Indeterminacy in International Legal Discourse and the Cultural Property Debate

Lucy Barker*

I. INTRODUCTION

The turn to postmodernism in late twentieth-century scholarship is reflected in the work of the 'New Stream' of international law theorists. A major goal of the New Stream theory has been to uncover the "deep-structure"[1] of liberal international legal argument in order to reveal its inherent indeterminacy. The primary purpose of this article is to examine how the New Stream is able to mount this particular attack on liberalism, and to illustrate how the indeterminacy theory manifests itself in the debate surrounding the allocation of cultural property, which can be defined as objects possessing artistic, archaeological or historical value.

The first part of this article is foundational. It introduces the components of the liberal conception of international law from which the New Stream theorists are able to conclude that liberal discourse is inherently indeterminate: the fundamental contradiction in the liberal vision of international law; liberalism's attempt to maintain an existence separate from international politics; and the constrained structure of international legal discourse which results from liberalism's flight from politics. At this point, the article will introduce the dominant framework for describing the conflicting interests in the cultural property debate. Cultural nationalism and cultural internationalism will be introduced as evidence of this constrained structure of international legal discourse.

The second part of the article describes how the New Stream theory combines these elements to condemn international legal discourse as indeterminate. Indeterminacy in international legal discourse will be shown as manifesting itself in liberalism's inability to prefer either of the two patterns of argument the constrained structure of international

---

* BA/LLB(Hons). I would like to thank Treasa Dunworth of the University of Auckland Faculty of Law for her encouragement and inspiration in preparing the paper on which this article is based.

1 Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) xvii.

discourse dictates, and the resultant reversibility of these two strands of argument. The debate between cultural nationalism and cultural internationalism will then be described to illustrate first, how resolution between the opposing positions seems difficult even without New Stream insight, and second, how New Stream indeterminacy theory would conclude that resolution between the two positions is in fact impossible. From the discussion of the cultural property debate, the article will also draw out the dominance that the internationalist position has had on its terms, which can also be explained from a New Stream perspective.

II. INTRODUCTION TO THE NEW STREAM AND THE TERMS OF THE CULTURAL PROPERTY DEBATE

1. An Introduction to New Stream Theory

(a) The New Stream in International Legal Theory

The 'New Stream'[2] in international legal theory is part of a larger movement in contemporary legal theory, commonly known as the Critical Legal Studies ("CLS") movement. In broad terms, the CLS movement seeks to "identify the crucial structural characteristics of mainstream legal thought as examples of...'liberalism'".[3] It serves as a denial of the liberal conception of law as comprised of "neutral and apolitical *legal* reasoning" capable of resolving "charged controversies",[4] seeking instead to reveal the "fundamental coincidence of law and politics",[5] and the indeterminacy of and contradictions inherent in legal rules.[6]

The task of the New Stream of international law theorists has been to demonstrate that the governing discourse in international law is simply a

---

2 The label 'New Stream theory' is perhaps a little misleading. As Purvis notes, New Stream theory cannot yet qualify as a movement: "It exists as a recent trickle of late modernist international legal scholarship, which may or may not channel itself into a full-fledged stream": Purvis, "Critical Legal Studies in Public International Law" (1991) 32 Harv Int'l L J 81, 91.

3 Kelman (ed), *A Guide to Critical Legal Studies* (1987) 2.

4 Ibid 1.

5 Charlesworth, "Current Trends in International Legal Theory" in Blay (ed), *Public International Law: An Australian Perspective* (1997) 408, 410.

6 Purvis, supra note 2, 89.

translation into the international domain of the basic tenets of liberal political theory.[7] Thus, the CLS criticisms of the liberal portrayal of law appear equally applicable to the liberal conception of international law. New Stream theory challenges liberalism's projection of international law as "rational, objective, and principled",[8] and therefore capable of achieving rational, objective and principled resolutions to international legal disputes. It seeks to reveal the indeterminacy, contradictions and subjectivism inherent in international law.

New Stream theory draws on diverse methodological approaches to support its position,[9] gathering inspiration from structuralism and post-structuralism,[10] as well as incorporating linguistic and literary theory, normative philosophy, critical theory, anthropology, prepositional logic, literature, sociology, politics and psychiatry.[11]

The aim of the remainder of this part of the article is to provide the background against which New Stream theory is able to mount its attack on the 'objectivity' and 'determinacy' of the liberal conception of international law.

As New Stream theory serves predominantly as a criticism of the liberal explanation of international life, the first step in this article will be to introduce what New Stream theorists mean by the liberal conception of international law. This exposition will reveal what New Stream theory sees as the fundamental contradiction in the liberal conception of international law: that international law must both confirm and constrain state authority.

The article will then introduce liberalism's attempt to carve out a separate, objective identity for international law, distinct from the subjectivities of politics. It will describe how, to achieve separation from international politics, international law is forced to prove both its distance from state behaviour – its *normativity*, and its basis in state behaviour – its *concreteness*. The New Stream insight is that the dual requirements of

---

7 Carty, "Critical International Law: Recent Trends in the Theory of International Law" (1991) 2 EJIL 66. Available at: <http://ejil.org/journal/Vol2/No1/art4.html> (last modified 7 August 2000).

8 Charlesworth, supra note 5, 410.

9 The diverse sources of inspiration for New Stream theory make its birthplace difficult to place. On the one hand, the influence of structuralism and critical theory on the New Stream give it a distinctly European flavour. Moreover, of the few book-length treatises on critical international theory, two were written by Europeans. On the other hand, Purvis notes that the "contemporary academic context for New Stream international legal theory has been unambiguously American". Much of the New Stream writing has been produced by American scholars and published in American journals: Purvis, supra note 2, 89-90.

10 Kennedy, "The New Stream of International Law Scholarship" in Beck, Arend and Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (1996) 230, 236 (originally published in (1988) 7 Wisconsin Int'l L J 7).

11 Purvis, supra note 2, 88-89.

normativity and concreteness have had a radically constraining effect on the structure of international legal argument, limiting international discourse to two possible patterns of justification. The article will then introduce the cultural property debate, showing how its terms correspond to these two patterns.

(b) Liberalism's Vision of International Law

Liberalism's conception of international law rests on two central tenets. The first places sovereignty at the centre of international life: "Sovereigns are both the subjects and objects of international life. No 'natural' world order pre-exists the sovereigns' appearance."[12] The second is the principle of subjective value:[13]

> This ... emphasizes that moral truth and moral worth are subjective, because ... universal morality is unknowable. There is no accessible 'objective value', 'intelligible essence', 'virtue' or platonic form. There can be no natural distinctions among things, nor any hierarchy of essences that might serve as the basis for drawing up general categories of facts and classifying particulars under those categories.

Objective value is denied, for to accept the possibility of pre-existing norms would be to risk embracing natural law, or "unverifiable maximums which only camouflag[e] the subjective preferences of the speaker".[14]

From these two tenets – the atomistic existence of sovereigns and the principle of subjective value – liberalism is led to make the maximisation of individual liberty the goal of international relations. However, the goal of maximising individual liberty must include the liberty of each sovereign to act based on the consent of fellow sovereigns, and the liberty to act in a manner entirely at odds with fellow sovereigns. Thus, at any one moment the liberty of an individual sovereign seems capable of quashing the liberty of its fellow sovereigns, and vice versa.[15] Liberalism must therefore be able to accommodate disputes between multiple sovereigns, each invoking their fundamental right to freedom of action.[16] It leaves the challenge of squaring these competing claims of sovereign liberty to the rule of law.[17]

---

12 Ibid 93.
13 Ibid 94, citing Unger, *Knowledge and Politics* (1975) 76-81.
14 Koskenniemi, "The Politics of International Law" (1990) 1 EJIL 4, 5.
15 Purvis, supra note 2, 95.
16 Charlesworth, supra note 5, 411.
17 Purvis, supra note 2, 95.

In international relations, the rule of law is "a set of prescriptive rules governing sovereign conduct".[18] Central to the rule of law is "its objectivity and neutrality, its promise of equal application of abstract principles, created through the popular will".[19] Herein lies the contradiction at the heart of the critical attack on the internal logic of liberalism: how can liberalism deny the existence of objective value and at the same time claim to resolve international conflicts through the rule of law – an appeal to rules of objective neutrality?[20] How can international law both confirm state authority and seek to constrain it through the rule of law?

(c) International Law and the Flight from Politics

The dominant international law theory, positivism, is 'liberal' in the sense that it "assumes a basic dichotomy between law and politics".[21] Liberalism has striven to carve out a discrete sphere for public international law, distinct from international politics, in order to maintain its identity as the objective and neutral rule of law, capable of the impartial resolution of disputes.

International law struggles to delimit itself from international politics in two ways. First, it must prove that it is more than a mere description of the political behaviour of states: a "non-normative *apology*" for state behaviour.[22] To achieve this, law must distance itself from actual state behaviour, will or interest[23] – it must show that it actually tells states what to do.[24] International law must therefore emphasise its "*normativity*" – that it binds states regardless of their sovereign will or political preferences.[25] Second, international law must show that it is more than a subjective, political view as to what the order among states *should* be like:[26]

> If law bears no relation to what States have accepted, it must be assumed to exist as a natural morality, an objective theory of justice. This conflicts with the principle of subjective value. But we cannot simply start assuming that values are, after all, non-subjective … [f]or if values are non-subjective, then

---

18 Ibid.
19 Charlesworth, supra note 5, 411.
20 Purvis, supra note 2, 96.
21 Charlesworth, supra note 5, 410.
22 Koskenniemi, *From Apology to Utopia*, supra note 1, 2 (emphasis added).
23 Koskenniemi, "The Politics of International Law", supra note 14, 7.
24 Koskenniemi, *From Apology to Utopia*, supra note 1, 1.
25 Koskenniemi, "The Politics of International Law", supra note 14, 8.
26 Koskenniemi, *From Apology to Utopia*, supra note 1, 44-45.

> we lose the justification behind the Rule of Law. ...We would have no basis to argue something as law merely because States have so willed or behaved or because it is in their interests.

Law would risk being seen as *utopian*,[27] as it would have no way of verifying the content of its 'natural morality' or 'objective theory of justice'. International law must therefore ensure its *concreteness*, its connection with the actual verifiable behaviour, will and interest of individual states and its distance from natural law.[28] These two delimitations work to produce the illusion of 'objectivity' in international law.[29]

International law must therefore be seen as both concrete – giving expression to the principles of the subjectivity of value, freedom of the State and sovereign equality – and normative – restricting states regardless of their sovereign will. In this way, liberalism's flight from international politics may be seen as a reflection of the fundamental contradiction that New Stream theory identifies in the liberal conception of international law: law must both confirm and constrain state authority.

(d) The Constrained Structure of International Legal Reasoning

To separate international law from politics and thus maintain its objectivity, international lawyers must be able to show that the law is simultaneously normative and concrete. They must show that it "binds a State regardless of that State's behaviour, will or interest [and also] that its content can nevertheless be verified by reference to actual State behaviour, will or interest".[30] The struggle to accommodate these conflicting ideas has forced international legal reasoning to operate within a constrained legal structure. The requirement of normativity – that law must constrain state behaviour – and concreteness – that law must be rooted in state behaviour – dictate that only two corresponding patterns of argument in international legal discourse are possible.

The first is the "ascending"[31] pattern of argument. Obligation in international law 'ascends' from and is determined by the behaviour, will or interest of individual states. The ascending argument privileges

---

27 Ibid 2.
28 Ibid.
29 Ibid 1.
30 Ibid 2.
31 Ibid 41.

concreteness over normativity: rules are justifiable because they correspond with the behaviour, will or interest of states.[32]

The second is the "descending" pattern of argument. Obligation in international law 'descends' from a higher normative code which overrides the individual behaviour, will or interest of states. It follows then that the descending pattern privileges normativity in international law over concreteness.

It is important to note at this stage that New Stream theory does not see the ascending and descending character of legal arguments as resulting from any intrinsic meaning of the arguments themselves. Instead, "[a] position, concept or argument is recognized as descending or ascending only in its opposition to a deviating one. Whether it manifests either pattern is the result of *projection* from a contrasting view."[33]

Thus, the descending and ascending arguments "define themselves by their mutual exclusion".[34] The only way an argument can be identified as ascending is to distinguish it from the descending argument, and vice versa. In this sense, one might liken the ascending and descending arguments to holes in a net. Each pattern of argument is empty in itself, and has identity only through the strings which separate it from its opposite.[35]

The conclusion New Stream theory draws from the division of international legal argument into ascending and descending strands is not that the patterns of justification are coherent in themselves – this cannot be the case as the patterns are "both exhaustive and mutually exclusive"[36] – but rather that they represent the only two types of argument possible under the liberal conception of international law.[37]

Many different doctrinal and practical disputes turn out as transformations of the descending and ascending patterns of argument.[38] The two strands are behind such dichotomies as naturalism/positivism, objectivity/subjectivity, interdependence/individualism, and community/autonomy.[39] As a practical example of the ascending and descending strands of argument, one might take the situation of a transboundary pollution incident.[40] Suppose that State A has allowed

---

32 Ibid.
33 Ibid 456 (emphasis in the original).
34 Ibid 449.
35 Ibid xx.
36 Ibid 41.
37 Purvis, supra note 2, 104.
38 Koskenniemi, *From Apology to Utopia*, supra note 1, 424.
39 Purvis, supra note 2, 104.
40 Koskenniemi, "Introduction" in Koskenniemi (ed), *International Law* (1992) xi, xxii.

noxious fumes to flow over its border into the territory of State B. State A, the polluting state, may well argue its right to produce the fumes in ascending terms: its "sovereign right to engage in industrial activities".[41] The affected State, State B, may well dispute State A's right to allow the fumes to flow over its boundary in communitarian terms. It may refer, for example, to a norm of "non-harmful use of territory".[42]

The example used throughout this article as a case study of the New Stream criticism of the indeterminacy and incoherence of the liberal conception of international law is that of the debate surrounding the allocation of cultural property. The article will now introduce the terms of the cultural property debate, and illustrate how they correspond with the ascending and descending strands of argument.

2. An Introduction to the Terms of the Cultural Property Debate

Before addressing the terms of the cultural property debate, it is helpful to give a brief definition of the objects that find themselves at its centre.

(a) Definition of Cultural Property

In broad terms, one can define cultural property as objects possessing "artistic, ethnographic, archaeological, or historical value",[43] although this category may be expanded to include "almost anything made or changed by man".[44] A "cultural object" is more comprehensively defined in Article 2 of the UNIDROIT Convention on Stolen and Illegally Exported Cultural Property[45] ("UNIDROIT Convention") as one which "on religious or secular grounds, [is] of importance for archaeology, prehistory, history, literature, art or science".[46]

---

41 Ibid.

42 Koskenniemi, "The Politics of International Law", supra note 14, 29.

43 Merryman, "Thinking about the Elgin Marbles" in Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 24, 27 (originally published in (1985) 83 Mich L Rev 1880).

44 Merryman, "The Public Interest in Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 94, 96 (originally published in (1989) 77 Cal L Rev 339).

45 The official text is published in English and French in the Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995) 34 ILM 1326.

46 Under art 2, the "object" must "belong to one of the categories listed in the Annex". The extensive list set out in the Annex to the Convention is found at Appendix 1 of this article.

(b) The Terms of the Debate: Cultural Nationalism and Cultural Internationalism

The significant feature of cultural objects, both movable and immovable, is that they 'possess value' and are 'of importance' for more than the people of their place or culture of origin. An object possessing a 'national' value may also have importance to other peoples, who respond to its broader human components. The dichotomous significance of cultural objects leads to conflicting conceptions of how cultural property should be allocated. Those who believe that property is most valuable in its contribution to understanding universal human culture advocate the movement of cultural objects beyond their nation of origin, while in many cases those of the originating culture wish to retain their cultural heritage within national borders.

The dominant framework for describing the tension between the protection of the 'universal cultural heritage' and the protection of the various national heritages which it comprises has been to label the former position '*cultural internationalism*' and the latter '*cultural nationalism*'. These terms were first devised by John Henry Merryman,[47] a fervent advocate of the internationalist position.

(i) Cultural Nationalism

Cultural nationalism views cultural property as nation-specific,[48] as it is integral to the cultural definition or cultural identity of a people. A nation deprived of its artefacts is said to be 'culturally impoverished'. The relationship between cultural objects and their nation of origin is seen as the main justification for advocating the retention of existing cultural works within the physical boundaries of the source nation, the repatriation of works in foreign hands, and the adoption of strict export controls.

A further concern is contextual – that cultural objects "can only be fully appreciated in close connection with accurate information as to their origin, history and traditional status".[49] This position is reflected in the Preamble to the UNESCO Convention on the Means of Prohibiting and

---

47 Merryman, "Two Ways of Thinking about Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 66 (originally published in (1986) 80 Am J Int'l Law 831).

48 Goepfert, "The Decapitation of Rameses II" (1995) B U Int'l L J 503, 601.

49 Vernon, "Common Cultural Property: The Search for Rights of Protective Intervention" (1994) 26 Case W Res J Int'l L 435, 449.

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 ("UNESCO 1970"):[50]

> Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.

In pursuit of the purpose of UNESCO 1970, which was to inhibit the "illicit" international trade in cultural objects, the contracting states agreed to oppose the "impoverishment of the cultural heritage" of a nation through the "illicit import, export and transfer of ownership" of cultural property (Article 2). They also agreed that trade in cultural objects exported contrary to the law of the source nation was "illicit" (Article 3) and agreed to prevent the importation of such objects and to facilitate their return to source nations (Articles 7, 9 and 13).

UNESCO 1970 is widely acknowledged as supporting the nationalist position, as pursuant to Article 1, the host State alone designates what it considers to be its cultural property – whether it considers that an object is "of importance for archaeology, prehistory, history, literature, art or science". The criticism that internationalists direct at this feature of UNESCO 1970 is that this is an invitation for selfishness on the part of the source nation:[51]

> [G]ranting each state the right to subjectively specify the scope and content of cultural property includes the right to exclude property from protection that others outside the state might find more culturally valuable. It also permits an exclusion from protection on grounds of domestic budget concerns --- i.e. if not designated, no funds need to be allocated to that artefact for protective purposes. A nationally controlled, self-designated cultural property framework cannot truly promote common [universal] cultural property interests.

---

50 (Paris, 14 November 1970) 823 UNTS 231 1970.

51 Vernon, supra note 49, 467. A similar criticism has been made of *Council Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* (Official Journal of the EC of 27 March 1993, no L 74, p 74, adopted on 15 March 1993) and *Council Regulation 3911/92 on the Export of Cultural Goods* (Official Journal of the EC of 31 December 1992, no L 395, p 1) issued by the European Community (now the European Union) to deal with cultural property questions arising from the establishment of the European Single Market. See Merryman, "A Licit International Trade in Cultural Objects" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 176, 180 (originally published in (1995) 4 Int'l J Cultural Property 13, and in Martine, Briat and Freedberg (eds), *Legal Aspects of International Trade in Art: Vol V* (1996)).

Cultural nationalism, in the sense just described, would correspond with the ascending pattern of international legal argument. The justification for the retention of existing cultural works, repatriation of works in foreign hands and the adoption of strict export controls 'ascends' primarily from the interest of the source nation in maintaining its relationship with its cultural heritage.

In reality, there are many more parties equally interested in the retention of cultural property within its original context that are not fuelled by any nationalistic sentiment. Such parties include anthropologists, who have widely expressed the view that excessive movement of cultural property threatens tribal art and culture;[52] archaeologists, whose prime concern is to preserve for study the original context of the object;[53] and cultural historians and other scholars in general, whose concerns mirror those of the archaeologists.[54]

(ii) Cultural Internationalism

Cultural internationalists view cultural objects as "components of a common human culture" and thus independent of origin or present location, property rights, or national jurisdiction.[55] Property is seen as most valuable in its contributions to the understanding of universal human culture. The claim of the states of origin is secondary to the human interest in the common history.

The internationalist position is perhaps most clearly expressed in the Preamble to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague 1954"):[56]

> Being convinced 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.

Cultural internationalists claim that their position fosters preservation, integrity, distribution, and access to cultural heritage, while cultural nationalism actually contributes to the cultural impoverishment of peoples in other parts of the world. The internationalist position

---

52 Prott and O'Keefe, *Law and Cultural Heritage*: *Vol 3: Movement* (1989) para 119.

53 See Vitelli, "An Archaeologist's Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 237.

54 Prott and O'Keefe, supra note 52, para 124.

55 Merryman, "Two Ways of Thinking about Cultural Property", supra note 47, 66-67.

56 (The Hague, 14 May 1954) 249 UNTS 240 1954.

strongly promotes a licit international traffic in cultural objects,[57] claiming that the global distribution of cultural property widens understanding and appreciation of cultural artefacts and reduces the harm caused by illicit traffic.

The cultural internationalist position clearly corresponds to the descending pattern of argument as described by the New Stream theorists. The individualistic will of source nations to retain their cultural heritage within their boundaries becomes secondary to the international interest in the 'common cultural heritage'.

III. INDETERMINACY OF INTERNATIONAL LEGAL DISCOURSE AND THE CULTURAL PROPERTY DEBATE

The aim of this part of the article is first to describe how New Stream theory is able to challenge the objectivity and coherence of the liberal conception of international law, based on the components of liberal international discourse introduced above. It will then introduce the main arguments in support of the cultural nationalist and cultural internationalist positions, with a view to illustrating the difficulties in reconciling their opposing visions as to how cultural property should be allocated. The article will then illustrate how the indeterminacy that New Stream theorists identify in international legal discourse in general is applicable to the cultural property debate in particular.

1. Introduction to Indeterminacy Theory

We have already seen that, to carve out an objective existence for itself free from subjective politics, international law needs to be both normative and concrete. Translated into international legal discourse, international argument needs to encompass both descending arguments, which privilege the common good over individual state behaviour, and ascending arguments, which privilege the individual will of states over the common good. The New Stream insight is that the attempt to encapsulate both ascending and descending arguments leads to

---

[57] See Merryman, "Draft Principles to Govern a Licit International Traffic in Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 228 (originally published in Martine, Briat and Freedberg (eds), *Legal Aspects of International Trade in Art: Vol V* (1996) 103).

indeterminacy and incoherence in international law. The only way that the conflicting patterns of argument can be reconciled is by imposing subjective conceptions of what the solution should be. In this way, New Stream theory challenges both the illusion of determinacy projected by the rule of law and the positivist conviction that international law occupies a distinct sphere separate from international politics.

This article will now describe how New Stream theorists are able to conclude that the attempt to encompass both ascending and descending arguments results in indeterminacy in international law from the inability to prefer either of the opposing strands, and the resultant reversibility in international legal argument.

(a) The Inability to Prefer the Opposing Strands of Argument

Incoherence arises first out of the inability to prefer either the ascending or descending strands of argument, at least not in any objective manner. Both positions cannot be simultaneously maintained, because each is vulnerable to legitimate counter-arguments from the opposing position. Moreover, these counter-arguments arise from the attempted delimitations from politics themselves.[58]

The descending argument arises from international law's attempt to avoid being labelled a mere description of the political behaviour of states: an 'apology' for state behaviour. It privileges normativity, presenting overarching norms external to state behaviour, will or interest. Yet in positioning itself above state behaviour, the descending argument risks being criticised by the ascending perspective for being utopian. This is a subjective view of what order among states should look like, with no way of backing up the content of its normative code.

The ascending argument arises from international law's attempt to avoid being seen as utopian. It privileges concreteness, sourcing obligation in the behaviour, will and interest of individual states. But in making state interests the beginning and end of international legal obligation, the ascending position risks criticism from the descending argument for being a mere apology for state behaviour. Thus, the more an argument tries to escape from one criticism, the further it sinks into another.[59]

Recalling that New Stream theory regards the ascending and descending patterns of argument as relational rather than self-contained, the endless exchange of criticism and counter-criticism between the

---

58 Koskenniemi, *From Apology to Utopia*, supra note 1, 1.

59 Ibid 46.

ascending and descending strands can be understood as a series of projections and counter-projections. The ascending argument is vulnerable to being projected in an apologist light by the descending argument, and the descending argument is vulnerable to being projected in a utopian light by the ascending argument.

One can illustrate the inability to consistently prefer either the ascending or descending patterns because of the vulnerability of each to legitimate counter-criticism by returning to the transfrontier pollution example cited earlier. State A, the polluting State, justifies its right to allow noxious fumes to flow over the boundary of State B by way of an ascending argument: its "sovereign right to use its natural resources in accordance with its national policies".[60] However, this position cannot be consistently preferred. There is nothing to stop State B from projecting A's position in a negative light as an egoistic apology for the political policy of State A.

Equally, the descending argument that State B offers to convince A to put a stop to the pollution cannot be consistently preferred. There is nothing to stop State A from projecting B's norm of 'non-harmful use of territory' in a negative light, showing it as utopian because it is unable to substantiate its content.

The only way to achieve resolution between A and B's conflicting propositions is by making "an ultimately arbitrary choice to stop the criticisms at one point instead of another".[61] We could decide that the correct resolution to the dispute is that State A be allowed to continue producing the noxious fumes, if our vision of justice means that we agree with the solution that the ascending argument proposes. But the point that New Stream theory makes is that this would have to be a subjective choice. There would be no objective justification for preferring A's solution for, as we have seen, A's position is vulnerable to challenge from B's perspective as apologism. Thus, preferring one solution over another is a political choice rather than a process of logical determinacy.[62] Any concrete solutions result from:[63]

---

60 Koskenniemi, "The Politics of International Law", supra note 14, 29.

61 Koskenniemi, *From Apology to Utopia*, supra note 1, 48.

62 Purvis, supra note 2, 108. In this conclusion, the New Stream might be compared with the realist school of thought. However, the realists can be distinguished from the New Stream in that they do not undertake a deconstruction of the predominant liberal discourse to come to their conclusion that political choice underlies international law. The realist focus is not so much the legal situation, but rather the "all-pervading struggle for power between States or blocs of States": White, *The Law of International Organisations* (1996) 12.

63 Koskenniemi, *From Apology to Utopia*, supra note 1, 456.

> [T]he factors legal realists have been at pains to point out – from the problem solver's more or less (usually less) articulate theory of justice or his wish to prefer one sovereign over another. But in each case, the solution will remain controversial and vulnerable for valid criticism which is compelled by the legal argument itself.

(b) The Phenomenon of Reversibility

The second way in which New Stream theory finds international legal discourse incoherent follows on from the first. We have seen above that neither the ascending nor the descending pattern of argument is able to be consistently preferred, because each is constantly vulnerable to criticism for being apologetic or utopian. To avoid such criticism, each strand of argument must be able to justify itself both in individualistic or ascending terms *and* in communitarian or descending terms. The capacity of each legal concept, argument or doctrine to be projected with a meaning that links it to both ascending and descending justifications is known as the phenomenon of reversibility.[64]

Reversibility can again be clearly illustrated by the transfrontier pollution example. We have seen that State A's ascending position is vulnerable to criticism from B's perspective as being an apology for State A's political policy. To avoid such criticism, State A must be able to project its position in a descending, communitarian light. It may do so by, for example, arguing that there is a norm of friendly neighbourliness "which requires states to tolerate minor inconveniences which result from legitimate uses of neighbouring states' territories".[65] Thus, A's position becomes individualistic in respect of itself, and communitarian with regard to B.

As B's descending position is equally vulnerable to criticism from State A for being non-normative utopianism, it must be able to project itself in an individualistic or ascending light. It might argue that the noxious fumes constitute an interference with its internal affairs,[66] thereby making its position seem both communitarian with respect to itself, and individualistic with respect to A.

While the phenomenon of reversibility averts the risk of criticism from the opposing strand of argument, it cannot be said that it thereby makes solutions to issues in international law more determinate. On the contrary, it has the opposite effect: how can we prefer one solution over

---

64 Ibid 449.

65 Koskenniemi, "The Politics of International Law", supra note 14, 29.

66 Ibid.

another if each solution, indeed conflicting solutions, can be justified by both the ascending and descending strands of argument? How can we prefer the solution offered by State A's ascending argument, or the solution offered by State B's descending argument, when their opposing solutions can be justified by both ascending and descending means?

Because reversibility removes the sole criterion for forming a preference[67] between opposing solutions, the only way to achieve resolution between the two is to impose a theory of justice beyond the descending and ascending arguments which both opposing sides present. However, this theory of justice would not derive from the rule of law,[68] and cannot be justified by reference to the legal concepts themselves.

(c) Conclusion

International legal argument upholds its semblance of formal coherence by using the descending and ascending patterns of argument so as to create argumentative conflict. This approach "makes [international legal argument] 'feel' natural and recognizably 'legal' … This gives it the aura of being formally patterned, neutral and determinate".[69] The theory of indeterminacy in New Stream theory seeks to dispute liberalism's projection of international law as formally patterned, neutral and determinate, and thus capable of achieving rational, objective and principled resolutions to international legal disputes.

The rule of law is incapable of achieving resolution to international legal disputes because the threat of legitimate counter-argument from the opposing position means that we are never consistently able to prefer either the ascending or descending strands of argument as superior to the other. To avoid such criticism, each position is forced to be able to 'reverse' itself, or justify itself from both the ascending and descending perspectives. The phenomenon of reversibility serves only to compound the indeterminacy of international law: not only are we unable to prefer either of the strands of argument, but reversibility also robs us of the sole criterion of preference.

From these insights it follows that liberal international law is not able to achieve objective resolution to international disputes. Solutions are accepted, but not as a result of the legal argument itself. They result from the decision-maker's subjective view of what the resolution should be.

---

67 Koskenniemi, *From Apology to Utopia*, supra note 1, 452.
68 Ibid 454.
69 Ibid 456.

Liberalism, therefore, fails in its mission to separate itself from subjective politics.

The aim of the remainder of this part of the article is primarily to see how these New Stream insights are applicable to the cultural property debate. First, it will describe the main arguments for the cultural nationalist/cultural internationalist positions, noting how the terms of the debate have been heavily dictated by the cultural internationalist viewpoint. From this description, the article will draw out how, even without the benefit of New Stream theory, the cultural property debate seems difficult to resolve. Neither argument is self-evident, as each is subject to the reverse argument from the opposing position. It will then describe the New Stream explanation for the difficulties in resolving the debate – that the debate is in fact indeterminate – by applying the indeterminacy theory to the internationalist and nationalist positions.

2. The Cultural Property Debate

(a) The 'Internationalism' of the Cultural Property Debate

Before examining the cultural property debate itself, it is necessary to note the dominance that internationalism has had over its terms and the effect this has had on the substance of the opposing positions. As noted above, the terms 'cultural nationalism' and 'cultural internationalism' are the brainchild of John Henry Merryman, an ardent supporter of the internationalist position. The terms have since gone on to become the dominant framework for many subsequent discussions on the allocation of cultural property.[70] Why the internationalist framework has proven dominant can be explained in terms of where the power in the cultural property debate lies, and the effect this has had on the ability of each side to express its interests.

The effectiveness of interests analysis such as the cultural nationalism/internationalism debate "depends to a large extent on the

---

[70] While Merryman's cultural nationalism/cultural internationalism framework dominates, it is not the only framework. Merryman himself offers an alternative: the "nation-oriented" approach and the "object-oriented" approach: "The Nation and the Object" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 15 (originally published in (1994) 3 Int'l J Cultural Property 61). Roger Mastalir would define the competing concerns as the "cultural aspect" and the "property aspect" of cultural property: Mastalir, "A Proposal for Protecting the 'Cultural' and 'Property' Aspects of Cultural Property under International Law" (1993) 16 Fordham Int'l L J 1033. Prott and O'Keefe, however, question the usefulness of organising competing claims into a theory of interests: Prott and O'Keefe, supra note 52, para 116.

degree of articulation which those holding these interests can make of them".[71] In many art-rich developing countries:[72]

> [C]onditions simply [do] not exist for the adequate articulation of interests, either because of repression, lack of leisure for people engaged in desperate poverty to undertake it, lack of education or simply lack of habit.

Lyndel V. Prott and P.J. O'Keefe would suggest that interests analysis such as that seen in the cultural nationalism/internationalism framework is particularly appropriate in wealthy Western communities "with strong traditions of public participation and of free speech, where people are practised in assessing and articulating what their own interests are".[73] Moreover, Western communities have more power to ensure that their viewpoint is circulated in the academic and public arenas.

The dominance of cultural internationalism and the framework that it has imposed on the debate has had a profound effect on how the nationalist and internationalist positions have been portrayed. As internationalism has itself dictated the terms of the debate, it has largely defined what can be understood under the nationalist position. Understood in terms of the New Stream patterning of descending and ascending arguments, the nationalist or ascending position has largely existed as a 'projection' of the descending or internationalist position, a label to encompass a position which runs counter to cultural internationalism, a foil to the 'superiority' of the communal approach. As a consequence, the nationalist position appears, as will be seen from the ensuing discussion, more reactive in comparison to the fully developed internationalist position.

The following aims to present some of the main ideas fuelling the cultural property debate and to assess their merits. Although the discussion will be structured within the cultural nationalism/internationalism polemic, the following section will attempt to present some counter-arguments to cultural internationalism beyond the projection of 'cultural nationalism'. Indeed, it would be difficult to do otherwise, as there are many parties critical of the internationalist position that are not motivated by nationalist sentiment.

---

71 Prott and O'Keefe, supra note 52, para 116.

72 Ibid. This is not to say that all art-rich countries are necessarily developing. There are, of course, many nations (eg Italy and France) that provide both a major source of cultural property and an active market.

73 Ibid.

(b) Central Tenets

It is helpful to consider internationalism's attack on the two central tenets of cultural nationalism:

(i) That there is a special relationship between cultural objects and a particular nation or culture; and

(ii) That this relationship would be significantly impaired by removing the object from the national territory.[74]

Internationalism proposes that such argument is purely self-serving assertion. It is not self-evident that an object must remain within a territory merely because it was made in or is historically associated with that territory.[75] Internationalists dismiss the majority of retentionist arguments based on 'cultural attachment' as mere 'sentimentalism' or 'romantic Byronism',[76] leaving a blatant desire for physical presence as the sole foundation for the majority of nationalist demands.[77] It is necessary to revisit this issue and present a nationalist perspective of this internationalist criticism after having reviewed the rest of the internationalist argument.

Even if cultural attachment is acknowledged, cultural internationalists claim that there is often no necessary relationship between that attachment and the physical location of the object.[78] For example, an object may have cultural value as testimony to a vanished way of life, as a great work of art of a specific time and place, or as evidence of the genius of a great artist or a great culture.[79] Yet it does not follow that by moving the cultural object offshore, such value will be misrepresented or

---

74 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 190.

75 Merryman, "Thinking About the Elgin Marbles", supra note 43, 53.

76 'Romantic Byronism' is defined as the "the romantic attribution of national character to cultural objects, with the corollary that they belong in the national territory": Merryman, "The Retention of Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 122, 139 (originally published in (1988) 21 UC Davis L Rev 477). The term's namesake, Lord Byron, was an outspoken critic of Lord Elgin's removal of the Parthenon sculptures ("the Elgin Marbles") from Greece. His criticism took its most influential form in the two poems *The Curse of Minerva* (1811) and the popular *Childe Harold's Pilgrimage* (1812). According to Merryman, "Byronism lies at the base of ... claims of nations of origin, while it discredits those who ... would advance alternative bases for the distribution of the world's cultural property": "Thinking About the Elgin Marbles", supra note 43, 45.

77 Vernon, supra note 49, 449.

78 Merryman, "Thinking About the Elgin Marbles", supra note 43, 53-54.

79 Merryman, "The Nation and the Object", supra note 70, 170.

dishonoured. Merryman gives the example of a Poussin painting acquired by the Cleveland Museum:[80]

> In the Cleveland Museum, the Poussin is still a Poussin, still the work of a great French artist, still a part of France's proud cultural heritage. The Cleveland Museum does not suppress the artist's identity or nationality or falsify the painting's history. On the contrary, the presence of the fully and accurately documented Poussin in the Cleveland Museum testifies not only to the work's French origin but also to its international importance and its universal human significance, thus further recognizing and honoring a great French artist and French culture.

Its cultural significance being independent of location, cultural internationalists would include the Poussin painting within the class of cultural objects that are "*culturally movable*".[81]

It follows, then, that the justification for retention of cultural objects only transcends mere self-serving assertion when the cultural significance of the object and its physical location are inseparable – when the object "fills a religious or a ceremonial or communal need of the people concerned".[82] To become what has been termed "*culturally immovable*",[83] three criteria must be fulfilled: the culture and the belief system from which the object came must still be alive;[84] the object must have been made to be used in religious or ceremonial ways by that culture according to its belief system; and third, if returned, the object must be put to that use.[85]

Despite cultural internationalism's scepticism about claims of cultural attachment, one internationalist argument is able to turn this main tenet of nationalism in its favour. By arguing that acquired objects retained for a great period of time in fact become a part of the cultural

---

80 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 191-192.

81 Ibid (emphasis in the original).

82 Merryman, "The Retention of Cultural Property", supra note 76, 141.

83 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 193.

84 However, as Maxwell L. Anderson, Director of the Michael C. Carlos Museum located at Emory University, notes, it is difficult to see that interested parties in the source nation would not see themselves as fulfilling the "living culture" prerequisite: "The politics of contemporary Turkey and Greece emphasize the past's continuity today, and by extension they would almost certainly demand the retention of objects currently on their soil": Anderson, "Art Market Challenges for American Museums" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 251, 254.

85 Merryman, "The Nation and the Object", supra note 70, 170. A cultural object which would meet the cultural immovability threshold is the 'Afo-a-Kom': "The Afo-a-Kom is a statue which is said to embody the soul of the people of Kom, a tribe in Cameroon. Its spiritual significance is such that it is the personification of the Kom belief in Animism, through which the spirits and soul of a rich cultural heritage communicate with the present citizens of Kom": DuBoff, *The Deskbook of Art Law* (1977).

heritage of the acquiring nation, continued retention in the face of demands for repatriation can be justified.[86]

The central tenets of the cultural internationalist position are equally subject to challenge from the nationalist perspective. Cultural internationalism proposes that:

(i) There is an international interest in cultural objects, over and above any national interest; and

(ii) Retaining cultural objects within their source nation can, in all but the most exceptional of cases, lead to the cultural impoverishment of humankind.

One challenge to this position has been that movement of cultural objects beyond the source nation does not necessarily enhance the universal cultural heritage. Depriving the source nation of its own cultural heritage may in fact harm the 'common cultural heritage', as it may dry up the sources of traditional inspiration and technique. The "exhaustion of a national cultural heritage in its country of origin will, in the long term, be to the detriment of other national heritages and the universal cultural heritage also".[87] As cultural internationalism acknowledges through the term 'cultural immovability', some objects may bear such close affinity to their contexts that it is in the best interests of humankind to retain them within this environment.

Critics of the cultural internationalist position have questioned whether most importing states will ever face the prospect of cultural impoverishment, as they already hold so many cultural items, and market forces continue to work in their favour.[88] Most importing states are not so much 'art poor' as they are 'art hungry'. Moreover, to label for example the United States as 'art poor' seems unrealistic when one considers "the failure of 'inflow' to the poorer countries of cultural objects from other cultures which might balance the loss of objects from their own".[89]

(c) Preservation, Integrity and Access

While cultural internationalists claim that nationalism contributes to the cultural impoverishment of peoples in other parts of the world,

---

86 Merryman and Elsen, *Law, Ethics and the Visual Arts* (3rd ed, 1998) 226.
87 Prott and O'Keefe, supra note 52, para 144.
88 Ibid.
89 Prott and O'Keefe, supra note 52, para 166.

internationalism is said to foster preservation, integrity, and access to cultural heritage. These three considerations constitute "a set of higher 'public welfare' values that transcend national interests and boundaries. They are concerned with the protection of cultural objects".[90]

The remainder of the discussion of the cultural property debate will present the internationalist argument for why internationalism and not nationalism best promotes these goals, and then address possible nationalist responses to such arguments.

(i) Preservation

Preservation, according to the internationalist view, is "the essential ingredient of any cultural property policy".[91] It takes priority over integrity and access concerns, for "if the object or its context is damaged, lost or destroyed, potentially important information about the human past and the opportunity to use, to learn from and to enjoy the object [are all] lost or impaired".[92]

Cultural internationalists dispute the assumption that retention of cultural property automatically fosters its protection or preservation.[93] On the contrary, the internationalist argument is that, in some instances, retention may in fact endanger the cultural object. The main culprit is what is termed "covetous neglect",[94] the hoarding of cultural works within the source nation despite inadequate display or conservation facilities. According to internationalists, if a source nation were seriously interested in the protection of its cultural objects, it would not try to retain them unless it was prepared to invest in conservation measures comparable to those the objects would receive abroad;[95] "retention entails the obligation of protection".[96] Should the source nation be unable to reach such standards of protection, then the cultural objects must be removed to a "locus of higher protection".[97] A free and open market in cultural goods is seen as one way in which cultural objects can reach their 'locus of protection', the assumption being that "those who are prepared to pay the

---

90 Merryman, "The Retention of Cultural Property", supra note 76, 148.

91 Merryman, "The Public Interest in Cultural Property", supra note 44, 112.

92 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 186.

93 This assumption, they argue, is supported by the 'nationalist' UNESCO 1970, which, while primarily concerned with the retention of cultural property, speaks only of "protection", thus supporting the implication that retention accomplishes, or at least advances, protection: Merryman, "The Retention of Cultural Property", supra note 76, 150.

94 Merryman, "Two Ways of Thinking about Cultural Property", supra note 47, 84.

95 Merryman, "The Retention of Cultural Property" supra note 76, 151.

96 Ibid 152.

97 Merryman, "Two Ways of Thinking about Cultural Property", supra note 47, 84.

most are the most likely to do whatever is needed to protect their investment".[98]

Again, there are legitimate criticisms to be made from the nationalist perspective of the internationalist presumption that movement fosters preservation. Internationalism's suggestion that there is no relationship in principle between the retention of cultural objects and their protection overlooks the inevitable losses that occur as a result of movement:[99]

> Even in the most carefully controlled conditions, movement of objects is likely to result in damage to some of them. Most major exhibitions ... have suffered some kind of damage to at least one of the objects exhibited during transit, installation, exhibit or demounting, despite the best efforts of museum experts.

Movement aside, it is questionable whether the final destination of the object, the acquiring State, constitutes a 'locus of protection' in every case. It is not self-evident that private ownership can always be equated with good curatorship.[100] It is equally questionable whether Western museums inevitably constitute a 'locus of higher protection', as they cannot always ensure the safety of cultural goods. As we have seen in New Zealand recently, the security of well-known objects cannot always be guaranteed.[101]

There is also the danger that the conservation techniques of Western museums may harm rather than preserve. This is particularly so in the movement of the cultural heritage of tropical countries to air-conditioned museum displays.[102] The Elgin Marbles, frequently cited as a prime example of the merits of retaining cultural objects within a 'locus of higher protection',[103] provide an interesting example. In the 1930s, the British Museum scrubbed many allegedly 'dirty' marbles, thus removing some of the original paint, and some of the marble patina.[104]

---

98 Ibid 87.

99 Prott and O'Keefe, supra note 52, para 110.

100 Walker Tubb, "Thoughts in Response to the Draft Principles" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 241, 242.

101 Eg, the theft of the Charles Goldie painting, "Memories of a Heroine", from Auckland Museum. See Wall, "Fast Thieves Grab National Treasure" *The New Zealand Herald*, Auckland, New Zealand, 2 August 2000, A1.

102 Prott and O'Keefe, supra note 52, para 1610.

103 Merryman supports the retention of the Marbles within the British Museum, as to reinstall them on the Parthenon would mean subjecting them to the elements and the pollution of Athens. The integrity of the temple has been compromised in the interests of preservation: See Merryman, "Thinking about the Elgin Marbles", supra note 43, 58.

104 Ibid n 117.

Cultural internationalists advocate a licit trade in cultural goods as a tool to protect property from the destructive forces of the black market. Internationalists would argue that the current response to the growing practice of looting cultural sites, the imposition of stricter export controls, is counterproductive.[105] Strict retentive laws merely supplement the harmful effects of the black market by pushing the export trade underground.[106] They ensure that unsupervised amateurs will excavate and deal with the objects, that the work will be careless and undocumented, and that the trade will follow surreptitious routes, "virtually guaranteeing the mistreatment of objects and sites, the corruption of police and customs officials and the demoralization of the legitimate cultural property establishment".[107]

The archaeological community would support the internationalist contention that restrictive export laws have little success protecting archaeological sites and contexts from looters.[108] However, it is not self-evident that a licit market would improve matters greatly, as practical experience has shown.[109] It seems all very well to blame the need for strict market controls on the black market, yet as Prott and O'Keefe point out, it is:[110]

> [T]he greater mobility of cultural objects, the greater volume of objects being moved and the consequently greatly increased threat to the cultures of poorer States that has given emphasis to the need for controls on excessive movement because of the damage which can be caused to the cultural heritage.

In any event, it cannot be said that a licit trade will better serve to protect the archaeological record. Any trade in antiquities which have not been professionally excavated in their context cannot help but be destructive. Professional excavation is dedicated to reconstruction rather than the retrieval of objects: while the yield of fragments may be high,

---

105 Merryman, "Two Ways of Thinking about Cultural Property", supra note 47, 85.

106 Merryman, "The Retention of Cultural Property", supra note 76, 153.

107 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 188-189.

108 Dwyer, "Critical Comments on the Draft Principles to Govern a Licit International Traffic in Cultural Property" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 231, 233.

109 Dwyer cites the case of Peru. Until the 1960s there was a legal internal market in antiquities, to the extent that the Sears-Roebuck store in Lima had a "pre-Colombian" art department. The Peruvian Government also sanctioned many exchanges with international museums. During this same period however, grave robbers "worked to feed both the legal and parallel illegal market. Public and private collections grew nationally and internationally while archaeological sites were literally turned into lunar landscapes": Ibid 232.

110 Prott and O'Keefe, supra note 52, para 115.

that of saleable goods that might be deemed 'art' is often extremely low. Furthermore, excavation is often not in the best interests of most artefacts. The stable conditions which have enabled an object to survive burial for thousands of years are virtually impossible to provide out of a sealed context.[111]

(ii) Integrity/Context

Cultural internationalists define the integrity or contextual concern as "the pursuit of knowledge, in the quest for valid information about the human past, for the historical, scientific, cultural and aesthetic learning that the object and its context can provide".[112] As noted above, when in conflict with the preservation concern, the latter must prevail.[113]

Cultural internationalism imposes the same preconditions when accommodating the contextual concern as it does when faced with claims that an object must remain within the source nation by virtue of that nation's cultural attachment to the object. Cultural artefacts are again divided into the culturally movable and the culturally immovable. Retention of cultural objects is only justified when movement of the object would cause loss of "[*t*]*rue* physical and contextual integrity",[114] by which is meant a loss of significance to both the object and the context of that object.[115] For internationalists, the level of decontextualisation must be so high that the effect of removal would be analogous to destruction. At this threshold, the contextual concern merges with the preservation concern.

Again, cultural internationalists see no justification for retention beyond 'romantic Byronism' when objects are movable "without significant damage or loss of explanatory power or aesthetic value".[116] Taking once more the example of the Poussin painting, it would be sheer romanticism and sentimentality for France to claim that because the Poussin was painted in France by a Frenchman, presumably with the

---

111 Walker Tubb, supra note 100, 242.

112 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 186.

113 Ibid.

114 Merryman, "The Public Interest in Cultural Property", supra note 44, 115 (emphasis added).

115 Ibid 113. Merryman gives the example of a stele hacked from a Mayan temple. Mayan writing is largely indecipherable except when accompanied by images that illustrate its meaning. In the surreptitious 'thinning' of Mayan steles for easier shipment, *huaqueros* leave behind much of the essential material surrounding the steles, resulting in a great loss in significance for both the object and its context: Merryman, "The Public Interest in Cultural Property".

116 Ibid 114.

intention that it be enjoyed by a French audience, it could not be removed without decontextualising it.[117]

As Sljivic notes,[118] it is questionable why the integrity principle is included as an integral component solely of the internationalist dialogue, as the integrity/access concern is likely in many cases to lean in favour of retention within the source nation.

(iii) Access/Distribution

From an internationalist perspective, humankind must be given a reasonable opportunity to access its own and other people's cultural achievements.[119] This policy is advanced by distribution, rather than retention within the borders of the source nation.

In frustration of this objective, it is claimed that nationalism finds no fault in the retention or 'hoarding' of multiple examples of artefacts already adequately represented in source nation collections, in some cases leaving them warehoused, uncatalogued, uninventoried and unavailable for display or for study by domestic or foreign scholars.[120] Cultural internationalism urges that such objects be made available by sale, exchange or loan, so that the culture of the source nation may be accessed by a wider audience for study and enjoyment.[121]

While cultural internationalism cites wider access as one of the advantages of moving cultural objects, it overlooks the fact that:[122]

> [L]ack of access is guaranteed by some sorts of movement, such as disappearance into a private collection or into the basement or storeroom of a large museum, especially if the object is uncatalogued and unpublicized.

The Petrie Museum in London stands as a recent example that source nations are not solely to blame for the hoarding of cultural artefacts. The Museum holds one of the largest collections of ancient Egyptian artefacts outside Cairo, yet with no room to display the works the collection has been crammed into an area slightly larger than a tennis court. Efforts are

---

117 Ibid.

118 Sljivic, "Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate between Cultural Nationalism and Cultural Internationalism" (1997) 31 Geo Wash J Int'l L & Econ 393, n 156.

119 Merryman, "Thinking about the Elgin Marbles", supra note 43, 59-60.

120 Merryman, "Two Ways of Thinking about Cultural Property", supra note 47, 84.

121 Ibid. This objective is reinforced in the Preamble to UNESCO 1970 and the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property.

122 Prott and O'Keefe, supra note 52, para 112.

only now being made to draw attention to the collection, assembled by Petrie at the end of the nineteenth century.[123]

A further criticism of the internationalist approach to the access concern is that cultural internationalism takes a one-eyed view of how accessibility should be measured. Relocation of cultural property from a poor country with an immobile population may in fact only benefit tourists; "[a]n object located in London or New York is just as much lost to a resident of the Solomon Islands as it would be by destruction."[124] This disparity does not always work the other way. As Prott and O'Keefe note, it is far easier for a resident of England or the United States to visit cultural objects in Turkey or India than for many citizens of those countries to visit Western museums. The internationalist position may further be criticised for taking a uniquely Western view of what constitutes access. It conceives of access in terms of exhibition and research, but does not accommodate the concepts of dissemination and teaching through use in the receiving communities.[125]

To any claims that lack of access results in the cultural impoverishment of the source nation, internationalism would answer that whether export really causes a significant loss of access to the work depends on whether it was publicly accessible before export or whether it was privately owned.[126] For example, if the Poussin painting was held in a private collection in the first place, how could France argue that the French cultural heritage was impaired through its sale to the Cleveland Museum? "What, besides location, has changed?"[127] Such argument reveals an element of internal contradiction in the internationalist perspective. Why is the 'universal cultural heritage' a legitimate justification for the movement of cultural objects into private hands, when cultural attachment to an object is not considered a sufficient justification for retention within private hands?

Having now reviewed the three major concepts in the internationalist argument, it is necessary to reconsider internationalism's condemnation of the nationalist position as pure 'self-serving assertion', 'sentimentalism' or 'romantic Byronism'. It has been argued that the concept of a 'universal cultural heritage' is at least equally as insubstantial, and that the three concepts of preservation, integrity and access do nothing to push 'universal cultural heritage' past anything more

---

123 "Museum Reveals its Hidden Egyptian Treasure" *New Zealand Herald*, Auckland, New Zealand, 17 July 2000, B5.

124 Prott and O'Keefe, supra note 52, para 112.

125 Ibid para 1612.

126 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 191.

127 Ibid.

than "a veil behind which to hide the self-interested retention of cultural property by acquisitive nations".[128] As one author has put it:[129]

> The simple fact that consumers exist who want to own what you own because they deem you to have too many or not to be looking after them properly hardly justifies them in relieving you of your property on those grounds. That decision cannot be theirs to take.

(d) Conclusion: Prima Facie Difficulties in Resolving the Cultural Property Debate

From this discussion, this article aims to identify how, even without the aid of New Stream insight, a definitive resolution to the competing visions of how cultural property should be allocated appears challenging. Neither position seems manifestly correct, and is always subject to criticism or the reverse argument from the opposing position. For example, internationalism's claim that retention of cultural objects results in the deprivation of the universal cultural heritage is not self-evident: denying a culture possession of its cultural artefacts through movement of cultural property may ultimately have the same effect. The claim that retention jeopardises preservation may be met by the argument that movement can reach the same result. Equally, the claim that retention impairs common access to the universal cultural heritage overlooks the fact that movement may have the same consequence.

In the next section, this article addresses how the New Stream theorists come to the conclusion that a definitive resolution to the cultural property debate is impossible, by applying the insights of indeterminacy theory to the cultural nationalist/internationalist debate. In particular, it addresses how the New Stream concludes that:

(i) Neither the nationalist nor the internationalist position can be consistently preferred, because neither is inherently superior. Each is vulnerable to criticism from its opposition; and

(ii) Neither the nationalist nor the internationalist position is inherently superior because the phenomenon of reversibility robs the positions of their inherent nature, thus making preference between the two impossible.

---

128 Mastalir, supra note 70, 1065-1066.
129 Walker Tubb, supra note 100, 243.

3. Indeterminacy of International Legal Discourse and the Cultural Property Debate

(a) The Inability to Prefer the Opposing Strands of Argument

We have seen that neither the ascending nor the descending argument is able to present itself as the inherently superior, self-evident or objective solution to international legal issues, because each argument is vulnerable to criticism from the opposite position for being too subjective:[130]

> From the ascending perspective, the descending model falls into subjectivism as it cannot demonstrate the content of its aprioristic norms in a reliable manner (i.e. it is vulnerable to the objection of utopianism). From the descending perspective, the ascending model seems subjective as it privileges State will or interest over objectively binding norms (i.e. it is vulnerable to the charge of apologism).

The following section will describe how each position is able to claim that the other is too subjective, and then transpose these criticisms onto the opposing positions in the cultural property debate. It will then illustrate how the exchange of criticism is found in the cultural property debate both within the oppositional structure of the debate itself, where one would expect to find criticism and counter-criticism, and in attempts to reconcile the two positions.

(b) Criticism and Counter-Criticism in the Debate Itself

(i) Cultural Nationalism and Criticism from the Descending Perspective

The descending perspective proposes that "common values override individual policies, common interests override individual wants, [and] man's nature is social, not individualistic".[131] The ascending, state-centric position is able to criticise the communitarian perspective for the following reasons:[132]

---

130 Koskenniemi, *From Apology to Utopia*, supra note 1, 41-42.
131 Ibid 426.
132 Ibid 426-427.

> Firstly, of course, values appear subjective. Secondly, no such common interests seem to exist which could be distinguished from the interests of individual States. Thirdly, there is no immediate perception of what man's or the law's nature is. ... To think otherwise would be to engage in nostalgic utopias. Moreover, each descending argument is threatening. As values are subjective, arguments from a natural justice, common interests or nature seem like imperialism in disguise. To speak of the world as a community seems, at best, a moralist fiction. Because subjective, it tends to degenerate into an outright harmful totalitarianism.

We have seen similar criticisms made of the internationalist or descending position in the cultural property debate. Critics of cultural internationalism have questioned the substance of the claim to a 'universal cultural heritage'. As seen above, it has been argued that the term is nothing more than a convenient and emotive moral basis to justify the self-interested retention of cultural property by acquisitive nations.[133] The 'higher public welfare values' of preservation, integrity and access are said to add no further substance to the claim.

That cultural internationalism amounts to cultural imperialism has been asserted by one critic specifically,[134] and others by implication. Nationalism resists the imposition of 'universal cultural heritage' as justification for concluding that, for example, a national collection holds too many examples of the one artefact, or that one artefact is receiving inadequate conservation. Instead, nationalism contends that "each State is [the] best judge of how it should protect its own national heritage".[135]

(ii) Cultural Nationalism and Criticism from the Ascending Perspective

The ascending perspective, presenting autonomy as the normative goal, is equally subject to being criticised from the communitarian perspective as 'negative egoism'. The ascending perspective risks apologism, as "it strengthens the absolutist claims of national power-elites and supports their pursuits at international dominance".[136]

In terms of the cultural property debate, it cannot be said that the descending cultural internationalist perspective is able to accuse cultural nationalism of being an absolutist claim of power elites. On the contrary, the power and influence in the debate lies on the side of the art-hungry acquiring nations, most of whom would support the internationalist

---

133 Mastalir, supra note 70, 1065-1066.
134 Walker Tubb, supra note 100, 242.
135 Prott and O'Keefe, supra note 52, para 160.
136 Koskenniemi, *From Apology to Utopia*, supra note 1, 424.

perspective. However, one criticism levelled at the nationalist position which corresponds with a typical descending criticism of ascending arguments is the egoism of the nationalist position. Cultural internationalists portray cultural nationalism as "carrying negative implications of sentimental or greedy desire for possession of cultural property while disregarding its value to the international community or its physical safe-keeping".[137]

This quotation draws out a further ground on which internationalism is able to criticise the subjectivity of nationalism in a sense beyond that of New Stream theory: nationalism is criticised for being too emotive, too sentimental. Such sentiment is inherent in the term 'romantic Byronism', which, for Merryman, obstructs reason and limits rational thought, "supp[lying] and limit[ing] the terms of discourse, pre-empting the argument and blocking the assertion of more appropriate criteria".[138]

(iii) Criticism and Counter-Criticism in Attempted Resolution to the Debate

The New Stream insight is that the threat of counter-criticism from the opposing position is constant. It is alive in debates such as the cultural property debate, where one would expect to find criticism and counter-criticism. It is also alive in attempts to combine or reconcile the two views. A recent practical example of this is the UNIDROIT Convention on Stolen and Illegally Exported Cultural Property 1995 ("UNIDROIT Convention"),[139] and its overt attempts to try to combine the nationalist and internationalist viewpoints.

The purpose of the UNIDROIT Convention is to protect cultural property by conferring on dispossessed owners – whether states, institutions or private individuals – the right to seek the return of objects stolen from them or illegally exported from their territories. In the words of the Preamble, the Convention seeks to introduce a regime of "common minimal legal rules" in as many states as possible to ensure that differences between various legal systems cannot be exploited to the benefit of the illicit trade. The UNIDROIT Convention was intended to work hand in hand with UNESCO 1970, as evidenced by the exact correlation between the cultural objects listed in the Annex to the

---

137 Mastalir, supra note 70, 1065.

138 Merryman, "Thinking about the Elgin Marbles", supra note 43, 45.

139 See supra note 45. The Convention entered into force on 1.7.1998 between China, Ecuador, Lithuania, Paraguay and Romania, on 1 September 998 for Peru, on 1 November 1998 for Hungary, on 1 November 1999 for Brazil and Bolivia, on 1 December 1999 for Finland, on 1 January 2000 for El Salvador, and on 1 April 2000 for Italy.

UNIDROIT Convention and those in Article 1 of the UNESCO Convention.[140]

The explicit objective of the drafters of the UNIDROIT Convention was to "strike an acceptable balance between the interests of those countries from which cultural property is routinely misappropriated and those which import and provide a market for such material".[141] The Preamble to the Convention reflects the drafter's attempt to achieve this balance. For example, it mentions the irreparable damage that can be caused by the illicit trade "to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples". In other words, "heritage must be considered in its significance for local communities, nations and humanity as a whole".[142]

To illustrate how the Convention has come under fire despite its attempt to reconcile the opposing camps, the following discussion mentions the two clauses in the Convention that deal with the return of cultural objects: Article 3, which addresses the restitution of stolen cultural objects; and Article 5, which deals with the return of illegally exported cultural objects.

Perhaps the key Article of the Convention is Article 3,[143] which opens with the unambiguous and absolute obligation on the possessor of a stolen cultural object to return it (Article 3(1)). There is no limit under Chapter II on those who may pursue a claim. Where the Convention meets criticism from the cultural internationalist camp is the definition given to the word "stolen" in Article 3(2):

> For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

The internationalist or descending criticism of Article 3(2) is similar to that directed at Article 1 of UNESCO 1970. Article 3(2) is said to

---

[140] For further discussion of the correlation between UNIDROIT and UNESCO 1970, see Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects* (1997) 15.

[141] The Law Reform Commission, *The Law Reform Commission Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (1997) 1.

[142] Prott, supra note 140, 19. Prott suggests that this section of the Preamble, rather than combining the dual interests, instead "rejects the suggested opposition between 'internationalism'...and 'retentionism': Ibid.

[143] Ibid 28.

support "bare retentionism".[144] Its effect is to give source nations a blank cheque, allowing them to use their domestic legislative processes to determine the outcome of an action in the requested State's forum. It seems an apology for the political whim of the source nation.

As opposed to the absolute obligation in Article 3, Article 5 provides a conditional right of return in the case of illegally exported cultural objects, a right accessible only to contracting states. Pursuant to Article 5(3), the court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State is able to establish that one of four interests has been "significantly impaired", namely:

(a) The physical preservation of the object or of its context;

(b) The integrity of a complex object;

(c) The preservation of information of, for example, a scientific or historical character; or

(d) The traditional or ritual use of the object by a tribal or indigenous community.

Once again, the criteria listed seek to strike a balance between the international and national interests. For example, the reference to the "preservation of information" reflects a concern not only for the culture of the requesting State but for that of humanity as a whole.[145]

The criteria have come to be known as the "Merryman list".[146] They were proposed by Merryman as an alternative to a criterion of pecuniary value[147] and, as can be seen from the list, they partly mirror the way in which Merryman justifies the internationalist position: Article 5(3)(a) corresponds to internationalism's preservation concern; (3)(b) and (c) to internationalism's integrity/context concern.

Despite Merryman's influence on the drafting of the section, internationalists are still able to find fault with the Article. The object of internationalists' criticism is the alternative catchall phrase at the end of Article 5(3):

---

144 Merryman, "The Unidroit Convention: Three Significant Departures from the *Urtext*" in Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 270, 277 (originally published in (1996) 5 Int'l J Cultural Property 11).

145 The Law Reform Commission, supra note 141, 46.

146 Prott, supra note 140, 59.

147 Ibid 56.

> [O]r establishes that the object is of significant cultural importance for the requesting State.

This catchall phrase was proposed at the same time as the Merryman list to cover cases which may not fall precisely under Article 5(3)(a) to (d).[148] It may be seen as supporting the nationalist position, because it allows the requesting State – the State seeking the return of illegally exported cultural objects – some autonomy in deciding which objects are of 'significant cultural importance' to the nation without regard to any external standard of what might constitute 'significant cultural importance'.

Once again, the clause is criticised by supporters of cultural internationalism for being, in essence, apologist. It is accused of supporting naked retentionism;[149] of being the "ultimate 'blank check'", as its effect is to require "blanket enforcement of all source nation export controls".[150]

UNIDROIT serves as an example that any attempt to accommodate both the ascending and descending strands of argument can only succeed in a formal, abstract sense:[151]

> Immediately as it is given concrete content - as soon as it becomes a programme of *what to do* - it will appear to overrule somebody's preferred substantive view and seem illegitimate as such.

From the patterns of criticism and counter-criticism evident in the cultural property debate, New Stream theory would conclude that neither the cultural nationalist nor cultural internationalist position can be inherently superior to the other. The nationalism/internationalism polemic is thus "singularly useless"[152] as a means for seeking resolution to conflicting views as to how cultural property should be allocated.

The only way that one can prefer the solution that one side of the debate presents is if our previous commitments about substantive justice

---

148 Ibid 59.

149 Merryman, "Three Significant Departures from the *Urtext*", supra note 144, 277.

150 Ibid 276-277. There have, however, been alternative readings of the clause. Prott, who introduced the clause originally, sees it as a:

[F]ifth (alternative) category of greater cultural importance that those listed in (a), (b), (c) and (d). [The removal of such cultural objects] has only to "significantly impair" one of the interests mentioned, whereas the final alternative has to establish that the object *itself* is of a high degree of importance - perhaps less than outstanding, but certainly more than "significant or "importance" ("significant cultural importance").

Supra note 140, 60 (emphasis in the original).

151 Koskenniemi, *From Apology to Utopia*, supra note 1, 431 (emphasis in the original).

152 Ibid 48.

lead us to stop the criticism at one point and ignore counter-criticism from the opposing side of the debate. The internationalist position, as the dominant and therefore most developed position, illustrates clearly the ultimate resort to subjective principles. For example, cultural internationalists are able to cite source nation export controls on cultural objects as evidence of 'blatant retentionism' by making a moral judgment against a policy of export prohibition. It is only by projecting source nation export controls as motivated by a 'greedy desire' for possession of cultural property,[153] and as flagrantly disregarding the property's value to the international community or its physical safe-keeping, that internationalism is able to conclude that an open market in cultural property is the superior solution. Such a conclusion cannot, however, be based on any objective determination, because the internationalist solution is not inherently preferable: it is equally vulnerable to being projected in a negative light by the nationalist perspective.[154]

Thus, New Stream theory would conclude that the cultural nationalism/cultural internationalism polemic is useless as a means resolving disputes, and that any conclusion which involves preferring one side of the debate over the other can only be based on the decision-maker's subjective view of what the solution should be, thus discrediting any notion that the cultural nationalism/internationalism debate is able to achieve objective resolution to the dilemma of how cultural property should be allocated.

(c) The Phenomenon of Reversibility in the Cultural Property Debate

We have seen that, for the ascending and descending strands of argument to avoid the reality of counter-criticism from the opposing strand, each must become 'reversible' – or able to project its solution in both an ascending and a descending light:[155]

> These two dangers [apologism/utopianism] ... can be avoided only if arguments become such as to contain the ideals of community and autonomy

---

[153] In fact, as Prott notes, many export laws have highly moral purposes. For example, a state may seek to recover a cultural object illicitly exported to return it to a tribal community, "which will itself have to resolve the question of rights to common property": Prott, supra note 140, 52.

[154] For example, cultural nationalism could argue that the internationalist solution is in this case imperialist. What right does cultural internationalism have to interfere with the policy of the sovereign source nation? On what basis can they justify this right? Cultural internationalism may cite the 'universal cultural heritage' as justification, but where does this norm come from? How can internationalism verify the content of such a 'universal heritage'?

[155] Koskenniemi, *From Apology to Utopia*, supra note 1, 424 (emphasis in the original).

> *both* within themselves so that they can exclude the appearance of Mr. Hyde in each other.

There is ample evidence of reversibility in the structure of the cultural nationalism/cultural internationalism debate, in the sense described by New Stream theory. For example, retention of a cultural object within its nation of origin can be justified under the context concern both from a nationalist perspective – cultural objects "can only be fully appreciated in close connection with accurate information as to their origin, history and traditional status"[156] – and an internationalist perspective, when movement of the object would cause such loss of "[*t*]*rue* physical and contextual integrity"[157] that removal of the object from its context would be tantamount to its destruction.

Movement of cultural objects may equally be dually justified: from the internationalist desire to distribute the 'universal cultural heritage' and the more nationalist justification that 'missionary art':[158]

> [M]ay increase the prestige and understanding of the culture so exposed: admiration for its artistic skills, interest in its mythology, a desire to understand the context in which objects have been produced.

To justify continued retention of the Elgin Marbles within the British Museum, internationalism is able to deploy both an internationalist argument: retention ensures preservation from the smog and elements of Athens as well as continued access and enjoyment; and a more nationalist argument: because the Marbles have been in Britain for such a long period of time they have in fact become a part of Britain's cultural heritage.

The cultural property debate even displays reversibility in the terms each camp uses to criticise the other. For example, 'retention' is equally used as a derogatory label by each camp for the policies of the other:[159]

> Internationalists contrast the term 'retention' with 'protection' in the circumstances of countries rich in cultural treasures that cannot protect them, house them or even catalogue them, but refuse to allow [some] to be taken abroad. Proponents of the repatriation of cultural property to source nations and peoples use 'retention' as the derogatory term referring to the desire of acquisitive nations to retain possession of cultural property over the human rights claims of source nations.

---

156 Vernon, supra note 49, 449.
157 Merryman, "The Public Interest in Cultural Property", supra note 44, 115 (emphasis added).
158 Prott and O'Keefe, supra note 52, para 103.
159 Mastalir, supra note 70, 1066-1067.

To get a sense of how the phenomenon of reversibility in the cultural property debate plays out in reality, we can adapt the cross-frontier pollution scenario to a typical problem in the allocation of cultural property. Suppose that State A is holding a number of unique and valuable sculptures that it is unable to properly conserve. It asserts its right to retain the sculptures, based on its cultural attachment to the items. State B argues that State A is under an obligation to remove at least one of the sculptures to a 'locus of higher protection', citing the universal interest in the sculptures. State B bases its demands on two grounds. First, the preservation concern: given the uniqueness of the sculptures, their destruction would deny humankind the opportunity to use, to learn from and to enjoy them. Secondly, the access concern: humankind must be given a reasonable opportunity to view and appreciate the cultural achievements of other peoples. Thus, State B interprets A's position to be egoistic and selfish, while portraying its own argument as communitarian.

State A's response may well be that it is the best judge of how it should protect its own national heritage. It may accuse State B of being totalitarian: B cannot impose obligations on it based on principles to which it has never agreed. State B will either have to argue that its preferred norm applies irrespective of acceptance – which risks utopianism – or change tack by making its argument protective of sovereignty: by keeping the sculptures to itself, State A is culturally depriving State B. B's position thus seems individualistic with respect to itself and communitarian with respect to State A. As seen above, State B could also justify its position from an individualistic perspective by arguing that the sculptures would serve as a 'good ambassador' of State A's culture.[160]

To counter this, State A needs to make a communitarian argument. It could argue that its continued retention is equally justified by the internationalist preservation, contextual and access concerns. The internationalist "pursuit of knowledge in the quest for valid information about the human past, for … learning that the object and its context can provide"[161] is best served by retaining the sculptures within State A. Even if State A were to accept that preservation must prevail over the contextual concern, there is no guarantee that the preservational needs of the sculptures, and indeed the internationalist access concern, is best met by movement of the object overseas. Thus, State A's position can be made to appear individualistic with respect to itself, and communitarian with respect to State B.

---

160 Bator, "An Essay on the International Trade in Art" (1982) 34 Stan L Rev 275, 306.

161 Merryman, "A Licit International Trade in Cultural Objects", supra note 51, 186.

New Stream theory would conclude that the reversibility apparent in internationalist and nationalist positions compounds the problems of indeterminacy in the debate. Because both cultural nationalism and cultural internationalism can and must be argued from an ascending as well as a descending perspective, the opposition between the two poles and, therefore, the sole criterion for making a preference between the two, is lost. Once again, because preference cannot be objectively made between the two positions – indeed, because reversibility makes preference impossible – concrete solutions result not from any objective principles but from the problem-solver's subjective theory of justice.[162]

In summary, the New Stream of international legal theory would deny the cultural nationalism/cultural internationalism debate the possibility of ever achieving objective, determinate resolution to problems of allocation in cultural property. The indeterminacy of the debate runs deeper than the superficial difficulties we encountered when first presented with the debate – the inability of either argument to present its position as self-evident or superior. It stems from the terms of the debate itself, which the liberal conception of international law constrains it to apply.

IV. CONCLUSION

The insights of New Stream analysis have sometimes been interpreted to mean that resolution to problems in international law is wholly open or wholly without structure and that the indeterminacy in international legal decision-making is complete.[163] The critical deconstruction of the liberal conception of international law in fact reveals international law's "constraining and structuring elements".[164] Its conclusion is simply that these structuring elements do not make international law more determinate. They act instead "like a set of bookends, defining the scope of indeterminacy".[165] Thus, international legal discourse displays a "structured incoherence or partial determinacy".[166]

---

162 Koskenniemi, *From Apology to Utopia*, supra note 1, 456-457.
163 Purvis, supra note 2, 114.
164 Ibid.
165 Ibid.
166 Ibid.

Nevertheless, the New Stream has been widely criticised as an "intellectual dead end",[167] because it offers no alternative to the liberal conception of international law that it deconstructs. It has "[failed] to commit to an affirmative image of international law's role in the world order",[168] for it holds that no such image can justify itself.[169]

Despite such criticism, the image of 'structured incoherence' that New Stream theorists present is a useful tool in examining the cultural property debate. First, it offers an explanation for the apparent difficulties in resolving the debate: a more fundamental reason why neither side is able to convincingly present its arguments as the manifestly correct position. Second, and most importantly, it encourages those involved in the allocation of cultural property to step back and re-examine the terms on which the various interests are represented. With the dominance of the internationalist position, and the enthusiasm of academics such as Merryman in proclaiming it, there is the danger that those asked to balance different interests will accept the internationalist presentation of the cultural nationalism/cultural internationalism polemic as the definitive framework, with the result that cultural nationalism will predominantly be portrayed as the poor cousin to the internationalist viewpoint, rather than a distinct and equally critical voice. New Stream theory reveals internationalism can never, as it has in the majority of literature, portray itself as inherently superior or objectively the correct solution to problems of allocation in cultural property, because the superiority of the internationalist position is purely a matter of the political agenda of the decision-maker. The insight that the cultural nationalism/cultural internationalism debate is dominated by the internationalist position, and that, in truth, the framework is fundamentally flawed as a mechanism for the objective resolution of the issue of cultural property allocation, may lead to a reconsideration of how the debate might be structured in order to represent interests equally, and solve issues determinately.

---

167 Kennedy, "The New Stream" in Beck, Arend and Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (1996) 226, 229.

168 Purvis, supra note 2, 116.

169 Kennedy, "The New Stream", supra note 167, 229.

APPENDIX

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995)

ANNEX

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

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

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

(iii) original engravings, prints and lithographs;

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

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.