REPATRIATION OF CULTURAL PROPERTY TO ITS STATE OF ORIGIN UNDER INTERNATIONAL LAW: AN ASSESSMENT OF IMPLEMENTATION IN THAILAND

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ABSTRACT

Illicit trafficking of cultural property is a major problem in many states of origin rich in cultural heritage, effecting loss of movable cultural property within those countries and cultural property disputes between states of origin (seeking repatriation of illegally removed cultural property) and market states (in which such property is located and who consume foreign cultural property). As raised by Merryman, cultural property disputes are theoretically based on two different concepts. The first is known as 'cultural nationalism', which supports cultural property being retained and managed by the nation in which it originated, and the second is 'cultural internationalism', which regards cultural property as components of common human culture. This thesis aims to examine international, regional and national legal frameworks for repatriation of cultural property. Repatriation depends on effective cooperation between states of origin as a requesting party and market states as a requested party for repatriation. However, the legal framework for repatriation under the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and 1995 *Convention on Stolen or Illegally Exported Cultural Objects* were designed with a preference for cultural nationalism. This fails to convince market states to ratify those Conventions, and establishment of appropriate forms of cooperation under those Conventions. Although the legal framework based on cultural nationalism seems to favour state parties of origin, its legal defects hamper achieving repatriation. Thailand is a state of origin and has also suffered from the shortcomings of the international legal framework in its requests for repatriation. This thesis argues that for repatriation to be feasible, there should be a balance between cultural nationalism and cultural internationalism to achieve appropriate cooperation between requesting parties and requested parties as a precursor to repatriation.

STATEMENT OF ORIGINALITY

This thesis is being submitted to Macquarie University, NSW, Australia and Thammasat University, Thailand in accordance with the Joint Doctoral Supervision Agreement (Cotutelle) dated 10 February 2017.

To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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LIST OF ABBREVIATIONS

1954 Hague Convention	*Convention for the Protection of Cultural Property in the Event of Armed Conflict*
1970 UNESCO Convention	*Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*
1995 UNIDROIT Convention	*Convention on Stolen or Illegally Exported Cultural Objects*
AIC	Art Institute of Chicago
AMCA	ASEAN Ministers Responsible for Culture and Arts
AON	*Act on Ancient Monuments, Antiques, Objects of Art and National Museums, B.E. 2504 (1961)*
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
AU	African Union
CCH	common concern of humanity
CHM	common heritage of mankind
Church of Cyprus	Autocephalous Greek-Orthodox Church of Cyprus
CITES	*Convention on International Trade in Endangered Species*
CPIA	*Convention on Cultural Property Implementation Act of 1983*
DFA	Department of Fine Arts
DSB	Dispute Settlement Body
EU	European Union
GATT	*General Agreement on Tariffs and Trade*
GI	Geographical Indications

ICJ	International Court of Justice
ICOM	International Council of Museums
ICPRCP	Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation
MET	Metropolitan Museum of Art in New York
MoU	Memorandum of Understanding
NESAC	National Economic and Social Advisory Council
NHB	*National Heritage Board Act (1993)*
NSPA	*National Stolen Property Act of 1934*
PRECUP	Philippine Registry of Cultural Property
Protocol I	*Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*
Protocol II	*Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*
TFEU	*Treaty on the Functioning of the European Union*
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	*Vienna Convention on the Law of Treaties*
WCO	World Customs Organization
WTO	World Trade Organization

LIST OF INTERNATIONAL LEGAL INSTRUMENTS

Charter of the United Nations

Constitution of the United Nations Educational, Scientific and Cultural Organization, opened for signature 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946)

Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975)

Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956)

Convention on Stolen or Illegally Exported Cultural Objects, opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998)

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972)

Convention on the Protection of Underwater Cultural Heritage, opened for signature 2 November 2001, 41 ILM 37 (entered into force 2 January 2009)

General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 12 January 1948)

Hague Convention (II) respecting the Laws and Customs of War on Land, opened for signature 29 July 1899, 187 CTS 429, (entered into force 4 September 1900)

Hague Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, 205 CTS 299, (entered into force 26 January 1910)

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Antiquities and Treasure Trove Act 1967 (Brunei Darussalam)

Cambodia

Constitution of the Kingdom of Cambodia 1993 (Cambodia)

Law on Cultural Heritage Protection 1996 (Cambodia)

France

French Code Civil of 1804 (France)

Indonesia

Law of the Republic of Indonesia No.11 of 2010 Concerning Cultural Conservation (Indonesia)

Japan

Japanese Civil Code (Japan)

Lao People's Democratic Republic

Lao People's Democratic Republic's Constitution of 1991 (Lao People's Democratic Republic)

Presidential Decree concerning Protection of National Cultural, Historic and National Heritage 1997 (Lao People's Democratic Republic)

Malaysia

National Heritage Act (Act No. 645) 2005 (Malaysia)

Mexico

Civil Code of the Federal District of Mexico (Mexico)

Myanmar

Antiquities Act 1957 (Myanmar)

Philippines

Cultural Heritage Act of 2009 (Philippines)

Singapore

National Heritage Board Act (Singapore, cap 196A, 1993 rev ed)

Thailand

Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961) (Thailand)

Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931) (Thailand)

Constitution of the Kingdom of Thailand B.E. 2560 (2017) (Thailand)

Customs Act B.E. 2560 (2017) (Thailand)

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National Governmental Organization Act B.E. 2534 (1991) (Thailand)

Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) (Thailand)

Thai Civil and Commercial Code (Thailand)

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Project of an International Declaration concerning the Laws and Customs of War, Brussels Conference, (27 August 1874)

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Memorandum of Understanding between the United States and Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material, opened for signature 19 September 2003, (entered into force 19 September 2003)

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Charter of the Association of Southeast Asian Nations

Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN, 28th ASEAN summit, (6 September 2016)

European Union Materials

Council Conclusions on Preventing and Combating Crime Against Cultural Goods, 3135th Justice and Home Affairs Council mtg, (13-14 December 2011)

Council Directives 2014/60/EU of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State [2014] OJ L 159/1

Council Regulation (EC) No 116/2009 of 18 December 2008 on the Export of Cultural Goods [2009] OJ L39/1

Treaty on European Union (1992) 55 *Official Journal of the European Union C 191*

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African Union Materials

Charter for African Cultural Renaissance

Constitutive Act of the African Union

UNESCO Materials

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4/7.6/5, UNESCO General Conference, 20th sess, UNESCO Doc CLT/CH/INS-2005/21 (28 November 1978)

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'The Conflict Between Cultural Nationalism and Cultural Internationalism: An Impact on Legal Protection and Restitution of Cultural Property' (Conference Paper, International Conference on History and Culture 2017: Safeguarding, Return and Restitution of Cultural Objects in Post Conflict Societies, Kyoto, Japan, 9–11 December 2017).

Peer-Reviewed Journal Article

'ASEAN Regional Framework: The Potential of Protection and Repatriation of Cultural Property from Illicit Trafficking' accepted for publication at LAWASIA Journal, TC Beirne School of Law, The University of Queensland Vol. 2018.

Chapter 1:
Repatriation of Cultural Property Under International Law: An Introduction

> We can forgive a man for making a useless thing as long as he does not admire it. The only excuse for making a useless thing is that one admires it intensely. All art is quite useless.[1]

Anyone who has visited a museum or other similar institution has seen cultural property or cultural object from other nations. While most visitors enjoy such cultural property, a tragedy may be hidden behind its story. Have we ever questioned how foreign cultural property has been collected prior to being exhibited? And whether such cultural property was legally removed from its place of origin? Cultural objects have regularly been stolen from private and public collections. Some have been illegally excavated and exported in violation of a nation's export law. Illicit trafficking of cultural property is usually mentioned along with the acquisition of cultural property. Although both the theft and illegal export of cultural property are recognised as illicit trafficking of cultural property, each result in different legal consequences. How can we distinguish the theft of cultural property from the illegal export of cultural property?

Meena uses the example of an American collector who purchases a painting stolen from a German museum and then smuggled into the United States (US).[2] This constitutes theft, as the German museum is the real owner and no title of ownership has been transferred through the theft. In another example, if the painting was removed to the US by its real owner without an export permit and was then sold to an American collector, this may violate export law instead.[3] The distinction between theft and illegal export depends on whether the ownership of cultural property can be transferred to a new possessor. How then, does theft and illegal export of cultural property result in different legal consequences?

The legal consequence arising from theft is different to that arising from illegal export of cultural property in terms of legal concept and practice. We may take legal action against a thief to recover our stolen cultural property, because we have property rights over our property and the courts of

[1] Oscar Wilde, *The Picture of Dorian Gray* (1891) preface. See the full preface at 'Dorian Gray', *eBooks@Adelaide* (Website, 27 March 2016) <https://ebooks.adelaide.edu.au/w/wilde/oscar/dorian/preface.html>.
[2] Thomas Meena, 'Night at the Museum: The Value of Cultural Property and Resolving the Moral and Legal Problems of the Illicit International Art Trade' (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 581, 592.
[3] Ibid 593.

all nations are commonly open for such recovery action.[4] The legal concept and practice is different for illegal export. For example, if the owner of a painting in Italy sold said painting to a Swiss collector who illegally removes such a painting out of Italy in violation of Italian law,[5] how can the painting be repatriated to Italy?

This is a fundamentally different legal enquiry as there are issues of standing. How can Italy come before a foreign court when they are not the legal owner of the property? To recover illegally exported cultural property, most nations usually apply other mechanisms to request repatriation of cultural property such as repatriation by diplomatic negotiations and creation of bilateral agreements between the requesting party and the requested party. As demonstrated, the distinction between theft and illegal export of cultural property results in different legal consequences.

Illicit trafficking of cultural property is not a new phenomenon,[6] but has greatly expanded since the Second World War, with cultural property sought after for its aesthetic fashion and investment qualities.[7] Since the advent of globalisation, our world is more globally connected and remote places open for discovery and travel. People around the world easily access fashions, films, customs and cultures of foreign countries.[8] Cultural barriers previously meant mainstream Western societies had limited interest in other cultural property.[9] This is unsurprising, given that many collectors, connoisseurs and ordinary people needed to overcome significant burdens to trade in cultural property, while museums have steadily grown connections to obtain property from all over the world.[10]

Due to the high value of cultural property, illicit trade in cultural property has rapidly grown to match international demand.[11] As estimated by Global Financial Integrity with INTERPOL's report, transnational crime in art and cultural property sees annual growth of US$3.4 billion to US$6.3 billion.[12] Moreover, INTERPOL recently reported that the value of the cultural goods illegally imported to the EU is becoming as lucrative as illegal trade in drugs, weapons, and

[4] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1889.
[5] Ibid.
[6] Michael W. Taylor, 'Evolving International Law for the Protection of Art' (1977) 2 *North Carolina Journal of International Law and Commercial Regulation* 131, 134.
[7] Ibid.
[8] Pernille Askerud, and Etienne Clément, *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention* (UNESCO, 1997) 9.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] United Nations Office on Drugs and Crime, 'Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes' (Research Report, UNODC, August 2011) 37-8.

counterfeit goods.[13] Growth in the illicit trade of cultural goods has been particularly strong in the Middle East (Afghanistan, Iraq and Syria) over the last decade due to armed conflict.[14] A majority of stolen cultural objects have entered the 'black market', the final destination of theft and a lucrative trading place[15] for cultural property, drugs, weapons and counterfeit goods.[16] As of September 2016, around 49,000 cultural objects were officially reported by INTERPOL's member countries as stolen and many more are listed as unreported but likely stolen.[17] The illicit trade in cultural property is regarded as 'one of the most persistent illegal trades in the world'.[18]

The problem of illicit trafficking of cultural property does not only cause cultural property loss, but provokes cultural property disputes between the original owner who seeks repatriation and the current possessors. Cultural property disputes have been recognised for many decades by the United Nations Educational, Scientific and Cultural Organization (UNESCO). As a result of many recent international conferences, UNESCO has played an important role in fighting illicit trafficking of cultural property by developing fundamental principles and international assistance for member countries to prevent and eliminate threats to cultural property. In considering the legal regime, UNESCO has recently adopted two key legally binding instruments for promoting cooperation among member countries.

The first is the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*[19] (1954 Hague Convention). The term 'cultural property' is first mentioned and defined in this Convention. According to its objective, the Convention shall be applied in the event of armed conflict and it is designed to prevent illicit import and export of cultural property belonging to a contracting party invaded and occupied during armed conflict. When the armed conflict is finally settled, this Convention requires the invading state(s) to return cultural property to the original owner. Under the 1954 Hague Convention, cultural property, immovable and movable, located in each state party shall be safeguarded and respected.

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[13] European Union, *Questions and Answers on the Proposals to Prevent the Illegal Import of Cultural Goods Used to Finance Terrorism* (13 July 2017) <https://www.europa-nu.nl/id/vkfvhm3cvxzn/nieuws/questions_and_answers_on_the_proposals?ctx=vh1alt8tl1wf&tab=0>.
[14] International Criminal Police Commission, *Works of Art* (4 May 2017) <https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art>.
[15] Kathleen Anderson, 'The International Theft and Illegal Export of Cultural Property' (2002) 8 *New England International and Comparative Law Annual* 1, 4.
[16] International Criminal Police Commission, above n 14.
[17] International Criminal Police Commission, *Works of Art: Database* (4 May 2017) <https://www.interpol.int/Crime-areas/Works-of-art/Database>.
[18] United Nations Educational, Scientific and Cultural Organization, 'The Fight Against the Illicit of Cultural Objects and the 1970 Convention: Past and Future' (Information Kit, UNESCO, March 2011) 2.
[19] Opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956).

The second is the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[20] (1970 UNESCO Convention). This Convention applies during peacetime and requests state parties to design their own preventive measures for the illicit import and export of cultural property. Additionally, the Convention provides the legal framework for repatriation that permits a state party to take appropriate steps to repatriate its own cultural property that was stolen or illegally exported (after the entry into force of this Convention). However, the requesting state party shall pay compensation to an innocent purchaser or to a person who has valid ownership of that property.

In 1995, the *Convention on Stolen or Illegally Exported Cultural Objects*[21] (1995 UNIDROIT Convention) was adopted as an outcome of collaboration between UNESCO and the International Institute for the Unification of Private Law (UNIDROIT) as a complementary instrument to the 1970 UNESCO Convention.[22] It was created to fulfil two main tasks—dealing with the technical problems resulting from different national rules (which remain controversial in the 1970 UNESCO Convention) and fighting an increase in illicit trafficking of cultural property.[23] Although the 1970 UNESCO Convention and 1995 UNIDROIT Convention function independently, they supplement each other by achieving a common purpose through different means.[24]

Although UNESCO has attempted to promote the legal protection and repatriation of cultural property from illicit trafficking, international law is not just only mechanism for fighting the problem of illicit trafficking. On the request of a UNESCO member state, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) can facilitate bilateral negotiations for repatriation of cultural property between the requesting state and other UNESCO member states.[25] UNESCO does not work independently, but collaborates with the World Customs Organization (WCO) to exchange significant information and prevent illicit trafficking.[26] The WCO established

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[20] Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).
[21] Opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998).
[22] United Nations Educational, Scientific and Cultural Organization, *The 1995 UNIDROIT Convention* (4 May 2017) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/>.
[23] Stephanie O. Forbs, 'Securing the Future of Our Past: Current Efforts to Protect Cultural Property' (1996) 9 *The Transnational Lawyers* 236, 246.
[24] Lyn Shepard and Eric Leake, 'International Transfer of Cultural Objects: UNESCO Convention of 1970 and UNIDROIT Convention of 1995' (Report of the Working Group, Federal Office of Culture on behalf of the Working Group, 1999) 10.
[25] United Nations Educational, Scientific and Cultural Organization, *Restitution of Cultural Property: Intergovernmental Committee (ICPRCP)* (4 May 2017) <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/>.
[26] World Customs Organization, *Trafficking of Cultural Property* (4 May 2017) <http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/trafficking-of-cultural-objects.aspx>.

an international standard for control of the export of cultural property by introducing a model export certificate to global customs.[27] Aside from the role of UNESCO, the International Council of Museums (ICOM) has adopted a Code of Ethics. Although this code is a non-legally binding instrument, it creates minimum standards for private and public museums and similar institutions for acquiring cultural property.[28] INTERPOL has developed a computerised database for stolen works of art including photographs and descriptions to help trace cultural objects.[29] All of the above form a network of international binding and non-binding mechanisms to fight illicit trafficking.

1.1 The Need to Rethink Cultural Property Concepts

This thesis agrees that effective control of illicit trafficking of cultural property requires sustained efforts beyond the control of individual countries.[30] This thesis is designed to examine the concept behind the international law on cultural property. When we think about cultural property, we are left with a number of questions. Why do we need to protect cultural property? Who should benefit from cultural property? Is the concept behind the international law on cultural property appropriate?

We need to protect cultural property because it is valuable. Indeed, the protection of cultural property does not include only things attached to the physical object, but extends to cultural property's context which is of specific value.[31] We know that cultural property is one of the most important and substantial evidences that can tell the past and illustrate a cultural lineage connecting present generations of a society and their ancestors.[32] It is a source of knowledge and preserves information that can directly communicate with us without words.[33] It is hardly surprising that cultural property is worthy of protection in recognition of it having benefits from a cultural,

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[27] United Nations Educational, Scientific and Cultural Organization, *Why is the UNESCO–WCO Model Export Certificate needed?* (4 May 2017) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/faqs/#c163827>. See also UNESCO and World Customs Organization, *Model Export Certificate for Cultural Objects* <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/>.

[28] See International Council of Museums, *Code of Ethics for Museums* (ICOM, 2013).

[29] Karl-Heinz Kind, 'The Role of INTERPOL in the Fight Against the Illicit Trafficking in Cultural Property' in Stefano Manacorda and Duncan Chappell (eds), *Crime in the Art and Antiquities World* (Springer, 2011) 175, 177.

[30] Karen S. Jore, 'The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?' (1987) 13 *Brooklyn Journal of International Law* 55, 58-9.

[31] Frank G. Fechner, 'Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 379.

[32] Lucille A. Roussin, 'Cultural Heritage and Identity' (2003) 11 *Cardozo Journal of International Law and Comparative Law* 707, 709.

[33] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 353.

historical and/or aesthetic perspective, including cultural identity and economic value.[34] Many countries attempt to preserve their cultural property in its original form and within certain places where it has its greatest significance.[35] Those countries also prohibit the export of cultural property and request for repatriation when their cultural property was illegally removed. Yet, the retention of cultural property within its place of origin is only one side of the coin, because cultural property is regarded as common human culture which should be distributed to mankind.

Merryman presented two ways of thinking about cultural property based on two competing concepts. The first is 'cultural property nationalism' or 'cultural nationalism' which supports the proposition that cultural property should be retained within the nation in which it is originated, because it reflects the identity of the people or society of said nation.[36] The second concept is 'cultural property internationalism' or 'cultural internationalism' which regards cultural property as components of common human culture which belong to everyone.[37] These concepts have an impact on the legal designation of cultural property. The 1954 Hague Convention recognises cultural property as common human culture, while the 1970 UNESCO Convention encourages the repatriation of cultural property to its place of origin. At the national level, countries rich in cultural property design their law and policy with strict prohibition of cultural property export and cultural property found within their own territory is vested in the state or public authorities' control. Conversely, countries poor in cultural property encourage the free flow of cultural property.

The conflict between cultural nationalism and cultural internationalism not only impacts on the design of regulations, it becomes the root of cultural property disputes as culturally rich countries cite the concept of cultural nationalism to repatriate their illegally removed cultural property, while importing countries refuse requests for repatriation of such cultural property by citing cultural internationalism to justify that cultural property need not be kept within its place of origin, but should be shared with everyone and preserved at any place where it has the greatest significance for mankind. This thesis will not judge which concept should be applied to better protect cultural property, since both are engaged in the interest of their proponents. Instead, this thesis argues that the preference for either concept to the exclusion of the other is inappropriate to resolve cultural property disputes. For example, the 1970 UNESCO Convention being on cultural nationalism would lead to failure in its implementation, because it is not supported by countries advocating

[34] Jason M. Taylor, 'The Rape and Return of China's Cultural Property: How Can Bilateral Agreement Stem the Bleeding of China's Cultural Heritage in A Flawed System?' (2006) 3 *Loyola University Chicago International Law Review* 233, 236.
[35] Fechner, above n 31, 382-3.
[36] Theresa Papademetriou, 'International Aspect of Cultural Property: An Overview of Basic Instruments and Issues' (1996) 24(3) *International Journal of Legal Information* 270, 292.
[37] John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *The American Journal of International Law* 831, 831.

cultural internationalism. Those countries may reject the request for repatriation, so cooperation between the requesting and requested party would be impossible. This challenges us to reconsider why and how a preference for only cultural nationalism under the 1970 UNESCO Convention would not be appropriate to resolve cultural property disputes.

1.2 'Cultural Property'

As noted by Fincham, the key term 'cultural property' reflects two conflicting elements, 'culture' and 'property'.[38] The former refers to values arising from an individual or a group of people, while the latter is engaged in an individual rights-based legal principle.[39] How should these two elements be related? Considering the legal aspect, property aims to protect right-holders from the intervention of others and provides the right of the owner(s) to exploit and dispose of assets.[40] When any property belongs to an individual or group of people, such property can be concurrently cultural and can be developed or faded over period of time.[41] Thus, property reflects cultural significance by itself which may be publicly or privately owned or part of the public domain.[42] However, cultural property is unique. Cultural property can embody the spirit of an individual or group of people, and is 'a descriptor or a valence rather than an exclusive label'.[43]

Through the lens of international law, the definition of cultural property is first mentioned in the 1954 Hague Convention, which divides cultural property into movable cultural property and immovable cultural property, giving great importance to the cultural heritage of every people such as monuments of architecture; art or history; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; and a variety of works of art.[44] This Convention does not regard cultural property as national treasures of a nation or individual, but promotes cultural property as cultural heritage of all mankind[45]—a clear leaning towards cultural internationalism. The definition of cultural property was again specified in the 1970 UNESCO Convention.[46] This Convention defines cultural property as property which, on religious or secular grounds, is specifically designated by a state as being of importance for archaeology, prehistory, history,

[38] Patty Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* 559, 567.
[39] Derek Fincham, 'Distinctiveness of Property and Heritage' (2011) 115(3) *Penn State Law Review* 641, 659.
[40] Ibid, 645-6.
[41] Susan Scafidi, 'Symposium: Perspective on Cultural Property & the Law - Introduction New Dimensions of Cultural Property' (2008) 31 *Fordham International Law Journal* 684, 684.
[42] Ibid.
[43] Ibid.
[44] See *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) art 1.
[45] Ibid preamble.
[46] See *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 1.

literature, art or science and which belongs to one or more of the categories listed in arts 1(a)–(k) (which are only in the form of movable property).[47] These two elements of its definition of cultural property demonstrate clear linkages with national designation, rather than the cultural heritage of mankind.

As defined by the aforementioned Conventions, cultural property only refers to a tangible object that may be physically possessed and preserved. The definition of cultural property in the 1954 Hague Convention is wider than that in the 1970 UNESCO Convention in terms of cultural property type as it refers to both movable and immovable property. Although the 1970 UNESCO Convention only refers to movable cultural property, it is 'rather comprehensive in that it also extents to natural things'[48] such as 'rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest'.[49] However, the 1970 UNESCO Convention's delineation of 'specifically designated by each state' (art) 1 seems controversial as this gives discretion to state parties to determine and define what is their movable property that falls within the definition of cultural property.[50]

The 1995 UNIDROIT Convention defines cultural property in art 2 and its Annex.[51] Although the term 'cultural property' is intentionally replaced by 'cultural object',[52] the core concept of both terms is not different in recognition of cultural importance. This similarity was also accepted among state parties so that the 1970 UNESCO Convention and 1995 UNIDROIT Convention can operate concurrently.[53] Yet, the 1995 UNIDROIT Convention deletes the vague 'specifically designated by each state' from the definition of cultural object to eliminate any confusion. This widens the scope of cultural property under the 1995 UNIDROIT Convention compared to the 1970 UNESCO Convention, as cultural property under the former is no longer limited by any state's designation.

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[47] Ibid.
[48] Sigrid Van der Auwera, 'International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges' (2013) 43 *The Journal of Arts Management, Law, and Society* 175, 178
[49] *The 1970 UNESCO Convention* art 1.
[50] Joshua M. Zelig, 'Recovering Iraq's Cultural Property: What Can Be Done to Prevent Illicit Trafficking' (2005) 31 *Brooklyn Journal of International Law* 289, 302.
[51] See *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) art 2 and annex.
[52] UNIDROIT Secretariat, *Summary Report on the Second Session of the UNIDROIT Study Group on the International Protection of Cultural Property, Held at the Seat of the Institute from 13 to 17 April 1989*, UNIDROIT Study LXX-Doc 14 (June 1989) 14. See also UNIDROIT Secretariat, *Preliminary Draft Convention on the Restitution of Cultural Property (drawn up by Mr. Roland Loewe in the Light of the two Studies prepared by Mme G. Reichelt)*, UNIDROIT Study LXX-Doc 3 (June 1988).
[53] Lyndel V. Prott. 'UNESCO and UNIDROIT: A Partnership against Illicit Traffic in Cultural Objects' (1996) 1 *Uniform Law Review* 59, 62.

How do 'cultural property' and 'cultural heritage' differ? This is the most popular confusion of terminology. 'Cultural heritage' is found in a variety of UNESCO legal instruments such as the *Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972*, *Convention on the Protection of Underwater Cultural Heritage of 2001*, *Convention for the Safeguarding of the Intangible Cultural Heritage of 2003* and *Declaration Concerning the Intentional Destruction of Cultural Heritage of 2003*. The 1972 World Heritage Convention recognises cultural heritage as monuments, groups of buildings and sites of outstanding universal value from the point of view of history, art or science.[54] This definition does not only refer to immovable property, but extended to landscapes.[55] The 2001 UNESCO Convention defines 'underwater cultural heritage' as sites, structures, buildings, artefacts, human remains or objects of prehistoric character partially or totally under water, periodically or continuously, for at least 100 years.[56] Despite being underwater, this includes movable form of cultural property in the sense of the 1970 UNESCO Convention such as objects of prehistoric character and artefacts. Therefore, 'cultural property' and 'cultural heritage' interact with each other.

Regional instruments also refer to cultural property in the same scheme as cultural heritage. In Southeast Asia, the *ASEAN Declaration on Cultural Heritage (2000)* has the objective of protecting, conserving, promoting and transmitting cultural heritage to future generations within each member state's territory. Under the Declaration, cultural heritage widely refers to cultural values and concepts, structures and artefacts such as buildings for worship, utility structures, tools, works of visual art, sites and human habitats, folklore, language and literature, traditional arts and crafts, performing arts, games, indigenous knowledge systems and practices, myths, customs, other living traditions, popular creativity in mass craft, popular forms of expression including music, dance, graphic arts, fashion, sports, games and cinema.[57] This definition of cultural heritage includes movable, immovable, tangible and intangible property, so cultural property as defined in the 1990 UNESCO Convention should be a sub-group of cultural heritage in contexts where the Declaration applies. The *Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN (2016)* mentions the concern over increasing threats of tangible cultural heritage which includes illicit trafficking of cultural property.[58] This concern may reflect that cultural property is

[54] See *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) art 1.
[55] Van der Auwera, above n 48.
[56] See *Convention on the Protection of Underwater Cultural Heritage*, opened for signature 2 November 2001, 41 ILM 37 (entered into force 2 January 2009) art 1.
[57] *ASEAN Declaration on Cultural Heritage*, 33rd ASEAN ministerial mtg (25 July 2000).
[58] *Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN*, 28th ASEAN summit, (6 September 2016).

one form of cultural heritage that the Association of Southeast Asian Nations (ASEAN) aims to protect from threats.

In Thailand, the *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* ('AON') provides the same definition of cultural property as that in the 1970 UNESCO Convention. Yet, the AON only includes tangible forms of cultural property, movable or immovable, in the definition and excludes intangible property. Focusing on movable cultural property, the first form is an antique, described as 'an archaic movable property, whether produced by man or by nature, or being any part of ancient monument or of human skeleton or animal carcass which, by its age or characteristics of production or historical evidence, is useful in the field of art, history or archaeology'.[59] Second, an object of art refers to 'a thing skilfully produced by craftsmanship which is high valuable in the field of art'.[60] The AON does not specify cultural heritage in its text, but covers physical items that have cultural significance as provided in the 1970 UNESCO Convention and are part of cultural heritage.

However, the interaction between cultural property and cultural heritage does not mean they can be interchangeably used in every context, because cultural heritage expresses 'a form of inheritance to be kept in safekeeping and handed down to future generations'[61] developed through the human experience,[62] while cultural property is viewed as a sub-group within cultural heritage, limited to physical objects such as monuments, works of art, historical items and similar objects.[63] This is not true if we roughly conclude that cultural heritage refers to only intangible objects, while cultural property refers to tangible objects, because cultural heritage has a wide definition including tangible and intangible matters such as ancient monuments, objects of art, antiques, folklores, social practices or festival events. The term 'cultural property' as a sub-group within cultural heritage may also refer to tangible and intangible matters such as property rights. So, we may consider a public dimension that may separate cultural heritage from cultural property. Cultural heritage is not privately owned by any individual, while cultural property is generally used in relation to commodification or market value and may be bought and sold.[64] Usually, cultural property is, legally and illegally, traded in a market, but the term 'cultural heritage' is not used in a commodifiable sense.

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[59] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 4.
[60] Ibid.
[61] Manlio Frigo, 'Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?' (2004) 86 *International Review of the Red Cross* 367, 369.
[62] Fincham, above n 39, 670.
[63] Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 *International and Comparative Law Quarterly* 61, 66.
[64] Ibid.

The word 'property' focuses on legal rights of individuals to possession of objects.[65] As recognised by the property law of many nations, it aims to protect right-holders from intervention of others and also respects right-holders' right to exploit and dispose of property.[66] Therefore, cultural property is interpreted in a more limited sense, as it refers to object or group of objects based on historic or scientific significance,[67] while cultural heritage is expressed as a collective and public notion in the realm of public interest,[68] as it did not and does not exist in the immediate sense, but it must pass from time to time from generation to generation.[69]

Understanding the distinction between 'cultural property' and 'cultural heritage' underpins the claim of cultural property concepts. If cultural heritage is not a commodity and has a public dimension, it should publicly belong to the communities or place where it was originated as a proof of inheritance handed down to said communities or place. In this sense, cultural nationalism regards cultural property as cultural heritage. When it is the heritage of the communities or place it belongs and reflects their identity or cultural value, it should not be distributed like an item for sale. Conversely, if cultural property is not heritage, it can be freely distributed to anyone and privately owned. This sense is cultural internationalism's character, promoting cultural property as an item shared among people by purchase or exchange. Thus, the distinction between cultural property and cultural heritage necessarily depends on what concept we apply.

How is cultural property different from Geographical Indications (GI)? As defined by the World Intellectual Property Organization, GI becomes 'a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin'.[70] GI generally consists of a name of the product's place of origin, representing its identity. For example, Ban Chiang Pottery is pottery produced in the Ban Chiang district, Udon Thani province, Thailand. Its designs are quite unique and outstanding, with authentic patterns of genuine artefacts found and excavated in Udon Thani province.[71] The pottery is a GI product of Thailand, because it is used to represent the original place it comes from. While both GI product and cultural property represent the cultural identity of the place they were born and can be regarded as a commodity, the GI product, which may reflect a form of cultural property, is not cultural property since it is only

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[65] Patty Gerstenblith, 'Identity and Cultural Property the Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* 559, 567.
[66] Fincham, above n 39, 645-6.
[67] Lucille A. Roussin, 'Cultural Heritage and Identity' (2003) 11 *Cardozo Journal of International & Comparative Law* 707, 707.
[68] Ibid.
[69] Fincham, above n 39, 642.
[70] World Intellectual Property Organization, 'Geographical Indications (GIs): An Introduction' (WIPO Publication No 952E, WIPO, 2017) 8.
[71] See Department of *Intellectual Property (Thailand), GI Thailand: Ban Chiang Pottery* (8 May 2017) <http://www.ipthailand.go.th/images/633/GI/north-east/udonthani_.pdf>.

realised as an object for sale.[72] While we can produce unlimited GI products for trading as a mass product representing their place of origin, it is impossible to reconstruct cultural property as a mass product due to it involving other elements beyond economic or commercial value such as historical and genuine value without any reconstruction.

For the purposes of this thesis, the terms 'cultural property' and 'cultural object' are used as recognised in the 1970 UNESCO Convention art 1 and 1995 UNIDROIT Convention art 2, as this thesis aims to focus on an item that can be physically removed and owned by any person. As a nature of illicit trafficking, it begins with the transfer of ownership of any item by violating the law, so the use of the term 'cultural property' is consistent with such a nature. It is also consistent with the research question (see Section 1.5) which only examines the legal framework for repatriation of 'a physical object' stolen or illegally exported from the real owner.

1.3 States of Origin and Market States

States of origin, or 'countries of origin' or 'source nations', are countries where 'the supply of desirable cultural property exceeds the internal demand … they are rich in cultural artefacts beyond any conceivable local use'.[73] States of origin include Afghanistan, Cambodia, China, Egypt, Greece, Italy, Iraq, Peru and Thailand. The term 'states of origin' is contrary to 'market states' or 'market nations' where the demand for cultural property exceeds supply and encourages the importation of cultural property from states of origin.[74] As observed by Dutra, most states of origin lack financial, human or other necessary resources to protect their own cultural property adequately.[75] These states often face issues such as tomb robbing, artefact mutilation and corruption.[76] In Thailand, for example, although the AON allows antiques and works of art to be vested with Thailand's Department of Fine Arts (DFA) which prohibits the export of these objects, economic incentives for illicit trafficking become irresistible for corrupt official enforcement officers.[77]

In contrast to states of origin, market states mostly own the financial resources to purchase cultural property from abroad, even though such high demand and resources encourage both legal and

[72] Malcolm Voyce, 'Geographical Indications, the EU and Australia: A Case Study on 'Government at a Distance' through Intellectual Property Rights' (2007) 7 *Macquarie Law Journal* 155, 155.
[73] Merryman, above n 37, 832.
[74] Ibid.
[75] Michael L. Dutra, 'Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China' (2004) 5 *Asian-Pacific Law & Policy Journal* 63, 65.
[76] Taylor, above n 34, 237.
[77] Simon R. M. Mackenzie, Dig a Bit Deeper Law: Regulations and the Illicit Antiquities Market (2005) 45 *British Journal of Criminology* 249, 258.

illegal export from states of origin.[78] This thesis focuses on why the transaction of cultural property occurs in the first instance, rather than the capacity of states of origins to protect their cultural property. If any developing country has more demand for foreign cultural property, they should be grouped as a market state. This thesis posits that the key definition of states of origin is linked with asymmetry between internal demand and external supply of cultural property. States of origin are states where people have less demand for cultural property and have no incentive to import cultural property from other nations.

1.4 Situation and Conceptual Problem

Why do we need to concern ourselves with states of origin? This question should consider the following questions. Where does the theft of cultural property normally occur? Where cultural property is illegally exported from? Due to high external demand for cultural property beyond local use, most states of origin have become targets of illicit trafficking. Unsurprisingly, they have attempted to protect their cultural property by imposing very strict prohibitions of cultural property export and seeking repatriation of stolen cultural property. This thesis limits its study of states of origin to examining how these states have attempted to request for repatriation of illegally exported cultural property under international law.

According to UNESCO, most states of origin have suffered from illicit trafficking of cultural property. Around 80% of cultural objects from Roman and Etruscan civilisation presently on the market have an illegal provenance.[79] Around 1.6 million Chinese cultural objects have been stolen and scattered in 200 museums in 47 countries including in private collections.[80] Egypt remains a huge target of theft, but has recovered 5,000 items of illicit provenance. Most African nations have lost 95% of their cultural objects.[81] At least 1,000 Mayan ceramic objects are illegally excavated every month in the Mayan region of Central America and an Italian dealer recently attempted to illegally export over 12,000 artefacts from Ecuador from various archaeological sites.[82] As interests in cultural items from Cambodia, Thailand and other Southeast Asia countries grows, a corresponding increase in looting and smuggling of cultural property has occurred.[83] Items include decapitated heads of Buddha images, parts of ancient monuments, ornaments and ceramics.[84]

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[78] Taylor, above n 34, 237.
[79] United Nations Educational, Scientific and Cultural Organization, above n 23.
[80] Ibid 3.
[81] Ibid.
[82] Ibid.
[83] Paul M. Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 293.
[84] Pimrapee Thungkasemvathana, 'Culture Not Commodity: A Recent UNESCO-Hosted Symposium on Illicit Trafficking of Historical Artefacts Stressed the Importance of International Cooperation in Preventing the Crime', *Bangkok Post* (Bangkok), 2 December 2014 <http://www.bangkokpost.com/print/446650/>.

Although many states of origin have recently attempted to protect and claim for return of their illegally removed cultural property, this is not easy as protection and repatriation cannot solely depend on states of origin. Collaboration with market states, the destination of illicit trafficking, is necessary. Despite the 1970 UNESCO Convention providing a legal framework to address this problem, theft and illegal export of cultural property is ongoing due to territoriality theory of jurisdiction. This principle provides neither extradition nor judicial cooperation in penal matters between member states, because it depends on the protective legislation of each state party and how it chooses to enforce the Convention's terms.[85] Most state parties cannot enforce the penal judgement of a foreign state if a treaty does not specifically establish that duty—thus, this is a gap allowing smugglers to commit illicit trade with impunity.[86] Moreover, the 1970 UNESCO Convention fails to promote cooperation between states of origin and market states, because it applies a cultural nationalism concept in its design.

1.5 Research Question and Methodology

This thesis examines the legal framework for repatriation of cultural property illegally trafficking under the 1970 UNESCO Convention and 1995 UNIDROIT Convention. Repatriation necessarily depends on effective cooperation between states of origin as the requesting party and market states as the requested party. However, the legal framework under those Conventions causes adverse effects to cooperation between states of origin and market states. As this thesis will highlight, this is due to the tension between cultural nationalism and cultural internationalism which both states of origin and market states use to justify intervention.

The legal framework is designed to apply only cultural nationalism which is not flexible to balance the benefits of states of origin and those of market states. This fails to convince market states to ratify those Conventions, because market states in which illegally removed cultural property is located do not wish to comply with the cultural nationalism concept which is not beneficial to them. As a consequence of the legal framework, the request for repatriation by states of origin has been deadlocked. This thesis will explore appropriate mechanisms that can reconcile the competing theories of cultural nationalism and internationalism that can respond to the competing needs from states of origin and market states.

The thesis will examine two key concepts of cultural nationalism and cultural internationalism and will offer critiques on each concept for implementing effective cultural property protections in Thailand. As such, the research methodology is doctrinal and will critically evaluate the operation

[85] Jore, above n 30, 68-9.
[86] Ibid 69.

of these principles on the international legal framework that regulates the protection of cultural property from illicit trafficking. The reading of primary sources of doctrine such as positive law in international, regional and national legal frameworks; judicial cases; and state practices relating to repatriation of cultural property is central in this examination. Secondary materials including the commentary on the law found in textbooks, legal journals, research papers, working papers, conference proceedings, dissertations and media reports are used to provide extensive citation for such primary legal materials.

This thesis begins with an analysis of repatriation of cultural property from a purely theoretical standpoint. This is mainly concerned with two competing concepts, cultural nationalism and cultural internationalism. This thesis narrows the origin of those concepts first raised by John Henry Merryman in *Two Ways of Thinking About Cultural Property*. This thesis examines Merryman's writing through a series of questions. What is cultural nationalism and cultural internationalism? Are there other concepts implicit to them? How have they evolved as sources of international cultural property law? What is the debate between them? This thesis extends Merryman's writing that cultural nationalism and cultural internationalism are not the only concepts applied to design cultural property law, and this thesis considers other relevant concepts that should be closely linked to them. For example, the concept of state's jurisdiction is commonly cited for why we need to maintain cultural property within its place of origin. The concept of cultural identity can be also applied to argue that cultural property should belong to the place it was born as it reflects a unique characteristic of said place. The concept of common heritage of mankind (CHM) or trade liberalisation supports the distribution of and access to cultural property in line with cultural internationalism. Yet, this thesis argues that cultural nationalism and cultural internationalism are not absolutely isolated from each other. They should be recognised as two sides of a coin—seemingly opposed, but inseparable. For example, while the British Museum raised cultural internationalism to claim that the Parthenon Marbles belong to mankind, they also belong to Greece as far as cultural nationalism is concerned. The two concepts have the same feature of preservation of cultural property, both aiming to protect cultural property from threats. This argument is developed in later chapters to identify the positive and negative aspects of both concepts and how they can interact with each other. This thesis examines the evolution of both concepts to determine how they were developed to have an impact on the design of international law.

This thesis uses the evolution of cultural nationalism and cultural internationalism with historical analysis to observe the paradigm shift in the legal framework on protection and repatriation of cultural property, from the 'to the victor goes the spoils' period since the Ancient Greek and

Roman times to 'the turning point' post–Second World War and the establishment of the United Nations (UN) in 1945 to the adoption of the 1970 UNESCO Convention and 1995 UNIDROIT Convention. This examination answers the questions of what is a change in the legal framework and why did this change occur. This examination provides the ground for the claim that the legal trend of protection and repatriation has remained motional and dynamic.

This thesis then shifts to study the texts of the current legal framework under international law, comprising the 1970 UNESCO Convention and 1995 UNIDROIT Convention. This thesis analyses and evaluates, through a doctrinal legal analysis and international legal interpretation, the impacts of the governing framework promoting repatriation of cultural property on states of origin. International law sources and other UNESCO resolutions and recommendations are included in the analysis. The texts of those legal instruments are interpreted and evaluated to prove how states of origin party to those Conventions have been at a disadvantage to realise repatriation. Despite the framework favouring cultural nationalism, this thesis explores how a preference for cultural nationalism over cultural internationalism leads to failure in the repatriation of cultural property. The interpretation of those texts also reveals legal defects and reasons why market states have been reluctant to ratify those Conventions.

This thesis next explores Southeast Asia, which has suffered from significant illicit trafficking of cultural property. This thesis claims that the repatriation of cultural property to ASEAN countries is very difficult to accomplish due to the lack of cooperation among them and the ASEAN regional framework's preference for cultural nationalism over cultural internationalism. To prove this, this thesis examines the relation between the ASEAN regional framework (ASEAN Charter and *ASEAN Declaration on Cultural Heritage (2000)*) and international legal framework on repatriation to determine whether they are consistent with each other. If they are, it is assumed that they are designed with the same basis which may become inappropriate.

Although the examination of the legal framework under international law is the core theme of this thesis, this thesis uses Thailand as a case study, because Thailand is a state of origin that designs its cultural property law with preference for only cultural nationalism. Thai law prohibits the export of cultural property and vests cultural property in the state's control. This thesis examines the *Act on Monuments, Ancient Objects, Art Objects and National Museum B.E. 2504 (1934)*, revised in 1961 and 1992, and its subsidiary laws as the most important Thai legislation concerning movable and immovable cultural property. This thesis interprets the texts of Thai law to determine impacts on protection and repatriation of Thailand's cultural property. An examination of two key Thai cases concerning cultural property protections will be used to consider this impact: *Phra*

Narai and *Luang Poh Sila*. These iconic cases will be applied with the legal analysis to determine whether preference for only cultural nationalism is beneficial to Thailand.

Cultural nationalism and cultural internationalism are two sides of the same coin. Requests for repatriation of cultural property do not succeed without cooperation between the requesting and requested party. Any country favouring only cultural nationalism or cultural internationalism will fail in requests for repatriation. This thesis examines feasible options based on a balance between cultural nationalism and cultural internationalism integrated with a bilateral approach to convince the requested party to cooperate with the requesting party in pursuit of repatriation.

1.6 Thesis Structure

This thesis comprises eight chapters. Chapter 1 has provided the background to the research, a brief overview of the key concepts, the research question and methodology and the thesis structure.

Chapter 2 examines the concepts of cultural nationalism and cultural internationalism in detail, including their evolution, the historical and ongoing debate between them, and their being the basis of the existing legal framework for repatriation of cultural property.

Chapter 3 examines the social, institutional and legal aspects of the legal framework for repatriation of cultural property. This examination answers the questions of what is a change in the legal framework and why did this change occur.

Chapter 4 interprets the key legal texts of the current legal framework, the 1970 UNESCO Convention and 1995 UNIDROIT Convention, and demonstrates that the preference for only one cultural property concept leads to particular concerns for states of origin.

Chapter 5 examines ASEAN, a region consisting of states of origin facing illicit trafficking, to observe how international law is reflected in the ASEAN framework for protecting and encouraging the repatriation of cultural property.

Chapter 6 narrows the investigation of ASEAN to Thailand as a case study. The Thai legal framework and practice for protection and repatriation is examined for its consistency with the ASEAN and international frameworks.

Chapter 7 builds on the inadequacy of the current international legal framework for repatriation demonstrated in the previous chapters and examines alternative approaches for states of origin to promote an effective outcome of requests for repatriation. This is based on the conciliation

between cultural nationalism and cultural internationalism, such that the requesting and requested party can come to a mutual agreement.

Chapter 8 clearly presents the conclusions and recommendations of this thesis, directly responding to the research question. The chapter summarises the results of the investigation and analysis in previous chapters and also provides directions for future research.

Chapter 2:
The Emergence of Cultural Property Concepts: Cultural Nationalism and Cultural Internationalism*

> The British say they have saved the Marbles. Well, thank you very much. Now give them back.[1]

Countries have designed their cultural property laws differently. While some countries strictly prohibit the export of movable cultural property and vest cultural property within their territory in the state or public authorities' control, some countries legally encourage the free flow of cultural property through trade. The difference can be found in international and national legal regimes and is based on opposing ways of thinking about cultural property. This is supported by Merryman in *Two Ways of Thinking About Cultural Property*. These two ways have coalesced into 'cultural property nationalism' (hereafter 'cultural nationalism') and 'cultural property internationalism' (hereafter 'cultural internationalism').[2]

2.1 Cultural Nationalism and Cultural Internationalism

According to Merryman, the first way of thinking about cultural property is cultural nationalism which recognises cultural property as part of national cultural heritage which 'gives nations a special interest … implies the attribution of national character to objects … legitimizes national export controls and demands for the "repatriation" of cultural property'.[3] The other is cultural internationalism which views that objects of artistic, ethnological, archaeological or historical interest are 'components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction'.[4] Obviously, cultural nationalism is contrary to cultural internationalism, because the former seems to support the power of the state

* The content of this chapter was the subject of a presentation entitled, 'The Conflict Between Cultural Nationalism and Cultural Internationalism: An Impact on Legal Protection and Restitution of Cultural Property' (Conference Paper, International Conference on History and Culture 2017: Safeguarding, Return and Restitution of Cultural Objects in Post Conflict Societies, Kyoto, Japan, 9–11 December 2017).

[1] Melina Mercouri quoted in *The Sunday Times* (22 May 1983) 15, C1; Melina Mercouri cited in John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1910.

[2] Raechel Anglin, 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide' (2008) 20 *Yale Journal of Law & the Humanities* 241, 244.

[3] John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *The American Journal of International Law* 831, 832.

[4] Ibid 831.

to control its cultural property located within the territory, while the latter aims to share benefits arising from cultural property as common cultural heritage.

Both concepts are used to explain how each nation creates its own way to preserve cultural property and there is clear incentive for nations to choose either concept. States of origin, unsurprisingly, prefer cultural nationalism when designing laws for retaining historic, archaeological or artistic objects within their territory because they deem that cultural property normally includes market value that should be harnessed by the state and their people.[5] This attracts many visitors from all over the world, leading to financial benefits. Market states generally promote cultural internationalism for claiming the universal status of cultural property which must be shared for all mankind. This status gives market states the legitimacy to retain foreign cultural property. Although both concepts are treated as the primary influence in the design of laws relating to cultural property, they are not isolated from other theories. This section examines how both concepts may be engaged with other relevant theories.

2.1.1 Extended Perspectives on Cultural Nationalism

As insisted by Merryman, cultural nationalism provides that objects of art and archaeology originate, *in situ*, from a cultural wellspring as products of a geographically limited culture and belong to the national inheritors or current occupiers of that same geographical location.[6] This reflects that the location of cultural property is paramount to identifying the owner of said property. That is, cultural property should be owned by the country or nation in which it was born. Moreover, it also encourages the state to take responsibility to preserve cultural property. This thesis claims that there are theories linked with and constituted as cultural nationalism such as the concept of jurisdiction, the relation between cultural property and cultural heritage, and cultural identity. This thesis claims that cultural nationalism has never been isolated from those and these can play important roles in being a strong basis for states of origin to repatriate lost objects.

2.1.1.1 State's Jurisdiction

According to the concept of cultural nationalism, cultural property is regarded as part of national cultural heritage, because it is a product of a geographically limited culture. Thus, it is closely related to the location where it was produced, so the nation occupying that location should inherit the power to own, preserve and control cultural property located therein. This claim is supported

[5] Maria Aurora Fe Candelaria, 'The Angkor Sites of Cambodia: The Conflicting Values of Sustainable Tourism and State Sovereignty' (2005) 31 *Brooklyn Journal of International Law* 253, 268.
[6] Sean R. Odendahl, 'Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership' (2001) 1 *University of Illinois Law Review* 475, 481.

by the concept of jurisdiction as a corollary of the *Lotus Case*.[7] This case refers to the concept of a state's jurisdiction which provides a state the power to assert the applicability of its national law to any person, property, territory or event within its territory.[8] Thus, each state has its own sovereignty which is the most extensive form of jurisdiction, denoting full and unchallengeable power over territory and all persons from time to time.[9] Cultural property found or located within the state's territory should be normally under the state's territorial jurisdiction. The state exclusively exercises its judicial, legislative and executive jurisdiction over cultural property located in its territory. States of origin prefer to design their law based on cultural property, with national treasures vested in the state or public authorities.[10] Therefore, state jurisdiction is used to support a state of origin's claim for protecting cultural property.

Despite the ability for sovereignty to determine which party is the legal owner of certain cultural objects, its enforceability collapses once a cultural object is removed from its state of origin's jurisdiction. While a state of origin fully claims its own sovereign right to design its law and policy prohibiting the export of cultural property located within its territory and retains control over said property, its law enforcement is not absolute—it is limited to its territory. It is impossible for the state of origin to enforce its law controlling its cultural property for illegally removed cultural property located in another state's territory. This is a gap that adversely affects the retention of cultural property within its place of origin. Smugglers may benefit from this gap by illegally exporting cultural property, with the importing state likely retaining the illegally exported cultural property regardless of the state of origin's law.

This distinction between the legal owner of cultural property and enforcement is reflected in the 1970 UNESCO Convention which applies the territoriality theory of jurisdiction. The Convention provides neither extradition nor judicial cooperation in penal matters as it depends on 'the protective legislation which each state has enacted governing its own territory for the enforcement of the treaty's terms'.[11] When most states cannot enforce their penal judgement of a foreign state and the Convention does not specifically establish that duty, smugglers may commit illegal export with impunity if they and stolen cultural objects are removed from the country of origin.[12] Although cultural nationalism is reinforced by the concept of state's jurisdiction, this must be restricted by the territoriality theory of jurisdiction which may block the state's power over cultural

[7] See *Lotus Case (France v Turkey) (Judgement)* [1927] PCIJ (ser A) No 10.
[8] Martin Dixon, *Textbook on International Law* (Oxford University Press, 7th ed, 2013) 149.
[9] Ibid 161.
[10] Lyndel V. Prott and Patrick J. O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, 1983) 40.
[11] Karen S. Jore, 'The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?' (1987) 13 *Brooklyn Journal of International Law* 55, 68-9.
[12] Ibid 69.

property. To resolve the limitation of state's jurisdiction and reinforce cultural nationalism, states of origin must cooperate with importing states to create any specific obligation that will privilege those states of origin to exercise their jurisdiction over their illegally removed cultural property located in the importing state's territory.

2.1.1.2 Cultural Heritage

Merryman often claimed that the retention of cultural property within its place of origin is based on the close relation between cultural property and cultural definition, because the identity or history of the people and community is illustrated and represented by objects which tell people what it is and where it comes from. Thus, a people deprived of their cultural objects is culturally impoverished.[13] The preservation of cultural property within the place whose cultural value and identity it reflects in accordance with cultural nationalism is necessarily related to a form of inheritance between generations of people or communities keep. This is a nature of 'cultural heritage'. This thesis asserts that such a nature of cultural heritage could become a platform for making a claim to cultural property based on cultural nationalism.

Cultural heritage has a public character. 'Culture' refers to expression of soul, individually and collectively, which is part of the immutable web of what a society is and does.[14] It is the manifestation of what a society has created and what a society values and believes.[15] 'Heritage' is used to much more broadly to link cultural, natural, movable, immovable, tangible, intangible, individual and collective heritage, but its core meaning is anything normally inherited.[16] If we need to prove why cultural property should be preserved within the place or community in which it was created, we must apply a nature of cultural heritage to explain how it is important to such a place and community.

To support cultural nationalism, cultural property must be regarded as a legacy of a society or place of origin as a whole, not just only any individual, since it is expressed as a collective and public notion in the realm of public interest.[17] The public nature of cultural heritage means all citizens are a mutual right-holder of cultural property and deserve benefits from such cultural property.[18] We must not separate the consideration of cultural nationalism from cultural heritage. They are together recognised to promote the collective interest of a nation for preservation of

[13] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1912-3.
[14] Patty Gerstenblith, 'Identity and Cultural Property the Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* 559, 561.
[15] Ibid.
[16] Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (Oxford University Press, 2006) 7.
[17] Lucille A. Roussin, 'Cultural Heritage and Identity' (2003) 11 *Cardozo Journal of International & Comparative Law* 707, 707.
[18] Candelaria, above n 5, 268.

cultural property within said a nation and repatriation when cultural property is illegally removed. Without such a nature of cultural heritage, cultural property may be reduced to a physical object with associated archaeological or historic information.

According to cultural nationalism, if cultural property is linked with a nature of cultural heritage, a public notion and interest arising from collective expressions of a society or civilisation inherited from its ancestor will be constituted in such cultural property. This is supported by *Elgin Marbles*.[19] The Greek Government has a standing request that the British Museum return its Parthenon Marbles, recognised as a symbol of the Greek nation and not just as historic objects. The Greek Government considers the Parthenon Marbles as its heritage, sculpted and inherited from Greek artists, thus, they should handed down to the current generation of Greek people. In *Axum Obelisk*,[20] Ethiopia spent many decades asking for the repatriation of the obelisk, a symbol of Ethiopian history and civilisation, from Italy. These cases indicate that if states need to claim cultural nationalism to request for repatriation of their cultural property, they must raise a nature of cultural heritage. Accordingly, a nature of cultural heritage becomes a platform for making a claim of cultural nationalism, since a nation becomes a stakeholder protecting the public interests of its society or civilisation.

2.1.1.3 Cultural Identity

This thesis claims that the cultural identity of a nation is represented and protected by the concept of cultural nationalism, since the retention of cultural property within its place of origin represents to visitors what it is and where it belongs. The relation between cultural nationalism and cultural identity should be also taken into account, because both become inseparable. This argument is supported by Larrain's comment that cultural identity is conceived by two ways of thinking. The first regards cultural identity as an already accomplished fact, and the second considers cultural identity as something being produced in an ongoing, never fully completed process.[21] This thesis agrees that cultural identity is not motionless and is dynamically developed from the past to the present along with cultural group membership. By its dynamic nature, the identity of a cultural group can be inherited from generation to generation. When members of a society or nation realise their mutual history, experience or pride inherited from the past, they feel that they belong to the same cultural group. Where can we look for cultural identity? Cultural identity is reflected through a variety of cultural types such as nationality, geography, history, religion and ethnicity, so

[19] See The British Museum, 'The Parthenon Sculptures' (12 August 2017) <http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures.aspx>.
[20] See Embassy of the Federal Democratic Republic of Ethiopia in London, 'The Axum Obelisk' (12 August 2017) <http://www.ethioembassy.org.uk/fact%20file/a-z/Looted%20Treasure/The%20Axum%20Obelisk.htm>.
[21] Jorge Larrain, *Ideology & Cultural Identity: Modernity and the Third World Presence* (Polity Press, 1994) 158.

individuals in a society who have mutual cultural types can be served with two functions of cultural identity by achieving 'belonging' (clarifying where they belong) and 'self-identification' (clarifying who they are).[22] These functions make members of a society or nation proud of their membership.

Although cultural identity is very abstract, its functions are substantialised in the form of cultural property as physical evidence that represents the identity of the society or nation that produced it. This thesis insists that cultural property can achieve cultural identity's functions by serving as evidence of the past (real or fabricated) for members of cultural group and connecting the present cultural group members with their ancestors.[23] This notion allows cultural group members to learn where they belong and who they are through cultural property. Cultural property allows them to be aware of their mutual nationality, geography, history, religion or ethnicity. It would be impossible to learn or be aware of where one belongs and who one is when cultural property is devastated or lost from one's society or nation. Accordingly, the preservation of cultural property within the society or nation who produced it logically helps members of such a society or nation to closely connect with their identity. In *Elgin Marbles* and *Axum Obelisk*, cultural property was not only recognised as national heritage, but as a physical symbol that evokes a shared history for the Greek and Ethiopian people respectively about their religion and ethnicity, inherently helping them to perceive and identify themselves.

2.1.2 Extended Perspectives on Cultural Internationalism

In contrast to cultural nationalism, cultural internationalism is claimed to allocate cultural property among market states. Market states often promote the universal status of cultural property to possess foreign cultural property and do not return it when requested by states of origin. As noted by Merryman, cultural internationalism does not identify cultural inheritors of the past by geographical location, but by cultural debt which 'society owes to past cultures that have invariably and in in numerous ways influenced present culture'.[24] This cultural debt reflects the status of cultural property as components of a common human culture which does not depend on national jurisdiction, places of origin or present location.[25] This explanation is directly contrary to the concept of state's jurisdiction, claiming that cultural property is independent of one nation's property rights or national jurisdiction or national control over it and that the interests arising from

[22] Tseming Yang, 'Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion' (1997) 73 *Indiana Law Review* 119, 127-8.
[23] Roussin, above n 17, 709.
[24] Odendahl, above n 6, 482.
[25] Merryman, above n 3, 831.

cultural property should be shared by all nations and people in the world.[26] This thesis agrees with Merryman that market states may claim the independent status of cultural property apart from national property to share cultural property's benefit to mankind. However, this thesis argues that the independent status should not be claimed without basis from other relevant theories such as Common Heritage of Mankind (CHM), common concern of humanity (CCH) and trade liberalisation. These theories are examined below.

2.1.2.1 Common Heritage of Mankind

What is the concept of the CHM? How is the CHM related to cultural internationalism? The CHM is mostly attributed to Maltese Ambassador to the UN Arvid Pardo's proposal that seabed resources should be reserved for peaceful purposes and marine research and national jurisdiction should not be claimed over the deep seabed since it belongs to mankind as a whole.[27] The four key features of the CHM are: 1) the common area is not subject to appropriation, 2) the common management of the area must be shared among all nations, 3) an active sharing of the benefits must be reaped from the exploitation of the area's resources, and 4) the use of the area must be dedicated to peaceful purposes.[28] Although the CHM initially emerged from the law of the sea regime, it is now widely recognised in many fields of international law.

In relation to cultural heritage, the CHM is placed in the 1972 UNESCO World Heritage Convention, the philosophy of which is that 'the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'.[29] The 1954 Hague Convention was also built on the notion that everyone makes contributions to the culture of the world, so damage to one cultural property means damage to the cultural heritage of all mankind.[30] The CHM is a fundamental principle that grounds support for cultural internationalism.

The first and foremost feature of CHM is 'common interest'. As noted by Holmila, the CHM has the objective of advancing common interest by laying down the principle of no claim or recognition of sovereignty or jurisdiction over common areas such as the high seas and outer

[26] Gao Sheng, 'International Protection of Cultural Property: Some Preliminary Issues and the Role of International Conventions' (2008) 12 *Singapore Year Book of International Law and Contributors* 57, 60.
[27] Erkki Holmila, 'Common Heritage of Mankind in the Law of the Sea' (2005) 1 *Acta Societatis Martensis* 187, 188-9.
[28] Daniel Goedhuis, 'Some Recent Trends in the Interpretation and the Implementation of the Rules *of* International Space Law*'* (1981) *19 Columbia Journal of Transnational Law* 213*,* 218-9.
[29] See *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) preamble.
[30] See *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) preamble.

space.[31] Yet, it is argued that the CHM is distinct from cultural internationalism, even though both concepts promote common interest to be equally shared among mankind. Cultural internationalism cannot refuse the claim of sovereignty or jurisdiction over cultural property. While the CHM is usually applied to common areas beyond the state's jurisdiction such as the high seas or outer space, cultural internationalism is not subject to such common areas, because cultural property naturally originates from human culture as dynamically inherited from past to present generations. We should not find cultural property in an area or location with no human culture. When cultural property is regarded as a product of human culture, it is normally located in the culture or nation that produced it or within the state's jurisdiction automatically, even though it is regarded as common interest.

The claim for sovereignty or jurisdiction over cultural property is also found in the selection of cultural properties promoted as world cultural heritage under the 1972 World Heritage Convention. Cultural properties eligible for world heritage status located within a nation cannot be listed on the World Heritage List if the nation does not give its consent.[32] Although cultural internationalism is based on the CHM in relation to promoting the common interest of mankind, it is inseparable from the claim of sovereignty or jurisdiction by any state. However, cultural internationalism accepts that one state may preserve cultural property acquired from another state in its own territorial jurisdiction if the preservation of the cultural property is considered as being beneficial to mankind. In *Elgin Marbles*, the British Museum claimed the legality of its retention of the Parthenon Marbles on the basis of the objective of preserving them in good condition, given Greece's poor management and weather which could destroy the Marbles. Consequently, the Marbles as an output of the common culture of mankind are better preserved in England for people around the world to appreciate them.

The CHM enables a balancing of different powers of interests between competing states.[33] Under the *UN Convention on the Law of the Sea*, common management is developed in the form of the International Seabed Authority. The Convention obligates state parties to ensure that any activity related to the deep seabed resources of areas beyond state's jurisdiction is governed by the International Seabed Authority and conducted for benefit of mankind.[34] Cultural property requires a similar approach due to its irreplaceable nature. Although cultural property can be exactly

[31] Holmila, above n 27, 193.
[32] Graham Nicholson, 'The Common Heritage of Mankind and Mining: An Analysis of the Law as to the High Seas, Outer Space, the Antarctic and World Heritage' (2002) 6 *New Zealand Journal of Environmental Law* 177, 195. See also *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) art 11.3.
[33] Holmila, above n 27, 193.
[34] See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994) arts 137(2), 140, 150, 153, 156 and 157.

reproduced with existing technology, copied cultural property would lack the historical, archaeological or artistic spirit. If one state can effectively take care of cultural property and facilitate access to it for people from around the world, this would be enough to justify that the common interest from such cultural property is shared among mankind. Conversely, for cultural internationalists, if cultural property is exclusively retained in its place of origin with a lack of preservation and, in doing so, would be damaged or prohibited from public access, no one benefits from it.

The benefit sharing, regardless of where cultural property is located, is restated by the concept of 'universal museum' which also fulfils the third and fourth features of CHM. A number of prominent museums and institutions recognised as universal museums, such as the British Museum in London and the Louvre in Paris, derive their status not only from their reputation, but their role in cultivating cultural exchanges.[35] This role fulfils one of the 1970 UNESCO Convention's objectives of promoting the cultural life of all peoples and mutual respect and appreciation towards cultural property to be enriched by the interchange of cultural property among nations for cultural, educational and scientific purposes.[36] Therefore, the status of universal museums may align with the CHM and cultural internationalism via the notion that cultural property should not be exclusively retained by any person or nation, but shared with all mankind and its preservation made a priority.

2.1.2.2 Common Concern of Humanity

CCH emerges from the need to protect fundamental values of humanity, propriety, patriotism, cultural values or a particular social order.[37] While the CHM is normally applied with a geographical scope to common areas and resources beyond any national jurisdiction such as the high seas or outer space, the CCH has wider scope both beyond and within national jurisdictions of individual states.[38] The CHM aims to share benefit arising from the common areas, while the CCH is not linked with geographic matters, but with matters of concern to humanity.[39]

For example, the effects of the climate crisis resulting from greenhouse gas emissions are not limited to national jurisdictions. Thus, this environmental problem is a common concern

[35] Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010) 164.
[36] See *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) preamble.
[37] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law*, (Martinus Nijhoff Publisher, 2007) 13.
[38] Jimena Murillo, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 134, 141.
[39] Ibid 142.

threatening human wellbeing as a whole. Although the CCH is different from the CHM by dint of its subject matter, it is argued that they are related to each other due to an equitable sharing system and burden of cooperation.[40] For example, under the CHM, the deep seabed resources in the high seas must be equally shared among nations, while the CCH requests all nations share their responsibility to address climate change by reducing their greenhouse gas emissions. This thesis observes that both concepts touch on equitable sharing, but the meaning of 'sharing' in terms of the CCH may not be limited to just benefit sharing, but extend to responsibility sharing.

Is the destruction or loss of cultural property recognised as a CCH? Although the CCH is mostly mentioned in international environmental law contexts, it is related to the preservation of cultural property in accordance with cultural internationalism. Since the mid-twentieth century, the UN's attempts to maintain basic values, such as international peace and security, human rights and human environment, have led to identifying domains of common concern.[41] This thesis claims that the protection of cultural property from destruction or loss should be accepted as a CCH, because cultural property reflects historical, archaeological or artistic value of human being which should be preserved as part of human rights.[42] The destruction or loss of cultural property inevitably deprives human culture as a whole. Although the loss of cultural property occurs within one nation, it does not reflect only that nation in which it is located, since all nations and people as a whole are adversely affected by the loss. The impact is similar to the climate crisis. UNESCO is an example of a CCH towards cultural property, because it possess a mandate to preserve cultural property through the 1954 Hague Convention and 1972 World Heritage Convention.

If we accept that the destruction or loss of cultural property is a CCH, it is necessary to identify how all nations may contribute to this common concern. As noted by Shelton, issues of common concern unavoidably transcend the boundaries of a single nation and require collective action.[43] This was insisted in the *Trail Smelter Case*,[44] which laid down the rule that each nation has particular duties to the global community, because any activity in one state's jurisdiction could probably affect another nation. To agree with this notion and Shelton's claim, we need to focus on the responsibility of each nation to the global community. The function of cultural internationalism responds to the CCH by encouraging common awareness and responsibility for all nations to address a problem of cultural property loss. This opposes the retention of cultural property within its place of origin, because it is not ensured that it would be effectively preserved and sidesteps

[40] Ibid.
[41] Kiss and Shelton, above n 37, 13-4.
[42] See Ben Boer, Culture, 'Rights and the Post-2015 Development Agenda' (Legal Studies Research Paper No 16/89, Sydney Law School, October 2016) 2-6.
[43] Dinah Shelton, 'Common Concern of Humanity' (2009) 39 *Environmental Law and Policy* 83, 83.
[44] See *Trail Smelter Case (Canada v United State of America)* [1938 and 1941] 3 RIAA 1911.

issues of sovereignty where the state fails to effectively exercise its power to preserve cultural property. There may be instances where a state is impaired in exercising its sovereignty to preserve cultural property. For instance, ongoing armed conflict in Syria is curtailing the Syrian Government from preventing the illegal destruction and excavation of archaeological and historic sites and tombs.[45]

When the destruction or loss of cultural property is recognised as a CCH, all nations would be obliged to protect it under the auspices of cultural internationalism. A state of origin should not be isolated to preserve cultural property only located in its own territory, but the responsibility of preserving cultural property should be shared among other nations including those with more potential to preserve it from risks. If cultural property is not well preserved in its states of origin, other states should take actions to preserve it, as because the threats to cultural property are a CCH. For example, in Syria, cultural property at risks should be removed to other states in the interests of its protection and preservation as a CCH. This underpins cultural internationalism's view that cultural property is independent of one nation's property rights or jurisdiction and should be shared for mankind regardless of its place of origin—responsibility sharing to address a CCH and protect the CHM.

2.1.2.3 Trade Liberalisation

Per Merryman, the distribution of or access to cultural property is one of cultural internationalism's functions. The concept of trade liberalisation underpins this. The national cultural property laws of many countries strictly prohibit the trade or export of cultural property, impeding the distribution of or access to cultural property. This restriction provokes failure in benefit sharing of cultural property and is opposed by cultural internationalists. Should cultural property be freely traded, imported and exported like other types of goods? Why do we restrict the trade and export of cultural property?

Responding to these questions through the lens of trade liberalisation, cultural property should not be restricted for trade and export. Trade liberalisation is clearly reflected in the *General Agreement on Tariffs and Trade* (GATT) which has the objective of promoting international trade and eliminating trade barriers. The elimination of restrictions on export of goods is generally recognised under the GATT art XI.[46] Article XI imposes some limitations on measures contracting parties can take to restrict trade, prohibiting the use of import or export bans, quotas and licensing

[45] Maamoun Abdulkarim, 'Illicit Trafficking of Syrian Cultural Property' (2015) 20 *Uniform Law Review* 561, 562.
[46] See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 12 January 1948) art XI.

schemes.[47] If cultural property were viewed as any other types of goods, the restriction on trade and export of cultural property in World Trade Organization (WTO) member nations' law would no longer be necessary. However, it is argued that cultural property is distinct from other types of goods normally promoted for free flow by the GATT. Cultural property is mostly constituted with artistic, historic or archaeological value that expressly represents the identity of the nation or place in which the cultural property originated. If cultural property were freely traded and exported, it would deprive the exporting nations of cultural identity and pride. Thus, there is an inherent tension between free trade of cultural property and the arguments of cultural nationalists.

The General Exceptions listed under the GATT art XX (f)[48] are often cited to prevent the trade of cultural property where it possesses artistic value. We may find the same idea under the Treaty of Rome which generally obliges its member countries to prohibit quantitative restriction on export and any measures with equivalent effect, with the exception of national treasures of artistic, historical or archaeological value.[49] Under those legal measures, national treasures should not be traded and exported as they represent the cultural identity and pride of the nation in which they originated. This reflects cultural property having special character distinct from other types of goods. However, not all types of cultural property are prohibited from trade and export. The European Court of Justice interpreted the restriction on export of cultural property as only including cultural property deemed 'national treasure'.[50] This interpretation may be applied to promote the free flow of cultural property. For example, any cultural property, especially that in private collections, not declared as national treasure is regarded as the same as any other type of goods or commodity as far as trade and export is concerned under trade liberalisation.

Trade liberalisation does not only increase opportunities to access cultural property, but decreases any risks of cultural property loss. The free flow of cultural property would mainly satisfy the demand for said property through the elimination of trade and export restriction and establishment of a common market for cultural property. Legal and open international trade would reduce black market demand and provide a financial benefit to states of origin for the sale of their cultural property, something that does not occur when cultural property is looted or illegally exported.[51] Further, deprivation of cultural identity and pride does not occur, since traded and exported cultural

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[47] International Institute for Sustainable Development and United Nations Environment Program, *Environment and Trade: A Handbook* (UNEP, 2nd ed, 2005) 36.
[48] See *The GATT* art XX(f).
[49] See *Treaty Establishing the European Economic Community*, opened for signature 25 March 1954, 2989 UNTS 11 (entered into force 1 January 1958) arts 34 and 36.
[50] John E. Putnam II, 'Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community' (1992) *The University of Chicago Legal Forum* 457, 464-5.
[51] Madeline Chimento, 'Lost Artifacts of the Incas: Cultural Property and the Repatriation Movement' (2008) 54 *Loyola Law Review* 209, 218.

property would become a 'good ambassador', representing its nation of origin and inspiring people from other nations to appreciate their cultural identity and pride.[52] This thesis agrees that cultural internationalism is not isolated from trade liberalisation, as the latter underpins the former's argument that free flow of cultural property would lead to benefit sharing among nations as a whole.

2.2 Debate Between Cultural Nationalism and Cultural Internationalism: The *Elgin Marbles*

Cultural nationalism and cultural internationalism are in conflict with each other. Although they have the mutual objective of preserving cultural property, their means are different. This thesis recognises that cultural nationalists normally raise the nature of ownership to argue against cultural internationalists, while cultural internationalists mostly claim better preservation in the name of a CCH and the CHM. However, this thesis argues that one concept should not preclude the other, since each concept reflects positive and negative aspects about cultural property. Both concepts and the surrounding issues were debated extensively in *Elgin Marbles*. This section explores this case.

The Elgin Marbles or Parthenon Marbles are a collection of classical Greek sculptures of architectural value and importance, comprising part of the Parthenon on the Acropolis of Athens.[53] This Temple was presumably constructed nearly 2,500 years ago in dedication to the Greek god Athena. It was later converted into the Church of the Virgin Mary of Athenians, then a mosque and eventually became the ruins that exist today.[54] From 1801–1805, Lord Elgin, then British ambassador to the Ottoman Empire (then in control of the territory), began the removal of the Marbles to England, claiming he was issued a legal document by the Empire authorising the removal.[55] It has been criticised that Elgin interpreted the document to his own advantage and bribed local officials to violently remove the Marbles.[56] In 1816, due to financial problems, Elgin sold the Marbles to the British Government and they have since been exhibited at the British Museum in London.[57] The Greek Government has requested the Marbles be repatriated since 1980, but the British Museum has rejected the request.

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[52] Paul M. Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 306.
[53] The British Museum, 'What are the Elgin Marbles' (1 June 2017) <http://www.britishmuseum.org/explore/highlights/article_index/w/what_are_the_elgin_marbles.aspx>.
[54] The British Museum, above n 19.
[55] Marbles Reunited, 'The Acquisition' (1 June 2017) <http://www.marblesreunited.org.uk/the-parthenon-sculptures/the-acquisition/>.
[56] Ibid.
[57] United Nations Educational, Scientific and Cultural Organization, 'Promote the Return or the Restitution of Cultural Property' (Information Kit, UNESCO) 1-2.

2.2.1 The Nature of Ownership of Cultural Property

The position of Greece is very obviously related to cultural nationalism. The Greek Government has claimed the Marbles belong to Greece since they were created by Greek artists in Greece for the civic and religious purposes of the Acropolis of Athens.[58] Modern Greece, the current occupier of the territory from which the Marbles originate, is the legitimate owner of the Marbles.[59] Greece's claim is consistent with the definition of cultural property which denotes cultural property as an item representing the identity and importance of the place in which it was created and reflecting values arising from the individual or group of people living in said place. Greece's position is grounded on the principle that the Marbles provide a story about religions, belief and life in ancient Athens and fall within the definition of cultural property.[60] When the Marbles are regarded as a linkage between the Greek people and their history, there is no justification for why Greece should not be the rightful owner of the Marbles and entitled to retain them within its territory.

The key argument supporting Greece's position results from two values. Firstly, the possession of the Marbles would provide an economic benefit to Greece, particularly market value from tourism. They would also command a huge price if offered for sale.[61] This economic value should be vested in Greece, not the British Museum, the present state in which the Greek people, the creators of the Marbles, reside. Secondly, the Marbles represent the national identity and pride of Greece, so 'the presence of the Marbles in England, or in any place other than Greece, is an offense to Greeks and to the Greek nation'.[62] This thesis views Greece's position as espousing cultural nationalism due to it citing the relation between cultural property and cultural heritage to make its claim to the Marbles. The concept of cultural heritage is a broad concept including cultural property, so the Marbles also fall within cultural heritage and have the feature of public interest. Greece may claim public interest in the Marbles which should be vested in its citizens as the right-holders. If the Greek citizens are the right-holders of Marbles, the Greek Government as their representative should have the right to claim for the repatriation of the Marbles on their behalf.

Greece's position that it is the rightful owner of the Marbles due to cultural nationalism is complicated by the fact that they do not possess any de facto jurisdiction over the Marbles as they

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[58] Merryman, above n 13, 1911.
[59] Odendahl, above n 6.
[60] Melineh S. Ounanian, 'Of All the Things I've Lost, I Miss My Marbles the Most! An Alternative Approach to the Epic Problem of the Elgin Marbles' (2007) 9 *Cardozo* Journal of *Conflict Resolution* 109, 114-6.
[61] Ana Sljivic, 'Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism' (1997-1998) 31 *George Washington journal of International Law & Economics* 398, 404.
[62] Merryman, above n 13, 1915.

are located outside of its sovereign territory. Although the Marbles originated in and were located within Greece's territory, they are now located outside the territorial jurisdiction of Greece. The enforcement of state's jurisdiction over the Marbles is impossible without any specific obligation between Greece and England. Proponents of the British Museum cite cultural internationalism to dispute Greece's claim. They argue that the Marbles are not only cultural patrimony of Greece, but belong to everyone as CHM. per Merryman, cultural internationalism has three main components: preservation, integrity and distribution.[63] The British Museum has claimed that by retaining the Marbles, access is open to everyone.[64] Also, repatriation of the Marbles to Greece would compromise future study and appreciation of them due to Greece's poor economy and humid weather compromising preservation of the Marbles.[65] This claim is consistent with cultural internationalism, particular the preservation of cultural property as a CCH, cultural property as the CHM and the trade liberalisation perspective on the distribution of and access to goods.

Scholars have raised the counterargument that Greece's argument lacks sufficient legal basis and that their desire to repatriate the Marbles is based more on emotional and economic grounds.[66] However, this a flawed argument. Criticism that Greece does not have sufficient legal basis to claim ownership of the Marbles is not based on any interpretation of domestic or international legal instruments and the notion that Greece only stands to gain financially from repatriation of the Marbles is unequitable. Under current arrangements, the British Museum and British Government stand to financially gain from the preservation of the Marbles in the British Museum. The retention of the Marbles at the British Museum results in England monopolising the benefit arising from tourism despite the fact that the Marbles were originally produced in Greece. Therefore, this thesis disagrees with the claims that Greece's position lacks sufficient legal basis and is dominated by emotional and financial motives.

This thesis also refutes that only cultural nationalism or cultural internationalism should be applied in determining legal ownership of cultural property. This thesis does not agree wholly with either concept, because they are not isolated from one another. For example, the British Museum cannot cite the CHM to retain the Marbles, as Greece may cite the same to request their repatriation. This

[63] Merryman, above n 3, 847.
[64] Roger W. Mastalir, 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law' (1992) 16 *Fordham International Law Journal* 1033, 1060.
[65] Paige S. Goodwin, 'Mapping the Limits of Repatriable Cultural Property: A Case Study of Stolen Flemish Art in French Museums' (2008) 157 *University of Pennsylvania Law Review* 673, 688.
[66] Mastalir, above n 64.

thesis argues that cultural internationalism is not irreconcilable with cultural nationalism, because cultural internationalism is simply a broader perspective that encompasses cultural nationalism.[67]

The interaction between cultural nationalism and cultural internationalism has been implicitly embedded in law. For example, the 1954 Hague Convention was adopted with a view to cultural internationalism, but its preamble provides that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.[68] This legal text reflects the interaction, with 'its' and 'each people' implying the cultural property originating from a specific group of people and belonging to them.[69] Thus, whether arguing for cultural nationalism or cultural internationalism in relation to the Elgin Marbles, the same conclusions should be reached.

2.2.2 The Identity of Cultural Property

In relation to cultural nationalism, it is argued by the British Museum that repatriation of the Marbles will establish a dangerous precedent for other universal museums that changes contemporary standards of how museums function.[70] To accept this argument would result in many states of origin being deprived of their cultural identity. This argument seems to raise the British Museum's (and other universal museums') interests as priority, but this must be weighed against the deprivation of cultural expression from the Greek community.

This thesis accepts that the identity of cultural property is subjective. Cultural internationalists insist that the physical location of the Marbles should not be a consideration as the British Museum has not attempted to appropriate the Marbles or disguise or misrepresent their place of origin.[71] Indeed, the Marbles represent their identity themselves, because they naturally tell who they are and where they belong or come from to all visitors, and the British Museum also details their story without falsification. So, goes the argument, the removal of the Marbles to England has not had any negative effect on the identity of Greece and the Greek people.[72] The British Museum has attempted to openly present the Marbles to all visitors, who leave with admiration and respect for

[67] David N Chang, 'Stealing Beauty: Stopping the Madness of Illicit Art Trafficking' (2006) 28 *Houston Journal of International Law* 829, 847.
[68] *The 1954 Hague Convention* preamble.
[69] Chang, above n 67.
[70] Michael J. Reppas II, 'The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the "Elgin Marbles" Must Be Returned to Greece' (1999) 9 *Fordham Intellectual Property, Media and Entertainment Law Journal* 911, 979; Merryman, above n 13, 1895.
[71] Ibid 1913.
[72] Sljivic, above n 61, 402.

Greek culture and achievement,[73] promoting Greek identity. Thus, although the Marbles are not located in Greece, the national identity of Greece has not been degraded.

On the question of whether the physical location of the Marbles is necessary for expressing the cultural identity of Greece, we should consider the relation between cultural property and its contexts. It is argued that cultural property can represent its identity when it is preserved with its contexts. The contexts should refer to its location, history and the circumstances in which they were made. When the Marbles were separated or isolated from their contexts, it is difficult to illustrate how they are important and relevant to Greek civilisation, and this thesis does not consider the exposition of the Marbles' story provided at the British Museum sufficient to showcase the identity of Greece. Due to the passage of time, it is possible that the identity represented by the Marbles may be misconceived. This claim is maintained by cultural nationalists who assert that, with the long period of possession, the Marbles may become a British patrimony instead of Greek, especially since they have been central to the British Museum's collection for almost two centuries and promoted as one of its crown jewels.[74] Although the Marbles are always proclaimed to have originated in Greece, people around the world know that they are not located in Greece. If they wish to see the Marbles, they visit London. It is possible that the Marbles could become a symbol of British pride, representing the former glory and power of the Britain Empire.

2.2.3 The Preservation and Integrity of Cultural Property

As claimed by this thesis, cultural nationalism and cultural internationalism have a mutual objective, the preservation of cultural property, but different ways of achieving this. Per Merryman, preservation is a fundamental element of any cultural property law and policy, as cultural property as a whole is undermined if they are lost or destroyed.[75] Thus, it is hardly surprising that preservation is an important component of both cultural nationalism and cultural internationalism. The conflict is in their different ways of ensuring preservation. Cultural internationalists argue that keeping cultural property within its place of origin may not guarantee its preservation.[76] Arguing in support of this, Fechner stated that the responsibility of preservation of cultural property should not be the exclusive burden of states of origin, as these states may not have the capacity to fulfil this responsibility.[77]

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[73] Merryman, above n 13, 1913.
[74] Ounanian, above n 60, 125.
[75] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 355.
[76] Nicole Klug, 'Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property' (2010) 42 *Case Western Reserve Journal of International Law* 711, 719.
[77] Frank G. Fechner, 'Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 389.

In relation to the Elgin Marbles, cultural internationalists recognise that the Marbles belong to common human culture, so the destruction of the Marbles will deprive people of all cultures.[78] The Marbles have been well maintained and safeguarded in the British Museum for almost two centuries, even though there is no reason to suppose that the Marbles would be less well preserved in Greece.[79] The British Museum claims that the sculptures remaining at the Parthenon have been severely eroded by exposure to a variety of hazards, particularly smog, while the Marbles have been much better cared for in London,[80] thus, the repatriation of the Marbles to Athens would not fulfil the objective of physical preservation of cultural property. This is despite the fact that if the Marbles were moved to Athens they would be placed in a museum, rather than reinstalled in the Parthenon.[81] The argument of superior preservation of the Marbles at the British Museum is arbitrary, because there has been no conclusive evidence to suggest that the Marbles would have been eroded or destroyed had they remained in the Parthenon.[82] This thesis also posits that Greece may claim the same against the British Museum, because it was recently discovered that the Marbles were irreparably damaged by the British Museum's cleaning process.[83] When the Marbles were removed from Greece, the British Museum deemed that the Marbles and other statues from Greece were white, despite the fact that many Greek statues were various colours and the Marbles themselves a light brown.[84] According to the British Museum, due to the public's dismay with the brown colour, the museum scrubbed the Marbles with coarse chemicals and harsh tools, adversely removing layers of the Marbles and their identifying features and detail.[85] This evidence clearly favours Greece to dismiss the argument of better preservation by the British Museum.[86]

Although cultural internationalists claim that better preservation practices can be outside states of origin, this thesis needs to clarify what the most important objective of cultural property law is. This thesis agrees with Merryman that preservation is the most important objective for cultural property law, because we cannot study and appreciate cultural property if it is lost or destroyed. If the British Museum can prove that it is able to provide the best preservation of the Marbles, then it should undoubtedly retain them. But the British Museum has not proven this. By the same logic, if Greece can prove their proficiency in preserving the Marbles, the Marbles should be repatriated. According to this argument, UNESCO may set up a guidance or standard for preserving the

[78] Merryman, above n 13, 1917.
[79] Ibid.
[80] Ibid.
[81] Ibid 1917.
[82] Chimento, above n 51, 221.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.

Marbles. If any country would like to retain the Marbles, it would be compulsory to prove how it will preserve the Marbles in accordance with the guidance or standard of preservation.

In terms of integrity of cultural property, the integrity is regarded for restoration of parts of 'dismembered masterpieces'.[87] Moreover, it becomes one of cultural internationalism's features. This thesis views the Marbles exhibited in London as parts of a dismembered masterpiece. If we try to imagine that the intact Parthenon was an integrated work of art, consisting of all parts, together more beautiful and meaningful than the dismembered pieces, it is reasonable to argue that the Marbles and other Parthenon sculptures should be reinstalled in the temple.[88] This argument for the integrity of the Parthenon sculptures seemingly favours Greece's position for repatriation of the Marbles. The Greek Government has attempted to reunite all sculptures from the Parthenon by building the Acropolis Museum project, completed in 2007.[89] This modern museum includes an as yet empty Parthenon Hall for the Marbles.[90]

Cultural internationalists argue that the Parthenon sculptures at the Acropolis Museum are at risk due to the various dangers arising from the atmospheric conditions and smog of Athens, because those sculptures cannot be reinstalled without exposing them.[91] This argument asserts the precedence of preservation over integrity as grounds to retain the Marbles in the British Museum. This thesis does not deny that the interests of preservation and integrity are in conflict, but the rationale that preservation should trump integrity leads to the conclusion that any work of art is better dismembered than seriously damaged or destroyed.[92] Additionally, cultural internationalists argue that it would not be possible to reinstall the Marbles at the Parthenon which is a ruin[93] (ie, integrity is impossible to achieve) and Greece would have (and plans) to exhibit them at the Acropolis Museum instead.[94] This thesis accepts that the argument of integrity by Greece is problematic and not a strong enough basis for repatriation of the Marbles.

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[87] Merryman, above n 13, 1918.
[88] Ibid.
[89] See Acropolis Museum, *Museum History* (3 June 2017) <http://www.theacropolismuseum.gr/en/content/museum-history>.
[90] Ounanian, above n 60, 127.
[91] Merryman, above n 13, 1919.
[92] Ibid.
[93] The British Museum, 'The Parthenon Sculptures: The Position of the Trustees of the British Museum' (15 September 2016) <http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/trustees_statement.aspx>.
[94] Merryman, above n 13, 1919.

2.2.4 The Distribution of or Access to Cultural Property

The distribution of or access to cultural property is always part of cultural internationalism. This feature is also relevant to the status of cultural property as CHM. If we perceive cultural property as a legacy of mankind, all people should be encouraged to access it. International trade is a popular way to distribute cultural property across the world and cultural internationalists prefer to establish a licit market in cultural property to improve distribution of and access to cultural property as common human culture.[95] This thesis accepts that the free, legal trade of cultural property can be a way to help people access cultural property and may result positive outcomes for states of origin in the form of financial windfall and positive representation of their culture.[96] This argument is also related to cultural identity. When people visit the British Museum and appreciate the Elgin Marbles, it is natural that they admire Greek civilisation.

Cultural internationalists express concern that if Greece should succeed in having the Marbles (and perhaps all of the great works of classical Athens) repatriated, the rest of the world would be culturally impoverished,[97] because all Greek works would be located in Greece, permitting convenient to access only to Greek people. They argue that the retention of the Marbles by the British Museum (and Greek works by other universal museums) is the best way to facilitate access to the works. This claim is easily refuted for the simple reason that while some people may find it easy to travel to the British Museum, this remains difficult or impossible for others.[98] This thesis does not agree, by this logic, any museum whose location allows for mass visitation has the right to retain the Marbles—or any other cultural property. As Chimento stated, the British Museum's claim is a self-serving statement that appeals to people's emotions.[99] The British Museum's claim to be the only most appropriate location for the Marbles on the basis of permitting access to the works is arrogant and, with advent of globalisation, untrue.[100]

Conciliating cultural internationalism with cultural nationalism leads to the conclusion that the Marbles should be distributed to everyone in accordance with common human culture while being promoted as Greek in origin and part of Greek identity and civilisation. This thesis accepts that the concepts of CHM and CCH must be taken into account in the distribution of the Marbles. This thesis needs to design possible models to establish collaboration between cultural nationalism and

[95] Cornelius Banta, Jr., 'Finding Common Ground in the Antiquities Trade Debate to Promote Pragmatic Reforms' (2016) 53 *Houston Law Review* 1113, 1119.
[96] Bator, above n 52.
[97] Merryman, above n 13, 1920-1.
[98] Chimento above n 51, 221.
[99] Ibid 221-2.
[100] Ibid 222.

cultural internationalism. The ideal models would be designed to fulfil the features of both cultural property concepts.

In the first model, the Marbles should be equally shared between Greece and England via a bilateral agreement that allows each country to retain the Marbles for six months a year. Each must preserve the Marbles them in accordance with the guidance or standard of preservation specified in the bilateral agreement. Each country would financially benefit from the Marbles for the duration they are exhibited. However, this thesis anticipates that this model would likely raise conflict about the repeated removal and transport of the Marbles, because is costly and can result in damage to the Marbles. In the second model, the Marbles are preserved and collected in the British Museum, assessed as the most appropriate location on the basis of access, and the financial benefit from their exhibition is equally shared with Greece as the state of origin. The Marbles are openly proclaimed as Greek in origin and part of Greek identity and civilisation. Greece also has the right to participate in preserving and repairing the Marbles in accordance with the collaboration scheme established by a bilateral agreement.

2.3 Evolution of Cultural Nationalism and Cultural Internationalism

According to Merryman, cultural nationalism and cultural internationalism have become the conceptual basis for modern cultural property law. They are not fixed concepts, but have evolved along with human history, philosophical ideas and state practices. This section details their evolution.

2.3.1 Evolution and Impact of Cultural Nationalism

Cultural nationalism was initially promoted during the French Revolution after the need to preserve cultural property was established[101] on the basis that cultural property is the centre of political life in the country. Gregoire claimed that cultural nationalism is based on political values.[102] Certainly, the origin of nationalism is not isolated from the duty of a nation, because a nation is the owner of the territory in which cultural property is located. During the revolutionary period, only a nation or state had the potential and capability to preserve cultural property. The preservation of cultural property became the responsibility of modern states, as cultural property is the most physical symbol of national spirit and refers to how people of a nation have been civilised. Cultural property played an important role as national identity was formed through works

[101] John Henry Merryman, 'The Retention of Cultural Property' (1988) 21 *U.C. Davis Law Review* 477, 490.
[102] Joseph L. Sax, 'Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea' (1989) 88 *Michigan Law Review* 1142, 1156.

such as art and literature while national institutions were being built.[103] Cultural objects that embodied the best of the people were 'the quintessence of France, its true heritage and patrimony'[104] and the destruction or loss of these (including the sale of them abroad) imperilled the most important symbol of the national identity.[105] Under the new French Republic, the legal status of cultural property was raised to national patrimony.

Cultural nationalism is closely linked with cultural identity which represents the self-determination of members in a society or nation and allows them to recognise who they are and where they belong. This argument is also advanced by nationalists. They argue that antiques or objects of art should be regarded as 'property of their respective nation'.[106] During the French Revolution, the report on revolutionary vandalism by Gregoire stated that French property of archaeological, architectural and artistic value should be respected as the nation's property and not be subject to private ownership.[107] The idea of national patrimony was accepted as a source of law during the French Revolution. The effort of the Commission on Monuments (established in 1790) helped the status of cultural property, as national patrimony was basis for the inventory of confiscated French cultural property.[108] After the Paris uprising in 1792, at the request of the Commission, cultural property beneficial to France was protected from destruction by respective decrees.[109] This request did not only save many important works of art, but set a precedent of state responsibility for preserving cultural property as national heritage.[110]

This thesis agrees that an effect of the French Revolution was the creation of cultural nationalism and the introduction of the duty of the state for preserving cultural property. In eighteenth century Europe, with the spread of the Enlightenment, many states accepted responsibilities for cultural property within their own territory, because cultural property embodies a liberal republican idea.[111] For instance, the 1789 French *Declaration of the Rights of the Man and of the Citizen* art 3 recognised the principle of sovereignty residing in the nation and that there is no person who may exercise any authority that does not directly proceed from the nation.[112] Its text implies the primacy of nation which is entitled to exercise and control cultural property within its national territory. The sovereign power is engaged in cultural nationalism which allows a state in which cultural

[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Klug, above n 76, 717.
[107] Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2006) 15.
[108] Francoise Choay, *The Invention of the Historic Monument* (Cambridge University Press, 2001) 195.
[109] O'Keefe, above n 107, 14.
[110] Sax, above n 102, 1152.
[111] Ibid.
[112] See Yale Law School, *The Avalon Project Documents in Law, History, and Diplomacy: Declaration of the Rights of Man 1789* (28 May 2017) <http://avalon.law.yale.edu/18th_century/rightsof.asp>.

property originated to preserve it as it belongs within such a state of origin's boundaries, justifying cultural retention schemes.[113]

Evolutionary conceptions of cultural nationalism first emerged in Europe with the notion of modern state and it was used as a political reason to instil nationalism more generally. Humanism was directly linked with cultural nationalism to promote the belief that cultural property embodies humans' quality. This belief encouraged the idea that cultural property was born within a nation, so it should belong to such a nation because it contains the identity and value of people of that nation. As a consequence of the French Revolution, the state was recognised as a primary actor exercising the exclusive right of the nations will. Thus, the concept of cultural nationalism was stabilised and expanded through national policy and law on cultural retention and repatriation schemes. The concept of cultural nationalism was included in the 1970 UNESCO Convention, as an effort by states of origin to codify the need to relieve the negative effects of illicit trafficking of cultural property and the need to seek means of protecting and returning cultural property to formerly colonised nations.[114]

Although cultural nationalism has impacted on international law design, this thesis argues that the decision to apply only cultural nationalism in the design of the 1970 UNESCO Convention was ill-conceived, since this does not benefit market states (thus, they were not inclined to ratify the Convention) and does not facilitate cooperation between states of origin and market states. Addressing a problem of illicit trafficking is beyond an individual state. It requires cooperation between states of origin and market states. The 1970 UNESCO Convention provided a legal framework that heavily favoured states of origin in claiming repatriation of illegally removed cultural property. This simultaneously discouraged many market states, who support free trade of cultural property, from ratifying the Convention.

The impact of favouring cultural nationalism was evident in the drafting process, resulting in conflict between states of origin and market states. The twelfth session of the UNESCO General Conference in 1962 adopted its Resolution relating to illicit trafficking of cultural property which insisted on the necessity of adopting a single international instrument for prohibiting and preventing illicit trafficking of cultural property. Two years later, the Resolution became substantial at the thirteenth session of the UNESCO General Conference in 1964.[115] The draft was not developed by market states, but by the Mexican and Peruvian proposals for international

[113] Sljivic, above n 61, 400.
[114] Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 3rd ed, 2007) 222.
[115] John B. Gordon, 'The UNESCO Convention on the Illicit Movement of Art Treasures' (1971) 12 *Harvard International Law Journal* 537, 539.

cooperation to protect cultural heritage submitted at the eleventh session of the UNESCO General Conference in 1960.[116] The primary impetus for fighting illicit trafficking came from states of origin and had a decidedly cultural nationalist slant.

After the Recommendation was adopted in 1964, cultural nationalism influenced its general principles. This was evidenced by the Recommendation not only requiring UNESCO member states to take appropriate steps to prevent illicit transfer of ownership of cultural property, but to impose law to effect that any import, export or transfer of ownership of cultural property be regarded as illicit trafficking.[117] This Recommendation became a basis of the 1970 UNESCO Convention. The drafting process was very complicated, because of the diverging interests of states of origin and market states. Market states opposed restrictive controls on the trading of cultural property, while states of origin preferred stronger and stricter measures to control illicit trafficking.[118]

The Convention obliges state parties to inhibit illicit imports, exports and transfer of ownership of cultural property and recognise the associated impoverishment of cultural heritage of countries of origin.[119] The Convention's language leans towards 'euphemism',[120] avoiding blunt discussion of important topics, and its provisions concentrate on the responsibility of state parties to develop their own protections to achieve the objectives of the Convention.[121] State parties of origin are favoured in retaining their cultural property and market states are at clear disadvantage. For example, art 3 states 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 illicit'.[122] Market states argued that this implies that state parties of origin can freely design their own law and policy prohibiting the export of all cultural objects from their territory, making it impossible for market states to purchase or import these.[123] This is just one example cultural nationalism pervading the Convention.

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[116] James A. R. Nafziger, 'The 1970 UNESCO Convention: Insights, Circumspections, and Outlooks' (Paper presented at Mexican Seminar: The Globalization of the Protection of Cultural Heritage The 1970 Convention: New Challenges, organized by UNESCO and UNIDROIT, Mexico, March 21-23, 2013) 211.
[117] *UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property*, UNESCO General Conference, 13rd sess, UNESCO Doc CPG.65/VI.13 F (19 November 1964) S II.5-7.
[118] United Nations Educational, Scientific and Cultural Organization, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector: Part II-1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Final Report)* (UNESCO: Internal Oversight Service Evaluation Section, April 2014) 5.
[119] *The 1970 UNESCO Convention* art 2.
[120] Merryman, above n 3, 844.
[121] *The 1970 UNESCO Convention* preamble.
[122] *The 1970 UNESCO Convention* art 3.
[123] Merryman, above n 3, 845.

In the end, there was little compromise—few market states ratified the Convention—and the Convention did little to promote the cooperation required to counter illegal export of cultural products.

2.3.2 Evolution and Impact of Cultural Internationalism

Cultural internationalism also evolved from state practices. The concept initially appeared in the Greek and Roman civilisation as philosophers' opinion opposing the notion that the destruction and pillage of enemy property was the right of the victor. The Greek and Roman civilisations seized cultural property from their places of origin[124] as trophies, with the Romans displaying them in triumphal marches celebrating Roman glory and military strength.[125] This practice was widely accepted, but was opposed by philosophers such as Polybius and Xenophon of Athens. The prominent Greek historian Polybius condemned Roman warfare, stating, 'I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country'.[126] No legal rule promoting the status of cultural property was developed during his lifetime.[127]

While cultural objects were pillaged by victors as symbols of conquest or military power, we should consider what happened to such cultural objects after they were pillaged. Most were destroyed, but some were collected to embellish the Roman Empire. This is an initiative of what we now dub cultural internationalism. The pillage of cultural property was an effective way to respect and protect cultural property as common human culture. This argument is reinforced by Greek practice under Alexander the Great from 350–326 BC. After the Persian Empire was defeated, Alexander desired to preserve cultural treasures seized from the Persians to mark his great conquest and enrich his Hellenistic empire.[128] Although the preservation of pillaged cultural objects is recognised as a corollary of military celebration, those cultural objects may have been better preserved under the auspices of the Roman or Hellenistic empires—while not their place of origin, those objects no longer risked destruction in war.

From material sources to formal sources, cultural internationalism has been recognised and formulated into legal form. The preservation of cultural property in wars was raised in conjunction with the idea of military necessity, later extended by Jean-Jacques Rousseau. Rousseau reasoned

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[124] John Henry Merryman, 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11, 13.
[125] Ibid.
[126] Ibid.
[127] Anthi Helleni Poulos, '1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis' (2000) 28 *International Journal of Legal Information* 1, 5-6.
[128] Joshua E. Kastenberg, 'The Legal Regime for Protecting Cultural Property During Armed Conflict' (1997) 42 *The Air Force Law Review* 277, 281-2.

that 'war, then, is not a relation between men, but between States; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers, not as members of their country, but only as its defenders'.[129] Based on this, he presented a concept of distinction between public property for military necessity and private property. Public property of the enemy used for the conduct of war should be ruined and seized, while other types of property, including private property or public property not used for military service such as churches, schools, libraries or private collections, should be protected.[130] This concept was influential in the design of later laws of war such as the 1863 Lieber Code, the 1899 and 1907 Hague Convention on the Laws of War and the 1954 Hague Convention. These legal instruments contain protective measures for cultural property whose destruction is not necessary for the prosecution of war.

A major development in cultural internationalism arose from reactions against the pillage of cultural property under the campaigns of Napoleon Bonaparte.[131] Napoleon's soldiers pillaged objects of art from defeated enemies to embellish the Musée Napoléon, later known as the Musée de Louvre.[132] This museum was built to celebrate Napoleon's conquests, like a model of the Roman Empire.[133] The plunder of works of art from the Italians was protested by French intellectuals. In *Quatremère de Quincy*, addressed to one of Napoleon's generals,[134] they expressed:

> The arts and sciences belong to all [the world], and are no longer the exclusive property of one nation … It is as a member of this universal republic of the arts and sciences, and not as an inhabitant of this or that nation, that I shall discuss the concern of all parts in the preservation of the whole.[135]

This statement clearly asserts the importance of cultural property which does not belong to one nation, but should be preserved for the world. These ideas had no evident effect on the French force in Italy, but were very influential in an English judicial decision in 1813.[136] During the War of 1812, paintings and prints carried by an US merchant vessel from Italy to the Pennsylvania Academy of Fine Arts, Philadelphia were seized by a British ship and taken to the British Court

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[129] Jean-Jacques Rousseau, *The Social Contract: Book I* (Harmondsworth: Penguin Book, 1968) 56. See also Grotius, Hugo, *The Law of War and Peace: Book III* (F.W. Kelse trans, Clarendon Press, 1925) Chapter V, Section I [trans of: *De Jure Belli ac Pacis Libri Treos*]
[130] Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmount Publishing Company, 1996) 5.
[131] Merryman, above n 124, 14.
[132] Stanislaw E. Nahlik, 'International Law and the Protection of Cultural Property in Armed Conflicts' (1976) 27 *Hastings Law Journal* 1069, 1071.
[133] Poulos, above n 127, 12.
[134] Merryman, above n 124, 15.
[135] John Henry Merryman, 'The Free International Movement of Cultural Property' (1998) 31 *New York University Journal of International Law and Politics* 1, 10.
[136] Merryman, above n 124, 16.

of Vice-Admiralty for judgment as prize. The academy pleaded that the Court release those cultural objects by claiming that even war does not leave science and art unprotected.[137] In his judgment, Dr Croke restated the legal status of cultural property:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.[138]

This thesis argues that cultural internationalism evolved alongside the legal status of cultural property. By the mid-eighteenth century, cultural property was no longer viewed as a trophy of war. Its status had been broadened to a common property of mankind, helping to restrain belligerents from seizing such objects. The protection of objects of art and science was recognised by cosmopolitan Europeans in the latter eighteenth century.[139] After the Second World War, cultural internationalism was solidified in the 1954 Hague Convention, adopted to respect and protect movable and immovable cultural property in the event of armed conflict. The placement of cultural internationalism in international law seems reasonable to convince a nation to protect and respect cultural property—including that physically possessed by the enemy—in times of war, for history indicated that there was little to convince countries of this necessity except by appeal to a communal interest in, and mutual respect for, other nations' patrimony.[140] This notion would guarantee the preservation of cultural property wherever located.

That cultural internationalism evolved out of armed conflict does not mean it is only applicable in wartime. This concept is widely applied in a variety of regimes such as cultural heritage and environmental regimes. The *UNESCO Recommendation Concerning the International Exchange of Cultural Property* encourages the free movement of cultural property as a powerful means of promoting mutual understanding and appreciation among nations.[141] The request for international cooperation among state parties to promote a systematic policy of exchanges would enrich all parties and lead to a better use of the international community's cultural heritage.[142] The World Heritage Convention also implies cultural internationalism by restating that 'the loss of any single

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[137] Ibid.
[138] John Henry Merryman, 'Note on the Marquis de Somerueles' (1996) 5 *International Journal of Cultural Property* 319, 321.
[139] Merryman, above n 124, 16.
[140] Chang, above n 67, 848.
[141] *UNESCO Recommendation concerning the International Exchange of Cultural Property*, UNESCO General Conference, 19th sess, UNESCO Doc 19C/RES.4.126 (26 November 1976) preamble.
[142] Ibid.

cultural and natural heritage site as a loss of the heritage of all the nations of the world'.[143] This confirms the importance of cultural property protection, regardless of its origins.

2.4 Conclusion

Cultural nationalism and cultural internationalism are two ways of thinking about cultural property. Both concepts evolved through human history, practice of states and scholars' opinions, which all served as material sources of law and were later crystallised as legal obligations under international and national law. States of origin generally raise cultural nationalism to argue for maintaining cultural property within their territorial jurisdiction based on state's sovereignty, cultural heritage and identity concepts. Market states generally promote cultural internationalism to justify possession of foreign cultural property as common human culture. The concepts appear opposed, but are inseparable. They share a common objective, preservation of cultural property, but differ in their means—preservation of cultural property within its place of origin under cultural nationalism versus preservation of cultural property for humankind in the location best suited to facilitating preservation and access under cultural internationalism. This thesis has argued for the need to balance the interests of states of origin and market states—which entails balancing the features of cultural nationalism and cultural internationalism—and this is discussed and developed in later chapters.

[143] Ved P. Nanda and George Pring, *International Environmental Law & Policy for the 21st Century* (Transnational Publishers, 2003) 34.

Chapter 3:
Historical Development of the International Legal Regime Concerning the Protection and Repatriation of Cultural Property*

> While in war art has belonged to the victors, in peace it has belonged to the rich, both individuals and nations.[1]

Cultural nationalism and internationalism has never been isolated from the legal developments on cultural property. The influence of these concepts can be elicited from legal texts, state practices and particular circumstances past and present. This chapter examines the historical development of the international legal regime governing the protection and repatriation of cultural property. This examination considers whether, why and how there has been a significant paradigm shift between cultural nationalism and internationalism reflected in international instruments.

The legal rules for the protection and repatriation of cultural property have been systematically shaped since the mid-twentieth century as a consequence of the Second World War.[2] This chapter uses the Second World War as a reference point in evaluating the historical development of international cultural property law. This chapter demonstrates that the Second World War marked a turning point, as it decisively shifted international law from a 'to the victor goes the spoils' perspective to an approach that aimed to preserve cultural objects.

3.1 Pre–Second World War

As touched on in the previous chapter, immediately prior to the Second World War, cultural property was regarded as special property to be protected from damage during times of conflict, regardless of its owner or where it was located. It was never isolated from the event of armed conflict and its importance was the first step to establish legal rules for its protection and repatriation. Cultural property was initially recognised under the pressure of war.[3] Although cultural property was recognised as a subject matter requiring regulation in the event of armed

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* The content of this chapter was presented as 'Legal Development of the Protection of Cultural Property: From the Event of Armed Conflict to the Illicit Trafficking' (Conference Paper, Asian Conference on Cultural Studies 2016: Cultural Struggle and Praxis Negotiating Power and the Everyday, Kobe, Japan, 2–5 June 2016).

[1] Michael W Taylor, 'Evolving International Law for the Protection of Art' (1977) 2 *North Carolina Journal of International Law and Commercial Regulation* 131, 134.

[2] David Keane, 'The Failure to Protect Cultural Property in Wartime' (2004) 14 *DePaul-LCA Journal of Art & Entertainment Law* 1, 7-12.

[3] Ana Filipa Vrdoljak, 'Intentional Destruction of Cultural Heritage and International Law' in K. Koufa (ed), *Multiculturalism and International Law: Thesaurus Acroasium XXXV Volume* (Thessaloniki Sakkoulas Publication, 2007) 380, 382.

conflict, prior to the eighteenth century it was primary viewed as a trophy of war (see Section 3.1.1).

Wars resulted in loss of life, devastation of areas and large-scale destruction of cultural property. Destruction and pillage by belligerents damaged cultural objects located in their place of origin. Cultural property was not positively recognised as victors believed that the destruction and pillage of the property of defeated enemies would lead to the glory and was legitimate conduct in accordance with 'the right to booty' or 'to the victor goes the spoils'.[4] Neither cultural nationalism nor cultural internationalism were constituted as a theoretical basis for cultural property regulation until many centuries later.

3.1.1 'Right to Booty' or 'to the Victor Goes the Spoils'

The first view of cultural property was linked with the concepts of 'the right to booty' or 'to the victor goes the spoils' widely recognised in the Greek and Roman civilisations. The Greek or Roman victor in war was legitimate in destroying and possessing everything, such as a persons, slaves and property, in a conquered region or town.[5] This thesis argues that, while this seems prima facie negative, there were positive effects on cultural property. Property pillaged by a victorious army was considered valuable and precious treasure representing the pride and identity of defeated enemies. Although the right legally pillage the cultural property of defeated enemies saw cultural objects removed from their place of origin, this arguably aided in its preservation.

Many cultural objects from Greece, Egypt and Asia Minor were displayed in Roman triumphal parades.[6] Because cultural property pillaged from defeated regions was recognised as a trophy, it was to be safely maintained for civilised appreciation. This rationale was later restated by Napoleon as his soldiers plundered many objects of art from defeated enemies to embellish the Musée Napoléon (the present-day Musée de Louvre).[7] Thus, this thesis argues that the concept of 'right to booty' should be considered as having both negative and positive aspects that reflect elements of modern-day cultural internationalism, chiefly, the preservation of cultural property regardless of its place of origin, even if this means moving the cultural property out of its place of origin.

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[4] Andrea Cunning, 'The Safeguarding of Cultural Property in Time of War and Peace' (2003) 11 *Tulsa Journal of Comparative and International Law* 211, 212.
[5] Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmount Publishing Company, 1996) 3.
[6] John Henry Merryman, 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11, 13.
[7] Stanislaw E. Nahlik, 'International Law and the Protection of Cultural Property in Armed Conflicts' (1976) 27 *Hastings Law Journal* 1069, 1071.

However, this belies different objectives. The victors of war preserved cultural property pillaged from other regions as a symbol of military strength and glory. Conversely, modern approaches to cultural internationalism preserve cultural property for its cultural value and importance to common human culture. The 'right to booty' did not provide any function of benefit sharing of cultural property.

The 'right to booty' was claimed in the Middle Ages. The destruction and pillage of cultural property in a war remained acceptable, particularly in the Crusades. This practice was changed due to popular philosophical writings of the time. Grotius's argued that cultural objects, such as sacred and artistic works which confer no military advantage, should not be destroyed.[8] The notion that cultural property should be isolated from military purposes played a key role in dismantling the 'the right to booty'.

3.1.2 Impact of Laws of War on Cultural Property's Status

Although no any legal rule was created to preserve cultural objects during the early period, it seems that an initiative to preserve cultural property was informally built up by philosophers' opinions. Between the eighteenth and twentieth century, philosophical writing such as the Lieber Code, adopted in 1863 during American Civil War, only allowed movable public property to be seized and appropriated by a victorious army.[9] The Lieber Code art 34 stated that churches, hospitals, foundations for the promotion of knowledge (public schools, universities, academies of learning, museums of the fine arts or of a scientific character) should not be considered public property.[10] This property related to cultural and artistic importance which is not normally used in the conduct of war. The isolation of cultural property from other property helped establish its special status.

Rousseau argued that the protection of property not used for the conduct of war is reasonable, because any public property of the enemy especially that used for the conduct of war should be ruined or seized to weaken the enemy. The destruction of other types of property, whether private or public, not used for military service does not weaken the enemy, but does damage the collective cultural wealth of mankind. Thus, it should be granted protection.[11] This idea was incorporated in the Lieber Code which required parties to protect classical works of art, libraries, scientific collections or precious instruments from avoidable damage,[12] with the provision being very clear that property of artistic and historical importance is isolated from other general property. Thus, the

[8] Merryman, above n 6, 13.
[9] See *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber and promulgated as General Order No.100 by President Lincoln on 24 April 1863, art 31.
[10] Ibid art 34.
[11] Toman, above n 5, 5.
[12] See Lieber Code art 35.

special status of cultural property was raised as the justification for preventing its avoidable destruction, seizure or removal under the Lieber Code. Although the Lieber Code did not forbid warfare (the main cause of pillage and destruction of cultural property), its provisions played a key role in promoting the artistic and historical importance of cultural property during wartime and placed an obligation on belligerents to respect this.

Although the Lieber Code was only applied in the American Civil War, its provisions were adopted as a basis for creating legal rules under the Declaration of Brussels and the 1899 and 1907 Hague Conventions. Consequently, the special status of cultural property (regardless of place of origin) was widely accepted and the orthodox view ('the right to booty') was restricted in the event of an armed conflict. By an international conference held in Brussels on July 1874, this approach was reinforced through the 1874 Brussels Declaration.[13] Although the Declaration was a non-legally binding instrument, it played an important role in creating a legal foundation for the protection of cultural property in wartime.

Article 8 of the Declaration provides that 'the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences … shall be treated as private property'.[14] Article 13(g) provides that 'any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war … shall be forbidden'.[15] Thus, the Declaration protected private property not used for the conduct of war from seizure or destruction, similar to the Lieber Code. Article 17 expanded the scope of protected cultural property to include movable and immovable property. The Declaration specified that all necessary steps were to be taken to spare damage to buildings dedicated to art or science not used for military purposes.[16]

The 1899 and 1907 Hague Conventions, both legally binding, made the special status of cultural property clear, prohibiting state parties 'to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'.[17] Moreover, they prohibit 'any attack or bombardment of towns, villages, habitations or buildings which are not defended'.[18] Many buildings such as a museums, art galleries and historical places become a shelter for cultural items or works of art in wartime, so these buildings were protected under the

[13] Ian M. Goldrich, 'Balancing the Need for Repatriation of Illegal Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale' (1999) 23 *Fordham International Law Journal* 118, 126.
[14] See *Project of an International Declaration concerning the Laws and Customs of War*, Brussels Conference, (27 August 1874) art 8.
[15] Ibid art 13(g).
[16] Ibid art 17.
[17] Ibid art 23(g).
[18] Ibid art 25.

Conventions. Pillage of property was also prohibited.[19] While it is argued that these legal obligations helped avoid the destruction and pillage of cultural property, they remained too general and weak to be implemented and the Conventions did not establish any sanctions for violations.

Both the 1899 and 1907 Hague Conventions faced issues of enforcement. The realities of warfare made it difficult to enforce commitments to preserve cultural property during wartime. The 1899 Hague Convention was later complemented by the 1907 Hague Convention only presented incremental amendments to the 1899 Hague Convention.[20] Although one amendment required the parties 'must' preserve protected buildings (which later included 'historic monuments'), this commitment was limited by to 'as far as possible'.[21] For example, the buildings specified in art 27 were to be protected from sieges and bombardments, but this protection would be forfeit if they were used for the military purposes.[22] The 1907 Hague Convention replaced the term 'communes' in the 1899 Hague Convention art 56 with 'municipalities' and added that 'all seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings'.[23]

The 1907 Hague Convention art 3 provides remedies for any state party damaged from a violation of the core provisions: 'a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.[24] There was no such obligation under the 1899 Hague Convention. However, the 1907 Hague Convention was isolated from the 1899 Hague Convention, because state parties to the 1899 Hague Convention were not automatically bound with the 1907 Hague Convention. Although the latter strengthened the former with a provision for proceedings against any state party who causes damage, state parties who did not ratify only remained bound by the 1899 Hague Convention.[25] Although those Conventions played key roles in regulating authorities in the First World War and Second World War—as most European powers had ratified at least one[26]—the failure to implement them was decisive in the destruction of cultural property during these wars. Formal prosecution for obligatory violation per art 3 never occurred

[19] *Hague Convention (II) respecting the Laws and Customs of War on Land*, opened for signature 29 July 1899, 187 CTS 429, (entered into force 4 September 1900) art 28.
[20] Grant R. Doty, 'The United States and the Development of the Laws of Land Warfare' (1998) 156 *Military Law Review* 224, 232.
[21] Patty Gerstenblith, 'Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward' (2009) 7 *Cardozo Public Law, Policy and Ethics Journal* 677, 682-3.
[22] Ibid.
[23] See *Hague Convention II* art 56 and See also *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 CTS 299, (entered into force 26 January 1910) art 56.
[24] *Hague Convention IV* art 3.
[25] Erika J. Techera, 'Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 1, 5.
[26] Gerstenblith, above n 21, 682.

for either war.[27] Instead, the payment for restoration of cultural property was included in post-war treaties—although these heavily favoured the victor nations.

The laws of war later adopted before the Second World War (see Section 3.1.3) included the significant point that cultural property was no longer a trophy in war and was to be protected from destruction and pillage. The 1899 and 1907 Hague Conventions had been the pilot international instruments for the legal recognition of the special status of cultural property, but this was challenged due to the weakness of their enforcement. Although the protection of cultural property under the laws of war engaged with cultural internationalism, because those laws imposed responsibilities on all belligerents to protect cultural property, this engagement remained blurred, because cultural property was protected due to its cultural importance and non-military status, not on the basis of it being common human culture. For example, the laws did not allow state parties to share any benefits from protected cultural property. This thesis argues that if the special status of cultural property was based it being regarded as common human culture, its protection would not be waived by military necessity. The concept of common human culture decrees that cultural property be preserved without exception and its benefits shared among people. Nevertheless, the creation of the laws of war undoubtedly prevented even more loss of cultural property and served as an early form of cultural internationalism.

3.1.3 Impact of Post–First World War Peace Treaties on Cultural Property's Status

The laws of war protect cultural property from damage in wartime on the basis of its special status. The peace treaties concluded after the First World War obliged parties to pay compensation for and restore cultural property looted and destroyed during the war. Importantly, these treaties justified this on the basis of cultural nationalism. This was the first time this concept was engaged with the event of armed conflict.

From 1914–1918, many historically and culturally valuable places were adversely affected by sieges and bombardments. For example, the Library of Louvain and Louvain University in Belgium and Rheims Cathedral in France were damaged by German forces.[28] Germany claimed these buildings were used by snipers, thus, their protection was void as specified under the 1907 Hague Convention and German actions were justified under the doctrine of necessity.[29] For obvious reasons, this claim is difficult to prove or disprove. Despite the fact that cultural

[27] Techera, above n 25.
[28] Anthi Helleni Poulos, '1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis' (2000) 28 *International Journal of Legal Information* 1, 18.
[29] Ibid.

internationalism should function to preserve cultural property, bestowing this duty on all belligerents, military necessity provides an exception.

At the end of the First World War, cultural nationalism played an important role in encouraging countries damaged by the Central Powers to request the return of seized cultural property and reparations for damaged and destroyed cultural property. Although the repatriation of cultural property was not codified in the existing laws of war, it could be operated under a peace treaty. The Treaty of Versailles signed on 28 June 1919 contained three provisions, arts 245–247, that provided how cultural or artistic property devastated and pillaged during the war should be recovered.[30] This thesis observes that cultural internationalism and cultural nationalism did not function cooperatively here, but both concepts were applied sequentially—first, the duty of all belligerents to protect cultural property (cultural internationalism) applied during the war, then the repatriation of cultural property to its place of origin applied post war (cultural nationalism).

The Treaty of Versailles arts 245–246 promoted national repatriation of movable cultural property by requiring the German Government to restore cultural property such as historical souvenirs or works of art, trophies or archives. For example, in regard to cultural places and their items, art 247 obliged the German Government to furnish the University of Louvain and Library of Louvain in Belgium and return printed books, manuscripts, incunabula, maps and objects of collection pillaged from those places to enable Belgium to reconstitute its great artistic works.[31] Importantly, the repatriation of pillaged cultural property was considerable, despite never being recognised under the existing laws of war (whose prohibition on pillage was meant to preclude the need for such provisions) and was repeated following the Second World War.

Although the Treaty of Versailles was partially designed to recover the damages from the First World War by requesting payment of compensation and repatriation of looted cultural property, this did not necessarily reflect the link between looted cultural property and its place of origin. Instead, repatriation was operated for the benefit of the victorious Entente Powers. For example, the original Quran of the Caliph Othman (seized by Russia) and the skull of the Sultan Mkwawa (seized by German authorities in German East Africa in 1898) were requested to be returned.[32] The skull of the Sultan Mkwawa was handed over to the British Government and later returned to Tanganyika to reward the Hehe people for their cooperation with the British during the war.[33] This

[30] Toman, above n 5, 337.
[31] Ibid art 247.
[32] See *Versailles Peace Treaty*, opened for signature 28 June 1919, 225 Parry 188 (entered into force 10 January 1920) arts 245 and 246.
[33] The *Sultan Mkwawa* was commonly known as *Chief Mkwawa* who was born at Luhota in Iringa Tanzania in 1855 and became a Hehe tribal leader in German East Africa, later as the mainland part of Tanzania, to oppose the

thesis does not refute that the repatriation of cultural property under the Treaty of Versailles was one of cultural nationalism's functions, but this thesis does argue that this was not consistent with the real goal of cultural nationalism. Cultural nationalisms holds that cultural property is as a product of a geographically limited culture providing cultural identity and value, thus, the repatriation of cultural property should be done with the aim to preserve cultural property within its own geographical and original contexts, not for political gain or as a consequence of victory in war.

This thesis argues that the application of cultural nationalism in the Treaty of Versailles remained blurred, because repatriation was done in accordance with the interests of the victorious nations, rather than for the purpose of preserving cultural property within its original place and cultural identity. This thesis observes that the status of cultural property before the Second World War was positively changed from being a trophy of war which could be legally destroyed and pillaged by the victors to special property protected under the laws of war and repatriated via peace treaties. Although it is argued that this change of cultural property's status did not directly result from the influence and application of cultural nationalism and cultural internationalism, because the change was primarily driven by the interests of the victorious nations. Nevertheless, this period marked an important shift in the perception and treatment of cultural property in wartime.

3.2 Post–Second World War

The Second World War prompted further legal development of the protection and repatriation of cultural property. The aftermath of the Second World War was an important period of change in the legal perspective towards cultural property.[34] To examine the consequences arising from the Second World War, three key aspects—social, institutional aspect and legal—are discussed. These aspects reflect the reasons and needs of legal development for the protection and repatriation of cultural property and its engagement with cultural internationalism and cultural nationalism.

German colonization. After his death, his skull was sent and kept in Bremen, Germany. See also Mkwawa.com (18 December 2017) <http://www.mkwawa.com/>.

[34] This thesis claims that 'the effect of the Second World War becomes more powerful to make a big change for the protection and repatriation of cultural property' because the Second World War resulted in the creation of specific events towards cultural property which never occurred before. This claim can be proved by the establishment of UNESCO which can play key roles in being a specific organization to promote and accumulate know-how about culture, science, and education. See also UNESCO, *Illicit Trafficking of Cultural Property* (20 December 2017) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property>. Additionally, after the Second World War, the world has rapidly changed as being re-organized with the peaceful purpose. The global community has been systemized by the roles of the United Nations.

3.2.1 Social Aspect

The Second World War brought about significant damage and change to European societies that, due to 'right to booty' approaches and colonisation, were traditionally the hub of cultural property.[35] Early German successes in the war coupled with Nazi policy facilitated the transfer and illegal acquisition of significant works of art and other cultural property from occupied nations.[36] Paris, recognised as a centre of the art world, became the main target.[37] German troops pillaged French public art collections and looted one-third of the cultural property held in private collections. Most are still missing. Tens of thousands of works of art were destroyed, looted, confiscated and hidden.[38] The Nazis plundered cultural property from all occupied territories as a matter of policy,[39] reflecting a clear the failure of the implementation of the existing laws of war.

Consequently, the post-war global community was motivated to seek the prohibition of war. The establishment of the UN and UNESCO promoted the legal development of the protection and restitution of cultural property, spurred by the post-war consensus that cultural property should be protected and regulated regardless of whether parties are subject to armed conflict. Although the special status of cultural property in wartime remained, cultural property's status was to that of common human culture to be protected and preserved at all times. Repatriation of cultural property was no longer a right of victors or a form of compensation, but vested in countries of origin seeking repatriation of their cultural property as a physical symbol and identity of them.

3.2.1.1 Decolonisation

Decolonisation was the first factor arousing the idea of repatriation of cultural property to its place of origin. Colonisation was marked by the popular, widespread and practically systematic pillage of cultural property from many colonised territories.[40] Many regions wealthy in cultural heritage such as Africa, Asia and South America were colonised by European powers and, consequently, a movement of cultural objects from those regions occurred for the benefit of Western collections.[41] For example, indigenous civilisations in South and Central America including the Aztecs in Mexico, Mayas in Central America and Incas in Peru were entirely ruined, looted and enslaved by

[35] Elissa S. Myerowitz, 'Protecting Cultural Property During Time of War: Why Russia Should Return Nazi-Looted Art' (1996) 20 *Fordham International Law Journal* 1961, 1987-8.
[36] Ibid 1987.
[37] Barbara Tyler, 'The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?' (1999) 30 *Rutgergers Law Journal*1, 449.
[38] Ibid 447-9.
[39] Myerowitz, above n 35, 1989.
[40] United Nations Educational, Scientific and Cultural Organization, 'Promote the Return or the Restitution of Cultural Property' (Information Kit, SCO) 1-2.
[41] Ibid 2.

the Spanish and Portuguese.[42] In Asia, Japanese troops moving across the Tsushima Strait attacked the Joseon[43] with the main objective to colonise and exploit the jewel of China including the pillage of other valuable objects such as national treasures and handicrafts.[44]

The aftermath of the Second World War also marked an important shift in that the repatriation of cultural property was no longer seen as a means to compensate for armed conflict, but a means to return cultural property to states of origin. This change reflected the increasing role of decolonised states of origin and their need for physical manifestations of their culture. The proposals of decolonised countries such as Mexico and Peru in UNESCO forums argued that recently decolonised nations were injured from the pillage of cultural property.[45] The primary impetus to fight illicit trafficking resulted from post-war decolonisation and changing perspective towards cultural property. From this flowed legal development of the protection and repatriation of cultural property.

3.2.1.2 Globalisation

Globalisation is a social factor motivating the repatriation of cultural property for many states of origin. Globalisation has allowed films, documentaries and photos to be rapidly exported, representing other cultures and making them more accessible than ever before.[46] Globalisation has partially collapsed cultural barriers among countries and reduced the obstacle of distance to interest in cultural property or artefacts located in foreign countries. This has allowed collectors, art connoisseurs and even ordinary people to demand and trade in cultural property, while an interest for museums has steadily grown alongside their connections to acquire cultural objects from all over the world.[47] Increased interests in foreign cultural property has also result in high prices, frustrating many collectors and fuelling international demand.[48]

While the globalisation facilitates acquisition of cultural property, through licit and illicit channels, this thesis argues that globalisation also provides states of origin with more opportunities to protect and request for repatriation of their cultural property. For example, increased access to information and communication facilitates investigations into stolen cultural property and international forums

[42] Poulos, above n 28, 9-10.
[43] The *Joseon* is a name of ancient dynasty which was formed in 1392 in Korean Peninsula.
[44] Geoffrey R. Scott, 'Spoliation, Cultural Property, and Japan' (2008) 29 *University of Pennsylvania Journal of International Law* 803, 830.
[45] See James A. R. Nafziger, 'The 1970 UNESCO Convention: Insights, Circumspections, and Outlooks' (Paper presented at Mexican Seminar: The Globalization of the Protection of Cultural Heritage The 1970 Convention: New Challenges, organized by UNESCO and UNIDROIT, Mexico, March 21-23, 2013) 211.
[46] Pernille Askerud, and Etienne Clément, *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention* (UNESCO, 1997) 9.
[47] Ibid.
[48] Ibid.

provide avenues for legislating on trade of cultural property and cooperation in countering illegal export of cultural property.

3.2.1.3 Divergence of States' Interests

This thesis observes that the interests of states of origin and that of market states has diverged sharply in the post-war period. Due to decolonisation and globalisation, the repatriation of cultural property has become more feasible, guided by cultural nationalism. Yet, claims for repatriation by states of origin are often opposed by former colonising countries.

The divergence of interest lies in the fact that states of origin wish to retain cultural property within their territory, while market states wish to purchase and import cultural property. Thus, cultural nationalism is not beneficial for market countries, as it threatens to provide grounds for the repatriation of the foreign cultural property in their possession. Former colonising countries claim the right and legitimacy to retain foreign cultural property, because the early period of colonisation advocated a 'right to booty'. Market states also tend to claim ignorance of any illegality involved in their acquisition of foreign cultural property. The period immediately following the Second World War and the establishment of the UN marked the modern-day inception of this ongoing conflict.

3.2.2 Institutional Aspect

The rise of global institutions is important to the legal development of the protection and repatriation of cultural property, as these became the originators of legal instruments considering the interaction between cultural nationalism and cultural internationalism.

3.2.2.1 Key Turning Point: Establishment of the UN

The establishment of the UN became the most powerful turning point in promoting legal development of the protection and repatriation of cultural property. As a result of the previous world wars, the UN was established to fulfil four main tasks: keeping the peace throughout the world; 2) developing friendly relations among all nations; working together to better people's lives, conquer hunger, disease and illiteracy, and encourage respect for each other's rights and freedoms; and acting as a centre to support all nations in achieving these main tasks.[49] These tasks aim to prevent the outbreak of war and, failing that, to mitigate the effects of war. The change of

[49] United Nations, *Everything You Always Wanted to Know About the United Nations* (United Nations Publishing Section, 2008) 3.

perspective on cultural property reflects this, chiefly, in that the notion of 'right to booty' is no longer a legitimate reason for confiscating cultural property.

As previous discussed, the 'right to booty' or 'to the victor goes the spoils' had a long history of acceptance and practice in warfare. Even after in the twentieth century, although the laws of war prohibited destruction and pillage of immoveable and movable property of cultural importance and value, this protection could be waived on the grounds of military necessity. The adoption of the UN Charter was another step towards eliminating the effects of war on cultural property. The UN Charter is the constitutive instrument of the UN which constructs the rights and obligations for member nations and structures its principle organs and procedures[50] (such as General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice (ICJ) and Secretariat). The principle of the UN Charter became the most important turning point in changing the legal perspective on the protection of cultural property in the event of armed conflict, as it stipulates the sovereign equality of nations and prohibits the use of force (except for territorial defence, see below).[51] Under art 2(4), the UN Charter provides that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[52]

The use of force always leads to loss and harm of lives and property. The UN Charter art 2(4) stipulates that the use of force is to be regarded as an illegal action, thus, undermining the 'right to booty' or 'to the victor goes the spoils'. This prohibition of the use of force is undoubtedly positive for the protection of cultural property, however, art 2(4) cannot be claimed to absolutely do this. The UN Charter art 51 states that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'.[53] Actions of self-defence are not regarded as not illegal, despite the use of force, when a member nation was attacked and immediately reports to the UN Security Council its necessary measures in the exercise of self-defence.[54] This thesis accepts that use of force may be permitted and this may adversely affect cultural property in the exercise of self-defence. There should be a need to consider the conditions or requirements necessary to protect cultural property in wartime—

[50] United Nations, *Basic Fact About the United Nations* (United Nations, Department of Public Information, 2011) 3.
[51] Ibid.
[52] *Charter of the United Nations* art 2(4).
[53] Ibid art 51.
[54] Ibid.

ideally, to reach any form of protection that cannot simply be waived by the justification of military necessity. This may be found in the 1954 Hague Convention.

3.2.2.2 UNESCO's Roles in Protection and Repatriation of Cultural Property

UNESCO has played a critical role in codifying legal rules governing cultural property. UNESCO was established as a special agency of the UN to promote peace. Underlying this is the recognition that, alongside political and economic factors, the foundation of humanity's moral and intellectual solidarity must also be promoted to build up the peace.[55] This thesis agrees with this reasoning, observing that the recognition of humanity's moral and intellectual solidarity helps to raise public awareness of cultural importance and value and collective pride in human culture.

In promoting humanity's moral and intellectual solidarity, UNESCO encourages member nations to promote international networks by mobilising education, building intercultural understanding, pursuing scientific cooperation, and protecting freedom of expression and human dignity.[56] According to the UNESCO Constitution art I, peace and security is the purpose of UNESCO which shall promote collaboration among nations by education, science and culture so that all nations respect justice, the rule of law, human rights and fundamental freedoms in conformity with the UN Charter.[57] To link this with the legal development of the protection and repatriation of cultural property, we find two roles related to cultural property.

UNESCO is a global institution governing cultural, scientific and educational issues. This role has an impact on cultural property law's unity. Before the establishment of UNESCO, the protection of cultural property was disunited, comprising a number of legal instruments from various institutions. UNESCO is a global, centralised organ for developing normative unity on cultural property and is recognised as such by the global community. UNESCO collates recent experiences and shortcomings of cultural property protection to further develop international rules. The existing international rules on cultural property were systematically codified due to UNESCO initiatives such as the 1954 Hague Convention and 1970 UNESCO Convention. These Conventions adopted the principles of many previous legal instruments, such as a concept of necessity deriving from the Lieber Code and Hague Conventions, and rectified their shortcomings. This is UNESCO's most important role in the normative development of protection of cultural property.

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[55] United Nations Educational, Scientific and Cultural Organization, *Introducing UNESCO* (20 October 2017) <http://en.unesco.org/about-us/introducing-unesco>.
[56] Ibid.
[57] *Constitution of the United Nations Educational, Scientific and Cultural Organization*, opened for signature 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946) art I.

UNESCO plays a supportive role in the implementation of the 1954 Hague Convention and 1970 UNESCO Convention. UNESCO has created long-term, capacity-building projects to assist state parties to implement multilateral agreements including workshops, study tours and training courses.[58] This has also generated deepened networks with nations and other international organisations (such as INTERPOL, UNIDROIT and the ICOM).[59] UNESCO runs periodical conferences and seminars on the protection of cultural property designed to provide a better understanding of the measures and mechanisms of its normative instruments.[60] Various training activities are also run, mostly consisting of a legal and an operational component and an education and awareness program.[61] These activities help state parties to the Conventions to implement their legal obligations effectively.

In examining the key roles of UNESCO in regard to the protection and repatriation of cultural property, there is an issue as to whether UNESCO can contribute to the settlement of cultural property disputes between states of origin and market states. For example, if a member nation needs to claim for repatriation of cultural property pillaged by another member nation during recent event of armed conflict. To consider this scenario, we may compare UNESCO with the WTO regime. The WTO designs its own dispute settlement body to facilitate member nations to resolve their conflict. The WTO rules for dispute settlement are codified in the Dispute Settlement Understanding governed by the Dispute Settlement Body (DSB). The Understanding art 2 empowers and authorises the DSB to play roles in various operations of the dispute settlement such as establish panels, adopt panel reports and maintain surveillance of implementation of rulings and recommendations.[62]

Since the end of the Second World War, UNESCO is the most important global organisation responsible for promoting collaboration among member nations for education, science and culture. With respect to the objective of the 1970 UNESCO Convention, UNESCO requests and encourages all state parties to protect and conserve their own cultural property from illicit trafficking. Thus, it would be reasonable to accredit UNESCO as an administrative organ, like the DSB, to settle any cultural property dispute among state parties. This idea is inviting, given that

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[58] United Nations Educational, Scientific and Cultural Organization, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector: Part II-1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Final Report)* (UNESCO: Internal Oversight Service Evaluation Section, April 2014) 59.
[59] Ibid 59-62.
[60] United Nations Educational, Scientific and Cultural Organization, *Illicit Trafficking of Cultural Property: Capacity-building and workshops* (20 October 2017) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/capacity-building/>.
[61] Ibid.
[62] See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) art 2(1).

the 1970 UNESCO Convention does not provide a dispute settlement mechanism; however, it is impossible, because, per the UNESCO Constitution art I, UNESCO is not authorised to play any role or function in dispute settlement among member nations. UNESCO's role is designated as that of a supportive regime, such as the encouragement and maintenance of international cooperation on cultural property or promotion of cultural knowledge.

By the DSB model, if UNESCO needed to settle a dispute such as the example given, the UNESCO Constitution would need to be modified to add the role of dispute settlement. This is uninviting, as the modification of the UNESCO Constitution is extremely complicated—art XIII requires the approval of the UNESCO General Conference by a two-thirds majority.[63] This thesis acknowledges the difficulty of such a course of action and that member nations would prefer to settle disputes via existing models such as the diplomatic negotiation or the ICJ procedure.

3.2.3 Legal Aspect

After the Second World War, legal development of the protection and repatriation of cultural property was enabled by an arrangement of institutions who became the originators of legal instruments.

3.2.3.1 The 1954 Hague Convention and Cultural Internationalism

Under the traditional laws of war, cultural property is protected in the event of armed conflict on the basis of its cultural importance and value—it is not promoted as common human culture.[64] Cultural property is regarded as common human culture under the 1954 Hague Convention. Although the UN Charter art 2(4) obliges member nations to refrain from the threat or use of force, which assists in preventing the loss or destruction of cultural property, as previously discussed this prohibition is not absolute and use of force is accepted in the exercise of self-defence. As such, while the 1899 and 1907 Hague Conventions remain in force, the destruction of cultural property resulting from the First World War and Second World War raise doubts as to their efficacy. To date, there is no international legal instrument solely concerning the protection and repatriation of cultural property in wartime that is isolated from the laws of war.

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[63] UNESCO *Constitution* art XIII.

[64] This status of cultural property as common human culture did appear in the recent legal instruments before the Second World War. See *Hague Convention (II) respecting the Laws and Customs of War on Land*, opened for signature 29 July 1899, 187 CTS 429, (entered into force 4 September 1900) preamble; See also *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 CTS 299, (entered into force 26 January 1910) preamble. This status is just indicated in the 1954 Hague Convention's preamble as seen this text 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind'.

The destruction and pillage of cultural property in the Second World War and shortcomings in the laws of war prompted the global community to create a permanent protection regime for cultural property that imposed rights and responsibilities on states prior to, during and following war.[65] This effort was initiated by UNESCO from 1945–1954 and resulted in the adoption of the 1954 Hague Convention. The drafters of this legal instrument took careful note of previous experiences, thus, the Convention is a legacy of the efforts to protect cultural property under the laws of war and incorporates cultural internationalism.

3.2.3.1.1 Safeguard and Respect for Cultural Property

The 1954 Hague Convention confirmed cultural property's status regardless of conflict—something never done under the laws of war. Under the Convention, the status of cultural property is based on two fundamental principles: the safeguard and protection of cultural property and respect for cultural property.[66] These principles are not new, but their application outside of and independent of war was. Previously, only the 1935 Roerich Pact, a regional legal instrument drafted under the approval of the Governing Board of the Pan-American Union, had aimed to protect cultural property both in peace and in war,[67] establishing the themes of 'respected' and 'protected' cultural property in its art I.

The Roerich Pact art I establishes that many culturally valuable places—historic monuments; museums; and scientific, educational, artistic and cultural institutions—shall be considered neutral places that belligerents are obliged to respect and protect.[68] The protection of cultural property applies during wartime, but obligations also apply during peacetime.[69] The Roerich Pact's objective is the protection of immovable cultural property, though it does not specify whether movable cultural property is included in its scope. The text of art I indicates that movable cultural property falls outside the Pact's scope,[70] yet this thesis argues that movable property may be protected under the Pact when located inside a building protected under art I.[71]

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[65] Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010) 78.
[66] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) art 2.
[67] Joseph F. Edwards, 'Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects' (1991) 22 *Toledo Law Review* 919, 940.
[68] *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*, opened for signature 15 April 1935, 167 LNTS 289 (entered into force 26 August 1935) art I.
[69] Ibid.
[70] Ronald T. P. Alcala, 'Babylon Revisited: Reestablishing a Corps of Specialists for the Protection of Cultural Property in Armed Conflict' (2015) 6 *Harvard National Security Journal* 206, 249.
[71] Toman, above n 5, 18.

The 1954 Hague Convention's first principle requests all contracting parties prepare appropriate measures during peacetime to safeguard cultural property from the threats of war.[72] This is an innovative obligation that encourages state parties to prepare for foreseeable effects on cultural property when war occurs. However, the Convention does not clearly provide how such measures should be prepared.[73] To supplement the 1954 Hague Convention, the *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954* (Protocol I) was adopted on 14 May 1954 and the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (Protocol II) adopted on 26 March 1999. Appropriate measures are given in Protocol II art 5 as the preparation of inventories and removal of movable cultural property, adequate *in situ* protection, planning of emergency measures for protection against fire or structural collapse, and designation of competent authorities responsible for the safeguarding of cultural property when war occurs.[74]

The 1954 Hague Convention's second principle is that all contracting parties are obliged to respect cultural property situated within their own territory by refraining from using said property and its surroundings for the following purposes: 1) purposes that probably expose cultural property to devastation or damage in the event of armed conflict, 2) any act of hostility against such cultural property, and 3) reprisals against cultural property.[75] However, these may be waived on the basis of military necessity.[76] This thesis observes that the doctrine of military necessity is a legacy of the laws of war which have never been wholly divorced from the protection of cultural property. All contracting parties are obliged to prohibit, prevent and stop any form of theft, pillage or misappropriation of, or any act of vandalism against, cultural property.[77] This obligation is further reflected in the 1907 Hague Convention art 56 which prohibits all seizure of historic monuments and works of art[78] (although its protective scope is broader than that 1954 Hague Convention and includes preventive measures). The term 'seizure' is also extended to include a variety of forms of theft, pillage or misappropriation. Importantly, the 1954 Hague Convention's definition of cultural property is not restricted to only a monument or work of art.

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[72] *The 1954 Hague Convention* art 3.
[73] Jan Hladik, 'Protection of Cultural Property: The Legal Aspect' (2006) 80 *International Law Study Ser. US Naval War College* 319, 320.
[74] *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (Protocol II)*, opened for signature 26 March 1999, 38 ILM 769 (entered into force 9 March 2004) art 5.
[75] *The 1954 Hague Convention* art 4.1.
[76] Ibid art 4.2.
[77] Ibid art 4.3.
[78] James A. R. Nafziger, 'International Penal Aspect of Protecting Cultural Property' (1985) 19 *International Lawyer* 835, 839.

3.2.3.1.2 Protection of Cultural Property With Cultural Internationalism

The legal obligations under the 1954 Hague Convention can contribute to establishment of a common human culture. They are related to the function of cultural internationalism, because all contracting parties are required to protect cultural property even if it belongs to other contracting parties. This obligation originated under the laws of war and it is restated in this Convention. A contracting party in occupation of the whole or part of the territory of another contracting party is obliged to take necessary measures to protect and preserve cultural property located in the occupied territory from any damage by military actions if the competent national authorities of the occupied state are incapable of taking such protective measures.[79] Cultural internationalism is applied to promote the status of cultural property as common heritage that every party, whether occupying or occupied, is responsible for preserving.

This represents an important shift from a 'to the victor goes the spoils' approach to protecting the intrinsic value of cultural property and its significance to the global community. Per Protocol II art 9, the following activities are prohibited: 1) any illicit export or other removal or transfer of ownership of cultural property; 2) any archaeological excavation, except when strictly required to safeguard, record or preserve cultural property; and 3) any alteration to, or change of use of, cultural property intended to conceal or devastate cultural, historical or scientific evidence.[80] The 1954 Hague Convention also provides special protection for some kinds of cultural property. Under art 1(a), all cultural property shall be safeguarded and respected in accordance with the fundamental principles, but there are some categories of cultural property requiring special protection. Under art 8.1, special protection shall be operated for three categories of cultural property: refuges intended to shelter movable cultural property in the war, centres containing monuments and other immovable cultural property of very great importance.[81]

3.2.3.1.3 Collaboration Between Cultural Internationalism and Cultural Nationalism

Cultural internationalism functions through legal obligations requiring all contracting parties to protect cultural property located within occupied territories. Nevertheless, the concept of cultural nationalism can be found in the 1954 Hague Convention. Despite the fact that this Convention mainly embodies cultural internationalism, this thesis argues that the obligation to repatriate cultural property reflects the need to preserve cultural property within its place of origin. This Convention does not only provide for the protection of cultural property as common heritage, but

[79] *The 1954 Hague Convention* art 5.
[80] *Second Protocol to the 1954 Hague Convention* art 9.
[81] *The 1954 Hague Convention* art 8.1.

permits contracting parties to repatriate their cultural property. The laws of war did not create any measure for returning cultural property pillaged by belligerents during war. As previously discussed, the repatriation or return of pillaged property traditionally depended on peace treaties or agreements between parties. The obligation of repatriation of cultural property created by the 1954 Hague Convention is an innovative remedy.

The concurrent obligations to ensure that contracting parties protect common heritage to mankind, while allowing repatriation of cultural property following illegitimate acquisition, represents an important concession to both cultural nationalism and cultural internationalism. During drafting, the Conference realised that a large number of the cultural objects pillaged by the Nazis had entered into black markets and were subsequently purchased by private and public collectors. Thus, the Conference was keen to address the problem of illicit trafficking of cultural objects from occupied territories.[82] However, it was argued that the drafted obligations of repatriation proposed to the Conference involved the private law on right of ownership with which governments were reluctant to interfere, so the Conference decided to deal with the private law on right of ownership by way of a separate or optional instrument, Protocol I.[83] Each state party is entitled to accept or reject Protocol I independent of the 1954 Hague Convention.[84]

According to Protocol I, all contracting parties are obliged to prevent the export of cultural property located in occupied territories.[85] This Protocol also prohibits contracting parties from importing cultural property from any territory they occupy, either directly or indirectly,[86] thus removing the pathway for illicit trafficking by controlling the export and import. For exported cultural property, art I.3 provides that, at the close of hostilities, each contracting party shall return cultural property in its territory to the competent authorities of the territory previously occupied if such cultural property has been exported in the violation of the Protocol.[87] If exported cultural property is held by an individual, the contracting party that was obliged to prevent its export shall pay an indemnity to the property holders in good faith and return the cultural property.[88] Contracting parties are also prohibited from retaining cultural property as war reparations.[89] Repatriation is an obligation that contracting parties must comply without waiting for the request for repatriation by the occupied party. However, the Protocol permits a contracting party to remove

[82] Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2006) 196.
[83] Ibid.
[84] Nahlik, above n 7, 1083.
[85] *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954 (Protocol I)*, opened for signature 14 May 1954, 249 UNTS 358 (entered into force 7 August 1956) art I.1.
[86] Ibid art I.2.
[87] Ibid art I.3.
[88] Ibid art I.4.
[89] Ibid art I.3.

cultural property from an occupied territory only for the purpose of safeguarding it against the dangers of armed conflict and the property is to be returned at the close of hostilities.[90]

Cultural nationalism can play a key role in retuning cultural property exported from an occupied territory. The occupied party can cite the legal obligations under Protocol I to have the occupying party repatriate its cultural treasures, but it is argued that the Protocol may become weak due to its separate and voluntary adoption by states. A state party to the 1954 Hague Convention is not bound by Protocol I unless they ratify it—an occupying state may not do so if deem the repatriation obligations are not beneficial. Parties to Protocol I are obliged to return occupied cultural property to the competent authorities of the territory previously occupied. This suggests that the repatriation should be based on a government-to-government basis, but the Protocol does not clarify how the claim for return could be formulated.[91] The request for repatriation of cultural property may depend on diplomatic negotiations between the occupying and occupied parties, which raises the question of efficiency.

3.2.3.2 The 1970 UNESCO Convention and Cultural Nationalism

The 1970 UNESCO Convention is an important milestone as it primarily promotes cultural nationalism in protecting cultural property from illegitimate acquisition.

3.2.3.2.1 From For the Benefit of Victors to States of Origin

According to the 1970 UNESCO Convention, repatriation is a key function that provides state parties of origin an opportunity to have their stolen or illegally exported cultural property returned. At the end of the First World War, repatriation was utilised to the benefit of the victors (see Section 3.1.3). This practice differed following the Second World War, because the Allied victors proclaimed their intention to repatriate property pillaged by the Nazis without waiting for the creation of the peace treaties.[92] This movement was initiated in 1943 by 17 Allied nations and the French National Committee. They adopted a declaration to fight the pillaging of occupied territories. Further, the scope of what constitutes looted property was broadened to include stocks

[90] Ibid art II.
[91] Lyndel V. Prott. 'UNESCO and UNIDROIT: A Partnership against Illicit Traffic in Cultural Objects' (1996) 1 *Uniform Law Review* 59, 65.
[92] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006) 140.

of commodities.[93] Although this declaration was not a legally binding instrument, it reflected the importance of repatriation as part of creating peace.

Following decolonisation, newly independent nations sought to have their looted cultural property returned and many nations took significant steps to prevent any further loss by vesting ownership of cultural property in the state. Unauthorised excavation and export of cultural property was made illegal.[94] These steps had the objective of reducing the flow of material into the existing antiquities and art markets used by collectors, individuals and institutions.[95] Cultural nationalism came to the fore as states or origin made many requests for repatriation of cultural property. Yet, cultural nationalism faced challenges in the rapid growth of illicit trafficking and resistance from countries possessing foreign cultural property. Since the end of the Second World War, an increased demand by private collectors for cultural property made it increasingly difficult to protect archaeological sites within states of origin from looting.[96] Many states of origin lacked the capacity to protect and preserve archaeological sites.[97]

In terms of the legal development of repatriation of cultural property, the 1970 UNESCO Convention incorporated cultural nationalism by allowing state parties of origin to request repatriation of their illegally removed cultural property. The preparation of the Convention noted the conflicting perspectives of countries rich in cultural property and countries that import cultural property. The lead to challenging negotiations, as the prohibition on importing cultural property without the exporting state's approval threatened the free market.[98] This directly reflected the competing views of cultural nationalism and cultural internationalism. Cultural internationalism sees the establishment of a free market for cultural property as helping to distribute cultural property to people around the world, cultural nationalism sees the prohibition of cultural property export and providing mechanisms for repatriation as helping to maintain cultural identity within its place of origin. The success achieved in repatriation by the victors following the First World War was not replicated by states of origin following the Second World War and decolonisation. The transition of repatriation from benefiting the victors of war to benefiting states of origin was not smooth, and the concept remains contested.

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[93] Commission for Looted Art in Europe, *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation of Control* (30 October 2017) <http://www.lootedartcommission.com/inter-allied-declaration>.
[94] Forrest, above n 65, 133.
[95] Ibid.
[96] Paul M. Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 291-2.
[97] Ibid 292.
[98] Forrest, above n 65, 166.

3.2.3.2.2 Protection and Repatriation of Cultural Property With Cultural Nationalism

While the 1954 Hague Convention favoured cultural internationalism, the 1970 UNESCO Convention favoured cultural nationalism. Cultural internationalism, popular before the Second World War and adopted in the laws of war, ceased as the orthodox approach for preserving cultural property following decolonialisation. The 1970 UNESCO Convention is evidence of that. The Convention is based on three main principles: 1) the principle of prevention, applied in a variety of protective measures, such as the establishment of national inventory on cultural property, creation of export certificates and promotion of public or educational awareness; 2) the principle of restitution; and 3) the principle of international cooperation which aims to reinforce the cooperation among and between states parties to jointly fight illicit trafficking of cultural property.[99] These principles became the essential features of legal norms, providing the general orientation and direction for positive law.[100] Cultural nationalism dominated these principles.

The 1970 UNESCO Convention changed the notion of protecting cultural property, because the legal status of cultural property is no longer regarded as the CHM, but national heritage. State parties are responsible for protecting cultural property from destruction or pillage in the event of armed conflict. Under the preventive principle, state parties are requested to establish their own national services for protecting cultural heritage, including the formation of draft laws and regulations designed to prevent illicit trafficking of cultural property.[101] Article 5(b) requires each state party establish a national inventory of protected cultural property.[102] For example, the Egyptian Law on the Protection of Antiquities provides that all antiquities—discovered or undiscovered, in the possession of the Egyptian Antiquities Authority or individuals or dealers in compliance with any previous law, or in the possession of an individual by chance, or recently excavated—are state property.[103]

The 1970 UNESCO Convention provides the feature of repatriation. This feature was formerly found in Protocol I to the 1954 Hague Convention or in peace treaties, this only resulted from the need to remedy a consequence of war—neither established how a state may request return of cultural property stolen or illegally exported during peacetime. The 1970 UNESCO Convention's

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[99] United Nations Educational, Scientific and Cultural Organization, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property-1970* (14 July 2017) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/>.
[100] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law*, (Martinus Nijhoff Publisher, 2007) 89.
[101] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 5(a).
[102] Ibid art 5(b).
[103] Maher Abd EL Wahed, 'The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: A View from Egypt' (2003) 8 *Uniform Law Review* 529, 533.

feature of repatriation provides for this. It may confuse a variety of terms—'return', 'restitution' and 'repatriation'—when we discuss the movement of property from one state to another.[104] The root meaning of these terms derives from '*restitutio in integrum*' which refers to 'the return of something which the defendant wrongly acquired from the claimant, or (at least) wrongly retain'.[105] It includes 'any remedy for the defendant's wrongful taking or retention of something the claimant was entitled to'.[106] As defined by Kowalski, the term 'restitution' is applied to the fact that 'it aims at reversing the effects of both looting during World War II and ordinary theft during time of peace',[107] while the term 'return' is used to 'concern both cultural objects taken abroad during the colonial period and works of art illegally exported for purely economic reasons'.[108] The term 'repatriation' is specifically used in situations when there has been a change to the territorial dimensions of a state causing the displacement of cultural property such as the changing of territorial boundaries after the end of armed conflict.[109] These terms are often used interchangeably and there is no universally accepted meaning.[110]

The 1970 UNESCO Convention contributed significantly to the legal development of the protection and repatriation of cultural property in times of peace. The Convention changed the legal philosophy to justify this, from cultural property as the CHM to national heritage. The Convention also marked a shift towards regulating cultural property during peacetime and not in reaction to the destruction brought about by warfare. However, this thesis argues that the preference for only cultural nationalism in the Convention unavoidably leads to conflicts with the interests of market states. This also undermines the Convention's effectiveness, as the protection and repatriation of cultural property from illicit trafficking is impossible without friendly cooperation between states of origin and market states.

3.2.3.2.3 Reinforcing Cultural Nationalism Under the 1995 UNIDROIT Convention

The concept of cultural nationalism was reinforced with the adoption of the 1995 UNIDROIT Convention. As a complementary instrument to the 1970 UNESCO Convention, cultural nationalism remains influential in supporting the repatriation of cultural property to its state of origin. The 1995 UNIDROIT Convention was created to rectify the vague language used in the

[104] Forrest, above n 65, 140.
[105] Steve Hedley, Margaret Halliwell, Andrew Grubb, et al, *The Law of Restitution* (Butterworths LexisNexis, 2002) 3.
[106] Ibid.
[107] Wojciech W. Kowalski, 'General Observation: Claims for Works of Art and Their Legal Nature' in the International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (Kluwer Law International, 2004) 33.
[108] Ibid.
[109] Forrest, above n 65, 144.
[110] Ibid 140.

1970 UNESCO Convention. The 1995 UNIDROIT Convention aims to correct the prevailing ineffective enforcement of cultural property protections contained within the 1970 UNESCO Convention 'by shifting the focus onto recipients in wealthy nations rather than counting on developing countries to police their own borders'.[111] The 1995 UNIDROIT Convention creates a single, harmonised source of law that requires cultural property to be repatriated, even if the theft of such cultural property cannot be proved, and allows private claims for pursuing repatriation through national legal systems.[112] This is a corollary of private law issues which differ substantially between legal systems, particularly civil law and common law systems.[113] By the common law principle of *nemo dat quod non habet*, a thief or subsequent purchaser cannot acquire ownership of stolen property, while the civil law system recognises that a *bona fide* or good faith purchaser can acquire good title which is defendable against claims by the original owner.[114] The reconciliation of conflicting legal systems on private property law is a primary task of the Convention.

The 1970 UNESCO Convention and 1995 UNIDROIT Convention are two main international laws adopted to fight illicit trafficking of cultural property. Although both Conventions function independently, they supplement each other by achieving a common purpose with different means.[115] The 1970 UNESCO Convention is a general Convention concerning both the protection and restitution of cultural property from illicit trafficking, comprising of the three pillars of the prevention of theft of cultural property, the restitution or return of cultural property and the creation of international cooperation. It provides the method for the restitution or return of cultural property, encourages state parties to design protective measures for cultural property (such as the establishment of national inventories of property, creation of export certification and stimulation of public awareness) and encourages international cooperation to reduce illicit trafficking.

The 1995 UNIDROIT Convention was specifically adopted to reinforce the restitution or return of cultural property and to reconcile the conflicting private law of state parties (civil law and common law systems) to prepare a set of uniform rules to be adopted by various state parties. It also broadened the opportunity of individuals to claim for the return of their stolen cultural property from an actual possessor. Therefore, cultural nationalism was strengthened to protect

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[111] Joshua M. Zelig, 'Recovering Iraq's Cultural Property: What Can be Done to Prevent Illicit Trafficking' (2005) 31 *Brooklyn Journal of International Law* 289, 305.
[112] Ibid.
[113] Forrest, above n 65, 197.
[114] Ibid 201.
[115] See Lyndel V. Prott, *Committee of Governmental Experts on the International Protection of Cultural Property: Commentary on the UNIDROIT Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects as Revised June 1993*, UNIDROIT Study LXX-Doc 42 (September 1993) 6. See also Federal Office of Culture on behalf of the Working Group, 'International Transfer of Cultural Objects: UNESCO Convention of 1970 and UNIDROIT Convention of 1995' (Report of the Working Group, Federal Office of Culture, 1999) 10.

cultural property from removal by providing the protection of the state's property and including cultural property stolen from an individual within its scope.

3.3 Conclusion

This thesis observes that the paradigm shift towards protection and repatriation of cultural property has closely engaged with cultural nationalism and cultural internationalism since the eighteenth century. The status of cultural property has dynamically changed from a trophy of war (in accordance with the concepts of the 'right to booty' or 'to the victor goes the spoils') to specially protected property under the laws of war. It is argued that the application of cultural internationalism under the laws of war remained blurred, because it was not clear whether cultural property was regarded as common human culture. Nevertheless, the laws of war triggered a change in perspective on cultural property. In terms of cultural nationalism, the repatriation of cultural property was promoted by the victorious nations at the end of the First World War. However, although part of the restoration process under peace treaties, the objective was not consistent with cultural nationalism, being for the victors' benefit, not for the intrinsic value of cultural property within its place of origin. After the Second World War, the establishment of the UN and decolonisation saw a turning point in the protection and repatriation of cultural property. The experiences of the Second World War triggered the advancement of the perspective on cultural property socially, institutionally and legally. Subsequently, cultural nationalism and cultural internationalism have influenced the design of various international legal instruments.

Chapter 4:
Repatriation of Cultural Property Under International Law: An Interpretation of the 1970 UNESCO Convention and 1995 UNIDROIT Convention

> The protection of cultural heritage can only be effective if organized both nationally and internationally by States working in close co-operation.[1]

The legal framework for repatriation of cultural property from illicit trafficking under international law is provided by the 1970 UNESCO Convention and 1995 UNIDROIT Convention. This thesis observes that the legal framework is strongly influenced by cultural nationalism which supports state parties to protect cultural property from any removal and to request for repatriation. This is intended to benefit states of origin[2] in protecting their cultural property from illicit trafficking. However, this thesis argues that repatriation is impossible without cooperation between states of origin and market states. Thus, the existing legal framework is inappropriate to facilitate state parties to succeed in repatriation and to resolve cultural property disputes. This thesis applies a doctrinal legal analysis and international law interpretation in this chapter to support this claim.

4.1 Scope of the 1970 UNESCO Convention and 1995 UNIDROIT Convention

This chapter begins with examining the scope of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention to demonstrate these have limited state parties of origin in requesting repatriation of their cultural property. The 1970 UNESCO Convention engages with cultural nationalism. Its preamble states that 'cultural property is civilization and national culture that its value can be appreciated only in relation to the fullest possible information regarding is origin, history and traditional setting'.[3] This refers to cultural property's value which can be sought from its origin, history and traditional setting. Per Fechner, the significance of cultural property is not reflected only by the things attached to the physical object, but includes cultural property's context.[4] This includes the location of the cultural property and its origins, so the scope should not

[1] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) preamble.
[2] This thesis uses the term 'state party of origin' for referring to a state party to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention which is regarded as a state of origin having been suffering from illicit trafficking and seeking for the repatriation.
[3] *The 1970 UNESCO Convention* preamble.
[4] Frank G. Fechner, 'Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 379.

only include the physical protection of cultural property, but should extend to the retention of cultural property within its original location.

4.1.1 Problems of the Definition of Cultural Property

The definition of 'cultural property' in the 1970 UNESCO Convention art 1 is one of its main defects which weaken state parties of origins' requests for repatriation. Article 1 identifies cultural property not only as works of art or historic objects, but objects of archaeological, artistic or historical value. Also, an antique or artefact is not limited to that produced by human hands,[5] but includes specimens of fauna, flora, minerals and anatomy and objects of paleontological interest. According to art 1, the term 'cultural property' is well defined as property which, on religious or secular grounds, is specifically designated by a state as being of importance for archaeology, prehistory, history, literature, art or science and which also falls within one or more of the following categories:[6]

a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist 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;
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;

[5] Susan Scafidi, 'Symposium: Perspective on Cultural Property & the Law - Introduction New Dimensions of Cultural Property' (2008) 31 *Fordham International Law Journal* 684, 685.
[6] *The 1970 UNESCO Convention* art 1.

j) archives, including sound, photographic and cinematographic archives;

k) articles of furniture more than one hundred years old and old musical instruments.

Although this can explain what sort of property is recognised as 'cultural property' and subject to the Convention's protective scheme, it may adversely affect state parties of origin in protecting and repatriating their cultural property. The vague language, 'specifically designated by each state', suggests that the Convention is restricted only to cultural property recognised by states of origin. This allows each state party to freely designate its property located in its own territory.

This requirement also leaves a private owner without recourse if the state has not designated the property as cultural property or if the state does not wish to take any action.[7] For example, cultural property stolen from private collections and not registered or designated by the state. In this situation, the state has never acknowledged the existence of such cultural property, so it is not obliged to take any action to inspect or request repatriation of such cultural property. The private owner has no recourse, since he cannot request the state of origin to protect or recover it in accordance with its legal obligations under the Convention which was adopted under the realm of public law, at a state-to-state level. This is a limitation of art 1 that permits only a state to claim legal obligations for repatriation of stolen cultural property.

Although each state party is required to designate cultural property within its territory that will be subject to the Convention, it is possible that cultural property is designated differently by each state party. While a narrow interpretation allows the state to specifically list individual items, a wider interpretation allows designation of all items within a territory as protected items.[8] A narrow interpretation would exclude the protection of undiscovered cultural property that was illegally excavated and exported, as this kind of cultural property had not been subject to the meaning of art 1 of the Convention, while a broad interpretation of the state's designation would lead to difficulty in classifying cultural property.[9] Moreover, it does not necessarily mean that their respective interpretation shall be recognised by the concerned importing state.[10] When the exporting state party claims legal obligations under the Convention to request for repatriation of cultural property imported into the requested state party, the requested state party may refuse the

[7] Stephanie O. Forbs, 'Securing the Future of Our Past: Current Efforts to Protect Cultural Property' (1996) 9 *The Transnational Lawyers* 236, 246.
[8] Vesna Coric Eric and Milica V. Matijevic, 'Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Goods' (2009) 3 *Strani pravni život* 273, 281.
[9] Edward M. Cottrell, 'Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property' (2009) 9 *Chicago Journal of International Law* 627, 632.
[10] Eric and Matijevic, above n 8, 281-2.

request and argue that such property is not recognised as cultural property under its specific designation.

The vague language, 'specifically designated by each state', is eliminated in the 1995 UNIDROIT Convention. Article 2 provides the definition of cultural property as 'cultural objects (that) 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'.[11] The term 'cultural property' specified in the 1970 UNESCO Convention is replaced in the 1995 UNIDROIT Convention by 'cultural objects', but both have a very similar meaning in terms of the cultural importance and value as the 1995 UNIDROIT Convention's drafters wished for both legal instruments to be applied together.[12] Similarly, the listed categories in the Convention's Annex are not different from those in the 1970 UNESCO Convention art 1.[13] A cultural object subject to the 1995 UNIDROIT Convention's jurisdiction consists of two key elements: possessing cultural importance, on religious or secular grounds, for archaeology, prehistory, history, literature, art or science; and falling into one or more of the listed categories from (a)–(k).

The vague language, 'specifically designated by each state', in the 1970 UNESCO Convention art 1 is not reproduced in the 1995 UNIDROIT Convention art 2, with the latter no longer relying on state designation. Article 2 has no reference to the national law of state parties for determining what type of cultural objects will be subject to the Convention's protective scheme.[14] The 1995 UNIDROIT Convention was established to reinforce the realm of private international law, permitting a private owner to request repatriation of stolen cultural property. This concept helps to fill the previously mentioned gaps of the 1970 UNESCO Convention. Another reason the 1995 UNIDROIT Convention eliminated the requirement for state designation is because this allows designation to be undertaken by national courts or other competent authorities,[15] rendering interpretation of what objects that should be protected under the Convention free from political influence of the state of origin.

This thesis argues that the state should be free to establish its national rules for designing or protecting its cultural property.[16] Nevertheless, the elimination of a state's prerogative to designate

[11] *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) art 2.
[12] Lyndel V. Prott. 'UNESCO and UNIDROIT: A Partnership against Illicit Traffic in Cultural Objects' (1996) 1 *Uniform Law Review* 59, 62.
[13] *The 1995 UNIDROIT Convention* annex.
[14] UNIDROIT Secretariat, *The International Protection of Cultural Property: UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and Explanatory Report*, UNIDROIT Study LXX-Doc 51 (January 2002) 13.
[15] *The 1995 UNIDROIT Convention* art 8.
[16] UNIDROIT Secretariat, above n 14, 14.

cultural property by the 1995 UNIDROIT Convention is appropriate to protect cultural property from illicit trafficking and when we consider the Convention's aims of promoting the uniform character of rules governing cultural property disputes. Additionally, this removes political influence from the determination of designation and reduces discrepancies in designation of cultural property between states, removing this complication from requests for repatriation.

4.1.2 Problems From Non-Retroactive Application

A related issue concerning the recovery of stolen cultural property is whether objects can be protected under the 1970 UNESCO Convention and 1995 UNIDRIOT Convention retroactively. Countless cultural objects were removed from their place of origin before the creation of the 1970 UNESCO Convention. The Convention does not mention any retroactivity and it is confined by the *Vienna Convention on the Law of Treaties* (VCLT). The VCLT art 28 provides treaty provisions do not bind a party in relation to any act or fact that occurred before the date of the treaty's entry into force unless a different intention is established by the treaty.[17] Thus, the 1970 UNESCO Convention, subject to the VCLT, must not permit any claim by its state parties to request for repatriation of cultural property looted before its entry into force. This thesis agrees that non-retroactivity is acceptable within the international legal regime. Many states of origin finding non-retroactive recourse under the 1970 UNESCO Convention can use other means to seek repatriation by incorporating an express clause allowing retroactivity in future international law.[18] To date, state of origins have not exercised an express provision allowing retroactivity, including in the 1995 UNIDROIT Convention which affirms non-retroactivity in its preamble.[19]

Decolonisation resulted in the emergence of many 'victim' states having no legal recourse to request for the return of illegally appropriated cultural property, despite the UNESCO General Conference in 1978 promoting international cooperation.[20] Under the Statutes of the ICPRCP, the intergovernmental committee is responsible for facilitating bilateral negotiations for the repatriation of cultural property among state parties.[21] Although state parties of origin may benefit from this instrument, we may question its efficiency. It is unlikely that market states will start making bilateral negotiations regarding the retroactivity of repatriation of illegally appropriated

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[17] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 28.
[18] Katherine D. Vitale, 'The War on Antiquities: United States Law and Foreign Cultural Property' (2009) 84 *Notre Dame Law Review* 1835, 1842.
[19] *The 1995 UNIDROIT Convention* preamble.
[20] Mounir Bouchenaki, 'Return and Restitution of Cultural property in the Wake of the 1970 Convention' (2009) 61 *Museum International* 139, 141.
[21] *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, General Conference Res 4/7.6/5, UNESCO General Conference, 20th sess, UNESCO Doc CLT/CH/INS-2005/21 (28 November 1978) art 4.

cultural property in their possession. It is doubtful that market states would positively respond to a proposal for the retroactivity of the 1970 UNESCO Convention and 1995 UNIDROIT Convention. Januszkiewicz confirms many market state parties with a long history of colonial and non-colonial plunder have opposed the repatriation of many cultural objects in their possession.[22]

Although retroactivity is not explicitly mentioned in the 1970 UNESCO Convention, the Convention does not clearly prohibit retroactivity as the 1995 UNIDROIT Convention does.[23] The 1970 UNESCO Convention art 15 states that there is nothing preventing state parties from concluding special agreements among themselves regarding the return of cultural property removed from its territory of origin before the entry into force of the Convention.[24] The Operational Guidelines for the Implementation of the 1970 UNESCO Convention adopted by resolution of the third Meeting of States Parties explains that art 15 encourages bilateral or regional agreements for repatriation.[25] This practice hopes for retroactive application for repatriation of cultural property, but this depends on the nature of bilateral agreements, the bargaining power of states of origins and the positions presented by both parties. Ultimately, the very nature of these agreements requires the mutual agreement of market states with states of origins, making it to capitalise on the art 15 allowance for retroactive application.

Although the 1995 UNIDROIT Convention prohibits retroactivity, some critics argue that art 9 allows a contracting state to apply any rules more favourable to the restitution or return of stolen or illegally exported cultural objects than provided for by this Convention.[26] There are issues with this interpretation. It is clear that the objective of the Convention relates to cultural objects moved after its entry into force. A broad interpretation of art 9 to allow retroactivity is inconsistent with the objective and scope of the Convention. Specifically, the purpose of art 9 is to allow other methods of recovery not indicated in the Convention and is related to recognising or enforcing a decision of a court or other competent authority of another state party,[27] such as the application of diplomatic negotiation, making a bilateral or regional agreement for the restitution or return of cultural property permissible, rather than retroactivity.

In practice, retroactivity raises enforcement issues as market states generally resist efforts for repatriation claims. If state parties of origin would need to implement the 1970 UNESCO

[22] Katarzyna Januszkiewicz, 'Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia' (2015) 41 *Brooklyn Journal of International Law* 329, 358.
[23] Paul M. Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 378.
[24] *The 1970 UNESCO Convention* art 15.
[25] *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, MSP Res 11, 3rd MSP mtg, UNESCO Doc C70/15/3.MSP/11 (18-20 May 2015) paras 113-4.
[26] *The 1995 UNIDROIT Convention* art 9(1).
[27] Ibid art 9(2).

Convention art 15 to repatriate their cultural property looted for a long period of time, this thesis recommends that they should recognise the reciprocity. If the requested state party would be satisfied with the reciprocal interest offered by the requesting state party, cooperation for repatriation coming under art 15 (ie, retroactive application of the Convention) could be conducted. This thesis argues that any request for repatriation of cultural property by state parties of origin without reciprocal function becomes too rigid and is based on the asymmetry of cultural property concept preferencing only cultural nationalism. This would disadvantage the requested state party and likely make such a request unproductive. As noted by Januszkiewicz, who also supports reciprocity, the national government of each state party has the real power to improve or change their cultural heritage policy which can lead to the creation of global cooperation.[28] It would be easier to improve or change their policy to facilitate the creation of reciprocity in relation to the repatriation of cultural property looted in the distant past.

4.2 Legal Consequence of Stolen Cultural Property and Illegally Exported Cultural Property

As noted by Monreal, illicit trafficking becomes the most real threat to the cultural heritage of many nations and can include all types of crime such as the theft, reprehensible according to natural law, and offences under penal law from each country may apply to the transfer and export of cultural property.[29] Critically, illicit trafficking does not only refer to the theft, but can also result from the violation of state export law. We need to separate the theft from the illegal export of cultural property. The 1995 UNIDROIT Convention establishes particular provisions for repatriation of illegally exported cultural property, isolating these for stolen cultural property.[30] It was accepted in its drafting process that the repatriation of stolen cultural property and illegally exported cultural property needed to be claimed differently, because of the different legal consequences which are related to private ownership of public property.[31] This section examines how the legal consequence of stolen and illegally exported cultural property is related to the request for repatriation.

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[28] Januszkiewicz, above n 22, 371.
[29] Luis Monreal, 'Problems and Possibilities in Recovering Dispersed Cultural Heritages' in *Georges Fradier* (ed), *Museum Vol. XXXI No.1 Return and Restitution of Cultural Property* (UNESCO, 1979) 49, 49.
[30] According to the 1995 UNIDROIT Convention, legal provisions relating to restitution or return of cultural property are specified in chapter II entitled 'Restitution of Stolen Cultural Objects' and chapter III entitled 'Return of Illegally Exported Cultural Objects'.
[31] Gerte Reichelt, *Study Requested by UNESCO from UNIDROIT Concerning the International Protection of Cultural Property in the Light in Particular of the UNIDROIT Draft Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables of 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, UNIDROIT Study LXX-Doc 1 (December 1986) 17-9.

4.2.1 Legal Consequence of Stolen Cultural Property

The 1970 UNESCO Convention and 1995 UNIDROIT Convention are legally binding instrument generally confined by the general rules of the VCLT. The obligations and rights provided by those Conventions shall only be implemented and claimed by states party to them. However, exceptions to such a general principle can be created for non-parties. These exceptions are divided into two cases. The VCLT art 35 provides that 'an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.[32] This exception is implemented with the third state's intention, because for the third state it is necessary to express its consent only in written form to comply with the obligations in a treaty. Yet, it is not apparent that the 1970 UNESCO Convention and 1995 UNIDROIT Convention have any provisions permitting a third state to give its consent to them, so both Conventions are restricted to be only claimed by their own state parties and a non-party cannot claim their obligations and rights.

The obligations and rights in a treaty become binding on a non-party if the obligations and rights are accepted as part of customary law as provided in the VCLT art 38.[33] As a result, this second exception does not need the intention or consent of third states. International custom becoming legal rule followed by states because they feel bound to do so[34] must compose two key elements: 1) general practice which is the practice of states among themselves having a notion such as the course of dealing and usage of trade where practices create justifiable expectations of future observance[35] and 2) *opinio juris* which requires evidence that a state has acted in particular way because it believes that it is required to do so by law.[36] This thesis argues that the obligation relating to repatriation of cultural property under the 1970 UNESCO Convention and 1995 UNIDROIT Convention should not be considered as custom, because it is based on different practices of state relating to property law between civil law and common law countries. Although both Conventions oblige state parties to return cultural property and pay a good faith possessor of stolen cultural property compensation, this practice is not general, because common law countries hold that the original owner still retains the good title or ownership of the stolen property even after such property has been stolen and even if subsequent innocent purchaser bought the stolen property,[37]

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[32] *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 26 ILM 1529 (entered into force 22 September 1988) art 35.
[33] Ibid art 38.
[34] Ben Clarke and Jackson Maogoto, *International Law* (Thomson Reuters, 2nd ed, 2009) 39.
[35] M. W. Janis, 'An Introduction to International Law' (1984) 16 *Connecticut Law Review* 897, 900.
[36] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 3rd ed, 2012) 114.
[37] Emma Slattery, *The Nemo Dat Rule: A Balancing Act* (LLB Thesis, Dublin City University, 2012) 10.

whereas civil law countries prefer to generally protect a good faith purchaser of stolen property.[38] As a result of disunity of state practice, this thesis observes that any benefit arising from the obligations and rights under those Conventions is not international custom that a non-party may claim.

Theft or other forms of illegal taking constitutes a criminal act and the original owner is entitled to recover the object from the thief or subsequent possessor.[39] In this regard, this thesis accepts that the import of stolen cultural property should become illegal under state criminal law. In the US, the *National Stolen Property Act of 1934* (NSPA) provides a variety of legal sanctions which will be applied to any person who transports foreign commerce goods known to be stolen or receives, conceals or sells such goods and the original owner of stolen property may seek to recover their possession in accordance with ordinary property law[40] applying the legal principle of *nemo dat quod non habet*. This principle is based on a concept that no person can transfer better ownership, or title,[41] so the subsequent possessor of stolen cultural property should not acquire the ownership of property transferred from a smuggler who is not the true owner.

Both moral and legal systems usually recognise the right of ownership and also condemn or punish thieves, so the right of ownership which is established under the property law of one country is generally recognised and enforced by the courts of another country.[42] This idea supports the original owner to sue the thief in a court for recovering stolen property to universally recognise property rights.[43] This practice was demonstrated in *Kunstsammlungen zu Weimar v. Elicofon*. A Brooklyn lawyer, Elicofon, bought two paintings in good faith and never knew that these paintings were Albrecht Durer paintings stolen from a storage unit in Germany at the end of the Second World War. As a result, an agency of the East German Government who were the original owner of the paintings sued Elicofon for the return of the paintings at a federal court in New York.[44] The Court held that Elicofon must return the paintings to the agency of the East German Government without compensation.[45] The judicial decision held the principle of *nemo dat quod non habet* which does not protect a thief or subsequent possessor to acquire good title of stolen property, even though the latter possessor claims good faith in acquiring the stolen property.

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[38] John Henry Merryman, 'The Good Faith Acquisition of Stolen Art' (Stanford Public Law Research Paper No 1025515, Stanford Law School, 2007) 1-2.
[39] Bator, above n 23, 286.
[40] Ibid 288.
[41] Adina Kurjatko, 'Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art' (1999) 5 *U.C. Davis Journal of International Law & Policy* 59, 70.
[42] John Henry Merryman, 'The Retention of Cultural Property' (1988) 21 *U.C. Davis Law Review* 477, 483.
[43] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1889.
[44] *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (1981).
[45] Ibid.

In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, the Court considered a claim of title of Byzantine mosaics by the Autocephalous Greek-Orthodox Church of Cyprus (Church of Cyprus) and the Republic of Cyprus held by Goldberg, Feldman Fine Arts, Inc and Peg Goldberg.[46] The Church of Cyprus and Republic of Cyprus claimed that the Church never intended to relinquish ownership of the four Byzantine mosaics, because the mosaics were improperly removed without the authorisation of the Church or the Republic of Cyprus during the Turkish military occupation in northern Cyprus. Conversely, the defendants claimed that the transfer of the Byzantine mosaics were authorised by Turkish Cypriot officials and Goldberg should be awarded the mosaics because they purchased them in good faith.[47] The Court in Indiana held that Goldberg must return the mosaics which were deemed as stolen from the Church of Cyprus, because Goldberg never acquired good title even though they were purchased in good faith.[48]

From the above cases, it seems clear that the original owner who claims a return of stolen cultural property must depend on the judicial procedure of the state where cultural property is located. In other words, a requesting party usually sue a current possessor of stolen cultural property in the court where the cultural property is located for its recovery. This practice reflects the rule of private international law which provides that 'the validity of a transfer of personal property and the ramifications of such a transfer on the rights of a person claiming title will be governed by the law where the property is located'.[49] This principle is known as the rule of *lex situs* which is also laid down in the 1995 UNIDROIT Convention.[50] The judicial decisions from those cases clearly held the principle of *nemo dat quod non habet*. Although the original owner surely benefits from this principle as they exercise their right to recover their belongings and are not required to do anything, the original owner is likely at disadvantage to settle the matter in an overseas and unfamiliar jurisdiction where this principle is excepted. The application of *nemo dat quod non habet* is accepted to protect a purchaser in good faith.

This thesis argues that in some cases *nemo dat quod non habet* may not favour the original owner. Normally, *nemo dat quod non habet* aims to protect the original owner and decline the transfer of cultural property from other non-owners who acquire such property without title. Yet, it raises a conflict between the original owner and a purchaser in good faith. For example, a thief steals any property belonging to A and then sells it to B who has never known that the property has been

[46] *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374 (1989).
[47] Juliana Stratton, '*Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc*., 917 F.2d 278 (7th Cir. 1990)' (1991) 1 *DePaul Journal of Art, Technology and Intellectual Property Law* 22, 22-3.
[48] Leonard D. Duboff and Christy O. King, *Art Law in A Nutshell* (Thomson and West, 4th ed, 2006) 25.
[49] Evangelos I. Gegas, 'International Arbitration and Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property' (1997) 13 *Ohio State Journal on Disputes Resolution* 129, 147-8.
[50] *The 1995 UNIDROIT Convention* art 8.

stolen from A, so, it would be supposed that B is a good faith purchaser without notice of the seller's lack of ownership.[51] The conflict is that both A and B, who are also innocent, need to claim their own title of the same property and A would surely like to sue B for the return of stolen property.[52] Who should really suffer from illicit trafficking committed by the thief as a third party? If we strictly comply with *nemo dat quod non habet* to recover stolen cultural property that is now possessed by a good faith purchaser, such a purchaser (ie, B) will suffer from their innocent action.

Accordingly, *nemo dat quod non habet* may not be accepted to protect the original owner of stolen property as exemplified by *Caterpillar Far East Ltd v. CEL Tractors Pte Ltd*.[53] In this case, some tractor spare parts were stolen by two employees working for the CEL Tractors Pte Ltd and they sold those parts to the Caterpillar Far East Ltd, the largest spare parts dealer in Singapore. The Court held that the Caterpillar Far East Ltd had acquired a good title, because it bought the parts with its good faith.[54] This decision appears contrary to the strict application of *nemo dat quod non habet*, because the Court weighted the right of ownership with commercial interests.[55] This idea was not new, because the compromise between the right of ownership and commercial interests was remarked by Lord Denning in *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd*:[56]

> In the development of our law, two principals have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.[57]

Lord Denning mentioned two competing interests: the protection of property referring to protection of ownership and the protection of commercial transaction raised for the support of free flow of commercial movement. These competing interests are inconsistent with each other, so which should become the priority? With respect to *nemo dat quod non habet*, it is not a general rule to prefer the support of commercial movement over protection of ownership. As suggested by Ahdar, we need to balance those interests with buyer beware principle. Buyers should be aware of purchasing any property since they will risk deprivation by an unknown owner, while the commercial movement should be stifled when it is believed that such property has a questionable

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[51] Ho Hock Lai, 'Case Note: Can a Thief Pass Title to Stolen Goods?: *Caterpillar Far East Ltd v CEL Tractors Pte Ltd* [1994] 2 SLR 702' (1994) 6 *Singapore Academy of Law Journal* 439, 439.
[52] Ibid.
[53] *Caterpillar Far East Ltd v. CEL Tractors Pte Ltd* [1994] 2 SLR 702.
[54] Ibid.
[55] Hock Lai, above n 51.
[56] *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd*. [1949] 1 KB 322.
[57] Ibid.

provenance.[58] Lord Denning commented that it is essential that those competing interests be periodically modified and compromised on an economic basis.[59] Lord Denning agreed with the protection of commercial transactions and the needs of our own times that shall be beneficial for a person who takes a property in good faith and for value, so *nemo dat quod non habet* can be excepted in some circumstances, specifically, on an economic basis, to protect a good faith party who purchased such property from any person having no title.[60] Therefore, an exception to the *nemo dat quod non habet* principle exists for a good faith purchaser, however, this principle is expressed differently in civil law systems.

While the exception to *nemo dat quod non habet* in common law system is carefully and specifically applied to protect a good faith purchaser in some specific situations as indicated in statutory laws or judicial decisions, civil law countries have designed a general rule which protects a good faith purchaser, rather than the original owner.[61] The major difference between common law and civil law system towards the exception to *nemo dat quod non habet* is based on the different method in statutory interpretation. Although common law statutes are recognised as an authoritative source of law in common law system, the legal attitude towards the statutes is different from civil law system, because the common law statutes are only enacted to consolidate or clarify existing law and are intended to build on existing case law invoked to interpret any ambiguities or uncertain meanings in a statute.[62] Thus, common law statutes are specifically enacted to consolidate the law on a particular area or facts of a case.[63] This legal attitude is a basis for providing the exception to *nemo dat quod non habet* which will be narrowly interpreted to protect a good faith purchaser. Conversely, civil law statutes or codes usually think in terms of solutions to problems which come from authoritative and systematic explanation of the law and work towards solutions from general clauses and principles.[64] This legal attitude is applied to the good faith acquisition of stolen property as a general exception to *nemo dat quod non habet* which is broadly interpreted to protect a good faith purchaser.

While most civil law countries prefer to generally protect a good faith purchaser of stolen property, common law countries only exceptionally provide such a protection to the good faith purchaser.[65]

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[58] Rex Ahdar, 'The Buyer in Possession Exception to The Nemo Dat Rule Revisited' (1989) 4 *Canterbury Law Review* 149, 150.
[59] Boris Kozolchyk, 'Transfer of Personal Property by a Nonowner: Its Future in Light of its Past' (1987) 61 *Tulane Law Review* 1453, 1455.
[60] Elham Balavar, 'The Doctrine of Nemo Dat Quod Non Habet and Its Exceptions' (2014) 4 *Journal of Applied Environmental and Biological Science* 7, 8.
[61] Arthur F. Salomons, 'Good Faith Acquisition of Movables' in Arthur S. Hartkamp et al (eds), *Towards A European Civil Code* (Kluwer Law International, 2009) 2.
[62] Peter de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007) 105.
[63] Ibid.
[64] Ibid.
[65] Merryman, above n 38.

In the common law system, the title of stolen cultural property is maintained by the original owner regardless of whether a third party has purchased it in good faith, while property law in the civil law system needs to provide absolute protection for good faith purchasers.[66] This point has an impact on the request for the return of cultural property by states of origin, because these states must necessarily respect the rule of *lex situs* to seek for the return of their stolen cultural property. They must request the national court of the country where their cultural property is located to order any person who has retained such property to return it, but the request for repatriation by those states would fail if the judicial decision and national law of country where the cultural property is located generally prefer to protect a good faith purchaser, rather than the original owner.

4.2.2 Legal Consequence of Illegally Exported Cultural Property

In terms of national export regulation, most countries regulate the export of cultural property by prohibiting some or whole categories of cultural property to be exported from their territory. Nevertheless, they may create a flexible measure providing a licensing scheme that requests an export license or certificate from any exporter before such cultural property will be removed from the country,[67] so the export of cultural property without such a license or certificate is prohibited. This case is different from the import of stolen cultural property, because the import of illegally exported cultural property in violation of foreign nation's export law may raise a question of whether the importing state of cultural property is required to enforce the export laws of a foreign country. If we consider the principle of state sovereignty which respects sovereign states to have exclusive legislative, judicial and executive jurisdiction on their own freedom of action and on their territory,[68] the importing state is not obliged to comply with the export law of the foreign state except when the importing state has any specific international obligation enforcing it to do so. This leads to cultural property dispute between states of origin from which cultural property was illegally exported and importing states, because these states of origin usually seek to have the cultural property returned, while the importing states would rather retain such property within their territory.

This thesis argues that the protection of cultural property from illegal export is not only recognised at a national level, but accepted at an international level. National treasures of artistic, historic or archaeological value are generally restricted by states of origin for international trade. The prohibition of cultural property exports is not only imposed by national laws of many states, but

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[66] Kathleen Anderson, 'The International Theft and Illegal Export of Cultural Property' (2002) 8 *New England International and Comparative Law Annual* 1, 14.
[67] Bator, above n 23, 286.
[68] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law*, (Martinus Nijhoff Publisher, 2007) 11.

recognised as a prohibited trade within the international trade regime. Although the GATT was adopted to promote trade liberalisation and eliminate a means of arbitrary or unjustifiable discrimination between contracting parties through GATT rules such as the General Most-Favored Nation Treatment or National Treatment,[69] the GATT art XX(f) permits contracting parties to design any measure which shall be imposed for the protection of national treasures of artistic, historic or archaeological value.[70] Article XX(f) must be narrowly interpreted to place the burden on the contracting party invoking this provision.[71] It is also argued that if the GATT would not establish this exception to protect cultural property, cultural property would not be distinguished from other goods or products that can be traded freely, despite the fact that cultural property represents the identity of individual or groups of community that cannot be reproduced like other mass commodities. Cultural property also consists of artistic, historic or archaeological value which must be built up over time. This thesis agrees to the restriction of international trade in cultural property to maintain cultural property value and the concept of cultural nationalism is also appropriate to be claimed to support such a restriction.

According to the application of cultural nationalism to national law, many states of origin strictly prohibit their own cultural property to be exported to a foreign country. This rigid export law, which is mostly enacted to retain cultural property within its place of origin, does not only prohibit the export of national treasures possessed by the state, but includes cultural property possessed by an individual. In Thailand, the AON strictly prohibits any person to export or take out of the Kingdom any antique or object of art, regardless of whether it is registered or not, unless a license has been obtained from the state.[72] If A moved cultural property out of Thailand without any export license and sold it to B in the US, it is interesting to consider how Thailand as a state of origin can seek to repatriate such cultural property exported in violation of its export law. If the Thai Government sues B in the US court for its repatriation, this raises two questions. Is the import of the cultural object into the US illegal? And is it compulsory that the US court must recognise and enforce the AON to order the return of the cultural object? These questions are answered by a general rule provided by US federal legislation:

> The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a United States Court; the possession

[69] See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 12 January 1948) arts I and III.
[70] Ibid art XX(f).
[71] World Trade Organization, *Analytical Index of the GATT-Guide to GATT Law and Practice* (World Trade Organization, 2012) 563.
[72] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 22.

> of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.[73]

The national court of an importing state is not obliged to recognise and enforce the export law of foreign countries and it is not compulsory to return the illegally exported cultural property to the exporting state. Additionally, a court of an importing state is not required to order a return of cultural property to a state of origin as a possessor of cultural property that was exported in violation of the foreign country's export law has not acquired such property from any thief, but they have rightfully transferred the title of cultural property from a person who has the right to transfer such property. Thus, the exporting state is not the owner and has no standing before a foreign court to claim *nemo dat quod non habet* for the return of such cultural property. The request for the return of cultural property exported in violation of the foreign country's export law must fall into realm of public international law, at a state-to-state level.

To agree with the general rule, the exporting state may not enforce the importing state to respect its export law, while the importing state is not necessarily obliged to recognise and enforce the foreign country's export law. This general rule applies in all major art-importing states, including England, France, Germany and Switzerland.[74] Additionally, this thesis argues that the international relation between exporting and importing state is based on the principle of state sovereignty, so each state has its sovereign right to exercise executive, legislative and judicial power independent from other states. In the absence of specific international obligations, the removal of cultural property from the territory of one country in breach of its export law is not recognised by any other countries to whose territory such cultural property is transferred as an illegal act.[75] This general rule is confirmed in *Attorney-General of New Zealand v. Ortiz*.[76] In this case, a Maori artefact was exported from New Zealand in violation of New Zealand export law, sold to a collector in Europe and finally came up for sale in a London auction house. In response, the New Zealand Government who were seeking the return of the Maori artefact claimed that, by New Zealand legislation, the New Zealand Government was the legitimate owner and entitled to possess the artefact.[77] Nonetheless, the Court of Appeal in the United Kingdom held that the claimant had not acquired the ownership of the artefact and the legal provisions of New Zealand would not be enforceable

[73] Bator, above n 23, 287.
[74] Ibid.
[75] UNIDROIT Secretariat, above n 14, 27.
[76] *Attorney General of New Zealand v. Ortiz* [1983] 2 WLR 809.
[77] Ibid.

in the United Kingdom in any event.[78] This demonstrates that a foreign country's export law cannot be enforced in the importing country.

In the absence of specific international obligations, this thesis argues that the exporting states seeking to repatriate or return their illegally exported cultural property can apply other judicial methods. As such, the exporting states may depend on the roles of ICJ. Under the ICJ Statute art 36, the jurisdiction of the ICJ covers all cases that parties refer to it and all matters particularly provided for in the UN Charter or in treaties and conventions in force.[79] However, the ICJ may provide both exporting states and importing states the settlement of cultural property dispute, but the ICJ cannot have automatic jurisdiction over the cultural property dispute, because it is necessary to obtain the recognition of ICJ jurisdiction from the parties to the dispute. This rule is specified under the ICJ Statute art 36(2), providing that the states parties to the Statute may declare that 'they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court'.[80] The ICJ's decision is not binding on the parties to the dispute if the parties do not give consent to recognise the jurisdiction of the ICJ. The role of the ICJ would not be helpful for exporting states to repatriate their illegally exported cultural property if importing states do not agree to recognise the ICJ's jurisdiction.

This weakness in the ICJ's jurisdiction makes it exceedingly difficult for states of origin to seek redress. Nevertheless, a remedy to repatriate cultural property may lie in the 1970 UNESCO Convention and 1995 UNIDROIT Convention through international collaboration. However, for effective international collaboration to occur, parties must have measures to prevent illicit exportation and measures to seek return of property that has passed through this preventive measure appropriately. A preference for either cultural nationalism or cultural internationalism may impede collaboration.

4.3 Interpretation of Repatriation of Cultural Property in the 1970 UNESCO Convention

The 1970 UNESCO Convention incorporated cultural nationalism, so its legal framework should encourage state parties of origin to retain cultural property within their territory and also protect it from illicit trafficking.[81] There are significant defects in this mechanism. Not only does the Convention prevent effective international collaboration, these defects impact on cultural property

[78] Koen De Jager, 'Claims to Cultural Property under International Law' (1988) 1 *Leiden Journal of International Law* 183, 193.
[79] *Statue of the International Court of Justice* art 36(1).
[80] Ibid art 36(2).
[81] *The 1970 UNESCO Convention* preamble.

that was either illegally exported according to the state of origin's export law and cultural property that was stolen.

4.3.1 Problems From the Repatriation of Stolen Cultural Property

Given the different legal consequences of stolen cultural property and illegally exported cultural property, the examination is divided into two sections. Section 4.3.1.1 examines the legal framework on repatriation of 'stolen cultural property' under the Convention and Section 4.3.1.2 examines the legal framework on repatriation of illegally exported cultural property under the Convention.

4.3.1.1 Too Rigid a Scope for Protecting and Returning Cultural Property

Although the 1970 UNESCO Convention encourages international cooperation for repatriation of stolen cultural property, the cooperation must be delimited by the scope of art 7(b). Articles 7(b)(i)–(ii) should become a platform to make a claim for repatriation of stolen cultural property, since any state party seeking to return its stolen cultural property is obliged to respect this scope. It provides that all state parties shall undertake

> … 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 States concerned, provided that such property is documented as appertaining to the inventory of that institution.[82]

This provision reflects the complete import ban under which cultural property stolen from one country cannot be imported into another country.[83] Although the complete import ban can eliminate illicit trafficking pathway, it is argued that art 7(b)(i) shows a legal defect—the failure to include objects in private collections as cultural property—which would negatively impact the claim for repatriation of stolen cultural property. As a result, the scope of the Convention is too narrow and does not reflect that an increasing amount of cultural property is stolen from private collections around the world.[84]

Also, the scope under art 7(b)(i) excludes undiscovered or unexcavated objects stolen from archaeological sites. Article 7(b)(i) does not only design the rigid scope of place where cultural property is stolen, but requests the listing of cultural property as appertaining to the inventory of a museum or other similar institution. Generally, all cultural objects acquired by a museum or other

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[82] Ibid art 7(b)(i).
[83] John B. Gordon, 'The UNESCO Convention on the Illicit Movement of Art Treasures' (1971) 12 *Harvard International Law Journal* 537, 550.
[84] See International Criminal Police Commission, *Works of Art: Database* (30 December 2017) <https://www.interpol.int/Crime-areas/Works-of-art/Database>.

similar institution should be documented into its inventory, so this thesis reasons that cultural property stolen from other places outside such a museum or other similar institution is not protected under this provision. State parties of origin would be at a disadvantage to request for repatriation of such stolen cultural property from another state party, because the requested party is not be obliged to implement art 7(b)(ii) if such stolen cultural property has not originated in a museum or other similar institution.

Although art 7(b)(ii) clearly provides the legal framework for state parties of origin to request for repatriation of stolen cultural property located within any other state party, it is argued that those state parties of origin are still at a disadvantage to succeed in their repatriation. Article 7(b)(ii) provides that:

> 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.[85]

The requesting party shall be firstly obliged to prove that its request for repatriation of stolen cultural property must be based on art 7(b)(i) which only applies to the theft of cultural property from a museum or other similar institution. If their request falls within the scope of this provision, the request for repatriation of cultural property can only be made through diplomatic offices. Under art 7(b)(ii), any private party or individual cannot initiate this action since it encourages only a state to make the claim for repatriation and also begin the recovery action through diplomatic offices, so the private party or individual who suffers from the theft is neglected by this remedy under the Convention.[86] The lack of private remedy is also linked with the rigid scope of the place where the cultural property was stolen when it is reasonable that private collections mostly attract many thieves, because it is easier to steal cultural property collected in private collections than that in a museum or other similar institution. If the private party or individual needs to request for repatriation, it is vital to request their state agency to do so.

This thesis accepts that the claim for repatriation of cultural property stolen from private collections may be recognised under the 1970 UNESCO Convention. As noted by Eric and

[85] The 1970 UNESCO Convention art 7(b)(ii).
[86] Gordon, above n 83.

Matijevic, the claim for private remedy is possible under the Convention only when the claim is admitted by the law of the state party.[87] An appropriate way of private remedy should be possible if we consider art 13(c) of the Convention which provides that 'the States Parties to this convention also undertake, consistent with the laws of each State … to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners'.[88] This provision is helpful for the private party to cooperate with their government or state agency for making a recovery action against any state party in whose territory their stolen cultural property is located.

Nevertheless, it is argued that the cooperation between a private party as the rightful owner and the state is difficult and uncertain to be completed since the state may not desire to make the recovery action if it deems that it does not have any strong interest in committing to protect the cultural property or it has other priorities.[89] This thesis considers it unlikely that cultural property stolen from private collections can attract the state to proceed with repatriation unless it has a strong interest in doing so. To make the recovery claim for a private party's benefit, we must raise the public facing nature of such stolen cultural property to convince the state to consider the recovery action for such a private party's benefit. It should be based on both social and political significance. Encouraging this argument by the claim that cultural property represents one society's identity which reminds all people of who they are and why they should be proud of their society[90] may convince the state, as the representative of that society's will in a society that should be proud of such identity, to protect cultural property regarded as the physical reflection of social identity from any loss. In terms of political interest, in *Elgin Marbles*, the stolen Marbles have become the symbol, soul and blood of the Greek people, so they are more meaningful than just objects. Thus, cultural property is used in ethnic, regional and national contexts which build and maintain national pride,[91] so the repatriation of cultural property, whether publicly or privately possessed, has a national character.

4.3.1.2 Weakness of International Cooperation Through Diplomatic Channels

The outcome of repatriation depends on international cooperation between the requesting and requested party. However, this thesis argues that art 7(b)(ii) undermines the international cooperation for repatriation with a legal defect which adversely affects the requesting party to

[87] Eric and Matijevic, above n 8, 283.
[88] *The 1970 UNESCO Convention* art 13(c).
[89] Eric A. Posner, 'The International Protection of Cultural Property: Some Skeptical Observations' (2007) 8 *Chicago Journal of International Law* 213, 220.
[90] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 349.
[91] Ibid 350-1.

succeed in its repatriation. To fight illicit trafficking, the importance of international cooperation is found in art 7(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[92]

From this provision, state parties shall prevent their museums and similar institutions within their own territory from acquiring illegally exported cultural property originating in another state party's territory. State parties shall inform a state party of origin that cultural property has been illegally removed. These obligations are supported by arts 5–6 which are regarded as a guidance for state parties to implement those obligations. Article 5 provides a variety of effective measures that state parties shall take to protect cultural property from removal[93] and art 6 prohibits any export of cultural property from state parties' territory if an export certificate has not been accompanied with such cultural property.[94]

The 1970 UNESCO Convention realises the importance of cooperation among state parties and attempts to support state parties of origin to retain cultural property within their own territory. As claimed by this thesis, an individual state would not be able to protect and return cultural property from illicit trafficking, because cultural property is generally removed across the border of its state of origin. This thesis agrees with the approach in the Convention, that it does not isolate each state party to fulfil its own obligations alone, but encourages all state parties to cooperate with each other. This is based on the principle of international cooperation which becomes important in all fields of international legal regime as indicated in the UN Charter art 1. This provision gives priority to resolve a variety of international problems, whether political, economic, cultural, social or humanitarian, by international cooperation.[95] The problem of illicit trafficking was recognised by the international community and the response saw the creation of the 1970 UNESCO Convention which reinforces the view that a multilateral approach, rather than a bilateral or regional approach, is the best form of international collaboration to prevent the illicit transfer of cultural property.

However, the use of international collaboration does have its weaknesses in ensuring that there is an effective enforcement mechanism to protect cultural property. The reliance of collaboration

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[92] *The 1970 UNESCO Convention* art 7(a).
[93] Ibid art 5.
[94] Ibid art 6.
[95] *Charter of the United Nations* art 1.

does not reflect implicit power imbalances that may be experienced between market states and states of origin, especially given the fact that many states of origin are also developing countries. These power imbalances and the lack of diplomatic capacity to pursue the repatriation of cultural property undermines the reliance on international collaboration as an effective mechanism to ensure the return of cultural property.

4.3.1.3 Negative Impact on Conflicting Rules of Legal Systems

As specified by art 7(b)(ii), state parties shall be encouraged to take appropriate steps to recover or return stolen cultural property, but the state parties that request to do so shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.[96] This provision is based on the exception to *nemo dat quod non habet* which aims to protect a good faith purchaser who has never known that cultural property was stolen or transferred from a person who has no title to that property or who has valid title to the property. This would provoke a failure in diplomatic negotiations between the requesting and requested party. In this scenario, the requested party who generally applies the exception to *nemo dat quod non habet* may claim its good faith acquisition of stolen cultural property against the requesting party who strictly complies with the protection of ownership rights. If we consider art 7(b)(ii) carefully, we see it favours state parties that hold to the exception to *nemo dat quod non habet*. This exceptional rule is generally applied by civil law countries. Yet, it is argued that art 7(b)(ii) is slightly different from civil law system's property law principle since it provides for the requested party to return stolen cultural property when the payment of compensation is done, while as noted by Anderson, in many civil codes of many civil law countries, a good faith purchaser is ensured unblemished title to property without any legal obligation to return the property.[97]

Article 7(b)(ii) seemingly contradicts both civil law system's property law principle which protects a good faith purchaser as noted by Anderson and common law system's property law principle which supports the title of stolen cultural property to be maintained in an original owner regardless of whether a third party purchased it in good faith.[98] However, this thesis observes that art 7(b)(ii) is not really in the middle of two legal systems. It prefers the protection of a good faith purchaser. This would likely have a negative impact on convincing state ratification of the Convention. We may assume most countries with a common law system hesitate to ratify the Convention, since they may not desire to comply with art 7(b)(ii) which is incompatible with their own property law. This Convention likely creates inconsistencies with domestic property laws, which was noted and

[96] *The 1970 UNESCO Convention* art 7(b)(ii).
[97] Anderson, above n 66, 14-5.
[98] Ibid 14.

reconciled by the uniform law later recognised in the 1995 UNIDROIT Convention. Per the Working Committee for drafting a purposed uniform law in 1961, its purpose was to protect 'a good faith purchaser' with a reason that 'a general rule protecting a good faith purchaser was consistent with the majority of existing laws and not contrary to trends in systems that are not based on such a general rule'.[99] When it was submitted to member governments for their observations, many countries heavily oppose it.[100] As indicated by the US, its rule less favours good faith purchasers and recommended civil law countries to adopt the US law as a way of discouraging the theft of cultural property.[101] The repatriation of cultural property necessarily depends on the most effective cooperation between the requesting and requested party. When many countries, especially common law countries, hesitate to adopt the Convention, any attempt at cooperation under its legal framework is abortive.

As remarked by many scholars, the 1970 UNESCO Convention mostly favours states of origin over market states, because it requests state parties of origin to take actions for protection and repatriation of their cultural property as indicated in arts 5–7, while market state parties are required to take necessary measures to prevent their museums from acquiring stolen property and are also requested to return stolen cultural property.[102] This mechanism reflects their burden in protecting cultural property. Market states seemingly have legal obligations to protect states of origin,[103] since all actions by market states shall be done to keep cultural property within states of origin. As noted by Levine, most market states do not wish to ratify the Convention due to their reluctance to restrict their art markets.[104] The preference for cultural nationalism in the Convention is evidenced in the burden placed on market state parties. Arguably, market states may also take advantage of this mechanism to promote cultural internationalism. While states of origin must enact laws for prohibiting cultural property export, market states must have laws prohibiting import. Market states may be in a better position to effectively enforce this requirement, because they have the capacity to prevent illicit acquirement of cultural property under their own control. Market states can preserve cultural property in their museums temporarily so that it can be distributed to people until there is a request for repatriation and proof by states of origin.

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[99] John Henry Merryman, 'The Good Faith Acquisition of Stolen Art' (Stanford Public Law Research Paper No 1025515, Stanford Law School, 2007) 7.
[100] Ibid 8.
[101] Stefano Rodota, 'The Civil Law Aspects of the International Protection of Cultural Property' (Paper presented at International Legal Protection of Cultural Property, Proceedings of the Thirteenth. Colloquy on European Law, Council of Europe, 1984) 100-2.
[102] Janene Marie Podesta, 'Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Underlines Its Goals by Unduly Targeting Market Nations' (2008) 16 *Cardozo Journal of International and Comparative Law* 457, 473.
[103] Ibid 474.
[104] Alexandra Love Levine, 'The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention' (2011) 36 *Brook Journal of International Law* 751, 762.

4.3.1.4 Payment for Just Compensation

Under art 7(b)(ii), the requesting party is obliged to pay just compensation to an innocent purchaser or person who has valid title to cultural property. This obligation remains controversial and may lead to a failure to repatriate cultural property. One of the most significant sources of controversy is that the expression of 'just compensation' provides no guideline on how much requesting parties must pay to good faith purchases. Not only may requesting parties have limited financial capacity to pay just compensation,[105] there are related issues as to whether this should be the sum of monies that the good faith purchaser has paid which may not accurately reflect market value or the social and cultural significance of the cultural property.

Most state parties of origin to the 1970 UNESCO Convention are economically classified as developing countries and least developed countries (eg, Afghanistan, Chile, China, Brazil, Egypt, Ethiopia, Guatemala, India, Indonesia, Iraq, Jordan, Mexico, Morocco, Myanmar, Nepal, Nigeria, Peru, Syria and Vietnam).[106] This argument is supported by Hardy, who demonstrated that an overwhelming majority of stolen cultural objects are found in developed countries, especially in Europe.[107] This thesis agrees that most state parties of origin are developing and least developed countries probably incapable of paying the just compensation requested by the requested party (which is likely a developed country). Undoubtedly, the vague conception of just compensation and the economic status of most state parties of origin leads to a failure to implement diplomatic negotiation for repatriation of stolen cultural property between the requesting and requested party.

4.3.2 Problems From the Repatriation of Illegally Exported Cultural Property

Illicit trafficking of cultural property refers the theft and illegal export of cultural property. This section examines whether and how the 1970 UNESCO Convention creates a legal framework for repatriation of illegally exported cultural property.

4.3.2.1 Impact of Non-Self-Implementing Treaty on Cultural Property

Article 6 requires the exporting state to introduce a certificate that the export of cultural property in question is authorised and such a certificate should accompany the item.[108] This mechanism is likely to be ineffectively applied by state parties due to the Convention being a non-self-

[105] Zsuzsanna Veres, 'The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention' (2014) 12 *Santa Clara Journal of International Law* 91, 105.
[106] United Nations, *Country Classification* (20 September 2017) <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.
[107] Samuel Andrew Hardy, 'Illicit Trafficking, Provenance Research and Due Diligence: The State of the Art' (Research Paper, UNESCO, 20 March 2016) 3.
[108] *The 1970 UNESCO Convention* art 6.

implementing treaty. As remarked by Edwards, the export of cultural property is illegal if it is not accompanied by an export certificate. However, this obligation is not replicated by importing countries requiring cultural imports possess a valid certificate of authorisation.[109] According to Edwards, this significantly undermines the ability for the Convention to express a coherent system to limit trade in illegally removed cultural property.[110] As a non-self-implementing treaty, state parties have the ability to design their own law for implementing it which provides them 'leeway' in their acceptance of the Convention's provisions.[111] Therefore, the legal framework for repatriation outlined in the Convention can be coherently enforced under each state's law, but the vagueness for implementing state law would lead to inconsistency for future action, particularly with respect to museums' provenance and repatriation policies.[112] Agreeing with this argument, the Convention allows its signatories to choose some provisions for implementation.[113] Market state parties naturally only implement provisions mostly beneficial to them.

The Convention obliging state parties to prevent their museums or other similar institutions from acquiring illegally exported cultural property.[114] For example, Switzerland has implemented the Convention's obligations by passing laws regulating cultural property import. The Swiss laws[115] aim to reconcile principle of individual responsibility within the art trade and keeping the art industry viable.[116] The due diligence and good faith provisions under the Swiss laws require a person or entity to prevent the import of cultural property that was illegally removed from a state of origin.[117] The US passed two key laws for implementing the Convention, the *Convention on Cultural Property Implementation Act of 1983* (CPIA) and NSPA, prohibiting the import of stolen cultural property from other states.[118] Those were positively adopted to comply with the Convention, but whether the Convention is effectively implemented necessarily relies on those laws' enforcement. In the US, the Department of Homeland Security is authorised by the CPIA to

[109] Joseph F. Edwards, 'Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects' (1991) 22 *Toledo Law Review* 919, 926.
[110] Ibid 930.
[111] Molly Torsen, 'Fine Art in Dark Corners: Goals and Realities of International Cultural Property Protection' (2005) 35 *Journal of Arts Management, Law, and Society* 89, 90.
[112] Leah J. Weiss, 'The Role of Museums in Sustaining the Illicit Trade in Cultural Property' (2007) 25 *Cardozo Art and Entertainment Law Journal* 837, 846.
[113] Leila Amineddoleh, 'Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions' (2014) 24 *Fordham Intellectual Property, Media, Entertainment Law Journal* 729, 740.
[114] *Kurt G. Sieh*r, 'Globalizing and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects' (2005) 38 *Vanderbilt Journal of Transnational Law* 1067, 1072.
[115] Two Swiss legislations which are enacted to regulate the import of cultural property into Switzerland: *The Cultural Property Transfer Act (CPTA)* and *the Ordinance on the International Transfer of Cultural Property (CPTO)*.
[116] Weiss, above n 112, 848.
[117] Lyn Shepard and Eric Leake, 'International Transfer of Cultural Objects: UNESCO Convention of 1970 and UNIDROIT Convention of 1995' (Report of the Working Group, Federal Office of Culture on behalf of the Working Group, 1999) 16.
[118] Amineddoleh, above n 113, 742.

inspect and seize illegally imported cultural property at the border.[119] It is functioned with the NSPA which prohibits the transportation of stolen goods and also imposes criminal penalties for whoever violated this law. However, inspection and arrest may be difficult due to US museums' crucial role, sometimes inadvertently, in a black market art network.[120] Fierce competition means most museums acquire cultural property despite knowing that its origins are questionable since they do not want to lose out to another museum that will readily accept such property.[121] This problem of enforcement is reflected in an increased number of requests for repatriation of illegally imported cultural property.[122]

4.3.2.2 Lack of Specific Obligation to Return Illegally Exported Cultural Property

Article 7(b) excludes how to return illegally exported cultural property. It only creates the framework for repatriation of cultural property stolen from museums and other similar institutions. This reflects repatriation of illegally exported cultural property falling outside the Convention's scope. This lack of specific obligation for illegally exported cultural property has a negative impact on states of origin. They cannot claim art 7(b)(ii) against the other party to return their illegally exported cultural property as cultural property is not stolen. This situation is based on the fact that the title of cultural property was legally transferred to the buyer, but it is then exported outside the country in violation of such country's export law. The question is whether the repatriation remains necessary where a purchaser has legitimately purchased cultural property, but did not obtain a certificate. In terms of stolen property, commonly, the ownership right universally recognised in the property law of one country will be recognised by the court of another country,[123] so the recovery action in this case is necessarily accepted among nations. In contrast to illegally exported cultural property, legal title has validly been transferred to a purchaser, so states of origin who are not the original owner cannot claim ownership right against the purchaser. The request for repatriation is no longer necessary. The purchaser as the requested party is not required to repatriate the cultural property unless there is a specific obligation to do so with the requesting party.

States of origin may operate their repatriation via negotiations. Without any specific obligation, state of origin may set out negotiations even though the outcome is unpredictable. Article 13(b) encourages state parties to ensure that, consistent with the laws of each state, their competent

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[119] Patty Gerstenblith, 'The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects' (2016) 64(2) *The United States Attorney's Bulletin* 12.
[120] Amineddoleh, above n 113, 743.
[121] Weiss, above n 112, 859.
[122] Ibid 860.
[123] John Henry Merryman, 'The Retention of Cultural Property' (1988) 21 *U.C. Davis Law Review* 477, 483.

services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.[124] This mentions illegal export of cultural property and provides a channel for its recovery action, but this thesis does consider such a channel beneficial to success in repatriation, because it does not establish any other mechanism to help the requesting and requested party resolve their conflict on illegal export of cultural property and simply leaves both parties to resolve the conflict by themselves.

It is common that the cultural property law of states of origin prohibit the export of cultural property unless accompanied by an export certificate. This does not mean that such cultural property law shall be automatically respected and enforced by the court of a requested party. Inherently, the court of requested party can freely refuse the request for repatriation of illegally exported cultural property by the requesting party if both parties do not mutually have any specific obligation to do so. What if the Convention would oblige the requested party to respect and enforce cultural property law of other state parties? This situation would tend to provoke conflict between the requesting and requested party and is opposed by importing countries. Also, this conflict would be beneficial for states of origin in the return of their illegally exported cultural property.

As argued by a US court, any legal obligation that enforces the requested party to respect and enforce the cultural property law of other state parties would contradict the long-established norms of the US and other importing countries' law.[125] To agree with this argument, there should not be any international obligation that enforces a state party to comply with another state party, because its impact would be worse. If the US is obliged to enforce the cultural property law of a requesting party, the US Federal Court would likely face a claim by a foreign country for repatriation and would be forced to conclude that any cultural property that can be proved as having been illegally exported from other countries must be unconditionally returned.[126] This situation is known as a 'blank check rule' that permits exporting countries to override other importing countries, since this rule commonly supports exporting countries to enact whatever sort of law they need 'which may lead to their blocking export of objects that may or may not be culturally significant'.[127] Although the blank check rule would enable states of origin to prevail over market states for repatriation, it seems impossible to be implemented because the blank check rule does not only provoke asymmetry of benefit between the requesting and requested party, but ensures that market states

[124] *The 1970 UNESCO Convention* art 13(b).
[125] Nina R. Lenzner, 'The Illicit International Trade in Cultural Property: Does UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?' (1994) 15 *University of Pennsylvania Journal of International Business Law* 469, 481-2.
[126] Ibid 482.
[127] Ibid.

in which illegally exported cultural property is located do not wish to be bound by such a legal obligation.

4.4 Interpretation of Repatriation of Cultural Property in the 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention is not isolated from the 1970 UNESCO Convention, because it aims to reinforce this Convention by expanding the legal framework for repatriation of cultural property. Due to the conflicting rule of legal systems caused by the exception to *nemo dat quod non habet* between civil law and common law countries, the 1995 UNIDROIT Convention attempts to reconcile property law's principle of both legal systems by requesting the purchaser of stolen or illegally exported cultural property return the cultural property and providing fair compensation to a good faith purchaser. As agreed by Oliver, property law's principle of both civil law and common law system is harmonised to maximise the number of countries ratifying the Convention.[128]

It is argued that the Convention does not attract ratification from many countries as intended. As of 1 September 2017, only 41 nations are a signatory to the 1995 UNIDROIT Convention and a majority of those are regarded as states of origin.[129] Compared with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention has failed to obtain widespread ratification by market states. In spite of fixing the 1970 UNESCO Convention's shortcomings, the 1995 UNIDROIT Convention still displays a preference for cultural nationalism in its legal framework for repatriation, with the associated negative impacts on international cooperation.

4.4.1 Problems From the Repatriation of Stolen Cultural Property

The 1995 UNIDROIT Convention has a wider scope to permit repatriation than the 1970 UNESCO Convention, because the latter only provides the legal framework for repatriation of stolen cultural property in art 7(b), while the 1995 UNIDROIT Convention provides the legal framework for repatriation of both stolen and illegally exported cultural property as specified in art 1.[130] The restitution of stolen cultural objects is specified in ch II and the return of illegally exported cultural objects mentioned in ch III.

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[128] Monique Oliver, 'The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property' (1996) 26 *Golden Gate University Law Review* 627, 655.
[129] International Institute for the Unification of Private Law, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status* (2 January 2018) <http://www.unidroit.org/status-cp>.
[130] *The 1995 UNIDROIT Convention* art 1.

4.4.1.1 Blurred Scope of the Theft of Cultural Property

Article 2 provides that 'cultural 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'.[131] Article 2 together with the Annex of the Convention removed the ambiguity in the 1970 UNESCO Convention by removing the requirement that cultural property must be designated by the state of origin.[132] As a result, the scope of cultural property that can fall under the protection of the 1995 UNIDROIT Convention can include property in private collections, not just property in museums and other like institutions.[133] The Convention also applies to individuals to claim for repatriation. A claim for repatriation before the courts or other competent authorities contemplated by art 8 may be brought either by an individual dispossessed of cultural property as a consequence of theft or by a state in similar circumstances.[134]

Article 3(2) broadens the 'theft' of cultural property to include illegal excavation. It provides that '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'.[135] It is argued that art 3(2) raises a gap that adversely affects the repatriation of stolen cultural property. Truly, the theft may include the pillage of archaeological sites, but it is compulsory to be consistent with the law of the state where the excavation took place. Although the 1995 UNIDROIT Convention is a self-implementing instrument which does not request further implementation into national law, illegal excavation under art 3(2) does require reference to the national law of states to determine whether the cultural property has been illegally excavated. For instance, Egyptian law vests all cultural objects to the control of the state. As previously mentioned, this law provides that all antiquities—regardless of status of discovery or current ownership—are the property of the Egyptian State.[136] Excavation in violation of such law is illegal as theft which is compatible with art 3(2). Yet, it is not ensured that other states enact the same law as the Egyptian law. The excavation in a state party's territory having no such law is not regarded as theft under art 3(2). For example, although Thailand's AON specifies that the

[131] Ibid art 2.
[132] Levine, above n 104, 770.
[133] Forbs, above n 7, 247.
[134] UNIDROIT Secretariat, above n 14, 17.
[135] Ibid art 3(2).
[136] Maher Abd EL Wahed, 'The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: A View from Egypt' (2003) 8 *Uniform Law Review* 529, 533.

excavation of cultural property in an archaeological site without any permission is illegal, it does not consider this illegal action as a form of theft.[137]

4.4.1.2 Disadvantage From the Rule of Lex Situs

Who is the claimant for the repatriation of stolen cultural property? Article 3(3) provides the key term 'claimant' who may make any claim for restitution of stolen cultural property within a limited period.[138] This provision does not obviously identify who may bring or raise the claim, its language only specifies 'claimant'. To compare with the 1970 UNESCO Convention, that Convention refers to the involvement of a 'state party', because it only allows a state to request for repatriation of stolen cultural property. Moreover, the request shall be functioned through diplomatic offices which implies that only a state is entitled to claim the Convention for the repatriation of stolen cultural property. The 1995 UNIDROIT Convention only provides the term 'claimant' instead of 'state'. As noted by Anderson, the claimant should allow a state and an individual to put forth a cause of action.[139] To agree with this argument, the Convention's scope including repatriation of cultural property stolen from both public and private collections and the way of repatriation is no longer restricted to diplomatic negotiation per art 8(1).

In terms of putting forth a cause of action, the claim for repatriation of stolen cultural property is specified in art 8(1). It obliges the claimant to bring the claim to the courts or other competent authorities of the state party where stolen cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in state parties.[140] This thesis observes that the claimant will have two channels to submit the claim: the court of the state party where such cultural property is located and other competent authorities where such cultural property is located. This should be very useful assistance in implementing the 1995 UNIDROIT Convention, because the claimant is allowed to take action swiftly and it also enables the courts to order effective measures to secure the restitution or return of stolen cultural property. The court's or competent authority's decision will be applied directly without resorting to the enforcement procedures required when cultural property is located in a state party other than the forum state.[141] Obviously, the rule of *lex situs* is applied as a basis for putting forth a cause of recovery action.

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[137] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 10.
[138] *The 1995 UNIDROIT Convention* art 3(3).
[139] Anderson, above n 66, 17.
[140] *The 1995 UNIDROIT Convention* art 8(1).
[141] UNIDROIT Secretariat, above n 14, 38.

It is argued that art 8(1) would pose an enforcement disadvantage for the claimant. It would be impossible to ensure that the court or other competent authorities are obliged to enforce the possessor to return stolen cultural property, because the outcome of any claim must depend on the court's discretion and national law of state party in which cultural property is located. If such a state party has its law strongly based on cultural internationalism or legalises the removal of cultural property, the claimant probably risks failure in repatriation. In *Government of Peru v. Johnson*, Peru sought to have its stolen or illegally excavated pre-Columbian objects in the defendant's collection returned by applying the rule of *lex situs* in putting bring a case before the Federal District Court. Peru proclaimed that pre-Columbian objects located in Peru are vested in the state's property in accordance with its vesting statutes and the requested objects were removed from Peru without permission.[142] The Court rejected Peru's claim by finding that Peru could not clarify those objects were removed while the Peruvian vesting statutes were in force.[143] Additionally, the Court found that Peru has never sought to exercise its ownership of those objects while they were in private possession, so the Peruvian laws could be recognised as having no more effect than export restrictions. They are public laws not enforceable abroad unless pursuant to a particular agreement.[144] This case reflects that it is not advantageous for the claimant to apply the rule of *lex situs* as the court's decision or law of the state in which cultural property is located would not favour the claimant.

Moreover, the problem of enforcement is exemplified in *Agudas Chasidei Chabad v. Russian Federation*, commonly known as *Chabad v. Russia*.[145] The recovery action for the Schneerson collection,[146] held at the Russian State Library, was brought against the Russian Government in a US federal court. The Chabad of the US, a Hasidic Jewish organisation, claimed that the Schneerson collection belongs to the Chabad organisation which was pillaged during the Second World War.[147] Although, the Court of Appeals for the DC Circuit ruled in Chabad's favour in July 2010, the Russian Government declined to return the collection for two reasons: the Russian Foreign Ministry deemed the Court's decision unlawful and there is no agreement between Russia and the US on mutual recognition and enforcement of civil judgments.[148] The Russian standpoint did not only result in the failure to have the collection returned, but adversely impacted on Russia–

[142] *Government of Peru v. Johnson*, 720 F.Supp. 810 (C.D. Cal. 1989).
[143] Ibid.
[144] Derek Fincham, 'How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property' (2008) 32 *Columbia Journal of Law & the Arts* 111, 118.
[145] *Agudas Chasidei Chabad v. Russian Federation*, *466 F.Supp.2d 6* (*2006*).
[146] The Schneerson collection is a unique collection of books belonging to the dynasty of Lubavitch tzadiks before the Russian Revolution and then was nationalized by the Soviet Government in the 1920s; See Jewish Museums, *Schneerson Library* (16 January 2017) <https://www.jewish-museum.ru/en/libraries/schneerson-library/>.
[147] Giselle Barcia, 'After Chabad Enforcement in Cultural Property Disputes' (2012) 37 *The Yale Journal of International Law* 463, 464.
[148] Ibid.

US political and cultural relations, because the Chabad organisation's lawyers requested the Court confiscate other cultural items in the US on loan from Russia to retaliate for Russia's non-performance, while Russia threatened to do the same.[149] The conflict between Russia and the US reflects the lack of an enforcement mechanism. The request for repatriation of stolen cultural property through the courts or other competent authorities is an inappropriate way to resolve cultural property disputes. Although the courts or other competent authorities hold that the requesting party can recover its stolen cultural property, the requested party who possesses such stolen cultural property usually refuses the claim for repatriation.

4.4.1.3 Avoidance of Statutes of Limitation

While a claimant under the 1995 UNIDROIT Convention can request repatriation of stolen cultural property in accordance with art 8(1), there is a statute of limitation. The statutes of limitation are useful to resolve cultural property disputes by preventing claims against as cultural property illegally acquired many years ago.[150] This thesis agrees that allowing claims for repatriation without any time limitation would provoke protest from many states. If the Convention did not create a statute of limitation, many states would hesitate to ratify the Convention because they do not wish to risk losing cultural objects.[151] Conversely, if the Convention did not provide an appropriate timeframe to regain possession of cultural objects, this would also be opposed by many states.[152] To realise the difficult designation of statutes of limitation, this thesis argues that statutes of limitation should reconcile the interests of the requesting and requested party.

There is no statute of limitation for the 1970 UNESCO Convention as the request for repatriation of stolen cultural property under art 7(b)(ii) is not based on the private law regime, but falls within the intergovernmental action by diplomatic channel. Therefore, the period of negotiation should be voluntarily based on both state parties' consent. If the requesting party would apply the rule of *lex situs* to request for repatriation of stolen cultural property at the court of the state in which such cultural property is located, the statute of limitation the court may apply must be in accordance with national law of the requested state as recognised in the Convention art 13(c). It is argued that the request for repatriation by the rule of *lex situs* may not be helpful for the requesting party, because each state party will apply its own statute of limitation.[153]

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[149] Carol Vogel and Clifford J. Levy, *Dispute Derails Art Loans from Russia* (16 January 2017) <http://www.nytimes.com/2011/02/03/arts/design/03museum.html>.
[150] Cottrell, above n 9, 638.
[151] Ibid.
[152] Veres, above n 105, 106.
[153] Patrick O'Keefe, 'Using UNIDROIT to Avoid Cultural Heritage Disputes: Limitation Periods' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 227, 228.

Further, this reflects a fundamental characteristic of the 1995 UNIDROIT Convention—it seeks to conciliate the private law of each state party to resolve cultural property disputes and designates certain time limits to foster certainty.[154] Additionally, during the negotiation phase of the Convention, the negotiating parties preferred to include a retroactivity clause which would negate a need to have a statute of limitations for claims.[155]

The statute of limitation can be divided into two periods: the general limitation period as outlined under art 3(3) and the special limitation periods under art 3(4). The first provides a period of three years from the time when the claimant knew the 'location' of the stolen cultural object and the 'identity' of its possessor and, in any case, within a period of 50 years from the time of the theft.[156] Article 3(3) has two layers of the limitation period. The first layer is a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor. This layer is called the 'relative limitation period' which refers to the situation that the claimant can have an adequate information to bring their action.[157] The second layer is a period of 50 years, called the 'absolute period' running from the time of the theft.[158]

The general limitation period in art 3(3) is not beneficial for the requesting and requested parties. The most appropriate statute of limitation would reconcile the interests of these parties. O'Keefe argues that the three years counted from when stolen cultural property is discovered is insufficient, as the claimant will likely be slow in arranging or putting forth a claim, while the period of 50 years from the time of theft is a too long as far as practicality is concerned, because any proof or information about stolen cultural property is not well preserved for such a time and many circumstances of theft are not easy to trace.[159] The period of 50 years from the time of theft raises the risk of fraudulent concealment where thieves conceal stolen cultural property until the specified time limit expires, after which stolen cultural property can be sold safely.[160] In this regard, this thesis argues that the statutes of limitation in art 3(3) do not help to reconcile interests of the requesting party or claimant and requested party and may adversely affect the claimant's chance for repatriation.

For the special limitation periods, art 3(4) only provides a period of three years as the relative limitation period, because cultural property indicated in art 3(4) should be important enough to be

[154] Eric and Matijevic, above n 8, 288.
[155] Ibid 285.
[156] *The 1995 UNIDROIT Convention* art 3(3).
[157] UNIDROIT Secretariat, above n 14, 17-8.
[158] Ibid.
[159] O'Keefe, above n 153, 230.
[160] Gao Sheng, 'International Protection of Cultural Property: Some Preliminary Issues and the Role of International Conventions' (2008) 12 *Singapore Year Book of International Law and Contributors* 57, 68.

specially treated.[161] Article 3(4) specially protects cultural objects which form an integral part of an identified monument or archaeological site or belong to a public collection. Such cultural objects have a public character that we may easily access and the period of three years in art 3(4) shall not be counted unless the claimant knows the location of stolen cultural object and also the identity of its possessor. Yet, it is argued that art 3(4) dissuades many market states from signing the Convention, because it provides for no time limits.[162] In contrast to the absolute period in art 3(3), only a relative limitation period in art 3(4) will be applied starting from when the claimant knew the location of the stolen cultural object and the identity of its possessor. If the requesting party or claimant does not know that yet, it means market states in which stolen cultural property is located remain at risk forever without time limits. It is hardly surprising that many market states in which a stolen cultural object as indicated in art 3(3) is located do not wish to be bound by the relative limitation period. In reality, it seem that the requesting party or claimant will spend a long time tracing such a stolen cultural object, because a cultural object qualifying under art 3(4) is different from other cultural objects stolen from private collections. It is some kinds of public property which should be publicly known among people. Most people normally know what it is and where it belongs. If such a cultural object was stolen and removed to other place in the world, it is not difficult to trace an identify its location and possessor within a short period of time. This is made even easier if it was purchased and exhibited by a museum or other similar institution located in a market state.

4.4.1.4 Failure in Harmonisation of Legal Systems

The 1995 UNIDROIT Convention was adopted to harmonise civil law and common law systems. This harmonisation is reflected in a legal framework favouring both the claimant as original owner and the current possessor as a good faith purchaser of cultural property. To support common law jurisdictions, the principle of *nemo dat quod non habet* is embedded in art 3(1) which allows an original owner to claim for repatriation of stolen cultural property from a good faith purchaser. However, the Convention lays down the rule of *demand and refuse* which requires the original owner to start their claim for repatriation of stolen cultural property from the possessor and redress under the Convention is only available if the claim has been denied.[163] The rule of *demand and refuse* is reflected in the statute of limitation. Moreover, the rule of *discovery* is also imposed as the original owner's responsibility, in that a cause of action for repatriation of stolen property will

[161] *The 1995 UNIDROIT Convention* art 3(4).
[162] Sheng, above 160, 66.
[163] Spencer A. Kinderman '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' (1993) 7 *Emory International Law Review* 457, 479.

not accrue until the original owner discovers, by exercising due diligence, where their property is located.[164] The original owner is encouraged to repatriate stolen cultural property in accordance with principle of *nemo dat quod non habet*, but the original owner has the burden of proof of ownership regarding the property.

While the original owner is permitted to claim repatriation for stolen cultural property, the good faith purchaser is also protected within the statutes of limitation and entitled to the payment of compensation in accordance with civil law systems. The title of stolen cultural property vests in the good faith purchaser, but the Convention allows the original owner to bring a claim against the good faith purchaser within the time limit. Until the original owner's claim for repatriation becomes successful, the good faith purchaser is still protected to acquire the payment of compensation. Nevertheless, it does not mean that the good faith purchaser is not without any proof of burden. Article 4(1) requests the current possessor of stolen cultural property who is entitled to the payment of compensation to prove the following requirements. First, they must demonstrate that they neither knew nor ought reasonably to have known that the cultural object was stolen. Second, it must be demonstrated that the applicant exercised their due diligence when acquiring the object.[165] Under arts 3(1) and 4(1), the Convention attempts to compromise and harmonise property law principles of civil law and common law system by placing proof of burden on both the original owner and good faith purchaser.

Although the 1995 UNIDROIT Convention is adopted to harmonise the conflicting legal rule of legal systems, it remains asymmetrical as the good faith purchaser is favoured over the original owner. As argued by Kinderman, the requirement of good faith purchaser or possessor in art 4(1) is a much easier burden than proving ownership of the property.[166] Article 4(4) helps to guide the possessor and court to determine factors or circumstances that may prove how the possessor exercised their due diligence, such as the character of the parties, price paid, registration of stolen cultural objects or any other relevant information and documentation.[167] Although art 4(4) is not a certain standard or principle, it provides guidance to decision-makers on whether the possessor acquired a stolen cultural object in good faith. While art 4(4) helps the possessor and court to determine good faith acquisition of stolen cultural property, there is no equivalent provision to a decision-maker to determine that the applicant has exercised due diligence. The claimant is obliged

[164] Ibid 480.
[165] *The 1995 UNIDROIT Convention* art 4(1).
[166] Kinderman above n 163, 487.
[167] *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) art 4(4).

to present any documentation evidencing that they were the legitimate original owners of the cultural property subject to dispute,[168] but in practice this burden of proof is difficult to satisfy.

This places the requesting party or claimant at a significant disadvantage to proceed with a claim to repatriate stolen cultural objects, because art 4(1) does not clarify how the possessor of stolen cultural object is legally entitled to payment of fair and reasonable compensation. The language 'fair and reasonable' together with a higher burden of proof makes it difficult for claimants to proceed with action. There are at least two victims in a case of theft: an original owner and a good faith purchaser or possessor who suffer from the illegal action of a thief as a third person.[169] Original owners are often placed in a financial disadvantage as they are required to provide just and reasonable compensation and may not have the financial capacity to undertake such action.

Scholars have recommended that the legal obligation for payment of compensation should instead be placed on the seller in bad faith of stolen cultural property or insurance company.[170] To agree with this recommendation, it is acceptable that it seems prejudicial to push away only the original owner or claimant to engage in the payment, since they are exposed to risk due to the vague nature of compensation—when we read the text of art 4(1), there is no guidance of what constitutes 'fair and reasonable' compensation.[171] This raises a concern as to the exorbitant price the claimant may have to pay.[172] It is recommended that the claimant should only be obliged to exercise the burden of proof and that the legal obligation for payment of compensation should be placed on the person who illegitimately deprived the owner of the property.

4.4.2 Problems From the Repatriation of Illegally Exported Cultural Property

The 1995 UNIDROIT Convention ch III provides a legal framework for repatriation of illegally exported cultural property which is isolated from the theft. Yet, the request for repatriation of illegally exported cultural property differs from that of stolen cultural property as it is not engaged in the realm of private law, but it falls within public international law at the state-to-state level.

4.4.2.1 Legal Obligation to Enforce Foreign Patrimony or Export Law

The claim for repatriation of illegally exported cultural property is a right only held by a state. It cannot be made by any individual or private entity as can be done for stolen cultural property. Per the 1995 UNIDROIT Convention art 5(1), only 'a contracting state' may request a court or other

[168] Anderson, above n 66, 18.
[169] Forbs, above n 7, 250.
[170] Ibid.
[171] Anderson, above n 66, 20.
[172] Ibid.

competent authority of 'another contracting state' for an order to return illegally exported cultural property.[173] Article 5(1) encourages the repatriation of illegally exported cultural property by intergovernmental action.

Article 5(1) may cause reluctance to ratify the Convention among many states, because it obliges the court or other competent authority of state parties to recognise foreign claims for repatriation. Anderson argued that art 5(1) contradicts the national law of states whose courts do not recognise foreign patrimony or export law as creating a cause of action.[174] Indeed, the 1995 UNIDROIT Convention attempts to provide a legal framework for addressing cultural property disputes among state parties because, without art 5(1), the requesting state party may depend on diplomatic negotiation, a weak channel, to request for repatriation. However, the obligation highlighted under art 5(1) is unlikely to be accepted by market states, for they do not wish their courts to enforce and recognise the patrimony or export law of foreign countries. The small number of market state parties to the Convention reflects this.

4.4.2.2 Limited Claim for Repatriation of Illegally Exported Cultural Property

Despite art 5(1), this thesis argues that the obligation of the court or other competent authority of the state party in which illegally exported cultural property is located to return illegally exported cultural property is not without any limitation. Under art 5(3), the requesting state party shall take a burden of proof on the illegal export before claiming repatriation. The requesting state party must prove that the illegal export of cultural object would significantly impair one or more of the four significant interests listed in arts 5(3)(a)–(d).[175]

This provision would be unfavourable for the requesting state party's to claim for repatriation, because the court or other competent authority of the state party in which illegally exported cultural property is located is obliged to order the return of illegally exported cultural property only in cases when the removal of cultural property would significantly impair one or more of the listed interests. This is a very narrow basis for a requesting state party to claim for repatriation of cultural property. In the absence of one or more of these significant cultural interests, the repatriation of illegally exported cultural property is not absolutely required.[176]

This thesis also argues that the claim for repatriation of illegally exported cultural property in arts 5(1) and 5(3) should be different from the repatriation of stolen cultural property in art 3 of the

[173] The 1995 UNIDROIT Convention art 5(1).
[174] Anderson, above n 66, 21.
[175] *The 1995 UNIDROIT Convention* art 5(3).
[176] Stephanie Doyal, 'Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy' (2001) 39 *Columbia Journal of Transnational Law* 657, 671.

Convention. In considering art 3, if the claimant can prove that a cultural object has been stolen, this sufficient grounds to request the court or other competent authority order repatriation, even when a significant cultural interest is not at stake.[177] Conversely, for the repatriation of illegally exported cultural property under art 5(1), it is compulsory to prove that the removal of the cultural object significantly impairs one or more of the significant cultural interests listed in arts 5(3)(a)–(d). This becomes an additional burden of proof for the requesting state party and decreases its prospects for the return of cultural property.

4.5 Conclusion

The legal framework for repatriation of cultural property under the 1970 UNESCO Convention and 1995 UNIDROIT Convention is inappropriate for resolving cultural property disputes and promoting international cooperation. Repatriation is impossible if market states and states of origin fail to cooperate with each other. The 1970 UNESCO Convention promotes cooperation among state parties with a preference for only cultural nationalism, reflected through its legal obligations which make market states reluctant to ratify the Convention. Additionally, due to its legal defects, it does not facilitate state parties of origin in the requests for repatriation. Although the 1995 UNIDROIT Convention was adopted to complement and reform the 1970 UNESCO Convention's shortcomings, it too promotes cultural nationalism which has resulted in few market states ratifying the Convention. Legal defects arising from the Convention's mechanism make request for repatriation by state parties of origin very difficult. Therefore, the legal framework for repatriation of cultural property under these Conventions is not beneficial for states of origin.

[177] Eric and Matijevic, above n 8, 291.

Chapter 5:
Repatriation of Cultural Property Under International Law: The Potential of Protection and Repatriation of Cultural Property Under ASEAN*

ASEAN, we are bonded as one
Look-in out to the world.
For peace, our goal from the very start
And prosperity to last.[1]

International legal norms can be more effectively implemented when they are enforced at regional levels.[2] The concept of cultural nationalism, found in the 1970 UNESCO Convention and 1995 UNIDROIT Convention, is reflected in the ASEAN regional framework on cultural property. ASEAN is a region rich in cultural heritage with a majority of ASEAN member countries regarded as states of origin. Thus, ASEAN's advocating of cultural nationalism has the aim of protecting cultural property in the region from any illicit removal and excavation. This thesis observes that ASEAN has preferred not to implement cultural nationalism in the form of any hard law, but attempted to encourage its member countries to protect and repatriate cultural property stolen or illegally exported by promoting mutual consensus, strategic and action plan, cooperative programs and harmonisation of national implementation.

Focusing on the relation between the international legal framework and the ASEAN regional framework, particularly the ASEAN Charter, *ASEAN Declaration on Cultural Heritage (2000)* and other related strategy and policy, this chapter determines the strengths and weaknesses of the ASEAN regional framework in governing the exchange of cultural property. This begins with an examination of the preference for cultural nationalism under the ASEAN regional framework which is related to, and reflects, international law. Comparison with other regional legal frameworks on cultural property is undertaken throughout to compare strengths and weaknesses. The chapter also examines how ASEAN countries have learned about protection and repatriation

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[1] 'The ASEAN Way'. Lyrics were written by Mr. Kittikhun Sodprasert, Mr. Sampow Triudom, and Mrs. Payom Valaipatchra. See Association of Southeast Asian Nations, *ASEAN Anthem* (10 February 2018) <http://asean.org/asean/about-asean/asean-anthem/>.

[2] Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Transnational Publishers, 1991) 97.

as part of the positive development of their countries in accordance with international and regional norms.

5.1 ASEAN Regional Framework on Protection and Repatriation of Cultural Property

Illicit trafficking and excavation is a significant concern for ASEAN countries such as Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. There are 24 cultural heritage sites located within seven ASEAN countries as listed in the World Heritage List under the UNESCO World Heritage Convention, demonstrating the richness and diversity of cultural property in this region.[3] Regional frameworks governing this property are primarily influenced by ASEAN.

5.1.1 ASEAN: An Overview of Culture and Arts

ASEAN is the outcome of regional cooperation among Southeast Asian countries to establish cooperation in three key areas or 'pillars': political, economic and sociocultural issues.[4] The establishment of ASEAN cooperation emerged from the ASEAN Declaration, adopted in 1967. This Declaration confirms the establishment of ASEAN with the objectives of promoting regional peace and stability, economic growth, social progress and cultural development through joint collaboration on matters of common interest.[5] This thesis observes that the ASEAN Charter, adopted in 2007, solidified ASEAN as a legal and rule-based organisation. This instrument elaborates ASEAN's objectives and provides institutional arrangements and member states' rights and obligations.[6]

As one of the three main pillars, the ASEAN Socio-Cultural Community (ASCC) was established to lift the quality of life of ASEAN people through culture and the arts, education, social welfare, gender, labour, the environment, health and science.[7] The ASCC lays out its commitments to fulfil the quality of life under the ASCC Blueprint as a roadmap to mutual goals. This document sets out several multi-sectoral and multi-stakeholder engagements with aims of raising and sustaining

[3] United Nations Educational, Scientific and Cultural Organization, *UNESCO World Heritage List* (10 February 2018) <http://whc.unesco.org/en/list>.
[4] Association of Southeast Asian Nations, *About ASEAN-Overview* (10 May 2018) <http://asean.org/asean/about-asean/overview/>.
[5] See *ASEAN Declaration (Bangkok Declaration)*, 1st ASEAN ministerial mtg, (8 August 1967) paras 1-3.
[6] See *Charter of the Association of Southeast Asian Nations*
[7] ASEAN established three communities to take specific actions for fulfil the goal of each pillar: ASEAN Political-Security Community (APSC), ASEAN Economic Community (AEC), and ASEAN Socio-Cultural Community (ASCC). See Association of Southeast Asian Nations, *ASEAN Socio-Cultural Community (ASCC): Factsheet* (11 May 2018) <http://asean.org/storage/2012/05/7d.-May-2017-Factsheet-on-ASCC.pdf>.

public awareness and deepening the ASEAN identity.[8] Although there is no direct mention of the 'cultural property' issue in this document, the way to lift the quality of life of ASEAN people through the socio-cultural pillar is engaged in the concept of cultural nationalism, with the ASCC promoting culture by sustaining public awareness and deepening the ASEAN identity. This direction makes ASEAN people proud of what they mutually have and where they mutually belong. This will lead people to the linkage between their identity and cultural property as a physical matter that reflects the importance of its place of origin.

In terms of institutional arrangements, the ASCC established the ASEAN Ministers Responsible for Culture and Arts (AMCA) as its specific organ on the culture and arts sector. This AMCA is a government-based organ designated to actively drive and implement ASCC's commitments. The ASEAN Charter art 2 gives strong priority to diplomacy and non-interference in the internal affairs of member countries,[9] necessitating cooperation on issues involving culture and the arts. The operation of AMCA is guided by the ASEAN Strategic Plan for Culture and Arts (2016–2025) which aims to facilitate how AMCA can reach goals for culture and the arts. The AMCA also launched 'ASEAN Culture and Arts Cooperation Dialogue' as an opportunity to exchange ideas and explore international collaboration with a wide range of stakeholders having interests in regional culture and arts.[10] The AMCA plays a similar role to UNESCO in encouraging collaboration to promote the repatriation of cultural property.

The ASCC has adopted five instruments: the *ASEAN Declaration on Cultural Heritage (2000)*, *Declaration on ASEAN Unity in Cultural Diversity Towards Strengthening ASEAN Community (2011)*, *Hue Declaration on Culture for ASEAN Community's Sustainable Development (2014)*, *Bandar Seri Begawan Declaration on Culture and the Arts to Promote ASEAN's Identity Towards a Dynamic and Harmonious ASEAN Community (2016)* and *Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN (2016)*. These instruments aim to promote and protect ASEAN culture and arts in accordance with the ASCC's commitments including the development of cooperative frameworks.

5.1.2 ASEAN Regional Cooperation on Cultural Property

The next section examines how ASEAN has promoted its regional cooperation for the protection and repatriation of cultural property.

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[8] ASEAN Secretariat, *ASEAN Socio-Cultural Community (ASCC) Blueprint 2025* (ASEAN Secretariat, 2016) 4.
[9] *Charter of the Association of Southeast Asian Nations* art 2.
[10] ASEAN Secretariat, *Turning Vision into Reality for a Dynamic ASEAN Community: Annual Report 2015-2016* (ASEAN Secretariat, 2016) 70-1.

5.1.2.1 Establishment of Mutual Direction Among Member Countries

The establishment of mutual direction for addressing any problem is the most basic stage in international and regional cooperation.

5.1.2.1.1 ASEAN Regional Framework

The ASEAN Charter[11] is the primary legally binding instrument establishing the objectives and framework for cooperation within the region. Although the ASEAN Charter is not directly linked with cultural property policy, it does provide provisions promoting cooperation among ASEAN member countries regarding cultural property. Illicit trafficking of cultural property is a transnational crime. Although the theft of cultural property is regarded as a criminal offence, its impacts are not limited within a country, because cultural property is usually transferred across borders. Given the transnational nature of illicit trafficking, the ASEAN Charter art 1 responds to all forms of threats, transnational crimes and transboundary challenges.[12] To implement this provision, art 5 obliges ASEAN countries to take necessary measures, including the enactment of domestic law for implementation of the ASEAN Charter's provisions.[13] Each member country takes this action by providing its own law and policy to address illicit trafficking of cultural property.

From the constitutional to specific instruments, the outcome of ASEAN cooperation on cultural property is reflected in five declarations. This thesis observes that only one clearly establishes the mutual direction and purpose of protecting cultural property from illicit trafficking within ASEAN member countries. The *ASEAN Declaration on Cultural Heritage (2000)* Principle 10 provides that:

> ASEAN member countries shall exert the utmost effort to protect cultural property against theft, illicit trade and trafficking, and illegal transfer … shall cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site or similar repositories, whether the stolen property is presently in the possession of another member or non-member country.[14]

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[11] The ASEAN Charter was adopted with the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter on 12 December 2005 and entered into force on 15 December 2008. This ASEAN Charter is regarded as the supreme legal instrument which provides institutional framework, purposes, principles, rights and obligations, procedures of dispute settlement and norms of ASEAN. According to 13th ASEAN Summit, held in Singapore in 2007, moreover, the most important outcome of this summit is the adoption of Singapore Declaration on the ASEAN Charter which requires all ASEAN member countries to ratify the ASEAN Charter as soon as possible in order to bring it into force and also requires them to respect the rights and implement the obligations outlined in the provisions of the ASEAN Charter. See *Singapore Declaration*, done in Singapore, 20 November 2007.

[12] *Charter of the Association of Southeast Asian Nations* art 1(8).

[13] Ibid art 5.

[14] *ASEAN Declaration on Cultural Heritage*, 33rd ASEAN ministerial mtg (25 July 2000) principle 10 [1].

This encourages all ASEAN member countries to fulfil two important tasks. The first is that they shall protect cultural property from theft, illicit trade and trafficking and illegal transfer. The second is the establishment of repatriation of illegally removed cultural property. Although this declaration is not legally binding, it reflects the commitment by all ASEAN member countries to combat the illegitimate removal of cultural property. Additionally, the request for ASEAN cooperation by this Declaration extends its scope to include illegal export of cultural property, not only cultural property stolen, whereby bad title has passed.

5.1.2.1.2 Comparison With the EU[15]

The establishment of a mutual direction to address illicit trafficking of cultural property in ASEAN undertakes a different direction to that displayed in European Union (EU) cooperation. The ASEAN approach is reliant on diplomatic measures to resolve cultural property issues and combat trafficking. As insisted in the ASEAN Charter art 2, ASEAN respects the independence, sovereignty, equality, territorial integrity and national identity of all member countries and does not aim to interfere in the internal affairs of those countries.[16] Each member country fully retains its own sovereignty within ASEAN.

Conversely, EU member countries are integrated under the establishment of a single supranational institution.[17] The EU direction for addressing illicit trafficking of cultural property is provided by the European Council which is responsible for taking measures to protect Europe's public and private heritage as one of the EU's objectives.[18] The EU direction is found in the Council Directives 2014/60/EU of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State. This Directive recommends that EU member countries ratify the 1970 UNESCO Convention and 1995 UNIDROIT Convention and cooperate with UNESCO to prevent crimes against cultural goods by taking common action, exchanging good practices,

[15] This thesis brings the European Union (EU) to be a comparative model because the EU has been the most well-known and substantial outcome of regional cooperation which does not only focus on just a free trade or political and economic sector like NAFTA or APEC, but the EU has also extended its wide range focal areas of regional cooperation including social, cultural and arts sector. This is very similar to ASEAN having socio-cultural sector as one of its three pillars. Thus, the EU should be taken into the comparison with the ASEAN due to its interesting and systematic cooperation.

[16] *Charter of the Association of Southeast Asian Nations* art 2 paras 2(a) and (e).

[17] This thesis observes that the establishment of supranational institution in EU is based on the concept of 'Supranationalism' which refers to 'a large amount of power given to an authority which in theory is placed higher than the state (in our case this authority is the European Union)' cited from Paul-gilbert Colletaz, 'Introducing the European Union: Between Supranationalism and Intergovernmentalism' on *Eurocultuer* (4 November 2013) <https://euroculturer.eu/2013/11/04/introducing-the-european-union-between-supranationalism-and-intergovernmentalism/>.

[18] Marie Cornu, 'Implementation of the 1970 UNESCO Convention in Europe' (Report to the Second MSP to the 1970 UNESCO Convention, UNESCO, 20-21 June 2012) 1-2.

implementing legal frameworks and promoting information and awareness.[19] Under this Directive, each EU member country is allowed to devise its own laws on how to fulfil the Directive's goal, but they are obliged to do this, rather than encouraged as under ASEAN's approach which respects national sovereignty.[20] The Directive is a form of legislation that directs all EU member countries to follow and pursue its goal. This form is not found in ASEAN, since neither ASEAN nor its subsidiary organisations are set up as supranational institutions with a legislative function. Without a legislative organ at the regional level, ASEAN cooperation mostly depends on diplomatic negotiations for providing any legal instruments and these will require member countries to ratify them, as opposed to the automatic adoption seen in EU member countries.

Although, prima facie, the deference to allow EU states to create and design their own laws to combat illicit trafficking appears to share similarities with the ASEAN way of respecting state sovereignty, there are important distinctions. ASEAN does not rely on any supranational institution to develop and inform its direction on how to combat illicit trafficking of cultural property, while the EU approach allows the European Council to establish priorities and political direction for the region. This difference in integration between ASEAN and the EU should affect the effectiveness of regional cooperation. In ASEAN, each member country still holds on its own decision-making power to freely reject cooperation and the direction taken by fellow member states.

According to the EU approach, EU member countries have relinquished part of their sovereignty to EU institutions.[21] This does not mean that EU members waive their sovereignty. They retain their sovereignty, although decisions taken by the EU organisation are binding on EU member countries. This supranational character embodies the characteristics of supremacy and direct applicability of its rights in relation to member countries' national rights.[22] Legal norms created by EU bodies are binding on EU member countries and demand their compliance. Conversely, ASEAN does not have any supranational legislative organ, so the creation of ASEAN legal norms depends on consensus or diplomatic negotiations among member countries.

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[19] *Council Directives 2014/60/EU of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* [2014] OJ L 159/1, preambles (8)-(16).
[20] See European Union, 'Regulations, Directives, and other Acts' on *EU Law* (11 May 2018) <https://europa.eu/european-union/eu-law/legal-acts_en>.
[21] Ajla Škrbić and Meliha frndić Imamović, 'The Sovereignty of the Member States of International Organizations with Special Focus on European Union' in Dunja Duić and Tunjica Petrašević (eds), *EU and Comparative Law Issues and Challenges Series Vol.1* (Faculty of Law Josip Juraj Strossmayer University of Osijek, 2017) 309, 310.
[22] Ibid 315.

5.1.2.2 Definition and Scope of 'Cultural Property'

5.1.2.2.1 ASEAN Regional Framework

The definition of 'cultural property' under international law is narrower than that under the ASEAN Declaration on Cultural Heritage, because the Declaration does not limit cultural property to only movable cultural property. The Declaration uses the wider term 'cultural heritage' to include all types of cultural property, whether tangible, intangible, movable or immovable.

Under the Declaration Principle 1, the term 'cultural heritage' refers to a wide range of cultural forms:

> (a) significant cultural values and concepts;
>
> (b) structures and artifacts; dwellings, buildings for worship, utility structures, works of visual arts, tools and implements, that are of a historical, aesthetic, or scientific significance;
>
> (c) sites and human habitats: human creations or combined human creations and nature, archaeological sites and sites of living human communities that are of outstanding value from a historical, aesthetic, anthropological or ecological viewpoint, or, because of its natural features, of considerable importance as habitat for the cultural survival and identity of particular living traditions;
>
> (d) oral or folk heritage: folkways, folklore, languages and literature, traditional arts and crafts, architecture, and the performing arts, games, indigenous knowledge systems and practices, myths, customs and beliefs, rituals and other living traditions;
>
> (e) the written heritage;
>
> (f) popular cultural heritage: popular creativity in mass cultures (i.e., industrial or commercial cultures), popular forms of expression of outstanding aesthetic anthropological and sociological values, including the music, dance, graphic arts, fashion, games and sports, industrial design, cinema, television, music video, video arts and cyber art in technologically-oriented urbanized communities.[23]

To compare this to 'cultural property' under the 1970 UNESCO Convention, the listed categories of cultural property in its arts 1(a)–(k) falls within the definition of 'cultural heritage' in the ASEAN Declaration on Cultural Heritage. As such, property relating to history, property of artistic interest or antiquities more than 100 years old should be included in the meaning of 'structures and artifacts and works of art … that are of a historical, aesthetic, or scientific significance'.[24] Thus, there is a coherent definition under both instruments. This should allow ASEAN member

[23] *ASEAN Declaration on Cultural Heritage* principle 1 para 3.
[24] Ibid

countries to comfortably ratify the 1970 UNESCO Convention, since both instruments can be harmoniously implemented.

The definition of 'cultural property' under the 1970 UNESCO Convention requires a state's designation as provided in the language, 'specifically designated by each state party'.[25] Any cultural property not specifically designated by a state falls outside the protective scope of the Convention. The requirement of state designation is not mentioned in the ASEAN Declaration on Cultural Heritage Principle 1. However, Principle 2 of the Declaration requests all ASEAN member countries to cooperate in the protection of antiquities or works of historic significance, whether movable or immovable, declared as 'National Treasures', 'Protected Buildings' or 'Protected Artifacts'.[26]

'National Treasures' the Declaration Principle 2 do not refer to all antiquities or works of historic significance located within ASEAN member countries, only those that an ASEAN country deems a national treasure in accordance with its national law. Thus, we may imply that any cultural property not declared as national treasure and any private collections fall outside the scope of protection under the Declaration. Thus, the scope becomes rigid, only safeguarding cultural property declared as a national treasure, similar to the shortcoming of the 1970 UNESCO Convention which only protects cultural property designated as such by each state party.

To confirm the rigid scope of protection and repatriation of cultural property under the Declaration Principle 10, the Declaration requests all ASEAN member countries to prevent illicit trafficking of cultural property and cooperate with each other to return, seek the return or help facilitate the return to their rightful owners cultural property stolen from museums, sites or similar repositories[27]—this restriction may exclude individual houses, private collections or archaeological sites. This rigid scope is very similar to the 1970 UNESCO Convention art 7(b)(ii) which allows a state party to request for repatriation of cultural property stolen from a museum or a religious or secular public monument or similar institution.[28]

The scope of protection and repatriation of cultural property of the Declaration is coherent with that in the international legal framework and should allow ASEAN member countries to comfortably ratify and implement international law on cultural property. However, this scope would lead to growing problems of illicit trafficking in ASEAN, since the Declaration excludes

[25] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 1.
[26] *ASEAN Declaration on Cultural Heritage* principle 2.
[27] Ibid principle 10.
[28] See *The 1970 UNESCO Convention* art 7(b)(ii).

cultural objects not yet excavated or declared by their state of origin as national treasures. This thesis observes that each ASEAN member country has adopted domestic law and policy with a larger scope of protection than in the Declaration. For example, Thai law prohibits any export of cultural property without permission, even though it may not have been declared a national treasure. This is discussed in detail in Chapter 6. This thesis observes that the regional framework under the ASEAN Declaration on Cultural Heritage is a minimum standard that may be applied in conformity with the domestic law of each ASEAN member country. Its soft nature makes the Declaration flexible and enables member countries to approach problems cooperatively.

5.1.2.2.2 Comparison With the EU

While ASEAN provides the definition of cultural property in its non-binding Declaration, the EU provides the definition of cultural property under two legally-binding instruments. The first is the Council Directives on the Return of Cultural Objects Unlawfully Removed From the Territory of a Member State which has the main purpose of the return of cultural property illegally removed from EU member countries. The definition of cultural property is found in art 2 of the Directives, denoting term 'cultural object' as 'an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the "national treasures" possessing artistic, historic or archaeological value' under national legislation or administrative procedures.[29]

The second definition of cultural property is identified under the Council Regulation No 116/2009 which aims to establish a uniform export control system. Annex I of this Regulation specifies and exemplifies many types of cultural object such as archaeological objects more than 100 years old that are the products of excavations, archaeological sites or collections, elements forming an integral part of artistic, historical or religious monuments of an age exceeding 100 years, pictures and paintings, etc.[30]

Although the EU seemingly allows member countries to designate which cultural property should be accorded the status of cultural property, this is broad and cause for disparity in classifying or defining cultural property among EU member countries. Each member country may adopt the definition of cultural property without harmonisation of laws. While the definition of cultural property under the Directives is that freely designated by each member country as its national treasure, cultural property under the Regulation is not necessarily indicated as national treasures

[29] *Council Directives 2014/60/EU of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* [2014] OJ L 159/1, art 1.
[30] *Council Regulation (EC) No 116/2009 of 18 December 2008 on the Export of Cultural Goods* [2009] OJ L39/1, annex I.

and is limited to objects more than 100 years old. Thus, the definition of cultural property under the Directives is quite relevant to the 1970 UNESCO Convention, since it is very broad.[31]

To compare with the ASEAN regional framework, it seems that the EU and ASEAN instruments openly permit their member countries to designate which cultural property should be accorded the status of cultural property. However, we see that the EU rarely explains what cultural property is. It does not establish a minimum standard of what should be clearly cultural property as it allows member countries to classify and define an object of archaeological, artistic or historic value located in their own territory. The ASEAN Declaration on Cultural Heritage gives more guidance on what constitutes 'cultural property' through Principles 1(a)–(f). As soft law, the ASEAN Declaration is regarded as a minimum standard which allow ASEAN member countries to design their own status and threshold for cultural property. This flexibility is consistent with the nature of ASEAN in which reliability, diplomacy and cooperation are priorities. Moreover, the Declaration does not separate the definition of cultural property into a case for return of unlawfully removed cultural property and a case for export control, as seen in the EU Directives and Council Regulation.

In terms of the promotion of an export control system in the region, the EU Regulations encourages the establishment of an export control system for cultural property among EU member countries. There is no comparable initiative in the ASEAN Declaration. Perhaps, this lies in different perspectives on cultural property. ASEAN applies the concept of cultural nationalism to protect cultural property from any export from its member countries' territory, thus, it does not set up any guidance or standard for promoting an export system. Instead, ASEAN allows member countries to freely design their own national law for export control of cultural property. Conversely, the EU encourages the exchange and free flow of cultural property in the region by way of regarding cultural property as common cultural heritage of Europe. This notion is relevant to the concept of cultural internationalism as supported by the Treaty on the Functioning of the EU (TFEU) art 167 which provides that the EU shall contribute to the flowering of the cultures of member countries and promote their common cultural heritage.[32]

5.1.3 Protection of Cultural Property With a Preference for Cultural Nationalism

The ASEAN way of encouraging its member countries to protect cultural property within their territory has cultural nationalism at its heart. Two important functions of cultural nationalism are

[31] Cornu, above n 18, 3.
[32] 'Treaty on the Functioning of the European Union' (2012) 49 *Official Journal of the European Union C 326*, art 167.

found in 1) promoting the power of the state to retain cultural property within its own territory with respect to the importance and identity of place of origin and 2) promoting the power of the state to proceed the repatriation when cultural property was illegally removed from its own territory. This section discusses the first of these functions and Section 5.1.4 discusses the second.

5.1.3.1 ASEAN Regional Framework

Cultural nationalism is fully applied under the ASEAN Declaration on Cultural Heritage. Principle 1 confirms the duty of each ASEAN member country 'to identify, delineate, protect, conserve, promote, develop, and transmit to future generation that significant cultural heritage within its territory'.[33] This is a clear link of cultural heritage with the power of the state. The Declaration promotes the state as a key actor with responsibilities for protecting 'cultural property' that becomes a sub-category of the Declaration's definition of 'cultural heritage'. This is consistent with the relationship between cultural nationalism and a state's jurisdiction which recognises that cultural property originates, *in situ*, from a cultural wellspring as products of a geographically limited culture, thus, it should belong to the national inheritors or current occupiers of that same geographical location.[34] This is exemplified by Thailand, whose laws are designed to preserve cultural property within its territory, for example, stipulating that the owner of cultural property, whether public or private, is not to export this cultural property without permission.[35] Thailand has full power to enforce its territorial jurisdiction to control citizens and property. Because ASEAN is not a supranational organisation in the same vein as the EU, it encourages regional cooperation through the ASEAN way which supports national implementations by member countries. In keeping with this, the ASEAN Declaration on Cultural Heritage only encourages and guides cooperate among member countries to preserve cultural property *in situ*.

The Declaration Principle 2 requires ASEAN member countries to promote cultural property as national treasures.[36] This thesis agrees with the motivation behind this provision that cultural property declared as national treasure shall be directly under the duty of the state. The state becomes the real stakeholder who cannot refuse the responsibility to protect or seek for repatriation of such national treasures. This state's declaration is an effective way to uphold the power of the state to control and retain cultural property within its own territory, because the state is fully entitled to trace and follow its national treasures and enforce an export ban. Principle 10 of the Declaration shows an effort to maintain the power of the state to eliminate a vicious cycle of illicit

[33] *ASEAN Declaration on Cultural Heritage* principle 1 para 1.
[34] Sean R. Odendahl, 'Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership' (2001) 1 *University of Illinois Law Review* 475, 481.
[35] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 22.
[36] *ASEAN Declaration on Cultural Heritage* principle 2 para 1.

trafficking consisting of illicit import and export of cultural property. This provision encourages ASEAN member countries to take measures to regulate 'the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions'.[37] This duty of state does includes the protection of cultural property from removal out of a state's territory and avoiding acquisition of illicitly traded cultural property.

The duty to avoid the acquisition of illicitly traded cultural objects applies to states, but also encourages persons and/or institutions in states to adopt this duty. Public museums or institutions governed by the state are not the only repositories of movable cultural property. Many private museums or institutions and individual collections not governed by the state may be engaged in the acquisition of illicitly traded cultural property. This thesis observes that most states of origin usually do not allow the private sector or individuals to possess or trade cultural property found in their territory unless given permission to do so. This acquisition of cultural property is regulated by the state. Additionally, the acquisition of cultural objects by public and private museums can be handled with international standards provided by the ICOM. The ICOM Code of Ethics for Museums provides guidance for museums to use their due diligence before acquiring any cultural object by investigating its origin, provenance, valid title or authorisation of fieldwork.[38] This guidance is a model ASEAN member countries may apply to create their own national law and policy to require individuals or institutions inspect objects of history or artistic before their acquisition.

To link with the 1970 UNESCO Convention, the ASEAN regional framework which preferences cultural nationalism is consistent with arts 5–6 of the Convention. Those provisions encourage state parties to retain their cultural property by contributing to the formation of laws designed to secure their protection, establishing a national inventory and export certificates.[39] Consequently, the features of cultural nationalism as embedded in the regional and international frameworks are consistent with each other. The retention of cultural property becomes the most primary stage of implementing cultural nationalism. ASEAN member countries are required to declare their cultural objects to be national treasures so that those objects shall be automatically controlled by the respective state. Subsequently, the repatriation of cultural property becomes the next stage of cultural nationalism which seeks to return illegally removed cultural objects to their place of origin. Given the cultural heritage and diversity of the ASEAN region, cultural nationalism is the preferred approach to lawmaking.

[37] Ibid principle 10 para 2.
[38] See International Council of Museums, *Code of Ethics for Museums* (ICOM, 2013) principles 2.2-3.
[39] See *The 1970 UNESCO Convention* arts 5-6.

5.1.3.2 Comparison With the EU and AU[40]

The EU regional frameworks are based on a hybrid of cultural nationalism and cultural internationalism. The TFEU art 167 provides that action by the EU shall be aimed at supporting cooperation between member countries in the area of conserving and safeguarding cultural heritage of European significance.[41] This is explained in the Council Conclusions on Preventing and Combating Crime against Cultural Goods. The Council Conclusions recommend EU member countries ratify the 1970 UNESCO Convention and 1995 UNIDROIT Convention and closely work with other relevant organisations like UNESCO or INTERPOL to take common actions such as exchange of good practices; making a standard for identifying cultural objects; coordination between law enforcement, cultural authorities and private organisations; and considering cooperation with third countries on protection against illicit trafficking.[42]

The framework under the TFEU and Council Conclusion is relevant to the duty of the state that aims to design law and policy to protect cultural property located in the state's territory. France, Italy, Spain and Portugal have different systems for controlling export and import of cultural property, and even England and Germany, in which protection of cultural property is poorly developed, have a permit system for exporting cultural property.[43] Accordingly, this protective model is linked with cultural nationalism which aims to maintain the power of state to prevent the removal of cultural property.

Yet, while cultural nationalism is reflected as discussed above, the EU encourages its member countries to develop markets in cultural goods, reflecting cultural internationalism. The EU attempts to drive its markets by requesting member countries adopt the uniform rules on trade with third countries needed for the protection of cultural goods.[44] The Council Regulation on the Export of Cultural Goods promotes the free flow of cultural goods with the qualifier that this be regulated by an export licensing system. This requires the presentation of a license granted by competent

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[40] The African Union (AU) is to be also taken into the consideration. This thesis observes that many African countries, mostly regarded as a state of origin, have been confronting illicit trafficking of cultural property because Africa is one of regions rich in cultural heritage like ASEAN and also most African countries are the signatory of the 1970 UNESCO Convention. Due to the same situation as ASEAN, the way the AU encourages its member countries to protect and return illegally removed cultural property should become interesting to be compared with ASEAN.

[41] 'Treaty on the Functioning of the European Union' (2012) 49 *Official Journal of the European Union C 326*, art 167.

[42] *The Council Conclusions on Preventing and Combating Crime Against Cultural Goods*, 3135th Justice and Home Affairs Council mtg, (13-14 December 2011) 3.

[43] Federal Office of Culture on behalf of the Working Group, 'International Transfer of Cultural Objects: UNESCO Convention of 1970 and UNIDROIT Convention of 1995' (Report of the Working Group, Federal Office of Culture, 1999) 13.

[44] *Council Regulation (EC) No 116/2009* preamble (2).

member states prior to the export of cultural goods.[45] Undoubtedly, this system would facilitate cultural property being distributed from country to country. People from EU member countries may have a chance to access and appreciate other member countries' cultural property in accordance with cultural internationalism.

This thesis argues that neither cultural nationalism nor cultural internationalism are absolutely applied in the EU, instead, they coexist. The export of cultural goods is only allowed when the good is accompanied by an export license issued by the competent authorities in the exporting country. Any export of cultural goods without a license is illegal and cultural goods remain within their place of origin. Linking with the GATT exceptions, this allows states to place any trade restriction measures on cultural property.[46] The prior grant and presentation of an export permit system has the same function as the GATT exceptions to protect cultural property. However, the status of cultural property restricted for the export needs to be further clarified since the EU Regulation's Annex I specifies the definition of cultural goods covered in the export scheme by only excluding national treasures.[47] Therefore, we should separate cultural goods that can and cannot be exported orderly into cultural goods in Annex I (ie, exportable) and cultural goods as national treasures under a member state' legislation (ie, restricted from export). If cultural goods would suit to Annex I, the restrictive measures on export of cultural goods by the GATT exceptions may be unnecessary and EU member countries can export these goods as regulated by the licensing scheme, while the trade restriction measures for cultural goods declared as national treasures remain aligned with the GATT exceptions.

The ASEAN and EU regional frameworks were adopted with different perspectives on cultural property. The ASEAN regional framework is heavily influenced by cultural nationalism in pursuing the power of the state to control and protect cultural property within its territory. ASEAN does not accept the establishment of a free market in cultural property, not even of an exclusive trading system for ASEAN member countries. Responsibility for the prohibition of cultural property export is left to national legislation. While the EU is similar to ASEAN in applying cultural nationalism to request its member countries to ratify the 1970 UNESCO Convention and 1995 UNIDROIT Convention and design legal and other mechanisms to combat crimes against cultural property, the EU does not strictly prohibit trade in cultural objects within the region. Although the EU controls trade with third parties and also regulates the export of cultural objects

[45] Ibid art 2-4.
[46] Article XX(f) of the GATT permits contracting parties to design any measure which shall be imposed for the protection of national treasures of artistic, historic or archaeological value. See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 12 January 1948) art XX(f).
[47] *Council Regulation (EC) No 116/2009* Annex I.

outside the EU, the EU does not reject that cultural objects, regarded as goods, can freely flow among EU member countries, because it recognises that cultural objects located within in its member countries are common cultural heritage of Europe. This hybrid of perspectives is not found in ASEAN.

The African Union (AU) and ASEAN face similar situations—being rich in cultural diversity and heritage—and have similar practices based on cultural nationalism. It may be argued that both should apply cultural internationalism if it promotes soft power and is in their national interest. For example, Chinese pandas are globally exported as a Chinese ambassador to promote soft diplomacy.[48] This depends on how we perceive cultural property. They may earn diplomatic reputation and money by distributing their cultural property all over the world, but it adversely affects their ownership rights and national identity. Although cultural property may become an ambassador, like a Chinese panda, its value is different. As a physical representative of its place of origin's identity and inheritance, cultural property cannot be reproduced as a mass product. It has value in having survived through long periods of time and being unique. This value is irreplaceable, unlike a panda. Even though we can duplicate its physical shape, we can never attach them same value to it. For example, the Sultan Mkwawa's skull[49] has value beyond its tangible form, for it is a cultural object—the remainder of the Sultan Mkwawa who fought German colonisation of German East Africa (modern-day Tanzania). Its value lies in reminding Tanzania's people who they are and why they are proud of their nation and history. This perspective gives the reason for why culturally rich countries espouse cultural nationalism.

The AU way to protect cultural property is found in the Charter for African Cultural Renaissance. The Charter lays down the framework for AU member countries to protect their cultural heritage. The preamble reflects the relation between this instrument and the 1970 UNESCO Convention, because the Convention was used as guidance for the Charter.[50] The Charter art 26 provides that 'African States should take steps to put an end to the pillage and illicit traffic of African cultural property'.[51] This is the only provision solely relevant to fighting illicit trafficking of cultural property.

The AU applies a broad framework like ASEAN. The effectiveness of such a framework depends on national implementation. For instance, Cote d'Ivoire enacts the Law of 28 July 1987 relative to

[48] See World Wildlife Fund, *Fuzzy Diplomacy: More than 25,000 apply for "Pambassador" Post* (3 September 2010) <http://wwf.panda.org/wwf_news/?194785/Fuzzy-diplomacy-more-than-25000-apply-for-Pambassador-post>.
[49] See Mkwawa.com (18 December 2017) <http://www.mkwawa.com/>.
[50] *Charter for African Cultural Renaissance* preamble.
[51] Ibid art 26.

the protection of Ivorian cultural heritage, providing that all archaeological projects are inspected and authorised by the government. Egypt strictly prohibits private sector from possessing cultural property and all cultural items are declared as state-owned property.[52] South Africa enacts the *National Heritage Resources Act of 1999* which appoints a state agency together with its council to promote the management of heritage resources and to introduce the system of heritage inspectors.[53] The AU and ASEAN do not establish any solid legal rules on the protection of cultural property in their respective regions. This thesis observes that both organisations are very reliant on diplomacy and national implementation. This character is different from the EU which oblige each member country to adopt its own law and policy to meet the goal of regional instruments.

5.1.4 Repatriation of Cultural Property From Illicit Trafficking

The repatriation of cultural property is the stage following cultural property being illegally removed from its state of origin. It is an important function of cultural nationalism found through promoting the power of the state to proceed with the repatriation. This section examines the ASEAN way to encourage its member countries to seek for repatriation of cultural property.

5.1.4.1 ASEAN Regional Framework

The repatriation of cultural property would be impossible without positive cooperation with another state in which illegally exported cultural property is found and located. ASEAN realises this concern and attempts to begin with the creation of cooperation for repatriation among its member countries. The ASEAN Declaration on Cultural Heritage Principle 10 provides that ASEAN member countries:

> shall cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site or similar repositories, whether the stolen property is presently in the possession of another member or non-member country.[54]

As previously discussed, this provision creates a rigid scope of repatriation as restricted to cultural property stolen from a museum, site or similar repository and repatriation of cultural property from theft, excluding the case of illegal export of cultural property.

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[52] Folarin Shyllon, 'Implementation of the 1970 UNESCO Convention by African States: The Failure to Grasp the Nettle' (Report to the Second MSP to the 1970 UNESCO Convention, UNESCO, 20-21 June 2012) 3-4.
[53] Ibid 7.
[54] *ASEAN Declaration on Cultural Heritage* principle 10 para 1.

The ASEAN regional framework on repatriation of cultural property copies the 1970 UNESCO Convention arts 7(b)(i)–(ii) which request the cooperation of state parties to return cultural property from a museum or religious or secular public monument or similar institution in another state party's territory.[55] Those instruments reflect the legal principle of *nemo dat quod non habet*[56] (discussed in depth in Chapter 4) which aims to protect the right of ownership, so the subsequent possessor of stolen cultural property should be requested for repatriation, because no title to cultural property was transferred from a smuggler. Although the ASEAN Declaration on Cultural Heritage follows the legal principle embedded in the 1970 UNESCO Convention, it does not apply the exception to *nemo dat quod non habet* which the Convention applies to protect an innocent possessor.

The ASEAN Declaration Principle 10 does not encourage that the requested member country or non-member country who should return stolen cultural property to the rightful owner be entitled to payment of any just compensation. This shows that the ASEAN Declaration strictly applies *nemo dat quod non habet*. It does not also mention the repatriation of cultural property illegally removed in violation of export law of a member country—again, this thesis observes the nature of ASEAN cooperation is reliant on diplomacy. Although the ASEAN Declaration does not specifically mention the return of illegally exported cultural property, this is considered to depend on cooperation among member countries per the general purpose of the organisation under the ASEAN Charter. Any ASEAN member country seeking for repatriation of illegally exported cultural property may apply the ASEAN Charter art 1(2) to request regional resilience by promoting cooperation with another member country.[57]

The ASEAN regional framework strictly applies cultural nationalism to promote repatriation of cultural property in the region and it is reliant on diplomacy. This is different from the EU which usually provides a binding legislative act for member states. ASEAN mostly prefers its member countries cooperate with each other by following the ASEAN regional framework to address any mutual problem. A brief discussion of one productive outcome of regional cooperation in ASEAN demonstrates this. Both Cambodia and Thailand recently implemented the ASEAN regional framework by adopting a bilateral agreement relating to the repatriation of cultural property from illicit trafficking, the 'Agreement Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute it to the Country of Origin'. This

[55] *The 1970 UNESCO Convention* art 7(b)(ii).
[56] Adina Kurjatko, 'Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art' (1999) 5 *U.C. Davis Journal of International Law & Policy* 59, 70.
[57] *Charter of the Association of Southeast Asian Nations* art 1(2).

bilateral agreement was adopted to facilitate the repatriation of cultural property from both theft and illegal export.

Although Cambodia and Thailand are not regarded as a market states, this thesis argues that a smuggler may use a neighbour country as a pathway to transport cultural property. This bilateral agreement is helpful for stopping illicit trafficking at the early stage by complying with the ASEAN Declaration Principle 10, since the agreement obliges each party to take measures to prohibit the import, export and acquisition of its stolen or illicitly imported cultural property and also provide information on it.[58] Each party will benefit from information on its illegally removed cultural property located in the other party's territory and facilitation for repatriation of stolen or illegally exported cultural property.[59] Although Cambodia and Thailand have established the bilateral agreement in pursuit of repatriation of cultural property illegally transited between their territory, this thesis argues that the outcome of their cooperation remains unsatisfied. In considering the low number of cultural objects seized and returned by Thailand, Thailand has just returned only 16 smuggled cultural artefacts to Cambodia since the agreement was established[60] despite the fact that the situation of illicit trafficking in Cambodia is raised in the ICOM Red Lists which include several numbers of antiques that can be subject to theft and traffic.[61] According to a report, moreover, approximately 80% of 345 pieces of Cambodian objects that were brought at auction from 1988 to 1995 in the United States had unclear provenience.[62] As a major hub in looted cultural objects, this seems the Thai government has been rather passive in preventing the flow of Cambodian artefacts through its own territory over the years.

The ASEAN Declaration does not mention the repatriation of cultural property from non-member states, but facilitates member countries to cooperate with each other in the development and establishment of national and regional inventories; database; and networks of academic institutions, governmental offices and museums concerned with cultural heritage.[63] This provision helps all member countries to recognise that cultural property in ASEAN is a mutual interest. The loss of any single cultural property from any member country reflect a loss of ASEAN heritage, so it is vital to jointly create effective networks to share and maintain each other's cultural property

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[58] *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, opened for signature 14 June 2000, (entered into force 14 June 2000) art 1.
[59] Ibid art 2.
[60] Prangthong Jitcharoenkul, 'Thailand Returns 16 Smuggled artefacts to Cambodia', *Bangkok Post* (online), 12 July 2015, <https://www.bangkokpost.com/thailand/general/620172/thailand-returns-16-smuggled-artefacts-to-cambodia>.
[61] International Council of Museums, *Red List of Cambodian Antiques at Risk* (ICOM, 2009) 2-8.
[62] Tess Davis, 'Supply and Demand: Exposing the Illicit Trade in Cambodian Antiquities through a Study of Sotheby's Auction House' (2011) 56 *Crime, Law and Social Change* 155, 157.
[63] *ASEAN Declaration on Cultural Heritage* principle 13.

and to take actions towards repatriation of cultural property, as exemplified by proved by the Cambodia–Thailand bilateral agreement.

Such a mutual interest is encouraged by the ASEAN Charter. Article 1 states ASEAN's need 'to promote an ASEAN identity through fostering of greater awareness of the diverse culture and heritage'.[64] 'ASEAN identity' is not the identity of any individual country in ASEAN, but the identity of all ASEAN countries as a whole. If cultural property is physical evidence of the identity of ASEAN culture, it should be mutually preserved by all member countries as it represents unique ASEAN cultural heritage. The ASEAN Strategic Plan for Culture and Arts (2016–2025)[65] also materialises the ASEAN Declaration by laying down key strategies and actions for member countries to increase the appreciation for the ASEAN's histories, cultures, arts, traditions and values[66] and to build up a common ASEAN voice in global cultural forums.[67] This plan is another way of reinforcing a mutual interest on preservation and repatriation of cultural property within ASEAN.

5.1.4.2 Comparison With the EU and AU

The EU regional framework for repatriation of cultural property among EU member countries is embedded in the Council Directives on the Return of Cultural Objects Unlawfully Removed From the Territory of a Member State which provides a legal framework aligned with the 1970 UNESCO Convention and 1995 UNIDROIT Convention. It applies judicial procedure, statutes of time limitation and payment of fair compensation for protecting the good faith possessor who is required to return property.

Each EU member country is requested to establish one or more central authorities responsible for carry out the Directives.[68] The central authorities of each member country shall consult and cooperate with the member countries' competent national authorities to seek for a specified cultural object illegally removed from the territory of the requesting member state.[69] The repatriation will begin with proceedings against the possessor by the requesting member state

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[64] *Charter of the Association of Southeast Asian Nations* art 1(14).
[65] By the goal of ASEAN Socio-Cultural Community (ASCC), ASEAN Strategic Plan for Culture and Arts 2016-2025 becomes a long-term strategy that was adopted in the Sixth ASEAN Ministers Responsible for Culture and Arts (AMCA) Meeting on 19 April 2014. This ASEAN Strategic Plan is to deepen an ASEAN mindset and facilitate intercultural dialogue among the peoples of ASEAN through the engagement of various stakeholders in raising awareness on, and appreciation for, the histories, cultures, arts, traditions and values of the ASEAN region. See ASEAN Secretariat, *ASEAN Strategic Plan for Culture and Arts (2016-2025)*, 7th AMCA mtg, (24 August 2016) 1-3.
[66] Ibid 3-4.
[67] Ibid 10.
[68] *Council Directives 2014/60/EU of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* [2014] OJ L 159/1, art 4.
[69] Ibid art 5.

before the competent court in the request member country.[70] This thesis observes that this obligation under the EU framework is based on the principle of *lex situ* which is relevant to the 1995 UNIDROIT Convention. The proceedings under this Directive shall not be brought more than three years after the requesting member country's competent central authority is aware of the location of the cultural object and identity of its possessor.[71] When the return of specified cultural objects is ordered, the competent court shall award the possessor fair compensation according to the circumstances that the possessor proves their due care and attention in acquiring the cultural object.[72] The EU regional framework for repatriation does not support the requesting and requested member country to proceed with the repatriation of cultural property through the European Court of Justice, but applies the principle of *lex situ* which empowers the relevant national court to settle the dispute.

Each EU member country shall adopt its own national law according to the Council Directives, because the national court in each member country can apply the national law to implement the way of repatriation as stipulated by the Directives. The EU supports repatriation between and among member countries due to the notion of common cultural heritage of Europe. The retention and return of cultural property within the EU is done to preserve this cultural heritage and diversity in accordance with the EU's purposes under the TFEU art 167.[73] Application of a similar regional framework in ASEAN would be interesting, as it is observed that the ASEAN regional framework is too broad and does not establish coherence for the repatriation of cultural property within the region. Each ASEAN member country individually follows its own way and practice for requests for repatriation from market states. This leads to a lack of unity among ASEAN member states in requesting repatriation. This thesis argues that a regional framework mirroring the EU regional framework would eliminate these issues.

In terms of repatriation of illegally removed cultural property, the AU Charter for African Cultural Renaissance is very similar to the ASEAN regional framework. It does not provide any solid obligations for AU member countries. The Charter art 27 provides that 'African States should take the necessary measures to ensure that achieves and other historical records which have been illegally removed from Africa are returned to African governments'.[74] This provision is a broad framework for repatriation of cultural property in the region. It has not been claimed to proceed with repatriation by African countries and there is no any solid cooperation under this framework.

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[70] Ibid art 6.
[71] Ibid art 8.
[72] Ibid art 10.
[73] 'Treaty on the Functioning of the European Union' (2012) 49 *Official Journal of the European Union C 326*, art 167.
[74] *Charter for African Cultural Renaissance* art 26

Many African countries prefer to repatriate their cultural property through UNESCO and the 1970 UNESCO Convention, rather than relying on the AU regional framework. This is proved by the effort of African countries in the UN General Assembly in 1973 to have the UN General Assembly establish the ICPRCP.[75]

African countries request for repatriation of illegally removed cultural property from market states through the ICPRCP.[76] In *Makonde Mask*, in 2010, the Republic of Tanzania requested the repatriation of a Makonde mask from the Barbier-Mueller Museum of Geneva, Switzerland. The ICPRCP became the key channel to facilitate this repatriation.[77] While Tanzania claimed that the artefact was stolen from its national museum in 1984 and requested for repatriation, the Swiss museum informed the ICOM and UNESCO that it could not reach to an agreement regarding the issue of ownership of the artefact.[78] From 2006–2010, the involved parties were served by mediation by the ICPRCP, leading to a the bilateral agreement under which Switzerland intends to donate the artefact to the National Museum of Tanzania.[79] This thesis observes African countries' preference for pursuing repatriation via ICPRCP and that no such preference exists among ASEAN states who seem unfamiliar with the roles of ICPRCP and prefer to pursue repatriation via bilateral diplomacy.

5.1.4.3 Conclusion: Strengths and Weaknesses

The ASEAN regional framework on protection and repatriation of cultural property is based on the ASEAN way. As noted by Katsumata, the ASEAN way is a unique style of diplomacy providing an informal and incremental approach to cooperate through consultation and dialogue with institutionalisation kept to a minimum.[80] The ASEAN comprises four principles: non-interference in the internal affair of member countries, quiet diplomacy, non-use of force/peaceful

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[75] Folarin Shyllon, 'The Recovery of Cultural Property by African States Through the UNESCO and UNIDROIT Conventions and the Role of Arbitration' (2000) 2 *Uniform Law Review* 219, 222.
[76] ICPRCP is the intergovernmental committee under the UNESCO which may be called on by UNESCO member countries to facilitate its need to restitution or return of lost cultural property. The ICPRCP can also play key roles in seeking ways of facilitating multilateral or bilateral negotiations for repatriation of cultural property among member countries concerned which should lead to the effective promotion of multilateral or bilateral cooperation for repatriation of cultural property to its states of origin. See also United Nations Educational, Scientific and Cultural Organization, *Intergovernmental Committee (ICPRCP)* (20 May 2018) <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/>.
[77] Ioanna Georgiou, *The Role of UNESCO in Cases of Return of Cultural Property to Their Countries of Origin. The Work of the UNESCO 'Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation'* (MA in Art, Law and Economy Thesis, International Hellenic University, 2016) 24.
[78] Ibid.
[79] Folarin Shyllon, 'The 16th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 21-23 September 2010' (2011) 18 *International Journal of Cultural Property* 429, 429.
[80] Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia The Case for Strict Adherence to the ASEAN Way' (2003) 25 *Journal of International and Strategic Affairs* 104, 106.

settlement of disputes, and decision-making through consensus.[81] The ASEAN way has strengths and weaknesses.

In terms of strengths, this ASEAN reflects the establishment of mutual direction among member countries. This thesis observes that the emphasis on diplomacy and non-interference in member countries' internal affairs is appropriate for cooperation among the 10 member countries, all regarded as states of origin and facing similar situations, experiences and problems. Thus, there is generally consensus on issues of mutual concern. The principle of quiet diplomacy is reflected in the ASEAN framework, or lack thereof, for the repatriation of cultural property in ASEAN. This quiet diplomacy discourages criticism of other member states' policies to avoid relational tensions.[82] This reflects the East Asian cultural value of 'face'.[83] Quiet diplomacy assures member countries of the avenue to resolve their mutual concerns via informal conciliation or private negotiation, rather than confrontation in public. An example of this is the previously discussed Cambodia–Thailand bilateral agreement on repatriation of cultural property.

In terms of weaknesses, this thesis identifies a lack of a solid or obligatory on the protection and repatriation of cultural property in ASEAN. The ASEAN Declaration on Cultural Heritage is non-binding and only provides a very general and broad commitment for member countries, reflecting the principle of non-interference. While the emphasis is on national implementation of frameworks and policies, there is no guarantee of countries doing this. Institutionalisation is minimal and member countries reserve their freedom to accept or reject the cooperation to ensure that such cooperation is productive. ASEAN lacks any power to initiate any campaign or cooperation with other organisations such as UNESCO or the ICPRCP to support the protection and repatriation of cultural property in the region.

These strengths and weaknesses reflect the unique style the ASEAN way. Possible steps for effective cooperation on repatriation of cultural property are as follows. Initially, ASEAN could support establishment of a diplomatic framework to repatriate cultural property between or among member countries, using the Cambodia–Thailand bilateral agreement as a pilot model. ASEAN should fully support cooperation between or among member countries with the mutual notion that cultural property originated in the region must be retained within its country of origin. Each member country would be obliged to facilitate the return of illegally removed cultural property found and located in its own territory to the ASEAN member country state of origin. This should

[81] Ibid 107.
[82] Ibid.
[83] The value of 'face' is one of East Asian cultural themes consisting of collectivism, hierarchy, face, harmony, social reciprocity, and view of time. See Bob Riel, 'East Asian cultural themes' on *Cross-Cultural Business Writing* (23 May 2018) <http://www.bobriel.com/pdf%20files/east%20asia%20business%20culture.pdf>.

be concluded in the form of a binding agreement for repatriation of cultural property. This inter-region cooperation for repatriation of cultural property be extended to other organisations to benefit from their mechanisms.

5.2 State Practices on Protection and Repatriation of Cultural Property

This section explores the state practices of ASEAN member states to examine whether and how those countries have coherently complied with the ASEAN regional framework.

5.2.1 State Practices[84]

Only four ASEAN member states have signed the 1970 UNESCO Convention: Cambodia, Laos, Myanmar and Vietnam.

5.2.1.1 Definition and Scope of Cultural Property

The ASEAN Declaration on Cultural Heritage's definition and scope of 'cultural heritage' is very broad (see Section 5.1.2.2.1). The regional framework requests member countries designate their cultural property. Laos[85] enacts two laws, the *Presidential Decree Concerning Protection of National Cultural, Historic and National Heritage (1997)* and *Law on National Heritage (2005)*. The Law (2005) has a wider scope than the Presidential Decree, as it was generally designed to provide an overview of cultural heritage framework and protective scope includes both tangible and intangible forms of culture. The Decree specifically provides for the protection of physical movable property—artefacts, antiques and objects of art—and immovable property—historical, archaeological or cultural sites. The Decree defines national cultural, historical and national heritage as public, collective or personal assets of cultural importance or historical importance and constituting evidence of the country, ancestors and general origin of Lao people including artefacts with historical, artistic value and over 50 years old.[86] Public or private cultural property may fall under this definition and be controlled by the state. Laos established the national inventory[87] for the state to consider and list cultural property found in Laos for the benefit of the Ministry of Information and Culture.

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[84] The state practices will be examined only in legal aspect to seek for the linkage and coherence between regional and national legal framework. However, this section will not examine a state practice of Thailand because it will be solely discussed and examined in chapter 6.
[85] Lao People's Democratic Republic (Laos) has not still ratified the UNESCO Convention yet, but Laos becomes the latest ASEAN member country which has been a signatory to the convention since 22 December 2015.
[86] *Presidential Decree concerning Protection of National Cultural, Historic and National Heritage 1997* (Lao People's Democratic Republic) art 2.
[87] Ibid art 12.

Myanmar[88] is a country rich in cultural heritage, movable and immovable, including prehistoric sites and stone tools from the ancient Pyu cities near Ayeyarwady River (1–10 AD).[89] Myanmar has strictly legislated on cultural property found in its own territory. The *Antiquities Act (1957)* defines 'cultural property' as antiquity including any object of archaeological interest such as fossil remains of man and animal, objects believed to have been used by early humans, paintings or inscriptions of ethnological and historical interest, sculptures, and things declared by the president as deserving preservation under the purpose of the Act.[90] It is interesting that any object may fall within the protective scope of the Act if the president deems that such an object should be preserved for the purpose of this Act. This Act obviously maintains the power of the state to define and manage cultural property in the country.

The power of the state to define and control cultural property is also found in Brunei. Under the *Antiquities and Treasure Trove Act (1967)*, cultural property that may be illegally removed refers to antiquities—'any movable object … which has been constructed, shape, inscribed, erected, excavated … any part of any such object and any human, plant, or animal remains at any date prior to or reasonably believed to be dated to fifty years onwards'—and historical objects—any artefacts or other objects of religious, artistic or historic interest such as works of art, paintings, textiles, etc.[91] Every cultural object discovered in Brunei after the Act's entry into force is state property and any person who discovers cultural property shall is obliged to inform the district officer of where such property was discovered.[92]

The Philippines established its specialised agency to function the *Cultural Heritage Act of 2009* which provides the definition of 'cultural property' as 'all products of human creativity by which a people and a nation reveal their identity, including churches, mosques and other places of religious worship, schools and natural history specimens and sites, whether public or privately owned, movable or immovable, and tangible or intangible'.[93] This definition is very broad and includes all forms of property (including privately owned property). The state agency, the National Commission for Culture and the Arts,[94] is authorised by this Act to establish and maintain the Philippine Registry of Cultural Property (PRECUP). Under the PRECUP system, the Commission

[88] Myanmar has become a state party to the 1970 UNESCO Convention by ratification since 5 December 2013.
[89] Myanmar Delegation, 'Country Report on Protection of Cultural Heritage in Myanmar' in Amareswar Galla (ed) (Paper presented at the Protection of Cultural Heritage in Southeast Asia: Workshop Proceedings, Hanoi, Vietnam 9-13 April 2001) 41.
[90] *Antiquities Act 1957* (Myanmar) art 2.
[91] *Antiquities and Treasure Trove Act 1967* (Brunei Darussalam) art 2.
[92] Ibid arts 3-4.
[93] *Cultural Heritage Act of 2009* (Philippines) sec 3.
[94] National Commission for Culture and the Arts was created in 1992 as the supreme organ to launch the policy on culture and arts in Philippines and implement such policy and relevant legislations for protection of cultural property. See National Commission for Culture and the Arts, *NCCA Transparency Seal* (21 February 2018) <http://ncca.gov.ph/ncca-transparency/>.

conducts registry and inventory of cultural property by authorising its coordinating cultural agencies[95] and local government to register any cultural property deemed important to cultural heritage, while private collectors or owners are required to register cultural property in their possession in the PRECUP, although they shall not be divested of possession and ownership.[96]

As shown above, ASEAN member countries define cultural property in conformity with the ASEAN regional framework, with a preference for a broad definition and scope that ensures all cultural property is under the state's control.

5.2.1.2 Protection of Cultural Property With Preference for Cultural Nationalism

Cultural nationalism is the conceptual basis of all ASEAN member countries' design of their legislation for retaining and protecting cultural property from the removal. In Cambodia,[97] this preference is reflected through its Constitution which lays down the legal obligations for the state to preserve and protect ancient monuments and antiques and to restore historical sites.[98] Any offence relating to cultural heritage and artistic heritage shall be severely punished.[99] State power to protect cultural property is detailed by the *Law on Cultural Heritage Protection (1996)* which provides legal norms, inventory, rights and obligations of stakeholders, and sanctions. This Law lays down its institutional arrangement by empowering the Supreme Council on National Culture as policymaker and the Ministry of Culture and Fine Arts as responsible for implementing policy released from the Council. The area of Angkor, a declared World Heritage Site, is managed by a specific authority, the Authority for the Protection of the Site and Management of the Region of Angkor.[100]

This Law is applied to movable and immovable cultural property, whether publicly or privately owned.[101] This Law provides the steps of 'inventory' and 'classification' to keep cultural property under surveillance by the state. Initially, both public and private cultural property are listed in the inventory in accordance with the decisions of the Ministry of Culture and Fine Arts. The owner of the listed property is obliged to inform the ministry before taking any action to move, destroy,

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[95] Coordinating cultural agencies in Philippines refer to National Museum, National Historical Commission of the Philippines, National Archives, National Library, Commission on Philippine Language, and Cultural Center of the Philippines which are all supervised by the National Commission for Culture and the Arts with particular missions on preservation of cultural property. See National Commission for Culture and the Arts, *Affiliated Cultural Agencies* (21 February 2018) <http://ncca.gov.ph/cultural-center-of-the-philippines/>.
[96] *Cultural Heritage Act of 2009* (Philippines) sec 14.
[97] Cambodia has ratified the 1970 UNESCO Convention since 26 September 1972.
[98] *Constitution of the Kingdom of Cambodia 1993* (Cambodia) sec 69.
[99] Ibid sec 70.
[100] See *Law on Cultural Heritage Protection 1996* (Cambodia) art 5.
[101] *Law on Cultural Heritage Protection 1996* (Cambodia) art 3.

modify, alter, repair or restore the property.[102] Classification is a following step that registers public or private cultural property already inventoried whose protection is in the public interest from an artistic, scientific, historical or religious point of view.[103] Classification has the same function as the declaration of national treasure and is not limited to public property. Any person who needs to alienate, move, destroy, modify or repair private cultural property prepared for classification or already classified is obligatory to inform the ministry, while public cultural property already classified is inalienable.[104] Cambodia strictly controls cultural property in its country and all actions towards cultural property, inventoried and classified, must be investigated by the state.

In Laos, the Presidential Decree Concerning Protection of National Cultural, Historic and National Heritage (1997) also prohibits any removal of cultural property out of Laos unless the Ministry of Information and Culture approves such removal by granting a certificate of export.[105] The preference for cultural nationalism is influential in the design of legal protection of cultural property in Myanmar. The *Antiquities Act (1957)* obliges the state to prohibit or restrict the trafficking in antiquities out of country or any specified region except when the removal is authorised by the president.[106] Before issuing authorisation, the president may request the antiquity to be inspected and sealed.[107] Custom and police officers are authorised at any place, land, water or air, to inspect and open any baggage reasonably believed to contain antiquities.[108] Myanmar very strictly applies cultural nationalism for retaining cultural property and maintaining the power of the state to control and regulate cultural property.

Retention of cultural property is favoured in Vietnam and the country implements the 1970 UNESCO Convention and ASEAN regional framework by enacting the *Law on Cultural Heritage (2001)*.[109] This Law creates the national inventory that encourages agencies and individuals to register cultural property in their possession so that the state can investigate and follow registered cultural property. Any cultural property considered and declared as national treasures shall be protected and preserved with special care.[110] Moreover, this Law prohibits relics, antiquities and

[102] Ibid arts 7-10.
[103] Ibid art 11.
[104] Ibid arts 20-1.
[105] *Presidential Decree concerning Protection of National Cultural, Historic and National Heritage 1997* (Lao People's Democratic Republic) art 13.
[106] *Antiquities Act 1957* (Myanmar) art 7(1).
[107] Ibid art 7(3).
[108] Ibid art 7(7).
[109] Vietnam has ratified the 1970 UNESCO Convention since 20 September 2005.
[110] *Law on Cultural Heritage 2001* (Vietnam) art 42.

national treasures from export, trade and exchange except when this is done for display, exhibition, research or preservation.[111]

Indonesia, although not a state party to the 1970 UNESCO Convention, provides a legal framework on cultural property in conformity with the international and ASEAN regional framework. The *Law of the Republic of Indonesia No 11 of 2010 Concerning Cultural Conservation* obliges the government to cooperate with individuals for mandatory registration of cultural property.[112] Article 68 states that cultural property, whole or part, can only be taken out of Indonesia for the purposes of research, cultural promotion or exhibition.[113] Removal of cultural property for any other reason is illegal.

Malaysia enacts the *National Heritage Act (Act 645) (2005)* to protect, tangible, intangible, land or underwater cultural property. Under this Act, the Minister of Tourism and Culture shall appoint the Commissioner of Heritage as the highest authority to function the Act.[114] Although the Minister is empowered by the Act to declare and list any object, site or underwater heritage as national heritage,[115] this declaration will not deprive any person who owns or possesses such national heritage.[116] However, Malaysia reserves the power to impose procedures and guidelines for such national heritage.[117] The Act prohibits any export of cultural object unless granted an export license granted by the state.[118] The concept of cultural nationalism is applied for preserving cultural property within Malaysia and under state protection.

As previously mentioned, the Philippines's *Cultural Heritage Act of 2009* states that any cultural property registered and listed under the PRECUP system shall not be permitted for export unless the Commission grants export authorisation (consistent with international and the ASEAN region framework).[119] Although the Act mentions only registered cultural property, other cultural property may be protected from removal. Section 5 lists works that can be declared important cultural property—some cultural works such as works of national heroes, works by *Manlilikha ng Bayan*, works by a national artist, a material or document at least 50 years old, and archaeological

[111] Ibid arts 12 and 44.
[112] *Law of the Republic of Indonesia No.11 of 2010 Concerning Cultural Conservation* (Indonesia) arts 28-29(1).
[113] Ibid art 68.
[114] *National Heritage Act (Act No. 645) 2005* (Malaysia) arts 4-5.
[115] Ibid art 67.
[116] Ibid art 68.
[117] Ibid art 72.
[118] Ibid art 83.
[119] *Cultural Heritage Act of 2009* (Philippines) sec 23.

and traditional ethnographic materials[120]—and subject to protective measures and protected from the export, even if they have not been registered.[121]

This thesis observes that most ASEAN member countries impose strict legal measures authorising their relevant state agencies to control cultural property and protect it from any removal out of their territory. The export ban is regarded as the primary regulation in those countries. Singapore is the only exception to this. With the spirit of free trade as a priority, Singapore does not enact any legislation that specifically prevents cultural property from legal or illegal export.[122] To support free trade, very few imported goods such as intoxicating liquors, tobacco products, motor vehicles and petroleum products are dutiable or under control and also incur goods and serves tax, and only a 7% goods and serves tax is levied on all other imported goods.[123] Cultural property is not controlled or prohibited from import and export[124] and may be privately owned and traded. Any cultural property found in Singapore's territory is not necessary owned and controlled by the state, but can be owned by the finder or its legal owner in accordance with the common law principle that respects the priority of titles to chattels.[125]

Singapore does make exception to the free flow of cultural objects when they are contained in national collections under the *National Heritage Board Act (1993)* (NHB). The NHB was adopted to safeguard all works of art and cultural artefacts that represent artistic endeavours and historical or cultural awareness.[126] The National Heritage Board was established by the NHB with the objective of exploring and presenting the heritage and nationhood of the Singaporean people;[127] developing and managing museums and other relevant facilities; and collecting, classifying, preserving and displaying works of art, artefacts and records[128] When the Board finds any work of art or artefact desirable for its collections, it may acquire, whether by purchase, exchange or gift,

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[120] Ibid sec 5.
[121] National Commission for Culture and the Arts (Philippines), 'Philippine Report on the Status of the 1970 Convention on Illicit Trafficking of Cultural Property' (Paper presented at Sub-Regional Symposium for the Prevention of Illicit Traffic in Cultural Heritage in Southeast Asia, UNESCO, Bangkok, 19-21 November 2014) 4.
[122] Singaporean Delegation, 'Protection of Singaporean Cultural Property' in Amareswar Galla (ed) (Paper presented at the Protection of Cultural Heritage in Southeast Asia: Workshop Proceedings, Hanoi, Vietnam 9-13 April 2001) 51.
[123] See Singapore Customs, *Import Procedures* (23 February 2018) <https://www.customs.gov.sg/businesses/importing-goods/import-procedures>.
[124] See Singapore Customs, *Competent Authorities' Requirements for Controlled Items* (23 February 2018) <https://www.customs.gov.sg/about-us/national-single-window/tradenet/competent-authorities-requirements-for-controlled-items>.
[125] Singaporean Delegation, above n 122.
[126] Ibid.
[127] *National Heritage Board Act* (Singapore, cap 196A, 1993 rev ed) sec 3.
[128] Ibid sec 6.

such a work from the owner.[129] Under the NHB, a work of art or artefact preserved in the collections is prohibited from export without the permission of the Board.[130]

The method of preserving cultural property in Singapore is distinctive from that of other ASEAN member countries, because Singapore does not apply the concept of cultural nationalism to preserve its own cultural property and promote the power of the state to do so. Singapore attempts a mix of cultural nationalism and cultural internationalism. The notion that the state will restrict the free flow of cultural property as little as possible becomes a general rule which regards the right of an individual to own, manage, remove or dispose any cultural property not contained in the National Heritage Board collections. Although the NHB permits the Board to explore and collect desirable cultural property for its collections, this acquisition is not based on absolute power of the state. The Board is obliged to acquire such cultural property by purchase or exchange without using any power of the state to enforce or coerce the owner into selling their cultural property. This is under the realm of private law. Moreover, any cultural property found in Singapore will not be vested in the state, but is owned by the finder. This thesis observes that cultural internationalism is favoured for free trade in cultural property, with cultural nationalism playing its key role in ensuring important cultural property is contained in the National Heritage Board collections (ie, prohibited from export and under the control of the state). Singapore has not ratified the 1970 UNESCO Convention and its cultural property regime is not compatible with the Convention.

5.2.1.3 Repatriation of Cultural Property From Illicit Trafficking

To implement the ASEAN regional framework, many ASEAN member countries have attempted to facilitate repatriation of cultural property among each other. The return of cultural property within the region by ASEAN member countries is not difficult, because they are states of origin with the similar experiences of illicit trafficking. The most productive example of such the cooperation in pursuing the return of cultural property is the previous discussed Cambodia–Thailand bilateral agreement.[131] This agreement is consistent with the ASEAN regional framework and ASEAN way, emphasising quiet diplomacy and reciprocal basis. This bilateral agreement obliges each party to take key measures to prohibit the import, export and acquisition of stolen and illicitly imported cultural property and it provide information concerning such property.[132] This

[129] Ibid sec 15.
[130] Singaporean Delegation, above n 122.
[131] See *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, opened for signature 14 June 2000, (entered into force 14 June 2000).
[132] Ibid art 1.

form of cooperation is not found among other ASEAN member countries. For example, Laos's and Malaysia's recent repatriations mostly depended on diplomatic negotiations with neighbour countries or cooperation with global organisations such as UNESCO or INTERPOL.

The outcome of repatriation is not under the control of any individual state, because it necessarily depends on negotiations between the requesting and requested party. ASEAN member countries cannot enforce their national law to return cultural property located in other countries as this is beyond their national jurisdiction. In some countries, there is extraterritorial application of legislation that applies to the punishment of citizens for committing a crime outside the state's territory. For example, Thailand's Criminal Code art 8 insists that 'whoever commits an offence as the followings[133] outside the Kingdom shall be punished in the Kingdom … the offender must be a Thai citizen and there has been a request for punishment by the government of the country where the offence has occurred or by an injured person'.[134] However, this extraterritorial application is quite passive, because it will be functioned when there is a request for punishment by the government of the foreign country or an injured person.

ASEAN member countries prefer to engage in bilateral negotiation with non-member states. This method is consistent with the obligations under Article 7(b)(ii) of the 1970 UNESCO Convention, which encourages a requesting party and requested party to take appropriate steps to recover cultural object concerned. Cambodia sought to cooperate with the US, a big market for illegally removed cultural property. Bilateral negotiation produced an agreement, the Memorandum of Understanding (MoU) Between the US and Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material (2003). This MoU obliges the US Government to restrict the import of certain categories of Khmer archaeological material identified on the 'Designated List' unless the Government of Cambodia grants a certificate or other documentation certifying such export.[135] The MoU also obliges the US to offer for return to Cambodia any material on the Designated List forfeited to the US Government.[136] This MoU is reciprocal and obliges Cambodia to permit the exchange of its archaeological material for public access for educational, cultural and scientific purposes.[137]

This thesis observes Cambodia's gain through the MoU (the facilitation of repatriation of cultural property from the US) as reflecting cultural nationalism, but also observes the application of

[133] Article 8(1) of Thai Criminal Code specifies 'offences of theft of any antique'
[134] *Thai Criminal Code* (Thailand) art 8.
[135] *Memorandum of Understanding between the United States and Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material*, opened for signature 19 September 2003, (entered into force 19 September 2003) art I(A).
[136] Ibid art I(B).
[137] Ibid art II.

cultural internationalism in the legal obligation that Cambodia shall permit the exchange of its cultural property, thus, benefiting US study of and access to Khmer archaeological material. The MoU does not favour either concept—both are compromised to achieve mutual benefit and satisfaction between Cambodia and the US. This thesis argues for the viability and necessity of cooperation of the like demonstrated in the MoU, based on a mixture of cultural nationalism and cultural internationalism and mutual benefit of states of origin and market states. The MoU was applied for the *Head of APSARA*.[138] This sandstone head was seized from Cambodia and imported to the US in 2005. Under the MoU, it was repatriated to Cambodia in 2007.[139] The reciprocity under such bilateral agreements should benefit states of origin more than compliance with the 1970 UNESCO Convention art 7(b)(ii) due to the exception to *nemo dat quod non habet* since they do not risk payment of exorbitant compensation and its shortcomings.

No other ASEAN member state has a bilateral agreement resembling the MoU. This thesis observes that ASEAN member countries have recently requested for repatriation of cultural property through bilateral negotiations with market states or foreign museums. For example, Myanmar recently negotiated with many countries for repatriation of its cultural property. These negotiations were reflected by the case of *Royal Regalia* in which Myanmar requested Victoria and Albert Museum in the United Kingdom return cultural property stolen during colonisation.[140] Myanmar also achieved repatriation of its five bronze statues produced during Pyu era from the New York Metropolitan Museum in the US.[141] Although bilateral negotiation with museums in market states is the most common method applied by Myanmar for repatriation of its cultural property, success is uncertainty, because it may fail or be deadlocked at any stage of negotiations should the requested party disagree.

Vietnam also shows preference for bilateral negotiation for repatriation of cultural property. Vietnam requested for repatriation of the Ngu Ho Pagoda bell from Japan in 1978. The bell was seized by the Japanese Army in 1940 and transported to Japan.[142] In 1977, Watanabe Takuro found the bell in Japan and told a local newspaper of his discovery during his visit to Vietnam.

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[138] The New World Encyclopedia describes that 'APSARA is a female spirit of the clouds and waters In Hindu and Buddhist mythology … APSARA are supernatural beings who appear as young women of great beauty and elegance that are proficient in the art of dancing' See the New World Encyclopedia, *APSARA* (18 January 2018) <http://www.newworldencyclopedia.org/entry/Apsara>.
[139] Sok Sidon, 'Angkorian Apsara Sculpture Returned From US', *The Cambodia Daily* (Cambodia) (online), 3 August 2007, <https://www.cambodiadaily.com/archives/angkorian-apsara-sculpture-returned-from-us-76880/>.
[140] Alex Bescoby, 'Who Stole Burma's Royal Ruby', *BBC News* (online), 7 November 2017, <http://www.bbc.co.uk/news/resources/idt-sh/who_stole_burmas_royal_ruby>.
[141] Aye Min Soe, 'Treasures from Myanmar Ancient Cities Displayed in New York Show High Culture of the Pyu Era', *The New Light of Myanmar* (Myanmar), 25 June 2014, C1.
[142] Editorial, 'For Whom the Bell Tolls', *Thanhnien News* (Vietnam) (online),19 October 2012, <http://www.thanhniennews.com/society/for-whom-the-bell-tolls-4761.html>.

Subsequently, Vietnam began to request for the return of the bell.[143] Worth noting is that the repatriation was successful, but this was not solely due to negotiations. Also influential was calls by a group of Japanese people for donations to buy the bell and return it to Vietnam.[144] Vietnam has also made many efforts for repatriation through payment in auctions. In 2014, the Hue Monument Conservation Center in Vietnam paid €40,000 to participate in various auctions and paid more for the repatriation of Nguyen Dynasty antiquities such as the Royal Rickshaw and King Thanh-Thai's bed which were in France.[145] In both of the above examples, there was no process undertaken under the 1970 UNESCO Convention (despite Vietnam, Japan and France all being party to the Convention). Vietnam mostly prefers to cooperate with requested parties via negotiations or public pressure—more flexible forms of requesting repatriation that likely result in mutual satisfaction for the requesting and requested party without relying on the Convention.

5.2.2 Coherences and Possibilities

The preference for cultural nationalism as a basis for domestic law and policy is clear in most ASEAN member countries to protect their cultural property. The establishment of inventories and prohibition of cultural property export are in compliance with the 1970 UNESCO Convention and ASEAN regional framework. This thesis argues that ASEAN has the high potential to intensify cooperation among ASEAN member countries and help its member countries negotiate with non-member countries.

To implement the ASEAN regional framework, ASEAN member countries implement legislation following the direction provided in the ASEAN Declaration on Cultural Heritage. Their national laws are designed to reserve the state's power to declare cultural objects as national treasures and protect them from destruction or removal out of country. Although some countries allow cultural property to be owned or possessed by an individual, they reserve the power to prohibit its export. Singapore is only ASEAN member country permitting the free flow of cultural property, with some exceptions (see Section 5.2.1.2). ASEAN member countries generally have the same objectives in relation to cultural property and similar experience in illicit trafficking. This provides grounds for comfortable cooperation.

The examination of state practices in this chapter raises the question of the necessity of ratifying the 1970 UNESCO Convention—only four ASEAN member countries have signed the

[143] Ibid.
[144] Ibid.
[145] Bui Ngoc Long, 'Hue Bringing Home Royal Rickshaw from France, Hopes to Retrieve Plundered Relics', *Thanhnien News* (Vietnam) (online), 8 April 2015, <http://www.thanhniennews.com/arts-culture/hue-bringing-home-royal-rickshaw-from-france-hopes-to-retrieve-plundered-relics-40785.html>.

Convention. This thesis does not perceive any necessity for the other ASEAN member countries to ratify the Convention. Each ASEAN member country provides its own cultural property law and this chapter has identified these domestic frameworks as conforming and in compliance with both the Convention and ASEAN regional framework in terms of preservation of cultural property.[146] All espouse cultural nationalism in the design of their domestic frameworks for the protection and repatriation of cultural property (except Singapore which practices a mix of cultural nationalism and cultural internationalism).

In differing from the Convention art 7(b)(ii), ASEAN member countries have not strictly applied the exception to *nemo dat quod non habet* to request for repatriation of illegally removed cultural objects from member or non-member states. ASEAN member countries prefer a method of repatriation based on negotiation and reciprocal benefit. This thesis argues that this is more appropriate than complying with the Convention. The Convention, preferencing cultural nationalism, favours states of origin, but this dissuades market states from ratifying or engaging the Convention, thus, the Convention actually provides little benefit to states of origin and hampers the chance for successful repatriation of cultural property. As a multilateral agreement, the Convention cannot provide a mutually beneficial framework for requesting and requested parties, because the character of multilateral agreements means they are forced to heavily comprise to reach a political consensus.[147] Further, the negotiation of any multilateral agreement is usually dominated by large and powerful countries and the input of small countries minimised.[148] Although the Convention adopts cultural nationalism and favours states of origin (the majority of its signatories), this approach was opposed by market states (who tend to be comparatively more powerful countries). An impact of US participation in the drafting process was that it gained a significant advantage due to exerting considered influence on the final text of the Convention.[149] The final text was mainly prepared by lawyers from market states and did little to protect the interests of states of origin.[150] For example, art 7(b)(ii) requiring the party seeking for repatriation to pay an inexact compensation to the requested party may impede repatriation, because the outcome necessarily depends on the requested party's consent and satisfaction. Further, this

[146] See *The 1970 UNESCO Convention* art 5.
[147] Arie Reich, 'Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity' (Bar-Ilan University Public Law and Legal Theory Working Paper No 14-09, Bar-Ilan University, 2009) 12-3.
[148] Ibid 13.
[149] Kifle Jote, *International Legal Protection of Cultural Heritage* (Juristforlaget, 1994) 201.
[150] Ibid.

compensation may be prohibitively expensive for the requesting part as most states of origin are classified as developing countries.[151]

ASEAN member states prefer a bilateral approach, including for protection and repatriation of cultural property. The Cambodia–Thailand bilateral agreement and Cambodia–US MoU are two clear models for this approach. This approach allows the requesting and requested party to design an agreement that suits their needs and interests, leading to reciprocal benefit.[152] For example, the Cambodia–US MoU established a standing agreement for the US to return Cambodian cultural property (without any legal obligation for payment of compensation) in return for Cambodia permitting the exchange of its archaeological material for public access for educational, cultural and scientific purposes.[153]

Arguably, such bilateral agreements may create a patchwork of different rules governing the exchange of cultural property with no clear principles. It is true that there are no legal principles established to enforce the terms of such agreements. Yet, bilateral agreements, by their very nature, depend on compromise between both parties with the aim to extract both parties' will and wish. The flexibility of bilateral agreements is one of their strengths and alluring features, and the introduction of principles to govern them could threaten this. Nevertheless, there is potential for codification of the unwritten principles of bilateral agreements in general. The first principle receiving such treatment should be the reciprocal principle which would ensure that no party is at a disadvantage during the formation and operation of a bilateral agreement. In regard to ASEAN and request for repatriation of cultural property, this proposed principle is compatible with the ASEAN way.

5.3 Conclusion

ASEAN has the potential to create regional cooperation on the protection and repatriation of cultural property. Its member countries have designed their own laws in coherence with the international and regional framework for pursuing the retention of cultural property within their own territories. Yet, for repatriation of cultural property, most ASEAN member countries do not initiate procedures under the international legal framework, but seek to reconcile their interests with the requested party via a bilateral approach. This thesis observes that this is compatible with the ASEAN way and more efficacious than complying with the international legal framework for

[151] See United Nations, *Country Classification* (28 May 2018) <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.
[152] Reich, above n 147, 15-6.
[153] *Memorandum of Understanding between the United States and Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material*, opened for signature 19 September 2003, (entered into force 19 September 2003) art I(B).

repatriation of cultural property. Given the common interest and experience of ASEAN member states in countering illegal export of cultural property and the general coherence of their state practices on this issue, ASEAN member countries should move to promote cooperation on repatriation, first among themselves and then between themselves and non-member states.

Chapter 6:
Repatriation of Cultural Property Under International Law: An Assessment of Implementation in Thailand

Take Michael Jackson back. Give us back Phra Narai.[1]

Thailand, an ASEAN member country and state of origin, has faced severe illicit trafficking of its cultural property. Although it has not ratified the 1970 UNESCO Convention, its national direction and state practice are in conformity with the Convention's legal framework and the ASEAN regional framework. Thailand has designed its policy and law to promote the retention of cultural property within its territory and sought to repatriate its cultural property removed in violation of its export law. Thus, Thailand provides a case study in the implementation of the international and regional framework in national policy. This chapter undertakes such an examination in four parts. Section 6.1 provides an overview of Thai law, Section 6.2 examines Thailand's protective scheme through three aspects (policy, legal and institutional), Section 6.3 examines Thailand's recent cases of repatriation and Section 6.4 summarises the conclusions of the chapter.

6.1 Overview of Thai Cultural Property Law

This section provides an overview of Thailand's legal system including its laws and regulations relating to cultural property to establish the legal context of Thailand.

6.1.1 Legal System

Thailand's laws and regulations relating to cultural property are enacted through the process of parliamentary legislation based on its civil law system. The first important step towards legal modernisation in Thailand began with the vision in law reform of King Rama V (1858–1910) who established the Ministry of Justice in 1892 in the hope of unifying the judicial system.[2] Revision of old laws was undertaken with a preference for to adapting English law (as many members of the legal profession had been educated in the United Kingdom and were familiar with English law).[3] However, it was perceived that English law was specific to English circumstances and, with absence of established domestic precedence in Thailand, left much room for confusion. Thus, the

[1] Yuenyong Opakul, 'Tap Lang (The Lintel)', *Carabao in English* (14 February 2018) <http://carabaoinenglish.com/song-translations/tap-lang>.
[2] Tanin Kraivixian, 'Thai Legal History' (1963) 49 *Women Lawyer Journal* 6, 10.
[3] Sansern Kraichitti, 'The Legal System in Thailand' (1968) 7 *Washburn Law Journal* 239, 241.

Thailand law reform turned to the continental tradition of codification (ie, civil law), except for commercial law (due to British dominance in trade and commerce at the time).[4] As a result of the law reform, Thailand established the Royal Commission on Codification in 1897 to draft and promulgate the codes of law in Thailand.

After the bloodless revolution of 1932, the administrative system of Thailand was greatly changed by a group of military and civil officials. They abolished the absolute monarchy and introduced a constitutional form of democratic government with the king as head of state.[5] This remains in place today. Thailand applies a check-and-balance system similar to Western democracies.[6] Under the Constitution, the king theoretically exercises his legislative power through parliament, executive power through the cabinet commanded by a prime minister, and judicial power through the courts.[7] In terms of hierarchy of law, the Constitution is the supreme law and the lower law includes codes of law and Acts of Parliament. To complement the Acts of Parliament, they may empower the government to enact its subsidiary laws such as royal decrees, ministerial regulations and other governmental notifications. The subject matter of lower law must not be contrary to upper law. The process of legislation requires a Bill, commonly presented either by the cabinet or the House of Representatives. When the Bill is taken into consideration and approved by both the House of Representatives and the Senate, it is submitted to the King for his assent and then becomes an Act.

6.1.2 Laws and Regulations Relating to Cultural Property

Laws and regulations relating to cultural property are codified in the form of Acts of Parliament and subsidiary laws. The AON is the most important cultural property law in Thailand with the objective of protecting immovable and movable cultural property from destruction, illegal excavation and illicit trafficking. The protective scheme under the AON is split into two main stages, the registration stage and protective stage. The legal protection of cultural property is also embedded in other laws such as the *Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931)* which prohibits any person to trade movable cultural objects unless permission is granted.[8] The *Land Excavation and Land Filling Act B.E. 2543 (2000)* is designed to control land excavation and land filling. If any object of art or antique is found in an area while excavation work is in progress, the excavation work shall cease, a local governmental official shall be informed within seven days from the date of finding and a local governmental official shall notify

[4] Ibid.
[5] Kraivixian, above n 2, 15.
[6] Ngamnet Triamanuruck, Sansanee Phongpala, and Sirikanang Chaiyasuta, 'Overview of Legal Systems in the Asia-Pacific Region: Thailand' (Scholarship@Cornell Law: A Digital Repository-Overview of Legal Systems in the Asia-Pacific Region Paper No 4, 2004) 3.
[7] Ibid.
[8] *Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931)* (Thailand) arts 4 and 12.

the DFA as soon as possible.[9] The legal obligation to notify the DFA upon the discovery of cultural property in Thailand is also contained in other laws such as the *Artesian Water Act B.E. 2520 (1977)* and *Mineral Act B.E. 2510 (1967)*.

6.2 Implementation of Cultural Property Protection

This section examines the protection of cultural property from illicit trafficking through policy, legal and institutional aspects. The relation between national implementation and the international and ASEAN regional framework will be also be examined.

6.2.1 Establishment of a National Direction on Cultural Property

The establishment of a national direction for addressing any problem is the basic stage in every country for resolving the problem.

6.2.1.1 Policy Aspect

Although the *Constitution of the Kingdom of Thailand B.E. 2560 (2017)* does not mention cultural property, it provides the duties of Thailand to preserve and promote local wisdom, culture, arts, tradition and good customs at the local and national level.[10] This Constitution establishes the power of the state to preserve Thailand's culture and arts, espousing cultural nationalism. The government is empowered as the leader for initiating appropriate measures or campaigns for protecting immovable or movable cultural property. The Constitution also obliges the government to establish a national strategy as a framework for creating other coherent and subsidiary plans.[11] This national strategy comes in the form of advice and recommendations from the National Economic and Social Advisory Council (NESAC) to the government on economic and social problems as basis for launching national economic and social development plans and subsidiary plans. The NESAC plan, as an umbrella policy, maintains the importance of cultural issues as the way to develop Thai people and society by preserving cultural, historical or archaeological sites for their access and appreciation.[12]

According to the NESAC, it builds a mindset for Thai people to be proud of their cultural identity. As the physical reflection of Thai cultural identity, cultural property lost or removed from the country deprives the Thai people of their identity. This mindset is consistent with the promotion

[9] *Land Excavation and Land Filling Act B.E. 2543 (2000)* (Thailand) art 25.
[10] *Constitution of the Kingdom of Thailand B.E. 2560 (2017)* (Thailand) sec 57(1).
[11] Ibid sec 65.
[12] Office of the National Economic and Social Advisory Council, *National Economic and Social Development Plan B.E.2560-2564 (2017-2021)* (4 June 2018) <http://www.nesdb.go.th/ewt_news.php?nid=6420>.

of public awareness and educational measures in the 1970 UNESCO Convention[13] and ASEAN regional framework.[14] In terms of subsidiary policy, Thai culture and arts are recognised at the ministerial and the Ministry of Culture directly takes responsibilities to comply with the NESAC plan by providing a long-term, 20-year policy on national culture. This policy lays down a framework for the Ministry's subsidiary organs to adopt,[15] but it may be insufficient as it mostly focuses on immovable cultural property such as historical buildings or archaeological sites which can be promoted as World Heritage Sites under the 1972 UNESCO World Heritage Convention.[16]

The Thai Government has the responsibility for the repatriation of illegally removed cultural property. Although this duty is not directly specified under the Constitution, but we may seek it in the duty to promote amicable relation with other countries. The Constitution Section 66 obliges the Thai Government to adopt the principle of equality in its treatment of other countries, pledge non-interference in other countries' internal affairs, and cooperate with international organisations for protecting national interests and the interests of the Thai people.[17] Due to the application of cultural nationalism in legislation, Thailand does not normally permit cultural property to be exported out of its territory due to it being considered a national interest. When any cultural property is illegally removed without any permission, the government is responsible for requesting other countries in which its illegally removed cultural property is located for repatriation.

While cultural nationalism is not clearly reflected in ministerial policy, this thesis observes that the DFA, a subsidiary organ governed by Ministry of Culture, administers a national policy on culture and arts. This policy is informed by cultural nationalism to settle the direction of Thailand as a state of origin. Under this policy, movable and tangible cultural property is covered in two protective schemes. Firstly, the DFA shall be obliged to manage and complement national inventory of antiquities and works of art and establish effective database of cultural items found in Thailand.[18] Secondly, the DFA shall be responsible for preserving cultural property, whether movable or immovable, in good condition so that such cultural property can be inherited by future generations.[19] The protective schemes are limited to the DFA's responsibility. Although the policy does not give any more specific details, this thesis identifies its embodying cultural nationalism

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[13] See *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 5.
[14] See *ASEAN Declaration on Cultural Heritage*, 33rd ASEAN ministerial mtg (25 July 2000) principle 1.
[15] Ministry of Culture, *Twenty Years Strategy of Ministry of Culture* (4 June 2018) <https://www.m-culture.go.th/th/more_news.php?cid=24&filename=index>.
[16] Ibid.
[17] *Constitution of the Kingdom of Thailand B.E. 2560 (2017)* (Thailand) sec 66.
[18] Department of Fine Arts, *The DFA Strategy for Culture and Arts* (10 February 2018) <http://www.finearts.go.th/ยุทธศาสตร์-แผนปฏิบัติราชการ/book/126.html%3Fpage=22>. 16-20.
[19] Ibid.

through its protective schemes which exclusively reserve the power of the DFA as a state agency to manage and control all objects of cultural and artistic value and do not allow individuals to freely allocate cultural property.

6.2.1.2 Legal Aspect

Thailand has enacted legislation to achieve the goals of the aforementioned policies. The AON, *Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931*), Land Excavation and Land Filling Act B.E. 2543 (2000) and other laws were designed to uphold the power of state agencies to govern or control all activities relating to cultural property within the country. Those laws are under the realm of public law, mostly reflecting the legal relation between the state and individual. Under the laws, the state becomes the key actor in actively protecting cultural property, while an individual who needs to manage, improve, trade or remove cultural property in their possession must request approval from the state.

6.2.1.3 Institutional Aspect

Thailand's direction on cultural property has led to the empowerment of institutions who issue their own regulations for their areas of responsibility. The *National Governmental Organization Act B.E. 2534 (1991)* authorises ministers to provide their own ministerial regulation for pursuing the establishment of subsidiary organs or agencies under the ministry.[20] The Minister of Culture provided the ministerial regulation on establishing the DFA. Section 2 of this regulation specifies the powers of the DFA. The DFA has a variety of missions to protect, preserve, maintain, recover, renovate, create, inherit, publish, study and develop the cultural heritage of Thailand. It is responsible for enforcing the AON and related regulations.[21] The powers of the DFA reflect cultural nationalism in state efforts to retain cultural property within its territory. This thesis observes that the DFA is also required to cooperate with other state agencies to implement the AON. For example, the DFA has worked closely with Thai Customs to investigate cultural objects exported without permission. The DFA's functions are integrated with other state agencies to achieve the national direction on cultural property.

6.2.2 Definition and Scope of 'Cultural Property'

The 1970 UNESCO Convention art 1 definition and scope of cultural property is rigid, limiting cultural objects to those 'specifically designated by each state',[22] while the ASEAN regional

[20] *National Governmental Organization Act B.E. 2534 (1991)* (Thailand) art 8.
[21] *The Ministerial Regulation on Establishing the Department of Fine Arts under Ministry of Culture on 10 May B.E. 2554 (2011)* (Thailand) sec 2.
[22] See *The 1970 UNESCO Convention* art 1.

framework refers to the broad concept of 'cultural heritage' which includes tangible, intangible, movable and immovable property of cultural value.[23] This section explores whether Thailand's definition and scope of cultural property in accordance with those frameworks and how it has implemented this.

6.2.2.1 Policy Aspect

Thailand does not provide the definition of cultural property in related policies. The NESAC's plan and Ministry of Culture's 20-year policy use the term 'cultural heritage' which does not clearly specify cultural property. They prefer to use the term 'cultural heritage' in a sense of integrated meaning. As such, the government encourages Thai people to appreciate and cherish 'culture' representing Thai identity.[24] 'Culture' broadly refers to historical buildings, archaeological sites, cultural objects, folk, tradition, arts, fashion, etc. This broad conception is similar to that of 'cultural heritage' under the *ASEAN Declaration on Cultural Heritage (2000)*. Yet, the DFA's policy on culture and arts only uses the words 'antiques and objects of art'[25]—a decidedly more narrow interpretation of cultural heritage—without any the explanation.

6.2.2.2 Legal Aspect

'Cultural property' does not appear in the AON which only uses 'antique and object of art'.[26] These are within the scope of 'cultural property' per the 1970 UNESCO Convention art 1 which refers to an item of historical, archaeological and artistic value. The AON divides movable cultural property into two forms: 1) 'antique' which is described as 'an archaic movable property, whether produced by man or by nature, or being any part of ancient monument or of human skeleton or animal carcass which, by its age or characteristics of production or historical evidence, is useful in the field of art, history or archaeology'[27] and 2) 'object of art' which refers to 'a thing skilfully produced by craftsmanship which is high valuable in the field of art'.[28] The *Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931)* art 3 describes 'antique' as an object offered for sale, exchange or disposal in the same manner as property, including historic items.[29] This definition is narrower than that in the AON and refers only refers to historic items, excluding the artistic elements found in the AON.

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[23] See *ASEAN Declaration on Cultural Heritage* principle 1.
[24] Ministry of Culture, above n 15.
[25] Department of Fine Arts, above n 18.
[26] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 4.
[27] Ibid.
[28] Ibid.
[29] *Act on Control of Sale by Auction and Trade of Antiques B.E. 2474 (1931)* (Thailand) art 3.

An ‘antique and object of art’ under the AON is a physical item which can be stolen or illegally exported. This character is compatible with the 1970 UNESCO Convention’s art 1 ‘cultural property’ in the sense of its listed categories. Yet, art 1 also requires a state to designate cultural property together.[30] The AON’s ‘antique and object of art’ is not clarified as requiring designation by the Thai Government. In this regard, if any ‘antique and object of art’ was not designated as such, they would be outside the art 1 definition of cultural property. However, this designation may be interpreted as occurring via the registration method. Thailand requires any ‘antique or object of art’ as provided by the AON art 4 be registered by personal determination of the Director-General of the DFA—such an item may fall in the scope of the Convention art 1.

Under the AON art 14, the Director-General of the DFA is authorised to cause, by means of notification in the Government Gazette, any antique or object of art to be registered if they deem that such antique or object of art, which need not be in the possession of the DFA, is useful or of special value in the field of art, history or archaeology.[31] Registered cultural property need not be in the possession of the DFA since any cultural property that belongs a state agency has been automatically registered as national property. Thus, by the meaning of art 14, any antique or object of art likely to eligible for registration by the Director-General’s determination resides in private collections or is possessed by an individual. For example, if any person has possessed an antique or object of art useful in the field of art, history or archaeology and the Director-General also deems that this antique or object of art falls within the conditions of registration, the antique or object of art would be registered and specially protected by the state. The Director-General of the DFA has exclusive power to register any antique or object of art without obtaining its owner’s permission. This process for registration should be recognised as the Thai state’s designation per the Convention art 1. Thus, any antique or object of art in the possession of individual not selected for registration falls outside the protective scope of the Convention.

Additionally, the registration of cultural property under the AON has an impact on the request for repatriation of stolen cultural property by complying with the Convention. To demonstrate, if Thailand ratified the Convention and requested for repatriation of its stolen cultural property under the Convention, the registration of the cultural property under the AON (ie, designation as cultural property by the Thai Government) would be necessary to satisfy it being cultural property under the definition of the Convention art 1. If the cultural property requested for reparation had not been registered as such, it would not satisfy the Convention art 1 and there would be no grounds for repatriation under the Convention.

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[30] *The 1970 UNESCO Convention* art 1.
[31] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 14.

6.2.2.3 Institutional Aspect

To implement the state's designation as required by the Convention, the DFA is responsible for registration of any antique or object of art. This thesis observes that the AON empowers the DFA to provide notification in the Government Gazette of its declaration of registration under the AON of an antique or object of art located in Thailand. The DFA notifications have been ongoing since 1986, with thousands of objects registered, many of which are not in the possession of the DFA. DFA notifications generally provide the description, size, location and an image of the registered antique or object of art.

6.2.3 Registration and Its Legal Consequences

The 1970 UNESCO Convention art 5(b) encourages state parties to create and maintain a national inventory of protected cultural property.[32] This thesis argues that the national inventory in the Thai legal regime is such an inventory, because the state is legal obligated to protect registered cultural property.

6.2.3.1 Policy Aspect

Thailand allows any individual to possess an antique or object of art, but such an antique or object of art is legally under the control of the DFA if registered by the DFA. Registration does not focus on who is possessing an antique or object of art, but the antique or object of art's historical, archaeological or cultural value as considered by the state.[33] This thesis highlights that this is an application of cultural nationalism by Thailand to empower the DFA as a state agency to register items at its discretion. This is consistent with Thailand's Constitution which imposes the duty of the state to preserve culture and arts.[34] However, this thesis argues that the DFA's power to register cultural property is limited by its organisational shortcomings including insufficient human resources, leading to the potential overlooking of some antiques or objects of art eligible for registration.

6.2.3.2 Legal Aspect

Movable cultural property located in Thailand can be possessed by the state or an individual. Although cultural property possessed by any individual may be registered by the DFA in accordance with the AON art 14, this registration does not deprive the owner of ownership.

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[32] *The 1970 UNESCO Convention* art 5(b).
[33] *The Ministerial Regulation on Establishing the Department of Fine Arts under Ministry of Culture on 10 May B.E. 2554 (2011)* (Thailand) sec 2.
[34] *Constitution of the Kingdom of Thailand B.E. 2560 (2017)* (Thailand) sec 66.

Nevertheless, the owner of registered cultural property must comply with the special requirements specified by the AON which include a variety of protective measures and responsibilities.

For example, the AON art 15 prohibits any person to repair, modify or alter any registered antique or object of art unless permission has been obtained from the Director-General of the DFA.[35] When the registered antique or object of art is deteriorating, dilapidating, being damaged or is lost or removed from the place in which it is stored, the AON obliges the possessor to inform the Director-General of the DFA of this within 30 days from the date of their being aware of the deterioration, dilapidation, damage, loss or removal.[36] Thus, registered cultural property is still in the possession of its owner, but is largely controlled by the DFA, reflecting cultural nationalism.

The AON generally prohibits any trade in registered antiques or objects unless awarded permission from the Director-General of the DFA.[37] When the owner is granted such permission, the AON obliges them to inform the Director-General of the DFA within 30 days from the date the transfer of ownership in written form, providing the details of the transferor's and transferee's name and residence and the date of transfer.[38] This facilitates the DFA to follow up and investigate the final destination of registered cultural property, a safeguard against registered cultural property being transferred to a black market. Also, any person who acquires ownership of registered cultural property by inheritance or will is obligatory to inform the Director-General of the DFA this acquisition within 60 days from the date of acquisition.[39] This does not apply to citizens outside Thailand's jurisdiction (only cases of criminal offence, for example, for stolen cultural property, fall within the extraterritorial application of Thai law).[40] Registration raises very strict obligations for the owner of registered cultural property. An individual is not entitled to preserve, maintain or transfer registered cultural property themselves, but is obliged to cooperate with a state agency to do so. Thus, Thailand vests the right to protect and control registered cultural property exclusively in state agencies.

6.2.3.3 Institutional Aspect

This thesis argues that the key functions of the DFA regarding the protection of a registered antique or object of art are curtailed to an extent. The DFA reserves the power to seek and register any appropriate antique or object of art. This is its active function (to bring antiques or objects of art into the inventory), while its power to repair, recover or renovate registered antiques or objects of

[35] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 15.
[36] Ibid art 16.
[37] Ibid art 19.
[38] Ibid art 17.
[39] Ibid art 17 para 2.
[40] *Thai Criminal Code* (Thailand) art 8.

art becomes its passive function, because the DFA waits for notification by the possessor before proceeding with any action. Should the DFA actively repair, recover or renovate registered antiques or objects of art without notification by the possessor? This thesis considers that active inspection by the DFA of registered antiques or objects of art not in their possession is difficult, especially as the DFA has no power to call for an inspection of such objects. Hence, the reliance on the legal obligation of owners of such objects to notify the DFA in the situations previously mentioned. Conversely, this should be different for antiques or objects of art in the possession of the DFA (regarded as national treasures), as the DFA can, by itself, inspect, repair or renovate such objects without any request or notification.

6.2.4 Identification and Protection of National Treasures

Per Mastalir, illicit trafficking of cultural property is impossible if it does not dispossess of someone having the right to legal trade.[41] Who has ownership of cultural property under the Thai legal regime? Although Thailand is a state of origin and advocates cultural nationalism, Thailand does not vest all movable cultural objects in the state automatically. An individual is entitled to own and possess cultural property in accordance with property law. How is state ownership of an antique or object of art determined in Thailand?

6.2.4.1 Policy Aspect

This thesis observes that the DFA's Strategy for Culture and Arts does not specify how cultural property found in Thailand shall be vested in the DFA, only imposing the duties for national museums. Cultural property owned by the state is generally preserved in the national museums and the DFA strategy is the guidance for national museums to preserve cultural property belonging to the state. The strategy encourages national museums to preserve and maintain antiques or objects of art with scientific and technological methods and supports them to establish and manage their collecting system so that people can easily access and study collections.[42] The policy requests national museums enter a global network with foreign national museums and cooperate with them to exchange information and know-how.[43] Thus, it is observed that antiques or objects of art belonging to the state are under the control of Thai national museums and they are key actors in promoting Thailand's cultural property among Thai people and collaborating with foreign museums or institutions for the benefit of Thailand's culture and arts.

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[41] Roger W. Mastalir, 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law' (1992) 16(4) *Fordham International Law Journal* 1033, 1043.
[42] Department of Fine Arts, above n 18, 25.
[43] Ibid.

6.2.4.2 Legal Aspect

According to Thai laws, an antique or object of art can be vested in the state as national treasures in three ways. The first is linked with the AON art 14, paragraph 2 of which empowers the Director-General of the DFA to consider the purchase of any antique or object of art that should be appropriately conserved as national treasures.[44] If the Director-General deems the antique or object of art should be conserved as national treasures, the AON allows the DFA to purchase it. Whether the antique or object of art is registered under the AON prior to purchase is irrelevant. This thesis observes that the AON does not provide any criteria or guidance for this decision, and the consideration and purchase is at the discretion of the Director-General of the DFA. This raises the potential for corruption or errors in decision-making. The AON does not comment on indigenous communities' antiques or objects of art. These are treated as any antique or object of art, and their purchase on the basis of being worthy of preservation as national treasures is at the discretion of the Director-General of the DFA.

The second way is related to cultural property found in Thailand's territory. The AON art 24 provides that any antique or object of art buried in, concealed or abandoned within the country or exclusive economic zone such that no one could claim ownership shall become national treasures.[45] Not all cultural objects found in Thailand are owned by the state automatically—this requires an antique or object of art satisfy three conditions: 1) an antique or object of art is buried in, or concealed, or abandoned at any place under such circumstances; 2) no one claims to be the owner of such an antique or object of art; and 3) the place of burial or concealment or abandonment must not be owned or possessed by any person. Arguably, these conditions may pose a weakness in Thai law. For example, the discovery of a buried antique or object of art during excavations triggers the requirement to cease excavation (per the *Land Excavation and Land Filling Act B.E. 2543 (2000)*, *Artesian Water Act B.E. 2520 (1977)* or *Mineral Act B.E. 2510 (1967)*). Yet, the AON does not provide any rule for the DFA, by itself or in cooperation with other state agencies, to request permission to excavate buried items. The laws oblige citizens who find a buried antique or object of art to notify a local government official within 30 days from the date of discovery,[46] with punishments for failing to do so.[47] Yet, this remains difficult to enforce, because citizens may not know whether a found item is an antique or object of art.

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[44] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 14 para 2.
[45] Ibid art 24.
[46] See *Land Excavation and Land Filling Act B.E. 2543 (2000)* (Thailand) art 25; *Artesian Water Act B.E. 2520 (1977)* art 23; *Mineral Act B.E. 2510 (1967)* art 34.
[47] *Land Excavation and Land Filling Act B.E. 2543 (2000)* (Thailand) art 39.

The third way is under the Thai Civil and Commercial Code s1325 which provides that if the finder of lost property informs, without any delay, the owner of the property and the owner ignores this and neglects to recover their property within one year from the date of finding, the finder of the property shall be entitled to ownership of the property. However, if said property is proved to be an antique or object of art, ownership shall automatically be vested in the state and the finder entitled to a reward of 10% of the property's value.[48] In this regard, the Thai Civil and Commercial Code generally aims to lay down the legal rule for acquiring ownership of lost property. Under the Code s 1325 and AON art 24, the DFA can claim ownership of lost property proved to be an antique or object of art subject to the aforementioned conditions.

To preserve antiques or objects of art belonging to the state, the AON obliges the DFA to manage and collect those cultural objects only within national museums governed by the DFA.[49] The AON also prohibits national treasures from being transferred by trade or other ways.[50] The AON supports the preservation of national treasures by allowing the DFA to acquire the financial benefit accrued from national museums. The AON art 27 authorises the Minister of Culture to provide the ministerial regulation on conducts of visitors and admission fees. Under this regulation, it permits national museums to request an admission fee from visitors.[51]

6.2.4.3 Institutional Aspect

To implement the DFA's policy and AON, antiques or objects of art deemed national treasures are managed and preserved in the collections of national museums governed by the DFA. This thesis observes that national museums have attempted to follow the DFA's guidance by reporting on their annual operations to the DFA. This thesis argues that, although the DFA's policy and AON provide good guidance, they have not been enforced adequately and effectively which is an obstacle to the preservation of national treasures.

In examining the reports of national museums' operations in 2017, two problems are identified. The first is that national museums have ineffectively recorded their inventory.[52] A state audit found from a random selection of national museums that 85.71% had not updated their inventory and 14.29% of those did not have an inventory. A majority had not recorded their inventory in digital

[48] *Thai Civil and Commercial Code* (Thailand) s 1325.
[49] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) arts 25-6.
[50] Ibid art 18.
[51] *The Ministerial Regulation on Conducts of Visitors and Admission Fee on 4 September B.E. 2551 (2008)* (Thailand).
[52] State Audit Office of the Kingdom of Thailand, 'The Examination Report of National Museums' Operations and Archaeological Fund, the Department of Fine Arts under the Ministry of Culture' (State Audit Office of the Kingdom of Thailand, 12 September 2017) 1, 8 (in Thai).

form.[53] The transportation of antiques or objects of art is also problematic, with transfers to other museums done without maintaining records. Daily checks of on-hand inventory against recorded inventory were almost absent.[54] A main cause cited for this is that curators and staffs have not comprehended such actions as necessary and lacked a stipulated timeframe in which to conduct these actions.[55] Of the museums surveyed, 71.43% had not allocated serial numbers or implemented classification systems for types of antiques or objects of art.[56] This adversely affected organisation of exhibits and increased the risk of lost and broken objects.

This thesis argues that Thailand lacks the human resources and technological enablers to implement the DFA's policy and AON. This is similar to other ASEAN member countries. For example, Laos's protection of its cultural property remains ineffective, because it lacks specially trained experts in human resources, management personnel, inventorying and maintenance of cultural property and export of cultural property without permission often occurs due to the lack of screening facilities at border crossings.[57] This thesis argues that the lack of necessary human resources and technology should be resolved via global cooperation (eg, technology transfer).[58]

6.2.5 Protection of Cultural Property From Illicit Trafficking

The 1970 UNESCO Convention and ASEAN regional framework prohibit the export of cultural property export without permission from the state authority.[59] This prohibition, based on cultural nationalism, is implemented by Thailand even though it is not a state party to the Convention.

6.2.5.1 Policy Aspect

Like other states of origin, Thailand strongly applies cultural nationalism in its cultural property policy which does not allow cultural property to be removed from its territory. This is specified in the DFA's Strategy for Culture and Arts which stresses the importance of preservation of antiques or objects of art within the country to pass these on to future generations.[60] Cultural nationalism is the core theme of Thailand's direction on cultural property.

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[53] Ibid 3.
[54] Ibid 3-4.
[55] Ibid 5.
[56] Ibid 8.
[57] Laotain Delegation, 'Country Position/ Situation Paper: Lao' in Amareswar Galla (ed) (Paper presented at the Protection of Cultural Heritage in Southeast Asia: Workshop Proceedings, Hanoi, Vietnam 9-13 April 2001) 32-3.
[58] This topic should become one of feasible options for Thailand to reinforce its protection and repatriation of cultural property, so this topic will be discussed in the next chapter.
[59] See *The 1970 UNESCO Convention* art 6. See also *ASEAN Declaration on Cultural Heritage* principle 10.
[60] Department of Fine Arts, above n 18, 16-20.

6.2.5.2 Legal Aspect

Illicit trafficking is classified into two types under Thai law: theft of cultural property and illegal export of cultural property. Theft of cultural property generally comes under one of the offences under Thai criminal law. This theft may occur to cultural property in public or private possession. The title of an antique or object of art registered by the DFA and possessed by an individual is vested in the individual who, as the rightful owner in accordance with property law, may exercise their rights including exclude anybody else from interfering with the property.[61] When their property is stolen, the function of criminal law is taken into account. The Thai Criminal Code art 334 provides that 'whoever dishonestly takes away any property of another person or which the other person to be co-owner to be said to commit the theft, shall be imprisoned not out of three years and fined not more of six thousand Baht'.[62] In terms of publicly owned cultural property, art 335 states that:

> Whoever, commits theft by taking away the Buddhist Statue, religious object, or any part thereof, which is possessed for the public to worship or kept for being the property of Nation, shall be punished with imprisonment of three to ten years and fined of six thousand to twenty thousand Baht.
>
> When the criminal offence in accordance with the first paragraph was committed in the temple, accommodation of monks, religious worship place, ancient place of the state, governmental office, or national museum, the offender shall be punished with imprisonment of five to fifteen years and fined of ten thousand to thirty thousand Baht.[63]

According to the Thai Criminal Code, illicit trafficking by theft would probably occur when cultural property was stolen and then removed out of Thailand. Punishment for theft of publicly owned cultural property (art 335) is harder than for that of private property (art 334). To link with the 1970 UNESCO Convention, art 7(b)(ii) permits state parties to request for repatriation of stolen cultural property through diplomatic offices.[64] If Thailand ratified the Convention, it would likely adopt art 7(b)(ii) to request another state party for repatriation of its stolen cultural property. However, as previously discussed, such a request may be limited to cultural property stolen from public collections. Given that the Convention only recognises international cooperation on repatriation at the state-to-state level by obliging the requesting and requested party to proceed through diplomatic channels, an individual suffering theft of cultural property from a private

[61] Roger J. Smith, *Property Law* (Pearson Longman, 6th ed, 2009) 3.
[62] *Thai Criminal Code* (Thailand) art 334.
[63] Ibid art 335 bis.
[64] *The 1970 UNESCO Convention* art 7(b)(ii).

collection would need to persuade the Thai Government to proceed with the repatriation on their behalf.

In relation to the illegal export of cultural property, the AON art 22 prohibits any export or removal out of country of any antique or object of art, regardless of whether it has been registered, unless permission has been granted by the Director-General of the DFA.[65] This provision reflects the rigid application of cultural nationalism, whereby the free movement of cultural property out of its place of origin if generally prohibited even when such cultural property is not in the possession of the state. Thailand strictly prohibits the export of any antiques or objects of art. The AON separates punishment into two cases. First, if the illegally exported antique or object of art was not registered, the exporter shall be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding 700,000 Baht or to both.[66] If the illegally exported antique or object of art was registered, the exporter shall be liable to imprisonment for a term of one to 10 years and a fine not exceeding one million Baht.[67] The punishment for illegal export of registered cultural property is harder as this is cultural property considered beneficial or specially valuable in the field of art, history or archaeology.

In terms of temporary export of cultural property, the Director-General of the DFA may grant case-by-case permission to an exporter to export cultural property subject to conditions and timeframes.[68] The illegality is constituted from the violation of either these conditions or timeframes. The exporter is required to deposit cash or financial warranty equivalent to the value of the temporarily exported cultural property value as a guarantee that it shall be returned to Thailand by the stipulated date.[69] This thesis observes that the AON does not impose any method for how temporarily exported cultural property shall be returned to Thailand other than confiscating the exporter's financial warranty. The AON does not provide any criminal sanction for the violation of conditions or timeframes of a temporarily exported antique or object of art. Given that some temporarily exported cultural property would be more valuable than the deposited warranty (indeed, it may be invaluable) following a failure to be returned, and is irreplaceable, this appears to be a weakness in the Thai legal framework. This is mitigated by the DFA ,who carefully calculate the cost of cultural property temporarily exported (ie, its value were it not to be returned) and denying permission for temporary export of cultural property deemed too valuable to be exported.

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[65] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 22.
[66] Ibid art 38.
[67] Ibid art 39.
[68] Ibid art 23.
[69] Ibid art 23 para 2.

There is an argument that promotes free and open trade of cultural property and reasons that prohibition of trade in cultural property provokes illicit trafficking. Collectors and the museum community argue that cultural property loss does not result from trade per se, but due to local corruption and poverty in states of origin.[70] Bauer argued that allowing licit trade would lead to many benefits such as the restructuring of the economics of the antiquities trade and a decrease in the benefits for looters and smugglers.[71] Importantly, a regulated market in cultural property would financially benefit states of origin as buyers would favour the guarantee that comes with legitimate purchase. Thus would drive record-keeping activities for cultural property and provide funds for additional protection measures at archaeological sites. Illicit excavation would become commercial excavation to feed the legitimate market to states of origins' benefit.[72] This thesis agrees that development of a licit market would financially benefit Thailand and likely decrease the demands for a black market and illicit trafficking; however, the financial incentive to bring cultural property to market may lead to unsustainable exploitation of cultural property and irreparable damage to archaeological sites, resulting in the damage and loss of cultural property and associated loss of archaeological, artistic or cultural information.

6.2.5.3 Institutional Aspect

In regard to the implement of the prohibition of cultural property export, The DFA itself has no power to inspect or arrest a person who illegally exports an antique or object of art. The duty to inspect and arrest lies with Thai Customs officials. Under the *Customs Act B.E. 2560 (2017)*, Customs officials are authorised to inspect any product or item prepared for export and confiscate any product or item that violates the export provisions of the Customs Act or other laws.[73]

The Customs Department report of export violation between 2012 and 2017 listed 14 detected cases of cultural property export in violation of the AON.[74] Illegal export of cultural property is difficult, as the generally fragile nature of an antique or object of art necessitates careful and usually bulky packaging and careful transport. It is difficult to move items packaged as such without suspicion from Customs officials and complicated procedures of export are designed to detect cultural property exported in violation of Thai law.[75] Nevertheless, the detection of only 14

[70] Alexander A. Bauer, 'New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates' (2008) 31(3) *Fordham International Law Journal* 690, 693.
[71] Ibid 714.
[72] Lisa J. Borodkin, 'The Economics of Antiquities Looting and a Proposed Legal Alternative' (1995) 95(2) *Columbia Law Review* 377, 413-4.
[73] *Customs Act B.E. 2560 (2017)* (Thailand) arts 157-8.
[74] The Customs Department, 'Report of Export Violation in Thailand' (Report No. PISR1130, The Customs Department, 2012-2017) (in Thai).
[75] The export procedures which is based on computerized database imposes many stages and responsibilities for exporter to achieve before removing any regulated item such as submission of declaration, verification of declaration, payment of duties and taxes, inspection, and release of cargo. See Thai Customs, *Export Procedures* (11

cases of illegal export in five years may indicate the ineffectiveness of anti-trafficking measures. Factors aiding illegal export include the lack of screening facilities at border crossings and corruption.

6.3 Implementation of Repatriation of Cultural Property

Although Thailand has not ratified the 1970 UNESCO Convention, this thesis argues that it has recently attempted to implement the Convention's art 7(b)(ii) to request for repatriation of cultural property from foreign museums. However, engagement under the spirit of the Convention was difficult and not advantageous for Thailand. This is explored in two recent cases of repatriation in Sections 6.3.1 and 6.3.2.

6.3.1 Repatriation of *Phra Narai* Lintel

The first and most outstanding case is the repatriation of the *Phra Narai* lintel in 1988. Thailand requested for repatriation of the lintel from the Art Institute of Chicago (AIC) in the US.

6.3.1.1 Factual Synopsis

The *Phra Narai* lintel is a stone lintel elegantly carved with an image of one of the Hindu Gods, Vishnu, reclining on the water. The lintel, produced between the tenth and thirteenth centuries of the Hindu era, is as a part of the *Phanom Rung* temple's body, located near the Thai–Cambodia border in the northeast region of Thailand.[76] In the early 1960s, it was found that the lintel has been removed from the *Phanom Rung* temple. James Alsdorf, a Chairman of the AIC, had purchased the lintel and lent it to the AIC in 1967.[77] The lintel was exhibited for many years at the AIC before the governing body learned from media reports that the Thai Government considered the lintel lost and was seeking its repatriation.[78] In 1971, as part of Thailand's initiative to renovate and restore the *Phanom Rung* temple, the Thai Embassy contacted James Alsdorf to request for repatriation of the lintel.[79] The AIC asserted that they had legally acquired the lintel as a donation from a private foundation and refused to return it to the Thai Government.[80] Long bilateral negotiations followed. Eventually, the Chicago-based Elizabeth Cheney Foundation as a third

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June 2018)
<http://en.customs.go.th/content.php?ini_content=import_export_151006_02&lang=en&left_menu=menu_export>.
[76] Barbara Crossette, 'Thais Accuse U.S. of Theft of Temple Art', *New York Times* (online), 10 February 1988, <http://www.nytimes.com/1988/02/10/world/thais-accuse-us-of-theft-of-temple-art.html>.
[77] Claudia Caruthers, 'International Cultural Property: Another Tragedy of the Commons' (1998) 7 *Pacific Rim Law & Policy Journal* 143, 144.
[78] Associated Press, 'Chicago Museum to Return Lintel Thais Say Was Stolen', *New York Times* (online), 25 October 1988, <http://www.nytimes.com/1988/10/25/us/chicago-museum-to-return-lintel-thais-say-was-stolen.html>.
[79] Caruthers, above n 77.
[80] Associated Press, above n 78.

party intervened in the negotiation and offered the AIC the donation of an equivalent Thai object to replace the lintel to secure the AIC from a net loss in its collections.[81] In 1988, the AIC accepted the donation and returned the lintel to Thailand.

6.3.1.2 Findings

The AIC claimed the good faith acquisition of the lintel in refusing Thailand's request for repatriation, while the Thai Government cited the principle of ownership. As claimed by the AIC, the *Phra Narai* lintel was purchased by a New York art dealer in 1966 from a Thai dealer on the open market in Bangkok and then donated to the AIC. The AIC was unaware that the lintel was stolen.[82] The AIC did not reject that the lintel belongs to Thailand, but fought against Thailand's request for repatriation on the basis that it acquired the lintel with good faith. Removing the lintel from Thailand without any permission was certainly the theft. Yet, the New York dealer who purchased the lintel from the open market might be protected as a good faith purchaser under the *nemo dat* rule due to its exception offering protection to the purchaser of goods in market overt. When the dealer donated the lintel to the AIC, the AIC also has valid title to the lintel. The AIC's claim is based on the 1970 UNESCO Convention art 7(b)(ii) which requests the requesting state pay just compensation to an innocent purchaser who has valid title to the property.[83]

In accordance with the Convention, the AIC refused the Thai request for repatriation and claimed that if the *Phra Narai* lintel were returned, the AIC, as an innocent purchaser with valid title, should be entitled to the payment of just compensation.[84] Further, the request for repatriation by Thailand would set the dangerous precedent for US and other museums and institutions around the world for the return of stolen cultural property—if museums were obliged to return every cultural object stolen from foreign countries without just compensation, they would be nearly empty.[85] This thesis observes that the AIC did not dispute Thailand's right of ownership of the lintel. The AIC only raised its good faith acquisition to retain the lintel and request for fair compensation if it were to return the lintel.

Thailand asserted ownership of the lintel and explained how the lintel was stolen and illegally exported from the country. First, the lintel was removed while US military units were stationed in the area of the *Phanom Rung* temple to support US troops in the Vietnam War, so it is highly

[81] Patrick Reardon, 'Art Institute Agrees to Return Thai Sculpture', *Chicago Tribune* (online), 25 October 1988, <http://articles.chicagotribune.com/1988-10-25/news/8802100130_1_art-institute-thai-government-museum>.
[82] Larry Ter Molen, 'Art Institute Acted in Good Faith', *Chicago Tribune* (online), 13 September 1988, <http://articles.chicagotribune.com/1988-09-13/news/8801300153_1_thai-press-art-institute-thai-government>.
[83] *The 1970 UNESCO Convention* art 7(b)(ii).
[84] Ter Molen, above n 82.
[85] Reardon, above n 81.

possible that the Americans used military equipment to blast the lintel off the temple's body and then airlifted it out by helicopter.[86] In support of this claim, many people living in the area during the Vietnam War stated that US soldiers removed some of the temple's pieces. The lintel was matched with other temple pieces and with a Thai archaeologist's report of Khmer-style temples in northeast Thailand which included photos of the lintel at the *Phanom* Rung temple taken in 1960.[87] Thailand present evidence of how the lintel was a part of the temple and that Thailand never accepted or authorised the removal of the lintel. This thesis argues that Thailand's claim of Thailand was based on the right of ownership and the concept of cultural nationalism—that is, the lintel originated in the geographical location now occupied by Thailand, so it must be under the state's territorial jurisdiction, and Thailand exclusively exercises its jurisdiction over the lintel and prohibits it from any removal. Thus, when the lintel was illegally removed, Thailand is entitled to apply for its repatriation.

6.3.1.3 Discussion

Based on the above, this thesis observes that this cultural property dispute dealt with the conflict between the concept of cultural nationalism (Thailand's claim) and that of cultural internationalism (the AIC's claim). As argued by this thesis, the repatriation of cultural property is impossible without cooperation between the requesting and requested party and if only one cultural property concept (cultural nationalism or cultural internationalism) is applied. Conversely, repatriation is likely to be successful and mutually agreeable when the requesting and requested party effectively cooperate based on a balance between cultural nationalism and cultural internationalism. In the request for repatriation of *Phra Narai* lintel, there was no such balance as each party to the dispute solely applied the concept beneficial to them. Although Thailand indirectly applied the legal framework of the 1970 UNESCO Convention to repatriate the lintel, this thesis argues that this was not advantageous.

Does the *Phra Narai* lintel satisfy the Convention's art 1 definition of cultural property? To do so, it would have to satisfy two elements: 1) that it was specifically designated by the state as such and 2) that it was regarded as an antique and prohibited for export under Thai law. This thesis argues that the lintel satisfies the Convention art 1(d),[88] because the lintel is a religious object specifically designated by the state as being of historical, literary or artistic importance, especially as it is an element of the *Phanom Rung* temple, a historical monument that has been dismembered.

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[86] Caruthers, above n 77.
[87] Ploenpote Atthakor, 'Expert Points to Old Trick to Reclaim Lintel from US' *Bangkok Post* (online), 24 August 2016, <http://www.bangkokpost.com/news/general/1069412/expert-points-to-old-trick-to-reclaim-lintel-from-us>.
[88] *The 1970 UNESCO Convention* art 1(d).

The AON art 7 empowers the Director-General of the DFA to select any monument, archaeological site or ancient area for registration as an ancient monument or site to be preserved by the AON.[89] The *Phanom Rung* temple was specifically registration as an ancient monument in March 1935 as declared by the DFA's Decree.[90] Because the temple is not possessed or owned by any individual, the temple is declared national property under the custody and care of the DFA. This registration results in the legal status of the lintel as a part of the temple's body, thus, as a result of the registration of the temple, the lintel is automatically registered and protected under the AON (even though it was later blasted off and removed from the temple's body). Additionally, to consider the definition of cultural property in the AON art 4, the meaning of 'antique' refers to a movable object that is part of an ancient monument.[91] When the lintel is regarded as an antique under the AON art 4, its export without permission is prohibited, regardless of whether it has been registered.[92]

How was Thailand disadvantaged and impended in its request for repatriation of the lintel by complying with the spirit of the 1970 UNESCO Convention? In considering the Convention art 7(b)(ii), the restitution or return of stolen cultural property shall be made through diplomatic offices and the requesting party shall pay just compensation to an innocent purchaser who has valid title to that property.[93] The Convention gives diplomatic negotiation as the only way of cultural property dispute settlement and does not create any other mechanisms. It also encourages the exception to *nemo dat quod non habet*, preferring the protection of an innocent purchaser of property. Thailand engaged in its request for repatriation in compliance with art 7(b)(ii) and the spirit of the Convention in opening bilateral negotiations with the AIC. This thesis argues that the bilateral negotiations were too uncertain and weak to provide any solid outcome. As noted by Palmer, the negotiation is the early stage of peaceful settlement, but it may become drawn out when the parties cannot reach an agreement.[94] Ultimately, the long negotiations between Thailand the AIC were only concluded and the dispute resolved via the intervention of a third party.

The long negotiations between Thailand and the AIC reflect a failure in repatriation through the diplomatic channel. This thesis argues that the settlement of cultural property disputes should not depend on only such a diplomatic channel, but a method that provides some means of reciprocity or persuasion. For example, state-to-state diplomatic negotiations generally involve political or

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[89] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 7.
[90] *The Decree of the Department of Fine Arts on 8 March 1935 as empowered by Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand).
[91] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 4.
[92] Ibid art 22.
[93] *The 1970 UNESCO Convention* art 7(b)(ii).
[94] Geoffrey Palmer, 'Perspectives on International Dispute Settlement from a Participant' (2012) 43 *Victoria University of Wellington Law Review* 39, 42.

economic persuasion in the form of any exchange of interests or reciprocal cooperation on particular issues.[95] This thesis agrees that such means of persuasion will facilitate both parties to the dispute to share their wishes and wants and offer reciprocal benefits, leading to settlement. The Convention art 7(b)(ii) only prescribes diplomatic negotiation, with no recommendation, guidance or mechanism for when negotiations become deadlocked. This thesis argues that negotiations between parties without any other means of persuasion or reciprocity are prone to failure, because each party to the dispute maintains its position.

The position of Thailand and the AIC reflected cultural nationalism and cultural internationalism respectively. While Thailand claimed cultural nationalism to support its ownership for repatriation of the lintel, the AIC raised its good faith purchase as grounds for its ownership of the lintel regardless of its original location in accordance with cultural internationalism. Thailand did not benefit by complying with the Convention art 7(b)(ii), despite the fact that Thailand proved its title to the lintel and the AIC never disputed Thailand's ownership. The Convention's failure to recommend an alternative to negotiations, both parties' sole application of one property concept and absence of any other methods of persuasion meant the negotiations were deadlocked for years. It may be argued that the AIC's return of the lintel after taking receipt of an item of equivalent value from a third party indicates that their position was motivated more by financial interests than the desire to preserve cultural property in line with the objectives of cultural internationalism. That is, the dispute was not purely one of cultural nationalism versus cultural internationalism. This links with the need to involve alternative means of persuasion in negotiations (which may involve matters seemingly unconnected with the dispute under negotiation) as previously mentioned.

6.3.1.4 Conclusion

As discussed, Thailand's compliance with the 1970 UNESCO Convention art 7(b)(ii) and the spirit of the Convention was not helpful in its request for repatriation of the lintel. The negotiations with the AIC conducted via diplomatic offices were deadlocked. The protection of good faith purchaser supported AIC's claim, regardless of Thailand's title to the lintel. The legal framework for repatriation under the Convention was not helpful. The repatriation would likely not have succeeded or would be ongoing if not for the intervention of a third party.

[95] Lyndel V. Prott, 'The Fight Against Illicit Traffic in Cultural Property: The Importance of Case Studies' (2004) 35 *International Institute for Asian Studies Newsletter* 24, 24.

6.3.2 Repatriation of the *Luang Poh Sila* Statue

The other outstanding case is the repatriation of the *Luang Poh Sila* statue in 1996. Thailand requested for repatriation of the statue from a purchaser who purchased the statue at auction at the Sotheby's Institute of Art in London.

6.3.2.1 Factual Synopsis

In 1929, villagers living in Sukhothai province, Thailand discovered the *Luang Poh Sila* statue in a cave, removed it and placed it at the *Thungsaliem* temple, Sukhothai province, Thailand with the belief that the statue blessed villagers in the area.[96] The *Luang Poh Sila* statue, which is a grey-sandstone Buddha statue in mediation posture with a seven-headed great serpent, *Naga*, encircled over him, is over 800 years old.[97] In 1977, the statue was stolen from the temple. In 1988, it was identified by Thai people living in London when it was exhibited at the Sotheby's Institute of Art for auction as part of a nine-item sale of Khmer, Thai, Indian and Himalayan art.[98] Although the DFA was informed about the finding of the *Luang Poh Sila* statue, it had been sold at auction before the institute could be contacted and was removed to the US. Thailand attempted to request for the return of the statue through negotiations with the purchaser, to which he finally agreed to in return for compensation from Thailand. In 1996, Thailand, via the ad hoc committee for repatriation of the *Luang Poh Sila* statue, agreed to pay compensation of US$200,000 to repatriate the statue from the American purchaser.[99] After 19 years, it was returned to Thailand and has since been located at the *Thungsaliem* temple.

6.3.2.2 Findings

Like the repatriation of the *Phra Narai* lintel, this cultural property dispute between the purchaser of the *Luang Poh Sila* statue at auction and Thailand involved the exception to *nemo dat quod non habet* and the right of ownership. While the purchaser claimed good faith acquisition, since he neither knew nor ought reasonably to have known at the time of acquisition that the statue was stolen and illegally exported in violation of Thailand's law, Thailand claimed its right of ownership to repatriate the statue, because it was proved that the statue was previously located in Thailand and was under the custody of the DFA. We observe here that both parties claimed their valid title to the same property and chose to adopt bilateral negotiation to settle their conflict over other

[96] Police Office of Thungsaliem, *History of Luang Poh Sila* (15 February 2018) <http://tungsaliam.sukhothai.police.go.th/room26.htm>.
[97] Ibid.
[98] Janine Yasovant, 'Luang Poh Sila' on *A Brief and Quirky History of the Arts* (16 February 2018) <https://www.scene4.com/archivesqv6/jan-2011/0111/janineyasovant0111.html>.
[99] Ibid.

forms of dispute settlement. This thesis also observes that the concepts of cultural nationalism and cultural internationalism were reflected in the claim of Thailand and the purchaser respectively. While the protection of good faith purchase of cultural property permits the statue not to be limited within its original place and distributed to everyone in accordance with cultural internationalism, Thailand's claim is consistent with the concept of cultural nationalism which advocates for Thailand as the existing occupier of geographical place where the statue originated to retain it.

6.3.2.3 Discussion

The *Luang Poh Sila* statue falls within the definition of an antique under the AON. Under the AON art 4, it is a movable, religious object useful in the field of history and art.[100] Additionally, it had been specifically designated by the DFA as registered cultural property. Considering the 1970 UNESCO Convention art 1(g), the statue is property important for history and art in conformity with artistic interest.[101] Nevertheless, the prohibition of cultural property export under the AON does not consider whether the property has registered. Article 22 prohibits the export of any antique or object of art without the DFA's permission, regardless whether it was registered.[102] Therefore, the registration of the statue does not need to be considered. When the *Luang Poh Sila* statue as an antique under the AON was stolen and illegally exported from Thailand without export permission, this became illicit trafficking.

Thailand and the purchaser of the statue began their cultural property dispute settlement with bilateral negotiation which is consistent with the diplomatic method provided by the 1970 UNESCO Convention. This thesis argues that bilateral negotiation is not a helpful avenue for Thailand to succeed in its repatriation due to its weak and uncertain function. While Thailand only aimed to return the statue, the purchaser asserted his good faith in acquiring it. These claims lead to deadlock. The Convention art 7(b)(ii) protects the good faith purchaser, because it is based on the exception to *nemo dat quod non habet*. Thus, complying with art 7(b)(ii) would adversely affect Thailand's request for repatriation. Although Thailand could have applied the rule of *lex situs* to sue the purchaser for repatriation of the statue in the court of the state in which the statue was located, the outcome of this avenue may also not be beneficial for Thailand, because the court may apply the exception to *nemo dat quod non habet* to protect the good faith purchaser. Neither bilateral negotiation nor lawsuit would likely provide the outcome desired by Thailand.

[100] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 4.
[101] *The 1970 UNESCO Convention* art 1(g).
[102] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 22.

On the point of good faith purchaser of property in public auction, this is important as the concept, in this case, essentially barred any opportunity for Thailand to repatriate the statue unless it would agree to pay the purchaser compensation. As previously discussed, the protection of good faith purchaser is a general exception to *nemo dat quod non habet* which is widely accepted among civil law countries. For example, the French Code of Civil art 2280 protects the purchaser who purchased a stolen thing at a fair market or public sale to be reimbursed by the original owner who needs to recover said thing from them.[103] The Mexican Civil Code art 779 provides that 'the owner may not recover a stolen object from the good faith purchaser in an auction or from a dealer in such objects unless he reimburses the possessor the price he paid for the object'.[104] The Japanese Civil Code indicates that a good faith purchaser who purchased lost or stolen goods in auction or public market is entitled to retain the goods unless the owner reimburses them the price paid.[105] Even in Thailand, the Thai Civil and Commercial Code art 1332 protects a good faith purchaser who purchased any property in market overt or by public auction and they are not bound to return the property to the owner unless the owner reimburses them the purchase price.[106] In this case, the concept of good faith acquisition at public auction in a civil law jurisdiction does not help Thailand to recover the statue without compensating the purchaser.

In the common law system, the original owner still retains good title to the property even after such property has been stolen and even if subsequent innocent purchasers were unaware that they bought stolen property.[107] Although the common law system may protect a good faith purchaser to have the good title to the property when it is proved that such property was purchased in public auction in accordance with English law by the *Sale of Goods Act 1979*[108] s 22(1), this was repealed by the *Sale of Goods (Amendment) Act 1994*. The protection of the original owner of stolen property was restated in *Solomon R. Guggenheim Foundation v. Lubell*.[109] In the mid-1960s, a rare gouache painting was stolen from the Solomon R Guggenheim Museum and was then purchased by Rachel Lubell and her husband from a gallery in Manhattan in 1967.[110] In 1987, the Trial Court

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[103] *French Code Civil of 1804* (France) art 2280. See also Alan Schwartz, 'Rethinking the Laws of Good Faith Purchase' (Yale Law School Scholarship Repository Paper No 4166, Yale University, 2011) 1332, 1380.
[104] *Civil Code of the Federal District of Mexico* (Mexico) art 799. See also Alan Schwartz, 'Rethinking the Laws of Good Faith Purchase' (Yale Law School Scholarship Repository Paper No 4166, Yale University, 2011) 1332, 1380.
[105] *Japanese Civil Code* (Japan) art 194. See also Ministry of Justice, *Japanese Civil Code* (20 February 2018) <http://www.moj.go.jp/content/000056024.pdf>.
[106] *Thai Civil and Commercial Code* (Thailand) art 1332.
[107] Emma Slattery, *The Nemo Dat Rule: A Balancing Act* (LLB Thesis, Dublin City University, 2012) 10.
[108] *Sale of Goods Act 1979* (UK) c 54, *S 22(1)*. Nevertheless, this Section has been repealed by the Sale of Goods (Amendment) Act 1994. This Section 22 (1) provides that 'where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of the title on the part of the seller'.
[109] *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y., 1991).
[110] Andrea Wallace, Alessandro Chechi, and Marc-André Renold, 'Case Chagall Gouache-Solomon R. Guggenheim Foundation and Lubell' (2013) *Platform ArThemis Art-Law Centre, University of Geneva* 1, 2-3.

ruled Mrs Lubell to have good title to the painting since the museum failed to take appropriate steps to recover it and did not prove its diligent sufficiently. However, the Appellate Division reversed this decision, stating that the Trial Court was mistaken to impose a duty of reasonable diligence on the museum and made incorrect use of the statute of limitations.[111] As affirmed by the New York State Court of Appeal, although Mrs Lubell retained the painting, she had to pay the museum to repurchase the painting, despite the fact that she had already purchased it in the 1960s.[112] This case reaffirms that the original owner's claim to their stolen property is privileged. Thus, Thailand would find requesting for repatriation through a court in the common law system much more beneficial.

6.3.2.4 Conclusion

Thailand was clearly at a disadvantage to request for repatriation using the spirit of the 1970 UNESCO Convention. The Convention's framework of repatriation does not facilitate Thailand to recover its cultural property. Consequently, the weakness of bilateral negotiation and the concept of good faith purchaser become the most important factors. The statue was only repatriated once Thailand agreed to pay the purchaser compensation of US$200,000. Thus, it is unsurprising that Thailand has not ratified the Convention.

6.3.3 Other Cases of Repatriation and Possibilities

As shown in the previous cases of the *Phra Narai* lintel and *Luang Poh Sila* statue, Thailand has attempted requests for repatriation in the spirit of the international legal framework, but this has been to its disadvantage. This thesis argues that it is not necessary or desirable for Thailand to ratify the 1970 UNESCO Convention, because Thailand does not benefit from its legal framework for repatriation. Following it tends to result in deadlocked negotiations and the exception to *nemo dat quod non habet* does not provide Thailand any privilege over the other party.

This section examines other cases of repatriation and finds that Thailand can apply other appropriate ways to repatriate its illegally removed cultural property. Thailand has recently applied bilateral cooperation for repatriation with Cambodia resulting in a bilateral agreement. The *Agreement Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin* was mainly designed to fight criminal activities that involve any removal of movable cultural property between Cambodia

[111] *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y., 1991).
[112] Wallace, above n 110.

and Thailand by introducing key measures for impeding illicit transnational trafficking in movable cultural property, imposing effective administrative and penal sanctions, and providing a method of repatriation of cultural property.[113]

This thesis observes that this bilateral agreement adopts the same objective and theme as the 1970 UNESCO Convention and includes the need for both protection and repatriation of cultural property from illicit trafficking. Its objective requires Cambodia and Thailand to cooperate for the return of cultural property stolen from one party and then located within the other party's territory. Moreover, it follows the Convention by providing the means of diplomatic offices for repatriation. Article 4 of the bilateral agreement requests both parties to request for repatriation of cultural property through the diplomatic channel.[114] This aligns with art 7(b)(ii) of the Convention. Thus, the settlement of cultural property disputes between the state parties falls within the realm of public law, only operating on a state-to-state level.

While the bilateral agreement's objective and theme in accordance with the Convention, its specific framework for repatriation is different. The request for repatriation of cultural property under the bilateral agreement can be applied to stolen or illegally exported cultural property.[115] Unlike the Convention, the scope for repatriation is not restricted to theft of cultural property from museums or similar institutions. Also, the bilateral agreement does not apply the exception to *nemo dat quod non habet* to oblige the state party to pay any compensation to the other state party. Article 4 of the bilateral agreement provides that:

> All expenses incidental to the return and delivery of the movable cultural property shall be borne by the requesting Party and no natural or judicial person shall be entitled to claim any form of compensation from the Party returning the property claimed. Neither shall the requesting Party be required to compensate in any way such natural or juridical person as may have participated in illegally acquiring or sending abroad the property in question.[116]

This provision is totally dissimilar from the Convention art 7(b)(ii) which requires the requesting party pay just compensation to an innocent purchaser having valid title to cultural property. This provision of the bilateral agreement is beneficial for both states, enabling repatriation without payment of compensation. The reciprocal principle embedded in the bilateral agreement for

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[113] *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, opened for signature 14 June 2000, (entered into force 14 June 2000) preamble.
[114] Ibid art 4 para 1.
[115] Ibid art 1 para 2.
[116] Ibid art 4 para 2.

repatriation is the most important for cooperation, because it allows Cambodia and Thailand to mutually agree on the best way forward, leading to a win–win solution.

In 2000, 43 antiques were illegally imported to Thailand by shipping, detected and confiscated by the Thai Customs, and no one claimed ownership.[117] Those antiques were sent to the DFA for preservation at a national museum in accordance with the AON art 24[118] (providing that antiques or objects of art abandoned within Thailand and without claim to ownership shall become national treasures).[119] The DFA submitted the question of whether these antiques should be vested in the state to the Office of the Attorney-General, because the *Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010)* empowers the Office of the Attorney-General to investigate and render a recommendation relating to a draft contract or any legal issue of the government and state agencies.[120] It was reported that the antiques probably belong to the Cambodian civilisation. In accordance with the Cambodia–Thailand bilateral agreement, the DFA was obliged to cooperate with the Cambodian Government to request evidence to enable identification of the antiques.[121] Having proved that the antiques were illegally exported from Cambodia, Thailand followed the bilateral agreement by notifying Cambodia and both proceeded with the repatriation in accordance with art 4 of the agreement without payment of any compensation.[122]

This thesis extracts positive and negative aspects from the repatriation of cultural property using such a bilateral agreement. Positively, the bilateral agreement generally provides both parties full reciprocity. Under the Cambodia–Thailand bilateral agreement, both parties are accorded the same rights and obligations, which they have negotiated and agreed to. As insisted throughout this thesis, successful request for repatriation is impossible without cooperation between the requesting and requested party. The nature of a bilateral agreement means it is designed to satisfy the needs of both parties[123]—in the case of the Cambodia–Thailand bilateral agreement, protection and repatriation of illegally trafficked cultural property without payment of compensation. Such reciprocity is not found in the 1970 UNESCO Convention, because as a multilateral agreement its

[117] Anuchart Kongmalai, 'Ancient Monument and Antique Laws: The Supreme Court's Decision and Attorney-General' (Office of the Attorney General Working Paper, 2015) 18 (in Thai).
[118] Ibid.
[119] *Act on Ancient Monuments, Antiques, Objects of Art and National Museums B.E. 2504 (1961)* (Thailand) art 24.
[120] *Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010)* (Thailand) art 23(2).
[121] According to the Attorney-General's Recommendation No. 88/2551 (2008), the Attorney-General finally recommended that the illegally exported forty-three antiques did not vest in the DFA because this case did not fall within Article 24 of the AON. See Anuchart Kongmalai, 'Ancient Monument and Antique Laws: The Supreme Court's Decision and Attorney-General' (Office of the Attorney General Working Paper, 2015) 19 (in Thai).
[122] Kongmalai, above n 117, 19
[123] Arie Reich, 'Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity' (Bar-Ilan University Public Law and Legal Theory Working Paper No 14-09, Bar-Ilan University, 2009) 15-6.

nature is that of comprise between the many national interests involved (as discussed in Section 5.2.2).[124]

Negatively, the difficulty of making any bilateral agreement lies in convincing a requested party to join it—especially in the case of market states. Cambodia and Thailand, both states of origin, have the same interest in curbing illicit trafficking of cultural property, making a bilateral agreement high desirable. Such amenability is unlikely to be present when requesting the cooperation of market states or foreign museums with sizable collections of stolen cultural property and an interest in facilitating the trade of cultural property. Market states prefer cultural internationalism as justification for retention of foreign cultural property like the *Elgin Marbles*, while states of origin prefer cultural nationalism to justify requests for repatriation. This divergence of interests does lend itself to facilitate establishment of a bilateral agreement which, as a rule, must be established based on a common interest. It is necessary for states of origin to persuade market states to join bilateral agreements for protection and repatriation of cultural property.

This thesis argues that establishment of bilateral agreements for protection and repatriation of cultural property would be positive for Thailand. The model of the Cambodia–Thailand bilateral agreement should be used to extend cooperation to other ASEAN member countries and states of origin who espouse cultural nationalism—the common interest of protecting and repatriating cultural property serving as the basis for a bilateral agreement. This is in line with the ASEAN way which supports a conciliatory and incremental approach to establish cooperation through diplomacy. Establishing such bilateral agreements with market states or foreign museums espousing cultural internationalism will be difficult, however, this thesis argues for endeavouring to persuade them by offering agreements based on a balance between cultural nationalism and cultural internationalism, thus securing their voluntary cooperation while permitting Thailand to remain at an advantage when requesting for repatriation.

6.4 Conclusion

Thailand applies cultural nationalism through its policy and legislation in line with the 1970 UNESCO Convention and ASEAN regional framework (even though Thailand has not ratified the Convention). Thailand has implemented the international and regional framework by legal measures such as the registration of cultural property, preservation of national treasures and prohibition of cultural property export to pursue the retention of cultural property within its

[124] Ibid 12-3.

territory. Those legal measures are adequate and compatible with the international and regional framework, but weak enforcement is a main cause of their failure. The recent cases of repatriation demonstrate Thailand followed the spirit of the international legal framework in requesting for repatriation, but this impeded and disadvantaged Thailand. This thesis recommends that Thailand should cooperate with requested parties by applying a bilateral approach, because the reciprocal understanding inherent in bilateral agreements would facilitate protection and repatriation of its cultural property. This is discussed in detail in the next chapter.

Chapter 7:
Making Bilateral Agreements and Their Implications for Repatriation of Cultural Property in Thailand: Synergetic, Adaptive and Integrated Approach

> He who knows that the right and the wrong do not exist, but that there is a sphere of doing which encompasses the two, will never leave the realm of art.[1]

The major theme of the 1970 UNESCO Convention is cultural nationalism which discourages major art-importing countries from ratifying it, leading to the lack of cooperation between states of origin as the requesting party for repatriation and those importing countries as the requested party. Its mechanisms also have legal defects that tend not to facilitate the requesting party—too rigid a scope for protecting and returning cultural property, weakness in encouraging cooperation on repatriation and uncertainty of payment of compensation. These weakness were demonstrated in Thailand's request for repatriation of the *Phra Narai* lintel and *Luang Poh Sila* statue (see Sections 6.3.1 and 6.3.2 respectively). Bilateral agreements, such as the Cambodia–Thailand bilateral agreement and Cambodia–US MoU, are the most encouraging and demonstratively effective method of facilitating repatriation. This chapter examines the impact of the bilateral approach to govern repatriation to assess its viability.

7.1 Making Bilateral Agreements and Their Implications

How would Thailand or states of origin convince requested parties, particularly market states and foreign museums, to willingly cooperate in making the bilateral agreements for repatriation? Feasible options will need to be based on a balance between cultural nationalism and cultural internationalism. The issues related to this balance are examined in this section.

7.1.1 Non-Preference for Only One Cultural Property Concept

Non-preference for only one cultural property concept will need to underpin any bilateral agreement between Thailand and a requested party for repatriation. For Thailand to secure the effective cooperation of a requested party to succeed in repatriation, it should avoid strong

[1] Hippocrates. This quote was published by Art for the World on the occasion of the 50th Anniversary of the World Health Organization because the Art for the World has been invited to present in 1998-1999 an international itinerant exhibition of contemporary art. See Art for the World <http://www.artfortheworldarchives.net/wwd/1998/edge_of/edgeexh.htm>.

assertion of cultural nationalism. Similarly, the requested party (generally market states and foreign museums) should not insist only on cultural internationalism. This thesis argues that cultural nationalism and cultural internationalism, while seemingly juxtaposed, are inseparable, thus, it is not necessary to preference either one to the exclusion of the other.

Both concepts have the same objective—preservation of cultural property. Benderson explained the importance of cultural property—a representation of human and societies' history and achievements[2]—the physical forms of which (antiques, works of art, artefacts, etc) are prone to damage, theft or destruction.[3] The loss of cultural property equates to a loss of identity and history, thus, it is imperative to preserve it.[4]

As previously discussed, cultural nationalism represents the element of state's sovereignty and supports the retention of cultural property within its place of origin so the state of origin where cultural property originated is responsible for preserving such cultural property. Preservation is one of cultural internationalism's three elements (preservation, integrity and distribution), as we cannot integrate, distribute or access cultural property lost or destroyed. Although cultural nationalism and cultural internationalism are closely related through their mutual preservative purpose, this thesis argues that the spirit of cultural nationalism as it protects cultural property's context including its original value and place of origin beyond how it should be preserved. This concept is used as the priority to request for repatriation while it must not ignore cultural internationalism since the latter concept's benefits shall convince a requested party to initially participate in the friendly compromise. In sum, it is true that we do not raise cultural nationalism to preclude cultural internationalism, however both concepts can converge by encouraging preservation that keeps the context of cultural property in tact within its state of origin, and yet leverages the capacity of cultural internationalism to implement effective preservation measures to reconcile competing interests from states of origin and market states.

7.1.2 Establishment of Mutual Direction for Compromise

To enable a bilateral approach, Thailand and the requested party for repatriation should agree to establish their aims, interpretations behind those aims and what they hope to achieve from cooperation. It seems impossible to establish cooperation for resolving any conflict if parties have different directions and understandings. While Thailand seeks for repatriation of its cultural property, market states wish to import and retain foreign cultural property. They need to meet each

[2] Judith Benderson, 'Cultural Property Law: Introduction' (2016) 64(2) *The United States Attorney's Bulletin* 1, 1.
[3] Ibid.
[4] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 355.

other halfway with non-preference for only one cultural property concept. A request for repatriation should not be retroactive, while the requested party should actively take appropriate steps to assist the requesting party to protect their cultural property from illicit trafficking.

As argued by Klug, the requesting party should play a key role in forgiveness for the past indiscretions of museums in acquiring their collections as part of the compromise.[5] This helps to reconcile cultural nationalism and cultural internationalism. History has seen phases such as colonisation or the world wars during which innumerable cultural objects were removed from their original place. Unsurprisingly, many museums have acquired some cultural objects with no clear provenance and some from black markets. The past indiscretion adversely affects the relation between states of origin and market states.[6] We cannot undo history, but cultural nationalists can step forward through forgiveness expressed via non-retroactive requests for repatriation.

This forgiveness will be an initiative for further cooperation on repatriation. Forgiveness for previous indiscretion is linked with the international law principle of non-retroactive application of treaties per the VCLT art 28. This provision rules that treaty's provisions 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.[7] This is applied to the 1970 UNESCO Convention, art 7(b)(ii) of which requires state parties to take appropriate steps to recover and return cultural property imported after the entry into force of the Convention.[8] To comply with international law, states of origin should not claim repatriation of their cultural property removed after a certain date—1970 is a convenient date to apply for this, given the passage of the Convention in this year. Accordingly, states of origin should only request for repatriation of cultural property removed after 1970.

Market states should facilitate the protection of the cultural property of states of origin by imposing strict import regulations to curtail illicit trafficking. States of origin cannot force market states to recognise their export regulations and market states do not wish to be bound by foreign regulations that may adversely affect their trade. As argued by Fechner, because states of origins' export regulations are mostly based on cultural nationalism, they are too strict for enforcement by art-importing countries. A better method to protect cultural property would be the introduction of

[5] Nicole Klug, 'Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property' (2010) 42 *Case Western Reserve Journal of International Law* 711, 724-5.
[6] Ibid 725.
[7] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 28.
[8] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 7(b)(ii).

import regulations oriented towards the objective of cultural property law.[9] The *Convention on International Trade in Endangered Species* (CITES) may confirm such a method as its protection of endangered species is quite similar to that of cultural property due to the danger from external demands by the markets of industrialised countries. The CITES requires all state parties to establish a 'Management Authority' responsible for granting export and import permits and a 'Scientific Authority' for considering whether trade in certain species is detrimental to their survival.[10]

In a similar vein to the CITES's control of endangered species' movement at both import and export stages, market states should establish a specific agency to inspect and prohibit all imports of cultural property exported without permission of the exporting state. They should impose a strong penalty on museums in their country for acquiring cultural property with questionable provenance to encourage dutiful acquisition. This is the position of the ICOM Code of Ethics for Museums which requests museums take responsibility for ensuring any object has not been illegally obtained or exported from its country of origin.[11] Market states should codify this in their federal or state laws, including penalties or sanctions for museums that violate such laws.[12] To support the establishment of museums' liability for acquisition of cultural property with questionable provenance, museums should not have room to claim ignorance of questionable provenance, since they regularly possess skilful human and financial resources and the ability to investigate the provenance of cultural property.[13]

As evidenced by the repatriation of the *Phra Narai* lintel and *Luang Poh Sila* statue (see Sections 6.3.1 and 6.3.2 respectively), compromise necessarily considers the real interests of both parties. Those cases also demonstrated that the parties had vested financial interests connected to the cultural property in question. Although market states commonly claim cultural internationalism to retain cultural property, citing concern for better preservation and distributing to visitors from all over the world, they expect income from displaying such property. Repatriation of cultural property to states of origin implies loss on the part of market states or the museums located therein. Likewise, states of origin claiming cultural nationalism to repatriate cultural property may also have financial motives. Preservation may be a secondary priority to the financial benefit derived

[9] Frank G. Fechner, 'Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376, 389.
[10] Kevin D. Hill, 'Convention on International Trade in Endangered Species: Fifteen Years Later' (1990) 13 *Loyola of Los Angeles International and Comparative Law Journal* 231, 234.
[11] International Council of Museums, *Code of Ethics for Museums* (ICOM, 2013), principle 2.3.
[12] Leila Amineddoleh, 'Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions' (2014) 24 *Fordham Intellectual Property, Media, Entertainment Law Journal* 729, 734.
[13] Leah J. Weiss, 'The Role of Museums in Sustaining the Illicit Trade in Cultural Property' (2007) 25 *Cardozo Art and Entertainment Law Journal* 837, 874.

from the cultural property in question. The important point here is that compromise should be designed to balance the interests of parties—for this to occur, both parties need to honestly state their interests. For example, if both a requesting and requested party openly state the precedence of financial interests, a comprise that satisfies this for both parties is negotiable and achievable. For example, the market state may retain the cultural property concerned on the basis of their achieving better preservation, greater audience and higher income from its display, but pay a percentage of the income from its display or another agreed rate to the state of origin.

7.1.3 Mutually-Beneficial Repatriation Agreement: Loan Program

To implement mutual direction for compromise, Thailand and market states or foreign museums should compromise their interests via a bilateral approach. As examined in the previous chapter, multilateral agreements are ineffective in reconciling cultural nationalism and cultural internationalism as their multilateral nature forces a compromise among all parties. Bilateral agreements meet the specific needs of both parties and encourage reciprocity.

This thesis argues that the repatriation of cultural property necessarily depends on cooperation between the requesting and requested party, ideally on the basis of the most preferable conditions for both parties (subject to compromise). This raises the question of how the specific interests of both parties can, as much as possible, be taken into account. This function is not found in multilateral agreements which serve the common denominator of the many national interests involved.[14] A bilateral agreement for repatriation of cultural property should provide a legal framework or terms persuasive enough to invite the party in which the cultural property concerned is located to accept and join the agreement. This bilateral agreement aims to facilitate the requesting party to succeed its repatriation while not depriving or otherwise infringing the interests of the requested party.

The legal framework or terms must provide mutual benefit arising from the cultural property concerned. The requested party must not be at a disadvantage to accept the request for repatriation if they are to agree to the agreement. On this note, the accord between Italy and the Metropolitan Museum of Art in New York (MET) should be taken into account. In 2006, Italy achieved an accord with the MET after a long negotiation for repatriation of the *Euphronios Krater* and other cultural objects. The conflict began with Italy claiming for repatriation of the Krater due to it having been stolen from Italy and illegally exported. The MET claimed good faith acquisition, as

[14] Arie Reich, 'Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity' (Bar-Ilan University Public Law and Legal Theory Working Paper No.14-09) 12-3.

they purchased the Krater from an American dealer in 1972 without knowing that it was stolen.[15] Italy claimed cultural nationalism against the MET to request for the repatriation of the Krater by proving that it was illegally removed from an Etruscan tomb outside of Rome, while the MET remained steadfast in its position of being a good faith purchaser. In 2006, the bilateral negotiations resulted in the creation of a mutually-beneficial repatriation agreement.

This agreement reflects the balance of both parties' interest through three major pillars: the acknowledgement of Italian ownership of the Krater, prohibition of further litigation and establishment of a loan program between Italy and the MET.[16] The repatriation was undertaken in three phrases. The first phrase was the return of four classical Apulian vases conducted as soon as possible. Second, the MET returned the Krater in 2008 under the specific condition that the MET be credited as the good faith purchaser of the Krater[17] purchased in 1972 as 'one of the finest existing examples of Greek vessels from the sixth century B.C.'.[18] Third, the repatriation was completed in 2010 when the MET returned a 15-piece silverware set purchased in the early 1980s.[19] In this case, cultural nationalism and cultural internationalism were reconciled by balancing the interests of Italy as the requesting party and the MET as the requested party.

The repatriation of the *Euphronios Krater* and other cultural objects reflects cultural nationalism's functions encouraging such objects to be preserved in their place of origin as a physical symbol and representation of the cultural identity of the people living there. In terms of cultural internationalism, the timeframe of repatriation was beneficial for the MET, allowing it to exhibit the Krater and other cultural objects for nine months. The bilateral agreement also maintained the museum's credit as a good faith purchaser of cultural property and barred any further litigation.[20] According to the loan program, Italy also promised to give the MET antiquities of the same importance and beauty as the Krater on long-term loans.[21] These conditions satisfy the objectives of preserving and providing access to cultural property. These elements of cultural internationalism are accentuated in the universal museum concept. The MET is regarded as a universal museum, on par with the British Museum or Louvre. These museums are classified as such by dint of their key role in promoting respect for cultural diversity and interchange through

[15] Paige S. Goodwin, 'Mapping the Limits of Repatriable Cultural Property: A Case Study of Stolen Flemish Art in French Museums' (2008) 157 *University of Pennsylvania Law Review* 673, 689.
[16] Ibid 690.
[17] Stacey Falkoff, 'Mutually-Beneficial Repatriation Agreement: Returning Patrimony, Perpetuating the Illicit Antiquities Market' (2007) 2(9) *Journal of Law and Policy* 265, 283.
[18] Anthee Carassava, 'Greek Officials Planning to Bring Charges Against Ex-Curator', *New York Times* (online), 5 May 2006, <http://www.nytimes.com/2006/05/05/arts/design/05getty.html>.
[19] Falkoff, above n 17, 284.
[20] Ibid.
[21] Elisabetta Povoledo, 'Met to Sign Accord in Italy to Return Vase and Artifacts', *New York Times* (online), 21 February 2006, <http://www.nytimes.com/2006/02/21/arts/design/21anti.html>.

the exhibition and study of the cultural heritage of all people.[22] The agreement with Italy facilitated the MET in this.

Thus, the mutually-beneficial repatriation agreement seems inviting as a means to resolve cultural property disputes. This thesis examines this mutually beneficial element in respect to making bilateral agreements for repatriation. As argued by Briggs, the mutually-beneficial repatriation agreement between Italy and the MET established new standards for cooperation with foreign museums without pursuing any form of legal action.[23] Briggs explains that:

> Italy achieves considerable bargaining power by making clear it will refuse to lend art and antiquities to uncooperative museums for temporary exhibitions. Amidst this dual pressure, Italy then offers museums a way out by waiving all liability … which is good for museum public relations … in exchange for what Italy desired.[24]

We should look at the heart of compromise between Italy and the MET. Italy desired repatriation of the Krater and other cultural objects, while the MET desired to exhibit these objects. The compromise permitted both to occur and avoided the cost and delay of the litigious process. This thesis supports a requesting and requested party to make a bilateral agreement based on the mutually beneficial element demonstrated in the mutually-beneficial repatriation agreement between Italy and the MET.

Arguably, the proliferation of bilateral agreements on cultural property could significantly impact on international or regional institutions, leading to stagnation of and lack of development in cultural property law. This is only a partial truth, because a bilateral approach tends to become part of international or regional institutions' development of cultural property law. Bilateral agreements detract from the formation of much-needed international legal precedent, because international law does not provide much practical assistance in encouraging voluntary repatriation.[25] As shown in regard to the 1970 UNESCO Convention, while UNESCO attempted to promote cooperation on cultural property through a multilateral agreement, the Convention has not been supported by market states. The development of legal norms by promoting a bilateral approach should be a trend that international or regional institutions should prefer to resolve problems due to its flexibility and comfort. Bilateral agreements help states to avoid the legal defects in international law such as limitation on applicability, vague language, lack of uniformity in application and financial burdens.[26] It seems useless for institutions to develop legal norms

[22] Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010) 164.
[23] Aaron Kyle Briggs, 'Consequences of the Met-Italy Accord for the International Restitution of Cultural Property' (2007) 7 *Chicago Journal of International Law* 623, 652.
[24] Ibid 642-3.
[25] Falkoff, above n 17, 294.
[26] Ibid.

unsupported by states. Conversely, cultural property law may be developed into a flexible framework that allows states to seek alternative choices or develop their own satisfactory resolution under such a framework. For example ASEAN, openly lets member states address conflict. It provides only a soft law framework and flexible principles. This leads to seeking solutions through negotiations, epitomised by bilateral agreements (eg, the Cambodia–Thailand bilateral agreement).

Legal defects in international law raise 'uncertainty' for states of origin seeking repatriation and market states or museums as the requested party.[27] This thesis has previous discussed the legal defects of the 1970 UNESCO Convention and 1995 UNIDROIT Convention (see especially Chapter 4) such as vague language, rigid scope of claiming for repatriation of cultural property, and failure to harmonise the right of ownership under the common law system and good faith purchaser under the civil law system. Those flaws are absent if parties enter into a mutually-beneficial repatriation agreement.

Although the model of the mutually-beneficial repatriation agreement between Italy and the MET is not easily replicated in all repatriation cases,[28] it lays down some important requirements that states of origin (as the requesting party) and market states or museums (as the requested party) may apply in making a bilateral agreement. The requirements are explained by Briggs as follows: 1) the cultural object in question becomes important to the possessing museum's collection, 2) the requesting party must be a state of origin having high intention to repatriate the cultural object, 3) the museum is unable to proceed with lengthy litigation, 4) the requesting party is capable enough to preserve the cultural property if repatriated, 5) the possessing museum is located in a state party to international law concerning repatriation of stolen cultural property, and 6) the requesting party is obliged to show evidence of illegality in the requested party's acquisition of the cultural property.[29] This thesis only applies some requirements to make a bilateral agreement based on the mutual direction for compromise.

This thesis argues that it is not necessary to focus on the cultural property in question that is important to the requested party's collection, but the requesting and requested party should voluntarily consent to repatriate any cultural property possessed by requested party and claimed by the requesting party, because the compromise should reflect their voluntariness as much as possible. Secondly, as insisted by this thesis, the preservation of cultural property is the most

[27] Christa L. Kirby, 'Stolen Cultural Property: Available Museum Responses to an International Dilemma' (2000) 104 *Dickinson Law Review* 729, 734.
[28] Goodwin, above n 15, 702.
[29] Briggs, above n 23, 643-8.

essential objective of compromise, because it is the mutual objective of cultural nationalism and cultural internationalism. Thus, the requesting party must prove its ability to preserve the cultural property to a standard not lower than that of requested party when the cultural property is repatriated. Thirdly, both parties to the agreement must agree not to proceed with litigation or any other legal action, because this thesis recognises that the compromise should be completed with the reciprocity to maintain their relationship and avoid confrontational litigation. Lastly, the requesting party is responsible for proving the illegality of the requested party's acquisition of the cultural property. This thesis argues that these four requirements should be the basis for making a bilateral agreement for repatriation to advance reconciliation for the benefit of both parties.

7.1.4 Mutually-Beneficial Repatriation Agreement: Exchange System

The channel of 'exchange' can be functioned through exchange by trade, lease or even by gift. This thesis observes some positive aspects from the exchange system to convince the requested party to participate in a bilateral agreement for repatriation. The most popular channel of exchange is trade in cultural property. This would be possible if Thailand and the requested party mutually established a licit market. This seems contrary to the state of origin's objective of seeking to repatriate its illegally removed cultural property, not sell it. However, there are benefits for states of origin, the primary one being that the looting of archaeological sites and trade in stolen cultural property would be decreased and the black market would be no longer desirable since buyers would prefer to purchase legal objects.[30] Also, states of origin economically benefit from a licit market and can invest additional funds to support protection efforts, permitting them to develop their human resources, technology, registries and new museums.[31]

It is argued that a licit market in cultural property contravenes the international legal regime. The 1970 UNESCO Convention does not recognise the legal trade in cultural property. The Convention supports the exchange of cultural property among state parties for scientific, cultural and educational purposes,[32] but does not specify any trade in cultural property. The 1976 UNESCO Recommendation does not suggest nations to trade their cultural property, but it does request cultural institutions implement a systematic policy for exchanging or loaning surplus objects that would enrich all parties and lead to a better use of the international community's cultural heritage.[33] In terms of negative aspects of a licit market, many countries' experiences indicate that

[30] Patty Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm Preserving the Past' (2007) 8 *Chicago Journal of International Law* 169, 183-4.
[31] Jane Warring, 'Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property' (2005) 19 *Emory International Law Review* 227, 271.
[32] *The 1970 UNESCO Convention* preamble.
[33] See *UNESCO Recommendation concerning the International Exchange of Cultural Property*, UNESCO General Conference, 19th sess, UNESCO Doc 19C/RES.4.126 (26 November 1976).

it will not prevent the looting of archaeological sites.[34] Those cultural objects offered on the licit market should be documented by the state, so undocumented cultural objects may be identified as stolen.[35]

This thesis opposes an exchange system via licit markets. The licit market would provide financial benefits for states of origin, but it does not strike a balance between cultural nationalism and cultural internationalism. While states of origin will be paid for selling their cultural property, they will permanently lose ownership of cultural property. If cultural property is a commodifiable thing and freely traded, states of origins' identity will be deprived as cultural objects leave their places of origin and their contexts and people. The decriminalisation of trade in cultural property would provoke an increase in looting of archaeological sites to feed increased demand.[36] Without strict state control over cultural property, newly discovered cultural property would not automatically be vested in the state[37] and the licit market incentivises the finder to sell it.

The establishment of licit trade in antiquities may not strike a balance between cultural nationalism and cultural internationalism, but its concept could be implemented to a limited degree between bilateral partners. In this way, the establishment of a licit market may reconcile cultural nationalism and cultural internationalism if states of origin retained ownership of antiquities offered for sale while purchasers (market states or foreign museums) were allowed to possess these. Bilateral agreements should be designed to allow trade in 'duplicate' cultural property instead of 'original' cultural property.

A state of origin seeking for repatriation and a market state or foreign museum in which the cultural property concerned is located should make an agreement that allows the establishment of a licit market in cultural property between them. There are two key stages under this agreement. Firstly, the requested party must return the cultural property of the requesting party, while the requesting party is obliged to allow the requested party to freely acquire a duplicate of the repatriated item. Secondly, the requesting party must enable and support a licit market displaying its own cultural property. When the requested party chooses to buy any cultural item as displayed, the requesting party must produce a duplicate of such item within a timeframe and sell it to the requested party. This agreement would help states of origin maintain ownership of cultural property, while market states or museums still financially benefit from a duplicate of such cultural property and can enrich

[34] Gerstenblith, above n 30, 184.
[35] Klug, above n 5, 737.
[36] Gerstenblith, above n 30, 183.
[37] Ibid.

their collections. However, this idea is sensitive, because market states or museums may prefer to obtain a genuine item, rather than a duplicate.

To promote the importance and value of a duplicate item, states of origin would be obliged by the agreement to limit duplicates of an original item to one. Repatriated or purchased cultural property would have a single duplicate made by the requesting party or state of origin for the requested party of market state.[38]

A balance between the interests of states of origin and market states or foreign museums is promoted by such an agreement. States of origin retain right of ownership and earn money from licit trade in duplicate cultural property. This duplicate cultural property still represents the identity and pride of its place of origin in accordance with cultural nationalism, while market states or foreign museums can access and appreciate foreign cultural property in accordance with cultural internationalism. Nevertheless, trade in duplicate cultural property may raise the difficulty of which antiques or objects of art should be duplicated.[39] For example, Thailand may only display cultural property of low market value for sale/duplication. This would make the market abortive. This thesis agrees that the need for buying must be closely related to the need for selling. The licit market in duplicate cultural property should be commonly regulated by the market mechanism allowing demand and supply to determine the prices and quantities of a duplicate cultural property offered for sale.

An alternative channel for exchange between Thailand and market states or foreign museums is the creation of a bilateral agreement for repatriation by a leasing program. This would resolve the asymmetry between cultural nationalism and cultural internationalism. This agreement would allow a party seeking for repatriation of cultural property to offer the requested party the option of leasing such cultural property. This channel is superior to that of the licit market in duplicate cultural property, because the potential objects for lease would not be limited to duplicate objects, but unique objects that may not be effectively preserved in states of origin.[40] Although the lessee would not return cultural objects at the time of making the agreement, it is ensured that the lessor retains the ownership right of such objects. A leasing program may be persuasive in gaining the

[38] In Thailand, the AON recognizes the production of a duplicate item of cultural property. Its Article 18 provides that '[a]ntiques or objects of art which are under the possession of the Department of Fine Arts or are registered and are useful or of special value in the field of art, history or archaeology, the Minister shall have the power to cause, by means of notification in the Government Gazette, such antiques or objects of art to control the duplication'.
[39] John Henry Merryman, 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11, 23.
[40] Jane Warring, above n 31, 278.

cooperation of market states or foreign museums as a lessee as this opens the possibility to lease other unique objects.[41]

How would cultural nationalism and cultural internationalism be reconciled by a leasing program? Thailand has an opportunity to repatriate its cultural objects from the lessee at the conclusion of a lease in accordance with the bilateral agreement. During the lease, Thailand can be granted financial benefits in the form of a leasing fee while retaining ownership. This thesis argues that Thai cultural identity or pride would not be deprived, because the leased cultural objects would be displayed as Thai cultural objects for the appreciation of visitors who will learn history and identity represented by those objects and may be motivated to visit their place of origin. In terms of cultural internationalism, market states or foreign museums as lessee may provide for better preservation of cultural objects. The lease system encourages the distribution of leased cultural objects to states and museums around the world for access by people of all nations. Accordingly, an exchange system by lease is an inviting option for a mutually-beneficial repatriation agreement.

7.1.5 Mutually-Beneficial Repatriation Agreement: Transfer of Technology

Transfer of technology could reconcile the disparity between museums in states of origin and those in market states. The use of technology for preserving cultural property one key claim of cultural internationalists for retention of foreign cultural property, prominently, in the case of the *Elgin Marbles*. The British Museum claims that the Marbles are still in good condition despite having been removed to England[42] and would have otherwise suffered from Greece's poor management and bad weather. The museum undertakes expert care and maintenance of the Marbles.[43] The claim of superior preservation of cultural property in market states reflects market states' or foreign museums' ability to leverage their technological capability to this end.

In considering Thailand's ability to use technology to this end, we can disregard its climate and geography from consideration (while these may adversely affect the quality of cultural property, they are beyond human control) and focus on its possibility and competence. The report on national museums' operations in Thailand indicates most have failed in implementing the DFA's policy and AON's guidance to preserve national treasures due to a lack of human resources and technology.[44] This reflects the status of Thailand as a developing country lacking the financial

[41] Ibid.
[42] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1917.
[43] Madeline Chimento, 'Lost Artifacts of the Incas: Cultural Property and the Repatriation Movement' (2008) 54 *Loyola Law Review* 209, 221.
[44] State Audit Office of the Kingdom of Thailand, 'The Examination Report of National Museums' Operations and Archaeological Fund, the Department of Fine Arts under the Ministry of Culture' (State Audit Office of the Kingdom of Thailand, 12 September 2017) 3-8 (in Thai).

resources and capability to provide the technology need to preserve cultural property. As previously discussed, most states of origin are classified as developing or least developed countries.[45] The financial limitations of those countries is an obstacle to providing the technology necessary for preserving their cultural property. Could market states or foreign museums assist Thailand and other states of origin to preserve cultural property by transfer of technology?

Transfer of technology has been undertaken in international environmental law contexts. Environmental problems do not only harm any individual country, but negatively affect the global community as a whole through ozone depletion, climate change, etc. The preservation of the global environment has parallels to the preservation of cultural property. The *Vienna Convention for the Protection of the Ozone Layer* requires state parties to protect the ozone layer through standards mandated by developed countries,[46] so developed country parties provide necessary assistance via transfer of technology to developing country parties.[47] The *UN Framework Convention on Climate Change* also provides transfer of technology as one action that Annex state parties shall conduct to support Non-Annex state parties to mitigate the effects of climate change.[48]

The global, collective risk and loss associated with climate change is analogous to cultural internationalism's consideration of any loss of cultural property as a loss for human culture as a whole. This thesis argues for the benefits of market states to enter mutually-beneficial repatriation agreements that entail technology transfer with states of origin. As cultural property preservation is beyond the capability of most states of origin, market states or foreign museums possessing the necessary technology for this should assist states of origin by upgrading their competence and technology transfer. Arguably, many developed countries do not transfer technologies to developing countries due to intellectual property rights to preserve their monopoly on technology. Thus, providing an incentive for market states to transfer their technology is necessary.

The loss of states of origins' cultural property is loss for human culture. If market states do not assist states of origin in preserving cultural property, they share in the loss. While cultural internationalism is a theoretical motivation for market states to engage in transfer technology to states of origin, a more pragmatic motivation would be states of origin permitting them access to cultural property. For example, states of origin could provide long-term loans of cultural objects

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[45] United Nations, *Country Classification* (20 September 2017) <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.
[46] Ana Sljivic, 'Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism' (1997-1998) 31 *George Washington journal of International Law & Economics* 398, 425.
[47] See *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 26 ILM 1529 (entered into force 22 September 1988) art 4(2).
[48] See *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 31 ILM 849 (entered into force 21 March 1994) art 4.

to market states without charge in exchange for technology transfer. This reciprocity would develop cooperation, potentially as a step towards repatriation of cultural property.

7.1.6 Negotiation, Mediation and Arbitration

The last option for repatriation is a return to basic methods: negotiation, mediation and arbitration. A series of compromises could be applied at any stage between states of origin and market states for repatriation of cultural property. The first and most basic avenue is bilateral negotiation. The point of compromise is to ensure an agreement is reached, while still ensuring both parties benefit. Negotiation helps to reduce litigious tension among parties. While the output of conciliation or negotiation is not binding on the parties, since they may freely follow or refuse the suggestions, this avenue is the easiest and fastest to resolve conflict since it only requires parties' consent to initiate the process.[49] Negotiation also permits parties to make persuasive, political and moral arguments.[50] Therefore, the outcome of any bilateral agreement depends on its terms and conditions are inviting and persuasive enough for both parties, including bilateral agreements for repatriation.

The negotiations between Italy and the MET are an example of good negotiation leading to a mutually satisfactory agreement. Could such a style of negotiation be achieved in other cases of requests for repatriation? Goodwin stated that the negotiations between Italy and the MET were accompanied by an appeal to cultural nationalism and cultural internationalism, so the outcome stemmed from the parties balancing these.[51] Accordingly, negotiations that do not appeal to those concepts will fail. The 1970 UNESCO Convention art 7(b)(ii) obliges the requesting and requested party proceed with repatriation through diplomatic offices. Yet, art 7(b)(ii) provides no alternative mechanism, meaning deadlocked negotiations drag on.

In considering mediation as the next level of compromise, mediation is more suitable for conciliation between the requesting and requested party, because it provides a private process, flexibility, freedom and is less costly than arbitration or litigation.[52] Cultural property disputes stem from states of origin seeking the ownership right to cultural property and market states (or other possessors of foreign cultural property) disputing this. Mediation allows the saving of face (eg, a market state or museum proven to be in possession of stolen cultural property maintains

[49] Guido Carducci, 'The Peaceful Settlement of Disputes and Cultural Property' (2006) 3 *ICOM News* 8, 8.
[50] Goodwin, above n 15, 686.
[51] Ibid.
[52] Richard Clark, 'Mediation in Art Law and Cultural Property Disputes' (September 2012) *Slaughter and May* 1, 2.

their reputation due to the confidential process), allows parties to mutually design a satisfactory compromise and allows selection of a neutral third party as mediator.

Bryne-Sutton argued that cultural property is dissimilar from other property, because it has economic, cultural and immaterial value.[53] The mediator's qualification to ascertain cultural heritage should be important to parties' consideration when appointing them. The cultural and immaterial value of cultural property is linked to countries, regions and, arguably, the whole of humankind[54] (ie, one cultural object can be simultaneously viewed as national heritage and CHM). Various perspectives on cultural property are involved in dispute settlement such as moral or ethical issues beyond the strictly legal matters. While a claim for ownership by the original owner contests the claim for good faith acquisition, the settlement of cultural property disputes cannot solely focus on legal rights or liabilities.[55] To support this, mediation can consider matters beyond the legal aspect by providing its conciliatory functions for sensitive, non-legal aspects in the interest of the parties.[56] Ideally, the mediator will identify and address non-legal issues that will encourage both parties to find a mutual solution while helping to preserve their relationship.[57]

If mediation is impossible or unproductive, the next stage is arbitration. Arbitration involves the appointment of one or more third parties (mutually accepted by the parties to the dispute) as arbitrator and permits the parties to design or structure the proceedings to suit their unique situation.[58] This avenue is indicated in the 1995 UNIDROIT Convention art 8.[59] The settlement of cultural property disputes by arbitration is not new in cultural property law. Its advantages include greater flexibility than the judicial methods, because both parties freely choose an arbitrator, a neutral location and specific procedures.[60] This is a way to avoid applying strict rules of procedure, evidence and remedies on the national jurisdiction of judicial proceedings.[61] An arbitral body established by mutual agreement is appropriate to understand both claims due to its proficiency in legal issues on cultural property and also functions independently without political influences.[62]

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[53] Quentin Bryne-Sutton, 'Arbitration and Mediation in Art-Related Disputes' (1998) 14(4) *Arbitration International* 447, 448.
[54] Ibid.
[55] Clark, above n 52, 3.
[56] Ibid.
[57] Ibid.
[58] Daniel Shapiro, 'Litigation and Art-Related Disputes' in Quentin Bryne-Sutton and Fabienne Geisinger-Mariethoz (eds), *Resolution Methods for Art-Related Disputes* (Schulthess, 1999) 17, 19.
[59] See *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) art 8(2).
[60] Evangelos I. Gegas, 'International Arbitration and Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property' (1997) 13 *Ohio State Journal on Disputes Resolution* 129, 157.
[61] Ibid 155.
[62] Ibid 155-6.

Arbitration may prevent the development of international cultural property law, but may also play a role in developing it. Cremades stated, '[a]rbitration in the commercial setting has served as a bridge between actual practice and normative aspiration, between commercial reality and the law'.[63] Although this pertains to arbitration's role in commercial law development, this idea can be applied to cultural property law. Arbitrators' decisions are the result of specific proposals put forth by the parties and do not rely on general principles.[64] Their decisions are not limited by existing legal norms that may not fit to resolve cultural property disputes as examined in the 1970 UNESCO Convention. Arbitral decision-making emphasises substance over format where contractual responsibility is concerned, so arbitrators make efforts to understand the contractual dynamics.[65] In cultural property contexts, the balance between ownership rights and good faith acquisition may not be achieved with the application of national law (as the result depends on the legal system) and arbitrations have encouraged cultural property lawyers to explore the potential of other methods of balancing the parties' interests. An arbitration's award creates a new rule, standard or practice fitting the specific character of cultural property disputes and having legal effect since such award is judicially enforceable. Thus, the arbitration is significantly linked with developing cultural property law.

The ICJ channel is recommended by scholars to address cultural property disputes, because of its role as a supreme and appropriate forum for international conflict of states.[66] Cultural property disputes are not always state-vs-state disputes. Many cases of repatriation were between states of origin and private museums or institutions. The ICJ's jurisdiction requires a state's recognition. This may discourage parties to the disputes from this channel as the recognition of the ICJ's jurisdiction is different from arbitration. In arbitration, both parties freely design specific procedures and appoint an arbitrator by mutual agreement. This freedom is not present in the ICJ option. Arbitration is more structural than mediation and less rigid than judicial methods.

In terms of retroactivity, arbitration is undertaken to resolve disputes involving retroactivity, rather than complying with the 1970 UNESCO Convention since the Convention does not allow repatriation of cultural property stolen or illegally exported prior to the entry into force of the Convention. Arbitration is capable of applying retroactivity as mutually agreed to by both parties.[67] Although an arbitrator renders a binding decision on the parties, the informal rules and procedures

[63] Bernardo M. Cremades, 'The Impact of International Arbitration on the Development of Business Law' (1983) 31 *Practitioners' Notebook* 526, 534.
[64] Ibid 526.
[65] Ibid 530.
[66] Ann P. Prunty, 'Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles' (1984) 72 *Georgetown Law Journal* 1155, 1157.
[67] Gegas, above n 60, 155.

of arbitration are still more amicable than litigation.[68] This is persuasive to elicit the parties' consent so that their conflict will be settled with a friendly atmosphere. Likewise, flexibility underpins the making of bilateral agreements for repatriation which aim to facilitate, as much as possible, both parties to settle their conflict. Thus, any such agreement should allow those parties to switch their method of settlement at any time when they mutually agree that the method they are currently applying is no longer workable.[69] This thesis argues that arbitration is an appropriate option to reconcile the interests of states of origin and market states.

7.2 Guidance for Thailand

Based on the above discussion of feasible options to convince market states or foreign museums to cooperate with Thailand for repatriation of cultural property, Thailand would best benefit from establishing bilateral agreements, rather than complying with the 1970 UNESCO Convention. The previously discussed feasible options should be integrated in any bilateral agreement to strengthen the chances for successful repatriation. This section provides short-term and long-term guidance for Thailand to achieve this.

7.2.1 Short-Term Guidance

The short-term guidance pertains to the existing situation and allows for easy implementation by Thailand. Thailand should initially set its national direction on cultural property to one of requesting for repatriation of its illegally removed cultural property. Thus, there is no need for any major change in Thailand's current national policy on cultural property, but Thailand should make its policy as an umbrella framework clear and substantial enough to answer how Thailand should move forward in its repatriation of cultural property. As shown by this thesis, Thailand's policies, such as the NESAC's plan and Ministry of Culture's policy, do not clearly state any framework on movable cultural property; instead, they mainly concerning immovable cultural property such as historical buildings or archaeological sites. Clear and substantial direction from those policies would be useful to design a subsidiary action plan and strategy to be implemented by the DFA as the DFA functions as a key agency for requests for repatriation.

However, this direction for repatriation should not solely espouse cultural nationalism, because, as shown, repatriation is not possible without the cooperation of the requested party. Thus, Thailand should, based on the non-preference for only one cultural property (see Section 7.1.1),

[68] Melineh S. Ounanian, 'Of All the Things I've Lost, I Miss My Marbles the Most! An Alternative Approach to the Epic Problem of the Elgin Marbles' (2007) 9 *Cardozo* Journal of *Conflict Resolution* 109, 133.
[69] The hybrid between mediation and arbitration is recommended as an alternative dispute resolution by Daniel Renken, *The ABC's of ADR: A Comprehensive Guide to Alternative Dispute Resolution*, Mediate (10 April 2018) <https://www.mediate.com/articles/renkenD.cfm>.

launch a flexible policy open to bilateral negotiation. Initially, Thailand should cooperate with other ASEAN member countries. This regional cooperation would facilitate Thailand and its neighbour countries to repatriate cultural property among each other. It would also likely strengthen the protection and repatriation of cultural property within the region, because smugglers usually use a neighbour country as a pathway to illicitly transport cultural property. The cooperation is consistent with the *ASEAN Declaration on Cultural Heritage (2000)* which supports member countries to facilitate each other to seek for repatriation.[70]

As shown by this thesis, most ASEAN member countries apply cultural nationalism in the design of their policies and law, thus, promoting regional cooperation with the same flavour should not be problematic. This also suits the ASEAN way. This thesis observes that such cooperation has been implemented through the Cambodia–Thailand bilateral agreement[71] which should become a pilot model of reciprocity and expanded to other ASEAN member countries. While there is potential for a regional agreement, given the previously discussed weakness of multilateral agreements, a series of bilateral agreements is preferable. Once this is achieved, Thailand and ASEAN member countries would benefit from regional cooperation for repatriation.

7.2.2 Long-Term Guidance

The long-term guidance pertains to Thailand implementing a system for establishing effective cooperation with market states or foreign museums in which its illegally removed cultural property is located. The key to succeed in this endeavour is making a persuasive offer to the requested party including feasible options. This thesis recommends that Thailand initiate negotiations with the requested party to establish a bilateral agreement on cultural property. The mutually-beneficial repatriation agreement between Italy and the MET would serve as a model for the primary option Thailand would offer other parties. The balancing of the requesting and requested party's interests sees the requested party retaining Thailand's cultural property under preservative conditions and long-term loan programs. The requested party can exhibit the cultural property for income and visitor access for study or appreciation. This satisfies the mutual preservative objective of cultural nationalism and cultural internationalism as well as satisfying Thailand's cultural nationalism since it retains the ownership rights to its cultural property.

This bilateral agreement is superior to complying with the 1970 UNESCO Convention art 7(b)(ii). This agreement removes the need to consider the conflict of ownership right under common law

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[70] *ASEAN Declaration on Cultural Heritage*, 33rd ASEAN ministerial mtg (25 July 2000) principle 10.
[71] See *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, opened for signature 14 June 2000, (entered into force 14 June 2000).

versus good faith acquisition under civil law and protects Thailand as the requesting party from paying compensation. This bilateral agreement is also superior to complying with the 1995 UNIDROIT Convention. The Convention request repatriation proceeded through the judicial system of the court of the state where cultural property is located with respect to the *lex situs* principle. The bilateral agreement proposed in this thesis allows the parties to determine their preferred avenue of dispute resolution, avoiding the litigious process. This is consistent with the ASEAN way and Thailand's own preference for reconciliation, saving costs, time and face and valuing relationships.[72]

This thesis has considered the establishment of a bilateral agreement relating to an exchange system as an alternative option which would establish a licit market for the sale or lease of cultural property between Thailand and the other party (see Section 7.1.4). This thesis argues that Thailand would prefer to offer trade in duplicate cultural property, rather than in genuine cultural property. Trade in genuine cultural property would not reconcile cultural nationalism and cultural internationalism—Thailand would lose the ownership right of cultural property traded. If cultural property is to be traded, this guidance recommends Thailand offer the other party duplicate cultural property for sale to reciprocate the approval of Thailand's request for repatriation. This is permitted by the AON.

The other option for a bilateral agreement relating to an exchange system is that Thailand and the other party mutually agree to the leasing of genuine cultural property. This option increases the incentive for the other party to join a bilateral agreement, because it offers the opportunity to possess genuine cultural property and promote and exhibit it. This satisfies cultural internationalism, while Thailand retaining ownership rights satisfies cultural nationalism. This thesis observes that a bilateral agreement need not only provide for an exchange system, but may also grant Thailand sustainable benefit for preservation of its cultural property. After a lease program concludes, the leased cultural property will be returned to Thailand, likely in equal or better condition. If Thailand lacks the capability to preserve its cultural property after repatriating it, the repatriation would be detrimental to the cultural property. Thus, this guidance recommends that a lease program be adopted together with an agreement for technology transfer. Instead of deriving financial benefits from the lease, Thailand may request the other party transfer technology for preservation of cultural property.

[72] Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization, 2013) 231-2.

7.3 Conclusion

Repatriation is impossible without the cooperation of the requested party. Thailand, as a state of origin, must convince market states or foreign museums retaining its cultural property to participate in cooperation based on reciprocity and a balance between cultural nationalism and cultural internationalism. While Thailand should be facilitated to succeed in repatriation, the other party should not be deprived by or suffer loss from this repatriation. This thesis argues that a bilateral agreement is the most feasible option for reconciling the cultural nationalism and cultural internationalism cultural property concepts, with a bilateral agreement on the protection and repatriation of cultural property entailing agreements on the creation of a loan program, exchange system and/or transfer of technology being recommended. Such a bilateral agreement would be highly beneficial for Thailand and the other party, underpinning cooperation. This is possible under Thai law and consistent with the ASEAN way.

Chapter 8:
Conclusions and Recommendations

Illicit trafficking of cultural property is a major problem in states of origin including Thailand. It causes the loss of movable cultural property in those countries and provokes cultural property disputes between the original owner of cultural property, who seeks for repatriation of stolen or illegally exported cultural property, and the current possessor of such property. Thailand and other states of origin commonly request for repatriation of their illegally exported cultural property from market states or foreign museums. Cultural property disputes occur when the requested party rejects the request and fights to retain foreign cultural property.

This thesis examined the international legal framework for repatriation under the 1970 UNESCO Convention and 1995 UNIDROIT Convention (see Chapter 4). This thesis argued that repatriation depends on cooperation between the requesting and requested party. This is not forthcoming, as states of origin and market states have different perspectives on cultural property. This thesis posed a research question that is doctrinal in nature and sought to determine why the preference for only cultural nationalism as embedded in the international legal framework fails to ensure cooperation between states of origin and market states for cultural property disputes.

8.1 Two Ways of Thinking About Cultural Property

There are two ways of thinking about cultural property and analysis and exploration of these is at the heart of this thesis. The delineation of cultural property concepts established the conceptual base of this thesis. The conflict between states of origin and market states is due to different ways of thinking about cultural property. States of origin prefer cultural nationalism which recognises cultural property as part of national cultural heritage and, thus, 'gives nations a special interest … implies the attribution of national character to objects … legitimizes national export controls and demands for the repatriation of cultural property'.[1] Conversely, market states prefer cultural internationalism which recognises that cultural objects are 'components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction'.[2]

[1] John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *The American Journal of International Law* 831, 832.
[2] Ibid 831.

This thesis argues that an approach that favours one cultural property concept is not ideal for facilitating cooperation between states of origin and market states in pursuing repatriation, as demonstrated in the examination of the international legal framework and specific cases such as the *Elgin Marbles* and *Phra Narai* lintel. This thesis proposes a bilateral approach based on a balance of the two concepts, seeing them as two sides of the same coin. Both concepts have the mutual objective of preservation of cultural property.[3] Their characters also inherently overlap each other. In *Elgin Marbles*, for example, while the British Museum raised cultural internationalism to claim the Marbles as common culture and justify their retention of the Marbles, Greece could claim its right to possess the Marbles by the same logic. This thesis argues for a reconciliation of the concepts to create a feasible approach for achieving a win–win solution for states of origin and market states in requests for repatriation.

This is grounded in an examination of the ASEAN regional framework and ASEAN member states' practice. This thesis observes that the rise of regionalism enables a new way of thinking where cultural nationalism and cultural internationalism are reconciled on the basis of sharing benefits between the requesting and requested party for repatriation. This also resolves the shortcomings of the international legal framework. This way of thinking encourages parties to apply a bilateral approach leading to mutual benefits such as the repatriation under long-term loan or exchange programs and is exemplified by the Cambodia–Thailand bilateral agreement, Cambodia–US MoU and mutually-beneficial repatriation agreement between Italy and the MET.

8.2 Examination of Legal Frameworks

The examination of the international legal framework demonstrated that an approach favouring one cultural property concept does not facilitate cooperation between states of origin and market states in pursuing repatriation. Defects in the international legal framework also undermine requests for repatriation.

8.2.1 International Framework

The 1970 UNESCO Convention encourages state parties to protect their own cultural property from any removal. Article 5 obliges state parties to enact law and regulations designed to prevent illegal import and export of cultural property and to establish a national inventory of protected property[4]—a clear reflection of cultural nationalism. The Convention art 7(b) provides the legal framework for repatriation which encourages a state party to cooperate with the other state party

[3] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 355.
[4] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 5.

to pursue repatriation. This thesis observes that the Convention favours states of origin and the return of their cultural property.

Yet, this thesis argues that the legal framework's adoption of cultural nationalism adversely affects requests for repatriation by state parties of origin. Most market states have not ratified the Convention as they have no desire to implement its legal framework which oblige them to take measures to prevent their museums or similar institutions from acquiring stolen cultural property and to return stolen cultural property.[5]

Additionally, the Convention's legal defects impede state parties of origin in requests for repatriation. The Convention's preference for cultural nationalism undermines cooperation between state parties of origin and market state parties; its effort to harmonise different legal systems results in favouring of the good faith purchaser (under art 7(b)), adversely affecting state parties of origin by obliging them to pay 'just compensation' for repatriation (the vague language of which is also problematic, because the requesting party risks paying an exorbitant or inappropriate price); and its legal framework provides too rigid a scope for what constitutes cultural property (restricting it to cultural property designated by a state as such and stolen from a public collection), thus restricting what cultural property states can request for repatriation. Similarly, the 1995 UNIDROIT Convention adopts cultural nationalism and, thus, fails to convince market states to cooperate with states of origin under its legal framework.

8.2.2 ASEAN Regional Framework

The majority of ASEAN member countries are states of origin who have experienced illicit trafficking. Thus, it is not surprising that ASEAN promotes cultural nationalism for the protection of cultural property in the region. Cooperation among member states for repatriation is based on the ASEAN way, a unique style favouring an informal and incremental approach to cooperation via diplomacy, consultation or dialogue, while institutionalisation is kept to a minimum.[6] This is different from the EU which establishes binding legislative Acts to be applied uniformly across EU member countries.

The rise of regionalism enables a new way of thinking where cultural nationalism and cultural internationalism are reconciled on the basis of sharing benefits between the requesting and requested party for repatriation. The ASEAN regional framework encourages all member countries

[5] Janene Marie Podesta, 'Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Underlines Its Goals by Unduly Targeting Market Nations' (2008) 16 *Cardozo Journal of International and Comparative Law* 457, 473.
[6] Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia The Case for Strict Adherence to the ASEAN Way' (2003) 25 *Journal of International and Strategic Affairs* 104, 106.

to perform two important tasks between and among themselves. The first is to protect cultural property from theft, illegal transfer, illicit trade and trafficking. The second is to repatriate illegally removed cultural property. This framework is based on the model in the 1970 UNESCO Convention art 7(b)(ii), but does not require payment of compensation by the requesting party. This reflects ASEAN adapting international law to suit the region. ASEAN's model provokes thought on new ways of thinking about sharing cultural property's benefits between the requesting and requested party for repatriation.

8.2.3 Thailand's Legal Framework and Practice

Thailand has not ratified the 1970 UNESCO Convention or 1995 UNIDROIT Convention, but enacts its law and policy based on cultural nationalism to protect its cultural property. The AON articulates Thailand's legal framework on cultural property which has the objective of protecting immovable and movable cultural property from destruction, illegal excavation and illicit trafficking. The AON is consistent with the international and ASEAN regional framework. This thesis examined its implementation through three aspects—policy, legal and institutional (see Section 6.2). Thailand's laws and policies are adequate to protect and preserve cultural property; however, the lack of enforcement by the DFA has undermined their implementation. The DFA lacks the skilful human resources and necessary technology to fulfil its roles. This is also seen in DFA-governed national museums which have failed to effectively inventory and register cultural property (see Section 6.2.4.3).

On the repatriation of cultural property, Thailand has not ratified the 1970 UNESCO Convention, but recently attempted to implement its art 7(b)(ii) to request for repatriation of cultural property. This thesis examined two iconic repatriation cases, that of *Phra Narai* lintel and *Luang Poh Sila* statue (see Sections 6.3.1 and 6.3.2 respectively). These cases demonstrated that Thailand's compliance with the Convention art 7(b)(ii) impeded and disadvantaged its request. The use of the diplomatic channel to negotiate with the requested party for repatriation and exception to *nemo dat quod non habet* saw negotiations become deadlocked and drag on for years. Accordingly, this thesis argues that Thailand would not benefit from ratifying the Convention.

This thesis argues that the international legal framework for repatriation is disadvantageous for Thailand, while the ASEAN regional framework is more flexible. Thailand has effectively implemented the ASEAN regional framework to promote cooperation on repatriation via a bilateral agreement with Cambodia. This bilateral agreement was mainly designed to fight criminal activities linked with any removal of movable cultural property by introducing key measures for blocking illicit transnational trafficking in movable cultural property, imposing effective

administrative and penal sanctions, and providing a method for repatriation of cultural property.[7] This thesis recognises the effectiveness of the Cambodia–Thailand bilateral agreement and argues that it should serve as a model for agreements with other ASEAN member countries and non-member states of origin.

8.3 A Bilateral Model Integrated With a Synergetic, Adaptive and Integrated Approach

Repatriation depends on cooperation between the requesting and requested party and any approach favouring one cultural property concept will undermine this. This thesis proposes a bilateral approach based upon the examination of existing legal framework, ASEAN and Thailand's experiences as well as practices. This approach shall finally provide a balance of the concepts on the basis of sharing benefits between the requesting and requested party for repatriation.

8.3.1 Establishment of Mutual Direction for Compromise

The establishment of mutual direction for compromise between Thailand and the requested party is the first step towards establishing a bilateral agreement. This mutual direction would become a convergence-based framework for Thailand and the requested party to identify matters of mutual interest for further cooperation. Under this mutual direction, the parties need to reduce their extreme wishes and meet each other halfway, comprising between cultural nationalism and cultural internationalism. For this to occur, cultural nationalistic claims for repatriation must not be retroactive, while market states must actively take steps to facilitate states of origin to protect their cultural property from illicit trafficking. This is supported by Klug, who encourages states of origin to lead by forgiving past indiscretions to push the compromise forward.[8] This thesis assesses that such forgiveness is compatible with international law. The VCLT[9] and 1970 UNESCO Convention[10] recognise the principle of non-retroactivity. In regard to requests for repatriation, these should be restricted to property removed from 1970 onwards, the date the 1970 UNESCO Convention was adopted.

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[7] *Agreement between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and to Restitute It to the Country of Origin*, opened for signature 14 June 2000, (entered into force 14 June 2000) preamble.
[8] Nicole Klug, 'Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property' (2010) 42 *Case Western Reserve Journal of International Law* 711, 724-5.
[9] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 28.
[10] *The 1970 UNESCO Convention* art 7(b)(ii).

Market states should contribute to protection of cultural property by imposing strict import regulations to curb illicit trafficking, replicating the CITES model of import and export control and in accordance with the ICOM Code of Ethics for Museums.[11] Market states should establish an agency to investigate and prohibit the import of cultural property not accompanied by an export permit granted by the exporting state. Market states should impose penalties on museums for acquiring cultural property with questionable provenance.[12] Further, museums should not have room to claim ignorance of cultural property's origin given their capability to determine this.[13]

8.3.2 Mutually-Beneficial Repatriation Agreement

To respect the mutual direction for compromise, this thesis recommends Thailand (as the requesting party) and market states or foreign museums (as the requested party) negotiate a mutually-beneficial repatriation agreement to reconcile their interests, leading to a win–win solution. This thesis argues for the superiority of bilateral agreements for repatriation, exemplified by the Cambodia–Thailand bilateral agreement, Cambodia–US MoU and mutually-beneficial repatriation agreement between Italy and the MET. Bilateral agreements reflect the needs and interests of the parties. In the case of bilateral agreements for protection and repatriation of cultural property, full reciprocity is the key to convincing the requested party to join.

This thesis observes that the bilateral approach in ASEAN is shaped and enabled by cultural similarities among member states and their being states of origin who espouse cultural nationalism. Thus, this bilateral approach may face difficulties when faced with parties of different cultures and outlooks (ie, state of origin vs market state and cultural nationalism vs cultural internationalism). This thesis examined feasible options, based on a balance between cultural nationalism and cultural internationalism, to integrate into the bilateral approach to convince parties to cooperate, including the creation of a loan program, exchange system and/or transfer of technology (see Section 7.1). These are permitted under Thai law and consistent with the ASEAN way.

8.3.3 Guidance for Thailand to Implement Its Repatriation

This thesis provided guidance for Thailand to implement the recommended bilateral approach for repatriation (see Section 7.2), divided into short-term (see Section 7.2.1) and long-term guidance (see Section 7.2.2). The short-term guidance pertains to the existing situation and allows for easy implementation by Thailand. This short-term guidance recommends Thailand clarify its national

[11] International Council of Museums, *Code of Ethics for Museums* (ICOM, 2013), principle 2.3.
[12] Leila Amineddoleh, 'Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions' (2014) 24 *Fordham Intellectual Property, Media, Entertainment Law Journal* 729, 734.
[13] Leah J. Weiss, 'The Role of Museums in Sustaining the Illicit Trade in Cultural Property' (2007) 25 *Cardozo Art and Entertainment Law Journal* 837, 874.

direction on cultural property and implement agreements with other ASEAN member countries (using the Cambodia–Thailand agreement as a model). The long-term guidance recommends implement a system for establishing effective cooperation with market states or foreign museums in which its illegally removed cultural property is located. The mutually-beneficial repatriation agreement between Italy and the MET would serve as a model for the primary option Thailand would offer other parties.

8.4 Implications and Significance of this Thesis

This thesis enhances the comprehension of international law, the ASEAN regional framework and Thailand law, particularly on the protection and repatriation of cultural property. Although a focal point of this thesis is repatriation of cultural property, this is invariably linked to its protection. When cultural property is not well protected within its place of origin, allowing for it to be illegally removed, efforts for repatriation follow. Accordingly, this thesis has jointly discussed protection and repatriation of cultural property.

This thesis extracted two ways of thinking about cultural property, cultural nationalism and cultural internationalism, as first presented by Merryman in *Two Ways of Thinking About Cultural Property*. This thesis explored these concepts and related principles (eg, state's jurisdiction, CHM and CCH) to identify the relation between the concepts, their history and their impacts on the protection and repatriation of cultural property. The thesis identified cultural nationalism and cultural internationalism as interrelated and linked, rather than juxtaposed as is commonly perceived. This finding allowed this thesis to propose for reconciliation and compromise between the concepts as a means to resolve the divergence of interests between states of origin and market states.

This thesis examined the international legal framework for repatriation of cultural property and demonstrated its inappropriateness for facilitating requests for repatriation. Its legal defects and conceptual basis (cultural nationalism) undermine cooperation between states of origin and market states. Thus, it was demonstrated that Thailand, as a state of origin, would not benefit from this international legal framework. This thesis examined the ASEAN regional framework and Thai policy, legislation and institutions. This thesis contributes to identification, examination and evaluation of the ASEAN and Thai frameworks for protection and repatriation of cultural property.

This thesis recommended and proposed a bilateral approach based on a balance of cultural nationalism and cultural internationalism on the basis of sharing benefits between the requesting and requested party for repatriation. This was proposed as a means to resolve the divergence of

interests between Thailand and a requested party to enable cooperation in the pursuit of repatriation.

8.5 The Way Forward

This thesis raises issues that call for further research. The repatriation of cultural property depends on cooperation between the requesting party, generally states of origin, and requested party, generally market states or foreign museums. Cooperation can be established in a number of ways. This thesis identified the international legal framework as undermining cooperation and inappropriate for states of origin. This thesis sought other ways to establish cooperation that would be advantageous for Thailand and other states of origin. This thesis identified a bilateral approach with integrated feasible options as the ideal approach to reconcile the interests of the requesting and requested party. However, such cooperation could be developed beyond bilateral approaches and agreements. For example, all states of origin in a region, possessing similar interests, could cooperate with each other and, as a collective, negotiate with the requested party for repatriation. For instance, all ASEAN member countries may come together to form a unified bloc in requests for repatriation of cultural property illegally removed from any member country. All ASEAN member countries would be regarded as stakeholders in the request for repatriation. The collective forum would have more power and influence than an individual country, reinforcing the advantage of states of origin.

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