



Edited by  
**James A.R. Nafziger**

# Cultural Heritage Law

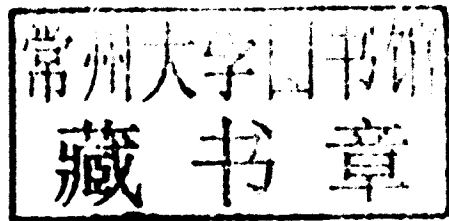
**INTERNATIONAL LAW 2**

# Cultural Heritage Law

*Edited by*

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INTERNATIONAL LAW

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# Introduction

James A.R. Nafziger

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## A. Definitions

Broadly speaking, the term ‘cultural heritage’ refers to the myriad manifestations of culture that human beings have inherited from their forebears. These manifestations include, for example: art, architecture, rural and urban landscapes, crafts, music, language, literature, film, documentary and digital records, folklore and oral history, culinary traditions, indigenous medicine, ceremonies and rituals, religion, sports and games, dance and other performing arts, and recreational practices such as those involving hunting and fishing. In the narrower sense in which the term generally will be used in this book, however, ‘cultural heritage’ is limited to tangible artifacts of cultural significance – that is, ‘cultural material’, ‘cultural objects’ or the European term ‘cultural goods’ – cultural sites, and intangible ideas and knowledge related to such objects. We commonly associate this narrower definition with the legal concept of property whether we are referring to physical or intellectual property. Accordingly, the terms ‘cultural property’ and ‘cultural heritage’ sometimes are used interchangeably. Strictly speaking, however, the term ‘property’ connotes ownership and imputes rights to owners and possessors of objects and intangibles whereas ‘heritage’ does not imply such ownership and concomitant rights. Of course, the term ‘cultural’ is itself subject to various interpretations.

A particularly important aspect of international cultural heritage law<sup>1</sup> is the concept of ‘*cultural patrimony*’. It refers to that part of a culture that is so fundamental to the identity and character of a nation, tribe, or other ethnic group that its members deem it inalienable. The term embraces tangible historic or archaeological sites and objects as well as intangible phenomena, such as folklore, rituals, language, music, and craft skills. Thus, for example, in the United States the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>2</sup> defines cultural patrimony to include objects having ongoing historical, traditional, or cultural importance central to Native American tribes and Native Hawaiian groups from which the objects may not be alienated, appropriated, or conveyed by an individual. Examples of Native American patrimony include Zuni War Gods and the Confederacy Wampum Belts of the Iroquois. Often, however, a specific determination of cultural patrimony is difficult in the absence of a statutory definition, or an official registration of it, as well as in the instance of competing claims to it between groups, including tribes, or between a group and a larger society.

The definition of cultural patrimony varies greatly among legal systems. Mexico and numerous other countries claim as patrimony all objects of a specified age and cultural affinity that have originated within their territories – for example, all indigenous material that is found within Mexico or that was exported after enactment of pertinent antiquities legislation. Such laws, which do not differentiate between culturally outstanding and less important material, pose difficult problems of recognition and enforceability elsewhere. Several European

countries avoid this problem by limiting the term to registered, officially listed, or otherwise explicitly identified cultural heritage that can be readily recognized and enforced by other countries. The Japanese and Korean patrimony features 'national treasures'. The United States patrimony, insofar as the term has legal consequences in global trade, extends only to objects and sites on federal and tribal lands, objects originating there, or sites and objects that historical preservation and other laws otherwise designate, even if found on private land. Subnational laws also define local cultural patrimony in the United States and several other federal systems.

The legal consequences of designating heritage as cultural patrimony also vary greatly. Countries that assert blanket ownership of all patrimony typically bar all export of it. Other countries, such as Guatemala, claim entitlement over patrimony only at the point of its export or attempted export, thereby allowing individual ownership of patrimony within the sovereign territory but requiring it to stay there. The governments of the United Kingdom and other Commonwealth countries are given an opportunity to purchase or arrange for the purchase of privately owned cultural material when it is bound for export, but only if it is of outstanding importance to the national patrimony. There is no consensus in theory or practice that sovereign designation of a cultural object alone reconstitutes it as a *res extra commercium* – something outside normal commercial dealings – that offers any additional protection or advantages.

In the absence of international agreement, a designation of particular cultural heritage as patrimony may heighten the normal tensions resulting from claims by one country for the repatriation of cultural material from another. Such claims often result in highly publicized disputes involving material whose acquisition is traceable to conquest, confiscation, or colonization. Among the most enduring claims is that involving the Elgin (Parthenon) Marbles, multiple claims against the Louvre and other French institutions for the return of Napoleonic booty and colonial treasures such as Benin bronzes from West Africa. Before the 2010 Revolution in Egypt, its then Director of Antiquities aggressively sought the return of the Rosetta Stone from London, the Bust of Nefertiti from Berlin, and other renowned cultural objects originating in the territory of modern Egypt and deemed to be part of the Egyptian patrimony.

In all of these cases, the question has arisen whether disputed objects any longer pertain to a particular *national* patrimony or rather have become part of the cultural patrimony of *humankind*. This issue is especially relevant when the national claims are made only on a territorial basis rather than on a pedigree of national identity and genuine cultural succession possessed by a claimant state.

## **B. The Emerging Legal Framework**

It is only in recent decades that the global community has acted to construct a specific, comprehensive framework of law to protect the cultural heritage of humankind, despite a long history of related issues and responses to them. To be sure, obligations for the return of plundered cultural material to territories of origin date back to Persian, Greek, and Roman times. The Hague Conventions of 1899<sup>3</sup> and 1907<sup>4</sup> on the laws and customs of war, followed by the reparation provisions of the Treaties of Versailles<sup>5</sup> and Saint-Germain<sup>6</sup> after the First World War, together prohibited and supported remedies for military plunder, seizure or destruction of monuments and works of art. These treaties, which were addressed to armed



conflict, articulated basic remedies for victim states. In 1935 the Roerich Pact<sup>7</sup> sought to protect monuments in the western hemisphere. But it was not until 1954 that the first major international agreement specifically designed to protect cultural heritage was opened for signature – namely, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>8</sup> – and even it is limited to situations of armed conflict.

The 1954 Hague Convention consolidated the rules of the Hague Conventions of 1899 and 1907 that pertained to cultural heritage as well as to pertinent international custom on the laws of war.<sup>9</sup> This Convention also added substantial details. Basically, it prohibits looting of cultural material during military operations and any use of cultural material that would likely expose it to military destruction or damage; requires parties to prepare in time of peace against foreseeable effects of armed conflict; and establishes designated zones of protection for sites and material of great importance to humanity. A distinctive emblem was devised for specially protected heritage. A 1954 Protocol<sup>10</sup> to the agreement requires occupying powers to prevent the illegal export of cultural material and to seize and return looted material. A 1999 Protocol<sup>11</sup> reinforces existing rules, mandates prosecution or extradition of violators, sets forth procedures to designate enhanced zones of protection, and establishes an implementing committee. This regime is reinforced by Protocol I of 1977<sup>12</sup> to the four 1949 Geneva Conventions on humanitarian treatment of persons during armed conflict. Finally, under customary law the deliberate destruction of protected sites and material is a ‘grave breach’ of the laws of war and therefore a war crime.

It is apparent that, historically, the scattered norms and rules of international cultural heritage law were addressed primarily to problems of military plunder, unwarranted destruction of cultural heritage, spoils of warfare, and occupation of foreign territory. These problems still threaten the world’s cultural heritage, as in the shelling of Dubrovnik and Mostar during the implosion of the former Yugoslavia and in the wake of the 2003 military intervention in Iraq. A robust art market, however, has shifted substantial attention to peacetime trafficking and other issues as well.

In the late 1960s and early 1970s, five general developments sparked a series of further initiatives to construct an effective framework of supervision and control. First, concerned archaeologists began to blow their whistles more shrilly on questionable excavations, illegal trafficking in cultural objects, and dubious acquisitions of them by collectors, museums, and other institutions. Second, governments began to bring pressure on import or market states to cooperate in barring the import of significant cultural material and in returning such contraband to countries of origin. Third, the global environmental movement inspired a new consciousness about the interrelationship between natural and cultural heritage and, in turn, a greater focus on protecting cultural heritage. Fourth, the Native Peoples Movement inspired efforts to regain possession of indigenous material and human remains as well as to claim rights based on traditional forms of expression and knowledge. Concerns about protecting tribal and other collective controls over traditional designs and pharmacological knowledge, in particular, have generated a rapidly expanding body of international law and new techniques for protecting intangible heritage. Fifth, more sophisticated thefts of cultural material linked to money laundering and other organized crime alerted law enforcement authorities to the need for better policing of transactions involving important cultural objects. It was truly alarming to find that illegal trafficking in cultural material had assumed a prominent place just behind drugs and weapons as international contraband.

In response to these developments, international organizations, particularly the United Nations Educational, Scientific and Cultural Organization (UNESCO), enlisted the cooperation of national governments and private institutions in fashioning and enforcing new rules and procedures. The resulting conventions, declarations, supervisory regulations, and other initiatives of UNESCO dominate the general framework of international cultural heritage law today.

### **C. The Functions of the Legal Regimes**

The legal regimes within this UNESCO-oriented framework perform five interrelated functions: *protection*, *cooperation*, *rectification*, *criminal justice*, and *dispute resolution*. Accordingly, the law seeks to protect the physical integrity and contextualization of cultural material; facilitate cooperation in its management, appropriate transfer, and safe return to legitimate claimants; rectify wrongful activity by means of civil remedies and otherwise; impose penal sanctions for illegal activity involving cultural material; and provide the means for amicably resolving related disputes.

In particular, claims for the return, restitution, or repatriation of cultural heritage have been of central importance. On the domestic level, for example, the historical and cultural identity of tribal and other indigenous groups is often at stake in efforts to reclaim significant artifacts from museums, art galleries, and private collections. On the international level, the recovery of stolen cultural material, whose value is estimated to be as high as \$4 billion annually, requires substantial diligence by customs officials and cooperation among international organizations, governments, private institutions, and individuals. Not surprisingly, the resulting claims are often complex.

### **D. The Core, UNESCO-based Conventions**

#### *1. Protection*

One of UNESCO's most successful programs and one of the most powerful tools for heritage preservation is the evolving regime under the World Heritage Convention (WHC).<sup>13</sup> Almost universally adopted, with 188 states parties, the WHC is unique in combining the protection of cultural and natural heritage in one instrument. It has evolved to reflect the needs of vastly different sites that have been formally designated for protection. Global concern for cultural sites has grown from the preservation of single historic buildings and complexes to measures for protecting entire towns and cultural landscapes. Initiatives have addressed often complicated issues related to those landscapes, transboundary sites, and thematic programs dedicated to marine heritage, world heritage forests, sustainable tourism, earthen architecture, and small-island developing states. Within the sphere of general international law, the World Heritage List has gradually attained greater prominence. In 2011 one of the listed sites, the Temple of Preah Vihear in Cambodia, again became the focus of a dispute before the International Court of Justice.<sup>14</sup>

A World Heritage Centre was established in 1992 as a single secretariat for both cultural and natural heritage and as a means for implementing the WHC's objectives. In addition, a World Heritage Committee, meeting annually, adopted a set of Operational Guidelines for the Implementation of the World Heritage Convention. The Committee's main contribution has been to create and develop a World Heritage List, which came into effect in 1978 and has since become a cornerstone of the WHC framework.<sup>15</sup> Governments nominate natural and cultural properties for listing properties of 'outstanding universal value' within their territorial jurisdictions. Nominated heritage must also pass an authenticity test and meet at least one of ten selection criteria that are explained in the Operational Guidelines. The process of inscribing nominated heritage on the World Heritage List involves tentative designation by states, independent evaluation of nominations by prescribed institutions, presentation of management plans and other supporting documents, and final approval by the World Heritage Committee.

States parties to the WHC agree to undertake effective site management, the submission of periodic reports, preparation of detailed management plans for sustainable tourism, and overall careful stewardship of sites. Fundamentally, they thereby bear *erga omnes* obligations to transmit listed World Heritage sites in good condition to future generations. The advantages to states parties include international prestige, enhanced tourist income, and access to emergency assistance for World Heritage sites in danger. One limitation is that a request for emergency assistance is voluntary and can be made only by a state on whose territory a site needing assistance is located.

The World Heritage List has grown to include nearly 1000 sites, as of 2012, inscribed for their outstanding universal value in over 150 sites around the world. They are classified as cultural, natural, or mixed cultural-natural sites. The term 'cultural heritage' embraces monuments, building complexes, and cultural sites whereas the term 'natural heritage' embraces natural features, geographical and physiographical formulations, and natural sites. Mixed sites can include entire landscapes. Also, sites may be serial, as with the tentative listing by the United States of ten Frank Lloyd Wright-designed properties that span the country from California to Wisconsin to New York.

The main constraints on fulfillment of national obligations are a lack of funds; a lack of administrative capacity, particularly in developing countries; priorities of economic development that may negatively affect sites; the effects of tourism; military exigencies; and climate change. Deficiencies in a domestic legal culture, such as a tradition of weak oversight and enforcement of legal measures, as well as a weak central political structure such as in some federalist states, may be additional complications. In the history of the World Heritage List, however, only two sites – Oman's Oryx Sanctuary and Germany's Elbe Valley – have been removed from the List for non-compliance by those states with their protective obligations.

It should be noted that, by and large, WHC provisions are soft. For example, these provisions simply implore each state party 'to do all it can, [...] to the utmost of its own resources', otherwise to take action 'in so far as possible, and as appropriate for each country' or '[w]hilst fully respecting the sovereignty of the [territorially relevant] States [...] and without prejudice to property rights provided by national legislation'.<sup>16</sup>

A List of World Heritage in Danger helps identify and generate support for sites that are under threat from climate change, natural disasters, conflict, poaching, pollution, urban sprawl, and inadequate funding. These sites are entitled to emergency safeguarding that may

entail special international funding and overall priority for general funding. Yellowstone National Park in the United States, for example, was on the danger list for eight years until nearby mining operations ceased, local building and road construction were modified, the full-facility tourist season was reduced, and the United States reported on plans to phase out snowmobile riding in the park.

Out to sea, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage<sup>17</sup> seeks to protect shipwrecks, their cargo and related material as well as to regulate historic salvage beyond the territorial waters of coastal states. The agreement delineates pertinent maritime jurisdictions and requires various types of cooperation and collaboration in protecting the heritage among flag states of sunken vessels, coastal states on whose continental shelves vessels may repose, and other interested states. Parties must also enforce a set of standards and requirements against salvors of wreck within their jurisdiction, cooperate in information-sharing and decision-making concerning discoveries and protective measures, and respond to excavation and importation of underwater heritage that violate prescribed standards and requirements, as set forth in an annex to the treaty. These provisions for good stewardship were initially drafted by the International Council on Monuments and Sites.

International cultural heritage law includes not only cultural objects, sites, and landscapes, but intangibles, as well. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage<sup>18</sup> embraces oral traditions, languages, social practices, rituals, festive events, folklore, craft skills, and traditional knowledge. The agreement calls on parties to prepare inventories for their intangible heritage as a basis for drawing up two lists, one of representative material and the other of material in urgent need of safeguarding. A list of 'masterpieces' of intangible practice includes, for example, the Duduk music of Armenia, the processional giants and dragons of Belgium, the mask dances of Bhutan, the shadow theater of Cambodia, and the ox-herding tradition of Costa Rica.

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression<sup>19</sup> recognizes that everyone profits from the free flow of diverse ideas, words, and images; encourages preservation of indigenous traditions and minority languages; and protects the distinctive cultures of rich and poor countries alike in an era of cultural homogeneity. Although the basic idea of the 2005 Convention to promote cultural diversity is universally accepted, it is also controversial. The Convention's proponents have hailed it as an important means for protecting threatened cultures, particularly in developing countries, from the homogenizing effect of cultural globalization. Opponents, on the other hand, have argued that the Convention promotes unwarranted restrictions of freedom of expression as well as access to, and free trade in, ideas and images. The debate has centered on the extent to which the treaty was anything more than an elaborate means to protect national cultural industries, especially the media, from the foreign influences of mass-marketed movies and television programs. The general economic stakes are obvious – for example, American movies alone garner billions of dollars at foreign box offices – but the specific implications of the Convention and its validity in international trade law are unclear.

## *2. Cooperation*

Several international agreements specifically seek to protect cultural patrimony from illegal trafficking and pillage. For example, one of the operative provisions in the 1970 UNESCO

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>20</sup> enables one treaty party to request another to impose emergency trade restrictions – normally prohibitions – on the importation of objects within a designated class or classes. The requesting state must demonstrate that each designated class is part of its cultural patrimony and is in jeopardy from pillage. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>21</sup> provides detailed rules for the return and restitution of cultural objects, especially ‘objects of significant importance’.

The 1970 Convention is a cornerstone of cultural heritage law, creating multilateral control over the movement of cultural heritage while seeking to promote its legitimate exchange and international cooperation in preparing national inventories of it. This Convention, using the superseded term ‘cultural property’, defines it as ‘property which on religious or secular grounds is specifically designated by each State as being of importance for archaeology, prehistory, history, literature or science’. The scope of protected property includes rare collections and specimens of fauna, flora, minerals, and anatomy, and objects of paleontological interest; property relating to history; products of archaeological discoveries; elements of artistic or historical monuments; antiquities such as coins that are more than 100 years old; objects of ethnological interest; works of art such as paintings and sculpture; rare manuscripts and documents; postage stamps; archives; and articles of furniture and musical instruments that are more than 100 years old. This expansive list is still the most widely accepted definition of cultural heritage.

The 1970 Convention’s most important features are a provision for export certification; the cooperative emergency measures, often enshrined in international agreements, that were noted earlier; a mandate that parties restitute properties within their jurisdiction stolen from museums, monuments, and other institutions; a requirement that, ‘consistent with national legislation’, parties prevent museums and similar institutions from acquiring property illegally exported from other states; a commitment that parties impose penalties or other administrative sanctions for stipulated infringements; and a provision for international cooperation in identifying cultural property and developing national inventories. Contraband items are recoverable on demand by the state of origin, so long as just compensation is paid to innocent purchasers. This document strikes a compromise between the interests of art-importing and art-exporting states while requiring the cooperation of importing states in the recovery and retrieval of property illicitly exported from other states.

At the regional level, a European Union Directive<sup>22</sup> requires member states to take measures to effect the return of cultural objects taken unlawfully from the territories of other member states, and, under an EU Council Regulation,<sup>23</sup> member states must require licensing of all important cultural material destined for export outside the EU.

### *3. Rectification*

Claims for restitution or return of cultural materials, both within and outside the 1970 Convention, seek to right the wrongs not only of modern commerce but also of past conquest and colonialization, particularly by native and colonial peoples seeking to reclaim material looted from them. Egypt, Greece, and Italy have been particularly active in pursuing recovery of long-displaced heritage reposing in foreign museums. Often all three dimensions of the cultural heritage predicament—conquest, colonialization, and commerce—converge. For

example, almost as soon as the British military had looted scores of extraordinary Benin bronze sculptures from West Africa in 1897, they found their way into private collections and museums, primarily in Europe. The combined legacy of conquest, colonialization, and commerce continues to generate tensions and to provoke ethical and legal questions, even as the cultural objects at issue continue to excite people's imaginations around the world and encourage notions of cross-cultural pride and human solidarity. During the last 20 years particularly prominent sources of claims in Europe and North America have been the confiscation of fine art by the Nazis during the Holocaust and, to a lesser extent, the nationalization of property by communist regimes beginning with the Bolshevik Revolution. The victims and heirs of these confiscations have generated important litigation for recovery of objects, new rules of private international law and strategies of dispute resolution, improved and more uniform codes of ethics for museums and other institutions, and increased pressures on national governments to assist in the recovery of seized objects by administrative and judicial means as well as intergovernmental cooperation.

#### *4. Criminal Justice*

Today illicit trafficking in antiquities is third in value only to drug smuggling and illegal arms trafficking as a global crime. The chief participants are souvenir-hungry scavengers, tomb robbers and other indigenous looters and traders; unethical art dealers and museums with questionable acquisition policies and practices; and investment firms that transform art into a financial commodity.

Provisions of municipal law help to localize an international wrong in an established legal system and to focus attention on the penal aspects in the municipal enforcement of international norms and customs. Many states treat theft of cultural heritage as they do any other theft, but there are exceptions. For example, in a few states it is an offense for any person to be found in possession of a cultural object that he is unable to show he has obtained lawfully, and in several other countries illegal excavations and trafficking in objects belonging to the national patrimony may even result in capital punishment.

Criminal prosecutions sometimes face difficult issues – for example, whether to include violations of export prohibitions within the definition of stolen material. We might note how one legal system has resolved this kind of issue as it arises in criminal prosecutions: Although the United States does not normally enforce the foreign antiquities or export laws of another state, its courts have recognized these laws to define the term 'stolen property' as applied to objects imported from another state. The courts have done so under the National Stolen Property Act<sup>24</sup> so long as the state of origin has specifically declared ownership over the material in point. Specific scienter, that is, actual knowledge of the violation of a specific foreign law or declaration of ownership by a foreign sovereign, has not been a requirement to convict a defendant.

#### *5. Dispute Resolution*

Because the origins of international cultural heritage law often lie in the battlegrounds of conflict, the underworld of crime, and the frontiers of indigenous self-determination, it is not surprising that the normative and institutional framework to protect the cultural heritage has

been essentially adversarial. Historically, efforts to develop an effective body of international cultural heritage law have emphasized formal remedies for past wrongs. Considerable emphasis has been placed on exclusive rights of ownership and the elaboration of rules for the restitution of stolen property or return of illegally exported property. In resolving related disputes, litigation has been a preferred means despite the voices of experience that have urged a greater recourse to mediation and other informal means of dispute resolution when that is feasible. Unfortunately, however, the stakes are sometimes too high in the commercial art world to rely on mediation and other informal techniques.

The availability of adjudication and the articulation of applicable rules, despite their limitations, are essential, of course. Conversely, an absence of detailed procedures and rules has inhibited the resolution of cultural property disputes such as those arising out of the confiscation and transfer of cultural objects during the Holocaust and World War II. But naked rules and formal processes for applying them are inadequate by themselves. A reliance on adversarial processes, particularly litigation, has been complicated by very difficult procedural problems such as evidentiary issues, refusals to recognize or enforce foreign export controls and antiquities laws, and the often prohibitive costs of litigation. Also, in addressing indigenous claims, it is apparent that formal rules, scientific theories, and academic practices have inherent limitations in constructing appropriate views of ancient human history and cultural traditions.

Technical issues of private international law may also complicate litigation. The most common of these issues involve the ownership of a stolen object that has been transferred to a bona fide purchaser; statutes of limitations; and repose in a state other than the state of origin long enough for the object then to become identified with the transferee state. Conflicting rules on the status of a bona fide purchaser as between the laws of civil code systems (protective of the purchaser as against the original owner) and the common law (not protective) are particularly troublesome.

Thus, informal methods of dispute resolution, such as mediation, are often preferable when the stakes are not so high as to preclude alternatives to litigation. More generally, a will to cooperate and collaborate in equitably sharing the global heritage – it is really a matter of *goodwill* – is essential. So is a balance between rectification of what has gone wrong and advocacy of what seems right. This, however, will require a greater emphasis on a spirit of commonality or solidarity, a commitment to the principle of sharing, and open, well-defined avenues for collaboration. The need is also apparent to refurbish both vocabulary and mindsets, which have relied too heavily on such dichotomies as art-exporting versus art-importing countries; common heritage of humankind versus national patrimony; salvage of underwater wreck versus preservation of underwater heritage; traditional knowledge versus intellectual property; and so on. Dichotomies of this sort are, of course, useful as analytical constructs in advancing any system of law and governance, but they are apt to blinker our vision of reality and inhibit constructive discourse and action.

A rather artificial distinction between so-called cultural internationalism and cultural nationalism has been particularly questionable. The benign-sounding term ‘cultural internationalism’ captures a respectable term – ‘internationalism’ – to justify *laissez-faire* practices that actually defy the fundamental requirements of cooperation and collaboration underlying internationalism in its normal sense. Essentially, the classification is simply a rhetorical construct to justify a perpetual legacy of questionable international commerce in

cultural material and, in effect, help to ensure that it accrues more to the benefit of private collectors than of the public as a whole.

Fortunately, such artificial dichotomies are yielding to more cooperative approaches for accommodating the many diverse interests in the cultural heritage of humankind. A gratifying number of galleries, museums, and other institutions have conformed to institutional and industry-wide codes of ethics, which have become stronger and more specific. The institutions have, therefore, voluntarily returned cultural patrimony either unconditionally or on a shared basis, such as by agreement for alternating possession and display of an object.

There is also a growing interest in collaborative processes of caring and sharing. Countries of origin and tribal societies have been particularly willing to share objects when they are redundant as patrimony. Collaborative resolution of disputes based on principles of mutual protection and exchange of cultural heritage, as opposed to adversarial process, offers particular promise in reconciling competing claims to patrimony. This approach was adopted in 2006 by the International Law Association (ILA) in its Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material.<sup>25</sup>

The ILA Principles are intended to be used by a broad range of interested parties: governments, museums, other institutions, persons, and groups of persons. To facilitate the desired spirit of partnership among such a broad range of actors and potential issues, the Principles are simple and specific. Their guidance for handling transfer requests promotes good stewardship. The Principles help to define the ethos of stewardship in the context of the actual or potential tensions that inevitably result from multiple legal claims to culturally important material. By fostering mutually acceptable agreements for the careful disposition and possession of such material, the Principles are intended to avoid unnecessary litigation of competing claims. They are not intended to replace litigation of issues but simply to facilitate collaboration between competing claimants in an informal process of first resort.

Bilateral agreements are beginning to reflect this trend as well – for example, an agreement between Austria and Mexico to share in the possession and display of a famous headdress attributed to the Aztec Emperor Moctezuma that has reposed in Austria since at least 1596 and, since 1878, in Austrian state museums. Concrete proposals also reflect this trend. For example, one proposal to settle Greece's famous claim for the return of the Elgin (Parthenon) Marbles from the British Museum is that their eventual return to Greece should not be simply a transfer from one location and one museum management to another, but should entail a mutual trusteeship with regard to conservation, display, access, record keeping, needs of scholars, consultation, and accountability.

## **E. Other UNESCO Instruments**

The UNESCO regime to protect cultural heritage also includes nonbinding declarations and recommendations to supplement the treaty framework. For example, the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage<sup>26</sup> largely responded to the demolition of two colossal Buddhist statues in Bamiyan, Afghanistan, by the then Taliban government of that country. This Declaration addresses the problem of intentional destruction in peacetime, wartime, and military occupation. It is premised on a specific violation of international law or, under the catch-all Martens Clause in the 1899 and 1907 Hague



Conventions, 'an unjustifiable offense to the principles of humanity and dictates of public conscience'. The operative provisions of the 2003 Declaration establish state responsibility and individual criminal responsibility for intentional destruction of cultural heritage or for any failure to take appropriate protective measures. The Declaration also instructs states to cooperate with each other in measures of protection and to organize public awareness-raising campaigns. UNESCO's Intergovernmental Committee for the Return of Cultural Property to its Countries of Origin is also noteworthy. Finally, we should take note of the deliberative processes and soft law generated by two UNESCO-affiliated international organizations: the International Council of Museums and the International Council on Monuments and Sites.

## F. Concluding Comments

The legal framework of international cultural heritage law has expanded greatly in recent years to keep up with the issues. The legal topics now range from the creation of cultural safety zones and safe havens for cultural material during armed conflict to the ongoing rectification of genocidal conquest during the European Holocaust and World War II, from the treatment of shipwrecks and their cargo to the protection of cultural landscapes, and from the protection of folklore and other intangibles to the promotion of traditional knowledge. All of these topics are controversial, as are the legal instruments that incorporate them, but the issues they embrace are vital to us all, whether our viewpoint is in the global arena, a national legislature, a courtroom, a classroom, an archaeological site, or a museum.

The essays in this anthology have been selected on the basis of their influence and importance. Thus, brief but consequential observations and commentary by non-lawyers appear along with lengthier summaries and analysis. The edition's intent has been to create more of a mosaic than a *mélange*.

## Notes

1. For fuller discussion of international cultural heritage law, from which this introduction draws, see JAMES A.R. NAFZIGER & TULLIO SCOVAZZI, *THE CULTURAL HERITAGE OF MANKIND* 145 (2008). See also the text and materials, which are fully indexed, in JAMES A.R. NAFZIGER, ROBERT KIRKWOOD PATERSON & ALISON DUNDES RENTELN, *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* (2010).
2. 25 U.S.C § 3001–3013 (2008).
3. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 26 *MARTENS NOUVEAU RECUEIL* (ser. 2) 949, *reprinted in* 1 *AM. J. INT'L L.* 129 (1907) [hereinafter 1899 Hague Convention].
4. Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 *MARTENS NOUVEAU RECUEIL* (ser. 3) 461, *reprinted in* 2 *AM. J. INT'L L.* 90 (1908) [hereinafter 1907 Hague Convention].
5. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 *Bevans* 43, 3 *Malloy* 3329–3522, at arts. 245–7.
6. Treaty of Saint-Germain, September 10, 1919, *reprinted in* A. TOYNBEE, 3 *MAJOR PEACE TREATIES OF MODERN HISTORY 1648–1967*, at 1535 (1967).
7. Treaty on the Protection of Artistic and Scientific Institutions and History Monuments, *done* April 15, 1935, 167 *L.N.T.S.* 289.