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REFLECTIONS ON CRIMINAL JURISDICTION IN INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

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I. INTRODUCTION

Questions of jurisdiction concerning protection of cultural property[1] are marginally addressed in conventions relative to the international protection of cultural property since only the territoriality theory is relied upon either explicitly or implicitly in the various relevant texts.[2] The 1982 Convention on the Law of the Sea,[3]

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1. The term "cultural property" is used herein as defined in 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, *reprinted in* 10 *I.L.M.* 289 (1971) [hereinafter cited as UNESCO Convention].

2. None of the major international agreements concerned solely with protection of cultural property contain detailed, explicit statements regarding jurisdiction. However, a reliance on the territorial theory of jurisdiction may be found in or inferred from the provisions of these relevant conventions: Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 289 [hereinafter cited as Roerich Pact]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter cited as 1954 Hague Convention]; European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139 [hereinafter cited as European Cultural Convention]; European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 66 Europ. T.S. 736 [hereinafter cited as European Archaeological Convention]; UNESCO Convention, *supra* note 1; Organization of American States: Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, OAS G.A. Res. 210 (VI-0/76) (1976), *reprinted in* 15 *I.L.M.* 1350 (1976) [hereinafter cited as OAS Convention], Convention Concerning Protection of World Cultural Property and Natural Heritage, U.N. Doc. A/CONF. 48/PC/11/Add. 3, 15 (1972) [hereinafter cited as World Heritage Convention].

3. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (not yet in force), art. 303 [hereinafter cited as Convention on the Law of the Sea]. Article 303 contains only a limited jurisdictional statement regarding the contiguous zone defined in article 33. Removal of property from the contiguous zone without the consent of the coastal state is presumed to infringe upon that state's territory in violation of article 3 of the convention. In limiting the scope of the article to the contiguous zone, the Convention includes no rule governing property found beyond the zone. Also, paragraph 2 of article 303 limits the scope of a coastal state's jurisdiction over cultural property found within the contiguous zone to prevent the removal of the property from the zone for the purpose of controlling traffic in antiquities only. The question of jurisdiction over property left *in situ* for study or other purposes is left unresolved. Paragraph 3 further limits article

however, contains two clauses dealing with protection of cultural property, including applicable theories of jurisdiction,[4] and what may be deemed guidelines for resolving conflicts of jurisdiction.[5] Scholarly writings on the subject jurisdiction are also limited, though the subject of international protection of cultural property has been treated extensively and in depth.[6]

Theories of jurisdiction, choice of law policies and rules, and

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303 by excluding, from the scope of the article, property subject to the rights of identifiable owners or the rules of admiralty. For a further discussion of the articles contained in the Convention on the Law of the Sea relevant to protection of cultural property, see Note, *Archaeological and Historical Objects: The International Legal Implications of UNCLOS III*, 22 VA. J. INT'L L. 777 (1982). *See also, e.g.*, H. CRANE-MILLER, INTERNATIONAL LAW AND MARINE ARCHAEOLOGY (1973) (examination of national and international maritime rights).

4. For the position of the United States, see RESTATEMENT OF THE FOREIGN RELATIONS OF THE UNITED STATES (Revised), (Tentative Draft No. 1), considered by the ALI in June 1980, *reviewed in* 74 AM. J. INT'L L. 954 (1980);Tentative Draft No. 2, considered by the ALI in May 1981, *reviewed in* 75 AM. J. INT'L L. 987 (1981); Tentative Draft No. 3, considered by the ALI in May 1982, Part IV - Jurisdiction, §§ 401, 419-20, 431-33, *reviewed in* 76 AM. J. INT'L L. 655 (1982) [hereinafter cited as RESTATEMENT]. *See also Harvard Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437 (Supp. 1935) [hereinafter cited as *Harvard Draft Code*]. For the writings of scholars on international law, see *e.g.*, E. LAUTERPACHT, OPPENHEIM: INTERNATIONAL LAW 43-79 (1952); 2 D.P. O'CONNELL, INTERNATIONAL LAW 665 (1965); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-253 (1968); W. BISHOP, INTERNATIONAL LAW 531-653 (3d ed. 1971); G. SCHWARTZENBERGER, INTERNATIONAL LAW 183-283 (1976) (for the writings of scholars on international law). For international criminal law scholars, see, *e.g.*, I M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, ch. VI (1983) [hereinafter cited as EXTRADITION]. For a pioneer in the area of extraterritorial criminal jurisdiction and conflicts of criminal jurisdiction, see H.F. DONNEDIEU DE VABRES, INTRODUCTION A L'ETUDE DU DROIT PENAL INTERNATIONAL (1922), H.F. DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* (1928). *See also* Szaszy, *Conflict of Laws Rules in International Criminal Law and Municipal Criminal Law in Western and Socialist Countries*, in II M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 135 (1973); Sarkar, *The Proper Law of Crime in International Law*, 11 INT'L & COMP. L.Q. 446 (1962) (examination of theories of jurisdiction for international criminal law).

5. *See* RESTATEMENT (SECOND) ON THE CONFLICTS OF LAW § 6 (1971). For contemporary U.S. scholarly writings, see e.g., A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW (1963); H. GOODRICH & E. SCALES, HANDBOOK OF THE CONFLICT OF LAW (1964); R. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); A. LEFLAR, AMERICAN CONFLICTS LAW (1968); W.L. REESE & M. ROSENBURG, CASES AND MATERIALS ON CONFLICT OF LAWS (1978); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1980) (background, usage and commentaries on conflict of laws).

6. *Cf.* ART LAW: DOMESTIC AND INTERNATIONAL (L. DuBoff ed. 1975); L. DUBOFF, THE DESKBOOK OF ART LAW (1977) [hereinafter cited as DESKBOOK]; Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982); Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971); Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689 (1974); Nafziger, *UNESCO-Centered Management of International Conflict Over Cultural Property*, 27 HASTINGS L.J. 1051 (1976); Nahlik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069 (1976); Merryman, *A Course in Art and the Law*, 26 J. LEGAL EDUC. 551 (1974). *See also The Penal Protection of Works of Art* (Proceedings of the International Institute of Higher Studies in Criminal Sciences, 1983).

methods of resolving conflicts of jurisdiction are threshold issues which should be addressed by the drafters of any international convention[7] and, in particular, by the drafters of instruments concerning international protection of cultural property (due to the transnational nature of the issues to which such instruments address themselves). Regrettably, the issue of jurisdiction in international agreements concerning protection of cultural property has never been sufficiently addressed and, thus, deserves further consideration.

The failure of any international agreement to adopt specific theories of jurisdiction or to at least provide some policy or rules regarding conflicts of jurisdiction creates problems with respect to the dual jurisdictional questions of legislation and enforcement. Ultimately, the recognition of foreign judicial judgments is questioned. The very nature of international protection of cultural property further compounds the problems where an international agreement does not contain explicit jurisdictional provisions.[8] This arises

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7. *See* M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CODE 145 (1980) (theories of jurisdiction applicable to international crimes are discussed in article III of the Enforcement Part) [hereinafter referred to as DRAFT INTERNATIONAL CRIMINAL CODE]. The Code was presented at the VIth U.N. Congress on Crime Prevention and the Treatment of Offenders, (Caracas, Venezuela, 1980) U.N. Doc. E/1980/L.1. For commentaries on the Draft International Criminal Code, see 52 REVUE INTERNATIONALE DE DROIT PENAL, No. 3-4 (1981).

8. The complex jurisdictional problems often encountered in an action at law to protect cultural property may be illustrated by Union of India v. Norton Simon Foundation. In 1951, the Swapuran Nataraja, a 10th century bronze representation of the Lord Shiva as Lord of the Cosmic Dance, was excavated in India. By the laws of India, this bronze is a legal entity capable of owning property, suing, and being sued. The image, while being restored in 1956, was stolen and a copy substituted in its place. In 1967, the Nataraja came into the possession of a Bombay art collector and was displayed by him.

Several years later, the statue was exported to the United States and sold by Ben Heller, a noted art dealer, to the Norton Simon Foundation. An export permit for "a 10th or 11th century dancing shiva" was obtained when the bronze left India. In 1973, the Nataraja was loaned to the Metropolitan Museum of Art for an exhibit. The Metropolitan notified the government of India of its plan to exhibit the piece. Due to the protests of the Indian government and the intervention of the Department of State, the Metropolitan agreed not to exhibit the idol.

In late 1974, India filed suit in England, New York (Ben Heller's domicile), and Los Angeles (the domicile of Norton Simon and the Norton Simon Foundation). Criminal proceedings were instituted against the original conservateur and his several accomplices. The complaint alleged a conspiracy to steal the Nataraja and traced the statue's path from the alleged theft to its sale to Norton Simon. India demanded return of the bronze, $500,000 damages for intentional infliction of mental suffering, $1 million in punitive damages, and costs incurred in locating the idol and litigating its return. Damages of $4 million were demanded in the event the Nataraja was not returned.

The Norton Simon Foundation denied that India had either title or rights to the im-

essentially because relevant international instruments either distinguish or blur the distinction between the contexts of war and peace, and the spectrum between war and peace (involving different levels of hostility). Some treaties are applicable only during times of armed conflict;[9] others are applicable during times of peace but also contain provisions regarding periods of belligerent occupation;[10] still others do not specifically state that they apply exclusively during times of peace, although such exclusivity may be inferred,[11] and others apply in time of both war and peace.[12] Rules governing jurisdiction and policies affecting choice of law differ significantly

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age. The defendants argued that the plaintiffs should be denied relief by the doctrines of unclean hands, *in pari delicto*, waiver, and estoppel. With reference to the theft of the Nataraja, the defendants argued that India should be estopped from recovery by their own inaction. Defendants further argued that plaintiffs knew or should have known of the bronze's whereabouts since 1965 when it was displayed openly and notoriously in Bombay. Therefore, by virtue of English, Indian, New York, and California statutes of limitation, India had abandoned title to the object.

The defendants also argued that laches barred the suit because India had failed to take action to recover the Nataraja within a reasonable time after it was put on notice of the object's location. Norton Simon had purchased the object in reliance on this non-action and, therefore, plaintiffs should be equitably estopped from bringing suit. Finally, defendants alleged that the laws of India, if construed in the manner urged by the plaintiffs, were contrary to United States public policy and not applicable in an American court. *See* Union of India v. Norton Simon Foundation, No. 74 Civ. 5331. (S.D.N.Y. 1976) (second amended complaint); No. CV 74-3581-RJK. (C.D.Cal. 1976).

The case was eventually settled out of court. *See* No. CV 74-3581-RJK, Stipulation and Order (C.D. Cal. 1976). Plaintiffs obtained a document quit-claiming all the defendants' right, title and interest in and to the Nataraja. In exchange, India permitted the object to remain in the possession of the foundation for ten years and to be exhibited in any country with which India had diplomatic relations. As a result of Norton Simon and the foundation's right to counterclaim against Ben Heller, the art dealer conveyed numerous art works and a sum of money to the foundation.

For a more detailed discussion of this case, see DESKBOOK, *supra* note 6, at 109-14.

9. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (effective Feb. 2, 1956) [hereinafter cited as 1949 Geneva Convention (IV)]; Protocol I Additional to the Geneva Convention of Aug. 12, 1949, *adopted* June 8, 1977 by the Diplomatic Conference on Reaffirmation of Humanitarian Law Applicable in Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex I of Aug. 15, 1977, *reprinted in* 15 *I.L.M.* 1391 (1977) [hereinafter cited as Protocol I]; Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, *adopted* June 8, 1977, by the Diplomatic Conference on Reaffirmation of Humanitarian Law Applicable in Armed Conflict, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex II of Aug. 15, 1977, *reprinted in* 16 *I.L.M.* 1391 (1977) [hereinafter cited as Protocol II].

10. 1954 Hague Convention, *supra* note 2, art. 5; UNESCO Convention, *supra* note 1, art. 11.

11. European Cultural Convention, *supra* note 2; European Archaeological Convention, *supra* note 2; OAS Convention, *supra* note 2.

12. Roerich Pact, *supra* note 2, art. 1.

depending on a peacetime or a wartime context. The absence of differentiated specificity in relevant international instruments as to contextual application, applicable rules of law, and choice of law policies and rules deprives the area of international protection of cultural property of much needed clarity, uniformity, and certainty of outcome.

International protection of cultural property, whether applicable to the context of armed conflict or peace, is achieved through two means. The first is criminal in nature and involves the prohibition, prosecution, and punishment of destruction of cultural property, pillage, and theft. The second is civil in nature and involves the restitution of cultural property to rightful owners who may be either states, individuals, or legal entities. Policies and rules governing jurisdiction and choice of law necessarily differ with respect to criminal prosecution and civil action. Consequently, the relevant international conventions should distinguish in their appropriate provisions between these two kinds of legal action applicable to the protection of cultural property. Such provisions would serve the interests of clarity, uniformity, certainty, and predictability of outcome, as well as effective enforcement, regardless of the forum deemed competent to adjudicate such actions.

It must also be noted that another jurisdictionally-related problem arises from the fact that the international legislator has not consistently expressed the legal nature of violations of international protection of cultural property. In the context of armed conflicts, certain violations are war crimes, and are thus international crimes subject to universal jurisdiction, as well as territorial jurisdiction as discussed below. In the context of peace, there is no indication from the international legislator as to whether certain violations can also be deemed international crimes. Furthermore, neither the nature of the violation (i.e., an international crime, a transnational crime, or a common crime)[13] nor the appropriate applicable jurisdictional theory is identified (e.g., universality and territoriality for international crimes, active or passive personality and protected interest, territoriality for transnational crimes, and any or all of the above for common crimes).

International protection of cultural property in the context of the regulation of armed conflicts, as stated above, makes violation

13. Bassiouni, *The Common Characteristics of International Criminal Law*, 15 CASE W. RES. J. INT'L L. 25 (1983).

of the defined prohibited conduct a war crime, thus an international crime, to which universality and territoriality of jurisdiction apply. The competent forum is therefore either an international criminal court, should one be established (even on an ad hoc basis), or national military tribunals, which compound jurisdictional problems with respect to civilians who may not be subject to its general jurisdiction.[14] As an international crime, it would entail the applicability of the doctrine *aut dedere aut judicare* which implies the duty to prosecute or extradite, the duty of states to lend judicial assistance and cooperation in the investigation, prosecution, punishment, and, in general, the enforcement of these aspects.[15] All these measures do not apply to non-international crimes, unless specifically established by conventional or customary international criminal law. Thus, the provisions of the relevant conventions are applicable in peacetime, unless the prohibitions in question are deemed to be in the nature of international crimes. Otherwise they will be enforced by the ordinary courts of general jurisdiction of the interested states, whether they be criminal or civil, and are not likely to benefit from the expanded scope and scheme of international enforcement including the broader jurisdictional bases recognized for international crimes.[16]

The lack of explicit jurisdictional provisions in conventions dealing with international protection of cultural property also raises conflict of laws issues. As the primary conventions dealing with international protection of cultural property contain no explicit jurisdictional theories, states must resort to national rules governing jurisdiction and choice of law. Thus, which particular state may assert jurisdiction or has priority of jurisdiction, and which body of law should be applied to violations of international agreements protecting cultural property, remains internationally unspecified. This situation frustrates, inter alia, the cooperation between states which is so necessary for the effective protection of cultural prop-

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14. *See* U.C.M.J. arts. 1-6 and 16-21, 10 U.S.C. § 101, § 802 art. 2 (1982) and e.g., Reid v. Covert, 354 U.S. 1 (1956), and O'Callaghan v. Parker, 395 U.S. 258 (1969); *see also infra* note 178.

15. For the concept of *aut dedere aut judicare*, see I EXTRADITION, *supra* note 4, chap. II, and Costello, *International Terrorism and the Development of the Principle of "Aut Dedere Aut Judicare,"* 10 J. INT'L L. & ECON. 483 (1975). The concept is predicated on Hugo Grotius' maxim "aut dedere aut punire." *See* H. GROTIUS DE JURE BELLI AC PACIS, Book II, Chap. XXI, § 5(1) (1625).

erty and, particularly, to the prevention and control of illicit traffic in cultural property.

The ensuing analysis explores some of the problems created by the absence of specific jurisdictional provisions in international agreements protecting cultural property.

II. HISTORICAL EVOLUTION OF THE PROTECTION OF CULTURAL PROPERTY

As stated above and discussed below, the applicable international conventions distinguish their contextual applicability either explicitly or implicitly i.e., during armed conflicts (war), or at other times (peace). The distinction is no longer helpful or useful because the question concerns not the context, but the object of the protection.[17] Since archaeological, national, historical, and other property of national and cultural heritage are the intended objects of international protection, there is no conceptual difference in the legal nature of the protection. The differences concern the types of protective measures and sanctions which should apply, such as those measures applicable to individuals acting in their private or personal capacity, and those applicable to states and individuals acting in their official capacity or pursuant to state-sponsored policy. The applicable conventions do not make such distinctions, but reflect the very questionable historical division of the international law of war and peace. Consequently, it is necessary to analyze the relevant applicable international instruments in light of those distinctions.

A. PROTECTION OF CULTURAL PROPERTY DURING PERIODS OF ARMED CONFLICT

The protection of cultural property during armed conflict has evolved over the relatively short period of the last two centuries.[18]

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16. I EXTRADITION, *supra* note 4, chap. II and *supra* note 13.

17. Bassiouni, *The Proscribing Function of International Criminal Law in the International Protection of Human Rights*, ___ YALE STUD. WORLD PUBLIC ORDER ___ (1983).

18. For centuries, the laws of war allowed belligerents to confiscate or destroy all enemy property, public or private. The ancient Romans originated the concept of "booty." Booty was property confiscated in accordance with the international rules of war and was "a legitimate by-product of war." DESKBOOK, *supra* note 6, at 129. *See also* TRUEUE, ART PLUNDER (1961). On the regulation of armed conflicts and relative conventions, see D. SCHINDLER & J. TOMAN, LAWS OF ARMED CONFLICTS (1981); L. FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY (1972); M. GREENSPAN, MODERN LAW OF LAND WARFARE (1959).

It was not until the mid-eighteenth century that cultural property was deemed exempt from those aspects of war which permit plunder and destruction of enemy property.[19] In 1758, Emheric de Vattel stated the emerging rule concerning the conduct of belligerents engaged in combat on foreign territory which prohibited wanton destruction and pillage of cultural property.[20] De Vattel felt that artistic treasures which "do honour to human society" should be spared from the ravages of war, and temples, tombs, public buildings, and "all works of a remarkable beauty" were to be preserved as far as possible.[21]

Such ideals, however, were lost on the rulers and military leaders of Europe of that time. Napoleon systematically removed art treasures from countries occupied by France during the Napoleonic Wars.[22] After Waterloo, at the negotiations for the Convention of Paris in 1815, France attempted to include a clause allowing for retention of confiscated property in Paris.[23] Nevertheless, the Duke of Wellington, speaking for the Allies, stated that systematic looting of art by a conquering army was contrary to principles of justice and to the rules of modern warfare.[24] The Allies ordered the return of both confiscated property, and property acquired by France through treaty, to their countries of origin.[25]

While the treaties of peace subsequent to the Napoleonic Wars did not expressly provide for the return of looted art,[26] the concept of protecting cultural property had evolved from a theory developed

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19. *See* Case of the Vessel Marquis de Somereules, 1812 Stew. Adm. 482. During the War of 1812, a ship carrying works of art belonging to the Philadelphia Museum of Art was captured by the British Navy and the art objects aboard were held as prizes of war. The Canadian court hearing the case held that objects of artistic value on the ship must be returned to their owner. The court reasoned that art was a part of the common heritage of mankind and, thus, protected from seizure during war.

20. E. DE VATTEL, THE LAW OF NATIONS 364 (1829 ed.).

21. *Id.* at 433.

22. Napoleon reasoned that all Europeans shared a common heritage, but that France was the most appropriate center for the great works of art. See Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 691-93 (1974) [hereinafter cited as *Art in Transnational Law*]. In order to give his "acquisitions" legitimacy, Napoleon enacted treaties containing art concession clauses. *See* Armistice Between France and the Pope, June 23, 1796, Martens, *Recueil General des Traites de Paix* 121 (1798), 53 Parry's T.S. 125; Treaty Between France and the Pope, Feb. 19, 1791, 6 Martens Recueil Des Principaux Traites (2d) 241.

23. *Art in Transnational Law, supra* note 22, at 693.

24. *Id.*

25. To have allowed a distinction between the two means by which Napoleon acquired works of art would have made the practice of "looting by treaty" legitimate in future armed conflicts. DESKBOOK, *supra* note 6, at 133; *Art in Transnational Law, supra* note 22, at 693.

by scholars to a practiced legal principle. A brief analysis of the provisions contained in international agreements over the ensuing 150 years firmly established that the protection of cultural property is a basic and fundamental rule in the regulation of armed conflict. Its purpose is to preserve what can now be called the inalienable right of all peoples to their natural cultural heritage.[27]

Certain international instruments concerning the regulation of armed conflicts establish that certain violations of cultural property rights explicitly or implicitly constitute an international crime, under conventional or customary international law. As such, the violators are subject to criminal prosecution and punishment under the theories of universality and territoriality in accordance with customary international law. Although the conventions referred to below do not necessarily provide for a specific jurisdictional base, subsequent interpretation and practice establish it. The following is a brief discussion of some of the more relevant texts.

The Lieber Code, adopted in the United States in 1863,[28] stated that only public property was subject to confiscation and that cultural property was not to be considered public property for purposes of confiscation or appropriation.[29] In no way could such property be seized, sold, given away, wantonly destroyed, damaged, or privately appropriated until such time as a peace treaty determined the ultimate ownership of the property.[30]

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26. The Allies considered it preferable to reach a private agreement with Louis XVIII prior to the conclusion of the peace treaties, rather than to force a humiliating public acquiesence on him. Attempts to retrieve stolen art were, therefore, disjointed and sporadic. *Art in Transnational Law, supra* note 22, at 693.

27. A number of human right documents reflect the principle that all people have the right to participate in and enjoy their cultural heritage. *See* Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/71 at 70 (1948) (every person has a right to own property and may not be arbitrarily deprived thereof; every person has a right to freely participate in the cultural life of the community and to enjoy the arts); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), U.N. GAOR Supp. 16, at 49, U.N. Doc. A/62 (1966) (all people have a right to freely pursue their social and cultural development; all persons have an equal right to enjoyment of social and cultural rights, to participate in cultural life, and to benefit from the protection of moral and material interests resulting from any literacy or artistic production of which that person is the author).

28. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, Adjutant General's Office, Department of the Army, Apr. 24, 1863 (Lieber Code), 2 F. Lieber, *Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Writings* 245 (1881). The code contains regulations for the proper conduct of United States troops during wartime.

29. *Id.* art. XXXI.

30. *Id.* art. XXXVI. *See also* art. XXXV (stating that classical works of art, libraries, scientific collections or precious instruments must be secured against all avoidable harm).

The 1874 Conference of Brussels,[31] although never ratified, declared that pillage was expressly prohibited and that enemy property could not be seized or destroyed unless militarily necessary.[32] Further, property belonging to institutions devoted to the arts, whether privately or publicly-owned, or privately or publicly-funded, was to be treated as private property and as such, seizure or destruction thereof was prohibited and should be prosecuted.[33]

The Hague Conventions of 1899[34] and 1907[35] on the Laws and Customs of War on Land incorporated, in large part, the concepts embodied in the Conference of Brussels. Both set out extensive provisions for the protection of cultural property in certain articles discussed below. Pillage is formally prohibited by article XXIII(g) which prohibits destruction or seizure of enemy property unless imperatively demanded by the necessity of war.[36] Private property cannot be confiscated.[37] Attack or bombardment of undefended towns, villages, or buildings, including cultural targets, is prohibited.[38]

Three provisions of the 1899 and 1907 Hague Conventions deal specifically with protection of cultural property. Article XXVII imposes a duty on signatory states to take steps to spare buildings dedicated to art, science, and religion and, further, imposes a duty to give notice to the enemy by marking such buildings. An occupying power must administer all public institutions, including museums, in such a manner as to preserve them.[39] In an even broader provision, all seizure or destruction of, or intentional

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31. Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels), *adopted by* the Conference of Brussels, Aug. 27, 1874, 4 Martens Nouveau Recueil (2d) 219.

32. *Id.* arts. XIII(g), XXXIX.

33. *Id.* art. VIII.

34. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1899), T.S. No. 403, 26 Martens Nouveau Recueil (2d) 949 [hereinafter cited as 1899 Hague Convention (II)].

35. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 Martens Nouveau Recueil (3d) 461 [hereinafter cited as 1907 Hague Convention (VI)].

36. 1899 Hague Convention (II), *supra* note 34, and 1907 Hague Convention (IV), *supra* note 35, common art. 47. Every provision protecting cultural property in international agreements is limited by the Rule of Necessity, which permits protection to the extent that the subject of protection is not used for military purposes or situated so close to a military objective as to render protection militarily impracticable.

37. *Id.* common art. 46.

38. *Id.* common art. 55.

39. *Id.* common art. 56.

damage to institutions of arts and sciences, historic monuments, or works of art or science is forbidden and should be subject to legal proceedings.[40]

Two other international instruments deal specifically with protection of cultural property from bombardment in time of war. The Convention (IX) Concerning Bombardment by Naval Forces in Time of War,[41] also enacted at The Hague in 1907, requires that all necessary precautions be taken to spare historic monuments and edifices devoted to worship, art, science, and charity.[42] Although never formally adopted, the Hague Rules of Air Warfare reiterate that historic monuments and other cultural institutions should be spared from bombing during hostilities.[43]

The Hague Conventions, however, failed to prevent widespread damage and destruction to cultural property during World War I, including the bombing of the Rheims Cathedral and the burning of the library at Louvain. At the end of the war, a number of peace treaties established reparations for confiscations of private property, including cultural property. Among them, the Treaty of Versailles[44] mandated that art objects taken by Germany both in the First World War and in the Franco-Prussian War be returned to their country of origin.[45] Article 297(a) required Germany to cease holding confiscated property and to restore it to its owners, if still extant *in specie*, and to provide agreed-to compensation in lieu of restitution.[46] A Mixed Arbitral Tribunal was established to adjudicate compensation to civilians for confiscated property.[47] Germany was also required to indemnify all bona fide third-party purchasers who might be injured by the restitution.[48] While not a party

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40. *Id.*

41. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351 (1907), T.S. No. 542, 3 Martens Nouveau Recueil (3d) 604.

42. *Id.* art. V.

43. Hague Rules of Air Warfare, *drafted by* a Commission of Juries at The Hague, Dec. 1922 - Feb. 1923, art. XXV, 17 AM. J. INTL L. SUPP. 245 (1923).

44. Treaty of Peace with Germany, June 28, 1919, 11 Martens Nouveau Recueil (3d) 323, 1919 For. Rel. (Paris Peace Conference XIII), 55, 740, 743, 2 Bevans 43 [hereinafter cited as Treaty of Versailles].

45. Article 247 required Germany to replace the books, manuscripts, and incunabula in corresponding number and value after the destruction of the Louvain Library.

46. *Id.* art. *245; see also Art in Transnational Law, supra* note 22, at 699.

47. Treaty of Versailles, *supra* note 44, art. 304.

48. *Id.* art. 297. Article 6 of the Annex to Section IV of the treaty, entitled *Property, Rights and Interests*, makes Germany responsible for conservation of confiscated property up to the time of restoration.

to the Treaty of Versailles, the United States did sign the Treaty of Berlin,[49] which contained similar provisions. A similar Mixed Claims Commission was established in a subsequent treaty.[50]

The Treaty of Sevres[51] between the Allies and Turkey ordered Turkey to restore all seized trophies, archives, historical souvenirs or works of art taken prior to October 1914.[52] Article 422 also required the return of all objects of religious, archaeological, historical or artistic interest, taken prior to August 1914, to the government of the territory from which they were taken within twelve months after the enforcement date of the treaty.[53] This treaty, however, never entered into effect.

In 1935, the United States initiated an inter-American treaty called the Roerich Pact.[54] The treaty declared that movable monuments may not be treated as spoils of war.[55]

Unfortunately, international agreement did little more to stop damage to cultural property in World War II than it had in World War I. The Third Reich systematically plundered the cultural property of Europe through the Einsatzstab der Dienststellen des Reichleiters Rosenberg, a Reich department established to gather *objects d'art* from all over Europe for "protection."[56]

The prosecutions of the major Nazi war criminals firmly established confiscation, destruction, and damage to cultural property as a war crime subject to prosecution and punishment,[57] and

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49. Treaty of Berlin 1921, 42 Stat. 1939 (1921), T.S. No. 658, 12 U.N.T.S. 192.

50. Agreement for a Mixed Commission, *done* Aug. 10, 1922, T.S. No. 665, 26 L.N.T.S. 358.

51. Treaty of Sevres, Aug. 10, 1920, 15 AM. J. INT'L L. SUPP. 179-81 (1921) [hereinafter cited as Treaty of Sevres].

52. *Id.* art. 420.

53. *Id.* Article 432 also provided for the preservation and return of the contents of the Russian Archaeological Institute at Istanbul, initially to be surrendered to the Allies in order to safeguard the rights of Russia.

54. Roerich Pact, *supra* note 2.

55. *Id.* art. 1.

56. Through a program of confiscation instituted in December 1941, 69,619 homes in Western Europe were plundered (mostly Jewish), including 38,000 in Paris alone, and 26, 984 railroad cars were needed to transport the objects to Germany. A list of 21,902 confiscated pieces was compiled. U.S. v. Goering, 6 F.R.D. 69, 157 (1946) [hereinafter cited as Nuremberg Judgment]. Four thousand "degenerate" post-impressionist works were destroyed when the barn in which they were housed was needed to store grain. DESKBOOK, *supra* note 6, at 144. *See also* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (U.S.G.P.O. 33 Vols. 1948) (provides record of the trial proceedings, including official documents, judgments and sentence of the defendants).

57. Nuremberg Judgment describes the acts of the Einsatztab Rosenberg as "Pillage of Public and Private Property," and cites violations of articles 48, 49, 52, 53, 55, and 56 of the 1907 Hague Convention (IV). 6 F.R.D. 120. *infra* note 61.

provided the first truly international enforcement of the international law protecting cultural property. The London Charter of August 8, 1945,[58] establishing the Nuremberg Tribunal, provided that "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" was a crime punishable under the jurisdiction of the Tribunal.[59] Pillage as extensive as that practiced by the Nazis was held to violate article 56 of the 1907 Hague Convention (IV), and the Nuremberg Judgment found the defendants guilty of violations of international treaties, including the 1899 and 1907 Hague Conventions, and the Treaty of Versailles.[60] The Tribunal thus found the crimes enumerated in the Charter to be war crimes recognized under international law. Specifically, Alfred Rosenberg, director of the Einstatzstab Rosenberg, was found guilty of war crimes based on his responsibility for the plunder of Europe.[61]

In an attempt to control looted articles after World War II, the United States, Great Britain, and France signed a Statement of Policy with Respect to the Control of Looted Articles.[62] The three nations agreed to take measures to seek out looted articles and prevent their exportation, to encourage liberated countries to provide lists of looted articles not yet recovered, to disseminate the lists to art dealers and museums, and to alert the general public in order to encourage the return of looted articles to their rightful owners.[63]

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58. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 18, 1945, 59 Stat. 1544 (1945), E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter cited as London Charter].

59. 59 Stat. at 1547. Other war crimes were prosecuted under Control Council Ordinance No. 10, Punishment of Persons Guilty of War Crimes (Berlin, Dec. 20, 1945) Official Gazette of the Control Council for Germany, No. 3, Jan. 31, 1946, which repeated, in article II(1)(b), the definition of war crimes contained in the London Charter article 6(d). Article II(3) of the ordinance provided for delivery of property forfeited or subject to restitution by the Nuremberg Tribunal to the Control Council for disposition. T. TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIAL UNDER CONTROL COUNCIL LAW NO. 10 (U.S.G.P.O. 1949).

60. Nuremberg Judgment, *supra* notes 56, 57 and note 59. *See also* DESKBOOK, *supra* note 6, at 144-64 (analysis of trials conducted during World War II).

61. *See* E. DAVIDSON, THE TRIAL OF THE GERMANS (1966), Trial of Alfred Rosenberg at 125; and R. CONOT, JUSTICE AT NUREMBERG (1983), Trial of Alfred Rosenberg at 377.

62. Paris, July 8, 1946, *reprinted in* DESKBOOK, *supra* note 6, at 161-62. American public policy requires the return of misappropriated property. On January 28, 1947, the State-War Navy Coordinating Committee signed a manifesto entitled *Return of Looted Object of Art to Countries of Origin*, which called for the return in reiteration of the Paris Statement of Policy with Respect to Control of Looted Articles. DESKBOOK, *supra* note 6, at 160.

63. Germany was not the only country to confiscate works of art. The Third Army of the United States under General George Patton removed a number of masterpieces from

After World War II, developments in the protection of cultural property during times of armed conflict were reflected in the Fourth Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War.[64] Article 53, however, states only that any destruction of real or personal property, whether publicly or privately owned, is prohibited.[65] Unfortunately, the fourth 1949 Geneva Convention does not reiterate some of the more detailed and explicit language of the Brussels Conference and the 1899 and 1907 Hague Conventions, though it makes certain violations a "grave breach" (i.e., a war crime).[66]

As a result, it became necessary to adopt a convention specifically for the protection of cultural property during armed conflict. This was accomplished in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.[67] This convention attempts to broaden the scope of the 1899 and 1907 Hague Conventions by taking into account the events of World Wars I and II, and by incorporating certain provisions of the 1949 Geneva Conventions to arrive at a truly effective and comprehensive agreement on the protection of cultural property during hostilities.[68] As such, the 1954 convention applies to conflicts of an international character, as well as to conflicts of a non-international character.[69] The convention also accounts for the possibility of damage to cultural property prior to a declaration of war.[70] In addition, it provides for protective measures to commence during times of peace in order that such protective mechanisms be in place at the outset of hostilities.[71]

Finally, the 1977 Protocols I[72] and II[73] Additional to the 1949 Geneva Conventions contain provisions for the protection of cultural

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the Kaiser Friedrich Museum and the Nationalsgalerie in Berlin. The works were taken on the grounds that the paintings needed protection from the Russians and were entrusted to the National Gallery of Art in Washington, D.C. After the war, the works were returned to Germany subsequent to being exhibited in the United States. DESKBOOK, *supra* note 6, at 177-78.

64. 1949 Geneva Convention (IV), *supra* note 9.

65. *Id.*

66. *Id.* art. 147 (describing wanton and extensive destruction and appropriation of property to be a "grave breach" of the convention).

67. 1954 Hague Convention, *supra* note 2.

68. *See supra* note 2.

69. 1954 Hague Convention, *supra* note 2, art. 18(3).

70. *Id.* art. 18(1).

71. *Id.* art. 3.

72. Protocol I, *supra* note 9.

73. Protocol II, *supra* note 9.

property.[74] A basic premise of the protocols is that parties shall

74. For a detailed description of the drafting of Protocol I, see H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS (4 vols. 1979), and M. BOTHE, K.J. PORTSCH & W.A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 519-21 (1982), wherein the authors state:

> 2.23. The *nature* of the offense is a direct attack upon certain civilian objects—the highly privileged objects—with the result of their extensive destruction. As in para. 3 (b) and (c) a certain consequence of the act is required. It is, however, added that the attack is justified if the objects have been apparently used in support of the military effort (see reference to Art. 53, subpara. (b)), or when such objects are located in the immediate proximity of military objectives. In this way the problem of collateral damage is covered.
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> 2.24. The *subject* of the offense does not appear in the provision. According to the nature of the offence it may be committed by any military leader, even of a small unit, who commands military personnel and has the power to decide whether an attack shall be made. It could also be the High Command of the armed forces of a HCP.
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> 2.26. The *objects* of the offence are "clearly recognized historic monuments, works of art or places of worship" which fulfill certain requirements, i.e., (1) they "constitute the cultural or spiritual heritage of peoples"; and (2) "to which special protection has been given by special arrangement." As an example of such an arrangement reference is made to measures "within the framework of a competent international organization" without, however, mentioning this organization by name nor the measures taken by it. Article 53 on the other hand openly refers to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and also to other instruments, in the process of providing that its provisions are enacted "without prejudice" to this or other Conventions. Even if it is admissible to regard the references to the unnamed international organization and its measures as allusions to UNESCO and the Hague Convention respectively, the legal significance of the reference remains doubtful. The definitions of the protected objects in subpara. (d) and in Art. 1 of the UNESCO Convention are not identical; and not all State Parties to the Conventions have also ratified the UNESCO Convention.
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> . . . Under these circumstances it does not seem legitimate to use the UNESCO Convention as a point of reference in the same way as "the relevant provisions of this Protocol"—i.e. of Parts III and IV—have been used in other cases (e.g. para. 3, opening words) to explain the requirement that these acts had to be committed "in violation of the Conventions and the Protocol."
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> 2.26. Subparagraph (e) is based on a proposal by Switzerland which was accepted without great difficulties. It repeats a provision of Arts. 50, 51, 130, 147 of the Conventions without adding any new element. It is already covered by para. 1 and is extended to new categories of protected persons by para. 2.
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> 2.27. Paragraph 5: From the beginning of the general debate on Art. 85 in the first Committee there were suggestions that the principles applied by the war crimes tribunals of the period after World War II should be incorporated into the Protocol. The practical consequences to be drawn from this incorporation were more or less precisely explained. . . . The basis for the deliberations of the Subgroup was a proposal limited to the statement that "grave breaches . . . shall be regarded as war crimes," with a reference to Art. 6 of the Charter of the Nuremberg International Military Tribunal added. This statement as worded, was certainly not incorrect, if taken directly. Most of the examples of war crimes listed in Art. 6(2)(b) of the Charter are grave breaches under the Conventions (see 1.1). There

at all times distinguish between civilian objects and military targets, directing operations only against military objectives.[75] Without prejudice to the other relevant international instruments, article 53 of Protocol I prohibits acts of hostility against historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of a people. The article further prohibits the use of such property for the military effort and prohibits direct reprisals against such property.[76] The Geneva Conventions and Additional Protocols make it a "grave breach" to destroy clearly recognized historic monuments, works of art, or places of worship.[77] As a "grave breach," the offense constitutes a war crime, and thus an international crime. The offense, therefore, becomes subject to universal as well as territorial jurisdiction, which in this case would be the aggrieved state where the violative act was committed, or against which it was committed.

Thus, under the regulation of armed conflicts, a violation of internationally protected cultural property constitutes a war crime, and is subject to prosecution and punishment as in the case of all other international crimes.[78] In this respect, even though the relevant provisions of the applicable convention do not so state specifically, the theory of universal jurisdiction is applicable to such

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was, however, undeniably the danger that this formulation lent itself to the drawing of the opposite conclusion, viz. that all acts classified as war crimes, namely all "violations of the laws and customs of war," would be regarded as grave breaches, and that in this way the method of strict definition of certain acts as grave breaches, adopted in the preceding paragraphs, would be nullified. This objection to a reference to the Nuremberg Charter led to a proposal to delete it and to add the introductory words: "Without prejudice to the application of the Conventions and of the Protocol" in order to make it clear that the declaration that gave breaches are war crimes has neither the consequence that all war crimes are grave breaches nor the result that persons found guilty of having committed grave breaches lose the protection of humanitarian law. . . .

2.28. The method employed in Art. 85 is selective. The only offences admitted are those which are strictly defined and have a solid basis in the Protocol. . . . There are, however, no general rules which would generally prohibit reprisals in cases where a prosecution of grave breaches is possible, nor any which provide that all acts which are prohibited as reprisals are automatically also grave breaches. There may be a presumption that an act which is prohibited as reprisal should also be a grave breach (in view of its gravity), but it is not more than a presumption and it is up to the legislator whether he is willing to follow it or not.

75. Protocol I, *supra* note 9, art. 48.

76. *Id. See also* Protocol II, *supra* note 9, art. 16.

77. Geneva Convention (IV), *supra* note 9, art. 47, and Protocol I, *supra* note 9, art. 85(4)(d).

78. *See* DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7.

violations, in addition to the territorial theory, but not to the exclusion of other theories that an aggrieved state may elect to apply.

Since jurisdictional bases are not enunciated in the relevant conventions, there are, of course, no provisions applicable to a ranking of jurisdictional theories nor are there any guidelines for the resolution of conflicts of jurisdiction. Therefore, state-parties to these conventions are left with whatever guidance customary international law and private international law may offer in that respect. This leaves the potential for jurisdictional conflict without effective sources of resolution in the relevant conventional international law. Thus, violations of these conventions are subject to the judicial jurisdiction of a potential international criminal court, should one be established, and to the jurisdiction of national military tribunals, whether of a general, ordinary, or ad hoc nature.

These violations, as international crimes, will entail the duties of states to prosecute or extradite and to provide judicial assistance and cooperation.[79] These conventions, and the duties that they create, and their consequences, will be contextually limited. They will also be limited in their application to those persons who come within the meaning of the relevant conventions and, eventually, to national codes or laws of military justice. As a result, a convention might exclude certain categories of offenses and certain categories of persons from the judicial jurisdictional competence of the tribunals, and all of the consequences attaching to the prosecution and punishment of international crimes.

B. Protection of Cultural Property During Times of Peace

International agreements protecting cultural property during times of peace are a product of this century.[80] The first international multilateral convention on this subject was concluded in 1954, and is applicable essentially to armed conflicts, as discussed above, although not exclusively limited to the context of war.[81] The 1954 Hague Convention applies to international traffic of unlawfully seized cultural property during armed conflicts and after the termination of the conflict. Thus, by extension, the convention also applies to peacetime conduct which derives from conduct or events whose origin was during wartime.

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79. *See supra* note 15.
80. *See supra* note 2.
81. 1954 Hague Convention, *supra* note 2.

The regional inter-American multilateral Roerich Pact,[82] signed in 1935, was the earliest document to protect cultural property in time of peace, although it also extends into periods of armed conflict.[83] The important difference between these two instruments and those applicable to other periods as discussed in this section is the absence of contextual overlap and application. The wartime related conventions apply to destruction, pillage and plunder by armed forces, and policies and practices of occupying forces, while the peacetime conventions apply to private conduct. Thus, the object of the protection is clearly distinguishable, as are the persons intended to be deterred and eventually prosecuted and punished, the practices sought to be prevented, controlled and suppressed, the means to accomplish these objectives, and the remedies available. Because of these distinctions, the enforcement scheme reflected in the conventions analyzed below is also different. Occasionally, the contextual overlap in some conventions blurs the distinctions as is discussed in the ensuing section.

The disproportionate number of international instruments protecting cultural property in time of war, in relation to the number of conventions protecting cultural property in time of peace, is perhaps due to the perception that the danger of destruction and pillage that may befall cultural property is greater in wartime than in peacetime. It should be noted that the need to protect cultural property from theft and illicit transfer of ownership in peacetime is just as potentially significant, both quantitatively and qualitatively. Further, conventions relating to a wartime context are predicated on the unarticulated premise that the violative conduct is state-sponsored, while those conventions relating to a peacetime context are predicated on the premise that the violative conduct is not state-sponsored, but rather is sponsored essentially by individuals for their personal or pecuniary interest.[84]

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82. Roerich Pact, *supra* note 2, art. 5.

83. It is interesting to note that, over the years, the conventions protecting cultural property or treaties containing provisions protecting cultural property have progressively expanded their applicability beyond situations of international armed conflict to periods of civil conflict and belligerent occupation. In light of this progression perhaps the recent application of principles of international law to conduct occurring outside the context of hostilities is a logical progression of the relevant international legislation making protection of cultural property during peacetime the final stage of this historical development.

84. For the distinction between individual and state-sponsored activity within the meaning of international criminal law, see e.g., DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7, at 40-44.

In the first instance, the consequence is that the conduct may also inure to the benefit of the state who commits the violation (even though committed by individuals). In the second instance, the primary beneficiary of the violation is the private interest of those who, in their private or personal capacity, commit such acts for their pecuniary or personal interests. These presumed distinctions are nowhere apparent in the relevant texts. Consequently, no jurisdictional distinctions are made in these texts as to the typology of violations, the applicable sanctions and, in general, their enforcement aspects. Such enforcement should be tailored to the dual purpose of protecting a defined interest from certain types of violative conduct and with due regard to the effectiveness of deterrence, prevention, control, and suppression.

The multilateral treaty of primary significance to the protection of cultural property in peacetime is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[85] The convention treats the term "cultural property" as inclusive of a wide variety of property, and import, export, and transfer of ownership of cultural property contrary to the provisions is deemed illicit.[86] The parties undertake to prevent transfer of ownership and illicit movement of such property, to ensure the earliest possible restitution of property to the rightful owner, to admit actions for recovery of cultural property brought by or on behalf of rightful owners, and to recognize the indefeasible right of each state to declare certain cultural property as inalienable and, therefore, ipso facto, not to be privately exported.[87]

The UNESCO Convention is supplemented by the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage.[88] International protection of the world cultural and natural heritage requires the establishment of national protective means, and a system of international cooperation and assistance designed

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85. UNESCO Convention, *supra* note 1. The convention is the result of a 1962 UNESCO Resolution (UNESCO Records of the General Conference, 12th Session, at 51-52 (1962)) on the desirability of an international convention for the protection of cultural property. For an extensive discussion of the convention, see Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971).

86. UNESCO Convention, *supra* note 1, art. 3. In addition, the export or transfer of ownership under direct compulsion from an occupied territory by a foreign power is illicit. *Id.* art. 11.

87. *Id.* art. 3.

88. World Heritage Convention, *supra* note 2.

to support the signatory parties in their efforts to, inter alia, identify and conserve that heritage.[89] States are to establish national services to protect, conserve, and exhibit cultural property,[90] and to take appropriate legal, scientific, technical, administrative, and financial measures for the identification, protection, conservation, and rehabilitation of the cultural heritage.[91] These means are the essential basis for the effective control, prevention, and suppression of violative conduct.

Three regional agreements are also designed to accomplish these purposes. Two are European and one is inter-American. The European Cultural Convention of 1954[92] encourages a policy of common action among the signatory states to safeguard and encourage the development of European culture.[93] The European Convention on the Protection of the Archaeological Heritage of 1969,[94] prohibits illicit excavations[95] and promotes delimination and protection of archaeological areas.[96]

A third European Convention is in Draft, "European Convention on Offences Relating to Cultural Property,"[96A] which establishes in Article 13 the following:

1. Each Party shall take the necessary measures in order to establish its competence to prosecute any offence relating to cultural property:
   a. committed on its territory, including its internal and territorial waters, or in its airspace;
   b. committed on board a ship or an aircraft registered in it;
   c. committed outside its territory by one of its nationals;
   d. committed outside its territory by a person having his/her habitual residence on its territory;
   e. committed outside its territory when the cultural property against which that offence was directed belongs to the said Party or one of its nationals;

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89. *Id.* art. 7.
90. *Id.* art 5(b).
91. *Id.* art. 5(d).
92. European Cultural Convention, *supra* note 2.
93. *Id.* art. 2.
94. European Archaeological Convention, *supra* note 2.
95. *Id.* art. 7.
96. *Id.* art 2.

96A. *See* Council of Europe Doc. CDPC (84)8, Add. II, April 26, 1984, and the earlier report of The Select Committee of Experts on International Co-operation in the Field of Offences Relating to Works of Art Doc. CDPC (84)3, January 30, 1984.

> f. committed outside its territory when it was directed against cultural property originally found within its territory.
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> 2. In the cases referred to in paragraph 1, sub-paragraphs (d) and (f), a Party shall not be competent to institute proceedings in respect of an offence relating to cultural property committed outside its territory unless the suspected person is on its territory.

It is clearly the most specific jurisdictional clause in any international instrument.

The Organization of American States has adopted a Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations.[97] The export of cultural property as defined by article 2 of the convention is considered unlawful, except where authorized.[98] The convention discourages illegal export or import of cultural property between the American states and promotes cooperation and mutual appreciation with regard to cultural property.[99]

Two bilateral treaties are also relevant in this context. They are between the United States and Mexico, and the United States and Peru. In response to Mexican concern over the illegal export of Mayan artifacts, the United States and Mexico entered into a Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties.[100] It was agreed that the states would deter illicit excavation and theft of cultural property,[101] and employ the legal means at their disposal to recover and return objects stolen following the effective date of the treaty.[102] The combination of the United States National Stolen Property Act[103] and a 1972 Mexican law giving title to all pre-Hispanic artifacts to the Mexican state, subject to rights acquired before enactment of the law,[104] has resulted in two landmark

97. OAS Convention, *supra* note 2.

98. *Id.* art. 3.

99. *Id.* art 1.

100. Treaty of Cooperation Providing for the Recovery and Return of Stolen Properties, July 12, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088 (effective Mar. 24, 1973) [hereinafter cited as United States-Mexico Treaty].

101. *Id.* art II(1)(b).

102. *Id.* art. III(1). The Attorney General of the United States is, therefore, authorized to institute civil actions in appropriate district courts to recover property illegally exported from Mexico. *Id.* at III(3).

103. 18 U.S.C. § 2315 (1976).

104. Ley Federal Sobre Monumentos y Zontas Arqueologicos, Artisticos y Historicos, 312 D.O. 16, 16 May 1972.

court decisions. These decisions held that an object may be considered as stolen under the National Stolen Property Act subsequent to a declaration of ownership by a foreign country.[105]

In 1981, the United States and Peru signed an Agreement for Recovery and Return of Stolen Archaeological, Historic, and Cultural Property,[106] similar to the 1970 Mexican-American treaty. The Peruvian agreement, however, focuses on communication concerning stolen property likely to be introduced into international trade.[107] The parties agree to detect and locate such objects entering their territory and to employ all legal means to recover and return stolen cultural property to the requesting party.[108]

Lastly, a number of international conventions, not on the protection of cultural property but on the law of the sea, contain provisions which affect marine archaeology.[109] In fact, due to the essentially jurisdictional nature of the conventions on the law of the sea, these documents are the only international agreements to provide explicit statements of jurisdiction which can be applied to cultural property, albeit within a narrow context. The Convention on the Law of the Sea, opened for signature in 1982,[110] contains two ar-

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105. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974); United States v. McClain, 545 F.2d 988 (5th Cir. 1977) [hereinafter cited as *McClain I*]; United States v. McClain, 593 F.2d 658 (5th Cir. 1979) [hereinafter cited as *McClain II*]. For a further discussion of *McClain I*, see Note, *Criminal Law: Theft of Artifacts—Once a National Declares Ownership of an Artifact, an Illegally Exported Artifact Can Be Considered Stolen Under the National Stolen Property Act*, 17 VA. J. INT'L L. 793 (1977).

In order to give Mexico's law international effect, the United States has adopted an Act to Prevent Importation of Pre-Columbian Sculpture and Murals, 19 U.S.C. §§ 2091-2095 (1976), which prohibits the import into the United States from anywhere in the world of pre-Columbian monumental architecture, sculpture or murals, without a certificate stating that the export was not in violation of the laws of the country of origin of the property.

106. Agreement for Recovery and Return of Stolen Property, September 15, 1981, 80 Stat. 271; T.I.A.S. No. 10136 (effective Sept. 15, 1981) [hereinafter cited as United States-Peru Treaty].

107. *Id.* at II(1).

108. *Id.* art. II(2). For further discussion of the treaty, see Note, *Emerging U.S. Policy with Regard to the International Movement of National Cultural Property*, 7 INT'L L.J. 166 (1982).

109. While the conventions do not specifically deal with marine archaeology, they establish a division of maritime jurisdiction. Convention on the Territorial Sea and Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964); Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964); Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962); Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective Mar. 20, 1966).

110. Convention on the Law of the Sea, *supra* note 3.

ticles dealing with cultural property found beyond a nation's shores. Article 149 states that all archaeological or historic objects found beyond the limits of national jurisdiction should be preserved or disposed of for the benefit of mankind, with particular regard being paid to the preferential rights of the state of origin, state of cultural origin, or state of historical and archaeological origin of the property. Cultural property found in the contiguous zone is provided limited protection under article 303 of the convention.[111]

The various conventions discussed hereinabove establish explicitly or implicitly two theories of jurisdiction: the territoriality theory, which is common to all the conventions, and what, for lack of a specific theory, could fall under an extension of the passive personality theory whereby the county of origin maintains a continuous right over the property irrespective of its subsequent illicit transfer or change of actual possessory control (much as the theory proper extends to the protection of the nationals of a given state).[112]

All of these conventions, though recognizing the right of state ownership and state regulation of various aspects of excavation, and the import, export and trade of cultural property as defined in each relevant instrument, apply essentially a territorial jurisdictional theory with respect to law making and law enforcement. But, they do extend certainly and explicitly to an *in rem* or *quasi in rem* right of the state of origin as pertains to the objects in question beyond territorial confines. In that respect, however, it is a form of the dual extension of the territorial theory through the subjective and objective territorial application which effectively extends it extra-territorially.[113] The conventions can also be said to embody the theory of the protected interest,[114] which in this context overlaps with the extensions of the territoriality theory. These theories will be briefly discussed below.

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111. *Id.*

112. For an excellent overview of the views of jurisdiction, see Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982) [hereinafter referred to as Blakesley]. For the application of the passive personality doctrine, see Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Israel Dist. Ct. Jerus. 1961). *See also* P. PAPADATOS, THE EICHMANN TRIAL (1964); for the only decision by the International Court of Justice on that subject, see The S.S. Lotus (Fr. v. Turk), 1927 P.C.I.J., ser. A., No. 10, at 74 (Moore, J., dissenting); II M. Hudson, *World Court Reports* 71 (1935).

113. *See* Blakesley, *supra* note 112, 1114-32. *See also* George, *Jurisdictional Basis for Criminal Legislation and Its Enforcement*, 1983 MICH. Y.B. INT'L. LEGAL STUD. 3-42.

114. *See* Blakesley, *supra* note 112, at 1132-39. *See also* Marcuss & Richard, *Extraterritorial Jurisdiction in U.S. Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981) [hereinafter referred to as Marcuss & Richard].

The above-mentioned instruments presuppose that all states share the same values and interests in protecting cultural property from the cupidity of individuals acting in their private or personal capacity to the detriment of the concerned states and other protected parties. That premise leads to another assumption, namely that states will cooperate in the prevention and suppression of such violations. Because states under these conventions are presumed not to sponsor such practices (which are also presumed to be contrary to their national laws) the legal nature of the violation is that of a common crime with transnational effect. However, a different characterization can also be made. Because such conduct potentially affects all states, is mostly committed transnationally, and violates existing international prescriptions, it should be deemed an international crime irrespective of whether committed in time of peace or war.[115] Furthermore, since it is also an international crime when committed in time of war, the violation should not be considered any differently in time of peace when states are even more desirous and capable of international cooperation in preventing and suppressing such violative conduct.

In the Draft International Criminal Code prepared by this writer, theft of national and archaeological treasures is deemed an international crime because of the reasons stated above.[116] The draft code's section dealing with enforcement, article IV, sets out theories of jurisdiction applicable to all crimes contained in the code and establishes a ranking of these theories as a rule for resolution of jurisdictional conflicts.[117]

The conventions discussed above, which apply to the context of peace, cover categories of offenses and offenders which differ from those covered by conventions on the regulation of armed conflicts discussed in the earlier section. They differ not only as to contextual application, but also as to typology of violations, their characterization (as an international crime, a transnational crime, or a national common crime), the category of offenders to which a violation applies, and the competent jurisdictional forum (i.e., national tribunals of ordinary criminal or civil jurisdiction, as opposed to an international criminal court or national military tribunals). As yet no convention exists which bridges the different contexts, applies comprehensively to all types of offenses and offenders, and

115. *See, e.g.,* DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7.
116. DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7, at 98. *See also* Appendix *infra*.
117. *Id.* §§ 1, 2, at 145.

establishes measures common, or distinct, for these offenses and offenders. The lack of a comprehensive scheme of enforcement is thus reflected in the absence of effective jurisdictional bases that may extend beyond the territoriality theory common to all relevant international instruments.

III. THEORIES OF JURISDICTION RECOGNIZED AND APPLIED IN CONVENTIONAL AND CUSTOMARY INTERNATIONAL CRIMINAL LAW

Five theories of jurisdiction are recognized under international law as giving rise to the power to legislate and the power to enforce. They are, in order of their general international recognition:[118] (1) the territorial theory, based on the notion of sovereignty that a state may assert jurisdiction over any conduct committed within its territory, extended by the subjective and objective theories of territoriality, and the law of the flag, or floating territoriality; (2) the protective or protected interest theory, based on the concept that a state should be allowed to assert jurisdiction over conduct occurring outside the state's territory which threatens the significant interests of the state; (3) the active personality theory, based on the notion that concomitant to a citizen's right to be protected by the state, the citizen has certain duties to his country even extraterritorially; (4) the passive personality theory, based on the theory that a state has a legitimate interest in the protection of its nationals abroad; and (5) the universality theory, based on the theory that crimes *delicti jus gentium* should be subject to the jurisdiction of all states, irrespective of where the acts have been committed, to allow for the protection of the universal values and interests of humankind.

A. TERRITORIAL THEORY AND ITS EXTENSIONS

The territorial theory is the basis upon which all states prescribe and enforce rules of conduct within their territory. As indicated previously, the term "jurisdiction" refers to the rule-making and rule-enforcing powers of a state. Moreover, as stated earlier, the operative question is whether these two aspects of jurisdiction must co-exist within the territorial boundaries of the state asserting jurisdiction. Under general principles of international law and private international law, there is no such requirement. Indeed, a state may exercise its jurisdiction in one of its many forms

118. *See supra* notes 4, 112, 113.

(*in personam, in rem, quasi in rem*) without necessarily applying its own laws, either because its laws will require or permit the application of another state's law, or because it is the only judicially competent forum which will apply another state's law.[119] Thus, a state having jurisdiction over the alleged offender or the property in question (the rule-enforcing state) may apply the law of a foreign state which has been violated by the conduct of the offender (rule-making state). A number of cases involving protection of cultural property have made use of foreign law as a basis for judicial action.[120] Considering the diverse national legislation concerning protection of cultural property, application of the law of the aggrieved state, through the conflict of laws rules of the adjudicating state, may resolve the conflicts of law problem.[121]

Under existing international instruments and the laws of most states, the courts of the state where the property is located at the time of the claim will have the first opportunity to exercise civil and criminal jurisdiction. This is true irrespective of whether the civil basis of jurisdiction is *in personam, in rem*, or *quasi in rem*, and whether the criminal prosecution is *in personam* or *in absentia*. Among the many jurisdictional problems is one related to the concomitance of civil and criminal jurisdiction, and the concurrent presence within the jurisdiction of both the defendant and the property. Thus, if the property is stolen from State *A*, stored in State *B*, the violator is a citizen of State *C*, and is found in State *D*, there are multiple competent jurisdictions. There is no basis for determining which has priority, or which jurisdiction is entitled to judicial assistance prior to or during the trial, or which one is entitled to the enforcement of its judgment.

None of the existing conventions deal with these questions, nor do they provide a sufficient basis from which to extrapolate some guidance for the resolution of such conflict of laws problems. Thus, the national law of each affected state will control. The result is diversity, inconsistency and unpredictability of outcome as to such conflicts of judicial jurisdiction and conflicts of applicable substantive laws. These problems cannot begin to find a modicum of harmonization under the present state of the applicable substantive law of international protection of cultural property. Consequently, the need for further international legislation is required.

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119. *See supra* note 5.
120. *See supra* note 105.
121. *See, e.g., supra* notes 5, 119.

B. *Protective or Protected Interest Theory*

Although the protective or protected interest theory implies conduct committed abroad which when causing an internal impact affects intangible rights specifically located within the territory, it is a particularly appropriate theory to apply to the protection of cultural property.[122] In accordance with the theory, the state from which the cultural property has been illegally removed would have jurisdiction over other interested states or would be able to exercise jurisdiction over an offender. But, the priority of such a theory over another is not established, save for the general proposition that the territoriality theory is deemed in general to have the higher priority. Perhaps this is because of the simple practical logic that the state where the offender, the offense, or the object of the offense is found cannot be effectively stripped of its right of legal action. It must also be stated that an extension of the territoriality theory under the subjective-objective theory will usually encompass the protected interest theory. This extension of the protected interest theory is akin to a long-arm extension of jurisdiction by the state claiming a right or interest in the property in question to protect such rights or interests in the property in question. The above result provides a valid and effective basis for assertion of jurisdiction. Therefore, the theory should be embodied in the various international conventions protecting cultural property.

C. *Active Personality Theory*

Jurisdiction over violations of international agreements protecting cultural property may be asserted through the active personality theory, thereby allowing a state to assert jurisdiction over crimes committed by nationals outside the state's territory. In order to determine whether this theory is available to a state, two approaches may be taken. The first is to review the general laws of the state and ascertain whether they incorporate the active personality theory. The second is to review any specific laws dealing with protection of cultural property with the same view.

In terms of general laws, a number of countries provide for the doctrine of active personality.[123] In such case, a citizen of a coun-

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122. Restatement, *supra* note 4, § 33; *Harvard Draft Code, supra* note 4, arts. 7, 8.

123. See Matter of Assarsson, 635 F.2d 1237 (7th Cir. 1980) and Matter of Assarsson, 687 F.2d 1157 (8th Cir. 1982) where Sweden requested the extradition of the relator from the United States for a crime committed in Denmark on the basis of its criminal law provisions that make a Swedish citizen subject to prosecution in Sweden for a crime committed in another state. *See also* Extradition, *supra* note 4.

try who commits a crime anywhere in the world, irrespective of whether the conduct constitutes a crime in the legal system of the country of origin, is subject to the penal jurisdiction of his country of citizenship. Consequently, where conduct constitutes a crime in the territory in which it occurred, any violation would subject an actor to the jurisdiction of his national state, in addition to the jurisdiction of the state in which the conduct took place.[124]

D. *PASSIVE PERSONALITY THEORY*

The passive personality theory is not per se applicable to the protection of cultural property. However, if the notion of protection can extend from persons to property and if an intangible right in that cultural property is a national right (as well as a private proprietary interest), then it could be said to apply.[125]

E. *UNIVERSALITY THEORY*

The historical development of the law of armed conflict makes it clear that damage and confiscation of cultural property is a war crime. Such conduct was prosecuted under the universality theory at the Nuremberg trials.[126] However, there is some difficulty, under certain international instruments, in applying the universality theory beyond situations of armed conflict to encompass conduct outside the context of an international crime. If one regards pillage in any form, conducted at any time, to be an international crime, then the principle of universality would apply.[127] Although a number of countries have been reluctant to assert jurisdiction on this basis for whatever crime, it may be contended that as soon as an international crime is established, universality of jurisdiction obtains as a rule of customary international law.[128] Recognition for this prop-

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Italy has a similar theory of jurisdiction, in particular where an Italian national is accused of a crime in another state. Where extradition is requested but denied, as Italy does not allow extradition of its nationals, the Italian judicial authorities, at the request of the Procuratore Generale and with the concurrence of the Minister of Justice, will approve prosecution of the offender in the Italian criminal courts, thus applying the active personality theory. ITALIAN PENAL CODE (CODICE PENALE), art. 9 (E.H. Wise trans. 1978). This question was dealt with in part at the XIth International Congress of Comparative Law, Caracas, Venezuela, 1982, and covered by this writer as a reporter on question V, see Bassiouni, GENERAL REPORT ON THE JUDICIAL STATUS OF THE REQUESTED STATE DENYING EXTRADITION, PROCEEDINGS OF XITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (in print).

124. *See id.*

125. *See supra* note 112.

126. Nuremberg Judgment, *supra* note 56, at 107-11; Charter of the International Military Tribunal: Far East, January 19 and amended Apr. 26, 1946, T.I.A.S. No. 1589, and note 57.

127. *See generally* DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7, and Appendix *infra*.

128. *Id.*

osition can be found in both the Nuremberg and Tokyo war crimes trials.[129] In addition, the universality theory has been deemed to be an appropriate jurisdictional theory with respect to the Genocide Convention,[130] to piracy,[131] and to hijacking under the 1970 Hague Convention[132] and the 1971 Montreal Convention.[133]

An examination of these and other international criminal law conventions leads to the conclusion that a doctrine of universality of jurisdiction over international crimes exists under conventional and customary international law.[134] Thus, if violations of conventions protecting cultural property can be considered to be international crimes, universality would apply.[135]

IV. UNITED STATES' APPROACHES

The United States has boldly extended extraterritorial application of criminal jurisdiction in recent years,[136] though in terms of potential conflicts of laws, this may not be a positive development. The trend toward extraterritoriality in the United States began with the *American Banana*[137] and *Alcoa*[138] cases, and other cases in the antitrust area. The jurisdictional theories applied in these cases were reflected and expanded in subsequent legislation, including

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129. *See infra* note 134.

130. Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, 73 U.N.T.S. 277. For a discussion of the crime of genocide, see Bassiouni, *Genocide and Racial Discrimination*, in I M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 523 (1973); Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145 (1947).

131. G.O.W. MUELLER & E.M. WISE, INTERNATIONAL CRIMINAL LAW 23 (1965). *See also* Sundberg, *Piracy: Air and Sea*, in I M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 455 (1973).

132. Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (effective Oct. 14, 1971).

133. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 3, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (effective Jan. 26, 1973).

134. *Harvard Draft Code*, *supra* note 4, art. 97. The Harvard convention suggests that universality would be applicable to such international crimes as slavery, traffic in persons and drugs, and war crimes. *See also* Feller, *Jurisdiction over Offenses with a Foreign Element*, in II M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (1973). See DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7, for the 20 other international crimes.

135. The conventions in question, of course, skirt this issue altogether, and no case has taken this particular position.

136. EXTRADITION, *supra* note 4, ch. VI, § 7, p. 1, and *supra* note 111 and 112.

137. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *See also* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. 97-290, title IV, § 401, 96 Stat. 1246 (codified at 15 U.S.C. §§ 1 note, 6a) and *amended* 15 U.S.C. § 45 (1982).

138. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

the Trading with the Enemy Act,[139] the Export Administration Act,[140] the anti-boycott legislation,[141] the Foreign Corrupt Practices Act,[142] the Securities and Exchange Act,[143] and the Internal Revenue Code.[144] There are presently eighteen different criminal provisions of the United States Code that apply extraterritorially.[145] These and other special legislative enactments broaden the scope of United States' extraterritorial jurisdiction without asserting any specific theory therefor.

Although the Federal Criminal Code currently does not contain an expanded extraterritorial jurisdiction provision, extensions of criminal jurisdiction, as reflected in the proposed revisions to the Code contain the broadest possible bases ever considered or applied (but follow prior extensions of specific legislation).[146] No

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139. Trading with the Enemy Act, 50 App. U.S.C. §§ 1-44 (1976 & Supp. V 1981) *amended* by Pub. L. No. 97-164, Title I, §§ 160(a)(17), 161(9), 96 Stat. 48, 49 (codified at 50 App. U.S.C.A. §§ 10, 42 (1982)).

140. Export Administration Act of 1979, 50 App. U.S.C. §§ 2401-2420 (1976 & Supp. V 1981) *amended by* Export Administration Act of 1981, Pub. L. 97-145, 95 Stat. 1727 (codified at 50 App. U.S.C. §§ 2401 note, 2405, 2410, 2411, 2417 (Supp. V. 1981)). *See* Note, *Trade—The Export Administration Act of 1979*, 4 SUFFOLK TRANSNAT'L L.J. 361 (1980). *See also* Marcuss & Richard, *supra* note 114.

141. 50 App. U.S.C. § 2407 (Supp. II 1979). *See also* Marcus & Richard, *supra* note 114.

142. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, Title I, § 101, 91 Stat. 1494 (codified at 15 U.S.C §§ 78a note, 78dd-1, 78dd-2 and amending §§ 78m and 78ff (1982)). *See* Note, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application*, 12 VAND. J. TRANSNAT'L L. 689 (1979).

143. Securities Exchange Act of 1934, ch. 404 Title I, Pub. L. 48 Stat. 881 (codified as amended at 15 U.S.C §§ 78a-78hh (1982)). *See* Note, *Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts*, 11 VAND. J. TRANSNAT'L L. 711 (1978); Note, *Securities—Transnational Application of Anti-Fraud Provisions of the Federal Securities Laws Expanded—SEC v. Kasser*, 8 SETON HALL L. REV. 795 (1977).

144. 26 I.R.C. §§ 1-9041 (1976 & Supp. V. 1981).

145. *See* Blakesley, *supra* note 112.

146. The Criminal Code Reform Acts of 1977 *amending* 18 U.S.C., 95th Cong., 1st Sess. (May 1977). *See also* the second version of the proposed Federal Criminal Code presented in S.B. 1437, §§ 202, 1734, 1751. *See* Note, *Extraterritorial Jurisdiction Under the Proposed Federal Criminal Codes: Senate Bill 1630 and House Bill 1647*, 12 GA. J. INT'L & COMP. L. 305 (1982).

These extensions have been proposed without any regard whatsoever to the conflict of laws questions that may be created, and certainly without due regard for the foreign policy and diplomatic consequences of creating such a maze of regulations. Recall that the result of President Reagan's embargo of December 1981 on trading with the U.S.S.R. It involved the attempted extraterritorial application of U.S. law to prevent export to the U.S.S.R. of products manufactured in Great Britain and France predicated on licenses of technology originally developed in the United States. The decision created a serious conflict between the United States and those two countries.

The proposed changes to the Federal Criminal Code go far beyond the provisions of

extraterritorial provisions exist, however, with respect to enforcement of provisions protecting cultural property, but nothing would prevent the adoption of such legislation which could be predicated on the active personality theory. The United States would, therefore, be able to prosecute an American citizen who has committed a violation of a convention to which the United States is a party, even if that violation occurred outside United States territory.[147]

V. APPRAISAL OF CONVENTIONAL ENFORCEMENT SCHEMES IN THE PROTECTION OF CULTURAL PROPERTY

Jurisdiction is the cornerstone of enforcement, therefore jurisdiction and enforcement are interlocked. The choice of a jurisdictional theory is a reflection of the intended enforcement scheme, and, *mutatis mutandi*, the determination of the scope of enforcement will entail the choice of a given jurisdictional theory. The wider the jurisdictional scope, the broader and, presumably, the more effective is enforcement. This is why the scope of the enforcement scheme of a relevant convention is an intricate part of its jurisdictional basis.

The relevant group of conventions analyzed herein is comprised of the 1954 Hague Convention protecting cultural property during armed conflict,[148] the 1970 UNESCO Convention,[149] the World Heritage Convention,[150] the Convention on the Law of the Sea,[151] the regional European conventions,[152] the OAS Convention,[153] and

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the RESTATEMENT, *supra* note 4. *See also* Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979); Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981).

147. With respect to internationally protected persons such as diplomats, foreign government officials, heads of state, etc., see 18 U.S.C. § 1116(b)(6) (1976) which provides for U.S. jurisdiction irrespective of where the crime was committed; Congress has extended federal jurisdiction for crimes against certain high-ranking officials beyond United States jurisdiction. 95 Stat. 1219, Pub. L. 97-285 (S.907), 18 U.S.C. § 351 and § 1751(g) (1976).

148. 1954 Hague Convention, *supra* note 2.

149. UNESCO Convention, *supra* note 1.

150. *See supra* note 2.

151. Convention on the Law of the Sea, *supra* note 3.

152. European Cultural Convention, *supra* note 2; European Archaeological Convention, *supra* note 2.

153. OAS Convention, *supra* note 2.

the United States-Mexico[154] and United States-Peru treaties.[155] The common purpose of these instruments is to protect a specifically identifiable kind of property right. However, the conventions have not been drafted to provide protection irrespective of any and all particular circumstances. Why, it may be asked, has no single convention dealing with all aspects of the protection of cultural property been drafted? The answer is simply a lack of political will on the part of the world community to do so, especially in light of conflicting values, interests, and strategies of the diverse participants in the world community.

The instruments, however, appear to share the same basic values expressed in the general goals of protecting national cultural property and national heritage as a basic cultural human right.[156] But, a divergence appears in the definition of what constitutes cultural property,[157] and that divergence has an impact on the strategies of protective schemes contemplated by the international instruments protecting cultural property. Thus, enforcement models differ and jurisdictional approaches are not clearly established beyond the most obvious, which in this instance is the territoriality principle.

One has to ask why the universality principle has not been recognized as applicable to these violations as when they occur in time of war and are considered war crimes, and for that matter to other international crimes as discussed above. The answer is simply that the international legislator has not yet unequivocally recognized violations of those international agreements protecting cultural property to be international crimes beyond the context of war crimes. One of the problems is the unfortunate distinction still preserved in international law between the law of war and the law of peace. Such a distinction should clearly be discarded in the area of international protection of cultural property, as it has largely disappeared in the area of international protection of human rights.[158] Another reason is that government officials who negotiate

154. United States-Mexico Treaty, *supra* note 100.

155. United States-Peru Treaty, *supra* note 106.

156. *See* 1954 Hague Convention, *supra* note 2, preamble; UNESCO Convention, *supra* note 1, preamble; World Heritage Convention, *supra* note 2, preamble; European Cultural Convention, *supra* note 2, art. 5; and *e.g.*, *supra* note 28.

157. *See* 1954 Hague Convention, *supra* note 2, art. 1; UNESCO Convention, *supra* note 1, art. 1; World Heritage Convention, *supra* note 2, arts. 1, 2; European Archaeological Convention, *supra* note 2, art. 1; OAS Convention, *supra* note 2, art. 2.

158. *See supra* note 17.

international agreements are traditionally cautious and conservative, expecting to do only what is most widely and generally accepted, seldom treading new ground. As a result, they leave to other sources of international law what is really the more appropriate task of conventional international law. Thus, the task frequently befalls the "publicist" to advance the frontiers of international law.[159]

The conventions are generally consistent in their limited and narrow approach to the question of jurisdiction.[160] Although they may implicitly establish a duty to punish or criminalize[161] and, at times, a duty to cooperate in investigating, prosecuting, and punishing those who commit offenses against cultural property,[162] the conventions fail to explicitly make such statements. In comparing the agreements dealing with the protection of cultural property with other international criminal law conventions, one notes the absence of specific and broader provisions on jurisdiction, extradition,[163] and judicial assistance and cooperation in penal matters.[164]

As stated above, the jurisdictional basis in all of the conventions is the more limited territorial basis, and that theory is only implicitly established.[165] The conventions contain such indirect

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159. *See* Statute of the ICJ, art. 38, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

160. *See* 1954 Hague Convention, *supra* note 2, arts. 3, 28; UNESCO Convention, *supra* note 1, arts. 2, 5, 6, 7, 8, 13; World Heritage Convention, *supra* note 2, arts. 4, 5, 6, 7; European Cultural Convention, *supra* note 2, art. 5; European Archaeological Convention, *supra* note 2, art. 7.

161. *See* 1954 Hague Convention, *supra* note 2, art. 28; UNESCO Convention, *supra* note 1, art. 8.

162. UNESCO Convention, *supra* note 1, art. 13(c); OAS Convention, *supra* note 2, arts. 22, 14; United States Mexico Treaty, *supra* note 100, art. III.

163. The one exception is the OAS Convention, *supra* note 2, which in article 14 subjects those responsible for crimes against cultural property to appropriate extradition treaties. Article 11 imposes a duty to institute judicial action where required by the laws of a state petitioned for recovery of illegally acquired cultural property. *See also* DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 7.

164. For judicial assistance and cooperation, see Gutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in II M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 189 (1973); Markees, *The Difference in Concept Between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters*, in II. M.C. BASSIOUNI & V.P. NANDA, *supra*, at 171; 45 REVUE INTERNATIONAL DE DROIT PENAL (1975). *See also* European Convention on Mutual Assistance in Criminal Matters, *done* Apr. 20, 1952, 472 U.N.T.S. 185, Europ.T.S. 30, and European Convention on Transfer of Proceedings in Criminal Matters, *done* May 15, 1972, Europ.T.S. 73.

165. Kegel & Seidel-Hohenveldern (trans. by Darby), *On the Territoriality Principle in Public International Law*, 5 HASTINGS INT'L & COMP. L. REV. 249 (1982).

statements as "in the most appropriate manner [for each state],"[166] "as appropriate for each country,"[167] "shall be governed by domestic legislation,"[168] or "situated within their own territory."[169] Perhaps because the territoriality theory is so accepted, the drafters felt that there was no need to specifically state it. The Convention on the Law of the Sea, also based on the territorial principle, remains the only one to provide explicit jurisdictional provisions, while also giving recognition to the jurisdictional claims of the country of origin, cultural origin, or historical and archaeological origin of the property.[170]

The 1954 Hague Convention states merely that parties will prepare in time of peace, to safeguard cultural property situated within their own territory by taking such measures as they consider appropriate.[171] Further, the parties will take necessary steps, within the framework of their ordinary criminal jurisdiction, to prosecute and impose penal or disciplinary sanctions upon persons, regardless of nationality.[172] The former provision asserts the application of national law as the means through which cultural property is to be protected. The latter provision would appear to allow assertion of jurisdiction on the basis of the subjective-objective territorial theory of jurisdiction, in that it does not limit jurisdiction to conduct occurring within the state's territory.[173] Therefore, it may be said that a country may assert jurisdiction over the sale of stolen cultural property outside its territory where neither party to the sale is a national of the state asserting jurisdiction.[174]

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166. European Archaeological Convention, *supra* note 2, art. 7.

167. World Heritage Convention, *supra* note 2, art. 5; UNESCO Convention, *supra* note 1, art. 5.

168. OAS Convention, *supra* note 2, art. 7.

169. 1954 Hague Convention, *supra* note 2, art. 3.

170. Convention on the Law of the Sea, *supra* note 3, art. 149. This article may create a conflict of law in that frequently more than one state will have one of the interests mentioned in the provision. The article provides no guidelines on resolution of such a conflict.

171. 1954 Hague Convention, *supra* note 2, art. 3.

172. *Id.* art. 28.

173. RESTATEMENT, *supra* note 4, § 18.

174. *Id.* Note that § 18(b) of the RESTATEMENT requires the effect within the territory to be substantial. The question remains whether such a sale would constitute an effect substantial enough to confer jurisdiction. However, the case of the Afo-A-Kom of Cameroon suggests that transactions in cultural property may often be sufficiently substantial. The Afo-A-Kom is a wood carving said to represent the soul of the people of Cameroon. The disappearance of the statue in 1966 meant that an integral part of an intrinsically superstitious people's spiritual life was gone. When the piece appeared in a New York art gallery, a formal request from the Cameroon government, supplemented by adverse public opinion,

However, use of the subjective-objective theory of territorial jurisdiction immediately creates a conflict of jurisdictions problem. The state wherein the effect of the proscribed conduct occurred would have objective territorial jurisdiction. The state in which the actual conduct took place would have subjective territorial jurisdiction. Both states might have an equal interest in prosecuting the case, but the 1954 Hague Convention provides no basis on which to determine which state might have priority of jurisdiction or how to balance the interests of the states in order to confer jurisdiction. It should be noted that the jurisdictional provisions in the 1954 Hague Convention leave the prosecution and punishment of offenders to be provided for in the national criminal codes of the respective states.

Further, the convention does not explicitly recognize the fact that in time of war jurisdiction may be asserted by military courts or tribunals, or national courts;[175] perhaps it was deemed too obvious. The most common forum for the prosecution of individuals for war crimes is the military tribunal, either established internationally on the basis of universal jurisdiction or under the national laws of individual states, or the ordinary criminal courts.[176]

The most favored view of jurisdiction over war crimes is that, as far as possible, national courts should adjudicate all war crimes coming within their respective territorial jurisdiction,[177] but allowing for the universality theory to apply so that in the event a given state fails to exercise its primary right of prosecution and punishment, another interested state could exercise jurisdiction. Certain categories of offenses should, however, be remitted to an international criminal court either because they are international crimes

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resulted in the return of the object to the government of Cameroon. DESKBOOK, *supra* note 6, at 71.

175. After World War II, actions for the recovery of property were instituted both in the military courts set up by the occupying allies and the national courts, with considerable confusion concerning authority to assert jurisdiction. *See supra* note 59.

176. This does not include the jurisdiction asserted by military tribunals. Court martials are limited to prosecution of persons currently in the armed forces and derive jurisdiction from the sovereign right of nations to raise and administer armies. *See* U.C.M.J., *supra* note 14, 10 U.S.C. § 102, § 2802 art. 2 (1982).

177. Witness, for example, the problems of the United States in prosecuting ex-servicemen for crimes committed during the Korean and Viet Nam wars. *See* Note *Jurisdictional Problems Related to Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970); Shaneyfelt, *War Crimes and the Jurisdictional Maze*, 4 INT'L LAW. 924 (1970). One author has proposed a theory under which war crimes jurisdiction may be maintained in federal court. *See* Paust, *After My Lai: The Case of War Crimes Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). *See also supra* note 14.

or because as transnational crimes they are more adequately and effectively dealt with by such a court. This is especially true when, for example, no national court has jurisdiction or when a state chooses not to exercise jurisdiction, or because the crime committed has an effect in more than one state or against the citizens of different states, or when the crime is committed by a head of state.[178]

In order for national courts to exercise common judicial jurisdiction under their general criminal laws, the provisions of the relevant international conventions must first be incorporated into national penal codes. In the context of armed conflicts regulations, however, the provisions prohibiting destruction or confiscation of cultural property are subject to military law and are not subject to the jurisdiction of the ordinary criminal courts.[179]

Where jurisdiction cannot be asserted by a national court, states may resort to special military tribunals. In the end, however, both fora are limited by the general or special criminal jurisdiction of the special military courts of the individual states. Thus, the convention is shortsighted in failing to provide alternative or contingent jurisdictional bases by which its provisions may be enforced.

Finally, the convention fails to address jurisdiction over recovery and restitution of property through civil actions after cessation of hostilities. Significant problems lie in determining title once property has been confiscated and sold to bona fide third party purchasers. Without even a statement of policy regarding this issue, the convention leaves the individual states to provide their own solution.

The 1970 UNESCO Convention[180] sets forth three means by which illicit traffic in cultural property may be controlled. First, the parties are to set up national services. As appropriate for each

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178. Historical Survey of the Question of International Criminal Jurisdiction, Report by the Int'l L. Comm. to the Secretary-General, U.N. Doc. A/CN.4/7. (May 27, 1949). *See* B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980). For a draft statute creating an international criminal court for the enforcement of the Apartheid Convention containing specific jurisdictional provisions, see U.N. Commission on Human Rights, *The Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, E/CN.4/AC/22CRP.10/Rev.1 (Dec. 10, 1980), *reprinted in* 9 HOFSTRA L. REV. 523 (1981).

179. *See supra* note 176. *See also* Baxter, *Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability*, in II M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 67 (1973).

180. UNESCO Convention, *supra* note 1.

country, such services would include development of draft legislation to protect the cultural heritage and prevent illicit export and transfer of ownership of cultural property, and the establishment of ethical principles to guide transactions in cultural property.[181] Second, consistent with national legislation, the states are to prevent the import and acquisition of illegally exported cultural property from its country of origin.[182] Third, states are to prohibit the export of cultural property from their territory unless accompanied by an export certificate.[183] The convention provides for the imposition of penalties or administrative sanctions for violations of articles 6(b) or 7(b), but otherwise generally provides only for the parties to oppose practices prohibited by the convention "within the means at their disposal."[184] A duty is imposed, as consistent with the laws of each state, to admit actions for recovery brought by the rightful owners of cultural property.[185]

It is very clear that the UNESCO Convention speaks exclusively of territoriality of jurisdiction. As mentioned above, the term "jurisdiction" in international law refers to two aspects of the authoritative decision-making process: rule-making and rule-enforcing.[186] States are competent to declare conduct violative of their interests and, therefore, punish all offenses committed within their territory. The question is whether the two aspects of jurisdiction must co-exist concurrently within a state.

The UNESCO Convention appears to vest the power to legislate concerning protection of cultural property in the individual state (rule-making); however, the convention does not clearly vest the power to enforce in any state (rule-enforcing). Even if not expressly stated, the result is at least an implicit conflict between the power of rule-making and the power of rule-enforcing. It is interesting to note that with respect to the United States-Mexico treaty and enforcement thereof in recent decisions by the Fifth and Ninth Circuits,[187] the U.S. Courts of Appeal have, in effect, interpreted the treaty to vest the power to legislate in the country of origin of the cultural property, while the right of ownership is to

181. *Id.* arts. 5(a), 5(e).
182. *Id.* art. 7.
183. *Id.* art. 6.
184. *Id.* art. 2(2).
185. *Id.* art. 13(b).
186. RESTATEMENT, *supra* note 4, § 7.
187. *See supra* note 105.

be enforced in the territory in which the object is located or in which the prohibited act was committed.[188]

Last, but not least, is the important, but overlooked, fact that most states will not enforce the penal judgments of another state[189] unless a convention specifically establishes that duty.[190] The absence of a clear statement in the relevant peacetime conventions on the recognition and enforcement of penal judgments renders the enforceability of these judgments questionable and, thus, reduces the impact of the convention with respect to the prevention, suppression and control of the activity sought to be internationally prohibited.

VI. CONCLUSION

The distinction made between relevant international instruments in their applicability to the contexts of war and peace is inappropriate to the effective enforcement of a common interest, based on the shared values and expectations of the world community which are presumably embodied in all these instruments. The consequences of this distinction are that certain violations are deemed international crimes while others are not specifically deemed to be so. The legal distinction, in turn, produces significant differences with respect to enforcement, and that in large part, is reflected in the jurisdictional bases set forth explicitly or implicitly in these instruments. These instruments are either too limited or too ambiguous regarding their intended enforcement. This is evidenced by the criminal jurisdictional problems discussed above.

A consequence of this situation is the diversity of eventually competent jurisdictions (i.e., an international criminal court, national military tribunals, national criminal or civil courts). Another consequence appears in the enforcement schemes, means, and methods

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188. *See supra* note 102. The *McClain* courts asserted a Mexican law as the basis for establishing that the property in question was stolen within the meaning of the National Stolen Property Act. *See also* King of Italy v. Marquis de Medici, 34 T.L.R. 632 (1918), wherein the English court gave extraterritorial effect to an Italian law protecting the Italian patrimony.

189. *See* The Antelope, 23 U.S. (10 Wheat) 66 (1825); *but see* Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975) and Von Mehren, *Enforcement of Foreign Penal Judgments in the United States*, 17 VA. J. INT'L L. 401 (1977). *See also* Bassiouni, *Perspectives on the Transfer of Prisoners Between the U.S. and Mexico and the U.S. and Canada*, 11 VAND. J. TRANSNAT'L L. 249 (1978); Paust, *The Unconstitutional Detention of Prisoners by the U.S. under the Exchange of Prisoner Treaties*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING THE U.S. LAW IN THE WORLD COMMUNITY (R.B. Lillich ed. 1981).

190. Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

(i.e., duty to prosecute or extradite, and lend judicial assistance and cooperation). Finally, a difference also exists with respect to prosecutable offenses and offenders in these differing contexts before multiple potentially competent fora.

In light of the observations made above, which are by no means exhaustive, the following recommendations are offered:

(1) The adoption of a comprehensive unified convention dealing with all aspects and types of protection of cultural property, irrespective of context. It should contain an appropriate differentiation between types of offenses, their definition (with a view to preserving the principles of legality embodied in the maxim *nulla poere sine lege*[191]), a statement of other able jurisdictional bases, with a priority ranking to settle conflicts of judicial jurisdiction, and provisions providing for the duty to prosecute or extradite and the establishment of a duty to lend judicial assistance and cooperation in the investigation, prosecution, and enforcement of the provisions of the convention and enforcement of the judgments of competent tribunals, including recognition of foreign penal judgments.[192]

(2) The drafting of model national legislation to implement such a convention for inclusion into the national laws of the interested states. This would provide greater uniformity of application and enhance enforcement.[193]

Almost all of the twenty-one recorded civilizations of this planet have had some form of cultural property the heritage or legacy of which has been received and transmitted for the enrichment of ensuing civilizations, and the enlightenment of succeeding generations. Yet curiously that which appears most commonly shared through

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191. M.C. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 52 (1978), cited by the Supreme Court in Kolender v. Lawson, 51 U.S.L.W. 4532, 4533 (1983).

192. *See, e.g.*, European Convention on the International Validity of Criminal Judgments, May 29, 1970, Europ.T.S. 70. *See also* EUROPEAN COMMITTEE ON CRIME PROBLEMS, COUNCIL OF EUROPE, EXPLANATORY REPORT OF THE EUROPEAN CONVENTION ON THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS (1970); Harari, McLean & Silverwood, *Reciprocal Enforcement of Criminal Judgments*, 45 REVUE INTERNATIONALE DE DROIT PENAL 585; Shearer, *Recognition and Enforcement of Foreign Criminal Judgments*, 47 AUST. L.J. 585 (1973); Breukelaar, *La Reconaissance des Jugements Repressifs Etrangers*, 45 REVUE INTERNATIONALE DE DROIT PENAL 565 (1974); Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in II M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 261 (1973).

193. This recommendation was attempted in connection with the enforcement of the Single Convention on Narcotic Drugs (1961), 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 151 (effective June 24, 1967), and the Convention on Psychotropic Substances, *done* Feb. 21, 1971, U.N. Doc. E/CONF.58/6, T.I.A.S. 9725 (effective July 15, 1980), *reprinted in* 10 I.L.M. 261 (1971), and was included in workpaper: *International Drug Control*, Abidaja World Conference on World Peace Through Law, Aug. 26, 1973. *See also* Bassiouni, *The International Narcotics Control System: A Proposal*, 46 ST. JOHN'S L. REV. 713 (1972).

the ages in all parts of the globe, and that which is universally perceived as deserving the highest protection seems to have been the object of so little effective concern by the world community. Perhaps it is as the cynics of the post-Napoleonic period argued after the Paris Conference of 1815, that if such treasures belong to the world and thus need to be preserved, why not keep them in Paris where so many more people from many parts of the world are likely to see and enjoy them? Perhaps it is because that which is of perservable value to some, is of attractive, sometimes destructible, appeal to others. But perhaps, too, the realization that our planet is the "spaceship-earth" is what it takes to bring about a true sharing of the values of protecting and preserving the cultural heritage of all peoples, not only for purely national or chauvinistic purposes, but for the inherent interest that we all share in each other's culture, now and for ensuing generations of this, and perhaps succeeding civilizations, if our planet survives the test of our destructive tendencies.

APPENDIX

M. Cherif Bassiouni, DRAFT INTERNATIONAL CRIMINAL CODE Presented to the VIth U.N. Congress on Crime Prevention and the Treatment of Offenders, (Caracas, Venezuela, 1980) U.N. Doc. No. E/1980/L.1

Article XVII. Theft of National and Archaeological Treasures

Section 1. *Definition*

1.1 Cultural property is any property which, on religious or secular grounds, is designated by a state as being of importance to its cultural heritage and which belongs to the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life

of national leaders, thinkers, scientists, and artists, and to events of national importance;

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

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

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

(f) objects of ethnological interest;

(g) property of artistic interest, including, but not limited to:

(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 statutary 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, 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.

1.2 Property which belongs to the following categories shall be deemed part of the cultural heritage of a state:

(a) cultural property created by the individual or collective genius of nationals of the state concerned, and cultural property of importance to the state concerned created within the territory of that state by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory of a state;

(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the state of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the state of origin of such property.

Section 2. *Acts of Theft of National and Archaeological Treasures*

2.0 Theft of national and archaeological treasures shall consist of:

(a) the import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted by a state to promote the enforcement of this Article;

(b) the export and transfer of cultural property under compulsion arising directly or indirectly from the occupation of a state by a foreign power;

(c) the importation of cultural property stolen from a museum or a religious or secular public monument or similar institution of a state, provided that such property is documented as appertaining to the inventory of that institution.

Section 3. *Recovery*

3.0 Recovery of cultural property shall only be by those lawful means provided for in international conventions on this subject and any other relevant convention, but such recovery shall not be deemed a seizure and just compensation shall be owed to the *bona fide* holder.

Section 4. *Specified Measures of Enforcement*

4.1 Each exporting state shall establish an appropriate certificate which would specify that the export of the cultural property in question is authorized by that state. The certificate should accompany all items of cultural property exported in accordance with this Section.

Section 2. Each state shall prohibit exportation of cultural property from their territory unless accompanied by the export certificate mentioned in Section 4.1.

4.3 Each state shall publicize by appropriate means the requirements of this Section, particularly to those persons or entities likely to engage in the import or export of cultural property.