

Was the Stela "Stolen"?

?Solo así he de irme?
?Como las flores que perecieron?
?Nada queda en mi nombre?
?Nada de mi fama aquí en la tierra?
!Al menos flores, al menos cantos!
—Cantos de Huexotzingo¹

I. INTRODUCTION

Mexico is a country rich in archaeological monuments and artifacts. This is evidenced by the ancient Mayan ruins dotting the Yucatan peninsula² and the numerous Aztec sites such as Teotihuacan in the heart of the country near Mexico City. Of great concern to the Mexican government is the flow of its cultural patrimony to museums, art dealers, and private collections outside the country's borders, and the resulting plunder of its archaeological sites due to the work of thieves and looters.³ Partly because one of the strongest markets for pre-Columbian⁴ artifacts exists in the United States,⁵ and because Mexico is an art-rich country in terms of pre-Columbian art, a wealth of law has developed on the subject. All parties concerned — the Mexican and U.S. governments,

-
1. Must I leave in this way?
Like the flowers that have perished?
Nothing remains in my name?
Nothing of my fame here on Earth?
At least flowers, at least songs!

(Author's translation.) This song is of pre-Columbian origin and is engraved over the entrance of an exhibition hall in the National Museum of Anthropology in Mexico City.

2. Wilbur E. Garrett, *La Ruta Maya*, 176 NAT'L GEOGRAPHIC 424 (1989).
3. SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY 112 (1978).
4. The term "pre-Columbian" means "of, relating to, or originating in the Americas before the voyages of Columbus." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1031 (new college ed. 1980). Some of the pre-Columbian civilizations of Mexico include the Mayans, the Aztecs, the Olmecs, the Zapotecs, and the Teotihuacanos. TIME-LIFE BOOKS, INC., TIME FRAME: AD 200-600, EMPIRES BESIEGED 141-162 (1988).
5. 1 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE, DISCOVERY AND EXCAVATION 57 (1984).

museum curators and museum-goers, art dealers, collectors, archaeologists, scholars, and other interested persons — would all agree that cultural property⁶ should be preserved and protected. How this is best accomplished is a source of great debate.

The arguments often allude to the idea of cultural value. As this Note will explore, the "specific cultural value" of an object to the society from which it came competes with the cultural value of that

6. The definition of "cultural property" includes objects of artistic, archaeological, ethnological or historical interest, to name only a few. Treaties and statutes concerning the subject generally set out a specific definition, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention]:

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 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;
- (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.

7. John H. Merryman & Albert E. Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, J. ARTS MGMT & L., Fall 1982, at 5, 8 [hereinafter *Hot Art*].

object to people *outside* the nation of origin of the art. The assumption underlying the notion that the "export . . . of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin"⁸ is that the inhabitants of the country of origin have a property right or an interest in the object which is not shared by peoples of nations outside the country of origin. It is a way of thinking about cultural property as a part of a *national* cultural heritage.⁹ Another way to view cultural property is as "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction."¹⁰ This idea is embodied in the preamble to the Hague Convention:

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 protection¹¹

This Note will describe the current state of the Mexican-American antiquities law and evaluate whether the existing law helps or harms the preservation of this "cultural heritage of all mankind."¹²

II. EXISTING STATE OF THE LAW

A. *The UNESCO Convention*

Most of the current law regarding the protection of cultural property in time of peace¹³ has grown out of the United Nations Educational,

8. UNESCO Convention, *supra* note 6, art. 2, 823 U.N.T.S. at 236.

9. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) [hereinafter *Two Ways of Thinking*].

10. *Id.* at 831.

11. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, pmbl., 249 U.N.T.S. 240, 20 I.L.M. 1282 [hereinafter *Hague Convention*] (emphasis added). The Hague Convention deals with the protection of cultural property from the acts of belligerents in time of war, but the propositions that cultural property is "the cultural heritage of all mankind," and that it has special importance which justifies special measures to ensure its preservation are principles of general applicability, not limited to controlling the conduct of belligerents in time of war or conflict. *Two Ways of Thinking*, *supra* note 9, at 841.

12. Hague Convention, *supra* note 11.

13. The problems associated with the protection of cultural property during

Scientific, and Cultural Organization (UNESCO)¹⁴ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁵ The UNESCO Convention is a multilateral treaty designed to protect the cultural property of the countries which are parties to the agreement against the dangers of theft, clandestine excavation, and illicit export.¹⁶

The underlying theme of the UNESCO Convention is that cultural property is a part of a "national cultural heritage."¹⁷

The basic purpose . . . is to inhibit the "illicit" international trade in cultural objects. The parties agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and transfer of ownership" of cultural property (Article 2), agree that trade in cultural objects exported contrary to the law of the nation of origin is "illicit" (Article 3), and agree to prevent the importation of such objects and facilitate their return to source nations (Articles 7, 9 and 13).¹⁸

armed conflict is a related subject and encompasses a somewhat different set of problems not dealt with in this paper. See LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 129-186 (1977 & Supp. 1984, V 1-19).

14. UNESCO's Constitution provides that one of the purposes and functions of the organization is to "[m]aintain, increase and diffuse knowledge . . . by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions." UNESCO CONST. art. I, § 2(c) (adopted Nov. 16, 1945), *reprinted in* WALTER H.C. LAVES AND CHARLES A. THOMSON, *UNESCO: PURPOSE, PROGRESS, PROSPECTS* 416 (1957).

15. UNESCO Convention, *supra* note 6.

16. *Id.* at pmbl. The UNESCO Convention is one of the most influential and most widely adopted international agreements. 1 JOHN H. MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* 91 (2d ed. 1987) [hereinafter *VISUAL ARTS*]. To date, 65 countries have signed the UNESCO Convention, most of which are "third world" nations. Of the major art-importing countries — Japan, Britain, Germany, France, Switzerland, and the United States — only the United States has signed. William Grimes, *The Antiquities Boom — Who Pays the Price?*, N.Y. TIMES, July 16, 1989, S. 6, at 17. Having signed the UNESCO Convention, a country is bound by it. Gerard Bolla, *Keynote Address*, 15 N.Y.U. J. INT'L L. & POL. 765 (1983). It is interesting to note that the great majority of countries which are parties to the UNESCO Convention are primarily considered as "exporters" of cultural property and only a small minority can be considered as "importers-exporters." *Id.* at 768.

17. *Two Ways of Thinking*, *supra* note 9, at 832.

18. *Id.* at 843. The UNESCO Convention also requires the parties to take steps to ensure the protection of their own cultural property by setting up appropriate

The main thrust of the UNESCO Convention is to get the signatory nations to support the export and import restrictions on the items each country has designated as forming a part of its "cultural heritage."¹⁹

B. *The U.S.-Mexico Treaty of Cooperation*

In 1970, the United States and Mexico signed a bilateral treaty providing for the recovery and return of stolen archaeological, historical, and cultural properties.²⁰ The treaty addresses only "properties of archaeological, historical or cultural importance."²¹ "If a dispute arises over the importance of a particular object, the treaty provides a mechanism for this determination. The country in which a smuggled object is found is required to assist in obtaining its return."²²

C. *Mexican Law*

Mexico, like most art-rich countries, has enacted legislation designed to prevent or severely limit the export of cultural property.²³

agencies to carry out various functions such as drafting model laws, regulations, and ethical rules in conformance with the Convention, establishing a list of the national inventory of works of major cultural importance, supervising excavations, and making public any disappearances of cultural property. UNESCO Convention, *supra* note 6, art. 5, 823 U.N.T.S. at 238. In accordance with the provisions under Article 5, the United States Congress enacted the Cultural Property Act. *See infra* text accompanying notes 58-74. The United States has also set up under the U.S. Information Agency a staff of two officials and a secretary, counseled by a Cultural Property Advisory Committee, to oversee the U.S. implementation of the UNESCO Convention. Stanley Meisler, *Art and Avarice; In the Cut-Throat Art Trade, Museums and Collectors Battle Newly Protective Governments Over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989, (Magazine), at 8.

19. The smuggling of archaeological material from Latin America to the United States has been greatly curtailed as a result of the UNESCO Convention and due to the efforts of the U.S. Information Agency and the U.S. Customs Service. James Walsh, *It's a Steal*, TIME, Nov. 25, 1991, at 86, 88.

20. Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494, T.I.A.S. No. 7088, 1971 [hereinafter Treaty of Cooperation]. The treaty was self-executing, and took effect on March 24, 1971. *Id.* The United States has entered into similar bilateral agreements with Guatemala, Peru, and Ecuador. Consequently, the flow of pre-Columbian artifacts, particularly monumental work, into the United States has been significantly reduced. William Grimes, *The Antiquities Boom — Who Pays the Price?*, N.Y. TIMES, July 16, 1989, S. 6, at 17.

21. Treaty of Cooperation, *supra* note 20.

22. DuBOFF, *supra* note 13, at 104.

23. WILLIAMS, *supra* note 3, at 110.

Since 1897, Mexico has had laws protecting its cultural heritage by vesting ownership of archaeological monuments in the Mexican government and prohibiting their removal "without express authorization of the Executive of the Union."²⁴ The most recent Mexican statute²⁵ defines "archaeological monuments" as movable and immovable objects which are a product of the cultures prior to the establishment of the Spanish culture in Mexico²⁶ and declares that these archaeological monuments are the inalienable and imprescriptible property of Mexico.²⁷ The effect of this type of statute is that it gives the Mexican government standing to bring legal action in a foreign court for recovery of the object since the government is, by law, the owner.²⁸ The export of any "archaeological monument" is expressly prohibited by the statute, except for exchanges or gifts to foreign governments or scientific institutes by agreement of the President of Mexico.²⁹ The statute also creates a "Public Register of Archaeological and Historical Zones and Monuments" for the registration and declaration of these types of zones and monuments³⁰ and prescribes fines and penalties for violation of the statute.³¹ Thus, the Mexican statute is virtually a total ban on the export of pre-Columbian art from Mexico.

24. Ley Sobre Monumentos Arqueologicos, [Law On Archaeological Monuments], art. 1, Diario Oficial de la Federacion [D.O.] (May 11, 1897), *reprinted in* DuBOFF, *supra* note 13, at 975. Similar Mexican statutes redefined "archaeological monuments" and expanded the scope of the statutory scheme in 1930 (Law on the Protection and Conservation of Monuments and Natural Beauty, 58 D.O. 7 (Jan. 31, 1930), *reprinted in* DuBOFF, *supra* note 13, at 976-980 (1977)), 1934 (Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty, 82 D.O. 152 (Jan. 19, 1934), *reprinted in* DuBOFF, *supra* note 13, at 972-974 (1977)), and 1970 (Federal Law Concerning Cultural Patrimony of the Nation, 303 D.O. 8 (Dec. 16, 1970), *reprinted in* DuBOFF, *supra* note 13, at 962-971 (1977)). For a review of the Mexican statutes, see *United States v. McClain*, 545 F.2d 988, 997 (5th Cir. 1977) (*opinion by* J. Wisdom).

25. Ley Federal Sobre Monumentos y Zonas Arqueologicos, Artisticos e Historicos [Federal Law Regarding Archaeological, Artistic and Historic Monuments and Zones], 312 Diario Oficial de la Federacion [D.O.] 16, *reprinted in* DuBOFF, *supra* note 13, at 958-961 (1977).

26. *Id.* art. 28.

27. *Id.* art. 27.

28. VISUAL ARTS, *supra* note 16, at 115.

29. Federal Law Regarding Archaeological, Artistic and Historic Monuments and Zones, *supra* note 25, art. 16.

30. *Id.* art. 21.

31. *Id.* art. 47-55.

D. U.S. Law

The National Stolen Property Act (NSPA) prohibits the transport in interstate or foreign commerce of any goods worth \$5,000 or more with knowledge that the goods were stolen, converted or taken by fraud.³² The NSPA subjects to criminal liability anyone who receives, conceals, stores, barter, sells, or disposes of any goods worth \$5,000 or more, or which constitute interstate or foreign commerce, with knowledge that the goods were stolen, unlawfully converted, or taken by fraud.³³ The NSPA does not specifically deal with cultural property, but rather with stolen goods. Congress' intent in enacting the NSPA, which has been in effect since 1934,³⁴ was to discourage theft and the receiving of stolen goods and to "aid the states [and foreign nations], which, because of jurisdictional limitations, could not prosecute the receivers or thieves of stolen property after that property moved across state lines."³⁵

The NSPA has been applied in two important U.S. court cases involving pre-Columbian cultural property imported into the United States. The first of these was *United States v. Hollinshead*.³⁶ In 1971, the government of Guatemala brought a civil action against Clive Hollinshead, an American art dealer, in a California state court for the return of Machaquila Stela II,³⁷ a Mayan stela³⁸ claimed by Guatemala to be its own. Under Guatemalan law, all pre-Columbian archaeological monuments are owned by the State and may not be removed without the government's permission.³⁹ Subsequent to the civil action being brought, Hollinshead and two co-conspirators were indicted by a federal grand jury for transporting and conspiring to transport in interstate and foreign commerce property stolen from Guatemala. In 1973, Hol-

32. 18 U.S.C. § 2314 (1976).

33. *Id.* § 2315.

34. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 344 (1982).

35. *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977).

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

37. "Machaquila" is the name of a Mayan archaeological site in Guatemala. See drawing of the stela done by archaeologist, Ian Graham, in DuBOFF, *supra* note 13, at 93.

38. Stelae are stone slabs, sometimes up to forty feet tall and weighing up to five tons, which are ornately carved with figures and hieroglyphs, erected in religious ceremonial centers. Bator, *supra* note 34, at 278. Mayan stelae are of major importance in deciphering the Mayan language. DuBOFF, *supra* note 13, at 69.

39. DuBOFF, *supra* note 13, at 91.

linshead and one of the co-conspirators were found guilty.⁴⁰ The main issue of the criminal case was whether the defendants knew the stela was "stolen." The court had received expert testimony as to the law of Guatemala regarding artifacts such as Machaquila Stela II, and there was also "overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stele, and that the stele was stolen."⁴¹ The Court of Appeals for the Ninth Circuit affirmed the convictions in 1974.⁴²

Another important case involving the application of the NSPA was *United States v. McClain*.⁴³ In that case, five individuals were convicted of conspiring to transport, receive, and sell stolen Mexican pre-Columbian artifacts, mostly small ceramics,⁴⁴ to an undercover FBI agent in interstate commerce in violation of the NSPA.⁴⁵ They were also convicted on other counts in violation of the same Act.⁴⁶ The *McClain I* court held:

[A] declaration of national ownership is necessary before illegal export of an article can be considered theft, and the exported article considered "stolen", within the meaning of the National Stolen Property Act. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.⁴⁷

This holding marked a "sharp departure"⁴⁸ from the general rule that had been accepted until then that it was not illegal to import a work of art into the United States simply because the work was illegally

40. Bator, *supra* note 34, at 346. The civil case was settled out of court by agreement. *Hot Art*, *supra* note 7, at 21.

41. *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

42. Bator, *supra* note 34, at 346.

43. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) [*McClain I*], rehearing denied, 551 F.2d 52 (5th Cir. 1977) (per curiam); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) [*McClain II*], cert. denied, 444 U.S. 918 (1979).

44. The artifacts included terra cotta figures and pottery, beads and a few stucco pieces. *Hot Art*, *supra* note 7, at 28.

45. *McClain I*, 545 F.2d 988, 992 (5th Cir. 1977).

46. *Id.* The defendants appealed and the Court of Appeals for the Fifth Circuit reversed the convictions and remanded due to an erroneous jury instruction regarding the Mexican government's ownership of the artifacts. *Id.* at 1000.

47. *Id.*

48. James R. McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813, 824 (1983).

exported from another country.⁴⁹ Consequently, the *McClain* case eroded the distinction between “stolen” and “illegally exported.” “Illegal export, after the adoption of the declaration [of state ownership of all antiquities], suddenly becomes ‘theft’.”⁵⁰

Prior to the *McClain* decisions, Congress enacted, in 1972, legislation prohibiting the import into the United States of monumental pre-Columbian sculpture or murals exported illegally from their country of origin.⁵¹ This statute, like the *McClain* holding, is an abrogation of the long-standing and generally accepted rule that it is not a violation of U.S. law to import an item simply because it has been illegally exported from another country.⁵² Thus, the statute is triggered not by a showing that the artifacts were *stolen*, but rather that they were *illegally exported*.⁵³ The statute applies, however, only to pre-Columbian “monumental or architectural” sculpture or mural⁵⁴ — a limited category of works.⁵⁵ The statute also provides a means for the country of origin to recover the object in question.⁵⁶ Any pre-Columbian monumental

49. *Id.* The case was remanded to determine when the pre-Columbian artifacts had been exported from Mexico and to apply the appropriate Mexican law to that export. *McClain I*, 545 F.2d 988, 1003 (5th Cir. 1977). At the retrial, the defendants were again convicted for violating the NSPA. *McClain II*, 593 F.2d 658 (5th Cir. 1979). The defendants again appealed, arguing that “Congress never intended the NSPA to reach items deemed ‘stolen’ only by reason of a country’s declaration of ownership.” *McClain II*, 593 F.2d at 663. The appellants also argued that “due process is violated by imposing criminal penalties through reference to Mexican laws that are vague and inaccessible except to a handful of experts who work for the Mexican government.” *McClain II*, 593 F.2d at 664. A different panel from the Court of Appeals for the Fifth Circuit rejected their arguments and upheld the convictions on the conspiracy count, but reversed the convictions on the substantive count on due process grounds. *McClain II*, 593 F.2d at 672. The court agreed with the earlier (*McClain I*) court’s holding that, “[I]n addition to the rights of ownership as understood by the common law, the NSPA also protects ownership derived from foreign legislative pronouncements.” *McClain II*, 593 F.2d at 664.

50. Bator, *supra* note 34, at 350.

51. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, Pub. L. No. 92-587, §§ 201-205, 86 Stat. 1297-98 (1972) (codified at 19 U.S.C. §§ 2091-2095 (1976)) [hereinafter Pre-Columbian Monumental Sculpture].

52. Bator, *supra* note 34, at 287.

53. *Id.* at 288.

54. Pre-Columbian Monumental Sculpture, *supra* note 51, § 202(a).

55. Hence, this statute was not used in the *McClain* indictments.

56. “Any pre-Columbian monumental or architectural sculpture or mural which is forfeited to the United States shall first be offered for return to the country of origin and shall be returned if that country bears all expenses incurred incident to such return and complies with such other requirements relating to the return as the Secretary shall prescribe.” Pre-Columbian Monumental Sculpture, *supra* note 51, § 203(b)(1).

or architectural sculpture or mural imported into the United States in violation of the statute is subject to seizure by customs officials and forfeiture under the customs laws.⁵⁷

A third U.S. statute which deals with the matter of cultural property is the Convention on Cultural Property Implementation Act (Cultural Property Act).⁵⁸ When the United States Senate ratified the UNESCO Convention in 1972, it did so subject to one "reservation" and six "understandings."⁵⁹ One of the "understandings" was that the provisions of the UNESCO Convention were not self-executing.⁶⁰ This

57. *Id.* § 203(a).

58. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, §§ 302-314, 96 Stat. 2350, 19 U.S.C.A. §§ 2601-2614 (1983) [hereinafter Cultural Property Act] reprinted in VISUAL ARTS, *supra* note 16, at 97-106.

59. Bator, *supra* note 34, at 370.

60. The one "reservation" and six "understandings" were:

The United States reserves the right to determine whether or not to impose export controls over cultural property.

The United States understands the provisions of the Convention to be neither self-executing nor retroactive.

The United States understands Article 3 not to modify property interests in cultural property under the laws of the states parties.

The United States understands Article 7(a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions.

The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties for the recovery of stolen cultural property to the rightful owner without payment of compensation. The United States is further prepared to take the additional steps contemplated by Article 7(b)(ii) for the return of covered stolen cultural property without payment of compensation, except to the extent required by the Constitution of the United States, for those states parties that agree to do the same for the United States institutions.

The United States understands the words "as appropriate for each country" in Article 10(a) as permitting each state party to determine the extent of regulation, if any, of antique dealers and declares that in the United States that determination would be made by the appropriate authorities of state and municipal governments.

The United States understands Article 13(d) as applying to objects removed from the country of origin after the entry into force of this Convention for the states concerned, and, as stated by the Chairman of the Special Committee of Governmental Experts that prepared the text, and reported in paragraph 28 of the Report of that Committee, the means of recovery of cultural property under subparagraph (d) are the judicial actions referred to in subparagraph (c) of Article 13, and that such actions

meant that the UNESCO Convention would not have legal force in the United States until Congress enacted implementing legislation.⁶¹ After nearly ten years of debate in Congress over how best to implement the UNESCO Convention, the Cultural Property Act was finally passed in late 1982.⁶² One of the reasons it took nearly ten years to enact the implementing legislation is that under the UNESCO Convention, the nation of origin is given the power to define "illicit" as it pleases.⁶³ Article 3 of the UNESCO Convention defines "illicit" as any trade in cultural property that is "effected contrary to the provisions adopted under this Convention by the States Parties thereto."⁶⁴ Therefore, if Mexico adopted legislation that prohibited the export of all pre-Columbian artifacts (as it has done), then the export of *any* pre-Columbian object from Mexico would be "illicit" under the UNESCO Convention.⁶⁵ Art importing nations such as the United States have called this the blank check feature of the UNESCO Convention.⁶⁶

The heart of the Cultural Property Act provides that the President may, upon the request of any "State Party,"⁶⁷ enter into agreements to impose import restrictions on specified archaeological or ethnological material.⁶⁸ Before entering into any such agreement, the President must first determine that: (1) the cultural patrimony of the State Party is

are controlled by the law of the requested State, the requesting State having to submit necessary proofs.

VISUAL ARTS, *supra* note 16, at 95-96.

61. *Id.* at 96.

62. For an account of the history leading to the passage of the Cultural Property Act, see McAlee, *supra* note 48, at 813-820.

63. *Two Ways of Thinking*, *supra* note 9, at 845.

64. UNESCO Convention, *supra* note 6, art. 3.

65. *Two Ways of Thinking*, *supra* note 9, at 844. See also McAlee, *supra* note 48, at 815.

66. *Id.*

67. A "State Party" is any nation which has ratified, accepted, or acceded to the UNESCO Convention.

68. Cultural Property Act, *supra* note 58, § 303(a)(2). The U.S. has only done so twice. In 1987, the U.S. Information Agency imposed emergency restrictions on the importation of pre-Columbian ceramic and stone artifacts from the Cara Sucia region of El Salvador, and in 1989, it imposed emergency restrictions on the importation of antique textiles from the Bolivian community of Coroma. The agency is considering a request by Canada for an agreement that would stop the flow of Canadian Indian and Eskimo artifacts to the U.S., and a request by Peru for emergency restrictions on the importation of artifacts looted from burial grounds of the Moche Kingdom in northern Peru. Stanley Meisler, *Art and Avarice; In the Cut-Throat Art Trade, Museums and Collectors Battle Newly Protective Governments Over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989, (Magazine), at 8.

in jeopardy due to the pillage of its archaeological or ethnological materials;⁶⁹ (2) the State Party has taken measures consistent with the UNESCO Convention to protect its cultural patrimony;⁷⁰ (3) the import restrictions would be of substantial benefit in deterring a serious situation of pillage and less drastic remedies are not available;⁷¹ and (4) the import restrictions are consistent with the general interest of the international community.⁷² Further, the Cultural Property Act restricts the President from entering into any agreement unless the import restrictions are "applied in concert with similar restrictions"⁷³ by nations having a significant import trade in such archaeological or ethnological material.⁷⁴

III. THE ARGUMENTS

A. *Cultural Value*

Certain works of art and cultural objects have a specific cultural value to the society from which they came.⁷⁵ Probably one of the most well known and most controversial examples is the "Elgin Marbles,"⁷⁶ so named after Lord Elgin,⁷⁷ the British Ambassador to Constantinople,⁷⁸ who removed a tremendous quantity of ancient Greek marble statues, sculptures, slabs of frieze, and other antiquities from the Parthenon in Athens (with the permission of the Turkish government, which controlled Greece at the time) and sold them to the British government.⁷⁹ Although the Greek government has formally requested

69. Cultural Property Act, *supra* note 58, § 303(a)(1)(A).

70. *Id.* § 303(a)(1)(B).

71. *Id.* § 303(a)(1)(C).

72. *Id.* § 303(a)(1)(D).

73. *Id.* § 303(c)(1).

74. *Id.*

75. *Hot Art*, *supra* note 7, at 8.

76. See generally DuBOFF, *supra* note 13, at 65-69, and WILLIAMS, *supra* note 3, at 9.

77. Scotsman Thomas Bruce, 7th Earl of Elgin (1766-1841), was a member of the British House of Lords and a career diplomat who had a strong desire to improve the position of fine arts in Great Britain by introducing British artists to ancient Greek art. VISUAL ARTS, *supra* note 16, at 4.

78. The former name for Istanbul, Turkey. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 285 (new college ed., 1980). Constantinople was the capital of the Ottoman Empire (1299-1919). *Id.* at 931. Athens, Greece, was also a part of the Ottoman Empire. VISUAL ARTS, *supra* note 16, at 4.

79. See generally WILLIAM ST. CLAIR, LORD ELGIN AND THE MARBLES 99-120, 250-62 (1983). See also JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 62, 67 (1989).

their return,⁸⁰ the marbles are still in the hands of the British government and on display in the British Museum in London.⁸¹

"Objects charged with cultural significance, the loss of which deprives a culture of one of its dimensions,"⁸² should be repatriated to their country of origin. This idea is embodied in Article 2 of the UNESCO Convention: "The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property"⁸³ Greece has claimed that the taking of the Elgin Marbles was both illegal and immoral⁸⁴ and has attempted in vain to obtain the return of the marbles.⁸⁵ Because the Parthenon is a symbol of the cultural identity of the Greek people, the absence of its marbles is "psychologically most intolerable."⁸⁶

80. VISUAL ARTS, *supra* note 16, at 13. The poet, Byron, attacked Lord Elgin in his poem, *Childe Harold*:

But most the modern Pict's ignoble boast,
To rive what Goth, and Turk, and Time hath spared:
Cold as the crags upon his native coast,
His mind as barren as his heart is hard,
Is he whose head conceived, whose hand prepared,
Aught to displace Athena's poor remains:
Her sons too weak the sacred shrine to guard,
Yet felt some portion of their mother's pains,
And never knew, till then, the weight of despot's chains.
What! shall it e'er be said by British tongue,
Albion was happy in Athena's tears?
Though in thy name the slaves her bosom wrung,
Tell not the deed to blushing Europe's ears;
The ocean queen, the free Britannia, bears,
The last poor plunder from a bleeding land:
Yes, she, whose generous aid her name endears,
Tore down those remnants with a harpy's hand,
Which envious Eld forbore, and tyrants left to stand.

Id. at 12.

81. *Id.* at 137. The term "Elginism" was coined by the French to refer to a form of vandalism of cultural objects. *Id.* at 13.

82. Robert Browning, *The Case for the Return of the Parthenon Marbles*, 36 MUSEUM 38 (1984), reprinted in VISUAL ARTS, *supra* note 16, at 135 [hereinafter Browning].

83. UNESCO Convention, *supra* note 6, art. 2.

84. VISUAL ARTS, *supra* note 16, at 13.

85. See *supra* notes 80-81 and accompanying text.

86. The Director General of UNESCO defined "cultural property" as a people's "irreplaceable cultural heritage, the most representative works of a culture, which the dispossessed regard as of highest importance, and the absence of which is psychologically most intolerable." Browning, *supra* note 82.

Another example of a piece of cultural property which has a specific cultural value to the society from which it came, but which, unlike the Elgin Marbles, has been returned to its people is the Afo-A-Kom, a wooden statue of religious and cultural importance to the Kom (a tribe in the West African country of Cameroon).⁸⁷ The Afo-A-Kom was acquired by a New York art dealer and was on exhibit in 1973 when officials of the Cameroon Embassy learned of the statue's whereabouts.⁸⁸ The Ambassador from Cameroon in Washington explained the significance of the Afo-A-Kom this way: "It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together."⁸⁹ After only a few days and a lot of publicity about the matter, the dealer returned the statue to the tribe.⁹⁰

The Afo-A-Kom for the Kom, the Elgin Marbles for the Greeks, perhaps the Aztec Calendar Stone for the Mexicans and the Liberty Bell for Americans are examples of objects that have cultural importance for the society quite distinct from their value as works of art, as antiquities, or as materials of scholarship.⁹¹

There is a competing interest at play in this idea of the "specific cultural value"⁹² of an object to the society from which it came, which is the cultural value to people outside the nation of origin of the art. The assumption underlying the notion that the "export . . . of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin"⁹³ is that the inhabitants of the country of origin have a property right or an interest in the object which is not shared by peoples of nations outside the country of origin. It is a way of thinking about cultural property as a part of a *national* cultural heritage.⁹⁴

87. VISUAL ARTS, *supra* note 16, at 56.

88. *Id.*

89. Official Statement made by His Excellency Francois-Xavier Tchounqui, the Ambassador of the United Republic of Cameroon on the Occasion of the Restoration of the Cameroon Sacred Statue, DuBOFF, *supra* note 13, at 119.

90. VISUAL ARTS, *supra* note 16, at 56-57. The trade and "widespread looting" of African cultural property is currently of great concern to many people. Ade Obayemi, director of museums and monuments in the West African nation of Nigeria recently stated, "Placing monetary values on these things [cultural property] is outrageous. They are not *objets d'art*. For us, they have spiritual and religious dimensions. They are our cultural heritage." Michelle Faul, *Widespread Looting of Antiquities Robs Africa of Its Cultural Heritage*, L.A. TIMES, Mar. 24, 1991, at A9.

91. See, e.g., *Hot Art*, *supra* note 7, at 8.

92. *Hot Art*, *supra* note 7, at 8.

93. UNESCO Convention, *supra* note 6, art. 2.

94. *Two Ways of Thinking*, *supra* note 9, at 832.

A better way to view cultural property is as "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction."⁹⁵ This idea is embodied in the preamble to the Hague Convention:

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 protection⁹⁶

Certain works of art or artifacts such as the Afo-A-Kom or the Liberty Bell probably should remain in their country of origin because they have a unique religious or historical significance to the people of that particular nation which is not shared by people of other nations. The item embodies a religious bond unique to one group of people, such as the Afo-A-Kom, or symbolizes a monumental historical event, such as the Liberty Bell — it cannot be replaced. In many other instances, however, the cultural property is duplicated and a great number of those types of works exist, such as the Greek marbles and Mexican pre-Columbian pots.

Early man . . . had a vivid belief in a concrete afterlife. Therefore, the tombs of notables were richly filled with the accoutrements of wealth and the symbols of rank. To insure proper service in the afterlife, slaves and wives were killed in very early times but, happily, in later and higher cultures, effigy statues were placed in the tombs in lieu of living retinue. Such tomb furnishings form the overwhelming bulk of the archaeological material which is found today in museum and private collections and in dealers' galleries.⁹⁷

It would serve the cultural interest of mankind better if duplicated artifacts were available to museums, scholars, and collectors throughout the world, rather than only being available in the country of origin.

95. *Id.* at 831.

96. Hague Convention, *supra* note 11 (emphasis added).

97. Letter from Andre Emmerich to the Washington Post (July 6, 1977) *reprinted* in VISUAL ARTS, *supra* note 16, at 72, 73; *see also* Walter Alva, *Discovering the New World's Richest Unlooted Tomb*, 174 NAT'L GEOGRAPHIC 510 (1988).

If an art-rich country, like Mexico, "indiscriminately retain[s] duplicates of objects beyond any conceivable domestic need, while refusing to make them available to museums, collectors and dealers abroad, [then it contributes to the] cultural impoverishment of people in other parts of the world."⁹⁸

It is generally known that Mexico possesses large quantities of antiquities that are simply hoarded. They duplicate works already fully represented in Mexican museums; they are not exhibited; they are not needed for and, in any case, are not available for study. They are and will remain unused and anonymous.⁹⁹

Access to the cultural objects is another related consideration. Assuming that cultural objects are a part of the "cultural heritage of all mankind," then mankind's cultural interest is best served if a greater number of people have access to the objects. The works of a culture should be widely distributed rather than concentrated in one place. "If all Aztec antiquities were kept in Mexico, that part of 'the cultural heritage of all mankind' would be, in practical terms, inaccessible to most of mankind."¹⁰⁰ Additionally, if all of the source nations' cultural property were repatriated, the world's museums would be emptied. Great collections such as those of the British Museum in London, the Louvre in Paris, and the Smithsonian Institute in Washington D.C. would be dismantled if the precedent of return were ever established.¹⁰¹

B. Archaeological Value

Another argument for the retention of cultural property is to prevent the destruction of the records of civilization.¹⁰² For example, archaeologists studying the ancient Mayans — a civilization whose complex hieroglyphic language is still largely undeciphered¹⁰³ — can only understand the significance of their monumental architecture and sculpture by examining it at the site.¹⁰⁴ Deciphering the Mayan language requires knowing the source of the glyphs and the location of the stela

98. *Two Ways of Thinking*, *supra* note 9, at 847.

99. *Hot Art*, *supra* note 7, at 16.

100. VISUAL ARTS, *supra* note 16, at 62.

101. See Godfrey Hodgson, *Bringing Home the Works That Went Astray*, INDEPENDENT, Mar. 21, 1990, at 21 (book review).

102. *Hot Art*, *supra* note 7, at 9.

103. Bator, *supra* note 34, at 279.

104. *Hot Art*, *supra* note 7, at 9.

they came from — even within a particular Mayan site — so that the glyphs can be cross-related with pictures and with each other.¹⁰⁵ Removing the sculpture or a part of it “takes it out of context and diminishes its meaning as a record of civilization.”¹⁰⁶ When studied in context, such artifacts can give significant information about the Mayan civilization; when unrecorded and separated from their original context, their historical and cultural value is almost nil.¹⁰⁷

The problem is that unauthorized, clandestine excavations and removals are almost always undocumented.¹⁰⁸ “Not only do the Mayan articles lose much of their archaeological significance when removed from their sites, but many of the articles are sent “underground” to private collections to which concerned scholars have no access.”¹⁰⁹

Also, in the case of the Mayan stelae, because they are such enormous monuments,¹¹⁰ they must be cut or broken into smaller pieces in order to be removed and transported away from the site. In so doing, *esteleros*¹¹¹ often damage and mutilate the stelae.¹¹² One technique, called “thinning,” involves sawing (often with a chainsaw), hacking, splitting apart with crowbars, or simply smashing the stela into movable pieces.¹¹³ Another author has described the damage this way:

The stelae are certainly not lightweight items. They measure up to twenty feet and weigh up to several tons. The plunderers have therefore had to develop techniques of removal, so as not to damage the means of their profit. Power saws are generally used. The stela is cut through vertically and the face removed. This is then cut into smaller segments, for transportation purposes and in order to multiply the profit by selling the pieces separately.¹¹⁴

105. Bator, *supra* note 34, at 279.

106. *Hot Art*, *supra* note 7, at 9. See also DuBOFF, *supra* note 13, at 69.

107. Grace Glueck, *Issue and Debate: Should Trade in Ancient Artifacts Be Restricted*, N.Y. TIMES, June 5, 1984, at C13.

108. *Two Ways of Thinking*, *supra* note 9, at 843.

109. DuBOFF, *supra* note 13, at 69.

110. See Bator, *supra* note 34, at 278.

111. An *estelero* is a looter who steals or mutilates a stela. (Author's translation.)

112. Bator, *supra* note 34, at 278.

113. *Id.* In Mexico, armed looters have used heavy machinery to hack apart ancient monuments, and have opened fire on strangers who disturbed their pillaging. *Black Market Flourishes Despite Law on Art Relics*, CHI. TRIB., Nov. 28, 1985, at Tempo 14D.

114. WILLIAMS, *supra* note 3, at 113.

Another method is to heat the stone with fire and then pour water on it until it shatters.¹¹⁵ The looters are generally after the pictorial stone carvings rather than the glyphs on the stelae because the carvings are more valuable on the market.¹¹⁶ Consequently, the glyphs are destroyed in the process of thinning, and some of the most important records of the Mayan civilization are lost forever.

The concern with de-contextualization is an important one which deserves protection, especially with regards to undocumented archaeological objects.¹¹⁷ Dr. Clemency Coggins, an art historian specializing in pre-Columbian art, was the first to decry the Maya crisis to the art world:

In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered.¹¹⁸

The archaeologist's concern with the loss of information is certainly a valid one. The archaeological interest should be protected. However, objects which have been properly excavated and fully documented or artifacts which are movable without a significant loss of information (such as sculptures, ceramics, coins, beads, jewelry, etc.) should not be unavailable for sale and export. Their absence will not destroy or damage any records of civilization, and allowing their export will likely foster further interest and scholarship in the civilization.

Another interest in Mexico's retention of its pre-Columbian art is in preserving the integrity of the archaeological site. Not only is archaeological and ethnological value¹¹⁹ lost, but some of the aesthetic value of the site is lost if the stelae and other artifacts are dismembered and removed from the site. This interest in preserving the integrity of the site is expressed in the preamble of the UNESCO Convention:¹²⁰ "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that *its true value can be appreciated*

115. DuBOFF, *supra* note 13, at 70.

116. Bator, *supra* note 34, at 279.

117. *Two Ways of Thinking*, *supra* note 9, at 844.

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

119. See *supra* notes 102-107 and accompanying text.

120. See *supra*, text accompanying notes 15-19.

*only in relation to the fullest possible information regarding its origin, history and traditional setting. . . .*¹²¹

It is true that cultural objects can be appreciated in their traditional setting. To be able to stand among the pillars of the Parthenon atop the Acropolis and behold its marble statuary and architectural ornaments would certainly inspire an appreciation of the ancient Greek civilization. However, it is a mistake to say that one would have *no appreciation* for the true value of the Parthenon's sculptures simply because they are being viewed in a British museum and not in Athens. To be able to view relics of the Mayas and the Aztecs at their original archaeological sites would be optimal aesthetically, but it is certainly possible to appreciate them away from their traditional settings as well.

C. *The Black Market*

As a result of the total prohibition on the sale or exchange of pre-Columbian works of art and cultural property between Mexico and the United States,¹²² the market for those objects can only be satisfied illegally.¹²³ Consequently, the current state of the law regarding pre-Columbian art has created a black market and the effect is contrary to Mexico's own best interest.

One of the consequences of an illicit market is a loss of control over the traffic in this type of art.¹²⁴ If there were an open and legal market, the trade could be regulated. Under the current state of the law, excavation is frequently done clandestinely and hurriedly by amateurs, resulting in damage to the artifacts and sites and a loss of archaeological information.¹²⁵

The dealers in pre-Columbian art make use of local peasants who know the jungle. In areas where the daily wage is under \$2.00, it is not difficult to hire men to remove the Mayan art. When a stela may be valued at over \$100,000 in New York or Los Angeles, the incentives to locate ruins are enormous.¹²⁶

121. UNESCO Convention, *supra* note 6, pmbl. (emphasis added).

122. See *supra* notes 13-74 and accompanying text for a discussion on the current state of the law in the U.S. and Mexico regarding pre-Columbian cultural property.

123. VISUAL ARTS, *supra* note 16, at 53.

124. *Hot Art*, *supra* note 7, at 16.

125. *Id.*

126. DuBOFF, *supra* note 13, at 70.

An open market would redirect the profit so that supervised excavations could be carried out and be properly conducted by responsible and professionally-trained people.¹²⁷ The local Mexican labor force could be legally employed in this manner and earn legitimate wages.

The problem of an illicit trade in stolen art and cultural property will not be solved unilaterally. The steps taken by the United States to stop the import of pre-Columbian art has simply resulted in a re-direction of the flow of artifacts to Europe.¹²⁸

[M]ere American self-restraint will do no good in this area. In many sectors of the art market, the Japanese are already spending more than American collectors. And before much time has passed, this will be true of *every* sector of the art market. In addition, pre-Columbian objects also command very high prices in Europe, especially in Germany and Switzerland. Unless a self-denying ordinance is truly international, in fact, it will merely have the effect of denying the United States what other people will then snap up.¹²⁹

The United States has significantly reduced the importation of pre-Columbian artifacts into the country, but the trade still continues to flourish — elsewhere.¹³⁰ Andre Emmerich, a prominent New York art and antiquities dealer (who no longer deals in pre-Columbian art) has said, "It all goes to Geneva now. Don't kid yourself. The market continues, but not here."¹³¹

D. *Physical Safety*

Concern for the physical safety of pre-Columbian stelae and other cultural property may even justify their removal from the site to protect them from the damage of looters.¹³² The international museum community plays an important role in protecting and preserving cultural patrimony.¹³³ The Elgin Marbles,¹³⁴ for example, located in the British

127. *Hot Art*, *supra* note 7, at 18.

128. Meisler, *supra* note 18, at 8 (statement by Constance Lowenthal, Executive Director of the International Foundation for Art Research).

129. KARL E. MEYER, *THE PLUNDERED PAST* 168 (1973) (quoting a statement made in a letter to the author by columnist Joseph Alsop).

130. Grimes, *supra* note 16.

131. *Id.*

132. *See supra* notes 110-116 and accompanying text.

133. Glueck, *supra* note 107.

134. *See supra* text accompanying notes 76-86.

Museum have been protected from the ravages of atmospheric pollution in Athens and the effects of the elements.¹³⁵

Andre Emmerich, the prominent New York dealer in both contemporary art and antiquities,¹³⁶ maintains that ethnological material, which consists largely of abandoned tribal ritual art such as masks, shields, and other ceremonial objects, would simply be "left to rot" if not salvaged by dealers, collectors, and museums.¹³⁷

The deplorable condition of some museums in developing countries is an additional reason to remove the trade restrictions on pre-Columbian cultural property. Museums which are under-funded, under-staffed, and which lack adequate climate control and theft control produce detrimental effects on the well-being and preservation of artifacts housed under those conditions. Pre-Columbian antiquities are sometimes better off outside the country of origin in the care of foreign museums, dealers, and collectors. The problem in Peru is especially critical.¹³⁸ Ceramics, textiles, and other objects have been stored in museums and storehouses without humidity controls and have been destroyed or seriously damaged by the humidity, termites, fungi, and rats.¹³⁹ Theft from inadequately guarded museums is another problem.¹⁴⁰

E. Economic Concerns

An economic interest is served in the retention and repatriation of pre-Columbian art.¹⁴¹ The presence of pre-Columbian works of art and archaeological sites in Mexico attracts tourists and their money and thereby enriches the nation's economy. Economically, *whoever* has pre-Columbian art and artifacts has something of value, and possession is necessary in order to enjoy the economic benefit. Therefore, it is

135. See photos comparing a metope from the Parthenon which has been in the British Museum with a metope in ruined condition which, until recently, was on the Parthenon in Athens. VISUAL ARTS, *supra* note 16, at 133.

136. See *supra* text accompanying note 131.

137. Letter from Andre Emmerich to the Washington Post (July 6, 1977), reprinted in VISUAL ARTS, *supra* note 16, at 72.

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

139. *Id.*

140. *Id.* According to U.S. government estimates, art theft is a \$2 billion a year business. According to one British estimate, it amounts to \$6 billion a year, making art theft one of the world's most profitable criminal enterprises behind the illegal drug business. James Walsh, *It's a Steal*, TIME, Nov. 25, 1991, at 86, 86-87.

141. *Hot Art*, *supra* note 7, at 10.

really a question of legal ownership as to who should enjoy the economic value of the cultural property.

Mexico possesses large quantities of antiquities and is considered to be an art-rich nation.¹⁴² However, it is considered to be a poor nation in terms of gross national product and per capita income. If Mexico treated its cultural treasury as an "exploitable natural resource" which could be "mined" as a source of income, its national economy could be enhanced.¹⁴³ Unique or monumental finds which are important to the country's history or culture could be maintained in the country, but duplicate artifacts such as pots, carvings, and jewelry which are already well represented in Mexican museums could be sold on the international market or traded for other artifacts which are not currently represented in Mexican museums. "The prices paid in the international market for such works would finance further exploration, preservation and scholarship."¹⁴⁴

F. Artistic Value

"There is also an important national artistic interest in retaining works of art."¹⁴⁵ The presence of art from the past of the homeland can be an inspiration to living artists. At the beginning of the Mexican revolution in 1911, a group of young Mexican painters looked to the native heritage of pre-Columbian art and incorporated it into a national style.¹⁴⁶ An example of the work of one of these painters, Jose Clemente Orozco, can be seen on a mural cycle at the University of Guadalajara in Mexico.¹⁴⁷ Besides inspiring artists, viewing a great work of art enriches the life of anyone who views it.¹⁴⁸ "A society deprived of its artworks is an impoverished society."¹⁴⁹ However, there is no reason that the artistic interest should be halted at national boundaries.

G. Moral Correctness

In 1977, Abner Mikva, a U.S. Congressman who sponsored legislation to implement the UNESCO Convention,¹⁵⁰ was quoted as

142. *Id.* at 16.

143. *Id.* at 18.

144. *Id.*

145. *Id.* at 11.

146. H.W. JANSON, HISTORY OF ART 651 (2d ed. 1977).

147. *Id.*

148. McAlee, *supra* note 48.

149. *Id.*

150. See *supra* notes 58-63 and accompanying text.

saying, "We're either a moral nation or we're not."¹⁵¹ This line of reasoning has been used (unsuccessfully) by Greece in arguing for the return of the Elgin Marbles¹⁵² from Britain. The problem lies in defining "moral".

Mexico, for example, has legislatively declared that all pre-Columbian objects located within the country are the property of Mexico and to remove them from the country is, essentially, theft.¹⁵³ Consequently, if an American tourist purchased and took out of Mexico an artifact such as a Mayan ceremonial mask which came from a tomb that a Mexican landowner had discovered on his own property and sold to the tourist, the tourist would have not only violated Mexican law, but under the *McClain* decision,¹⁵⁴ would also be guilty of theft under U.S. law.¹⁵⁵ "Moral" is thus determined in this case by Mexican law. However, the Mexican government should not have a superior moral or property right over the very artifacts that the majority of the Mexican population's ancestors (the Spanish conquistadors) attempted to destroy.¹⁵⁶

H. The Ambassadorial Value

Finally, and perhaps the most compelling argument for free trade in pre-Columbian art is that "art is a good ambassador, creating an

151. George Lardner, Jr., *Stolen Art Traffic Bill Causes Flap; Dealers Oppose Bill to Curb Traffic in Stolen Art*, WASH. POST, May 18, 1977, at A1.

152. See *supra* text accompanying notes 76-85.

153. See *supra* text accompanying notes 23-31.

154. See *supra* text accompanying notes 43-50.

155. *Id.*

156. Speaking at a College Art Association symposium in 1971 on the international illicit traffic in art, Andre Emmerich (see *supra* text accompanying note 131) stated:

Like everyone else I would like to be on the side of virtue, motherhood, and so forth. I am not quite sure on which side virtue lies. . . . Do the descendants of the Turks who drove out the Greeks from Asia Minor have a better right to the art made by the ancestors of the Greeks? Do the destroyers of the Maya civilization [have more right] to its remnants than we do? I propose that it's a basic moral question. I beg the obvious fact that the art of mankind — the art of ancient mankind — is part of mankind's cultural heritage, and does not belong exclusively to that particular geographic spot where ancient cultures flourished. I think that this country more than any other has a special claim to the arts of all mankind. . . . American institutions have bought the objects they have acquired, and have not only paid with money, but we have paid with the debt of scholarly contributions. . . . I would say that probably the majority of work on pre-Columbian art has been done by American scholars. So I think we have paid our way.

MEYER, *supra* note 129, at 28-29.

understanding of, interest in and admiration for the country of origin. . . . Movement of art internationally also broadens tastes and sensibilities, eliminating parochialism and ignorance, and promoting international understanding."¹⁵⁷

IV. CONCLUSION

In an attempt to stop the destruction of archaeological monuments and the flow of pre-Columbian cultural property outside Mexican national boundaries, the Mexican and United States governments have put into effect an unusually restrictive legal scheme. There is a virtual ban on the trade in pre-Columbian antiquities between the two countries. All parties concerned — the Mexican and U.S. governments, museum curators and museum-goers, art dealers, collectors, archaeologists, scholars, and other interested persons — would all agree that cultural property should be preserved and protected. The current state of the law most certainly has restricted the flow of pre-Columbian antiquities into the United States, and the Mexican *national* interest is being protected. However, because of a larger *international* interest, for the reasons stated in this Note, it does not appear to be the best way of treating the "cultural heritage of all mankind."

Lynn S. Waterman*

157. DuBOFF, *supra* note 13, at 75.

* J.D. candidate, 1993, Indiana University School of Law—Indianapolis.