

Alexander Frid

The Common Heritage Doctrine and the Treatment of Cultural Property: History, Theory, and Practice

Key Terms:

- ◆ *Raison d'etat*
- ◆ Kantian Universalism
- ◆ National Self-Determination
- ◆ Enlightenment
- ◆ Secularized Globalism
- ◆ Hegelian *Weltgeist*
- ◆ Institutional Expropriation
- ◆ Common Heritage of Mankind Doctrine

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According to Alexander Frid, research is a tool for developing analytical skills that are pertinent to succeeding in today's professional and academic worlds. Research afforded him the opportunity to contribute to the demands of political science while also allowing him to express his deep interest in the emergence of international norms that address both theoretical and practical concerns. Frid plans to further apply his reasoning skills at UC Berkeley as a law student. ◆

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Abstract

This paper examines three rationales explaining the development of international law governing cultural protection. Departing from traditional theoretical approaches in international relations, this paper looks at normative aspects of state behavior that go beyond the typical aspirations for power, prestige, and wealth. The plunder of cultural property in times of war has been acceptable behavior for centuries as expropriated items were considered "trophies of war" by the victors. The paper argues that late 18th to early 19th century liberal discourses instilled a sense of a universal identity in people of different nations. This sense of a common identity, advocated in Kantian universalism and Hegelian *Weltgeist*, prompted states to consider certain objects as belonging to humankind as a whole—the concept of a common heritage. The acceptance of the common heritage doctrine led to the development of international laws and conventions prohibiting the plunder and pillage of cultural property during wartime, provisions for repatriation, and changes in state behavior. ◆

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Faculty Mentor

Alexander "Sasha" Frid's project, "The Common Heritage Doctrine and the Treatment of Cultural Property," contributes to research taking place at one of the most exciting frontiers of international relations. In recent years, scholars have begun to explore the ways in which international rules emerge and evolve, and how those rules affect the behavior of countries. Sasha's paper adds to that effort by explaining the development of international rules for the protection of art treasures in times of war. Working together on the project was extremely beneficial for both of us. The collaboration advanced my own research efforts and helped Sasha toward a prize-winning honors thesis. ◆



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Introduction

Hugo Grotius, writing in the early 17th century, held that "the essential characteristic of just wars consists above all in the fact that the things captured in such wars become the property of the captors."¹ In fact, the German word for war, *krieg*, is defined as "exertion," an endeavor to obtain something. Similarly, the Greek word for Mars is derived from Ares, meaning "to take away" or "seize." Embracing this definition, municipalities, states, and empires engaged in the thievery of art objects during war. For the most part, the looting of cultural objects was not an individual act committed by a soldier who stood to profit from stealing an object of value. Rather, the looting of art objects was sanctioned by the rulers of the entity engaged in war, a practice that will be called "institutional expropriation."² Institutional expropriation refers to state mandated operations of mechanically looting the cultural property belonging to another nation during war; it also applies to sanctioned explorations and journeys by imperialist countries to seize artifacts from their colonies. The capture of cultural property not only served a profit-related whim; albeit stolen objects, many containing priceless gems and generous amounts of gold, had tremendous value within themselves. Primarily, however, looted cultural objects were considered "trophy of war," commonly displayed in the museums of the victors. It is commonly believed that the Romans originated "the idea of the triumph as the rape of the works of art in which a nation gloried, and their display in the triumphal procession upon the conqueror's return to Rome."³ Art capture came within the framework of Roman expansion throughout the history of the empire and specifically in the following conquests: Veii, Praeneste (380 BC), Volsinii (264 BC) with a booty of 2,000 statues, the wholesale pillaging of Syracuse (212 BC), Tarentum (209 BC), L. Mummius, and Caus Verres.⁴

Cultural objects, which here will be often referred to as cultural property, include a vast array of artifacts such as paintings, monuments, sculptures, statues, rare manuscripts, items found in archaeological sites, antiquities, and various other articles. Taking of such property by a conquering state has been seen as just and within the scope of the law of war. [Grotius views war as an extension of God's Will, namely those wars waged in defense of self and property, to prosecute injuries, and to inflict deserved

instances of repatriation of cultural artifacts. Yet, no one has addressed the reason for the emergence of such laws and the explanation for the change in the norm.

This paper will provide three explanations for the emergence of laws prohibiting the plunder of cultural property during war as well as the change in state practice. The first factor for which the change in state behavior can be attributed to is the emergence of the "common heritage of humankind" doctrine. Enlighten-ment philosophers opined that a sense of universality exists throughout human culture that is guided by reason and virtue. Since states, as G.W.F. Hegel thought, represent the synthesis of the polis, they will act accordingly with virtue and respect to other such entities. As such, states ideally recognize the rights of other states to exist and will abstain from plundering the possessions of those states. While for Grotius, Machiavelli, Hobbes, and other Realist thinkers, the purpose of war was to inflict punishment and retribution, Hegel viewed war as an instrument of universal spirit.⁷ Thinkers like Montesquieu, Rousseau, Locke, Kant, and Voltaire saw "in the rationality of humans the basis for progress, human perfectibility, and the discovery of universal social and political principles."⁸ These principles developed the formation of individual civil and political rights which were later "enshrined in national constitutions in strikingly similar forms."⁹ The development of these universal, liberal principles led to the idea that cultural objects belong to humanity, and that destruction of such objects would prevent future generations from enjoying the beauty of these works.

The second factor that would explain the emergence of laws prohibiting plunder and seizure of cultural objects is actually an ideology that is in opposition to liberal universalism. The national self-determination doctrine emerged with the French Revolution, manifesting the virtue of the democratic ideal for all mankind in the challenge against the tyranny of the "ancient regime": "government should be based on the will of the people, not that of the monarch, and people not content with the government of the country to which they belong should be able to succede [sic] and organise themselves as they wish."¹⁰ The 19th century witnessed the development of the self-determination doctrine and the strengthening of

punishment.^{5]} He also maintains that the seizure of booty is agreeable with the Divine Will.⁶ Less than 250 years after Grotius defended the "justness" of seizing prize and booty, European leaders embraced a set of laws that prohibited states from plundering cultural objects in times of war. The 19th century saw the condemnation of states engaging in the looting and plunder of cultural property as well as the development of a body of international law prohibiting such actions. Historians have documented the first laws of cultural property protection and

nationalistic pride throughout Europe. During that period, Polish, Italian, Magyar, and German people claimed self-determination. Giuseppe Mazzini's passion for Italian freedom and unity exemplified the nationalist fury of that time:

In labouring according to true principles for our Country we are labouring for Humanity; our Country is the fulcrum of the lever which we have to wield for the common good. If we give

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up this fulcrum we run the risk of becoming useless to our Country and to Humanity. Before associating ourselves with the Nations which compose Humanity we must exist as a Nation. There can be no association except among equals; and you have no recognized collective existence.¹¹

Cultural objects symbolize a sense of historical greatness of a nation or a people. In the words of John Henry Merryman, they "speak directly to the inner consciousness within which we resolve whether we do really feel a sense of belonging to a group or community."¹² They revive a feeling of pasthood that cultures embrace and nationalist leaders glorify. Perhaps, this propinquity between a cultural object and a group prompted newly formed 19th century nations to adopt laws that prohibit looting of cultural property and mandate its repatriation.

Finally, the third approach assumes a conflict perspective in explaining the change in the norm as well as law governing the treatment of cultural property. The argument here suggests that in the 19th and early 20th centuries, it was in the best interests of states to devise laws that prohibit the looting of cultural objects during times of war. With the relative balance of power in Europe at that time, states stood to gain from laws that protected their cultural treasures from foreign invasion. Besides, the alliance structure prevented hegemonic military dominance by any one state, thus prompting states to realize that each would benefit from such protections. At the same time, as laws were devised protecting European cultural artifacts, imperial states continued looting expeditions in their colonies.

History and Practice

Grotius condoned, even advocated, the seizure of cultural objects in times of war. He was not the first one, since expropriation of valuable objects was the norm for centuries before. Aristotle once wrote: "[f]or this law is a species of common agreement under which things captured in war are said to be the property of the captors."¹³ Similarly, Plato makes the following statement: "all those goods which were the property of the vanquished, become the property of the victor."¹⁴ Seizure of objects became a tradition as victorious armies returned back to

of discourse emerged describing the state of human nature. In the *Leviathan*, Thomas Hobbes argued that man's primary goal is self-preservation, and that virtue is only the habit of doing what tends to our own self-preservation.¹⁶ He wrote: "in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power, that ceaseth only in death."¹⁷ The state was considered an extension of these human motives. Theorists argued that these human inclinations for self-interest and power were the guiding principles for governments in a "zero-sum" world. As Nicolo Machiavelli argued, "[a prince is] oftentimes necessitated, for the preservation of his State, to do things inhuman, uncharitable, and irregular."¹⁸

These elements were at the foundation of the state system, formed with the signing of the Peace of Westphalia in 1648. The emerging Westphalian system rested on two governing pillars of state relations: national sovereignty and independence.¹⁹ The Peace of Westphalia essentially solidified the shifting trend away from city-state governments to a system of sovereign, independent states. Westphalia reduced the power of the pope and the emperor to the status of territorial princes.²⁰ Authority became centralized, falling in the hands of the regional princes. The domestic centralization "helped to institute anarchy as the ruling principle of international relations."²¹ The formulation of the Westphalian system essentially fostered war between states as it "was a constant invitation to military expansion by the strongest powers and in this sense a constant incentive to follow the dictates of the military-political world."²² Rosecrance argued that "unless new territory was taken, kings and parliamentary leaders might become vulnerable to a major foe."²³ Thus, state leaders, supported by domestic politics, chose to engage in military expansion.

Before the ink could dry on the Westphalian treaty, the European nobility asserted its intentions of military conquest and territorial acquisition. Consequently, the end of the Thirty Years War coincided with the rise of France as a major military power. France's Louis XIV set the standard for his royal peers after the Peace of the Westphalia, a standard that advocates "the pursuit of power and glory through military conquest."²⁴

their homelands with acquired possessions of the defeated enemies. Such was the case in Rome. After a long procession through the streets of Rome, officers would present the loot of cultural treasures to the emperor. These objects would then take their place in the Roman palaces, glorifying the empire and its triumphs. In fact, under Roman *Corpus Juris*, it was stated that things captured in war become the property of the captors; the same principle was affirmed by canon law.¹⁵

In the 16th and 17th centuries, an abundance

After the end of the Thirty Years War, the concept of *raison d'etat* evolved as the guiding principle of European diplomacy. Even before the war ended, however, this doctrine was widely promulgated by the leaders of European warring entities. One such ruler was Cardinal de Richelieu, the First Minister of France from 1624 to 1642. Although he never saw the war's end, French post-war dominance could not be envisioned without his successes—certainly attributed to his strategy and ideology. Under his rule, the doctrine of

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raison d'etat replaced the "medieval concept of universal moral values as the operating principle of French policy."²⁵ When Pope Urban VIII learned of the Cardinal's death, he allegedly said, "[i]f there is a God, the Cardinal de Richelieu will have much to answer for. If not...well, he had a successful life."²⁶ Richelieu held no affinity for religious convictions or for those enemies who shared them. To Richelieu, the policy of national self-interest was the highest moral law. He wrote in his *Political Testament*, "[i]n matters of state, he who has the power often has the right, and he who is weak can only with difficulty keep from being wrong in the opinion of the majority of the world' ♦ a maxim rarely contradicted in the intervening centuries."²⁷

At the time rules of warfare were not defined or even considered; destruction of enemy targets was the prerogative of two adversaries engaged in war. Destruction, pillage, and plunder of cultural objects was the "enduring law of mankind" and "part of the law of nations."²⁸

The Enlightenment and Universalism

Enlightenment thinkers contested the assumptions espoused by Hobbes, Machiavelli, and others. They argued for rationality and progress as indispensable features of human nature. Enlightenment thought devised higher principles of ethics and morality as well as rules for individuals to follow in an attempt to attain these goals. For Immanuel Kant, morality came from reason; since humans were rational creatures, all were capable of being moral. For morality and virtue to exist, people would need to look beyond their self-interests. While the Westphalian system established basic rules of sovereignty and state interdependence, the era of Enlightenment brought with it rules that transcended the anarchical model of state relations. Enlightenment thought of the 18th century introduced numerous scientific and intellectual advances that furthered "secularized globalism."²⁹

The Enlightenment conception of a civil society was universal in principle. It did not refer to any specific nation or people, but to the human society as a whole. Kantian metaphysics introduce the imperative of universality to the more practical: state relations. Departing from *raison d'etat* and the traditional system of state relations based on brute force and interest, Kant provides a moral basis for the international system: "

organizations among states.³¹ Yet, Kant does not explicitly favor a universal civil community, rather a system of states with republican governments assenting to moral and ethical principles. As such, states would abide by such principles in their affairs with other states ♦ a universal structure based on overarching ethical rules.

Enlightenment thought was instrumental in the development of liberalism. The fundamental values of liberalism "emerged from the thought of Enlightenment political theorists who asserted the basic freedom and dignity of individuals and the inalienable rights that inhered in them."³² At the foundation, liberalism calls:

For freedom from arbitrary authority, often called "negative freedom," which includes freedom of conscience, a free press and free speech, equality under the law, and the right to hold, and therefore to exchange, property without fear of arbitrary seizure. Liberalism also calls for those rights necessary to protect and promote the capacity and opportunity for freedom, the "positive freedoms." Such social and economic rights as equality of opportunity in education and rights to health care and employment, necessary for effective self-expression and participation, are thus among liberal rights. A third liberal right, democratic participation or representation, is necessary to guarantee the other two.³³

Although individualistic in essence, liberalism advocates a higher form of international ethics to guide state behavior. These principles would be instrumental in the formation of normative frameworks for states to follow. These frameworks lead to the development of rules for the international community that prohibit certain behaviors. A key factor in rule-making is the role of institutions that exist as forums for states to voice their concerns and discuss the applicability of the rules.

The Common Heritage of Mankind

[a]ct so as to treat humanity, in your own person as well as everyone else's, always as an end and never as mere means." On this account, he proposes a general condition for the existence of public right and a law of nations: "the rule of law among men agreement among the nations to leave the state of nature (which he, like Hobbes, considered to be the state of war) in order to abjure war."³⁰ To achieve this, Kant advocates diplomacy between nations based on "open covenants, openly arrived at." He criticizes Grotius as well as the balance-of-power school in that they do not recognize the importance of lawful

Enlightenment thought and the rise of liberalism were pivotal factors in 1) the development of laws protecting cultural property in times of war and 2) the change in state practice in regards to the seizure and plunder of cultural objects. These changes are partly due to the literary recognition of the "common heritage of mankind" doctrine at the inception of the 19th century. Its origins arise from Kantian and Hegelian conceptions of "universalism." Although the concept [common heritage of mankind] itself was not directly recognized

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or "practically" applied by states until well into the 20th century, its meaning was fundamental in rule-making for the international community in the 19th century.

Hegel's influence on liberalism and the transformation of society is central to this analysis. For Hegel, the French Revolution represents a tremendous human achievement, the idea to put reason at the foundation of a state. The Revolution signified the advent of "subjective consciousness and, with it, the principles of liberty, equality, and the rights of man and citizen."³⁴ Hegel thought that these principles constituted the true essence of a modern state. In his writings, Hegel expressed that it is necessary that all men be recognized as free, that the principle of internal freedom have made its appearance in religion, and that the particularity of needs be evident in man's morals.³⁵ The realization of these ideals would only occur at the end of history. Hegel's proclamation of the end of history in the *Phenomenology of Mind* came with Napoleon's defeat of the Prussian monarchy at the Battle of Jena. He saw this as "the victory of the ideals of the French Revolution, and the imminent universalization of the state incorporating the principles of liberty and equality."³⁶ These principles make up the Hegelian "World Spirit," a universal concept of progress. The 1806 Battle of Jena marked the point when the "vanguard of humanity actualized the principles of the French Revolution."³⁷ Hegel, in affirming the universality of human nature, writes: "[i]t is part of culture, of thought as consciousness of the individual in the form of universality, that I am apprehended as a universal person in which all are identical. A man counts because he is a man, not because he is Jewish, Catholic, Protestant, German, Italian, etc."³⁸ This idea was directly counter to the doctrines of the national identity movements gaining force in early 19th century Europe. Hegel's man was endowed with "self-will," not group identification, reinforcing the common human identity principle.

Hegel criticizes Kant's idea of perpetual peace through membership in a federation of states. Kant's league assumes the adherence and obedience of all states in the federation. Hegel notes that "even if a number of states make themselves into a family, this group as an individual must engender an opposite and create an enemy."³⁹ He also disagrees with international law scholars about the efficacy

to war to settle their disputes. International law does not have any universal authority and thus, can not impose its will to secure peace. Hence, Kant's support for international law as a means of dispute resolution is not a feasible option in a state system. As such, Hegel proposes the so-called "universal homogeneous state," emerging at the end of history, that "recognizes and protects through a system of law, man's universal right to freedom, and [is] democratic insofar as it exists only with the consent of the governed."⁴²

By and large, the Kantian federation of states and the Hegelian "universal homogeneous state" advocate some sort of universal identity among people. This new sense of universalism, prevalent in literature of the late 18th and early 19th centuries, brought about the development of the common heritage of mankind doctrine. The doctrine was certainly pivotal in the origination of rules governing the protection of cultural property. Many historians affirm that "the taking of important movable cultural symbols of invaded and conquered states and peoples as trophies of war [or merely for their economic value], and the defacing or destruction of their monuments as marks of victory, have been important parts of the culture of the waging of war for millennia."⁴³ The development of the rules for the protection of cultural property came from the much broader liberal ideal—the anti-war norm. As L. T. Hobhouse noted in 1911, "it is of the essence of liberalism to oppose the use of force, the basis of all tyranny" and thus, "liberals stand firmly against the 'tyranny of armaments' and the 'military spirit' which 'eats into free institutions and absorbs public resources which might go to the advancement of civilization'."⁴⁴ Rules were developed to lessen the amount of destruction that occurs in war. These laws precluded states from systematically killing civilians, abusing prisoners of war, and utilizing overly destructive warfare methods in battle. The majority of these rules emerged from the essential liberal principle—the freedom of the individual. As Michael Doyle suggests, "this is a belief in the importance of moral freedom, or the right to be treated and a duty to treat others as ethical subjects, and not as objects or means only. This principle has generated rights and institutions."⁴⁵ Other liberal ideas, namely the right to own, may explain the emergence of the cultural property protection regime. John Locke

of such laws, remarking that "international law is the result of the relations between independent states. Its content has the form of the 'ought to be,' because its realization depends upon different sovereign wills."⁴⁰ States, like individuals, exist and enter into agreements only if they recognize each other. As Hegel claims, "since the sovereignty of a state is the principle of its relations to others, states are to that extent in a state of nature in relation to each other. Their rights are actualized only in their particular wills and not in a universal will with constitutional powers over them."⁴¹ When states cannot reach an agreement, they turn

acknowledged that humans have certain natural rights, one being the right to self-preservation. He extrapolated those rights into a right to own property.⁴⁶ Cultural property not only belongs to a person or a state, but in the words of the 1954 Hague Convention, it constitutes a "common heritage of all mankind." Thus, destroying any of it detracts from the essence of human civilization. Similarly, states gained mutual respect for one another and devised provisions in international legislation prohibiting the plunder of cultural property.

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The initial introduction of the idea of cultural property protection in legal codes came with implementation of the United States of America War Department *General Orders No. 100: Instructions for the Governance of the Armies of the United States in the Field*, drafted by Francis Lieber in April 1863 [known as the Lieber Code].⁴⁷ The Lieber Code, the prototype for international conventional law protecting cultural property, prohibited the destruction and seizure of private property, while stressing the importance of protection of works of art, scientific collections, libraries, and hospitals. Article 34 postulates that "the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character...whether public schools, universities, academies or learning or observations, museums of fine arts, or of a scientific character-such property is not to be considered public property."⁴⁸ The first international regulations for wartime protection of cultural property, the Declaration of Brussels, drew upon the principles in the Lieber Code. The 1874 international conference provided in Article 8 that "the property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or willful damage to, such establishments, historical monuments, or works of art or science, shall be prosecuted by the competent authorities."⁴⁹

Only with the implementation of the First Hague Conference in 1899 did cultural property acquire protection by a formal international treaty. Article 56 of the Hague Conference adopted the principles of both the Declaration of Brussels and the Oxford Code to formulate a body of Regulations Respecting the Laws and Customs of War on Land, "while the parallel rules governing naval bombardment tried to afford some protection to churches and other important cultural monuments, including a provision for marking such protected buildings with a distinctive flag."⁵⁰ A more substantial Hague Convention in 1907, attended by 44 sovereign states, including the United States and Russia, revised the 1899 Convention and adopted a number of resolutions on the Laws and Customs of War. For instance, Article 27 of the Fourth Hague Convention declared that "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments...provided that they are

It was in this convention where the term "common cultural heritage of all mankind" was finally enshrined as a precept of international law, implying that cultural objects belong to the human civilization as a whole. Destroying cultural property would prevent future generations from experiencing the splendor of such objects.

The notions of property rights and mutual respect drove states to develop legislation and agreements prohibiting the plunder of cultural property and stipulating its return. The matter of the *Vessel Marquis de Somereules* [1812 Stew. Adm. 482] was the first legal case to address these prohibitions and requirements for repatriation. During the War of 1812, a ship carrying cultural objects belonging to the Philadelphia Museum of Art was captured by the British Navy; the contents were held as prizes of war.⁵³ The Canadian court hearing the case ordered the objects returned to their rightful owner. The court reasoned that "art was a part of the common cultural heritage of mankind and, thus, protected from seizure during war."⁵⁴ This decision constituted the first legal recognition of cultural property rights and was the first case to actually utilize the term "cultural property of all mankind."

Around the turn of the 19th century, Napoleon undertook the greatest looting operation since the fall of Rome. In 1798, Paris was the setting for an "elaborate spectacle which deliberately echoed the classical Roman triumph."⁵⁵ In the Champs de Mars Square, a procession was held for the world's supreme works of art looted during Napoleon's conquests. These included the Discobolus, the Dying Gladiator, the Laoccon, the Medici Venus, and numerous other works that now form the "vocabulary of art."⁵⁶ After Napoleon's defeat in Waterloo, the Convention of Paris in 1815 addressed the issue of art plunder during Napoleon's conquests. The Duke of Wellington, speaking for the Allies, stated that "the systematic looting of art by a conquering army was contrary to the principles of justice and to the rules of modern warfare."⁵⁷ The Allies ordered France to return both confiscated property, and property acquired through treaty, to their countries of origin."⁵⁸

The 1812 court ruling and the 1815 Convention of Paris order reflect a shifting trend in Europe at that time. On some level, states adopted the Kantian model of

not being used at the time for military purposes."⁵¹ Furthermore, the treaty affirmed that it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."⁵² Provisions for cultural property protection became engrossed in a number of other international conventions throughout the 19th and 20th centuries, culminating in the 1954 Hague Convention on the Protection of Cultural Property in Times of Armed Conflict.

rights and ethics in the treatment of one another. The recognition of laws on the international level and the mutual respect by states demonstrate the emergence of "higher" moral codes of conduct as guiding principles of international affairs. The idea of a common heritage of mankind was consistent with these principles as it instilled into states the notion that some objects carry a higher purpose and thus, need to be preserved.

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National Self-Determination

Around the time of the advent of liberalism and the common heritage doctrine, another norm, with a much different purpose, emerged: national self-determination. The modern idea of self-determination emerged in the late 18th century in congruence with the French and American revolutions. In 1789, expressing the inalienable right of self-determination, the Third Estate, 600 elected commoners representing 95 percent of the French population, gathered in Versailles without the other two estates—the nobility and the clergy—and declared themselves the National Assembly.⁵⁹ They pledged to continue and press for a new constitution. In August of the same year, the National Assembly, in the Declaration of the Rights of Man and of the Citizen, proclaimed the principle of political sovereignty replacing the divine right of kings by the divine right of the people.⁶⁰ National self-determination connotes the right and opportunity of people to determine their own government.⁶¹ The term also "contains the idea that 'a people' to whom this right ought justly to be conceded should be defined by nationality."⁶²

Although there are many parallels, there is a potential conflict between liberalism and self-determination: while liberalism advocates individualism, self-determination calls for group identity. To create this identity, oftentimes a nation must be engrossed in a sovereign state. Historically large empires, prevalent in 19th century Europe, prevented nations from gaining their manifest destiny-statehood. They spread over vast territories and were inhabited by numerous nationalities. Very often, due to religious or historical reasons, these groups clashed. When nations gained recognition through statehood, other groups challenged their sovereignty. One of the main questions in applying the self-determination doctrine is "who is the 'self' to whom the right of self-determination attaches?"⁶³ The dilemma in deciding who is a "self" is immediately evident: "recognition of the rights of one 'self' entails a denial of right of a competing 'self'."⁶⁴ In other words, every demand for self-determination preempts a countervailing demand by another national group. Soon Europe was faced with a question: Who deserves it more?

By the same token, the question of what constitutes national identity was also prevalent in 19th century Europe. Groups have been characterized as entities that have

group identity as "art speaks directly to the inner consciousness within which we resolve whether we do really feel a sense of belonging to a group or community [and] links group members to their ancestors and heirs, thereby both satisfying a basic need for identity and symbolizing shared values."⁶⁶ John Moustakas avers that "group rights exist independently, however, they merit the protections and the powers afforded [to] individuals, including in some cases, the right to control property."⁶⁷ Some groups may view a cultural artifact as a "living thing which enables them to achieve confidence in themselves and, thus, able to imagine their future."⁶⁸ A group's attachment to an object symbolizes history and cultural identity. Furthermore, the association of art with its geographical-historical milieu elevates the object's significance.⁶⁹ An object that is displaced from its place of origin loses its context and its overall meaning. A piece of art not only has extravagant beauty, but it also has a historic importance as it is often associated with a nation or a culture.

As nations acquired statehood, they preserved their cultural artifacts and opted to enter into international agreements that prohibited the plunder of cultural property. Cultural objects helped to "determine" their existence, and as a result they chose to sign on to legislation to help prohibit the plunder of such objects during war. As such, the issue of cultural property protection was not a question of the common heritage of mankind, but that of national identity. States did not intend to bind themselves to an agreement to protect the heritage of mankind, rather they intended to protect their own heritage at times of war. Essentially, the emergence of cultural protection laws came with the development of self-determination as a viable force changing the shape of Europe. The conflict between self-determination and the universalism of the Enlightenment era can also be seen in a larger context.

Self-determination gained a great deal of force throughout the 19th century as nations declared their territorial sovereignty. Authors embracing nationalism and group identity found their place in literature of that time challenging Enlightenment ideology. The German reaction to the French Enlightenment, voiced by Von Herder in *Another Philosophy of History*, evoked not a universal concept of progress, a Hegelian

both "a distinct existence apart from [their] members, and ones recognized by a condition of interdependence where the identity and well-being of the members and the group are linked."⁶⁵ Throughout history, groups identify cultural objects that characterize their greatness and exemplify the richness of their culture. Those urging self-determination for a given group, also call for the preservation of cultural property of that given nation and repatriation of cultural objects, which at one point belonged to that nation or its people. For them, cultural property is analogous to

Weltgeist, but a Volksgeist, the innate spirit of each nation.⁷⁰ Contrary to Enlightenment philosophy, Von Herder held that "there is no universal notion of the Good, the True, and the Beautiful, to be apprehended by natural reason. All norms are socially and historically contexted. All have local origin and local definition. For the French to assert otherwise, said Herder, displayed their arrogance. Germany found its unity, its exaltation and in turn its own brutal arrogance in combating France under the concept of a German Volk."⁷¹

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The events at the turn of the century give considerable weight to the national identity argument. Napoleon was the first ruler "to identify the State with his proclivities, looting not to gain personal trophies, or to decorate a personal triumph, but for the greater glory of France."⁷² He plundered for France. Plundering itself was considered for the good of the nation, for its future progress. In 1796, leading French artists argued that education justifies robbery: "the more our climate seems unfavorable to the arts, the more do we require models here in order to overcome the obstacles to the progress thereof. The Romans, once an uncultivated people, became civilized by transplanting to Rome the works of conquered Greece. Thus the French people will, by seeing models from antiquity, train its feeling and its critical sense."⁷³

National identity explains why France was ordered to return the loot after the defeat of Napoleon. Simply put, states throughout Europe wanted the return of objects forming their identity.

The State Interest Model

Did the emergence of the norms of protection, prohibitions against plunder, and repatriation emanate from some idealistic purpose—whether it be the common heritage of mankind doctrine or the acquired sense of national identity? Or did states devise the rules out of their own interests? After the defeat of Napoleon, leaders of European states met to design the future of Europe at the Congress of Vienna. The participants at the Congress formed two alliances that resulted in the balance of power in Europe: the Quadruple Alliance consisted of Great Britain, Prussia, Austria, and Russia and the Holy Alliance was limited to the three eastern courts of Austria, Prussia, and Russia. Since France of the 19th century in reflection was considered the Germany of the 20th century, any French tendencies would be countered by the joint force of the Quadruple Alliance. In the design, the German Confederation proved to be too strong to be attacked by France, and too decentralized and weak to threaten its neighbors.⁷⁴ The arrangement made at the Congress of Vienna secured peace between the Great Powers in Europe for almost 100 years.

In a balance of power, there is approximately equal distribution of power and resources between states; no state possesses a significant military advantage.⁷⁵ In the

protection of cultural objects. Each state would gain some form of protection and thus, would benefit by signing onto such an agreement.

Besides, while European states agreed to abstain from plundering the cultural property of one another, they continued to loot objects in their colonies. During the Benin massacre of 1897, the British pillaged tens of thousands of wood, ivory, and bronze objects—some of which were proudly displayed at the British Museum in 1982⁷⁶—even after repeated attempts by the Nigerian government to persuade the British to return the objects. In another example, during the late 19th century, the Madrid Geographical Society of Spain appointed Jose Valero y Berenguer, of the Administrative Corps of the Army, in charge of establishing trading posts, promoting relations with the indigenous peoples, and working in the "interests of geographical science" in the Spanish possessions in the Gulf of Guinea.⁷⁷ The term "interests of geographical science" symbolizes the notion that Spain held the right to seize the cultural property from its colonial holdings. Between 1874 and 1886, well over 100 objects were brought back and deposited in the Museum of Ethnology in Spain.⁷⁸ These operations occurred at the state level, sanctioned by the government for the sole purpose of plundering cultural artifacts from colonies. Obviously, such actions contradicted the provisions for cultural property protection and prohibitions of plunder advocated by European states between themselves.

Conclusion

During World War II, Hitler's army engaged in a massive looting operation through Nazi-occupied territories. Anything of value was taken back to Germany. The war also caused the destruction of cultural objects, buildings, and monuments as the towns and the cities were demolished by invading armies. Post-World War II world witnessed the establishment of a regime governing both cultural property protection and repatriation. The 1954 Hague Convention, ratified by most countries, prohibited the destruction and plunder of cultural property in times of war. Decolonization brought with itself the advancement of anthropological thinking, or in other words, respect for diverse cultures and the values that each contribute to the human civilization.⁷⁹ In

golden age of balance of power politics (period from the end of the Napoleonic era until World War I), no state had military capabilities that surpassed those of other states. No one state had an advantage and would not decisively prevail in a confrontation. Hence, on the fields of battle, both sides would potentially suffer, acquiring heavy losses. Those losses include priceless works of art, buildings, and monuments. Therefore, it was in all of the states' interests to enter into a convention that would mandate the

addition, decolonization gave rise to the origination and the development of human rights philosophies "which have given these peoples a basis of claim legitimate even in legal systems which have hitherto denied their rights to their own cultural materials."⁸⁰ The decolonization period also witnessed the formation of a notion that "groups have intrinsic rights to exist, develop, flourish, and perpetuate themselves, and that these rights often are intertwined with groups'

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relations to history and objects..."⁸¹ These ideas changed the perception of group and cultural identity by calling on nations to reexamine the relations that existed between the North and the South. The result was the enactment of the 1970 UNESCO Convention governing the import, export, and transfer of cultural property. It provided for the return of stolen cultural artifacts to their rightful owners or places of origin. The Convention benefits "source nations" (third-world nations possessing cultural objects) in that stolen objects that end up in Western markets are repatriated. It has definitely exemplified the shifting trend in state behavior that recognizes the rights of all nations to possess objects of their heritage.

Yet, repatriation has not been widespread, to say the least. Museums of many European cities are still crowded with cultural objects expropriated from former colonies. It does not seem likely that these objects will be returned since tourism is a prominent industry generating millions in proceeds. Even when the issue involves another European country, repatriation does not usually occur as in the case of the Elgin Marbles. Lord Elgin, a British diplomat removed marble decorations from the Parthenon in Athens and eventually sold them to the British Museum. After countless pleas for repatriation by Greece, they remain on display at the museum. Similarly, French law prohibits the export of any cultural object older than 75 years old from French territory without a permit granted by a supervisory commission. These objects do not in any way have to represent French heritage.

Admittedly, there are problems with the laws governing both protection and repatriation. In times of war, armies look for strategic importance of a target, not its cultural significance. Soldiers plunder and sell their loot for a profit. Scavengers continue to raid archaeological sites throughout the "third world" and sell their spoils on illegitimate markets. On its face, any critic of cultural property legislation can look at the inefficacy of such laws. Such critics also denounce all international law as inefficient since there is no overarching authority to enforce it. They claim that in spite of the law, states continue to transgress. To them the author says, despite the law, people continue to steal and kill. The important thing to get out of this analysis is not how inadequate the international regime is in addressing cultural property protection or repatriation or that states act only out of their interests in devising cultural property legislation. Rather, the point is to witness progress and the

higher moral purpose in their actions. The Kantian federation and the Hegelian universal community are behind the emergence of the body of international law that calls on states to look beyond their interests, and to a higher good. It is important to not only look at the faults, but also to the intended goals of such legislation. In most cases, the goals tend to be positive and humanitarian—quite a change from Richelieu's Europe and Machiavellian ethics. This shows progress on the part of the international community.

End Notes

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development of benign rules and institutions instilling a higher purpose in international politics.

This paper presented several arguments on the issue of why the change in state practice occurred and laws were devised. Notwithstanding, the author argues that the Enlightenment ideology of universalism influenced states to protect cultural property. The emergence of the common heritage of mankind doctrine fostered in states a sense of respect for objects of cultural significance, regardless of their origin. They entered into agreements to protect these objects for future generations. Although national identity and state interests played a part in the decision, the common heritage doctrine presented states with a

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