical to many already existing in museums in the home country. By allowing a trade in such works, the black market demand for such goods is lessened and the art-rich countries are better able to protect their most important pre-Columbian works and sites from pillage. Because the scope of the enforcement is decreased, more officials will be available to police and protect the most important elements of their countries' cultural heritage. Further, the revenue that can be generated from the legitimate trade can then be funneled back into excavating new sites and protecting and preserving existing artifacts and sites.²⁴⁰

The second problem with the existing system is it ignores any legitimate interests in cultural exchange. Both the exporting country and the importing country have much to gain through the exchange of cultural works of art. All such benefits are defeated by the restriction of all trade in pre-Columbian goods.

A legal system designed to protect cultural property and national patrimony should also have the goal of balancing the competing interests involved in the international trade in art. This is the stated goal of the UNESCO Convention.²⁴¹ Although the Convention has not been successful in the worldwide protection of cultural property, its failure is not attributable to any unsoundness in the principle of balancing the interests. Its ineffectiveness has been due to a lack of international cooperation.

Because this greatly needed international cooperation still appears very unlikely, the best alternative method of balancing the competing interests involved in the international transfer of pre-Columbian artifacts is to allow a legitimate trade in the less important works. The importing states will gain knowledge and appreciation for other cultures, the exporting state will reap the rewards of increased interests in and travel to their country, and the most

237. *Id.*

238. Bator, *supra* note 10, at 51-62; Williams, *supra* note 44, at 26-27.

239. *Id.*

240. Stille, *supra* note 1.

241. UNESCO Convention, *supra* note 57, preamble.

important items of pre-Columbian heritage will be better protected at home and preserved for study and exhibit.

CONCLUSION

There are good arguments and important interests involved on both sides of the issue of the international trade in pre-Columbian artifacts. It is necessary for art-rich countries to keep important cultural works at home to protect and preserve their cultural heritage for their future generations. All people, however, have an interest in and can benefit from the accessibility of art and artifacts from other societies and cultures.

Blanket export and import restrictions defeat both interests. Because such restrictions encourage black market trade, the art-rich countries are unable, with their limited resources, to adequately protect important sites and monuments from the resulting large scale pillage. Therefore, the important artifacts and monuments that constitute the national "patrimony" are not protected or preserved for study or for the enjoyment of future generations.

The interest in the accessibility of pre-Columbian works in the United States is also frustrated. The existing laws have made museums very wary of purchasing pre-Columbian works due to the fear of confiscation by customs authorities or possibly even criminal prosecution under a *McClain* rational if the artifact proves to have been "stolen".²⁴² This is not to say that the illicit trade in pre-Columbian artifacts has been stopped in the United States. It does still exist, however, the result of the strict measures has been to shift a larger portion of the trade to Europe where the import laws are less stringent.

One possible solution is the use of bilateral agreements such as the U.S.-Mexico Treaty. Agreements of this kind are beneficial because they can be tailored to meet the specific needs of the situation and the individual interests of the parties. The bilateral agreement that are in force between the U.S. and the Latin American countries, however, have tended to endorse very restrictive measures against import and export and thus have also led to black market trade and the shifting of the trade to Europe.

International cooperation between the art exporting states and the art-importing states in the form of an international convention appears to have the best opportunity for real success in eliminating the illicit trade. It is unlikely, however, that such a convention could be drafted at this time that would accommodate all of the national and international interests involved.

A practical solution to the immediate problem is to allow a legitimate trade in the lesser important pre-Columbian works. Such a trade would alleviate some of the black market demand for these artifacts; would allow for the limited resources of the art-rich countries to be spent protecting their most important artifacts, monuments and sites; and would be a source of

242. Stille, *supra* note 1.

revenue which could be used for the preservation and protection of important items of pre-Columbian heritage. Further, allowing a legitimate trade in "duplicates" and minor originals makes these works of art generally accessible. Everyone derives benefits from this accessibility.

Allowing a legitimate trade in pre-Columbian works of lesser importance is not a final solution to the problem of illicit trafficking in pre-Columbian artifacts. It does, however, promise better protection for the most important works of pre-Columbian heritage, and allows for a balancing of the interests involved in the international trade of such works. It is a practice that should be adopted to remedy the ineffectiveness of the present system.

*Jamison K. Shedwill**

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