LEGAL APPROACHES TO THE TRADE IN STOLEN ANTIQUITIES

As the home of the largest market for stolen or illegally exported antiquities, the United States is in a superior position to influence the world antiquities trade. The countries victimized are often archaeologically rich but economically poor, so the incentives for individuals to sell objects to foreigners often override the effect of contrary national policies. A knowledge of United States official policy and the availability of judicial and private remedies is crucial to governments seeking recovery of plundered national treasures. The intent of this article is to explore the nature of the trade, and to review international and domestic legal approaches, relevant United States Government policies, and suggested alternatives.

The problem brings several interests and viewpoints into conflict. The interests which have prevailed to date are those of the discoverers and plunderers of antiquities, the smugglers and the dealers to whom they sell, and the American museums and private collectors who provide the ultimate market and motivation for the trade.[1] Opposed are the interests of the people, governments, and national museums of the countries of origin, as well as archaeologists and the universities they represent. Where the objects are of religious or local traditional importance, such as the Afo-a-Kom statue recently returned to Cameroun from a New York gallery, their recovery may be socially and politically imperative.[2] The broader concepts of nationalism and internationalism are

1. Though the scope of this article is limited to the market for stolen antiquities in the United States, the cities of London, Paris, Tokyo, and Zurich are also significant centers of the trade. Many items pass through these and other major centers of economic activity prior to their arrival in the United States, rather than being sent directly, which would draw greater attention to their origins. AFRICAN ARTS, Autumn 1970, at 70. *See also* Reinhold, *Theft and Vandalism: An Archaeological Disaster*, EXPEDITION, Summer 1973, at 25 [hereinafter cited as Reinhold].

2. A poignant example of the effect of the theft of a national treasure came to light in October 1973, when the Afo-a-Kom, a uniquely significant religious carving stolen six years before, was discovered in a New York art gallery. The Afo-a-Kom is an important object of worship in the Kingdom of Kom, in the United Republic of Cameroun. The statue was sold to smugglers by a trusted member of the royal court (who was never paid). He stole it from the house of worship at the instigation of a trader from another region. Kom tribal leaders believe there was a ready buyer for the statue before it was stolen. Upon delivery by the thief to the trader, the Afo-a-Kom was transported by taxi and otherwise, in the guise of a wrapped corpse, to the port of Douala, from which it left for New York by an unknown route. The people of Kom were deprived of the foremost manifestation of their religious and cultural heritage, and were agitated and distressed by its absence. The statue is the embodiment of the unity and peace of the people, having been carved at the behest of the greatest religious and political leader in Kom history about 100 years ago. Its disappearance caused the people of Kom to go into mourning and

each invoked in the debate over the proper role of museums, art dealers, governments and international organizations.

The illicit international trade in antiquities offers high rewards and has created vested interests in its perpetuation.[3] Many indigent persons in countries rich in archaeological treasures derive their income from the sale of artifacts they find or plunder from ancient sites. Their reward, in relation to that of the exporters to whom they sell, is miniscule.[4] Laws against the exportation of antiquities are almost universal,[5] yet are universally unsuccessful as applied in curbing the outflow of ancient or traditional art and artifacts.[6] In most cases, the smugglers are the only ready buyers, competing only with each other. The national interest of the country of origin is unrepresented at the crucial first stage of the trade, where the finder disposes of his booty.[7]

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become quarrelsome, even refusing to co-operate in customarily community endeavors. The discovery of the statue in New York brought immediate efforts by the Cameroun Government to effect its return. Legal action was foregone in favor of private negotiations, as is usually the case. For effective legal action, documented evidence that the statue was indeed stolen and smuggled out of Cameroun illegally would have been required, so the informal approach was far more expedient. The Afo-a-Kom was returned to the people of Kom by the Museum of African Art in Washington, D.C., which purchased it from the dealer. The incident has brought considerable publicity to the harmful effects of the illegal antiquities trade. *See* Ferretti, *African Aides Act to Retrieve Statue*, N.Y. Times, Oct. 26, 1973, at 45, col. 5 [hereinafter cited as Ferretti]; Blakeslee, *Return the Sacred Statue, the Ruler of Kom Pleads*, N.Y. Times, Oct. 30, 1973, at 1, col. 3; Ferretti, *Owner Returning Statue to Kom*, N.Y. Times, Oct. 31, 1973, at 1, col. 1.

3. Prices of antique art objects have increased 90% to 95% in the past year. BARRON'S, Dec. 31, 1973, at 20. *See also* Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, at 96, 97.

4. *See* Heath, *Bootleg Archaeology in Costa Rica*, ARCHAEOLOGY, July 1973, at 217 [hereinafter cited as Heath], which offers informative insights into the economic significance of the illicit trade in Costa Rica. Mr. Heath's article considers many socio-economic factors not dealt with in other articles. Any comprehensive program to combat plundering must deal with the needs currently met by the trade at its source as well as controlling trafficking and marketing.

5. The United States is a notable exception, having no restraints on the exportation of American Indian artifacts or historically significant items per se.

6. The failure of the export laws in some nations is due to the severity of the restrictions (discussed *infra*), but generally, in victimized countries, official corruption or laxity in enforcement of the laws is rampant. This corruption ranges from willingness to look the other way while smuggling takes place to outright participation. *See* Heath, *supra* note 4. *See also* Reinhold, *supra* note 1.

7. This is because the governments seldom have representatives in the field where artifacts are unearthed and launched into the international trade. The Panamanian Government has taken steps to improve its ability to become involved at this first stage. N.Y. Times, Jan. 23, 1972, at 25, col. 1. The program of policing, cataloguing, and regular visitation of remote areas is directed by the Department of Historical Patrimony under Dr. R.T. de Arauz. *See also* Graham, *A New Method to Protect Maya Sculpture from Looters*, ARCHAEOLOGY, April 1973 at 25 [hereinafter cited as Graham], for proposals of protection *in situ* and for large scale removal of endangered monuments from unprotected

Once an object has been smuggled outside its country of origin, deliverance to its final destination in an American museum or private collection is quite efficient, though the route taken may be devious and indirect. Importation into the United States violates no American law, with one exception of limited applicability,[8] assuming that the object is properly declared at customs. The possibility of retrieval by the country of origin depends on its ability to discover the whereabouts of the piece, prove a claim that the object originated within its borders, *and* that it was exported in violation of its laws, or was stolen.[9] In the United States, art dealers have customarily accepted antiquities readily without proof of their provenance, understanding that the illegal circumstances of their removal precludes authentication by the seller. Dealers seek authentication of valuable pieces by academic experts, many of whom accede on the grounds that it is better that an object be observed and noted by someone with a scholarly interest in recording its characteristics, than that it pass into private hands without the academic community's knowledge of its existence.[10]

Once authenticated, antiquities are in great demand by private collectors and museums which are not involved in archaeological expeditions. The latter do not suffer from the retaliatory bans against archaeologists from the United States with which some countries have reacted as a result of the possession of their national treasures by Americans.

The opponents of those providing or serving the demand for stolen antiquities have been motivated by the destruction of the archaeological record resulting from the removal of objects from their context, and by the destruction of good will between American institutions and foreign governments.[11] Archaeologists who have decried the destruction of the archaeological record have spoken in the interest of science; their motives have been international in that they are non-national and apolitical. The internationalistic view that antiquities are a part of the com-

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sites. According to Mr. Graham the Edward Logue Tinker Foundation of New York has been active in this area.

8. The Pre-Columbian Antiquities Act, 19 U.S.C. § 2091 *et seq.* (Supp. 1973). See text accompanying note 37 *infra*, for a treatment of its operational effect.

9. Private negotiations are resorted to in the majority of instances. In the Afo-a-Kom case, for example, the interest of the possessor in protecting his public image, as well as the willingness of Warren Robbins of the Museum of African Art in Washington, D.C., to negotiate made the extralegal approach more responsive to the needs of the victims of the theft. Ferretti, *supra* note 2.

10. Meyer, *The Plundered Past* (pts. 1-3), THE NEW YORKER, Mar. 24, 1973, at 96, Mar. 31, 1973, at 80, April 7, 1973, at 96.

11. Once an object is removed from the spot in which it was discovered, dating and analysis of its function are rendered much more difficult, and the object may be useless for research purposes.

mon heritage of mankind, and thus belong to all the world, is expressed[12] with the intent of justifying multilateral efforts such as those proposed by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,[13] and by the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.[14] Yet the same argument has been made in support of the right of *any* country to hold the treasures of any other country, and in derogation of the right of a modern government to claim the treasures of a past civilization as its own.[15]

Article 6 of the 1972 UNESCO Convention attempts to reconcile the "common heritage" theory with national claims to a right of possession of antiquities originally discovered within the political boundaries of a modern nation, both of which it recognizes as valid.[16]

The preface of the 1972 UNESCO Convention does not speak in terms of *national* treasures or heritage, but rather considers that "elements or structures of an archaeological nature need to be preserved as part of the world heritage of mankind as a whole," and that "the deterioration or disappearance of any item of the cultural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."[17] Since the Convention intends to avoid the deterioration or disappearance of artifacts, it does not directly challenge smuggling for purposes of selling the objects to museums, and is actually viewed by

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12. Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, at 112.

13. 10 INT'L LEG. MAT. 289 (1971), [hereinafter cited as 1970 UNESCO Convention]. *See* Note, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM. J. TRANSNAT'L L. 316 (1973) [hereinafter cited as Note].

14. UNESCO Doc. 17 C/106 (1972), 11 INT'L LEG. MAT. 1358 (1972) [hereinafter cited as 1972 UNESCO Convention].

15. Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, at 112.

16. 1972 UNESCO Convention, *supra* note 14, art. 6 provides:

> 1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.
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> 2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and preservation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.
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> 3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

17. UNESCO Doc. 17 C/106 (1972).

some as theoretically supportive of it![18]

The phrase "international protection of the world cultural and natural heritage" is illuminated by Article 7 as "the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage."[19] Here the term "conserve" implies both physical preservation and retention of objects within the State's boundaries. It does not appear to extend to the retrieval of objects already removed.[20]

Despite the absence of emphasis on *national* rights and duties in the preface of the 1972 Convention, Article 5 pledges the Parties to unilateral "measures . . . for the protection, conservation, and presentation of the cultural and natural heritage situated on its territory . . . ."[21]

Accompanying the Convention at its adoption on November 16, 1972, was the UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage.[22] The Recommendation approaches unilateral action to preserve antiquities as a duty owed by the nation in possession of them to the rest of mankind. Like the Convention, it does not address itself to national possessory interests. The emphasis is on "the effective protection, conservation and preservation of the cultural and national heritage." Protection, in the Recommendation, is directly related to retention of the object in its environment, which clearly includes protection against removal by looters. Particularly useful in this regard are the suggested measures of inventorying and mapping cultural property (paragraphs 29 and 31).[23]

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18. Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, 96, 112 *et seq.* A letter to the editor of AFRICAN ARTS from Arnold Rubin, of Jos, Nigeria, is a persuasive rebuttal. AFRICAN ARTS, Winter 1970, at 79.

19. UNESCO Doc. 17 C/106 (1972).

20. Nevertheless this Convention could be of great theoretical and financial aid against plundering and exportation. The "World Heritage Fund" established by article 15 could be a basis for (1) enabling states to discover many items not yet known to be in existence, (2) assisting in programs of protection *in situ*, removal of treasures endangered by looters or by natural elements to safekeeping in national or local museums, (3) enabling states to police large-scale exposed sites, (4) facilitating the requisite inventorying of objects for protection under the 1970 UNESCO Convention. See note 27 *infra* and accompanying text. The 1972 UNESCO Convention may be vital to effective implementation of the 1970 UNESCO Convention in the area of inventorying, since without the World Heritage Fund inventorying may be too expensive. Although discussions of the illicit antiquities trade have not as yet mentioned the 1972 UNESCO Convention, its role in the international effort could become favorably decisive.

21. UNESCO Doc. 17 C/106 (1972).

22. UNESCO Doc. 17 C/107 (1972), 11 INT'L LEG. MAT. 1367 (1972) [hereinafter cited as UNESCO Recommendation].

23. *Id.*, para. 29 states:

> Each Member State should draw up, as soon as possible, an inventory for the protection of its cultural and natural heritage, including items which, without

Paragraph 48 of the Recommendation provides for the punishment of looters through uncomplicated administrative channels.[24] This provision is not merely punitive, but it also strives to effect restitution of the antiquity and restoration of the site.

The stolen antiquities trade was also the subject of UNESCO action during 1970.[25] A compromise was reached between the plundered nations, notably Mexico, Turkey, and Iran, and countries in which antiquities are most often sold, the United States, the United Kingdom, France, Switzerland, and West Germany. This resulted in the approval of a draft resolution on November 4, 1970, by a 63-1 vote with eight abstentions, by the UNESCO General Conference.[26] This was the culmination of ten years of negotiations, of which the end product is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, adopted November 14, 1970.[27] United States ratification of the Convention will be complete when Congress enacts the necessary implementing legislation, which was submitted to it in June 1973.[28] Current United States policy favors the adoption of the Convention by as many States as possible.[29] The 1970 UNESCO Convention represents the first international action against the illicit antiquities trade, and sets a standard by which nations could effectively reduce their loss of antiquities.

Within the definition of the term "cultural property," which is an outline of the limits of the 1970 Convention's effect, are two potentially troublesome elements. Article 1 limits the definition to "property which . . . is specifically designated by each State as being of importance for

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being of outstanding importance, are inseparable from their environment and contribute to its character.

Id., para. 31 states:

To ensure that the cultural and natural heritage is effectively recognized at all levels of planning, Member States should prepare maps and the fullest possible documentation covering the cultural and natural property in question.

24. *Id.*, para. 48 states:

Penalties or administrative sanctions should be imposed upon those responsible for any other action detrimental to the protection, conservation or presentation of a protected component of the cultural or natural heritage, and should include provision for the restoration of an affected site to its original state in accordance with established scientific and technical standards.

25. *See* Note, *supra* note 13, at 330.

26. N.Y. Times, Nov. 4, 1970, at 9, col. 1; N.Y. Times, May 9, 1973, at 38, col. 1.

27. 10 INT'L LEG. MAT. 289 (1971); *see also* Gordon, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971).

28. Letter from Ted A. Borek, Attorney-Advisor, Office of the Legal Advisor, U.S. Dep't of State, to John B. Seabrook, Jan. 22, 1974, on file at the *Syracuse Journal of International Law and Commerce*.

29. *Id.*

archaeology, prehistory, history, literature, art or science . . . ."[30] Together with Article 5, subparagraph (b)[31] this suggests that any item otherwise qualified for protection under this Convention will not be protected unless recorded in an inventory of cultural property. If so, a large portion of the smuggled treasures, those discovered by looters and thieves and never made known to the government of the country of origin, go unprotected.[32] Neither does the Convention help in retrieving objects stolen prior to the establishment of such inventories.[33] As yet no nation has catalogued all of its antiquities, so all which are currently held abroad will be unaffected.

A second potentially troublesome aspect of Article 1 of the 1970 Convention is the wide range of items eligible for the cultural property designation under subparagraphs (e) and (g). Subparagraph (e) includes all "antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;" while subparagraph (g) includes:

> property of artistic interest, such as:
> (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
> (ii) original works of statutory art and sculpture in any material;
> (iii) original engravings, prints and lithographs;
> (iv) original artistic assemblages and montages in any material.

These include vast classes of objects, inclusive of whatever ranges of quality and value a party elects. As the experience of Nigeria's wide-ranging controls has suggested, broad restrictions may stimulate the

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30. *See* Note, *supra* note 13, at n.55.

31. 1970 UNESCO Convention, *supra* note 13, art. 5, subpara. (b) assigns each State Party to the Convention the duty of

> . . . establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.

32. *See* Graham, *supra* note 7, at 25.

33. The 1970 UNESCO Convention requires adequate evidence of the provenance (origin and prior ownership) of any art objects crossing the borders of States Parties to the Convention, under article 10. This may not be an adequate safeguard, as one art dealer pointed out to Karl Meyer:

> What does 'provenance' mean? It doesn't mean a thing. I have a warehouse in Europe and I keep a lot of things there. If they ratify the UNESCO Convention, then what? I know several indigent counts who would be delighted, for a price, to swear that any piece of mine had been part of the family collection for centuries. I bring my things in from Europe, and who's going to deny it? The treaty won't end the trade. It will just mean more trouble.

Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, at 104. Unfortunately, more trouble means higher prices, and increasing prices stimulate more looting.

black market by channeling more items through it, and may be difficult to enforce.[34]

The first bilateral arrangement for the return of stolen artifacts in which the United States has joined is the Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties.[35] Article I of the Treaty defines the scope of items recoverable under its provisions:

> 1. For the purposes of this Treaty, "archaeological, historical and cultural properties" are defined as
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> (a) art objects and artifacts of the *pre-Columbian* cultures of the United States of America and the United Mexican States of *outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art*;
> (b) art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States of outstanding importance to the national patrimony;
> (c) documents from official archives for the period up to 1920 that are of outstanding historical importance;
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> *that are the property of federal, state, or municipal governments or their instrumentalities,* including portions or fragments of such objects, artifacts, and archives.
> 2. The application of the foregoing definitions to a particular item shall be determined by agreement of the two governments, or failing agreement, by a panel of qualified experts whose appointment and procedures shall be prescribed by the two governments. The determinations of the two governments, or of the panel, shall be final (emphasis added).

The italicized phrases severely limit the range of the Treaty. The language "of outstanding importance to the national patrimony" suggests that only spectacular works of art will be earnestly sought after, which leaves items smaller than the enumerated "stelae and architectural features" in doubtful status. However, section 2 adds flexibility which could enable the parties to expand the effect of the treaty to non-monumental objects as well. The Treaty was not intended to be the sole method of effectuating the return of stolen artifacts.[36]

The only United States legislation providing for the return of stolen antiquities and the punishment of those involved in the trade is the Pre-

34. Letter from A. Rubin to the editors, AFRICAN ARTS, *supra* note 18.

35. Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, [1971] 22 U.S.T. 494, T.I.A.S. No. 7088.

36. Letter from T. Borek, *supra* note 28.

Columbian Antiquities Act of 1972.[37] It requires any "pre-Columbian monumental or architectural sculpture or mural which is exported from the country of origin," sought to be imported into the United States, to be accompanied by a certificate "which certifies that such exportation was not in violation of the laws of that country."[38] Failure to produce such a certificate results in seizure under United States customs laws and return of the object to the country of origin, at the latter's expense. The Secretary of the Treasury is authorized to impose additional prerequisites to the return of objects confiscated, by regulation. The monumental sculptures protected by the Act suffer greater damage than most antiquities at the hands of smugglers because it is generally found necessary to cut these into many pieces in order to transport them without attracting attention.

Besides the Pre-Columbian Antiquities Act[39] there are United States customs laws, as well as federal, state, and local laws which may be applicable in cases where an antiquity or other work of art is identified as stolen. It is a violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2315 to import, transport, possess or sell stolen property with knowledge that the property is in fact stolen. The chief difficulty in effective application of this statute is in meeting the standard of proof; namely, beyond a reasonable doubt that the defendant had this knowledge.[40] State and local laws concerning the possession of stolen property and its recovery by the rightful owner generally do not require knowledge on the part of the violator that the object is stolen in providing for the seizure of the item.[41]

Convictions have been obtained under federal law[42] in two recent cases involving Guatemalan stelae which were documented by the Guatamalan Government prior to their theft, and discovered in the United States. In the first, *United States v. Hollinshead*,[43] an art dealer was convicted of possession of a stolen stela in interstate commerce, and action for its recovery was commenced under California state law in 1971.[44] Since the passage of the Pre-Columbian Antiquities Act, such recovery is possible under federal jurisdiction. In the more recent of the

37. The Pre-Columbian Antiquities Act, 19 U.S.C. § 2091 *et seq.* (Supp. 1973).

38. *Id.*

39. The Act includes no new penalties other than forfeiture and no new system of import inspection. Note, *supra* note 13, at 324-25.

40. Letter from George C. Corcoran, Assistant Commissioner (Investigations), U.S. Customs Service, to John B. Seabrook, Jan. 18, 1974, on file with the *Syracuse Journal of International Law and Commerce*.

41. *Id. See, e.g.*, N.Y. CPLR § 7101 *et seq.*

42. 18 U.S.C. § 2314 (1970).

43. United States v. Hollinshead, Ind. No. 10970 (C.D. Cal. 1973).

44. *See* Note, *supra* note 13, at 319.

only two federal prosecutions in this area during the past year, one Harry K. Brown was convicted of possession of a stolen stela in the Eastern District of Arkansas.[45]

Both customs law and the laws relating to stolen property are applicable subsequent to the passage of an object through customs. If there is any violation of customs law[46] associated with the entry papers accompanying an object, action may be taken under that law which may lead to the confiscation and return of the object.[47] Where an object enters the United States clandestinely without being declared at customs, the anti-smuggling provisions of 18 U.S.C. §§ 542, 545, and 1001 apply.[48] The scarcity of reported cases in this area results from the greater expedience of private negotiations, rather than judicial relief, in recovering important cultural property.

Most countries rich in antiquities have attempted to retain them by means of strict control of their excavation and export. Ghana's National Museum Decree of 1969 and National Museum Regulations of 1973 exemplify this active approach.[49] The Decree requires the issuance

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45. Letter from the office of Carl W. Belcher, Chief, General Crimes Section, Criminal Division, U.S. Dep't of Justice, by John A. Myler, Attorney, to John B. Seabrook, Jan. 28, 1974, on file with the *Syracuse Journal of International Law and Commerce*.

46. 19 U.S.C. §§ 1453, 1497, 1584, 1592 (1970).

47. Letter from George C. Corcoran, *supra* note 40.

48. *Id.* Mr. Corcoran writes that the United States Customs Service conducts investigations whenever an alleged foreign stolen work of art is reported located in the United States. The following is a brief synopsis of some recent investigations by the U.S. Customs Service concerning the importation of art and/or artifacts:

> In October 1972, 127 pieces of pre-Columbian artifacts were seized by Customs agents after their discovery by local Los Angeles authorities subsequent to a narcotics raid. The appraised value of the artifacts was $66,000.00.
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> In February, 1973, information was developed that indicated a large quantity of narcotics would be smuggled into New Orleans aboard a Panamanian cargo ship. Subsequent investigations by Customs special agents uncovered 61 pounds of marijuana and 50 pounds of pre-Columbian artifacts.
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> On April 28, 1973, an international art dealer arrived at Logan International Airport, Boston, from England. The man failed to declare ten Oriental and Indian artifacts and five ancient documents valued at $105,140.00. Among the items seized was a tiger-head statuette of gold inlaid with precious stones valued at over $70,000.00.
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> In October 1973, a wooden statue owned by the African nation of Cameroon was reported by the New York Times to be in the possession of a New York gallery owner. Customs special agents in New York immediately instituted an investigation and placed the statue under constructive seizure pending the results of the investigation, as the art gallery owner had stated he wished to sell the statue. As a result of an agreement among the State Department, Justice Department, the Cameroon Ambassador to the United States, and the U.S. Customs Service, the statue was purchased by a Washington museum and subsequently returned to Cameroon.

49. N.L.C.D. 387 (Ghana) [hereinafter cited as Decree]. The Ghanaian approach is

of an export permit and the exhaustion of a waiting period prior to the export of any antiquity,[50] and gives the National Museum Board an option to purchase any antiquity for its market price.[51] The Decree further protects antiquities still *in situ* or undiscovered by requiring a permit for all excavation, searching, removal, or sale of any antiquity and making failure to comply an offense punishable by imprisonment.[52]

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similar to that of other African states rich in archaeological and ethnographical treasures. Ghana's regulations are chosen as exemplary. I am indebted to Mr. F.B. Duah of the Ghana Museum, Accra, for having provided the materials cited.

50. Decree, *supra* note 49, para. 1 provides:

(1) No person shall export any antiquity except in accordance with an export permit issued by the Board.

(2) Application for an export permit shall be made in writing to the Director of the National Museum at least three months before the proposed date of export, unless the Board in its discretion accepts a lesser period.

(3) Every application shall contain the name of the antiquity, its function, a full description with dimensions, its local cost or an estimate of its value, and the date when, the place where, and the person from whom it was obtained.

(4) Unless the Director otherwise requires, the application shall be accompanied by an adequate photograph or photographs of the antiquity.

51. Decree, *supra* note 49, para. 6 provides:

(1) Where the Director is of the opinion that any antiquity is likely or intended to be exported (whether lawfully or otherwise), or where an application for an export permit has been made and refused, the Director may—

(a) require the owner of the antiquity or the person in whose possession or custody it may be to surrender it to the National Museum; and

(b) pay for the antiquity a price which is assessed by the Board and which is, in the opinion of the Board, the fair market price of the antiquity in Ghana.

(2) Payment for an antiquity under this paragraph shall be made to the person who is, in the opinion of the Board, the owner or person otherwise lawfully entitled to receive payment therefor.

(3) Any person required to surrender an antiquity under this paragraph who fails to do so shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred New Cedis, and the antiquity shall be forfeited to the National Museum by order of the Court.

52. Decree, *supra* note 49, para. 12 provides:

(1) Any person who—

(a) exports or attempts to export any antiquity without an export permit or otherwise than in accordance with an export permit or otherwise than through a recognised customs port or airport; or

(b) sells or offers any antiquity for sale by way of trade or business without a licence or than in accordance with a licence issued by the Board; or

(c) by excavation or similar operations searches for any antiquity without a permit or otherwise than in accordance with a permit issued by the Board; or

(d) without the written consent of the Board, alters, destroys, damages, or removes from its original site any antiquity, or attempts to do so; or

It places upon all persons a duty to notify the authorities of the discovery of any antiquities[53] and classifies failure to do so as a punishable offense. The inclusion of non-Ghanaian items in the definition of "antiquities" reflects an interest in regional and international co-operation, and in avoiding having Ghana become a haven for dealers involved in exporting illegally from other countries.[54] The Regulations add licensing and inventorying requirements for sellers of antiquities and "objects of archaeological interest."[55]

Looting and smuggling will persist as long as there exists an international market for antiquities. Despite all efforts to control the ability of looters to supply the market, a successful program must place emphasis on the *demand.* This approach has not yet been effectively pursued in multilateral action. The demand for valuable antiquities by private collectors in the United States is motivated, in part, by their investment value. For the private collector who, unlike museums, does not publicize

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(e) defaces, damages or destroys any notice or tablet erected by the Board; or

(f) in any application to the Board or to the Director under this Decree, knowingly makes any statement which is false in any material respect or supplies any photograph which is false in any material respect; or

(g) wilfully obstructs any member or employee of the Board in the exercise of any power conferred on the Board by this Decree; or

(h) otherwise contravenes or fails to comply with any provision of this Decree,

shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred New Cedis or to imprisonment not exceeding twelve months, or to both.

(2) Where a person is convicted of attempting to export any antiquity contrary to any provision of this Decree the court may order that the antiquity be forfeited to the National Museum.

(3) Where a person is convicted of an offence which has resulted in damage to, destruction or removal of any antiquity or any part thereof, or any notice or tablet erected by the Board, the court may, in addition to any other penalty which it may impose, order him to pay such sum as the court may determine to repair the damage or for the value of the thing removed or destroyed, and may, in default of such payment, order him to be imprisoned for a further period not exceeding three months in addition to any term imposed under subparagraph (1).

53. Decree, *supra* note 49, para. 10, subpara. (1) states:

Every person who discovers an antiquity, and the owner or occupier of any land upon which an antiquity is discovered on becoming aware of the discovery, shall without delay notify the Board in writing of the discovery.

54. Ghana Museum and Monuments Board, *Interested in Ghana's Cultural Property?* (undated pamphlet). A major problem encountered by West African nations is smuggling across national borders in remote, unpatrolled areas and their easy transportation and shipment from neighboring countries where antiquities laws do not protect foreign items from export. AFRICAN ARTS, Spring, 1972, at 8 (editorial comment).

55. Ghana National Museum Regulations, 1973, Executive Instrument 29.

his acquisitions, antiquities offer an investment with great price-appreciation potential with almost no risk. Assuming an object is genuine, which is normally guaranteed by art dealers, its value will not fall. Through prosperity and recession, antiquities prices climb. If the economic safety of investing in antiquities can be undermined, the demand for them as investments could be significantly reduced. Instances of frequent successful recovery by countries of origin from private collectors would have a chilling effect on the security-conscious investors who stimulate the smuggling of the finest pieces. In most American jurisdictions recovery is possible under the common law grounds of conversion; a *bona fide* purchaser who receives goods from one who has stolen them, or merely has no power to transfer them, becomes a converter when he takes possession.[56]

A more direct judicial approach may be available in the criminal process of the country of origin. Whenever an art dealer, collector, or trader who has handled illegally exported materials is present in the country from which they were stolen, his arrest and trial as a conspirator in the theft would help deter his like-minded compatriots. If the same were applied to museum officials who have personally participated in the acquisition of stolen antiquities, the demand for them by museums might be sharply reduced.

Another measure widely suggested to ease the demand is a reduction in the severity of the restrictions on export.[57] Many nations' export laws are so wide-ranging that no antiquities may legally be exported. If such countries would permit duplicate pieces and minor ethnological specimens to be exported, these would help satisfy the demand without draining the country of significant pieces.

The availability of contemporary/traditional art offers a valuable opportunity to those nations whose traditional art styles have not been forgotten to protect their antique art objects.[58] If nations fortunate enough to have traditional styles preserved allow contemporary/

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56. RESTATEMENT (SECOND) OF TORTS § 229 (1965).

57. Crowley, *The Contemporary-Traditional Art Market in Africa*, AFRICAN ARTS, Autumn 1970, at 43.

58. *Id.* Professor Daniel Crowley of U.C.L.A. has noted that:

> Hundreds of thousands of objects wholly traditional in materials, methods, and styles are still being produced each year in Africa. Only the functions of some of them have been changed from their original religious, religio-social, or secular local usages to new functions as products to be sold as trophies to travellers . . . . What appears to be needed is more and better work in slowly-evolving traditional styles aimed at a market willing to reward excellence with high prices. Evidently, such a market already exists among collectors.

Crowley goes on to suggest that museums should take more of an interest in such ethnographic specimens instead of emphasizing the unique treasures which are of singular significance in their places of origin.

traditional objects to be exported to satisfy the demand which now is lost to the illicit trade, the market's demands for quality and consistency with tradition will cause the styles to be preserved and the quality of contemporary/traditional art to be refined.[59]

Another method by which the demand could be reduced is the elimination of the tax deduction available to private collectors who make donations of objects of doubtful provenance to museums. Presently, such deductions are available to offset up to thirty percent of an individual's taxable income.[60] A more extreme tax measure, less likely to be accepted politically, is the elimination of the tax exempt status of museums which purchase stolen art. It would be preferable for museums to review their own acquisition policies and refuse to accept any objects without proof of legal exportation. The University of Pennsylvania Museum, in 1970, was the first to announce such a policy.[61] Chicago's Field Museum and several university-affiliated museums have followed suit, but these are museums which sponsor archaeological expeditions. They are under pressure due to their reliance on foreign governments for permission to excavate. Many large museums which do not engage in archaeological expeditions are under no such pressure and have not joined in the so-called Pennsylvania Declaration.[62]

The thrust of most remedies proposed, whether legal or extra-legal, remains future-directed. The more difficult problem of regaining treasures already held privately in the United States continues to be ap-

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59. This effect seems likely to come from the aesthetically-minded collector, but not from the investor whose interest is in unique national treasures. As Professor Crowley points out, however, some antiquities laws prevent this opportunity from materializing:

> After seeing the incomparable collections of the Museums of Lagos, Benin, and Ife, only the most unprincipled collector could object to the strict Nigerian antiquities laws restricting export. But as interpreted today, this policy is self-defeating, and explains the dearth of non-comtemporary art for sale in Nigeria. The law forbids not only the export of antiquities, but also of new objects made for ritual purposes, and requires the purchaser to present each piece to officials of the Lagos Museum to obtain an exit permit for any pieces the museum does not choose to retain. This chancy, inconvenient, and time consuming process understandably discourages legitimate collectors and the development of a trade in new traditionally-styled objects still produced in Nigeria in considerable number. Any apparent foreigner can expect frequent and vigorous customs inspections and/or requests for bribes if he wants to keep even such ordinary craft objects as Abeokita incised gourds which can be considered national treasures only by a considerable feat of the imagination. In practice, wherever there are such antiquary laws, Muslim traders foster their religion's prejudices against graven images by secreting them across national frontiers for sale to infidels.

Id.

60. *Id.*

61. Meyer, *The Plundered Past* (pt. 1), THE NEW YORKER, Mar. 24, 1973, at 120

62. Meyer, *The Plundered Past* (pt. 2), THE NEW YORKER, Mar. 31, 1973, at 97.

proached on a piecemeal basis, through private negotiation. In negotiations with museums and renowned art dealers, a country's bargaining position depends largely on the negative public image which refusal to return stolen art can create. Thus the negotiators seeking restoration generate as much publicity as possible, while the dealer or museum caught with contraband seeks the opposite. Unfortunately, once an object has reached a private collector, public opinion is no longer as viable a weapon. In such cases, retrieval is rare except where a violation of United States customs laws takes place, but the Customs Service is prepared to help in the recovery of stolen works of art once identified.[64]

> It is particularly helpful to have a formal request for the return of an item located in the United States from the foreign source nation. This request should be forwarded through the U.S. State Department representatives to the U.S. Customs Service for investigation.
>
> It is also essential to notify U.S. Customs whenever it is suspected a stolen work of art is bound for the United States. In this way the appropriate Customs authorities can place a look-out for the item or the suspect carrier. Information concerning works of art already located in the United States along with names and addresses of suspected U.S. owners should also be forwarded for investigation by U.S. Customs.[65]

While preventing exceptional treasures from reaching private hands, it is vital that the security in such investing be eroded; but it would be counter-productive to attempt to cut off the flow of minor antiquities and traditional art to the casual collector who gathers them for aesthetic value, with a genuine interest in the arts of the country they represent. As the editors of *African Arts* have pointed out recently:

> The few things casual collectors bring home make points for African art in places and contexts never reached by museums, and act as ambassadors of African culture where such representation is needed most. This much erosion Africa can afford.[66]

The legal approaches, especially the antiquities laws of victimized nations, must take into account the inevitability of the demand for traditional art forms, and attempt to permit the satisfaction of it in ways consonant with the interests of each nation in protecting its finest treasures. Total prohibition of exportation will remove the aesthetically-minded casual collector from legitimate channels and stimulate a black market. The risks to the exporter in the black market trade cause vastly inflated prices, which accelerate as controls are tightened, producing a price appreciation attractive to investors whose financial resources stim-

63. *Id.*
64. Letter from G. Corcoran, *supra* note 40.
65. *Id.*
66. AFRICAN ARTS, Spring 1972, at 8 (editorial comment).

ulate the looters to seek the unique treasures countries can least afford to lose. Only a balanced program of controls and permitted exportation of expendable antiquities, reproductions, and contemporary/traditional art, together with active efforts at locating and retrieving national treasures heretofore considered "safe" in American collections, can bring the inevitable demand to acceptable levels.

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