

2011

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### Recommended Citation

Alexandra L. Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 *Brook. J. Int'l L.* (2011).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol36/iss2/9>

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# THE NEED FOR UNIFORM LEGAL PROTECTION AGAINST CULTURAL PROPERTY THEFT: A FINAL CRY FOR THE 1995 UNIDROIT CONVENTION

## INTRODUCTION

In 1911, Vincenzo Peruggia shocked the world when he stole Leonardo da Vinci's Mona Lisa from the Louvre museum in Paris, marking one of the world's first major art thefts.<sup>1</sup> Almost a century later, in 2007, "five armed and masked thieves walked into a museum<sup>2</sup> while it was open on [a] Sunday afternoon" and stole four pieces of art within five minutes.<sup>3</sup> In 2008, the world witnessed even more dramatic art crime, including "a stolen Caravaggio that turned out to be a fake, gun-wielding thieves and under-the-table ransoms, and something of a real-life Thomas Crown affair."<sup>4</sup>

Since the disappearance of the Mona Lisa, cultural property theft has become an increasingly prevalent crime in many countries despite inconsistent and often misleading statistics.<sup>5</sup> Thefts range from large-scale museum thefts to smaller thefts from galleries, private homes, and religious buildings.<sup>6</sup> France, for example, with "more than 1,200 museums

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1. See Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J. L. & ARTS 111, 112 (2008) [hereinafter Fincham, *Lex Originis Rule*]. Authorities recovered the painting two years later, and the thief "was tried and convicted." *Id.* (citing SEYMOUR V. REIT, *THE DAY THEY STOLE THE MONA LISA* (1981)).

2. The museum is located in Nice, France.

3. Maia de la Baume, *Four Masterworks Stolen From a French Museum*, N.Y. TIMES, Aug. 7, 2007, at E2. The police reported that the stolen works were Claude Monet's "Cliffs Near Dieppe," Alfred Sisley's "Lane of Poplars at Moret-sur-Loing," and Jan Brueghel the Elder's "Allegory of Water" and "Allegory of Earth." The French police were able to recover these pieces in June of 2008. *French Police Recover Stolen Monet Painting*, MSNBC (June 4, 2008), <http://www.msnbc.msn.com/id/24973627>.

4. Noah Charney, *2008 in Review: Art Crimes of the Year*, ARTINFO (Dec. 30, 2008), <http://www.artinfo.com/news/story/29907/2008-in-review-art-crimes-of-the-year/> [hereinafter Charney, *Art Crimes of the Year*]. The article lists the five largest art crimes that occurred in 2008, discussing thefts in Sao Paulo, Brazil; Zurich, Switzerland; Vancouver, Canada; Odessa, Ukraine; and London, England.

5. For a discussion concerning issues with art theft statistics, see Mark Durney, *Art Theft Statistics: Valuable Tools in Need of Reliable Measures*, 1 CULTURAL HERITAGE & ARTS REV. 13 (2010). Durney explains that "there have been few comprehensive efforts to collect and interpret statistics," and statistics "only present a reflection of the incidents registered with, or reported to law enforcement." *Id.* at 13. In addition, INTERPOL's data between 2003 and 2008 reflects a decrease in the number of thefts reported by certain countries, yet the data is incomplete and thus somewhat misleading. *Id.* at 14.

6. See generally Fincham, *Lex Originis Rule*, *supra* note 1, at 112.

across the country as well as hundreds of churches [with] valuable works of art," faces an astonishing amount of art crime each year, constantly prompting authorities to contemplate increases in security and methods of deterrence.<sup>7</sup> Further, cultural property theft creates additional problems when it is "perpetrated by or on behalf of organized crime syndicates and used to fund other illicit activities, such as drugs or arms trades."<sup>8</sup> Today in France, one of the most art-rich and most art-theft-plagued countries, almost 38,000 works of art are missing, "of which 3,444 are known to have been destroyed and 145 reported stolen," with the remainder simply lost or unreported.<sup>9</sup>

Although cultural property theft in France is particularly noticeable, France exemplifies only a small part of an expanding global problem,<sup>10</sup> and most countries have at some point been plagued by this problem and have sought to address it through various treaties or legislation. Several international treaties provide guidelines for the implementation of cultural property laws; however, despite these treaties' potential for success, law enforcement agencies and private organizations throughout the world are "limited by imperfect information and unclear guidelines."<sup>11</sup> As a result, countries maintain their own legislation<sup>12</sup> instead of relying on an international regime, and no uniform law has been implemented. However, though some national legislation comports with existing treaty recommendations, the lack of uniformity among nations often results in inconsistent and inadequate regulation.<sup>13</sup> While the importance of protect-

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7. *France Plans Tighter Security After Art Thefts*, REUTERS (Sept. 13, 2007), <http://in.reuters.com/article/hollywood/idINL1388223520070913>.

8. Charney, *Art Crimes of the Year*, *supra* note 4. The article further claims that art crime "has become the third-highest-grossing world criminal trade over the past 40 years." *Id.*

9. Adam Sage, *Artful Dodgers: Men from the Ministries Mislaid Heritage of France*, TIMES ONLINE (Jan. 13, 2009), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/visual\\_arts/article5622135.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/visual_arts/article5622135.ece).

10. As mentioned before, because France has so many museums, galleries and churches, it is particularly prone to art theft. This Note only uses France as an example of how one small country can be so affected by this problem.

11. Molly A. Torsen, Note, *Fine Art in Dark Corners: Goals and Realities of International Cultural Property Protection as Switzerland Implements the 1970 UNESCO Convention*, 8 GONZ. J. INT'L L. 1, 2 (2005).

12. For example, the U.S. has implemented legislation in accordance with an international treaty protecting cultural property, but it has also implemented a criminal statute. See Convention on Cultural Property Implementation Act, *infra* note 86, and National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2006).

13. The UNESCO Convention does not require that member countries implement all provisions of the treaty. Rather, countries are free to choose which provisions and guide-

ing cultural property is not in dispute, theft remains an increasing international problem.

Throughout the past century, international efforts have become increasingly focused on protecting cultural property, namely through international treaties. In 1970, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>14</sup> was implemented in order to provide protection of cultural property during peacetime.<sup>15</sup> The UNESCO Convention was relatively well received and widely ratified, and the U.S., for example, implemented cultural property laws both in accordance with and independent of the UNESCO framework. However, the UNESCO Convention was somewhat short-lived, as the International Institute for the Unification of Private Law (“UNIDROIT”) created a new treaty intended to replace the UNESCO Convention: the 1995 Convention on Stolen or Illegally Exported Cultural Objects,<sup>16</sup> which to date remains the most recent international treaty concerning cultural property.

Although many large market countries, such as the United States, are still not signatories, this Note recognizes the potential of the UNIDROIT Convention for providing a successful, uniform framework through which cultural property can be protected. As the UNIDROIT Convention allows no reservations except those expressly stated within the treaty, countries must implement all or none of the provisions, resulting in a uniform law among member countries that could protect cultural property and minimize the problems that arise from inconsistent or incomprehensive regulation. Thus, this Note maintains that countries must work collectively and promote the creation of uniform law, as provided by the UNIDROIT Convention, in order to successfully decrease theft and protect cultural property.

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lines they will use, and thus the resulting legislation is not uniform. *See* UNESCO Convention, *infra* note 14.

14. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

15. Another convention was enacted prior to the 1970 UNESCO Convention with the purpose of protecting cultural property in wartime. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

16. International Institute for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

Part I distinguishes cultural property theft from other art crimes and surveys its effects on the international community.<sup>17</sup> Part II examines the developments of the international treaties mentioned above,<sup>18</sup> comparing them and examining how they define cultural property.<sup>19</sup> Parts III and IV provide an analysis of the UNESCO Convention and the U.S. implementing legislation, focusing specifically on how each has been unsuccessful in several respects.<sup>20</sup> Finally, Part V addresses the UNIDROIT Convention, concluding that global accession to the treaty, and thus implementation of uniform international law, is the most realistic hope for success in decreasing cultural property theft.<sup>21</sup> Although some countries have expressed concern over certain aspects of the treaty and critics argue that widespread implementation is unlikely,<sup>22</sup> its clear guidelines provide a uniform framework for the protection of cultural property that is of utmost importance. As such, despite its lack of extensive support to date, the treaty may provide the best available solution to this ongoing worldwide problem, and countries should support the protection of cultural property by signing on to the UNIDROIT Convention.<sup>23</sup>

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17. Four different art crimes will be defined, but the focus of this Note is on cultural property theft and its effects throughout the international community. Each of the different art crimes mentioned have slightly different effects, but the solution proposed in this Note, namely encouraging countries to accede to the UNIDROIT Convention, would have an effect on all art crimes.

18. This Note does not fully discuss the 1954 Hague Convention, which was implemented for the protection of cultural property during wartime. Because the 1954 Hague Convention is not fully applicable today and has been largely replaced by the UNESCO Convention, it is not relevant to the discussion here. See further explanation *infra* note 34.

19. This Note discusses only the legislation that has resulted in the U.S. from the UNESCO Convention: the Convention on Cultural Property Implementation Act. As many market countries, including the U.S., have still declined to ratify the UNIDROIT Convention, there is no implementing legislation to discuss at this point.

20. Christopher D. Cutting, Comment, *Protecting Cultural Property Through Provenance*, 32 SEATTLE U. L. REV. 943, 969 (2009).

21. Although scholars and critics have made many suggestions to help minimize art theft internationally, the UNIDROIT Convention appears to have the greatest potential for success.

22. See discussion *infra* Part V.

23. While the examination and analysis within this Note focus mainly on the U.S. legislation with respect to cultural property, this Note recognizes that similar problems plague almost all other legal systems.

## I. ART CRIME: A HISTORICAL BACKGROUND

The FBI estimates that the art market faces losses of up to six billion dollars per year from the “looming criminal enterprise” of art crime.<sup>24</sup> Vandalism, forgery, antiquities looting, and art theft are the four main art crimes affecting the market today, and although they encompass various sub-categories, they are all “premeditated criminal activities” that target cultural property.<sup>25</sup> Art vandalism, broadly characterized by destruction of art, is an act of violence targeting specific objects that “the public holds dear.”<sup>26</sup> Art forgery, or art deception, “encompasses a range of confidence tricks that involve the premeditated misattribution of art for profit.”<sup>27</sup> Although art forgery has historically been part of a smaller market, art forgery cases have also been known to extend to “high-profile, multi-million dollar forgeries . . . [and] mass market fakes.”<sup>28</sup> Antiquities looting, which accounts for up to seventy-five percent of all art crime, deals with objects taken from both the ocean and land that are not accounted for and do not appear on stolen art databases or registries.<sup>29</sup> This crime is often particularly difficult to trace and control, as “countries strain to keep native artifacts within their national borders, [while] the international demand for antiquities pulls them into the art market.”<sup>30</sup>

Art theft, or cultural property theft, which is the subject of this Note, is one of the most troublesome art crimes plaguing the international art market. Historically, cultural property theft has had a different influence on the art market than other art crimes, as the high-profile nature of art makes it almost impossible to sell in the regular market.<sup>31</sup> Despite many attempts to decrease the amount of crime, many countries have faced “a flourishing of dramatic and devastating instances of art theft,” making it

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24. See *Art Theft*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/hq/cid/arttheft/arttheft.htm> (last visited Jan. 14, 2011).

25. Noah Charney, *Buyer Beware: Four Major Art Crimes and How They Affect the Market*, ARTINFO (Aug. 11, 2008), <http://www.artinfo.com/news/story/28263/buyer-beware/> [hereinafter Charney, *Buyer Beware*].

26. M.J. Williams, Note, *Framing Art Vandalism: A Proposal to Address Violence Against Art*, 74 BROOK. L. REV. 581, 581–82 (2009).

27. Charney, *Buyer Beware*, *supra* note 25.

28. Joseph C. Gioconda, *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?*, 31 HASTINGS COMM. & ENT. L.J. 47, 56 (2008).

29. Charney, *Buyer Beware*, *supra* note 25.

30. Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 377 (1995).

31. Charney, *Buyer Beware*, *supra* note 25.

“one of the most prolific international crimes.”<sup>32</sup> Further, although international efforts have consistently attempted to decrease illicit art trade and deter theft of cultural property, “[c]ompeting national policies of art-importing and art-exporting countries have weakened attempts to gain world support for international agreements governing stolen property cases.”<sup>33</sup> While the UNESCO Convention<sup>34</sup> and the subsequent UNIDROIT Convention have attempted to better protect cultural property, making theft “a clear violation of international law,” cultural property theft remains a problem.<sup>35</sup>

Cultural property theft, on both a small and large scale, leads to even more complex and long-term problems, specifically when cultural property disputes arise between “an original owner and a subsequent good-faith possessor.”<sup>36</sup> Default laws that apply to real property also apply to art theft cases, and unfortunately, “these rules regularly offer little or no assistance, [so] many claimants have resorted to seeking resolution of their claims through non-legal means.”<sup>37</sup> Specifically, these legal rules often treat cultural property the same way they treat any object, without regard to the special importance or value of the property.<sup>38</sup> Even more problematic is that, although some disputes actually proceed to litigation, resolving the issues can prove difficult as “both parties are often relative innocents” and the “lack of harmony [between the laws of separate legal systems] not only ensures that no overarching policy choices will be furthered, but it also prevents parties from anticipating legal outcomes.”<sup>39</sup>

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32. Paige L. Margules, Note, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609, 609–10 (1992).

33. Claudia Fox, Comment, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 229 (1993). Fox discusses the UNIDROIT Convention pre-ratification. However, several provisions changed as drafts were proposed, and the final treaty, as of 1995, is different in certain respects.

34. Again, this Note focuses on both the UNESCO and UNIDROIT Conventions, but it does not delve into an explanation of the Hague Convention. For a relevant discussion, see *id.* at 246–48.

35. Cutting, *supra* note 20, at 949.

36. Fincham, *Lex Originis Rule*, *supra* note 1, at 111.

37. *Id.* at 112.

38. However, the UNIDROIT Convention provides a new status for cultural property, separating it from regular goods. See *infra* note 44.

39. Fincham, *Lex Originis Rule*, *supra* note 1, at 113–14 (explaining that “[u]nderlying each dispute are the competing claims of two relative innocents, making it ‘impossible for the law to mete out exact justice’”). Fincham also discusses that the “default legal rules” dealing with these situations “have created a myriad of potential out-

Although criminal laws are rarely successful in deterring cultural property theft, attempts to solve the issues surrounding cultural property still tend to ignore other potential solutions and instead hone in on how criminal law may affect or decrease illicit trade.<sup>40</sup> Accordingly, a more uniform system, in many major market countries such as the U.S., is necessary in order to increase progress and significantly reduce illicit trade and theft.<sup>41</sup> As it addresses all of these issues, the UNIDROIT Convention would harmonize law among member states, create a separate status for cultural property, and provide a uniform system through which to protect cultural property.

## II. A BACKGROUND ON INTERNATIONAL CULTURAL PROPERTY AGREEMENTS AND DEFINING CULTURAL PROPERTY

International law has historically focused on the importance of maintaining and protecting cultural property, yet despite this concern, many legal systems have still failed to significantly decrease theft.<sup>42</sup> Different international treaties have “shaped and governed” how countries protect cultural property,<sup>43</sup> yet these treaties are by no means infallible and problems constantly arise. The UNESCO Convention was one of the first major treaties to pose solutions for protecting cultural property,<sup>44</sup> and it

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comes; which ultimately makes securing historic sites, and safeguarding collections from theft more difficult.” *Id.*

40. Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 598 (2007) [hereinafter Fincham, *Federal Criminal Penalties*]. Fincham focuses specifically on cultural property debates within the U.S.

41. *Id.* at 599, stating that “[w]ithout a well-ordered system which allows dealers and purchasers to deal in legitimate objects, the criminal penalties [of the U.S.] will never serve their stated goal . . . .” Although the context of the article is limited to a comparison with the U.K., a more well-ordered system could better serve all countries.

42. As will be discussed throughout this Note, a great deal of international treaties and national legislation exist, but various flaws have prevented their success.

43. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1838 (2009). However, Vitale focuses mainly on how the U.S. law regarding cultural property has been shaped by the UNESCO Convention.

44. Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 33 (1998).

The General Conference concluded that international cooperation was one of the most efficient ways to protect each country’s cultural property from the dangers that could result from the illicit transfer of such property. Therefore, parties to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property . . . .



mandated that member parties “protect the cultural property of other member states through national legislation and international cooperation.”<sup>45</sup> However, despite its guidelines for implementing potentially successful legislation, the UNESCO Convention has proved largely unsuccessful, and, as a result, in 1995 UNIDROIT formulated the UNIDROIT Convention with the intent to replace the earlier UNESCO Convention.<sup>46</sup> Although these two treaties have been met with both criticism and praise, neither treaty has been ratified by many large market countries.<sup>47</sup> Despite this reception, however, the UNIDROIT Convention requires uniform law among member parties, which will likely prove far more successful in the international market than the UNESCO Convention has proven.

One benefit of adopting the uniform law under UNIDROIT is the clarification of the definition of cultural property. Currently, international treaties and national legislation provide varying classifications,<sup>48</sup> and pinpointing one definition is often difficult as it can be “tempting to define cultural property as including only chattels, limited to art and historic relics.”<sup>49</sup> Cultural property possesses both objective and subjective qualities, making a universal definition of the term even more problematic.<sup>50</sup> For example, some cultures might consider very untraditional works of art to be “culturally significant,” while others might not recognize any cultural or artistic value in those particular objects.<sup>51</sup> Thus, defining cul-

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*Id.* at 33–34.

45. Vitale, *supra* note 43, at 1839.

46. See Jennifer H. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 543–44 (1997); see also Fox, *supra* note 33, at 230.

47. As of January 2011, the U.S. and many other market countries are still not signatories to the UNIDROIT Convention, but the U.S. is a party to the UNESCO Convention.

48. See Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457, 465–67 (1993). Although “stolen” and “illegally exported” cultural property are often classified within one category, this Note is concerned with art theft and thus focuses on the issues surrounding stolen cultural property.

49. Edward M. Cottrell, Comment, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L L. 627, 628 (2009). Cottrell further explains that this limited view of cultural property is “clearly inadequate” and far too limited, as it would neglect all types of immovable pieces of cultural heritage, such as “the Parthenon, cave drawings, [and] the Bamiyan Buddhas.” *Id.*

50. Kinderman, *supra* note 48, at 515–16.

51. *Id.* Kinderman provides an example:

tural property subjectively and giving “states complete deference to define objects that possess ‘cultural significance’” allows for a serious lack of uniformity.<sup>52</sup> In defining “cultural property,” the UNESCO Convention focuses on whether “an object possesses one of several universally recognized ‘cultural’ characteristics.”<sup>53</sup> Specifically, it states, “the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.”<sup>54</sup> Somewhat similarly, the UNIDROIT Convention defines cultural objects as “those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.”<sup>55</sup> These two definitions contain the same list of cultural property sub-categories, yet UNIDROIT attempts to create a more uniform definition between member states by eliminating the language of the UNESCO Convention that permits “each State” to assign importance to specific cultural objects. This is particularly important as it eliminates the potential for subjective definitions, instead providing a more consistent framework through which cultural property may be classified by each signatory.<sup>56</sup>

### III. 1970 UNESCO CONVENTION

Importation of illegally obtained artifacts became increasingly problematic in the 1960s,<sup>57</sup> and thus the UNESCO Convention “was the end

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[C]onsider a rock that is an item of extreme religious importance to the natives of a small Pacific island. The rock itself does not possess any overt artistic characteristics; to any other culture it is just a rock. Yet, on a subjective level it possesses great cultural significance to the islanders.

*Id.* at 516.

52. *Id.*

53. *Id.* at 515.

54. UNESCO Convention, *supra* note 14, art. 1 (emphasis added). More specifically, Article 1 lists eleven categories of cultural property, including several subcategories.

55. UNIDROIT Convention, *supra* note 16, art. 2. The Annex to the UNIDROIT Convention lists the same categories of “cultural property” as are listed in the UNESCO Convention. *Id.* annex.

56. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989). This Note does not discuss archaeological pieces, although this category of cultural property is extremely expansive. While several expansive definitions exist, most scholars and critics refer to cultural property as “objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture,” but the category can also include “almost anything made or changed by man.” *Id.*

57. See Phelan, *supra* note 44, at 33.

product of a long line of efforts to stop the pillaging and looting of archaeological sites, and the theft of cultural property of extreme importance.”<sup>58</sup> The treaty focuses on garnering international cooperation to ensure that cultural property remains in its origin country or is lawfully exported,<sup>59</sup> and it “envisions cultural property as a part of a national cultural heritage”<sup>60</sup> that must be protected. The main tenet of the UNESCO Convention is to “give international effect to national” issues through a list of “non-self-executing obligations” that demand national implementing legislation by each member party.<sup>61</sup> Thus, the Preamble to the treaty “propounds the legal principle that cultural property belongs to humankind and involves the moral obligation of all nations to protect human cultural heritage.”<sup>62</sup> Further, stating as one of its considerations “that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,”<sup>63</sup> the UNESCO Convention aims to create a framework through which member parties can enact legislation that protects cultural property.<sup>64</sup> Although it has received much criticism and has not been overly successful, the UNESCO Convention remains the “primary international instrument that addresses the international movement of, and market in, cultural materials.”<sup>65</sup>

The UNESCO Convention provisions are each aimed toward providing expansive protection of cultural property, and, as mentioned earlier, Article 1 allows member states to designate specific items of cultural importance.<sup>66</sup> Article 3 mandates that “the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illi-

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58. Lehman, *supra* note 46, at 539 (quoting Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 339 (1983)).

59. See Phelan, *supra* note 44, at 33.

60. *Id.* at 34.

61. Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1077 (2005). Siehr quotes the treaty, stating that it obliges “the state parties ‘to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported’ and ‘to recover and return any such cultural property imported.’” *Id.* (quoting UNESCO Convention, *supra* note 14, arts. 7(a), 7(b)(ii)).

62. Lehman, *supra* note 46, at 540.

63. UNESCO Convention, *supra* note 14, pmbl.

64. See Fox, *supra* note 33, at 248–49.

65. Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW 613, 613 (2007).

66. See UNESCO Convention, *supra* note 14, art. 1.

cit,”<sup>67</sup> and Article 6 further imposes upon parties an “obligation to introduce an authorization certificate that would accompany an item of cultural property being exported and that would show that the export of the item in question was authorized.”<sup>68</sup> Interestingly, when Articles 3 and 6 are read together, they “should have significant bite, for their combined result make it illegal for any state party to import any work of art or any other item of cultural property unless the export of that item was specifically authorized by the state of origin party.”<sup>69</sup>

Despite its many signatories and the UNESCO Convention’s attempt at clear prohibition of “the importation of cultural property illegally exported or stolen from a foreign nation,”<sup>70</sup> the treaty has had a marginal effect.<sup>71</sup> First, many provisions are “mere rhetoric and thus impose no real requirements on signatories.”<sup>72</sup> Article 2 is particularly demonstrative of this problem, as it generally requires that “the states signing the Convention will oppose illicit import, export, and other types of transactions ‘with the means at their disposal.’”<sup>73</sup> Further, Article 2 “essentially sets forth the principle that illicit trade in cultural property is undesirable, that it deprives source countries of their cultural heritage and rightful property, and that international cooperation is an effective means of controlling the problem,”<sup>74</sup> yet no substantive requirements are provided. As a result, there has been little international motivation to implement

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67. *Id.* art. 3.

68. Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 927 (1991). Article 6 states:

The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

UNESCO Convention, *supra* note 14, art. 6.

69. Edwards, *supra* note 68, at 928.

70. Fox, *supra* note 33, at 249.

71. Kinderman, *supra* note 48, at 460.

72. Nina R. Lenzner, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT’L BUS. L. 469, 479–80 (1994).

73. *Id.* at 480 (citing UNESCO Convention, *supra* note 14, art. 2).

74. *Id.*

UNESCO Convention legislation in response to theft and illegal export of cultural property.<sup>75</sup>

In addition, many scholars argue that the UNESCO Convention favors source nations too heavily, so many market nations<sup>76</sup> declined to ratify it.<sup>77</sup> These large market countries are not signatories “because of a general reluctance to restrict their art markets,”<sup>78</sup> and negatively impact their economies, but “without the presence of some international source of law binding the art-market nations . . . art-exporting countries have little chance of combating the problem of the illicit trade in works of art.”<sup>79</sup> Thus, the imbalance between large and small market member countries impacts the potential for the UNESCO Convention to succeed.

Further, although many countries have domestic cultural property laws, the laws do not always successfully deal with cultural property theft because they are inconsistent and ignore the international scale of the crime. This problem is further perpetuated by the UNESCO Convention framework, which, rather than promoting “adherence to a uniform set of laws . . . permits individual countries to maintain their own import and export regulations as well as laws regarding restitution of stolen property.”<sup>80</sup> At least in part, the failure of the UNESCO Convention to demand a uniform framework of law has contributed to a lack of improvement in the protection of cultural property.<sup>81</sup> Perhaps most importantly is that the UNESCO Convention, unlike the UNIDROIT Convention, does not require that member parties implement all of the treaty’s provisions. Accordingly, the treaty allows for creation of widely differing legislation, which in turn perpetuates the problem of cultural property theft.

Although it has faced criticism,<sup>82</sup> positive attributes of the UNESCO Convention are noteworthy. For example, although it may favor source

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75. Kinderman, *supra* note 48, at 461.

76. The U.S. is an exception.

77. Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, 508 (1996).

78. Lehman, *supra* note 46, at 540 (quoting William D. Montalbano, *Big Business: Art Thieves Find Italy is a Gold Mine*, L.A. TIMES, Aug. 25, 1988, at A1).

79. Lenzner, *supra* note 72, at 479.

80. Lehman, *supra* note 46, at 543 (citing Kinderman, *supra* note 48, at 470).

81. However, this failure to require a uniform law is perhaps why so many countries have agreed to sign on, knowing that they can implement legislation independent of the legislation of other countries. This creates a type of cycle that can only be avoided by implementing uniform law. *See generally* Kinderman, *supra* note 48.

82. Vitale, *supra* note 43, at 1842. For example, some critics argue that the UNESCO Convention is a “failure because too few of the States Parties to the Convention adopted implementing national legislation . . . [and] [t]oday, critics point to the fact that the 1970

countries, the treaty does permit “market countries and source countries to communicate and cooperate for the protection and return of cultural property through diplomatic channels and domestic legislation,”<sup>83</sup> and it has facilitated several “successful repatriations of cultural property.”<sup>84</sup> Further, some major market countries have ratified the treaty and created implementing legislation, including Germany, France, and the United Kingdom,<sup>85</sup> demonstrating a desire to better protect their cultural heritages. The U.S. is one of the market nations to also ratify the treaty, and its implementing legislation remains in effect today.<sup>86</sup> However, despite some of the UNESCO Convention successes, its shortcomings demand further consideration.

Generally, while the UNESCO Convention may have been successful in some respects, it does not provide for uniform law, allows member parties to maintain individual regulations,<sup>87</sup> does not require acceptance of all provisions, and has not been regarded positively or ratified by many market nations.<sup>88</sup> As such, the UNIDROIT Convention as a whole provides a greater potential for successfully deterring and decreasing cultural property theft.

#### IV. UNITED STATES PROTECTION OF CULTURAL PROPERTY: THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT

Although cultural property theft is a problem throughout the global market, U.S. law is particularly important because the U.S. is one of the largest consumers of cultural property.<sup>89</sup> Two statutes in the U.S. address individuals who deal in stolen cultural property:<sup>90</sup> the National Stolen Property Act (“NSPA”)<sup>91</sup> and the Archaeological Resources Protection

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UNESCO Convention has no retroactive protections, and therefore, does not apply to cultural property stolen or illegally exported before November 1970.” *Id.*

83. While some scholars believe that this is a positive aspect of the UNESCO Convention, others disagree. This Note focuses on this disagreement, arguing that uniform law would be much more effective in protecting cultural property than allowing for individual domestic legislation.

84. Vitale, *supra* note 43, at 1842.

85. *Id.*

86. See Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2010).

87. Lehman, *supra* note 46, at 543.

88. See Vitale, *supra* note 43, at 1842.

89. See Cutting, *supra* note 20, at 944.

90. Vitale, *supra* note 43, at 1836.

91. 18 U.S.C. §§ 2314–2315 (2010).

Act ("ARPA"),<sup>92</sup> and both were implemented to "prosecute individuals who buy, sell, or otherwise deal in cultural property stolen or illegally exported from a foreign state."<sup>93</sup> Although some critics argue that the two statutes conflict with the U.S. implementation of the UNESCO Convention, courts have found this argument unpersuasive and the statutes are still in effect.<sup>94</sup>

However, the main U.S. law focused on cultural property protection is the U.S. UNESCO Convention implementing legislation, the Convention on Cultural Property Implementation Act ("CPIA"),<sup>95</sup> which was passed primarily because Congress recognized that "the United States was ripe for illegal import of items of cultural property."<sup>96</sup> Although the U.S. ratified the treaty in 1972, it did not pass the CPIA until 1983, though it was the first market nation to implement the UNESCO Convention.<sup>97</sup> Before it became a party to the treaty, the U.S. had not significantly addressed the problems concerning cultural property theft and illegally exported cultural property,<sup>98</sup> but currently the NSPA, ARPA, and CPIA exist as the primary means for dealing with cultural property theft in the U.S.<sup>99</sup>

The CPIA provisions were designed to parallel the main goals of the UNESCO Convention,<sup>100</sup> and one of the most notable aims of the CPIA is the prohibition against any "import of cultural material identified as stolen from an institution in another state party to the UNESCO Conven-

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92. 16 U.S.C. §§ 470aa–470mm (2010). For a further discussion on relevant aspects of ARPA, see Vitale, *supra* note 43, at 1855–58.

93. Vitale, *supra* note 43, at 1837.

94. *Id.*; see also *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003); Fincham, *Federal Criminal Penalties*, *supra* note 40, at 618, explaining that "Schultz raised three arguments in support of his appeal . . . (2) the enactment of the Cultural Property Implementation Act of 1983 preempts the prosecution under the NSPA . . ." but "the Second Circuit Court of Appeals found the arguments unpersuasive." *Id.*

95. 19 U.S.C. §§ 2601–2613 (2010).

96. Vitale, *supra* note 43, at 1843.

97. *Id.* at 1842 n.44.

98. Lehman, *supra* note 46, at 539.

99. Although the NSPA and ARPA legislation are extremely important for the protection of cultural property in the U.S., this Note focuses on the international treaties in place and their resulting legislation. Thus, a discussion of these two statutes is not included.

100. Vitale, *supra* note 43, at 1844. Vitale states that the three purposes of CPIA are

to prohibit the import of documented cultural material stolen from the museum or similar institution of a state party to the [Convention]; to assist in that property's recovery and return if it is found in the United States; and to apply specific import controls to archaeological or ethnological materials that compose a part of a state's cultural patrimony in danger of being pillaged.

*Id.*

tion.”<sup>101</sup> Additionally, an important result of the CPIA has been the creation of the Cultural Property Advisory Committee (“CPAC”).<sup>102</sup> This committee, comprised of cultural property professionals,<sup>103</sup> convenes when a country requests U.S. assistance in protecting its cultural property under the UNESCO Convention.<sup>104</sup> The CPAC reviews requests from countries seeking import restrictions, and it makes recommendations regarding the laws for import and export of cultural property.<sup>105</sup> Some scholars assert that the CPAC is the CPIA’s “most effective [element] insofar as it fosters continuing study, debate and vigilance over the legal landscape as it relates to cultural property.”<sup>106</sup>

However, aside from the CPAC, the CPIA has faced much criticism and it has not had a noticeably significant effect on cultural property protection. First, although it purports to reflect the main tenets of the UNESCO Convention, the CPIA only implements Articles 7 and 9.<sup>107</sup> Although Articles 7<sup>108</sup> and 9<sup>109</sup> are significant provisions, the U.S. deci-

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101. Torsen, *supra* note 11, at 8.

102. 19 U.S.C. § 2605(a).

103. See Torsen, *supra* note 11, at 10 (“The CPAC, which is comprised of museum professionals, archaeologists, anthropologists, gallery owners, and other people affiliated with cultural property professions, is a very powerful entity and its recommendations are usually determinative.”).

104. *Id.*

105. See Vitale, *supra* note 43, at 1846.

In order to enter into a bilateral agreement, the President or his designee must make four determinations: (1) that the cultural patrimony of the foreign state is in jeopardy; (2) that the foreign state has attempted to protect its cultural patrimony; (3) that import controls on the objects requested by the foreign state would substantially benefit the deterrence of their pillage; and (4) that import controls are “consistent with the general interest of the international community in the interchange of cultural property among nations.

*Id.* (citing 19 U.S.C. § 2602(a)).

106. Torsen, *supra* note 11, at 10.

107. See Lenzner, *supra* note 72, at 487.

108. Article 7 states:

The States Parties to this Convention undertake: (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the



sion to only implement these two articles demonstrates the potential for problems to arise among nations who choose to implement different provisions; for example, one can foresee instances in which countries' non-UNESCO provisions conflict with other countries' UNESCO-implementing provisions, or vice versa. Further, among several other noteworthy "deficiencies" is the concern that the statute as a whole restricts the United States' assistance under the CPIA to countries that have similar UNESCO Convention implementing legislation.<sup>110</sup> As a result, many countries that might benefit from the CPIA are banned from receiving any U.S. assistance under the statute because they have not ratified the treaty.<sup>111</sup> Further, the language of the CPIA suggests that it only applies to state-run museums, allowing "private institutions [to] escape scrutiny."<sup>112</sup> Finally, although the CPIA "establishes clear policy regarding cultural property imported into the United States," providing at least some notice to foreign states regarding "steps they need to take in order

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States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

UNESCO Convention, *supra* note 14, art. 7.

109. Article 9 states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

*Id.* art. 9.

110. See 19 U.S.C. §§ 2602(a), 2603(c) (2010).

111. Torsen, *supra* note 11, at 9.

112. See *id.* for a further discussion on this aspect of the CPIA.

to obtain U.S. protection of their cultural property,"<sup>113</sup> the statute has made little progress in truly decreasing the amount of crime.

The U.S. "inconsistent treatment of cultural property" is noticeable through its varying legal remedies.<sup>114</sup> Although the CPIA, through UNESCO guidelines, attempts to protect cultural property, it has been seriously criticized,<sup>115</sup> especially because it ignores other UNESCO Convention provisions and "applies only to property imported from certain nations."<sup>116</sup> Although the importance of protecting cultural property is clear to national policymakers and the international community, domestic "laws are [as] strikingly inconsistent"<sup>117</sup> as international legal remedies. Accordingly, the U.S. should serve as a model to other countries by recognizing the importance of uniform international law, which the UNIDROIT Convention promotes, while also encouraging member parties to work together to protect cultural property.

#### V. 1995 UNIDROIT CONVENTION

After the UNESCO Convention proved unsuccessful in many respects, UNESCO requested that UNIDROIT draft a new, "more efficient" and effective treaty.<sup>118</sup> In 1986, UNIDROIT began to reexamine the issues addressed by the UNESCO Convention and to "propose the adoption of uniform laws throughout all states regarding cultural property."<sup>119</sup> Stating as one of its purposes "to study means and methods for modernizing, harmonizing, and coordinating private and in particular commercial law as between States and groups of States,"<sup>120</sup> UNIDROIT formulated the 1995 UNIDROIT Convention, with key goals "to return cultural property to its rightful owners and to reduce the profitability of illicit traffic in art."<sup>121</sup>

The UNIDROIT Convention aims to "enhance [the UNESCO Convention's] effectiveness by ensuring that all states, civil and common law jurisdictions alike, apply a uniform body of cultural property law."<sup>122</sup>

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113. Vitale, *supra* note 43, at 1847.

114. See Cutting, *supra* note 20, at 960.

115. *Id.* at 969.

116. *Id.*

117. *Id.* at 944.

118. See Siehr, *supra* note 61, at 1078. "Also, this Convention does not formulate an independent supranational policy of international art trade, restricts itself to the international enforcement of national export prohibitions, and, of course, entitles the bona fide possessor to reasonable compensation under Article 6." *Id.*

119. Kinderman, *supra* note 48, at 461.

120. Fincham, *Lex Originis Rule*, *supra* note 1, at 133 n.124.

121. Lehman, *supra* note 46, at 543.

122. Kinderman, *supra* note 48, at 461.

The treaty is designed such that all countries with implementing legislation will follow the uniform law dictated by the provisions of the treaty, as member countries must implement all of the provisions.<sup>123</sup> As such, the treaty aims to harmonize “private laws of various states so as to reduce the harmful effects that occur when laws conflict,”<sup>124</sup> and the preamble to the UNIDROIT Convention emphasizes this determination, stating as its aim “to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States.”<sup>125</sup> Accordingly, “the most likely result for those who ratify will be that the wide assortment of laws currently governing ownership rights in cultural property will be preempted and substantially harmonized in a single source.”<sup>126</sup> Thus, the greatest strength of the UNIDROIT Convention is its goal of creating a uniform body of international law through “harmonization” of international law, and, if widely implemented, the treaty would likely provide an innovative and successful means of protecting cultural property.<sup>127</sup>

#### A. UNIDROIT Convention Text and Format

The UNIDROIT Convention is divided into several chapters consisting of separate articles, and the organization is clearer than that of the UNESCO Convention so its provisions are easier to understand and thus potentially easier to apply.<sup>128</sup> The UNIDROIT Convention provides the framework for a uniform law among all member parties, meaning that once laws are implemented in accordance with the treaty and harmonized into one source, dictated by the treaty, parties affected by cultural proper-

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123. See UNIDROIT Convention, *supra* note 16, art. 18.

124. Fincham, *Lex Originis Rule*, *supra* note 1, at 133.

125. UNIDROIT Convention, *supra* note 16, pmbl. One clause of the preamble states:

DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all.

*Id.*

126. Lehman, *supra* note 46, at 545.

127. Fincham, *Lex Originis Rule*, *supra* note 1, at 134. The UNIDROIT Convention “recognizes the inherent difficulty in relying on developing nations to police their own borders and archaeological sites.” *Id.*

128. See Kinderman, *supra* note 48, at 504.

ty theft could likely “consult this single source to determine the legality and prudence of certain transactions under consideration.”<sup>129</sup>

Article 1 of the UNIDROIT Convention discusses the scope of the treaty, marking a significant departure from the UNESCO Convention’s treatment of cultural property. Rather than combining all cultural property into one category, as the UNESCO Convention does, the UNIDROIT Convention uses Article 1 to divide its application into the distinct categories of “stolen objects” and “cultural objects illegally removed” from a country,<sup>130</sup> recognizing “that these two areas, while closely related, pose distinct problems.”<sup>131</sup> This distinction also represents an important movement toward improving the laws because it gives a special status to cultural property, seen in Article 2, separating it from objects of little or no cultural significance.<sup>132</sup> As discussed earlier, Article 2 defines cultural property and includes a list of categories in the Annex to the Convention that cover all objects that can be classified as cultural property.<sup>133</sup> The

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129. Lehman, *supra* note 46, at 545.

130. Kinderman, *supra* note 48, at 504–05; *see* UNIDROIT Convention, *supra* note 16, art. 1. Article 1 states that “[t]his Convention applies to claims of an international character for: (a) the restitution of stolen cultural objects; (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage . . .” *Id.*

131. *Id.* at 505.

132. *See* UNIDROIT Convention, *supra* note 16, art. 2.

133. *See id.* annex. “[C]ultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.” *Id.* The Annex lists:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

definition eliminates "vague" or "overbroad" definitions of what is protected, as it includes only chattels,<sup>134</sup> but the most notable aspect of the definition of cultural property is that it "validates cultural property as a unique type of property subject to distinctive property laws."<sup>135</sup> Further, the UNIDROIT Convention, unlike the UNESCO Convention, does not allow each state to designate its own items of cultural significance, as it provides an extensive definition of cultural property<sup>136</sup> that helps to maintain uniformity.

Chapter II, "Restitution of Stolen Cultural Objects," discusses what constitutes a stolen cultural object, the requirements of due diligence in returning stolen objects, statutes of limitations, and compensation to the possessor.<sup>137</sup> Article 3(2) explains that a stolen cultural object for purposes of the Convention shall include an object "which has been unlawfully excavated or lawfully excavated but unlawfully retained."<sup>138</sup> As will be discussed in detail below,<sup>139</sup> Article 3 requires "the possessor of a cultural object which has been stolen [to] return it,"<sup>140</sup> reversing the common assumption that a bona fide purchaser will attain good title.<sup>141</sup> Rather, Article 4 provides for restitution to good faith purchasers who exercise due diligence, but there is no option to retain good title.<sup>142</sup> The due diligence requirement is, however, broad, and UNIDROIT mandates

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(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

*Id.*

134. See Cottrell, *supra* note 49, at 643.

135. Phelan, *supra* note 44, at 45.

136. See UNIDROIT Convention, *supra* note 16, annex.

137. See *id.* ch. II. This Chapter contains Articles 3 and 4, which both deal exclusively with stolen cultural objects.

138. *Id.* art. 3(2).

139. See *infra* Part V.C.

140. UNIDROIT Convention, *supra* note 16, art. 3(1).

141. Lenzner, *supra* note 72, at 496.

142. Article 4(1) states:

The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

UNIDROIT Convention, *supra* note 16, art. 4(1).

that all “circumstances of the acquisition” be considered, further encouraging judicial discretion.<sup>143</sup> In addition, Article 3 provides for a three-year statute of limitations “from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.”<sup>144</sup> Further, Article 3(5) permits a member state to extend the statute of limitations to seventy-five years or “such longer period as is provided in its law,” allowing the requirement to also fall within a country’s discretion.<sup>145</sup> Thus, although the treaty requires that a signatory implement all provisions, some discretion will be permitted.

With a structure parallel to that of Chapter II, Chapter III provides provisions concerning the return of illegally exported cultural property, defined as a

cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit.<sup>146</sup>

This distinction between stolen and illegally exported cultural property provides a more comprehensive and thorough way of dealing with cultural property, as it provides provisions that cover broader situations.<sup>147</sup> Further, in contrast to the Article 3 demand that a possessor of stolen cultural property return it, Article 5(1) explains that a “Contracting State

143. Article 4(4) states:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

*Id.* art. 4(4).

144. *Id.* art. 3(3).

145. *Id.* art. 3(5).

146. *Id.* art. 5(2).

147. See, however, *id.* ch. III, for a list of provisions regarding the return of illegally exported cultural objects (this Chapter contains Articles 5, 6 and 7). Further, “[a]lthough the UNESCO Convention addresses the restitution of cultural property exported contrary to a state’s legislation, no standard exists to determine precisely which types of property constitute works of ‘great cultural significance.’” Kinderman, *supra* note 48, at 508–09. In addition, see UNIDROIT Convention, *supra* note 16, ch. III, for the articles that address illegally exported cultural objects.

may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.”<sup>148</sup> This recognizes the need for member states to work together to ensure that cultural property is protected to the highest possible extent, adding to the variety of situations for which UNIDROIT accounts.

Finally, Chapters IV and V provide general and final provisions, respectively. Article 8 of Chapter IV explains where claimants may bring suit, providing that a

claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.<sup>149</sup>

Further, Chapter IV includes a provision that expands another UNESCO Convention limitation by allowing “private parties [in addition to member states] to initiate restitution” of “stolen or illegally exported objects.”<sup>150</sup> Also noteworthy, as mentioned before, is Article 18, which requires member parties to accept all of the UNIDROIT Convention provisions, stating that “[n]o reservations are permitted except those expressly authorised [sic] in this Convention.”<sup>151</sup> Through this final requirement, member parties can be certain that their laws will be uniform with any other countries that ratify the Convention, and thus the overall structure of the treaty supports the creation of uniform international law.

### *B. UNIDROIT Convention Criticism*

Some weaknesses may explain why many market countries have declined to ratify the UNIDROIT Convention.<sup>152</sup> The main criticism is of Article 18, ironically, which is written such that “if states were wary of certain provisions of the Convention, they could not sign on to other provisions which they found effective.”<sup>153</sup> Essentially, because the treaty allows “no reservations,”<sup>154</sup> potential member states are concerned with committing to each provision without the ability to eliminate any provi-

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148. *Id.* art. 5(1).

149. *Id.* art. 8(1).

150. See Fincham, *Lex Originis Rule*, *supra* note 1, at 134; see also UNIDROIT Convention, *supra* note 16, art. 8. Article 2 also demonstrates how both member states and private parties may request restitution of stolen or illegally exported objects. *Id.* art. 2.

151. UNIDROIT Convention, *supra* note 16, art. 18.

152. See Fincham, *Lex Originis Rule*, *supra* note 1, at 139

153. *Id.*

154. UNIDROIT Convention, *supra* note 16, art. 18.

sions that they find problematic. However, the provision demands consideration of the UNESCO Convention's failure to promote adherence to uniform law,<sup>155</sup> and countries must recognize the importance of maintaining consistent regulations and legislation. As this lack of uniformity was one of the fatal flaws of the UNESCO Convention,<sup>156</sup> the need for Article 18 of the UNIDROIT Convention is clear. Further, because some UNIDROIT Convention provisions permit and even encourage judicial discretion, the treaty is not as absolute as it seems. As this provision specifically ensures the creation of uniform law, it is necessary in order for the treaty to provide a successful framework for protecting cultural property and decreasing theft.

In addition, some critics argue that two of the treaty's provisions, Chapter II Article 3(2) and Chapter III Article 5(3), appear to conflict, raising questions as to the intended meaning of each provision.<sup>157</sup> The relevant portion of Article 3(2) states, "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place."<sup>158</sup> Article 5(3) is more detailed and provides that the court or authority of a member country "shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs" one of four enumerated "interests,"<sup>159</sup> in effect establishing a "limited right of return."<sup>160</sup> First, Article 3(2) "is arguably unnecessary because, like Article 5(3), it provides for return, but, unlike Article 5(3), it is an all-

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155. See Lehman, *supra* note 46, at 543.

156. See *id.*

157. See Fincham, *Lex Originis Rule*, *supra* note 1, at 139.

158. UNIDROIT Convention, *supra* note 16, art. 3(2). The full text reads: "For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place." *Id.*

159. The full provision provides:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical Preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation or information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.

*Id.* art. 5(3).

160. Fincham, *Lex Originis Rule*, *supra* note 1, at 139.



encompassing, streamlined return provision.”<sup>161</sup> Another concern with Article 3(2) is that it provides no protection where a compelling interest conflicts with the enforcement of certain “foreign ownership declarations,”<sup>162</sup> and it only requires member parties to recognize foreign ownership declarations in certain circumstances.

Although these are legitimate criticisms with respect to the treaty, Article 3(2) applies only to “excavated” objects and not objects falling within “the terms of a source nation’s generic ownership law.”<sup>163</sup> This means that many cultural objects will not fall within the broad reach of Article 3(2),<sup>164</sup> perhaps mitigating some concerns. There are also no specifications as to what provision a country must choose in litigation, so it is hopeful that countries will be free to apply Article 5(3)<sup>165</sup> where there are “legitimate international interests” at stake, as the limited right of return laid out in Article 5(3) is an “idea with great promise.”<sup>166</sup> In addition, since Article 4 provides for restitution to good faith purchasers, there is some additional protection in certain circumstances.<sup>167</sup> Finally, it is important to note that these two provisions fall under separate chapters that deal with defining and regulating separate categories of cultural property<sup>168</sup> that earlier treaties failed to distinguish—stolen cultural objects and illegally exported cultural objects.<sup>169</sup> This distinction follows naturally from the UNIDROIT Convention ideal of consistently promoting international interests, and the treaty promotes these interests and is comprehensive by covering both categories of cultural property.

Some critics of the UNIDROIT Convention have also argued that implementing legislation could bring rise to complex litigation,<sup>170</sup> noting the issues that might arise from creating a uniform framework while still

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161. *Id.* at 140.

162. *Id.* Fincham’s example: “[W]hen a source nation does nothing to police the antiquities trade itself, has not made its national ownership declaration sufficiently clear, or has only selectively enforced its ownership.” *Id.* (citing *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989)).

163. John Henry Merryman, *The UNIDROIT Convention: Three Significant Departures from the Urtext*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 333, 338 (2009).

164. *Id.*

165. *Id.* at 339.

166. Fincham, *Lex Originis Rule*, *supra* note 1, at 139.

167. *See* UNIDROIT Convention, *supra* note 16, art. 4.

168. *See id.* chs. II, III.

169. Fincham, *Lex Originis Rule*, *supra* note 1, at 139.

170. *See id.* at 134 (quoting James Fitzpatrick, *Against UNIDROIT*, THE ART NEWSPAPER, Jan. 19, 1997, at 19).

allowing for concurrent private action.<sup>171</sup> However, other scholars argue that some of these criticisms seem “unfair and exaggerated,”<sup>172</sup> and hopefully the uniform framework among member parties will ensure that private actions are not inconsistent with public results. Essentially, the UNIDROIT Convention simply allows for private parties, in addition to member states, to bring suits, but this does not conflict with the tenet of maintaining uniform law as provided through the treaty.<sup>173</sup> Rather, it recognizes that both individuals and member states may need to bring actions, ensuring wider protection of cultural property while maintaining similar, uniform laws throughout the member states. As such, many provisions of the UNIDROIT Convention simply expand upon some of the successful provisions of the UNESCO Convention while eliminating the problematic provisions. If market countries ratify the UNIDROIT Convention and embrace a system of uniform law, the potential for protection would increase dramatically and the criticisms would hopefully disappear.

### C. Why UNIDROIT: Advantages

The potential for protecting cultural property through uniform law and reconciling the “differences between civil and common law nations”<sup>174</sup> outweighs the shortcomings of the UNIDROIT Convention.<sup>175</sup> First, as mentioned earlier, the uniform law provided by the UNIDROIT Convention would most likely ensure that the “motley assortment of laws currently governing ownership rights in cultural property will be

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171. See *id.* Fincham discusses the pros and cons of the UNIDROIT Convention, explaining that its “shortcomings . . . render widespread implementation difficult.” *Id.*

172. *Id.*

173. See *infra* Part V.C.

174. Fox, *supra* note 33, at 256.

175. As this Note is concerned with cultural property theft, or “stolen” cultural property, as treated under the UNIDROIT Convention, it does not elaborate on the differences between the UNESCO and UNIDROIT treatment of illegally exported cultural property. However, the main difference between the two conventions with respect to illegally exported property is that the

UNESCO Convention is premised on each sovereign’s right to apply import restrictions on cultural property and seize illegally imported articles. It is also discretionary in its application and litigation is usually not successful. The UNIDROIT Convention, on the other hand, is not discretionary. It greatly expands the rights of foreign governments seeking the return of illegally exported property . . . .

*Id.* at 256–57.

preempted," harmonizing laws among all nations.<sup>176</sup> Although the treaty does not explicitly state that national laws will be preempted, the creation of uniform law would most likely demand this result, especially because countries would presumably follow the newly implemented legislation.

Another advantage of the UNIDROIT Convention is that it ensures maximum protection of cultural property, as several provisions encourage judicial discretion in certain instances by listing important considerations or pointing to the applicable law of a contracting state.<sup>177</sup> Further, countries can be assured that the treaty is in their best interests because the UNIDROIT Convention states that "[n]othing in this Convention shall prevent a Contracting State from applying any rules more favourable [sic] to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention."<sup>178</sup> Thus, these provisions provide assurance that courts would retain discretion in determining how to proceed in certain cases, and thus the treaty promotes uniform law without being unrealistically absolute.

Further, many other principles of the UNIDROIT Convention mark significant changes from the UNESCO Convention that will serve to decrease cultural property theft. For example, one of the most important departures from the UNESCO Convention is that UNIDROIT expands the pool of claimants permitted to initiate restitution for stolen cultural property to include private individuals in addition to member states.<sup>179</sup> In response to the "new, insidious black market for cultural property," UNIDROIT follows through with "a new legislative response . . . that recognizes individuals, not states, as the primary actors in cultural property theft."<sup>180</sup> This will ensure greater protection of cultural property by widening the class of potential claimants and hopefully decreasing the number of thefts that occur in general. Further, the treaty mandates that a

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176. Lenzner, *supra* note 72, at 491–92. Lenzner's comment was written prior to the final draft of the UNIDROIT Convention, but the final treaty still provides no explicit provision concerning preemption. *See also* Lehman, *supra* note 46, at 545.

177. *See* UNIDROIT Convention, *supra* note 16, arts. 3(5), 4(4), 9.

178. *Id.* art. 9; *see also* Lenzner, *supra* note 72, at 491 n.117 (explaining that one concern with respect to this provision is that forum shopping may result). However, although it is arguable that this could contradict the requirement of uniform law, allowing for the use of other rules may not necessarily diminish the main requirement of uniform law. If the UNIDROIT Convention were widely implemented, there would be a general framework of uniform law among member countries, yet judges would have discretion in certain cases. This would hopefully ensure a greater protection of cultural property.

179. *See* UNIDROIT Convention, *supra* note 16.

180. Cutting, *supra* note 20, at 949.

“bona fide purchaser of stolen objects will not receive good title,”<sup>181</sup> requiring the purchaser to return the object in exchange for reasonable compensation as long as the purchase was made in good faith.<sup>182</sup> As both of these provisions protect possessors and good faith purchasers, albeit in different ways, they have the potential to significantly deter cultural property theft, or at least provide appropriate restitution.

Chapter II of the UNIDROIT Convention encompasses specific guidelines for dealing with stolen cultural property, restitution, and compensation to good faith purchasers, and these provisions provide fair and reasonable protection for all parties involved in cultural property disputes. However, a particularly important requirement of the UNIDROIT Convention is that it places an extremely important focus on the return of stolen cultural property. Aiming to ensure restitution in all cases by requiring “cultural property to be returned even if a theft cannot be firmly established,”<sup>183</sup> Article 3(1) commands that a “possessor of a cultural object which has been stolen shall return it.”<sup>184</sup> Regardless of the good faith of the purchaser<sup>185</sup> or any other circumstances, the possessor is obligated to return the object, subject to a three-year statute of limitations for bringing a claim for restitution.<sup>186</sup> This provision is thorough in that it protects original owners by requiring possessors to return stolen cultural property, but it also “insures some security for the possessor by setting the limitations period” within which “the original owner can bring a claim.”<sup>187</sup> The statute of limitations set forth in the UNIDROIT Convention also represents “a compromise to the competing source and market nation interests,” further supporting that these countries should accede to the treaty.<sup>188</sup>

In addition, Article 4 mandates that a possessor who is required to return stolen property shall be entitled to “fair and reasonable compensa-

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181. Fincham, *Lex Originis Rule*, *supra* note 1, at 134 (citing UNIDROIT Convention, *supra* note 16, art. 4(5): “The possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.”).

182. *See id.* at 135. Fincham explains that this good faith requirement “could act to deter illicit trade, by requiring each purchaser to police their own acquisitions.” *Id.*

183. *Id.* at 134. Fincham further explains that the UNIDROIT Convention discusses how the theft does not need to be proven in order for a state to demand return of an object; rather, the state must simply claim that the object was illegally exported. *Id.* at 134 n.128 (citing UNIDROIT Convention, *supra* note 16, art. 5).

184. UNIDROIT Convention, *supra* note 16, art. 3(1).

185. This is discussed in Article 4 of the UNIDROIT Convention. *Id.* art. 4.

186. *Id.* art. 3(3).

187. Fox, *supra* note 33, at 257–58.

188. Bengs, *supra* note 77, at 530.

tion provided that the possessor neither knew nor ought reasonably to have known that the object was stolen.”<sup>189</sup> This provision is particularly relevant to encouraging civil law nations to become signatories, as in “civil law nations the good faith purchaser is allowed to retain the stolen property” while the UNIDROIT Convention is focused primarily on “securing the return of stolen cultural property.”<sup>190</sup> Since this difference between the law of civil nations and the law required by the UNIDROIT Convention is somewhat dramatic, “[p]roviding reasonable compensation serves to reduce the shock of transition from complete protection of the good faith purchaser to almost no protection.”<sup>191</sup> Thus, UNIDROIT seems to strike a fair balance between certain aspects of common law and civil law rules.

Article 4 also states that the possessor must “prove that it exercised due diligence when acquiring the object”<sup>192</sup> in order to obtain compensation, but the “intentionally vague” language of the provision encourages judicial discretion, again demonstrating how the treaty requires uniform law without being too extreme.<sup>193</sup> This clause and the “fair and reasonable compensation” requirement are both somewhat vague, allowing for more judicial discretion depending on the circumstances of the theft. Further, since the good faith purchaser receives no protection in a common law jurisdiction, the UNIDROIT Convention requirement of due diligence “would, therefore, be an unexpected bonus to the current possessor.”<sup>194</sup> This provision as a whole is potentially successful in that it would arguably increase due diligence of parties acquiring cultural objects, expand the protection that is currently afforded to cultural property owners, and ensure restitution in appropriate cases.

Through its provisions, specifically in Articles 3 and 4, the UNIDROIT Convention is “consistent with existing international law and U.S. domestic law,” and provides “an equitable solution to the complex issues involved in art theft cases.”<sup>195</sup> Although the criticisms of the

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189. UNIDROIT Convention, *supra* note 16, art. 4(1).

190. Bengs, *supra* note 77, at 529.

191. *Id.*

192. UNIDROIT Convention, *supra* note 16, art. 4(1).

193. See Fox, *supra* note 33, at 262 (explaining that “[t]he UNIDROIT Convention does not give much guidance in determining the amount of compensation to be paid. The Convention’s language is intentionally vague to allow judicial discretion in assessing the factors which may determine a fair and reasonable amount”). Fox also explains that this concept is consistent with U.S. law. *Id.* at 266; see also *Guggenheim v. Lubell*, 569 N.E.2d 426 (N.Y. 1991); *Autocephalous Greek Orthodox Church v. Goldberg & Feldman Fine Arts*, 717 F. Supp. 1374 (S.D. Ind. 1989).

194. Bengs, *supra* note 77, at 529.

195. Fox, *supra* note 33, at 266.

UNIDROIT Convention are not without merit, the treaty “takes significant steps toward reconciling existing tensions between market and source nations, and between the civil and common law countries by protecting both the rights of the original owner and of the bona fide purchaser.”<sup>196</sup> Because there are often conflicting rights, the UNIDROIT Convention’s attempt at reconciling those conflicts, harmonizing private law, and creating a uniform body of international law is a huge step toward protecting cultural property. Although there is no flawless international treaty protecting cultural property, the UNIDROIT Convention “provides a glimmer of hope for increased regulation of a market that has become a virtual free-for-all”<sup>197</sup> and may be the closest the international community will see.

#### VI. CONCLUSION

Although the importance of cultural property demands laws that will truly protect it, there is currently no legal system that has effectively done so. While the UNESCO Convention ignores the need for uniform law and permits individual countries to maintain varying domestic laws concerning stolen cultural property, domestic laws still do not provide adequate protection. Further, since cultural property theft has historically been regulated on the domestic scale, many countries have resisted the movement toward a more uniform, international system of regulation like the one set forth in the UNIDROIT Convention.

However, recognizing the need for uniform law is imperative, and implementing the UNIDROIT Convention “would confirm the special status of cultural property and, hopefully, would provide the additional impetus currently needed for adequate international cooperation in the preservation and protection of the world’s cultural treasures.”<sup>198</sup> Further, it would provide a means of deterring cultural property theft without severely complicating the art market, as it successfully expands upon the positive provisions of the UNESCO Convention while eliminating the unsuccessful ones.<sup>199</sup> The problem of stolen cultural property has to date “been unchecked due to the lack of an effective international agreement,”<sup>200</sup> and the UNIDROIT Convention provides a uniform, international framework for protection. Although arguments have been made that the lack of “sufficient ratification and application” is a sign of the

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196. *Id.*

197. Lenzner, *supra* note 72, at 500.

198. Phelan, *supra* note 44, at 57.

199. See Fox, *supra* note 33, at 265.

200. Lehman, *supra* note 46, at 548.

UNIDROIT Convention's failure,<sup>201</sup> more widespread ratification, at least in the near future, seems more plausible than ratification of a new treaty. As such, the next step in the right direction toward protecting cultural property is large market country implementation of the UNIDROIT Convention and thus implementation of a widely uniform international law.

"Nations, both market and source, need to adopt a spirit of compromise regarding cultural property regulation," and the "UNIDROIT Convention provides a framework for that compromise."<sup>202</sup> This compromise is particularly important, as both market and source countries should recognize and acknowledge the innovative approaches of the UNIDROIT Convention for protecting cultural property through uniform law. Although the criticisms are not "a surprising reaction to any effort to seriously modify the art trade,"<sup>203</sup> the UNIDROIT Convention solutions for protecting cultural property are unparalleled, and the creation of uniform law is the primary highlight.

As discussed throughout this Note, no treaty or national legislation has proven successful in dealing with stolen cultural property and its effects. As members of the international community have created successful "international regimes to deal with other areas," cultural property laws "should be addressed in a similar manner."<sup>204</sup> Cultural property theft is a global problem that has yet to noticeably decline, as a truly successful framework for protection has not been implemented. Although countries have natural reservations against implementing new legislation that might seriously affect their legal systems, cultural property theft is not a self-regulating area and now is the time to address it. Large market countries should support ratification of the UNIDROIT Convention and its uniform framework, which, despite criticism, still appears to have potential for long-term success in deterring and decreasing cultural property theft.

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201. Cottrell, *supra* note 49, at 658.

202. Bengs, *supra* note 77, at 535.

203. Fincham, *Lex Originis Rule*, *supra* note 1, at 134.

204. Kinderman, *supra* note 48, at 461.

\* B.A., Colgate University (2008), J.D., Brooklyn Law School (expected 2011). I would like to thank my parents, my brother, and Michael Tedesco for their endless love, support, and encouragement throughout the writing process and always. Thank you also to the staff of the *Brooklyn Journal of International Law* for their assistance in preparation of this Note. Any errors or omissions are my own.