

Why Not Loan Instead of Loot? A Preventative Proposal Regarding the Illicit Trade of Antiquities in a World of Terrorism

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I. INTRODUCTION

The looting of antiquities from countries rich in ancient artifacts for the purposes of personal collections, museums, or otherwise, has been a long tradition dating back centuries—though the effects of this harmful practice were not seriously considered until centuries later.¹ The market for art and antiquities “functioned virtually without any effective legal, moral, or ethical constraints.”² Because of this, looting and pillaging of source countries was rampant over centuries.³

The protection of cultural heritage is now mostly a universal concept, with the majority of nations across the world being signatories to international treaties and resolutions that protect cultural heritage and antiquities.⁴ The 1954 Hague Convention, the 1970 United Nations Educational, Social, and Cultural Organization (UNESCO) Convention, and the 1995 International Institute for the Unification of Private Law or the *Institut international pour l’unification du droit privé* (UNIDROIT) Convention, are some of the major international agreements on this issue.⁵ Individual countries have also adopted domestic policies that seek to deter and even outlaw

1. See Juan Pablo Sánchez, *How the Parthenon Lost Its Marbles*, NAT’L GEOGRAPHIC (Nov. 7, 2019), <https://www.nationalgeographic.com/history/magazine/2017/03-04/parthenon-sculptures-british-museum-controversy/> [https://perma.cc/B5AP-J2WQ] (discussing the conflicts relating to Britain’s display of artifacts taken from the Parthenon in Greece).

2. LEONARD DUBOFF ET AL., *ART LAW IN A NUTSHELL* 10 (West Academic 2016).

3. HERBERT LAZEROW, *MASTERING ART LAW* 314 (Carolina Academic Press 2015) (“[S]ource states (the countries where art was produced) and market states (the countries where art is currently collected).”); DUBOFF ET AL., *supra* note 2, at 10.

4. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/> [https://perma.cc/YH4B-65KY].

5. *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954* art. 1, May 14, 1954, 249 U.N.T.S. 241 [hereinafter 1954 Hague Convention]; *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, Nov. 14, 1970, 823 U.N.T.S. 11806 [hereinafter 1970 UNESCO Convention]; *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, June 24, 1995, 2421 U.N.T.S. 43718 [hereinafter UNIDROIT Convention].

these illegal practices,⁶ some in response to the international treaties themselves.⁷ The United States, in particular, has extensive regulations protecting cultural heritage and preventing the illicit import of antiquities.⁸

Though these resolutions and legislations have brought significant awareness of these issues to the international stage, in practical application, they prove too little too late. Today, most of the looting and destruction have been at the hands of terrorist organizations and other violent, non-state actors. How can the existing international treaties stop the organizations that are not parties to these conventional rules of law?

This Comment provides a comprehensive and preventative solution to the destruction of antiquities at the hands of non-state actors. The solution is a customizable loan agreement that works in tandem with existing international legislation. It can be changed to meet the needs of unique situations and can be incorporated into the existing international agreements. However, its focus is prevention, not criminal litigation. The idea is to make this agreement available to governments, museums, and private actors who wish to participate in the protection of at-risk artifacts by removing them from the areas of conflict to safe environments ideal for conservation.

This Comment will begin with a historical overview of the practice of illegal antiquities trade and destruction with a tour of major world events that sparked the need for international legislative protection. Next, this Comment will analyze international legislation to establish the strengths and weaknesses regarding the application to non-state actors. Then, this Comment will analyze domestic legislation, also in terms of strengths and weaknesses regarding non-state actors. Finally, this Comment will present a solution in the form of a contract shell that can be used for loan agreements between countries, private foundations, museums, and other entities. Specific analysis will be devoted to the realities of this loan agreement in terms of what it seeks to accomplish, what it seeks to prevent, and how it will apply to situations involving terrorist groups and violent non-state actors.

6. Neil Brodie & Colin Renfrew, *Looting the World's Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 347–48 (2005); UNIDROIT Convention, *supra* note 5.

7. See LAZEROW, *supra* note 3, at 324–25. The European Union passed regulations for export licenses in response to the 1970 UNESCO Convention.

8. See *id.* at 326.

II. HISTORICAL OVERVIEW OF ILLICIT ANTIQUITIES TRADE AND DESTRUCTION

To propose solutions to the growing international problem of antiquities looting and destruction, it is necessary to first understand the issue. This section will provide a brief historical overview of the concepts necessary to fully realize the problems faced today in this area of law and a basic explanation of why the specific international agreements discussed in the next part of this Comment were necessary.

A. Defining “Antiquities” and the Importance of Cultural Heritage

In an ordinary dictionary, “antiquities” are defined as “relics or monuments (such as coins, statues, or buildings) of ancient times.”⁹ But the word carries more meaning than just being ancient items.¹⁰ Many sources use the terms “cultural property” and “antiquities” interchangeably, giving more weight to the intrinsic importance of these items rather than as simply relics of ancient times.¹¹ For the purposes of this Comment, “antiquities” will take on the latter meaning—one of intrinsic importance to the culture and heritage of the people that the items were taken from.

Cultural heritage is damaged by looting because “[t]he loss of an artifact of cultural property creates a significant gap in the source group’s collective sense of identity.”¹² The artifacts stolen or damaged have invaluable historical significance, but what is even more damaging to cultural heritage is the damage inflicted in the process of stealing the artifacts. For instance, at archeological sites, looters often destroy all of the work that has been done to preserve every aspect of the civilization being studied.¹³ As such, “The deliberate, hasty and clandestine removal of archaeological objects . . . leads to the loss of information about the past and the destruction of certain cultural groups’ sense of historic identity.”¹⁴ The grave importance of antiquities shows that their destruction and “looting destroys not only, cultural sites but also the heritage of cultural groups.”¹⁵ The intrinsic

9. *Antiquity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/antiquity> [<https://perma.cc/J5BC-6QFS>].

10. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENV’T L. & POL’Y J. 1, 7 (2004) (demonstrating that antiquities are embedded with a people’s group identity, are irreplaceable, and form tangible aspects of a given group’s cultural heritage).

11. See Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIA. BUS. L. REV. 55, 59 (2014).

12. Cohan, *supra* note 10.

13. *Id.*

14. *Id.*

15. *Id.* at 4.

importance of antiquities justifies the global responsibility for their protection and provides the basis of support for the new, innovative mechanism discussed in this Comment.

B. Cultural Heritage Destruction in Times of War

1. WWII and Nazi Crimes Against Cultural Heritage

Before the atrocities of World War II, there was legislation in place establishing the basic rules of war, such as the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land,¹⁶ and the regulations of these conventions, which stipulate that all reasonable measures must be taken to avoid destroying monuments of cultural, historical, artistic, and scientific significance.¹⁷ Despite these provisions, “World War II caused unbelievable carnage and record displacement of art.”¹⁸ The Nazis were ruthless in their attempts to exterminate culture and dictate what culture would be in the Third Reich.¹⁹

In Poland, Nazi Germany nearly succeeded in wiping out Polish culture and heritage both physically and psychologically.²⁰ In 1944, Poland’s Ministry of Preparatory Work for the Peace Conference conducted a report to research the extent of the damage in Poland.²¹ The report concluded that “the main purpose of the Nazi occupation was the destruction of the Polish population and its culture and that the inflicted losses not only undermined its biological existence but also impeded its cultural and historical development.”²² Though this report was published in September 1944, it was completed before the Warsaw Uprising that occurred a month prior in August 1944, which was a failed attempt to overthrow the Nazi regime in Poland.²³ The devastation that followed was beyond what any

16. Laws and Customs of War on Land (Hague, II), July 29, 1899, 32 Stat. 1803; Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277.

17. Patty Gertenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 339 (2016).

18. RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS 2.15 (4th ed. 2012).

19. *See id.*

20. *See generally* Marek Sroka, “Nations Will Not Survive Without Their Cultural Heritage” Karol Estreicher, *Polish Cultural Restitution Plans and the Recovery of Polish Cultural Property from the American Zone of Occupation*, 57 POL. REV. 3, 3–28 (2012).

21. *Id.*

22. *Id.* at 8–9.

23. *Id.*

report could have predicted.²⁴ The destruction of an entire city rich with Polish heritage was more than any one country could take.²⁵ Polish efforts continued underground to publish more reports and garner international support.²⁶

Beyond the destruction of one entire nation's culture, the Nazis targeted the cultural heritage of the Jewish people whose culture spanned several nations.²⁷ At this time, "[W]idespread looting and plundering occurred at high levels . . . these actions were taken as part of systematic plan 'to annihilate the Jews [and] to destroy their cultural heritage.'"²⁸ Because the destruction was so widespread across Europe, "[M]embers of the international community disseminated the idea that some objects are so important that the costs and responsibilities of protection and preservation should be borne by all nations, regardless of the source or site of the objects."²⁹ The destruction of the Nazi Regime prompted the international community to come together and sign the Hague Convention of 1954 as a direct response to the Nazi ideology in a comprehensive "attempt to define cultural property."³⁰ The 1954 Hague Convention was followed by several other international agreements that will be discussed later in this Comment.

2. U.S. Invasion of Iraq and the Sacking of the Baghdad Museum

Cultural heritage is generally at risk in times of war, even if its destruction is not the primary goal of the aggressor. When the United States invaded Iraq in 2003, thousands of priceless artifacts were destroyed or stolen from the Iraqi museum in Baghdad.³¹ Within days of the U.S. invasion, "[L]ooters broke into the [National Museum] without being obstructed by U.S. forces and stole or destroyed over ten thousand relics."³² Over the years, thousands of objects were recovered but thousands more were sold to the black market.³³ Because U.S. troops failed to secure the museum and the toppled

24. *Id.* at 9–10.

25. *Id.* at 10.

26. *See id.*

27. Whitney Bren, Note, *Terrorists and Antiquities: Lessons from the Destruction of the Bamiyan Buddhas, Current ISIS Aggression, and a Proposed Framework for Cultural Property Crimes*, 34 CARDOZO ARTS & ENT. L.J. 215, 222 (2016).

28. *Id.*

29. ALEXANDRA DARRABY, ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW, *Introduction* § 6:80 (2017).

30. Bren, *supra* note 27.

31. Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 PACE INT'L L. REV. 397, 398 (2015).

32. *Id.* at 409–10.

33. *Id.* at 410.

government of Iraq was dissolved, chaos erupted as the destruction and looting were rampant.³⁴

Matthew Bogdanos, the chief investigator into the Baghdad museum thefts for the U.S. military, reported that the particularly vulnerable museum was robbed on three separate occasions.³⁵ Left particularly vulnerable by Saddam Hussein's forces, the museum had been "used as a fighting position, Iraq army uniforms were scattered all around, as were expended RPGs. In a courtyard smoldered the remains of hundreds of Ba'ath party cards and files."³⁶ By the time U.S. forces entered, they found destruction everywhere as "every one of the 120 offices had been ransacked [and] every piece of furniture [was] broken."³⁷

The United States was largely blamed for their inaction regarding the destruction of the museum.³⁸ However, in reality, the U.S. Department of State Cultural Heritage Center was involved in "discussions and consultations on the best courses of action to protect cultural heritage sites, how to recover and repatriate artifacts looted from sites and museums, and how best to work with our archaeological and cultural heritage counterparts in academic institutions, non-governmental entities, and at the State Board of Antiquities and Heritage [SBAH] in Iraq" in the days immediately following the invasion.³⁹

In the years following the invasion, the United States led efforts with the cooperation and assistance from Iraq, Italy, and police and customs processes throughout the world that resulted in the return of thousands of artifacts.⁴⁰ Their accomplishments are an invaluable example of the importance of international cooperation and for countries embroiled in similar conflicts who may be facing the same risks posed for cultural heritage. The mistakes and lapses in U.S. military strategy regarding the invasion and sacking of

34. *Id.*

35. David Randall, *Revealed: The Real Story Behind the Great Iraq Museum Thefts*, INDEPENDENT (Nov. 13, 2005), <https://www.independent.co.uk/news/world/middle-east/revealed-the-real-story-behind-the-great-iraq-museum-thefts-515067.html> [<https://perma.cc/UCP6-2BYK>].

36. *Id.*

37. *Id.*

38. Morag Kersel & Christina Luke, *Ten Years after Iraq: Archaeology, Archaeologists, and U.S. Foreign Relations*, 1 FRIENDS OF AM. SCHS. OF ORIENTAL RSCH. (2013), <https://www.asor.org/anetoday/2013/05/ten-years-after-iraq-archaeology-archaeologists-and-u-s-foreign-relations/> [<https://perma.cc/WB9B-PSU6>].

39. *Id.*

40. Randall, *supra* note 35.

the museum are also valuable lessons for countries preparing for future conflict. Establishment of security for cultural heritage sites is crucial.

Even more essential for the protection of cultural heritage and antiquities is the use of a loan agreement that would remove objects from high-risk war zones. Had there been a loan agreement contract available for use, countless artifacts may have been removed temporarily before the invasion, truly ensuring their safety and preservation.

III. INTERNATIONAL CULTURAL HERITAGE LEGISLATION

International treaties and agreements for the protection of cultural heritage and antiquities are largely reactionary—they were created in the aftermath of great atrocities against cultural heritage. They attempt to be preventative so that great acts of destruction never happen again. But looting, destruction, and mistreatment of cultural sites and artifacts have occurred despite these agreements.

A. The 1954 Hague Convention

The first major international agreement of consequence is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁴¹ This Convention was the first since the destruction of World War II to give a comprehensive definition of what cultural property is and how it should be protected in times of war.⁴² Article 1 of the 1954 Hague Convention provides a broad definition of cultural property as buildings, monuments, artifacts, books, manuscripts, etc. that are “of great importance to the cultural heritage of every people.”⁴³ While the definition is inclusive and seeks to put the responsibility of protection of these artifacts on all people, it has contradictory elements that sacrifice its efficacy.⁴⁴

The 1954 Hague Convention establishes codes of conduct that prohibit the taking or destroying cultural property.⁴⁵ However, such codes of conduct may be “waived only in cases where military necessity imperatively requires such a waiver.”⁴⁶ After defining cultural heritage as the heritage

41. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 art. 1, May 14, 1954, 249 U.N.T.S. 241.

42. See *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/> [https://perma.cc/8DPB-SHWL].

43. 1954 Hague Convention, *supra* note 5.

44. See LAZEROW, *supra* note 3, at 306.

45. 1954 Hague Convention, *supra* note 5.

46. 1954 Hague Convention, *supra* note 5, at art. 4(2).

of all people to be protected by all people, “by what authority can an official of one state (and an unelected official of that state) ‘waive’ the rights of all peoples that the Convention has set in place?”⁴⁷ This contradiction could easily result in the distortion of the 1954 Hague Convention’s goals and lead non-state actors to justify destruction as military necessity, even though non-state actors and terrorists are not bound to such conventions.

The 1954 Hague Convention also provides the framework for the transport of cultural property with certain protections afforded to the artifacts if the situation is too dangerous for the artifacts to remain where they are.⁴⁸ While the intentions of this Convention are noble, its application remains incredibly limited as it only applies to the “High Contracting Parties,” which are the countries that are signatories to the Convention.⁴⁹ With vague phrases, such as “internal armed conflict,” the 1954 Hague Convention does little to resolve the salient issue of who bears the responsibility to protect the artifacts.⁵⁰ Unfortunately, no provision in this Convention takes into account the possibility of destruction due to terrorist organizations.⁵¹

The Convention offers recommendations for times of peace in anticipation of conflict in the Convention’s Second Protocol in 1999.⁵² This preparation may promote the prevention of looting and destruction. But since the majority of the artifacts are in resource-poor countries, the effectuation of that preparation is far from secure. For example, in Iraq—a country already crippled by the destruction of war and ISIS—there are thousands of unguarded archeological sites that are the origins for the majority of antiquities currently on the black market.⁵³ Iraq’s legitimate and weakened government, the one answerable to this Convention, is simply not able to supply the thousands of troops necessary to guard the archeological sites while its people are dying at the hands of ISIS.⁵⁴

47. See LAZEROW, *supra* note 3, at 306.

48. See 1954 Hague Convention, *supra* note 5, at art. 13.

49. See *id.* at art. 18.

50. Bren, *supra* note 27, at 224.

51. See *id.*

52. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, arts. 3, 5, Mar. 26, 1999, 2253 U.N.T.S. 172.

53. LAZEROW, *supra* note 3, at 306; Alyssa Buffenstein, *Monumental Loss: Here Are the Most Significant Cultural Heritage Sites That ISIS Has Destroyed to Date*, ARTNET: ART WORLD (May 30, 2017), <https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060> [<https://perma.cc/4XA5-8SSB>].

54. LAZEROW, *supra* note 3, at 306–07 (“[T]he Hague Convention assumes that during an occupation, the legitimate former government continues to function.”).

B. *The 1970 United Nations Educational, Social, and Cultural Organization*⁵⁵

The aftermath of WWII saw the reconstruction of Europe and the struggling economies of developing nations that turned to the growing black-market industry of antiquities looting.⁵⁶ In the decades that followed the war, “[T]hefts were increasing both in museums and at archaeological sites . . . private collectors and, sometimes, official institutions, were increasingly offered objects that had been fraudulently imported or were of unidentified origin.”⁵⁷ It was in this context that the United Nations drafted another convention in 1970 known as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).⁵⁸ In this Convention, the United Nations established a permanent intergovernmental committee called the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP).⁵⁹ The purpose of this committee is to “find ways that could facilitate bilateral negotiations between the concerned countries for the restitution or the return of cultural property and to encourage them to reach agreements to this effect.”⁶⁰ This committee is the most promising in terms of prevention of destruction and looting. It provides the necessary middle ground between two parties that may be in dispute over artifacts, such as the case between England and Greece.⁶¹ However, the degree to which it is successful in application is still up for

55. UNESCO is currently ratified by 140 member states not including the United States, which has accepted but not ratified. *See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, 14 November 1970*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=13039> [<https://web.archive.org/web/20200620043551/http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=13039>]. However, as we will see later, the United States enacted its own legislation to support this treaty and continues in its good-faith effort to refrain from acts contrary to the convention. *See Protect and Preserve International Cultural Property Act*, Pub. L. No. 114-151, 130 Stat. 369 (2016).

56. UNESCO, *supra* note 4.

57. *Id.*

58. *Id.*

59. “Return & Restitution” *Intergovernmental Committee*, UNESCO, <https://en.unesco.org/fightrafficking/icprcp> [<https://perma.cc/E7MQ-G9YH>].

60. *Restitution of Cultural Property*, UNESCO (2017), <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/historical-background/> [<https://perma.cc/M9VF-QD6K>].

61. Sánchez, *supra* note 1 (explaining that Greece requested the return of numerous marble sculptures from the British Museum that were taken from the Parthenon in the 17th century).

debate. The solution proposed in the later sections of this Comment will incorporate the existing framework of this intergovernmental body.

The 1970 UNESCO Convention prohibits the illegal trade of antiquities that further exacerbate the destruction of cultural heritage.⁶² It expands on the 1954 Hague Convention in that it allows for countries to request the return of their artifacts by way of repatriation and restitution.⁶³ This Convention has done significantly more than prior conventions by providing preventative recommendations to its member nations in the fight against illicit antiquities trade and cultural heritage destruction.⁶⁴ Some of the recommendations include “the creation of inventories, export certificates, monitoring trade, the imposition of penal or administrative sanctions, and educational campaigns” as well as requiring members to enact legislation in their own countries to combat this issue.⁶⁵

As with most international conventions, there are shortcomings. The 1970 UNESCO Convention has a rather narrow application in that its main focus is artifacts that are easily moveable and can be easily smuggled.⁶⁶ This Convention does not account for items that are affixed to the landscape or larger monuments, such as the Parthenon, that cannot be moved in its entirety.⁶⁷ These structures are most vulnerable to complete destruction since they are fully exposed to war-time combat as well as looters who inflict unnecessary and irreparable damage to archeological sites.⁶⁸ This Convention is also not effective unless the signatories enact the appropriate legislation in their own countries.⁶⁹ The Convention can impose sanctions through a United Nations Security Council resolution and grant assistance only to those signatories that are fully cooperative, which calls into question the practicality and effectiveness of the Convention.⁷⁰

Again, how will this Convention deal with the hostile presence of fully functioning terrorist states in the Middle East? It is unreasonable to expect that an organized terrorist quasi-state, such as ISIS, will suddenly stop

62. See UNESCO, *supra* note 4.

63. *Id.*

64. UNESCO Convention 1970, HERITAGE FOR PEACE, <https://www.heritageforpeace.org/heritage-for-peace/legal-framework/unesco-convention-1970/> [<https://perma.cc/23GK-WJPS>].

65. *Id.*; Bren, *supra* note 27, at 225.

66. Bren, *supra* note 27, at 225.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

their destruction of cultural heritage because of an international convention. They do not abide by international or domestic laws. They operate on the antithesis of law and order. The only way to stop the destruction and illegal looting of antiquities and cultural heritage is to remove these items from the control of ISIS. That is exactly what the loan agreement will achieve if implemented properly. The working mechanics of this solution will be looked at more closely in Section VI.

*C. The 1995 International Institute for the Unification of Private Law Convention*⁷¹

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects greatly expanded the protections of cultural heritage that the previous 1970 UNESCO Convention was not able to reach.⁷² It established “minimal legal rules for the restitution and return of cultural objects between Contracting States” and was “intended to facilitate the restitution and return of cultural objects.”⁷³ A major improvement in this Convention from the 1970 UNESCO Convention is that the UNIDROIT Convention placed the burden of proof on the possessor of the artifact in question to prove the legality and legitimacy of the purchase.⁷⁴ This is crucial because the source country is often less developed than private collectors, museums, or private foundations in wealthier industrialized nations and may not have the same means of proving their case as wealthier parties.⁷⁵

Though this treaty enacted promising resolutions in the struggle to end this illicit industry, it does not have the practical elements necessary to carry out its mission. Currently, with forty-eight countries signed on to the treaty, “[T]he majority of the countries which have signed the treaty are source nations.”⁷⁶ It could be argued that the increase of criminal prosecutions and threats of sanctions will not appeal to the majority of nations that have ties to this illicit practice. Many museums in the United States and the United Kingdom have ties to artifacts with questionable origins.⁷⁷ However, despite the lack of retroactivity in both the UNIDROIT Convention

71. INT’L INSTITUTE FOR THE UNIFICATION OF PRIV. L. (2019), <http://www.unidroit.org> [<https://perma.cc/K5A8-SXYF>].

72. See Szopa, *supra* note 11, at 66.

73. UNIDROIT Convention, *supra* note 5.

74. Hannah D. Willett, *Ill-Gotten Gains: A Response to the Islamic State’s Profits From The Illicit Antiquities Market*, 58 ARIZ. L. REV. 831, 842 (2004).

75. See Cohan, *supra* note 10, at 12, 91.

76. Szopa, *supra* note 11, at 66.

77. See Evangelos Kyriakidis, *Illegal Trade in Antiquities: A Scourge That Has Gone On For Millennia Too Long*, CONVERSATION (June 15, 2018), <http://theconversation.com/illegal-trade-in-antiquities-a-scurge-that-has-gone-on-for-millennia-too-long-98093> [<https://perma.cc/227L-X7U9>].

and 1970 UNESCO Convention, the majority of these purchasing nations are hesitant to sign on.⁷⁸ The proposed loan agreement, discussed later in Section VI, will eliminate this hesitation because it removes the possibility of artifacts being looted from the start. Purchasing nations, such as the United States and United Kingdom, will not have to worry about the origins of the items being imported because the purpose of the loan agreement is to save these priceless items from destruction—the main difference being that the items will be on loan.

D. United Nations Security Council Resolution 2199

On February 12, 2015, the United Nations Security Council unanimously agreed to condemn the actions of the Islamic State terrorist groups in the Middle East for their destruction of cultural heritage.⁷⁹ The Security Council recognized and expressed their concern that the illicit actions of the terrorists were “generating income . . . which [was] being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.”⁸⁰ In an unanimous decision, the Council stated that “all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property . . . by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people.”⁸¹ The Council called upon UNESCO, Interpol, and other “international organizations, as appropriate” to work toward implementing this resolution.⁸²

This resolution came as a great sign to those in the Middle East who have been working toward international recognition of terrorist crimes. As reported by the *New York Times*, “Iraqi officials, who were major sponsors of the resolution have said ISIS militants seek to sell what they cannot destroy, and the country’s United Nations ambassador . . . has said the extremist group earns as much as \$100 million annually from antiquities trading.”⁸³ Even though the resolution is non-binding, the “unanimous

78. Szopa, *supra* note 11, at 67.

79. S.C. Res. 2199 (Feb. 12, 2015); Rick Gladstone, *U.N. Resolves to Combat Plundering of Antiquities by ISIS*, N.Y. TIMES (May 28, 2015), <https://www.nytimes.com/2015/05/29/world/middleeast/un-resolves-to-combat-plundering-of-antiquities-by-isis.html> [<https://perma.cc/N3H5-CAL9>].

80. S.C. Res. 2199, ¶ 16 (Feb. 12, 2015).

81. *Id.* ¶ 17.

82. *Id.*

83. Gladstone, *supra* note 79.

support for the measure represent[s] ‘a turning point’ in a global determination to combat the destruction” as now there is clear international support for combating these terrorist actions head on.⁸⁴

IV. CONTINUANCE OF CRIMES AT HANDS OF NON-STATE ACTORS

Despite the varied and thorough body of international treaties, conventions, and resolutions, cultural heritage destruction and antiquities looting has continued and increased with the rise of organized crime and terrorist activity in the Middle East.⁸⁵

Cultural heritage and antiquities looting and destruction in the Middle East today is not much different than the events that inspired the initial international treaties and conventions. The main difference, however, is that the looting and destruction is not occurring in conventional wars, but through terrorists and non-state actors.⁸⁶ Terrorist organizations operate much like the Nazi Regime in that the customary rules of war are disregarded.⁸⁷ Terrorist groups, such as ISIS and the Taliban, are not nearly as organized or legitimate as the government of the Third Reich was, but their authority and destructive practices remain the same as any other violent regime.

With failing governments in the Middle East giving way to violent non-state actors, regions of these countries are being held hostage by terrorist organizations under which established international rules of law and order are never upheld.⁸⁸ For example, there is an abundance of reporting on ISIS’s vast destruction of antiquities and cultural heritage sites throughout the Middle East.⁸⁹ However, there is significantly less reporting on the resulting rise of the black market trade in antiquities under ISIS.⁹⁰

Archaeological sites looters are often locals suffering from acute poverty.⁹¹ The spoils of artifacts they gather find their way to legitimate markets through an international network of middlemen and smugglers.⁹² The most lucrative of these exchanges are far removed from the initial looters.⁹³ The looting is most commonly found in countries with political

84. *Id.*

85. *See, e.g., id.*

86. *See, e.g., id.*

87. *See infra* Section II.B.1.

88. Willett, *supra* note 74, at 834.

89. *Id.*

90. *Id.*

91. Cohan, *supra* note 10, at 8.

92. Szopa, *supra* note 11, at 61.

93. *See id.*

unrest.⁹⁴ Countries suffering political unrest and war are already in a severely vulnerable state, most notably Middle Eastern countries.⁹⁵

Throughout the Middle East, Islamic terror groups are using their religion to justify the public destruction of cultural heritage.⁹⁶ ISIS in particular has destroyed five cultural heritage sites in Syria, including one UNESCO world heritage site, and eight in Iraq.⁹⁷ Afghanistan, Iran, Lebanon, and Egypt have all experienced cultural heritage destruction and looting either from terrorists or war.⁹⁸ Privately, however, the same terror groups are profiting off the illicit trade of the very elements of culture they destroy.⁹⁹

Several of Syria's ancient cities filled with rich cultural heritage artifacts were damaged by ISIS.¹⁰⁰ Even though the destruction of cultural heritage is a war crime under UNESCO, ISIS has relentlessly and purposefully gone after priceless, ancient cultural heritage in Syria.¹⁰¹ According to their religious interpretation, "The group considers representational art idolatrous, and as a result, works of art at museums, mosques, and churches have become targets of its hammers, axes, bulldozers, and bombs."¹⁰² ISIS used social media to broadcast their destruction¹⁰³ while smuggling and looting artifacts worth millions.¹⁰⁴ Since 2013, "more than 1,000 historical sites have been looted for financial gain" and "less than one percent of stolen artifacts known to have been taken from Syria have been recovered."¹⁰⁵

94. *Id.* at 59.

95. *See* Willett, *supra* note 74, at 858.

96. *See* Buffenstein, *supra* note 53.

97. Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), <https://www.nationalgeographic.com/news/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/> [<https://perma.cc/CL5J-LWED>].

98. *See infra* Section III.

99. *See* Heather Pringle, *ISIS Cashing in on Looted Antiquities to Fuel Iraq Insurgency*, NAT'L GEOGRAPHIC (June 27, 2014), <https://www.nationalgeographic.com/news/2014/6/140626-isis-insurgents-syria-iraq-looting-antiquities-archaeology/> [<https://perma.cc/LW6W-7CL8>].

100. Buffenstein, *supra* note 53.

101. *Id.*

102. *Id.*

103. *Id.*

104. Lindsey Lazopoulos Friedman, *ISIS's Get Rich Quick Scheme: Sell the World's Cultural Heritage on the Black Market—Purchasers of ISIS-Looted Syrian Artifacts Are Not Criminally Liable Under the NSPA and the McClain Doctrine in the Eleventh Circuit*, 70 U. MIA. L. REV. 1068, 1076 (2016).

105. *Id.* at 1075–76.

Afghanistan was also plagued with the same violent extremism that affected Syria and Iraq.¹⁰⁶ The Taliban, based in Afghanistan, implemented strict religious rules that included the destruction of items deemed idolatrous.¹⁰⁷ Because of Afghanistan's geographic location, its borders were filled with objects and monuments of immense cultural heritage value.¹⁰⁸ The international community was well aware of the Taliban's plans to destroy the iconic Buddhas of Bamiyan, which are large immovable statues of Buddha from the Silk Road era.¹⁰⁹ The Taliban publicized their plans to destroy the monuments and documented their destruction in detail while the world watched.¹¹⁰ The existing international law completely failed Afghanistan in this situation because the Taliban was not a legitimate government, and therefore, was not obligated to observe any of the international agreements on cultural heritage.¹¹¹ As it stands, "[N]o international law or treaty provides full protection to cultural property that is purposefully destroyed by a quasi-state actor intentionally seeking to destroy the cultural property."¹¹² Had there been a loan agreement in place, countries abroad could have acted together to send resources to protect the buddhas as they were immovable. Terror groups are not answerable to the existing international laws, so there needs to be a creative solution that removes the opportunity of destruction from the equation.

Islamic extremism has systematically destroyed monuments and sites throughout Iran.¹¹³ The President of Iran met with the UNESCO Director-General in 2016 to discuss ways to "counter violent extremism."¹¹⁴ President Hassan Rouhani proposed that "UNESCO organize an international conference on the role of culture to stop violence" and advocated for UNESCO to develop educational programs to combat the extremism.¹¹⁵ President Rouhani even drew attention to Iran's World Against Violence and Extremism (WAVE) initiative to highlight how foundational culture is to society.¹¹⁶ However, such initiatives take years to be successful. This is simply not a realistic solution to the continuous problem of looting and destruction. The artifacts need to be removed or heavily guarded until the risk has been abated.

106. See Bren, *supra* note 27, at 216.

107. *Id.* at 229–30.

108. *Id.* at 228–29.

109. *Id.*

110. *Id.* at 229.

111. *Id.* at 230.

112. *Id.*

113. See *UNESCO and Iran Stress Urgency of Protecting Cultural Heritage*, UNESCO, <https://en.unesco.org/news/unesco-and-iran-stress-urgency-protecting-cultural-heritage> [<https://perma.cc/9EQZ-QGT6>].

114. *Id.*

115. *Id.*

116. *Id.*

Lebanon's brutal civil war lasted from 1975 to 1990.¹¹⁷ During that time, the entire country was a warzone and cultural heritage was seen as a prime target for looters who were able to steal antiquities from the National Museum's storehouse in Byblos.¹¹⁸ During the civil war, museum curators were acting in anticipation of looters and were able to protect "treasures that were not looted by sealing them up in the basement or encasing them in cement."¹¹⁹ However, not everything was safe from the thieves. The sculptures that were stolen have since been returned—some three decades later.¹²⁰

Five marble statues were returned to Lebanon in 2018, but they are just a handful of the hundreds that were looted from the Byblos storehouse in 1981.¹²¹ Their recent return can be attributed to "the global fight against antiquities smuggling that has been stepped up since wartime looting in Iraq and Syria."¹²² However, if there were a loan agreement available for use in emergency situations, such as times of war or impending unrest, would these artifacts have been stolen or loaned in the first place?

During the period of Egypt's civil unrest from 2011 to 2013, the country experienced waves of chaos and violence.¹²³ As a result, police and security forces no longer protected ancient cultural heritage sites, resulting in an organized network of looting.¹²⁴ Emboldened looters faced minimal guards "armed only with sticks and occasionally small revolvers or antiquated rifles with no ammunition (unless they had managed to purchase some)."¹²⁵ Beyond the unorganized looting, there were reports of high tech groups who orchestrated attacks on museums with assistance from heavy machinery.¹²⁶

117. *Ancient Statues Looted in Lebanese War Returned Decades Later*, REUTERS (Jan. 12, 2018, 8:41 AM), <https://www.reuters.com/article/us-lebanon-antiquities/ancient-statues-looted-in-lebanese-war-returned-decades-later-idUSKBN1F11Y0> [<https://perma.cc/Y4ZA-LC2Q>].

118. *Id.*

119. *Id.*

120. *Id.*

121. Angus McDowall, *Ancient Statues Return to Lebanon as War on Smuggling Intensifies*, REUTERS (Feb. 2, 2018, 9:05 AM), <https://www.reuters.com/article/uk-lebanon-antiquities-idUKKBN1FM228?edition-redirect=uk> [<https://perma.cc/QL82-DND9>].

122. *Id.*

123. Salima Ikram, *Cultural Heritage in Times of Crisis: The View from Egypt*, 1 J.E. MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 366, 366 (2013).

124. *Id.*

125. *Id.* at 368.

126. *Id.* at 369.

In reaction, international agencies have made statements and recommendations to combat these problems.¹²⁷ UNESCO “entered into discussions with the Ministry of Antiquities in establishing strategies to protect the sites for short-term, and for the long-term creating education mechanisms to involve local inhabitants to view themselves as stakeholders, and thus protectors of the sites themselves.”¹²⁸ Despite these discussions, sites are still under threat with local Egyptians taking matters into their own hands.¹²⁹ For example, “In 2011 the Cairo Museum was encircled by a human shield to protect it from further attacks.”¹³⁰

Countries in the Middle East facing conflict, such as Egypt, should not have relied on recommendations from international treaties that are unable to stop looting and black-market trading of antiquities. Rather, they could have relied on a contract loan agreement that allows a willing party to safely remove artifacts and keep them on a temporary basis. Private collectors, museums, and foundations devote time and money into the acquisition of antiquities and other cultural heritage objects, many of which have questionable provenances and origins.¹³¹ Through this loan agreement, those parties can gain possession of the priceless artifacts, while minimizing the risk of acquiring conflict items.

V. DOMESTIC EFFORTS IN CULTURAL HERITAGE PROTECTION

Efforts to stop the looting and destruction of cultural artifacts around the world have come in the form of legislation, such as the Protect and Preserve International Cultural Property Act in the United States, and through private actions on the part of museums and foundations.¹³² In recent years, U.S. museums have taken note of the crisis of antiquities in the Middle East and other war-torn countries. The Association of Art Museum Directors adopted protocols to address violent conflicts that put antiquities at risk.¹³³ Additionally, in the last century, Italy devoted an

127. *Id.*

128. *Id.*

129. *Id.* at 370.

130. *Id.*

131. *See Finders, But Not Keepers: The Controversies of Cultural Heritage and Ownership*, GLOB. HERITAGE FUND (Aug. 21, 2018), <https://globalheritagefund.org/2018/08/21/finders-but-not-keepers-the-controversies-of-cultural-heritage-and-ownership/> [https://perma.cc/H7TC-EQGL].

132. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151 § 1, 2, 130 Stat. 369, 369 (2016); *see* Jeffrey A. Becker, *Organizations and Agencies That Work to Protect Cultural Heritage*, SMART HIST. (Mar. 25, 2018), <https://smarthistory.org/preserve-cultural-heritage/> [https://perma.cc/4GE9-JS3R].

133. Press Release, AAMD Issues Protocols to Protect Works of Cultural Significance in Danger of Damage or Destruction, Ass’n of Art Museum Dirs. (Oct. 1, 2015), <https://>

entire police force solely for the protection of Italy's cultural heritage and the prevention of illicitly exported works of art.¹³⁴ These are examples of innovative mechanisms combating the destruction of cultural heritage and looting.

A. The Association of Art Museum Directors Protocols for Safe Havens

The Association of Art Museum Directors (AAMD) enacted a unique set of protocols that attack the central issue of antiquities left vulnerable in countries in crisis.¹³⁵ These Protocols pragmatically answer the question: what can we do about works of art that are *currently* at risk? The AAMD is an organization of museum directors across the United States, Canada, and Mexico that establish standards and practices for museums in their network.¹³⁶ On October 1, 2015, AAMD announced the "Protocols for Save Havens for Works of Cultural Significance from Countries in Crisis."¹³⁷ These Protocols were enacted because AAMD recognized the risk that artifacts of cultural significance are facing today as a result of "violent conflict, terrorism, or natural disasters."¹³⁸ The Protocols call for the safe removal of artifacts in danger of destruction. AAMD's member on their Archeological Materials Task Force Julian Raby stated, "The Safe Haven Protocols are grounded in the principle of stewardship that is the hallmark of the museum community, as well as in our belief in the urgent need to safeguard works that are in imminent danger of damage or destruction and cannot be sufficiently protected in areas of the world that are in crisis."¹³⁹

In compliance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the AAMD Protocols seek to build off of this foundation by providing "safe havens to those works in danger of damage, destruction or looting until they can be safely

aamd.org/for-the-media/press-release/aamd-issues-protocols-to-protect-works-of-cultural-significance-in [https://perma.cc/73ET-WNGS] [hereinafter AAMD Protocols].

134. LAURIE RUSH & LUISA BENEDETTINI MILLINGTON, *THE CARABINIERI COMMAND FOR THE PROTECTION OF CULTURAL PROPERTY 1* (Boydell & Brewer, Boydell Press 2015).

135. *AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis*, ASS'N OF ART MUSEUM DIRECTORS (Oct. 1, 2015), <https://aamd.org/document/aamd-protocols-for-safe-havens-for-works-of-cultural-significance-from-countries-in-crisis> [https://perma.cc/B7JN-RFQX] [hereinafter *AAMD Protocols II*].

136. *Id.*; see, e.g., *Standards & Practices*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/standards-and-practices> [https://perma.cc/3XFN-6TH2].

137. AAMD Protocols, *supra* note 133.

138. *Id.*

139. *Id.*

returned.”¹⁴⁰ Following the format of a standard museum loan agreement, the Protocols lay out articles on immunity, inventory and documentation, transport, storage conditions and special care, conservation and restoration, records, publication, scholarly access, exhibition, education programs, and the ultimate return of the items.¹⁴¹ The most important of these articles is the one that concerns the source of works in need of safe havens.¹⁴²

Article 2 specifically details that “in the event of a terrorism occurrence or during an armed conflicts or natural disaster, works may be brought for save haven in the United States, Canada or Mexico from any depositor, assuming of course compliance with applicable law.”¹⁴³ The Protocols recognize a major setback in that it may not be clear who has the authority to allow the artifacts to be taken for safekeeping. They give examples of who can be considered a “depositor,” which include museums, governmental entities, U.S. government authorities who have possession, private individuals, companies or organizations who own or have possession.¹⁴⁴ However, ultimately, “the depositor” will be unique to each situation.

These Protocols illustrate what this Comment attempts to provide as a legal solution to the growing problem of antiquity destruction and theft as a result of terrorism in the Middle East. However, the AAMD Protocols do not do enough. They are only relevant to their member museums. They are not binding international law. A full, legal mechanism is needed for the international community, and for museums and private citizens alike, to have the opportunity to save these artifacts from destruction—whether that be by loan or physical protection for immovable objects. Incorporating the loan agreement into international law would not only allow the AAMD Protocols to expand to museums outside of the network but would also apply the protocol’s legal framework to all of the participating countries in the international community.

B. United States Law Enforcement Position on ISIS Looted Goods

In 2016, the United States enacted the Protect and Preserve International Cultural Property Act within the Convention on Cultural Property.¹⁴⁵ The Act was passed in order “to protect and preserve international cultural property at risk due to political instability, armed conflict, or natural or

140. *AAMD Protocols II*, *supra* note 135.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. 19 U.S.C. § 2601.

other disasters, and for other purposes.”¹⁴⁶ The Act specifically includes emergency protection for cultural heritage at risk of destruction by way of Syrian import restrictions.¹⁴⁷ Furthermore, the Act gives the President authority to impose import restrictions “with respect to any archaeological or ethnological material of Syria.”¹⁴⁸

Generally, under the Convention on Cultural Property, a country that is party to the 1970 UNESCO Convention can request that the United States enact import restrictions if its implementation “would be of substantial benefit in deterring a serious situation of pillage.”¹⁴⁹ The President may not enter into such an agreement with a requesting party if they will not also enact similar restrictions in their own country.¹⁵⁰ However, the Protect and Preserve International Cultural Property Act allows the President to enact import restrictions on any archaeological or ethnological material from Syria regardless of whether Syria is a party to the 1970 UNESCO Convention and complies with the respective restrictions.¹⁵¹

If it is significantly harder to import looted antiquities, then the source of revenue is cut off from thieves, as they will have limited avenues to sell, and the looting will eventually subside. This will further deter looting when all countries with strong markets for antiquities enact similar import restrictions. However, if Syria is not working to prevent looting in its own country, then preventing the import of cultural heritage items into the United States increases their risk of destruction in Syria. Therefore, the Act includes a waiver to accommodate for this very issue. The waiver allows certain items from Syria into the United States if the relevant conditions are met:

- (A)(i) The owner or lawful custodian of the specified archaeological or ethnological material of Syria has requested that such material be temporarily located in the United States for protection purposes; or

146. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369, 369 (2016).

147. *Id.* § 3(a).

148. *Id.*

149. See 19 U.S.C. § 2601(9); 19 U.S.C. § 2602(a)(1)(C)(i).

150. 19 U.S.C. § 2602(c)(1).

151. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, § 3(a)(2), 130 Stat. 369, 369 (2016).

(ii) if no owner or lawful custodian can reasonably be identified, the President determines that, for purposes of protecting and preserving such material, the material should be temporarily located in the United States.¹⁵²

The waiver of import restrictions recognizes the risk of preventing the removal of the objects from danger in Syria. It recognizes that there are situations where the artifacts are safer in the United States than they would be in Syria. In order to support protection and preservation efforts, the objects should stay in the United States on a temporary basis. In order to waive the import restriction, the President must certify that the conditions are met with “the appropriate congressional committees.”¹⁵³ There is simply no time to waste while the fate of these artifacts rests on whether the President and Congress agree on whether the artifacts can be safely imported to the United States. This also strains the federal system that is already burdened with excessive regulation and administrative duties. If these artifacts were allowed to be imported freely, without the burdens of regulations, many more could be saved.

While the majority support the United States’ efforts to restrict imports to stop looting, some believe that antiquities in conflict zones should be imported freely, without regard to their troubled provenances.¹⁵⁴ The minority sentiment is that the artifacts imported from the Middle East, looted by terrorists, should be accepted and that “the expenses that museums might incur—including the costs of returning the pieces to the countries of their origin—are worth paying to keep them out of reach of ISIS sledgehammers.”¹⁵⁵ The problem with this idea, is that by allowing the looting to continue, and allowing the purchasing of these looted objects to continue, financial incentives are provided to the terrorists, looters, and smugglers.

A necessary comparison must be made between objects in the United States that were found to have been looted, and those objects that were located by terrorists in the Middle East. The former objects are meticulously restored and conserved, while the latter objects are mutilated and destroyed. Import restrictions may deter looting but are continuing to leave these artifacts exposed to risk of destruction. Countless artifacts have been lost to the barbaric ISIS terrorists. Would it not be better to remove the artifacts from the war path preemptively—before either their destruction or theft? Preemptive removal is precisely what the loan agreement discussed in Section VI offers.

152. *Id.* § 3(c).

153. *Id.* § 3(c)(1).

154. Gary Vikran, *The Case for Buying Antiquities to Save Them*, WALL ST. J. (Aug. 19, 2015, 6:48 PM), <https://www.wsj.com/articles/the-case-for-buying-antiquities-to-save-them-1440024491> [<https://perma.cc/NF6F-A6U5>].

155. *Id.*

C. Italy's Specialized Police Force

Italy has devoted an entire specialized police force known as the Carabinieri Command for the Protection of Cultural Property to combat the looting in its own country.¹⁵⁶ Though the Carabinieri function to uphold Italian law and protect Italian cultural heritage, important comparisons can still be made as Italy's situation is not dissimilar to that of the countries affected by ISIS. Italy, just like Iraq, Syria, and other countries whose cultural heritage has been looted and destroyed for profit, suffers from a harmful, criminal enterprise at the hands of what are called *tombarolisu*. *Tombaroli* is "the Italian term for grave robbers and a term often generically applied to looters of ancient tombs and archaeological sites in Italy."¹⁵⁷ The Italian countryside outside of Rome, home to hundreds of ancient Etruscan tombs filled with priceless ancient artifacts, has been victim to looters over generations as "local families in [the neighboring towns] have supported themselves by looting the Etruscan tombs and ancient neighbourhoods of the original Etruscan city."¹⁵⁸ In stark contrast to the violent intentions of terrorists in the Middle East, the *tombaroli* actually take pride in their work of looting ancient graves, seeing themselves as amateur archeologists.¹⁵⁹

The Carabinieri had to tackle this culturally embedded criminal activity and have enjoyed great success as the Carabinieri have come to be "universally regarded as the core of cultural property law enforcement for the Italian State and the ultimate source of information and analysis concerning crimes against art and antiquities within Italy and at the international level."¹⁶⁰ In fact, most of the recent recovery from terrorist destruction in Iraq came from the aid of the Carabinieri.¹⁶¹ The Italians have been influential in archeological assistance in Iraq since the 1960s, but more recently have been heavily involved with the recovery of artifacts from the Gulf Wars and the American invasion discussed earlier.¹⁶² Most importantly, the Carabinieri deployed peacekeeping troops to secure affected archeological

156. RUSH & MILLINGTON, *supra* note 134.

157. *Id.* at 20.

158. *Id.* at 55.

159. *Id.* at 59.

160. *Id.* at 10.

161. *Id.* at 161.

162. *Id.*

sites and helped with the repatriation of countless objects to the Iraqi museums.¹⁶³

Unfortunately, even with the presence of armed Carabinieri officers, it is difficult to escape the violence of the terrorists in the region as many were killed and injured from a suicide bombing in 2003.¹⁶⁴ After the attack, Italian efforts were negatively affected, but not defeated. The Carabinieri were successful in “establishing a prototype for the development and implementation of an archaeological site protection programme for host nation personnel under the most extreme and challenging conditions imaginable” while also receiving the intense appreciation and gratitude from the Iraqi people.¹⁶⁵

This unique, Italian police force benefitted the Iraqi people as well as other countries suffering from similar circumstances ranging from Kosovo and the former Yugoslavia to Central and South America.¹⁶⁶ Their organized methods and strategies should be a model for the rest of the world to take action in stopping cultural heritage destruction. A force, such as the Carabinieri, would be instrumental in implementing the loan agreement discussed in the next section for safely removing antiquities from war zones.

VI. THE INTEGRATIVE LOAN AGREEMENT

Despite the efforts discussed in the previous section, antiquities remain vulnerable in violent combat situations. The overarching goal in international efforts should be the protection of cultural heritage. One unique solution to combat this growing issue is the implementation of a loan agreement between countries, private actors, and international organizations in order to remove antiquities from the risk of destruction altogether.

The loan agreement—an example of which is provided in Appendix A—is unique in that it would guarantee ownership is vested in the source country from the outset. Ownership is a recurring controversy in cultural heritage cases.¹⁶⁷ Some countries have their own laws that make it impossible

163. *Id.* at 161–62.

164. *Id.* at 167.

165. *Id.* at 169.

166. *Id.* at 170.

167. In one case, British forces stole artifacts of cultural heritage from Ethiopia over a century ago. Today, the Victoria & Albert Museum in London considered loaning these artifacts to Ethiopia. Even though true ownership rests with Ethiopia, and various movements have encouraged the full restitution of artifacts back to Ethiopia, there are some that are hopeful that the loan is a step in the right direction. See Yomi Kazeem, *A British Museum Is in Talks to Return Ethiopia's Looted Art Treasures, But Only on Loan*, QUARTZ AFR. (Apr. 4, 2018), <https://qz.com/africa/1244544/ethiopia-looted-artifacts-uks-victoria-albert-museum-may-loan-maqdala-back-to-ethiopia/> [<https://perma.cc/3LU4-EB89>].

to restitute artifacts to the source country, even if they were stolen.¹⁶⁸ These types of laws create a “convenient legal barrier that has prevented countries and communities that have been asking for their treasured assets from getting them back.”¹⁶⁹ The loan agreement is also unique in that it is intended to be incorporated into the existing international legal framework, so as to avoid conflicting domestic laws.

To make it available to parties around the world, this contract should be worked into an international body like the United Nations. As the intrinsic goal of the loan agreement is the eventual return of the objects once the risk of destruction is averted, a fitting place to access the contract would be the United Nations Intergovernmental Committee for Promoting the Return of Cultural Property (ICPRCP). The ICPRCP can be the resource for a variety of situations from ownership disputes to impending destruction at the hands of terrorist groups. Additionally, since the ICPRCP is a committee within UNESCO, incorporating this agreement into a widely recognized international body with numerous member states, such as the UNESCO, would allow the majority of the countries around the world to use the agreement immediately.¹⁷⁰

The preliminary discussions on who should be the preferred party to receive and care for the artifacts will ultimately be decided by the lending party with the assistance of the ICPRCP. The ICPRCP could enact a working group to compile a list of appropriate and willing participants that should be vetted and approved. Announcements should be made when there are opportunities for acquisition of an object or collection of objects. The

168. Under French law, public French art collections belong to the French state and cannot be given back to the country of origin even if it was acquired via looting. Ciku Kimeria, *The Battle to Get Europe to Return Thousands of Africa's Stolen Artifacts Is Getting Complicated*, QUARTZ AFR. (Nov. 29, 2019), <https://qz.com/africa/1758619/europes-museums-are-fighting-to-keep-africas-stolen-artifacts/> [<https://perma.cc/QG8E-SLPN>].

169. *Id.*

170. “*Return & Restitution*” *Intergovernmental Committee*, UNESCO, <https://en.unesco.org/fighttrafficking/icprcp> [<https://perma.cc/W3SM-MET5>]; There has been recent conflict between the United States and UNESCO for the United States’ perceived politicization of the U.N. body, which ultimately led to the United States self-removal from this body. However, there is still a great number of nations that are party to UNESCO and the efficacy of the loan agreement being accessible through UNESCO makes it a valid option. To garner true international support, a non-controversial international body would be the preferred option for the loan agreement—though this is no easy task. Thomas Adamson, *U.S. and Israel Officially Withdraw from UNESCO*, PUB. BROAD. SERV. (Jan. 1, 2019, 10:15 AM), <https://www.pbs.org/newshour/politics/u-s-and-israel-officially-withdraw-from-unesco> [<https://perma.cc/SZ26-EVFN>].

United States has a useful system of Notice of Funding Opportunities (NOFO) that are announced to the public when the government has funding available for grant applicants.¹⁷¹ A similar technique can be used in countries around the world to make these announcements widely available for anyone who wants to participate, granted they meet the qualifications set by the ICPRCP or any international body ultimately facilitating the loan.

Appendix A is a sample contract agreement similar in structure to that of a standard museum loan contract. It is written in such a way that it can be customized for the objects, the parties, the date of return, and the variety of circumstances that may occur in these situations—as many standard agreements are. It addresses concerns that are standard in contracts of this nature, such as insurance, transport, and immunity from seizure among other conditions.

Because the duration of the loan will not always be clear at the outset of the agreement, monetary incentives must be a central part of the loan. A problem that could arise is the issue of expenses. As this loan will be used in emergency circumstances, the borrower will not be able to accurately budget for the care and preservation of the artifacts. There must be enough assurance that the borrower will be able to care for the objects for an extended period of time, and to do this they will need a healthy revenue source. It will be difficult for private parties or museums, which are often non-profit entities, to enter into an agreement as expensive as this without some guarantee that their investment will be returned.

Questions of authority could also impact the implementation of this loan agreement. Under whose authority is this loan enforced? Who determines when the pieces should be returned? What is considered a peaceful time or a time of stability? All of these questions can be answered in preliminary discussions between the two parties entering into the agreement. The authority will be based on the contract itself and if there is to be a dispute, it will be resolved by the ICPRCP.¹⁷² The main objective of this contract agreement is that two parties mutually agree that one nation will lend priceless artifacts or allow for the protection of immovable monuments of cultural importance to another country who will accept these artifacts on

171. See, e.g., *Dictionary of Terms*, CTRS. FOR DISEASE CONTROL, <https://www.cdc.gov/grants/dictionary/index.html#nofo> [<https://perma.cc/MF54-PTB3>]; *Fiscal Year 2020 Notices of Funding Opportunities for Hazard Mitigation Assistance Grants*, FED. EMERGENCY MGMT. AGENCY [FEMA], <https://www.fema.gov/grants/mitigation/fy2020-nofo> [<https://perma.cc/XVD6-5ANF>].

172. The ICPRCP has already been successful in leading negotiations and mediations for a number of cases regarding restitution disputes. *Restitution of Cultural Property*, UNESCO, <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/> [<https://perma.cc/PCB8-WYLE>].

a temporary basis. This eliminates the need for black market smuggling because the artifacts will be removed with the full permission of the country of origin.

It is entirely possible that a country's government at a specific time will not sign on to an agreement with another nation for the purposes of conservation and protection. This could be due, in part, to violent regimes that would rather see these items destroyed than exist, like the Nazi regime or the Taliban. However, as seen in the Nazi Regime, there were still remnants of the previous governments of Poland and other states in the resistance that persevered and were successful in their efforts at cultural heritage conservation. The same is true today in the Middle East. ISIS has not taken the entire country hostage. Even in regions outside the Iraqi government's reach, there are still private citizens and private organizations that are willing to step in to help.

For example, consider the recent devastation in Paris, France. Although, the burning of the Notre Dame Cathedral in April 2019 was not an act of aggression, over the course of a few days almost \$1 billion was pledged to rebuild this iconic element of Catholic and French cultural heritage.¹⁷³ Imagine what could happen if private organizations were invited to the international stage to help struggling governments in need protect their cultural heritage and antiquities. The loan agreement would effectively stop the illegal export of antiquities because the artifacts would be removed legally. There would no longer be disputes in ownership because the contract would expressly state the true ownership in accordance with national patrimony laws. The contract could be also be applied retroactively—a shortcoming of the 1970 UNESCO Convention—as long as the two parties mutually agree and settle the dispute as could be the case in the dispute regarding the Elgin marbles between England and Greece.¹⁷⁴

Some of the main incentives for countries to accept artifacts on a temporary basis are that the party or government receiving the artifacts will have full permission to display in museums. They will have full rights to apply appropriate conservation and restoration methods. They will bring awareness of the threats against these artifacts to the international stage, which will be especially beneficial to the public image of many private foundations.

173. Aurelein Breeden, *Millions in Notre-Dame Donations Pour in as France Focuses on Rebuilding*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/world/europe/donate-notre-dame-fire.html?module=inline#> [https://perma.cc/5B7Q-9B4P].

174. Sánchez, *supra* note 1.

Countries will be incentivized to loan out their artifacts because they understand that they are under threat of destruction, that these items will not be lost to them as in the case of Greece and the Elgin Marbles. The contract will guarantee a return of the artifacts to their country of origin. Overall, the loan agreement will open doors for further diplomatic relations and even bring in revenue for the lending countries in the form of future loan agreements in times of peace. This can easily increase revenue to the lending country and increase the tourist demand in viewing these items around the world.

VII. CONCLUSION

Throughout history, cultural heritage has been at risk of destruction in times of war. We have seen various international and domestic efforts to respond to these risks through treaties, resolutions, conventions, and domestic legislation. In recent times, antiquities and cultural heritage have been under threat from non-state actors and terrorist organizations. Existing legislation and international agreements have attempted to stem the looting and destruction by restricting imports of cultural heritage objects and condemning the destruction at the hands of violent non-state actors.

Despite these efforts, antiquities and cultural heritage destruction is an ongoing issue. Laws and resolutions have little to no effect on terrorists whose existence is the antithesis of law and order. The solution should be to remove these antiquities from the line of fire. Increased efforts at protection need to be promoted for those objects and cultural heritage sites that are immovable. The loan agreement provides the adaptability needed for parties around the world to take initiative and take part in a loan of these artifacts instead of leaving them at risk for theft or destruction. The loan agreement also provides a real tool that can be used by parties beyond government actors and should be made as widely accessible as possible. Its position within the international community can give the loan immense reach. The loan agreement has great promise and potential and needs only creative solutions and ideas to help it along.

APPENDIX A: SAMPLE LOAN AGREEMENT¹⁷⁵

Cultural Heritage Loan Agreement

In accordance with the terms and conditions outlined in the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention, and all other internationally agreed upon treaties regarding the import, export, protection, and conservation of Antiquities and Cultural Heritage, the parties here ensigned, agree to the [loan or lending of protection over said artifact] for the duration [to be agreed upon] for the purposes of conservation, protection, and restoration of the objects. The leasing party agrees on behalf of itself and all other venues to observe the conditions and obligations contained herein.

Objects to be Loaned/Protected

[Description of the object/s to be loaned and their cultural significance]

Care and Preservation

The leasing party agrees to uphold the standards of conservation as outlined by the International Council of Museums regardless of the fact that the objects may or may not be in a museum setting. This ensures the objects receive adequate protection and care as they are invaluable pieces of cultural heritage.

Security Protocols

The leasing party agrees that the loan will be under continuous and vigilant protection from the hazards of fire, theft, exposure to extreme or deteriorating light, extremes of temperature and relative humidity, insects, dirt, or handling of unauthorized or inexperienced persons or the public.

Storage areas where the objects will be located will be locked with alarms on windows, doors, and any other openings. Access to these storage areas will be restricted.

Exhibition galleries where the loaned object(s) are located will be under guard during the exhibition installation and deinstallation, with access to the areas limited to those staff members immediately involved; and the area will be locked and secured when staff are not working.

All loaned object(s) on exhibition will be within continuous sight of a trained guard or employee at all times during public hours with at least one stationary guard or trained employee for every two galleries.

Rights for Display and Showcasing

The leasing party will be allowed to profit from the display and showcasing of the objects, including but not limited to photo depictions, souvenir recreations, etc., pursuant to the standards of the International Council of Museums and not sacrificing any elements of conservation, restoration, or protection. The leasing party may profit from the display for the duration of the loan.

175. The structure of this contract was formed from various examples of existing museum contracts regarding loan agreements. *Art Loan Contract*, ORG. OF AM. STATES ART MUSEUM OF THE AMS., <http://museum.oas.org/img/forms/loanoutgoing.pdf> [<https://perma.cc/8549-5MFK>]; *Simple Loans Administration*, ESMEE FAIRBAIRN FOUND., <https://dms-cf-02.dimu.org/file/032yiVimrwmV> [<https://perma.cc/G9SX-CEXG>]; *Loan Agreement*, EVELYN BURROW MUSEUM, http://www.burrowmuseum.org/wp-content/uploads/2018/07/Museum_loan_agreement_form_2.pdf [<https://perma.cc/8J3X-ZWYL>]; *Icom Guidelines For Loans*, INT'L COUNS. OF MUSEUMS (1974), <https://icom.museum/wp-content/uploads/2018/07/Loans1974eng.pdf> [<https://perma.cc/RAZ9-G7FH>]; *Art Exhibition & Loan Agreement*, UNIV. CAL., SAN DIEGO, https://blink.ucsd.edu/_files/safety-tab/risk/art-exhibit-loan-agreement.pdf [<https://perma.cc/9296-SRT4>].

Photography of Loan Object(s) by Borrower

The leasing party has full permission to photograph, film, or videotape the loan object(s), or to allow such to be done by third parties for publicity and promotional purposes in connection with the exhibition, as well as for academic and scientific purposes.

Photography may occur only on the leasing party's premises under the supervision of an appropriate member of their staff. Photography conditions are governed by the same environmental conditions, lighting restrictions, and care, handling and display requirements indicated previously in this document. Flashbulbs or flash equipment may only ever be used if there is a guarantee of the safety of the object(s). Photography by the Borrower and third-party photography may be used at the discretion of the Borrower, including any duplicates or derivatives.

Transportation

The Parties agree on the following terms of transportation:

The lending party will provide, to the best of their abilities, safe entry and exit into the country, abiding by all existing trade laws. The leasing party will likewise abide by all existing trade laws and will, to the best of their abilities, provide safe transport and protection from the country of origin to its destination.

In the instance of threat from a non-state actor or terrorist group, the parties will be granted protection from the lending government but will also have access to a specialized task force of security officers.

Packing and Handling

If possible, the lender will prepare the packages for the borrower to ensure expeditious transfer out of the conflict zone. Leasing party retains the right to inspect the packages before transport. Leasing party is held ultimately responsible for any damages that may occur in transport.

Ownership Agreements

The Parties agree that the lender is the true and rightful owner of the objects. No duration of the loan can change the true owner of the object unless the parties mutually enter into a separate and distinct purchase agreement pursuant to and compliant with all international standards of ethics regarding antiquities and cultural heritage.

Immunity from Seizure

Immunity from Seizure protection will be required from all leasing parties for whom the laws of such countries provide such protection.

Expenses Incurred

The leasing party shall bear all expenses of the loan, which may include but are not limited to: conservation to prepare the object(s) for loan, special preparation or framing, condition report photographs, packing/crating, insurance, shipping and shipping agents' fees, the staff overtime, expenses for the staff or courier travel, and miscellaneous out-of-pocket costs related to the loan. The Lender will make every reasonable effort to provide the leasing party with estimates in advance of all applicable costs.

Insurance

The leasing party shall insure the loaned objects in its possession on a wall-to-wall basis for the amounts specified on the face of this form by the Lender. The objects shall be insured against "all risks" or physical loss or damage from any external cause while in transit and on location during the period of this loan. In the event of a disagreement on the amount of loss, a competent and disinterested appraiser shall determine actual loss.

Return of objects to Lender

The Parties agree that the end date of the lease may be extended pursuant to a mutual agreement between the Parties. In the case of a threatening or hostile force in the lending country, the return of the objects may be delayed until the lending country can guarantee the safety of the objects. The level of safety and peace within the lending country will be held to the standards of the United Nations Security Council to avoid any dispute as to the understanding of peace and security. "Safety" pertains to the level of ability to protect and secure the cultural objects within the lending country.¹⁷⁶

176. The safety of the objects can be guaranteed when the lending country establishes the means for their own conservation and protection of the artifacts. A model example is the Greek museum in Athens near the Parthenon. Sylvia Poggioli, *Greece Unveils Museum Meant for 'Stolen' Sculptures*, NAT'L PUB. RADIO (Oct. 19, 2009, 1:28 PM), <https://www.npr.org/templates/story/story.php?storyId=113889188> [<https://perma.cc/ZH63-9J49>].

