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Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property

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**PROTECTING ANTIQUITIES AND SAVING THE UNIVERSAL MUSEUM: A
NECESSARY COMPROMISE BETWEEN THE CONFLICTING IDEOLOGIES
OF CULTURAL PROPERTY**

*Nicole Klug**

The debate over ownership of antiquities is not a new conflict. Nationalists insist that all cultural items discovered within the legal borders of a nation belong to that nation and its people. Conversely, internationalists assert that antiquities are the property of people universally. Despite the ratification of international treaties and tremendous efforts toward reform, internationalists and nationalists are still unable to reconcile their opinions to the detriment of both viewpoints. Archaeologists and art-rich nations continue to struggle with looting and the illicit market, while universal museums worry about licitly expanding their collections to ensure a complete view of the world's history. This Note examines the struggle between these divergent viewpoints and proposes some solutions to aid in reaching a compromise, which will ensure the legal and universal appreciation of culture and history worldwide.

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* Articles Editor, Case Western Reserve Journal of International Law. B.A., New York University (2007); J.D., Case Western Reserve University School of Law (expected 2010). To my parents, Ron and Jackie Klug, and my sister, Amy Klug, thank you for your unconditional love and confidence in my abilities—you have made many insurmountable tasks manageable with your unwavering support. To Joan Connelly, my sincerest thanks for first introducing me to the cultural property arena and helping to bridge my interests between law and the arts. Finally, to Dan Ujcz, thank you for your great efforts and advice in the innumerable rounds of edits on my Note.

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“The battle over ancient treasures is, at its base, a conflict over identity, and over the right to reclaim the objects that are its tangible symbols. At a time when East and West wage pitched battle over fundamental notions of identity . . . , antiquities have become yet another weapon in this clash of cultures, another manifestation of the yawning divide. And ironically, it undermines the very purpose of cultural exchange, of building bridges and furthering mutual understanding.”¹

I. INTRODUCTION

As you open your Sunday paper, an article on the front page catches your eye: “Ten Commandments Tablets Unearthed in Gaza During Archaeological Dig.” The article reports that the Metropolitan Museum of Art in New York City came to an agreement with Israel permitting the museum to remove some of the items it discovered, while the remainder of the artifacts would remain in Gaza. Upon discovering the Tablets, the Met is in luck because, according to its agreement with Israel, it now has the authority to export them to New York for restoration and display.

The first thing that you may ask after reading this article is: When can I see the Tablets? Or perhaps different though related questions come to mind, such as who will have an ownership claim? Why would an item be preserved in a war-torn region where its safety may be compromised? Where can the entire find be legally restored and exhibited? Will the find ever be shared with other nations? It is fairly implausible that a partage agreement² such as the one described in the Sunday paper would exist

¹ SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 3 (2008).

² Partage was the standard practice of dividing up artifacts between archaeologists, their patrons, and the host territory. During the late 19th and early 20th centuries a partage system was the most common agreement between host nations (“art-rich nations”) and Imperial nations. Under a partage agreement, a source nation would allow archaeologists to come into the nation and perform digs. Though the source nation kept much of what was found, the

amidst the staunch nationalistic views of art-rich nations.³ Yet one may query whether a treasure such as the Ten Commandments should be kept in the safety of a “universal museum”⁴ as a treasure for all of humankind to view in the safety of a peaceful nation. Despite continuous confrontation, these questions remain unanswered.⁵

One view—the internationalist perspective—espouses that a treasure such as the Ten Commandment Tablets belongs on display for the entire world to see. Internationalists strongly adhere to the viewpoint that art belongs to humanity and must be dispersed for international appreciation.⁶ Under the internationalist view, allowing the Tablets to remain in a war-torn region such as Gaza would put one of the greatest archaeological finds in peril, ultimately denying humanity the right to benefit from history. Alternatively, the nationalist view contends that the Tablets belong to, and should remain in, the country where they were unearthed.⁷ As rightful owners, the host nation would be responsible for their display, preservation, and protection.⁸

archaeologists took home a share for their affiliated museums and universities. This system rarely persists, as a source nation now keeps almost 100% of what is found. Richard Layco, *Who Owns History*, TIME, Feb. 21, 2008, at 5, available at <http://www.time.com/time/magazine/article/0,9171,1715290-1,00.html>.

³ Art-rich nations, or source nations, are those nations that have a multitude of intrinsic archaeological items. For instance Greece, Cyprus, Italy, and Japan are all prime examples of nations that have a deep archaeological history. These nations are also referred to as host nations at times as a result of their history of hosting teams of archaeologists from researching nations.

⁴ “[A] universal museum is one dedicated to the proposition that museums can serve as an instrument for the dissipation of ignorance and superstition about the world through the presentation of the world’s shared artistic legacy.” *The New York Metropolitan Museum of Art*, ETHICS SCOREBOARD, Mar. 2006, http://www.ethicsscoreboard.com/heroes/0603_met.html (quoting James Cuno, director of the Art Institute of Chicago) (last visited Mar. 16, 2010). Examples of universal museums include the Metropolitan Museum of Art, the British Museum, and the Louvre.

⁵ See, e.g., Kate Fitz Gibbon, *The Elgin Marbles: A Summary*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 109 (Kate Fitz Gibson ed., 2005) [hereinafter WHO OWNS THE PAST?]; Africa Reparations Movement (ARM), Campaign for the Return of the Benin Bronzes: The British and the Benin Bronzes, <http://www.arm.arc.co.uk/britishBenin.html> (last visited Mar. 16, 2010).

⁶ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986) (“One way of thinking about cultural property—i.e., objects of artistic, archaeological, ethnological or historical interest—is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”) (footnote omitted).

⁷ *Id.* at 832 (“Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the ‘repatriation’ of cultural property.”).

⁸ See generally *id.*

These two views represent opposing ends of a large spectrum concerning cultural property⁹ ownership. The differences between the views become stark when antiquities with questionable or unknown provenance¹⁰ are involved. However, neither view can reach an ideal outcome when employed in isolation. The two sides must reach a compromise in order to ensure both that art-rich nations can protect their rightful property and that the universal museum does not become an institution of the past.

This Note explores the mounting controversy over the consequences and benefits accompanying the international disbursement of cultural property. Part II discusses the legal and historical background of the cultural property debate, providing a brief overview of the two historical schools of thought: (1) nationalism; and (2) internationalism. Part III explores the evolution of the debate over cultural property and the adaptation that nationalists and internationalists must make to both protect antiquities and save the universal museum. Part IV demonstrates the great strides that both nationalists and internationalists have made, and are making, to reach an intermediary view. This section also provides recommendations to assist museums, archaeologists, collectors, and nations to continue this process of reaching an intermediary view, such as: (1) forgiveness of past indiscretions; (2) better protection of the archaeological sites of host nations by utilizing the Blue Shield; and (3) the creation of a strong licit market and the implementation of loan programs to ensure future cultural exchange between nations.

II. THE LEGAL AND HISTORICAL BACKGROUND OF THE CULTURAL PROPERTY DEBATE

While the history of protecting cultural property dates back to 1863 in the U.S. with the enactment of the Lieber Code,¹¹ the international cultur-

⁹ Cultural property is defined by the U.N. Education, Scientific and Cultural Organization in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science." UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970].

¹⁰ Provenance is a term referring to the actual position and location in which an archaeological item is discovered. Alternatively, provenance is the detailed history of an item's location since its creation (from creation to present day). K. Kris Hirst, *Provenience, Provenance, Let's Call the Whole Thing Off*, ABOUT.COM, May 16, 2006, <http://archaeology.about.com/b/2006/05/16/provenience-provenance-lets-call-the-whole-thing-off.htm> (last visited Mar. 16, 2010).

¹¹ Signed by Abraham Lincoln during the Civil War, the Lieber Code stated: "[c]lassical works of art, libraries, scientific collections, or precious instruments . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged

al property debate began in the mid-twentieth century with the formation of the U.N. Educational Scientific and Cultural Organization (UNESCO).¹² The U.N. formed UNESCO with the intention of “building peace in the minds of people”¹³ by promoting a mutual understanding of cultures from all over the world.¹⁴ With the continued international discussion of the protection and appreciation of cultural property on the forefront, two distinct worldviews became apparent—nationalism and internationalism. John Merryman, a preeminent scholar on the cultural property debate, first characterized the divergent views and recognized that each school of thought works to further define cultural property law.¹⁵ Nevertheless, according to Merryman, the two views present very different interpretations of property and ownership rights surrounding cultural property as a whole.¹⁶

A. *Internationalism and the Universal Museum*

Internationalists view cultural property as property of the global community as a whole.¹⁷ “[I]nternationalists reason that humans have a common, universal heritage and history, and therefore, that any cultural property, no matter where it is located, is important to every human being.”¹⁸ The theory is that everyone has an interest in the preservation and enjoyment of cultural property, regardless of its provenance, mired past, or to whom it originally belonged.¹⁹

Historically, internationalism was the prevailing worldview with regards to the allocation of cultural items. Cultural internationalism has its roots in the sentiment of the seventeenth-century archaeologist and author Quatremère de Quincy:

or bombarded.” U.S. Dep’t. of War, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 35 (Apr. 24, 1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp. The Lieber Code was the first attempt by any nation to enact a law protecting cultural heritage for the furtherance of cultural history, whether national or international. *Id.*

¹² UNESCO, About Us, http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Mar. 16, 2010).

¹³ UNESCO, Building Peace in the Minds of People, <http://www.unesco.org/new/en/unesco/> (last visited Mar. 16, 2010).

¹⁴ UNESCO, Cultural Diversity, http://portal.unesco.org/culture/en/ev.php-URL_ID=34321&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Mar. 16, 2010).

¹⁵ Merryman, *supra* note 6, at 833.

¹⁶ *See id.*

¹⁷ *Id.* at 831.

¹⁸ Janene Marie Podesta, Note, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT’L & COMP. L. 457, 469–70 (2008).

¹⁹ *See generally* Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN 241, 241 (2008).

[T]he arts and sciences belong to all [the world], and are no longer the exclusive property of one nation. . . . It is as a member of this universal republic of the arts and sciences, and not as an inhabitant of this or that nation, that I shall discuss the concern of all parts in the preservation of the whole.²⁰

The formation and growth of universal museums throughout the world is the epitomic illustration of this viewpoint that the arts and sciences belong to the entire world. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocols (Hague 1954) best embodies the internationalist attitude that cultural property belongs to the global community. The preamble declares 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.”²¹ Although Hague 1954 reinforces the notion that damaging cultural property from one country is damaging to all mankind, Hague 1954 is silent regarding the removal of cultural property from the original nation-state.²²

B. *A History of Nationalism and Protecting National Culture*

Nationalists advocate for the protection of cultural heritage belonging to the inhabitants within a modern nation’s borders.²³ “In its truest and best sense, cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need an exposure to their history. . . . Such artifacts are important to cultural

²⁰ John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1, 10 (1998) (quoting LETTRES AU GÉNÉRAL MIRANDA SUR LE PREJUDICE QU’OCCASIONERAIENT AUX ARTS ET A LA SCIENCE LE DÉPLACEMENT DE MONUMENTS DE L’ART DE L’ITALIE, LE DEMEMBREMENT DE SES ÉCOLES ET LA SPOLIATION DE SES GALERIES, MUSÉES, ETC. 88–89 (Edouard Pommier ed., 1989)), in PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 593 (2d ed. 2004).

²¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The Convention “undertake[s] to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any act of vandalism directed against, cultural property” in a time of war. Saving Antiquities for Everyone, Treaties and Legislation [hereinafter SAFE Treaties and Legislation], <http://www.savingantiquities.org/heritagetreaties.php> (last visited Mar. 16, 2010) (quoting 1954 Hague Convention, *supra*, art. 4.3).

²² The Convention does, however, require a State that occupies “the whole or part of the territory” of another State Party to assist the authorities of the occupied country with the protection of its own cultural patrimony.” SAFE Treaties and Legislation, *supra* note 21 (quoting 1954 Hague Convention, *supra* note 21, art. 5.1). As of December 18, 2003, 108 countries had ratified the Convention and 87 had accepted the Protocol. SAFE Treaties and Legislation, *supra* note 21.

²³ Merryman, *supra* note 6, at 832.

definition and expression, to shared identity and community.”²⁴ Nationalists advance several rationales supporting their view that cultural objects are the property of their respective nation states. For example, supporters cite national pride²⁵ and the domestic realization of market value.²⁶ The Archaeological Institute of America (AIA)²⁷ argues that retention of cultural objects in their original site provides the context of the object and presents a clearer view of the historical path²⁸ of both the nation and the object reinforcing an archaeological record.²⁹

The spirit of nationalism became internationalized with the ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970),³⁰ the 1972 UNESCO Convention Concerning the Protection of World Cultural and National Heritage (UNESCO 1972),³¹

²⁴ Anglin, *supra* note 19, at 242 (quoting John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1912–13 (1985)).

²⁵ Anglin, *supra* note 19, at 245 (“[B]ecause cultural property is an expression of a civilization that existed or is currently existing within a state, its citizens thus have a stronger claim based on identification and national pride.”).

²⁶ *Id.* (“[C]ultural property usually has utilitarian qualities, including market value, that may be harnessed by the state and its people.”).

²⁷ AIA prides itself on its strict policies governing the importation and acquisition of antiquities, as well as resolutions governing undocumented antiquities. *See generally* AIA, About the AIA, <http://www.archaeological.org/webinfo.php?page=10352> (last visited Mar. 16, 2010).

²⁸ The AIA has repeatedly issued press releases urging the American Associate of Museums Directors (AAMD) to take care in choosing the objects their institutions requisition because acquiring looted items will provide an incomplete history. *See, e.g.*, Press Release, Archaeological Institute of America, Response to New AAMD Guidelines on the Acquisition of Archaeological Materials and Ancient Art (2008) [hereinafter Response to New AAMD Guidelines], available at <http://www.archaeological.org/pdfs/AAMD2008.pdf>.

²⁹ *See* FRANK G. MATERO, ARCHAEOLOGICAL INST. OF AMERICA SITE PRES. PROGRAM, HERITAGE, CONSERVATION, AND ARCHAEOLOGY: AN INTRODUCTION (2008), available at <http://www.archaeological.org/pdfs/Matero.pdf>.

³⁰ Held on November 14, 1970, the Convention is the keystone of a network of national and international attempts to deal with the illicit international traffic in smuggled or stolen cultural objects. Merryman, *supra* note 6, at 832–33. It states: “It is incumbent upon every State to protect the cultural property existing within its own territory . . . [E]very State [should] become increasingly alive to the moral obligations to respect its own cultural heritage.” UNESCO 1970, note 9, art. 1. As of 2008, 103 countries have committed to the 1970 Convention. The U.S. joined in 1983—the first major art-market country to do so—by passing legislation enabling the Convention. SAFE Treaties and Legislation, *supra* note 21. But the U.S. declined to implement Article 10(a) on the alleged grounds that regulation of antiquities dealers is best left to state and local governments. *Id.*

³¹ The aim of UNESCO 1972 is the preservation of immovable cultural property and natural sites while compelling nations to prohibit the importation of cultural property stolen from another participating country. *See* Convention Concerning the Protection of the World Cultural and Natural Heritage pmb., Nov. 16, 1972, available at <http://whc.unesco.org/archive/>

and the 1995 International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT 1995).³² These Conventions furthered the international community's attention to the domestic protection of cultural property and are the pure embodiment of the nationalist view.

III. THE IMPORTANCE OF A COMPROMISE

The 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property attempts to strike a compromise between internationalists and nationalists:

[T]he circulation of cultural property . . . is a powerful means of promoting mutual understanding and appreciation among nations. . . . [A] systematic policy of exchanges . . . would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages.³³

The international involvement of museums, archaeologists, and political leaders is necessary to encourage an international understanding of culture while maintaining the property rights of individual nations. "We can safeguard the artifacts that have survived through the millennia while still addressing the injustices and destruction that have resulted from extracting those artifacts from the ground."³⁴ The dichotomous viewpoints that emerged regarding cultural property, however, suggest that both nationalists and internationalists have rejected the alleged compromise of 1976. This compromise will only come to fruition if each school sets aside its differences to clearly see the problems that mar both the nationalist and internationalist perspectives.

convention-en.pdf. The 1972 Convention received wide international support, likely because it did not impose particularly "onerous obligations" on participating countries. *SAFE Treaties and Legislation*, *supra* note 21.

³² UNIDROIT is an independent intergovernmental organization aimed at studying the needs and methods for modernizing, harmonizing, and coordinating private law as between States and groups of States. UNIDROIT: An Overview, <http://www.unidroit.org/dynasite.cfm?dsmid=84219> (last visited Mar. 16, 2010). UNIDROIT 1995 seeks to harmonize the laws of participating countries regarding claims for the return of stolen or illegally exported cultural property. Further, it clarifies the extent to which importing countries are obliged to respect other countries' export-control laws. Moreover, it allows private individuals to bring claims for the return of stolen cultural property that has ended up in a foreign country. *See SAFE Treaties and Legislation*, *supra* note 21; UNIDROIT Secretariat, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 61 UNIF. L. REV. 476 (2001).

³³ UNESCO Recommendation Concerning the International Exchange of Cultural Property at pmbl., Nov. 26, 1976, http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

³⁴ WAXMAN, *supra* note 1, at 372.

A. *Problems with the Internationalist/Nationalist Dichotomy*

The large rift dividing the efforts to protect cultural property arose from radical views of a few passionate advocates. The wide differences between the nationalist and internationalist spectrums demonstrated an unwillingness of art-rich nations, museums, and collectors to “adapt to the changing mores of a shifting global culture.”³⁵ Sharon Waxman, a leading scholar on cultural property, has observed that the attempt to strike a balance between the two views failed in large measure due to the “us versus them” politics of a limited number of advocates on each side.³⁶ She opines that “the politics of ‘us versus them’ has to give way to a reaffirmation of the value of cultural exchange, and its real embrace by both sides.”³⁷

A major criticism of nationalism is its failure to take into account the benefit that other nations derive from exposure to the culture and heritage of art-rich nations. Janene Marie Podesta, a legal commentator, argues that the danger of keeping cultural property items within their original countries is that it might not consider whether staying in the country would “best preserve or advance the significance of the piece.”³⁸ Moreover, James Cuno, director of the Art Institute of Chicago and a leading proponent of the internationalist view, argues that the “[n]ationalist retentionist cultural property laws conspire against our appreciation of the nature of cultural as mongrel, overlapping, and a dynamic force for uniting rather than dividing humankind.”³⁹ Arguing that the nationalist view perpetuates a divided view of the world into “irreconcilable sectarian, or tribal, entities,” Cuno notes that by continuing to argue over who and where antiquities belong, museums, archaeologists, and nations alike have spent the past forty-five years acting in direct conflict with the aim of UNESCO.⁴⁰

In turn, a major criticism of internationalism is that it advances the distrusting view that antiquities are the property of all humankind for both highly-developed and under-developed nations, but safe for display only in westernized nations.⁴¹ Nationalists believe that by forcing art-rich nations to “disperse” their cultural assets, “western” nations are essentially stealing.

³⁵ *Id.* at 373.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Podesta, *supra* note 18, at 471.

³⁹ JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 19 (2008).

⁴⁰ *Id.* at 19–20.

⁴¹ Cuno admits that “[m]useums own antiquities . . . only insofar as they hold them in trust for the public they serve.” *Id.* at 13. But he also argues that antiquities clearly cannot be best preserved in their presumed countries of origin, citing the situations in Afghanistan and Iraq as prime examples supporting this contention. *Id.*

Podesta commented that the major difference between internationalism and nationalism is that nationalists think of the owners of cultural property in a “moral sense” rather than a “legal one.”⁴² She continues to say that: “internationalists reason that humans have a common, universal heritage and history, and therefore, that any cultural property, no matter where it is located, is important to every human being.”⁴³ However, this view is arguably the opposite of the legal reality—universal ownership is both solely theoretical and merely an argument based in morality. Property common law—“acquisition by find”—counsels that trespassing, invitee, and employee finders must always surrender found property to the owner of that property.⁴⁴ While some courts apply a theory of equitable division of property,⁴⁵ the basic construct of property law always assigns ownership of an item to the actual owner of the land.⁴⁶

However, Cuno comments that “discussions about the law—strictly speaking, about the legality or illegality of acquiring unprovenanced antiquities—[are] insufficient, and . . . uninteresting.”⁴⁷ He suggests that international treaties such as UNESCO 1970 serve only the interests of the archaeologists and the preservation of the archaeological record and ignore the best interests of the general public.⁴⁸ Cuno even recognizes the illegality of museums acquiring looted antiquities, but reconciles that “[d]oing what is right is different than doing what is legal.”⁴⁹ In the alternative, it is arguable that protecting the interests of the host nations of the cultural property items would better serve every person who wants an accurate understanding of both the history and cultural history of the world—protection of cultural property in its original State is doing both what is right and what is legal.

⁴² Podesta, *supra* note 18, at 470 (citation omitted).

⁴³ *Id.* at 469–70 (citing Merryman, *supra* note 6, at 831–32).

⁴⁴ 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 1 (2008).

⁴⁵ At times, when the all-or-nothing approach to property causes irreconcilable conflict, courts have held that found property should be shared equitably among the competing claimants. *See Triano v. Popov*, 2005 WL 1230766 (Cal. App. 1st Dist. May 24, 2005) (finding that the two claimants of Barry Bonds’ seventy-third home run baseball must share the ball).

⁴⁶ A good comparison can be drawn from undiscovered archaeological sites and cultural property to fugitive resources. One court commented that minerals “have the power and the tendency to escape without the volition of the owner. . . . [However,] [t]hey belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control.” *Westmoreland & Cambria Nat’l Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

⁴⁷ CUNO, *supra* note 39, at 24.

⁴⁸ *Id.*

⁴⁹ *Id.* at 9.

B. *Imperialism, Politics, and the Change in the International Playing Field*

1. The role of politics in the preservation of cultural property

Cuno argues that the notion of cultural property is merely a political construct. “To include antiquities within the political construct of cultural property is to politicize them. It is to make them part of modern, national cultural politics.”⁵⁰ His argument also demonstrates how the political spectrum can be widely interpreted. Cuno provides the following example:

A Lebanese man was quoted as saying recently, in the midst of the sectarian violence within his country and the conflict between Hezbollah and Israel, “If you cut me, you see Lebanon. You see the prophet Muhammad, you see Imam Ali, you see the cedars.” . . . He didn’t say the ancient Roman ruins or antiquities within Lebanon’s borders. The stuff of his culture—*his* cultural property—does not include antiquities before the Muslim conquest. And his culture is not the same as a Lebanese Sunni’s or Christian’s culture. Culture after all is personal; it is not national.⁵¹

While it is correct to attribute part of the nationalist view to political aspirations, it is irrational to assume that a citizen from a war-torn nation would cite an absolute allegiance to the complete historical basis of the national homeland. However, Andrew Solomon, a scholar with an interest in conservation, observed that “[i]n an era of multiculturalism, the notion that any cultural group owns all of its production has a faddish appeal, and repatriation has taken on the trappings of political correctness.”⁵² The debate over cultural property is politicized, but generally the laws of art-rich nations suggest that it is the job of the leaders of each nation to protect the best interests of their constituents.⁵³

⁵⁰ *Id.* at 11. Cuno believes that: “Museums are, or should be, instruments for encouraging our skeptical inquiry into the simplistic notions of cultural identities. National policies and laws should respect this all-important contribution of the world’s museums by encouraging a licit trade in antiquities and cultural property.” James Cuno, *Museums, Antiquities, Cultural Property, and the US Legal Framework for Making Acquisitions*, in WHO OWNS THE PAST?, *supra* note 5, at 146.

⁵¹ CUNO, *supra* note 39, at 11 (emphasis in original) (citation omitted).

⁵² Andrew Solomon, *Art in Jeopardy*, in WHO OWNS THE PAST?, *supra* note 5, at 239.

⁵³ *See, e.g.*, Greek Statute No. 3028 of 28 June 2002 on the Protection of Antiquities and the Cultural Heritage in General art. 21(3), 2002 Ephimeris tis Kyberniseos at 3003, *translation available at* http://ifar.org/country_title.php?docid=1180079975 (last visited Mar. 16, 2010) (“Ancient movable monuments, which constitute finds from excavations or other archaeological research, regardless of their dating, belong to the State in terms of ownership and possession, are extra commercium and imprescriptible.”); Law No. 5226 for the Conservation of Cultural and Natural Property (2004) (Turkey), *translation available at* http://ifar.org/country_title.php?docid=1180202246 (last visited Mar. 16, 2010) (stating “[a]ll movable and immovable cultural and natural property that is to be conserved and found

2. How imperialism affected the international movement of cultural property

Politics, war, and imperialism have had mixed effects both for art history and cultural immersion.⁵⁴ The advent of colonialism allowed for the forceful seizure and division of antiquities taken from art-rich nations and dispersed throughout imperial nations. For example, consider the Benin Bronzes.⁵⁵ In the late nineteenth century, the British seized, by force, a collection of more than 1,000 brass plaques from the royal palace in the Kingdom of Benin.⁵⁶ Approximately 200 pieces went directly to the British Museum in London, while much of the remainder was divided between the U.S. and Germany.⁵⁷ Although the Bronzes led to greater appreciation of African culture in Europe, imperialism resulted in a great loss for Benin.

Imperialist nations did not only resort to force when thieving the cultural heritage of art-rich nations. “In the late nineteenth and early twentieth centuries it was not unusual for museums to send expeditions to excavate sites and share in the division of objects with the source country.”⁵⁸ Consider the ongoing and unresolved debate over the Parthenon marbles. In the early nineteenth century, Thomas Bruce, the seventh Earl of Elgin, removed “approximately half of the remaining sculptures and decorative relief-carvings of the Parthenon.”⁵⁹ With permission from the Ottoman Empire, over the course of eight years Elgin’s men removed “274 feet of frieze of marble blocks that surrounded the Parthenon’s main inner chamber, fifteen of the ninety-two metopes from the outer colonnade, and seventeen figures in the round from the triangular pediments.”⁶⁰ Elgin’s motivation in

or to be found on property belonging to the state, public institutions or private institutions and individuals is considered as a state property.”).

⁵⁴ For example, most of the eighteenth century Spanish artists, such as Bartolomé Esteban Murillo and Diego Rodríguez de Silva y Velázquez, were little known in their native Spain. But in the early nineteenth century Spanish painting arrived en masse in France as Napoleonic war loot. While on display at the Louvre, French artists adopted the Spanish artists brushwork, laying the foundations for Impressionism and spurring a modern art movement. Carol Kino, *Trading Places: Cultural Property Disputes Are Reshaping the Art World—But How?*, SLATE, July 28, 2003, <http://www.slate.com/id/2086136/>.

⁵⁵ See generally Africa Reparations Movement (ARM), *supra* note 5.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Shelby White, *Building American Museums: The Role of the Private Collector*, in WHO OWNS THE PAST?, *supra* note 5, at 166 (The Metropolitan Museum of Art, the Oriental Institute of Chicago, and the University of Pennsylvania, all benefited from the practice of partage).

⁵⁹ Gibbon, *supra* note 5, at 109. Elgin, an enthusiast of the art of ancient Greece, served as British ambassador to the Ottoman Empire from 1799 to 1803. *Id.* By 1800, when Elgin’s men arrived, Greece had been ruled by the Ottomans for 400 years. *Id.*

⁶⁰ *Id.* at 111.

acquiring the marbles stemmed from his desire to “raise the level of understanding and appreciation of Greek art, and to revitalize artistic endeavor in Britain.”⁶¹ Upon the arrival of the Parthenon marbles in Britain, Elgin’s actions immediately became a point of contention.⁶² Although the marbles ultimately were acquisitioned by the British Museum, the Greek government still challenges rightful ownership over the marbles and questions regarding rightful ownership remain at the center of the cultural property debate.⁶³ As the above example illustrates, imperialism essentially excused looting through the very loose laws that surrounded partage programs for archaeological digs.

UNESCO 1970 requires that internationalists modernize their view to understand that there is no innate right to any of the items that come from the ground of other nations.⁶⁴ “The world is increasingly divided: more nation-states than ever before, and more nation-states with laws that restrict the international movement in archaeological and cultural property found within their borders.”⁶⁵ By embracing this view that there is no innate right to another nation’s treasures, internationalists may be able to ensure that archaeological items will travel the world.

IV. MOVING FORWARD: SOLUTIONS

Recently, both museums, as internationalist proponents, and art-rich nations began to make strides in the mutual goal of protecting antiquities. However, to continue moving forward with the protection of antiquities, each side must make further concessions. UNESCO 1970 greatly affected the way in which the art-world views the collection of antiquities worldwide. Most significantly, UNESCO 1970 governs claims of repatriation and the sale and purchase of looted antiquities.⁶⁶ Yet UNESCO 1970 cannot alone resolve the conflict between the universal museum and the art-rich nations. Art-rich nations, as discussed, are continually concerned with protecting the cultural heritage that still remains in and on their land, as well as the ownership and repatriation of the cultural heritage that was taken from

⁶¹ *Id.* at 112.

⁶² *Id.* While most believed that the marbles should go to the British Museum for their protection, the minority advocated for their return to the Ottoman government. *Id.*

⁶³ See, e.g., *Elgin Marbles: The Story so Far*, BBC, Nov. 30, 1999, http://news.bbc.co.uk/2/hi/uk_news/543362.stm.

⁶⁴ UNESCO 1970, *supra* note 9, pmb. See Solomon, *supra* note 52, at 239 (“The nationalist supporters of this view say that all Egyptian material should be in Egypt, all British art in Britain, all Benin masks in Benin.”).

⁶⁵ CUNO, *supra* note 39, at 16.

⁶⁶ See UNESCO 1970, *supra* note 9, pmb.

them.⁶⁷ Conversely, the greatest concern of a universal museum is its continued existence; because the licit acquisition of antiquities has become increasingly difficult, the universal museum fears stagnation, and, even worse, disappearance.⁶⁸

There is no merit in the destruction of the universal museum. Without museums celebrating a vast array of cultures, the understanding of cultural history and the understanding of other nations would suffer greatly.⁶⁹ So, while nationalists and internationalists still find themselves on opposite sides of the art market with competing agendas, it is possible to “thread a path through the thicket of competing agendas.”⁷⁰

It is possible to continue to protect the antiquities and cultural heritage of art-rich nations while fostering the integrity and importance of the universal museum in that both nationalists and internationalists have an interest in the appreciation of antiquities. Though their method of appreciation may differ, proponents of each side understand the importance of cultural history for humanity. Without compromise between art-rich nations and universal museums, multi-cultural understanding and acceptance will not continue to grow. However, with further concessions by both nationalists and internationalists, the public can appreciate the art and history of nations worldwide while understanding the full provenance and ownership of that history.

A. *Forgiving Past Indiscretions & Looking to the Future*

To move forward, the first concession must be made by art-rich nations. Nationalists must forgive past indiscretions made by museums in order to make any strides forward with this debate. Arguments and lawsuits filed regarding antiquities acquired a century ago only stall the debate and help neither internationalists nor nationalists further their directed goals.⁷¹

Historically, universal museums have taken part in activities that have proven destructive to the integrity of many nations' cultural heritage,

⁶⁷ See Saving Antiquities for Everyone, Cultural Heritage in Danger: Why Should We Care?, <http://www.savingantiquities.org/heritagewhy.php> (last visited Mar. 16, 2010).

⁶⁸ See WAXMAN, *supra* note 1, at 371–72.

⁶⁹ “The great Western museums were built with a message of a hierarchy of cultures. . . . If we don’t understand the origins of human history, we are nowhere. . . . We can’t change the past. But we can continually reconsider it.” *Id.* at 372 (quoting Los Angeles County Museum of Art director Michael Govan).

⁷⁰ *Id.*

⁷¹ This refers only to those antiquities acquired before 1970—those illegally acquired from 1970 to the present are governed by UNESCO 1970, and must be returned to legally abide by the treaty. See UNESCO 1970, *supra* note 9.

such as acquiring black market items and artifacts with no provenance.⁷² Such acquisitions impede society's understanding of history because artifacts lacking clear provenance do not tell a clear story regarding their origins and the context in which they were used. Yet over the past ten years museums have begun to trade their traditional "eighteenth century Enlightenment ideals" of collection for more modern values.⁷³ Most universal museums, field museums, and even smaller period-driven museums now condemn their acquisition practices of the past.⁷⁴ By altering their acquisition policies and abiding by the strict rules in international treaties, bilateral treaties, and even national policies, museums bolster the universal condemnation of the illicit art market.

This strict rule-abiding attitude reflects both the international and national viewpoints of many major art museums. For example, in 2002 the International Group of Organizers of Large Scale Exhibitions⁷⁵ released a statement in which the international museum community recognized that the "illegal traffic in archaeological, artistic, and ethnic objects must be firmly

⁷² The Metropolitan Museum of Art and the Cleveland Museum of Art are only two examples, among many, of the former destructive acquisition policies of universal museums. See, e.g., Press Release, Metro. Museum of Art, Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture (Feb. 21, 2006), available at http://www.metmuseum.org/Press_Room/full_release.asp?prid={F9704AC3-297B-4704-999B-111ACC8E6804}; *U.S. Museum Returns 14 Stolen Artifacts to Italy*, REUTERS, Nov. 19, 2008, <http://www.reuters.com/article/idUSTRE4AI68Z20081119>.

⁷³ WAXMAN, *supra* note 1, at 371 (i.e., abandonment of oppressive partage agreements and black-market trade).

⁷⁴ In October 2006 the J. Paul Getty Museum strengthened their acquisition policy, requiring works of ancient art and archaeological materials being considered for acquisition to have been documented outside their countries of origin prior to the enactment of UNESCO 1970. AIA, Archaeology Watch: J. Paul Getty Museum, <http://www.archaeological.org/webinfo.php?page=10387> (last visited Mar. 16, 2010). In early 2007, the Indianapolis Museum of Art declared a complete moratorium on the acquisition of undocumented antiquities. The moratorium will remain in effect while the museum "evaluates and reframes" its current policies on the collection of antiquities and ancient art." AIA, Archaeology Watch: Indianapolis Museum of Art Declares Moratorium on Antiquities Acquisitions, <http://www.archaeological.org/webinfo.php?page=10427> (last visited Mar. 16, 2010). Maxwell Anderson, the IMA's Director and CEO, commented:

We hope it will be a small step towards stemming the tide of illegal excavation or clandestine removal of accidentally discovered objects from countries [around] the world . . . [and] will encourage other major collecting institutions around the world to take a similar step, along with collectors and dealers.

Id.

⁷⁵ This Group is comprised of directors of forty of the world's largest museums and galleries, including the Metropolitan Museum of Art, the Louvre, the Hermitage, the State museums of Berlin, and the British Museum. *Shifting the Blame*, FORBES, Jan. 21, 2002, http://www.forbes.com/2003/01/21/cx_0121hot_print.html.

discouraged.”⁷⁶ More significantly, the Association of Art Museum Directors (AAMD)⁷⁷ has repeatedly released guidelines for its constituents to follow.⁷⁸ As recently as June 2008, the AAMD released a new report on acquisition of archaeological materials and ancient art.⁷⁹ In the press release accompanying the new report, Gail Andrews, the President of the AAMD, commented:

Art museums play a dynamic, central role in the artistic and cultural life of their communities and the nation. . . . Through public exhibitions and a broad spectrum of education, research, publication, and other programs, art museums provide a window into cultures over the span of human history. Museums evolve their professional practices as the world changes and the new AAMD Report provides our members guidance when considering the acquisition of archaeological materials and ancient art.⁸⁰

The AAMD's new report is guided by the notion that there is a public benefit in art museums exhibiting, collecting, and preserving works of art, but that it is still important to abide by the law in considering the acquisition of antiquities; the acquisition must be responsible, ethical, and, of course, legal.⁸¹ Dan Monroe, Chair of the AAMD Subcommittee which authored the new Report, suggested that “[w]ith the adoption of these Guidelines, [the

⁷⁶ INT'L GROUP OF ORGANIZERS OF LARGE SCALE EXHIBITIONS, DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS (Oct. 2002), <http://www.tomflynn.co.uk/UniversalMuseumsDeclaration.pdf>. Comparatively, it is important to recognize that the main crux of this declaration was to identify the trouble with looting, but to maintain that repatriation of items acquired in the past was essentially an impossible task.

We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

Id.

⁷⁷ The AAMD is a membership organization representing 184 directors of major art museums in the U.S., Canada, and Mexico. Its purpose is to aid its members in establishing and maintaining the highest standards for themselves and their institutions. About AAMD, <http://www.aamd.org/about/> (last visited Mar. 16, 2010).

⁷⁸ See, e.g., Press Release, AAMD, New Report on Acquisition of Archaeological Materials and Ancient Art (June 4, 2008) [hereinafter AAMD Press Release], available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting Gail Andrews, President of AAMD and Director of the Birmingham Museum of Art).

⁸¹ *Id.* (quoting Michael Conforti, incoming President of AAMD and Director of the Sterling and Francine Clark Art Institute). The guidelines provide strict suggestions for changes that must be made to museum acquisition policies regarding purchase, gift, bequest, and exchange of archaeological materials and ancient art. See *id.*

AAMD] look[s] forward to bypassing old debates that have divided the cultural community and entering into a new era of collaboration with archaeological and other organizations to devise new, effective ways to safeguard heritage resources worldwide.”⁸²

The Report’s implementation was almost immediate. In November 2008, the Portland Museum of Art was the first to post an object since the guideline revision’s publication.⁸³ The museum offered a thirty-six inch tall stone sculpture with little ownership history for international scrutiny by placing it on a web site where Southeast Asian cultural organizations and governments could examine it and possibly make a claim for the work.⁸⁴ The AIA announced its complete approval of the implementation of the AAMD’s new guidelines by issuing the following statement: “[The AIA] applauds the AAMD’s revision of its Report and Guidelines on the Acquisition of Archaeological Materials and Ancient Art released on June 4. These new guidelines incorporate many of the principles for museum acquisitions of antiquities that the AIA has long advocated.”⁸⁵ This press release is a dramatic change from past AIA commentary on AAMD policies and guidelines.⁸⁶ Furthermore, while the AIA comments that there are certainly some issues unresolved by the new AAMD guidelines,⁸⁷ this is the greatest stride

⁸² *Id.* The Portland Museum of Art is a great example of the new Report’s implementation. See *Portland Museum Asks: Do You Know This Idol?*, SEATTLEPI, Nov. 4, 2008, http://seattlepi.nwsourc.com/local/386299_statue05.html (last visited Mar. 16, 2010).

⁸³ *Id.*

⁸⁴ *Id.* The notion behind the offer is that if someone is able to prove that the sculpture was stolen from or illegally exported out of their country, then the Portland Museum will return the sculpture. Maxwell Anderson, the Director and CEO of the Indianapolis Museum of Art, commented that actions of this nature by museums “raise[], in high relief, what [museums] should do about works in circulation without provenance.” *Id.*

⁸⁵ Response to New AAMD Guidelines, *supra* note 28.

⁸⁶ Compare *id.*, with AIA PROF’L RESPONSIBILITIES COMM., PRINCIPLES FOR MUSEUM ACQUISITIONS OF ANTIQUITIES (Mar. 2006), available at http://www.archaeological.org/pdfs/archaeologywatch/museumpolicy/AIA_Principles_Museum_Acquisition.pdf, and AIA PROF’L RESPONSIBILITIES COMM., AIA STATEMENT ON MUSEUM ACQUISITIONS AND LOANS OF ANTIQUITIES AND ANCIENT ART WORKS (Mar. 2006), available at <http://www.archaeological.org/webinfo.php?page=10344>.

⁸⁷ Response to New AAMD Guidelines, *supra* note 28.

Some issues are not resolved by the new AAMD guidelines, such as cases in which a museum cannot establish the full ownership history of an antiquity as far back as 1970. The new guidelines permit such an acquisition to proceed based on the museum’s informed judgment, a factor that leaves much to the discretion of the individual museum. This discretion is to be informed by balancing the potential financial and reputational harm to the museum against the benefit of acquiring the object. It is the AIA’s hope that concerns for the rights of the country of origin and the potential harm to the world’s cultural heritage will be incorporated in this decision.

Id.

that the art community has made toward reaching a compromise in the cultural property debate.

In light of these changes, nationalists must now move forward and forgive past indiscretions so that future relations might be strengthened. This forgiveness, however, should be implemented differently depending on the circumstances surrounding the looting and subsequent acquisition of cultural property. Any item acquired after 1970 must be returned to the nation from which the item was taken in accordance with UNESCO 1970.⁸⁸ Alternatively, if a looted antiquity was acquired prior to UNESCO 1970, a museum, collector, or auction house should not be required to return the piece of art in question.⁸⁹ Museums should also recognize and openly identify a history of plunder and misappropriation.⁹⁰ As opposed to ignoring a shamed history, museums can teach future generations the importance of a licit market by publicly recognizing mistakes from the past.⁹¹

However, those items looted as a result of war crimes, such as pillage, may have a different fate than those looted from archaeological sites and sold on the black market, or even those removed as a part of a partage program. Looted items that are casualties of war crimes must be returned to those nations or people from whom they were stolen.⁹²

B. Enforcement & Use of National & International Committees of the Blue Shield

The next important step in working towards a compromise rests on all nations—both art-rich and those interested in purchase and exhibition. Though it will primarily benefit the national interest in antiquities yet to be unearthed, every nation with an interest in both the protection and sharing of

⁸⁸ UNESCO 1970, *supra* note 9, art. 7.

⁸⁹ An example of this policy was demonstrated most recently at a sale at Christie's auction house. In early 2009, Christie's in Paris auctioned off Yves St. Laurent's vast collection. China urged Christie's to withdraw two bronzes looted from the imperial Summer Palace in Beijing nearly 150 years ago, but was rebuffed when Christie's refused. The legality of Christie's refusal is two-fold: (1) France never ratified UNIDROIT 1995; and (2) more importantly, the agreement does not apply retroactively to objects looted decades or centuries ago. David Barboza, *China Seeks to Stop Paris Sale of Bronzes*, N.Y. TIMES, Feb. 16, 2009, at C1.

⁹⁰ "No museum can legitimately claim to be a custodian of history if it ignores the history of its own objects for reasons of personal convenience." WAXMAN, *supra* note 1, at 373.

⁹¹ *Id.*

⁹² Examples of how this policy is both followed and ignored are demonstrated by the history of World War II art repatriation suits filed worldwide. See Int'l Foundation for Art Research, World-War II Era/Holocaust Related Art Loss, http://ifar.org/case_law.php?ID=1 (last visited Mar. 16, 2010).

cultural heritage must become a party to the 1954 Hague Convention⁹³ and a member of the International Committee of the Blue Shield (ICBS).⁹⁴

The ICBS has often been likened to the “cultural equivalent of the Red Cross.”⁹⁵ “It is the protective emblem specified in the 1954 Hague Convention . . . for marking cultural sites to give them protection from attack in the event of armed conflict.”⁹⁶ Founded in 1996, the ICBS was formed as an advisory body to both the Committee and States that were a party to the 1954 Hague Convention.⁹⁷ In 1999, a Second Protocol to the Hague Convention was adopted and came into force after its ratification in 2004.⁹⁸ The Second Protocol modified the first in several ways: (1) “it greatly limited the circumstances in which an attack on cultural property could be mounted on the ground of ‘military necessity;’”⁹⁹ (2) it made provisions for “‘exceptional protection’ for the most important sites and institutions;”¹⁰⁰ and, most importantly, (3) “it introduced the concept of ‘a cultural war crime.’”¹⁰¹ This modification not only greatly enhanced the protection that designated cultural sites received, but also the designation of a “cultural war crime” finally allowed prosecution of those nations responsible for destruction of cultural institutions.¹⁰² With the ratification of the Second Protocol, the ICBS gained official recognition.¹⁰³

⁹³ 1954 Hague Convention, *supra* note 21. The 1954 Hague Convention required states to: (1) “prepare in times of peace for the safeguarding of cultural property against the foreseeable effects of armed conflicts;” (2) “respect cultural property . . . by refraining from any use of the property . . . likely to expose it to damage or destruction in the event of armed conflict;” (3) “prohibit, prevent and . . . put a stop to . . . theft, pillage or misappropriation of . . . any acts of vandalism directed against [] cultural property;” and (4) “introduce . . . military regulations . . . to ensure observance of the present Convention [] and to foster respect . . . for the culture and cultural property of all peoples.” *Id.* arts 3, 4(1), 4(3), 7(1).

⁹⁴ Ross Shimmon, *The Blue Shield: The Cultural Red Cross?*, World Library and Information Congress: 69th IFLA General Conference and Council (July 31–Aug. 1, 2003), *available at* <http://archive.ifla.org/IV/ifla69/papers/600e-Shimmon.pdf>.

⁹⁵ ICBS, About the Blue Shield, http://www.ancbs.org/index.php?option=com_content&view=article&id=41&Itemid=19 (last visited Mar. 16, 2010).

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ U.S. Committee of the Blue Shield, International Treaties and Other Legal Instruments: 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, <http://uscbs.org/resources.htm> (last visited Mar. 16, 2010).

⁹⁹ Shimmon, *supra* note 94, at 3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“[This means] that those responsible for the deliberate damage to and destruction of cultural institutions (and collections) can be prosecuted.”).

¹⁰² *Id.*

¹⁰³ *Id.*

The mission of the ICBS is to protect the world's cultural heritage in emergency situations.¹⁰⁴ Moreover, members of the ICBS have the opportunity to establish national Blue Shield committees. The ICBS describes that it is:

[V]ital that the international initiative is taken up and supported by local initiatives. Blue Shield Committees are being formed in a number of countries. They bring together the different professions, local and national government, the emergency services and the armed forces. They provide a forum for them to improve emergency preparedness by sharing experiences and exchanging information. They provide a focus for raising national awareness of the threats to cultural heritage. They promote the ratification and implementation by national governments of the Hague Convention.¹⁰⁵

So far, only nineteen nations have formed national committees¹⁰⁶ and nineteen have committees under construction.¹⁰⁷ The further formation of National Committees will encourage self-regulation and will, in turn, provide greater protection to art-rich nations and to the cultural property therein.¹⁰⁸

¹⁰⁴ *Id.* at 4.

Our remit is to: (1) facilitate international responses to threats or emergencies threatening cultural property; (2) to encourage safeguarding and respect for cultural property, especially by promoting risk preparedness; (3) to train experts at national and regional level to prevent, control and recover from disasters; (4) to act in an advisory capacity for the protection of endangered heritage; and (5) to consult and co-operate with other bodies including UNESCO, ICCROM and the International Committee of the Red Cross (ICRC).

Id.

¹⁰⁵ ICBS, Working for the Protection of the World's Cultural Heritage, http://www.ancbs.org/index.php?option=com_content&view=article&id=39&Itemid=13 (last visited Mar. 16, 2010).

¹⁰⁶ The ICBS website states that the following nations have formed National Committees: Australia, Austria, Belgium, Benin, Chile, Cuba, Czech Republic, France, Israel, Italy, Macedonia, Madagascar, The Netherlands, Norway, Poland, Senegal, U.K., Ireland, and the U.S. ICBS, List of National Committees, http://www.ancbs.org/index.php?option=com_content&view=article&id=83&Itemid=45 (last visited Mar. 16, 2010).

¹⁰⁷ The ICBS reports on their website that the following nations have committees under construction: Argentina, Azerbaijan, Bolivia, Brazil, Canada, Colombia, Germany, Hungary, India, Indonesia, Luxemburg, Mexico, Palestine, Peru, Russia, Slovenia, South Korea, Switzerland, and Venezuela. *Id.*

¹⁰⁸ For example, the U.S. Committee of the Blue Shield was formed in 2006 in response to the "heritage catastrophes around the world." U.S. Committee of the Blue Shield, http://uscbs.org/about_us.htm (last visited Mar. 16, 2010). The U.S. Committee's goals include: (1) coordination of the military, U.S. government, and other cultural property organizations to protect cultural property worldwide during armed conflict; and (2) to provide and assist cultural organizations in emergency planning for situations involving armed conflict. *Id.* This demonstration of commitment to the protection of cultural property is a far stride from the U.S.' complete disregard for cultural property and archaeological sites with its invasion of Iraq in 2003. See generally Elizabeth C. Stone, *Patterns of Looting in Southern Iraq*, 82

National committees can multiply effectiveness by bringing together the different professions. . . . The great strength of Blue Shield is that it is cross-sectoral, bringing together professions and institutions across the cultural spectrum. By pooling their expertise, and drawing in military authorities and emergency services, the Blue Shield offers a powerful model for managing disaster risks at a national level.¹⁰⁹

If nations worldwide would commit to the formation of National Blue Shield Committees, a greater number of antiquities could remain protected from armed-conflict, and art-rich nations and museums may be able to come closer to a compromise.

C. *Creating a Licit Market and Utilization of Sponsor, Loan, and Renting Programs*

Finally, both art-rich nations and collecting nations must commit to a licit market and stable sponsor and loan programs. As important as it is to retain items of cultural heritage within host-nations, it is equally important to continue to disperse cultural artifacts from all over the world to other nations so that humanity's understanding of differing cultures may continue to grow.¹¹⁰ A strong licit market, along with established loan and sponsor programs, will help generate revenue for the art-rich nations that are struggling to protect the vast archaeological sites yet to be excavated and help to display important examples of cultural history worldwide.¹¹¹

ANTIQUITY MAG. 125 (2007), available at <http://www.antiquity.ac.uk/ant/082/ant0820125.htm> (describing the looting and destruction of archaeological sites in Iraq).

¹⁰⁹ George Mackenzie, *The Blue Shield: Symbol of Cultural Heritage Protection*, at 3, World Library and Information Congress: 68th IFLA General Conference and Council (Aug. 18–24, 2002), available at <http://archive.ifla.org/IV/ifla68/papers/093-099e.pdf>.

¹¹⁰ For example:

[T]he Metropolitan Museum of Art was founded on April 13, 1870, “to be located in the City of New York, for the purpose of establishing and maintaining in said city a Museum and library of art, of encouraging and developing the study of the fine arts, and the application of arts to manufacture and practical life, of advancing the general knowledge of kindred subjects, and, to that end, of furnishing popular instruction.”

METROPOLITAN MUSEUM OF ART, ANNUAL REPORT 9 (2008–2009) (quoting Charter of the Metropolitan Museum of Art), available at http://www.metmuseum.org/about/pdf/annual_report/Entire_2009_Annual_Report.pdf.

¹¹¹ Poorer nations often have difficulty funding projects for protection and display of their cultural heritage because of the great expense it takes on a country's budget. For example, Greece allocated 1.5 billion Euro to the Ministry of Culture alone. See CHRISTOS ZACHOPOULOS, ABOUT GREECE: CULTURE, MUSEUMS, ANTIQUITIES 190, available at http://video.minpress.gr/wwwminpress/aboutgreece/aboutgreece_museums.pdf.

1. The current state of antiquities in art-rich nations

Italy and Japan provide two varying perspectives on the current state of art-rich nations and how the nationalist view limits them. While both suffer from an extensive history of having their respective cultural properties looted and misappropriated, each has taken a unique approach to the future protection of their nation and its history.

a. Italy case study

Italy is one of the most publicly identified art-rich countries that has fallen victim to looting and an extensive history of cultural property misappropriation. Italy has experienced everything from *tombaroli*¹¹² to invading armies to natural catastrophes¹¹³ as a threat to their cultural property,¹¹⁴ and, accordingly, Italy has established a series of laws first codified in 1909 “declaring that ‘all manner of things moveable or immovable’ that are at least 50 years old and ‘of historical, archaeological, paleo-anthropological interest’ fall under the government’s protection.”¹¹⁵ Unique property laws entitle the government to assert ownership rights to any item dug up from a citizen’s land, though the finder or owner will often be entitled to a reward.¹¹⁶ Although often criticized, the Italians rationalize their strict laws,

¹¹² *Tombaroli* are typically home-grown Italian citizens who steal from archaeological digs at night to supplement their incomes. Accordingly, the Italian government assigned a special task-force to deal with the *tombaroli*. See generally Alastair Smart, *Maurizio Fiorilli: Scourge of the Tomb Raiders*, TELEGRAPH.CO.UK, Aug. 10, 2008, <http://www.telegraph.co.uk/culture/art/3558325/Maurizio-Fiorilli-scourge-of-the-tomb-raiders.html> (last visited Mar. 16, 2010).

¹¹³ The eruption of Mount Vesuvius in A.D. 79 destroyed the entire city of Pompeii as well as the surrounding towns Herculaneum, Oplontis, and Terzigno. Lost with the cities was rich architecture and exquisite works of art. The Field Museum, Pompeii: Stories From and Eruption, <http://www.fieldmuseum.org/pompeii/introduction.asp> (last visited Mar. 16, 2010).

¹¹⁴ Elisabetta Povoledo, *Italy Defends Treasures (and Laws) with a Show*, N.Y. TIMES, Oct. 8, 2008, at C6.

¹¹⁵ *Id.* Moreover, these laws allow for the regulation of sale, export or restoration of any property that is more than fifty years old. *Id.* The government has the authority to acquire any object for sale, so long as it matches the original asking price. *Id.* Annex A of the 2004 Code of the Cultural and Landscape Heritage enumerates items considered to be categories of cultural property. The list covers exhaustively every object plausibly considered cultural property plus some. One of the more outlandish inclusions is “means of transport dating back 75 years.” MINISTERO PER I BENI E LA ATTIVITA CULTURALI, CODE OF THE CULTURAL AND LANDSCAPE HERITAGE (Jan. 22, 2004) (Italy), available at http://portal.unesco.org/culture/fr/files/25850/11095449593Codice_in_inglese.pdf/Codice+in+inglese.pdf.

¹¹⁶ Povoledo, *supra* note 114.

commenting that “art is the patrimony of humanity” and that it is the government’s duty to “ensure that it continues to exist.”¹¹⁷

While Italy’s cultural property laws remain extremely strict and severely limit the permanent export of antiquities, Italy recently made an attempt to share its antiquities with the world.¹¹⁸ In October 2008, Italy sponsored an exhibition celebrating the success of the century-old cultural heritage laws. The show, titled “Ruins and the Rebirth of Art in Italy,” was Italy’s attempt to celebrate the success of century-old cultural heritage legislation.¹¹⁹ Pieces on display included the “Marching Artemis”¹²⁰ and a second-century marble statue of Dionysus,¹²¹ both great triumphs under Italian repatriation laws.¹²²

The opening of this show, however, coincided with one of the more controversial decisions made by the Italian government regarding the management of its cultural property. Italy’s recent appointment of Mario Resca, the former and notorious chairman of McDonald’s Italia, as “adviser on value-adding for museums,” is a highly controversial decision.¹²³ While Italy is no doubt rich in culture, it recognizes that many of its ancient sites are crumbling from a lack of attention.¹²⁴ Even as an industrialized nation, it is difficult for the country to keep up with the ever-present demands of preservation.¹²⁵ Accordingly, Resca suggested the possibility of renting works

¹¹⁷ *Id.* (quoting Cosimo Ceccuti, President of a national committee for the celebration of conservation laws).

¹¹⁸ *Id.*

¹¹⁹ New York Times, A Century of Italian Art (Slide Two), http://www.nytimes.com/slideshow/2008/10/07/arts/08heritageslide_2.html (last visited Mar. 16, 2010).

¹²⁰ “Marching Artemis” was “dug up illegally around 1994 and then sold to Swiss art traffickers. The traffickers tried in turn to sell it to Japanese and American collectors when the looted pieces were identified by Italy’s elite art-theft squad.” Povoledo, *supra* note 114.

¹²¹ The statue of Dionysus:

[W]as given to Hitler by Mussolini in January 1944. It came back to Italy in 1991 after German scholars lobbied for its return. (Italy is still hoping to retrieve the head of the statue, which is thought to have been illegally excavated in 1928 along the Appian way near Castel Gandolfo, transported to England and donated in 1966 to the Ashmolean Museum in Oxford.)

Id.

¹²² *Id.*

¹²³ Resca became the first director-general or “supermanager” of 464 nationally owned museums and archaeological sites. He hopes to boost attendance at the museums by making museums more accessible and the overall visit a more positive experience. See Francis X. Rocca, *A Cultural Conversation/With Mario Resca: A Turnaround Specialist Takes on Italy’s Museums*, WALL ST. J., Jan. 13, 2009, at D7; Elisabetta Povoledo, *Cheeseburgers Get into the Mix in the Italian Debate on Museums*, N.Y. TIMES, Nov. 22, 2008, at C1.

¹²⁴ “The country is burdened and blessed with a staggering quantity of archaeological and artistic monuments and treasures.” WAXMAN, *supra* note 1, at 287.

¹²⁵ *Id.*

of art to foreign museums.¹²⁶ While Resca's plans for the future of Italy's museums and cultural sites certainly do not come without great criticism,¹²⁷ they are at the very least demonstrative of Italy's hope to provide better protection for its cultural heritage by bolstering the economy surrounding the arts.

b. Japan case study

Japan has also fallen victim to cultural property misappropriation.¹²⁸ However, Japan is frequently characterized as a safe-haven for stolen artifacts from other nations.¹²⁹ Scholars attribute this mischaracterization to three factors: (1) Japan's concentration of discretionary wealth with interested and capable buyers attracting the flow of illicit cultural assets;¹³⁰ (2) its position as a significant political and economic international force;¹³¹ and (3) the view that Japan's laws are sympathetic to those items with questionable provenance by metaphorically wiping their historical plate clean.¹³²

Internationally, however, Japan's cultural heritage model is recognized as an ideal hybrid of nationalist and international principles. Japan employs a comprehensive system that both preserves and protects cultural heritage,¹³³ but also allows for the promotion of Japanese culture worldwide

¹²⁶ Povoledo, *supra* note 123.

¹²⁷ "[T]he art world here is in an uproar over suggestions . . . that the country should think of its state museums and archaeological sites as generators of revenue." *Id.*

With a highly varied resume, including stints as a Versace Group director . . . and most famously (or notoriously) as chairman of McDonald's Italia, . . . Resca has already sparked protest, in the form of a petition circulated by an Italian research institute. Signed by 7,000 people, including curators at the Louvre and the Metropolitan Museum of Art, the petition warns darkly against reducing art to a "negotiable commodity" and "introducing a process of disposable consumerism" into Italy's cultural heritage.

Rocca, *supra* note 123.

¹²⁸ Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 813 (2008).

¹²⁹ *Id.* at 813–14 (explaining the strained relationship between Japan and Korea).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Appendix 1: Japan's Protection of Its Cultural Heritage—A Model, in WHO OWNS THE PAST?*, *supra* note 5, at 331. In accordance with the Law for the Protection of Cultural Properties, cultural properties in Japan are divided into categories: "National Treasures, Important Cultural Properties, Important Intangible Cultural Properties, Important Tangible/Intangible Folk Cultural Properties, Historic Sites, Places of Scenic Beauty and Natural Monuments." Japanese Ministry of Education, Culture, Sports, Science and Technology, Protection and Utilization of Cultural Properties [hereinafter MEXT], <http://www.mext.go.jp/english/org/struct/040.htm> (last visited Mar. 16, 2010).

through “museum exhibitions, a liberal trade regimen, grants for scholarships, and conservation assistance for important works of art of Japanese origin in collections throughout the world.”¹³⁴ Japan designed its cultural property law in this way in order to promote future international exchange.¹³⁵ “For almost every registered important work of art, there are many unregistered works of comparable age and quality.”¹³⁶ As of March 1, 2005, the Japanese government designated 12,435 objects as “Important Cultural Properties” and, of those, only 1,069 were categorized as “National Treasures.”¹³⁷ Since national treasures are most severely restricted in transfer and in most cases are ineligible for export outside of Japan, the government works to keep the number of registered national treasures low.¹³⁸ Japan’s intention behind its cultural property law was to preserve cultural property so its citizens could utilize their heritage and make a contribution to the evolution of world culture.¹³⁹

Under the 2004 Amendment of the Law for the Protection of Cultural Properties, cultural property protection was extended to cultural landscapes and folk technology for the first time. The registration system was also expanded to include tangible cultural properties other than architectural structures (the amendment came into force on April 1, 2005).

Id.

¹³⁴ *Appendix 1: Japan’s Protection of Its Cultural Heritage—A Model, supra* note 133.

¹³⁵ MEXT, *supra* note 133.

Recognizing that outstanding cultural properties around the world are the common property of humanity, the Agency for Cultural Affairs is engaged in international cooperation for the preservation and restoration of cultural properties. Such cooperation includes the holding of international conferences and the implementation of training. Furthermore, the Agency is holding overseas exhibits of classical Japanese art, including national treasures and important cultural properties, is working to deepen the understanding of Japanese history and culture through Japan’s outstanding cultural properties, and is promoting mutual understanding with other countries by holding exhibitions of valuable cultural properties from other countries in the museums and art museums of Japan.

Id.

¹³⁶ *Appendix 1: Japan’s Protection of Its Cultural Heritage—A Model, supra* note 133, at 333.

¹³⁷ MEXT, *supra* note 133.

¹³⁸ *Appendix 1: Japan’s Protection of Its Cultural Heritage—A Model, supra* note 133, at 333.

¹³⁹ Bunkazai Hogo-hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950, art. 1 (Japan). Therefore, the importance of protection and preservation extends beyond self-protection. Japan designated a number of artworks from China and Korea as “National Treasure” and “Important Cultural Property.” *Appendix 1: Japan’s Protection of Its Cultural Heritage—A Model, supra* note 133, at 335.

Two of the more unique aspects of the Japanese cultural-property model are: (1) Japan's interpretation of the term "protection"¹⁴⁰ and (2) its emphasis on cultural exchange.¹⁴¹ "In some art-rich countries the term 'protection' becomes a euphemism for nationalization of cultural property. In Japan, 'protection' is defined entirely on the basis of physical protection and necessary conservation of the art object, site or monument."¹⁴² Furthermore, cultural exchange is one of the most important aspects of Japan's cultural-property policies.¹⁴³ Both Japan's government and its citizens hold Japanese cultural property in very high regard.¹⁴⁴ The cooperative approach created through Japan's cultural property laws demonstrates a deep commitment to the preservation of cultural heritage for the future.¹⁴⁵

2. The positive aspects of licit market and trade programs

The current auction market for antiquities has become inundated with off-the-chart prices. Critics describe the auction of antiquities at such astronomical prices as a "catastrophe," putting archaeological sites in greater danger than ever before.¹⁴⁶ Some archaeologists even argue that the astronomical prices inadvertently encourage private collectors to seek out a

¹⁴⁰ *Appendix 1: Japan's Protection of Its Cultural Heritage—A Model*, *supra* note 133, at 333–34.

¹⁴¹ In a 2003 report by the Commissioner's Advisory Group on International Cultural Exchange, a section entitled "Time is Ripe for Japan to Disseminate Its Culture to the World" stated:

Amidst a tug-of-war between cultural change spurred by deepening international interdependence and people's desire to maintain their own cultural heritage, there is a growing need to conduct international cultural exchanges of a kind that can enhance people's life styles in a culturally rich, peaceful, and pluralistic manner. The operative concept in carrying out such exchanges must be "respect for cultural diversity." . . . By taking the lead in this form of international cultural exchange, Japan can transmit to the world a message of peace—one that declares "Now, as never before, is the time for cultural exchange among nations."

AGENCY FOR CULTURAL AFFAIRS JAPAN, COMM'R ADVISORY GROUP ON INT'L CULTURAL EXCHANGE, ABOUT THE FUTURE PROMOTION OF INT'L CULTURAL EXCHANGE REPORT 3–4 (Mar. 24, 2003), available at <http://www.bunka.go.jp/english/pdf/gattaiban.pdf>.

¹⁴² *Appendix 1: Japan's Protection of Its Cultural Heritage—A Model*, *supra* note 133, at 333–34.

¹⁴³ *Id.* at 336.

¹⁴⁴ In fact, "[t]he veneration in which many Japanese people hold these objects provides greater assurance that they will not be let go than even the most restrictive legislation." *Id.* at 335.

¹⁴⁵ *Id.* at 337.

¹⁴⁶ Sotheby's auctioned a 3¼-inch sculpture of a lioness from Mesopotamia, which was on loan to the Brooklyn Museum for sixty years. With a pre-sale estimate of \$14–18 million, the limestone figure was sold for \$57.2 million. Nadira A. Hira, *Really Old Money*, *FORTUNE*, Oct. 27, 2008, at 176.

black market to acquire antiquities for their personal collection.¹⁴⁷ They further contend that illegal trafficking in antiquities and the looting of archaeological sites has increased over the past five years, despite the enforcement of UNESCO around the world.¹⁴⁸ In fact, John Merryman suggested that UNESCO's 1976 Recommendation opposed legitimate international trade, directly resulting in a rise in prices and an encouragement of an illicit trade.¹⁴⁹ Now, instead of undocumented antiquities going to museums in countries that respect cultural patrimony laws, those antiquities offered on the illicit market are "either remaining in the private domain of private collectors and dealers or being sold or donated to museums in countries that do not enforce foreign patrimony laws."¹⁵⁰ The sale of antiquities through illicit markets results in two problems: (1) these items are essentially lost to the world; and (2) the fact that an illicit market for antiquities still exists denotes the failure of UNESCO 1970 to deter criminals from looting and essentially destroying invaluable archaeological sites.

The creation of: (1) a more fluid and licit market offering items of cultural property for trade or sale;¹⁵¹ and (2) a loan or renting program that will allow host-nations to generate revenue from their property to be reinvested into their cultural property protection programs,¹⁵² will help to remedy these problems. While "[the] AAMD [openly] encourages the creation of licit markets and strongly urges all nations to provide a legal method for the sale and export of art, thereby furthering the goal of deterring the illicit excavation and trafficking of archaeological materials and ancient art,"¹⁵³ it is more likely that art-rich nations would be amenable to the loan and possible rental of their property for extended periods of time. For example, though accompanied by unfortunate circumstances, the agreement negotiated for the return of the Euphronios Krater between the Metropolitan Museum of Art and the Italian Ministry of Culture included a clause in which the Ministry agreed to provide the Metropolitan Museum of Art with long-term future

¹⁴⁷ *Id.*

¹⁴⁸ CUNO, *supra* note 39, at 5.

¹⁴⁹ John Henry Merryman, *A Licit International Trade in Cultural Objects, in WHO OWNS THE PAST?*, *supra* note 5, at 269–70.

¹⁵⁰ CUNO, *supra* note 39, at 5.

¹⁵¹ Merryman, *supra* note 149, at 270 ("The market is a much more efficient and productive mechanism for the international circulation of cultural property . . .").

¹⁵² A renting program, some may argue, will cheapen or commercialize art and culture, but if the compromise allows for the continued long-term distribution of culture throughout universal museums worldwide, while providing funds for art-rich nations to protect and display their cultural heritage, is some commercialism too much of a compromise?

¹⁵³ AAMD Press Release, *supra* note 78, at 2.

loans.¹⁵⁴ A loan or renting program should placate nationalists, and a strong market will please internationalists. Understandably, universal museums are concerned with continuing to expand their collections and art-rich nations are concerned with maintaining title to all cultural items that are rightfully theirs. Again, a middle ground must be found and compromise will have to come into play.

V. CONCLUSION

Over time, both advocates from the nationalist and internationalist sides of the spectrum have begun to make concessions in order to protect the one thing that everyone agrees is important—the world's cultural history. Apologies have been offered, and stricter treaties and policies have been committed. But, as always, actions speak louder than words, and only time will tell whether the available solutions will be employed to protect the world's antiquities.

¹⁵⁴ Press Release, Metro. Museum of Art, Statement of the Metropolitan Museum of Art on Its Agreement with the Italian Ministry of Culture (Feb. 21, 2006), *available at* http://www.metmuseum.org/Press_Room/full_release.asp?prid={F9704AC3-297B-4704-999B-111ACC8E6804}.