

THE ROLE OF MUSEUMS IN SUSTAINING THE ILLICIT TRADE IN CULTURAL PROPERTY

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INTRODUCTION

Museums are the focal point of a tourist's journey, a researcher's thesis and a child's education. As non-profit institutions established specifically to conserve and communicate the world's cultural heritage,¹ museums are given the highest esteem and deference regarding their scholarly exhibitions. This reverence has, in large part, allowed these institutions to avert in-depth investigations into their collections, raising significant issues concerning the acquisition and exhibition of cultural property.

While the international trade in cultural property has been

¹ United Nations Educational, Scientific and Cultural Organization Culture Homepage, <http://portal.unesco.org/culture/en/> (last visited Sept. 9, 2007).

recognized as a potential source of illegal activity since the late 1940s,² in the 1970s the cultural trade grew exponentially, and with it came the growth of the illegal trafficking in stolen antiquities. Today, “[t]he illicit trade in cultural objects is sustained by the demand from the arts market, the opening of borders, the improvement in transport systems and the political instability of certain countries.”³ The recent increase in reported stolen property claims following the growth of the antiquities “black market” triggered international interest, which has started to break down communication barriers between the public, states and museum collections.⁴ Maxwell Anderson, the former director of the Association of Art Museum Directors,⁵ said that “[t]he ground is shifting radically under newly documented claims. . . . While there may not be a single clear solution for every claim, institutions will need to be forthright in explaining future acquisitions.”⁶ While international and domestic law-makers have created a broad framework to govern this cultural industry,⁷ it has been a slow process with museums worldwide left to defend their practices and acquisitions.

“Lifting a white sheet with a flourish to unveil the Sabina, the Italian Culture Minister, Francesco Rutelli, said the piece would be returned to Tivoli to rejoin ‘her restless companion’ at Hadrian’s Villa.”⁸ On Sept. 28, 2006, the Museum of Fine Arts, Boston, reached an accord with the Italian government to return 13 disputed archaeological artifacts. Included was the Sabina, which, since 1979, had been held in the museum’s esteemed collection.

² The International Criminal Police Organization, to which the U.S. is a member, has tracked the illegal art trade since 1947. Interpol Property Crime Homepage, <http://www.interpol.int/Public/WorkOfArt/Default.asp> (last visited Sept. 9, 2007).

³ *Id.*

⁴ Hugh Eakin, *Museums Under Fire on Ancient Artifacts*, N.Y. TIMES, Nov. 17, 2005, at E1. “In recent years archaeologically rich countries like Italy, Greece and China have relied on tightening international laws and growing public interest to open well-organized campaigns to repatriate artifacts and crack down on the antiquities trade.” *Id.*

⁵ The Association of Art Museum Directions [hereinafter AAMD] was established to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice; serving as forum for the exchange of information and ideas; acting as an advocate for its member art museums; and being a leader in shaping public discourse about the arts community and the role of art in society.

About the AAMD, <http://www.aamd.org/about/> (last visited Oct. 6, 2006).

⁶ Eakin, *supra* note 4.

⁷ Molly Torsen, *Fine Art in Dark Corners: Goals and Realities of International Cultural Property Protection*, 35 J. ARTS MGMT. & SOC’Y 89 (2005).

⁸ Elisabetta Povledo, *Boston Art Museum Returns Works to Italy*, N.Y. TIMES, SEPT. 28, 2006, at E27. The Sabina statue was created in the Roman, Imperial Period, around 136 A.D. The sculpture stands at seventy-nine and half inches tall and “is most likely a portrait statue of Sabina, wife of Emperor Hadrian (A.D. 117-138).” An Agreement with the Italian Ministry of Culture: List of Works, *available at* <http://www.mfa.org/master/sub.asp?key=2656&subkey=3414> (last visited Oct. 6, 2006).

The agreement reached between the Boston museum and the Italian government is a repeat performance by an American museum repatriating stolen cultural property. In February 2006, the Metropolitan Museum of Art⁹ “agreed to return a trove of antiquities that Italian authorities say had been taken from the country illegally.”¹⁰ In an interview with PBS following the return of the Italian pieces, a MET spokesperson asserted that this agreement, “will pave the road to new legal and ethical norms for the future.”¹¹ As a result of the cooperation exhibited by the museums in the Boston and MET accords, the Italian government agreed to extend long-term loans of equally important artwork to both museums as well as to, “collaborate on other projects like archaeological digs.”¹² These international compromises “mark[] the beginning of a new era of cultural exchange.”¹³

In the beginning of this century, however, when claims from such countries as Greece and Egypt started to emerge in the international media, museum directors were not as proactive in addressing the claims.¹⁴ In fact, “[museum directors] [took] issue with [the] rising tide of claims for repatriation of antiquities [which were] acquired centuries ago in an atmosphere of ethical standards far different from today’s.”¹⁵ Additionally, museum directors argued that, if the goal of museums is to promote universal awareness of the world’s cultures by displaying artifacts, museums should not be hindered from continuing their jobs at the risk of legal action by the true owner.¹⁶ In approximately the last three years, this apathetic perspective came under siege after the public’s awareness of scandalous international art cases, such as the charges against a former J. Paul Getty Museum curator in a Rome, Italy court for conspiracy to import illegally excavated

⁹ Hereinafter MET.

¹⁰ *A NewsHour with Jim Lehrer: Museums Investigate Stolen Art* (PBS online news hour broadcast Feb. 28, 2006), transcript available at http://www.pbs.org/newshour/bb/entertainment/jan-june06/art_2-28.html.

¹¹ *Id.*

¹² Povoledo, *supra* note 8.

¹³ Press Release, Museum of Fine Arts, Boston, Museum of Fine Arts, Boston and Italian Ministry of Culture Sign Agreement Marking New Era of Cultural Exchange: MFA Transfers 13 Antiquities to Italy (Sept. 28, 2006), available at <http://www.mfa.org/press/sub.asp?key=82&subkey=3444> (last visited Sept. 9, 2007).

¹⁴ William Mullen, *Museums Balk at Art Returns; Objects Acquired Centuries Ago Not Negotiable*, CHI. TRIB., Dec. 15, 2002, at C1.

¹⁵ *Id.* In 2002, 18 directors of the world’s most prominent art museums made public a statement about their concern over repatriating artifacts to requesting countries. *Id.* This statement put forth the argument that, “today’s ethical standards cannot be applied to yesterday’s acquisitions.” Eakin, *supra* note 11. Museum directors who attended this conference represented the Louvre in France, the Hermitage in Russia, the MET and the J. Paul Getty Museum in Los Angeles. *Id.*

¹⁶ Mullen, *supra* note 14.

antiquities.¹⁷ The recent accords between American museums and Italy demonstrate the gradual change in attitude of museum directors, who are now responding more vigilantly to claims concerning illegally confiscated artwork.

While agreements made by the Museum of Fine Arts, Boston and the MET have garnered praise by the international community, these acts constitute small steps as compared to the great number of questionable artifacts housed in museums worldwide.¹⁸ Therefore, this note addresses the issue of why illegally traded antiquities still remain under the auspices of museums. This note argues that the various acts of domestic legislation implementing the 1970 United Nations Educational, Scientific and Cultural Organization Convention,¹⁹ together with disparate museum policies and codes of ethics concerning stolen artwork, have allowed the acquisition and maintenance of illegal artwork to persist within the international museum community.

The first section of this note explores the reasons why certain countries have a greater problem with the recovery of stolen antiquities. Additionally, the first section presents a discussion of different cultural perspectives on the purpose of museums worldwide, shedding light on why countries with rich archaeological backgrounds, such as Italy, are reacting with such vigilance to repatriate their national patrimony. The second section reviews key historic international responses to the problem of stolen artwork, specifically the 1970 UNESCO Convention. State responses to the UNESCO Convention illustrate how the differences in the domestic legislation implementing the Convention contribute to the continued prevalence of illegally acquired artworks in museums. The third section addresses how the lack of a universal ethical code for museum acquisition of new works and provenance research of current museum pieces, permits museum professionals to continue engaging in the illegal art trade by discouraging policy changes and by not taking affirmative steps toward greater restrictions on museum

¹⁷ Frances D'Emilio, *Antiquities Spark a Global Tug of War: Countries, Courts Battle Illicit Trade in Ancient Treasures*, MSNBC NEWS, Dec. 4, 2003, available at <http://msnbc.msn.com/id/3660463> (last visited Sept. 9, 2007).

¹⁸ Povoledo, *supra* note 8. These are only the actions of two museums and a total of thirty-four artifacts. *Id.*

¹⁹ The United Nations Educational, Scientific and Cultural Organization [Hereinafter UNESCO] "promotes international co-operation among its [] Member States and six Associate Members in the fields of education, science, culture and communication. About UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Oct. 18, 2006). See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, 1970 UNESCO Convention, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

acquisitions. The fourth section compares the progression of antiquities provenance and repatriation claims to claims involving Holocaust-era looted artwork.

I. HOW DIFFERENT CULTURAL PERSPECTIVES ON THE PURPOSE OF MUSEUM COLLECTIONS AFFECT THE EXTENT OF STATE INVOLVEMENT IN REPATRIATING CULTURAL ARTIFACTS

The term “cultural property” has been defined by the United Nations 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.”²⁰ Under international law, “[cultural property] that can be subject to trading restrictions or prohibitions range from human remains to postage stamps.”²¹ The breadth of this definition illustrates the leeway given to states in defining national cultural property. The definition of national cultural property proves important when determining the scope of protection given to objects deemed “national” artifacts.

Attempts by nations to control the movement of national artifacts, particularly antiquities, resulted from the looting of archeological sites,²² which has taken place since ancient times. Thus, artifacts circulating in the art trade and displayed in museum collections today often have a connection to early archaeological looting.²³ As a result of the entrenched illicit trade, limited documentation exists to fill the gaps in provenance research, presenting serious issues for countries attempting to prove the ownership of artifacts deemed protected national cultural property.

For reasons other than provenance, countries with rich archaeological backgrounds are tremendously affected by the persistence of the illegal trade of antiquities. “According to Mr. Vivian Davies, Keeper of Egyptian Antiquities at the British Museum, ‘the destruction in countries like Egypt is catastrophic. Massive destruction is being done to archaeological sites in Egypt on a daily basis, [where o]bjects are finding their way out through various laundering systems.’”²⁴ It is this vast destruction and loss of artifacts into the “black market,” together with international

²⁰ UNESCO Convention, *supra* note 19.

²¹ CULTURE, MEDIA AND SPORT COMMITTEE, CULTURAL PROPERTY: RETURN AND ILLICIT TRADE, SEVENTH REPORT, 2000-7, H.C. 371-I, *available at* <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcmuds/371/37104.htm> (last visited Sept. 9, 2007).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

agreements, that have brought the illicit trade of antiquities into the forefront of the public's interest and museum agendas.²⁵

The extent of state involvement in repatriating cultural artifacts stems from that state's perspective on the purpose of museum collections. "There is a very real tension between the belief that great culture is a shared inheritance of everybody and the view that it is the particular inheritance of one modern political entity."²⁶ The two perspectives at odds are the cultural internationalist view on the one hand, and the nationalist view on the other, the former believing in a shared world heritage and the latter arguing that cultural property is limited to the citizens where the property is located.²⁷ Cultural nationalists thus argue for the exhibition of cultural property within the country of origin, in contrast to internationalists who believe in best serving the world's heritage by displaying the pieces in museums worldwide.

As was first articulated in The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, the cultural internationalist view asserts the principle that "everyone has an interest in the preservation and enjoyment of all cultural property, wherever it is situated, from whatever cultural or geographic source."²⁸ Further, cultural internationalists criticize:

[A] state's indiscriminate retention and prohibition of the trade of cultural objects, when it already has multiple examples of a similar piece and hoards them 'beyond any conceivable domestic need,' [as it] drives the black market in antiquities. Looting to feed the international demand of cultural artifacts in turn contributes to the irreplaceable loss of archaeological knowledge.²⁹

Many directors of the most prominent museums in the world share the cultural internationalist view and have termed it the

²⁵ D'Emilio, *supra* note 17.

²⁶ Eakin, *supra* note 4. Cultural property can be categorized either as property of the entire human culture, "whatever their places of origin or present location, independent of property rights or national jurisdiction." John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986). On the other hand, cultural property can be characterized 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." *Id.* at 832. These two categories divide states into source nations, where cultural property is abundant, and market nations, where high demand for the cultural property exists. *Id.*

²⁷ Eakin, *supra* note 4.

²⁸ John Henry Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1881, 1916 (1985).

²⁹ Maria Aurora Fe Candelaria, *The Angkor Sites of Cambodia: The Conflicting Values of Sustainable Tourism and State Sovereignty*, 31 BROOK. J. INT'L L. 253, 270 (2005).

“universal museum concept.”³⁰ For these directors and others holding the same perspective, the universal museum concept characterizes the importance and purpose of museum collections.³¹ Countries holding the cultural internationalist viewpoint, including the United States and Switzerland, are typically, wealthy, large art importing nations.

In contrast, countries sharing the cultural nationalist perspective are often those seeking the repatriation of their cultural property and who have been plagued by the looting of their archaeological sites. Cultural nationalists emphasize that, “something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government of a nation should have power over artifacts historically associated with its people or territory.”³²

Under the “cultural patrimony” laws of many foreign countries — including Egypt, Italy and Turkey — any artifact found within the country’s land after a certain date is considered the possession of the government, not the person who found it or owns the land where it was found. In cases where these antiquities are eventually sold to museums, the government considers them ‘stolen.’³³

Domestic laws of countries touting cultural nationalism reflect this ideology by limiting activities, such as exports,³⁴ and putting forth legislation aimed at retrieving property in foreign museums.³⁵

As exemplified by current disputes, one of the main issues facing nationalist countries is collecting sufficient evidence to prove that an object was, in fact, stolen from its territory. Currently, the Egyptian government is battling the St. Louis Art

³⁰ Mullen, *supra* note 14.

³¹ The concept of the “universal museum” involves the idea that art from cultures around the world can be displayed in one place, other than the source country, and represent “antiquity through the modern era.” *Id.*

³² Merryman, *supra* note 28, at 1912.

³³ Reni Gertner, *New Legal Agreements Send “Stolen” Art Back To Its Roots*, MINN. LAW., Sept. 11, 2006.

³⁴ Mullen, *supra* note 14. Italy is an example of country holding a nationalist perspective as a result of its rich cultural history dating back at least 2000 years and having archaeological traces of the major civilizations of the world within its border. Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT’L L. 657, 672 (2001). “The Italian government has actively attempted to ensure the protection and conservation of this wealth of cultural property” by subjecting cultural property in Italy “to extensive state regulation and control.” *Id.* Italian law, including the Italian Constitution, “provide[s] the framework for a system of State ownership and control for all cultural property found within Italy.” *Id.* at 673.

³⁵ The British Museum and Greek officials have been in an age old battle over ownership of the Elgin Marbles, originally from the Parthenon in Athens. Mullen, *supra* note 14.

Museum for a mummy mask it claims was stolen from a storage facility within its border.³⁶ The St. Louis Art Museum claims, however, that it “verified the ‘provenance’ of the mask at the time of purchase — which involves tracing the artwork back through who has possessed it over time — contacted the Art Loss Register . . . and consulted with the director of the Egyptian Museum to confirm that the item was appropriate for purchase.”³⁷

In another dispute, a Turkish museum has begun its effort to retrieve ceramics dated to the Ottoman era, which they believe were stolen from Istanbul and are now housed in the Louvre Museum in Paris and another French museum.³⁸ The Hagia Sophia Museum in Istanbul claims that the ceramic tiles were stolen by a French art collector from the tombs of two sultans. This is just one of the thirty-five objects the Turkish Culture Ministry is attempting to recover.³⁹

Arguments on both sides of the issue make resolving disputes between countries and museums over the origin and correct placement of antiquities difficult. Even though cultural nationalism has dominated the debate, professionals in the art world continue to resist this view. Without increased museum cooperation, even in conducting greater provenance research, addressing repatriation requests will continue to be an arduous process. Yet, without denying the importance of protecting a nation’s cultural property, cultural nationalists could benefit by displaying artifacts symbolizing their national heritage in museums worldwide. Educating the population about a specific culture garners support for the importance of that nation’s history and role in worldwide development. While efforts by the international community push countries to respond to the illicit art trade, that same sense of urgency has not effectively pressed the museum community into action.

II. HOW THE 1970 UNESCO CONVENTION HAS BEEN THE FORCE BEHIND STATE ACTION TO PROTECT CULTURAL PROPERTY

A. *The UNESCO Convention*

In the late nineteenth and early twentieth centuries, domestic legislation controlling the movement of cultural property

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Turkish Museum Seeks Return of Stolen Era Rare Tiles*, CAN. BROAD. CO., June 25, 2006, available at <http://www.cbc.ca/arts/story/2006/06/25/hagiasophia-tiles-louvre.html> (last visited Sept. 9, 2007).

³⁹ *Id.*

triggered a more aggressive response to the exploitation of cultural property by the international community.⁴⁰ A resurgence of interest in pursuing the whereabouts of illegally traded cultural property prompted UNESCO to act by forging the Convention for the Protection of Cultural Property in Armed Conflict.⁴¹ UNESCO continued its efforts in this area by making recommendations to member states, including a provision denouncing the acquisition of archaeological objects without adequate background research.⁴² The pervasiveness of the illicit transfer of cultural property across borders and into museum collections pushed UNESCO to formulate the 1970 UNESCO Convention to counteract and delegitimize these practices.⁴³ The states party to this Convention affirmed that illicit cultural trade is one of the “main causes of the impoverishment of the cultural heritage of the countries of origin.”⁴⁴ Signators also declared their commitment to international cooperation as the most efficient means of resolving cultural property disputes.

Of the 190 member states of UNESCO, 102 are signatories to the 1970 UNESCO Convention either by ratification, acceptance, accession or succession.⁴⁵ “Many of the signatories are Third World countries and source nations, but large art importing nations such as Canada, France, the United States, Switzerland, and Germany have also signed.”⁴⁶ In understanding the weight of a signatory to the Convention, it is important to recognize that states must enact enabling legislation for domestic enforcement of the Convention and that states may submit reservations and understandings in ratifying the treaty.⁴⁷ These factors affect the degree to which states follow provisions of the UNESCO Convention, particularly where museums are not bound by any

⁴⁰ PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 9 (Institute of Art and Law) (2000). Countries that passed domestic legislation included Greece in 1834, Italy in 1872 and France in 1887. After World War I and into the 1930s, the League of Nations drafted two conventions that ended unsuccessfully, mainly as a result of the world situation during the time leading up to World War II. *Id.* at 9-10.

⁴¹ *Id.* at 10.

⁴² *Id.* at 11.

⁴³ UNESCO Convention, *supra* note 19. The convention-making process began in 1964 when UNESCO appointed a committee of experts from around the world to draft preliminary recommendations on how to proceed and structure a treaty on the illicit trade of cultural property. O’KEEFE, *supra* note 40, at 13.

⁴⁴ *Id.*

⁴⁵ Torsen, *supra* note 7.

⁴⁶ Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 65 (Fall/Winter 2004).

⁴⁷ O’KEEFE, *supra* note 40, at 25. Under international law, “while states may limit, by reservation, their obligations under an international treaty . . . there is in every treaty a certain core content which parties must accept if they wish other States to acknowledge them as parties to the treaty at all.” *Id.*

state law.

Although the articles of the UNESCO Convention favored a cultural nationalistic view, the United States, and other cultural internationalist supporters, eventually implemented the convention, showing the importance of international cooperation in increasing the legal trade of cultural property.⁴⁸ One of the main considerations for countries with an opposing cultural position to become party to the UNESCO Convention was that the Convention was not a self-executing treaty.⁴⁹ As a non self-executing convention, states have the ability to formulate their own legislation for implementation, giving states leeway in their acceptance of the provisions of the UNESCO Convention.⁵⁰ In short, “[n]ot every article in the UNESCO Convention need[ed] to be embodied in a given state’s laws.”⁵¹

The latitude given to states in fulfilling their treaty obligations under the UNESCO Convention influenced the extent of any state legislation or administrative structure put in place.⁵² Even though the principles outlined in the UNESCO Convention provide the basis of almost any claim asserted for the repatriation of cultural property, the application and enforcement of these principles differs under each state’s law.⁵³ The UNESCO Convention provided a starting point for comprehensive regulation of the illegal cultural property trade, but its vagueness and latitude for the implementing state legislation lead to inconsistency for future action in this arena, specifically with respect to museums’

⁴⁸ Torsen, *supra* note 7. The UNESCO Convention is noted as one of the most important international treaties concerning the illegal trafficking of antiquities during peace time. Jennifer N. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and The UNIDROIT Draft Convention*, 14 ARIZ. J. INT’L & COMP. LAW 527, 539 (1997).

⁴⁹ Article 19 of the UNESCO Convention states that, “[t]his Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.” UNESCO Convention, *supra* note 19.

⁵⁰ Torsen, *supra* note 7.

⁵¹ *Id.*

When a state becomes party to an international convention it undertakes to fulfill whatever obligations the convention contains. How it does this is a matter for the State concerned and depends on its political, legal and administrative structure. In some States an obligation may be fulfilled by administrative arrangements while in other States this may need provision in the law.

O’KEEFE, *supra* note 40, at 102.

⁵² *Id.*

⁵³ Lehman, *supra* note 48, at 540. The UNESCO Convention encourages states to resolve claims through separate settlements, as stated in Article 15, “[n]othing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed.” UNESCO Convention, *supra* note 19. However, as recognized in Article 9(b)(ii), the convention also gives states a platform from which to assert claims against another party state. *Id.*

provenance and repatriation policies.⁵⁴

B. *The Swiss and United States Implementing Legislation for the 1970 UNESCO Convention*

Given the leeway UNESCO offers, Switzerland and the United States took different approaches in interpreting the principles of the UNESCO Convention. Even though both are wealthy, cultural internationalist countries with high economic interests in the trade of cultural property,⁵⁵ their enabling legislation reflects two different overall positions on how to counter the illicit trade of cultural property.⁵⁶ Comparing these state instruments illustrates how the UNESCO Convention, as the historic framework for domestic legislation, fosters inconsistent enforcement efforts, preventing a significant reduction in the illegal trade of cultural property.

“In the midst of mounting international awareness of [Switzerland’s] gross mishandling of cultural property,” in 2004, the Swiss finally implemented the UNESCO Convention.⁵⁷ The new Swiss legislation, the Federal Act on the International Transfer of Cultural Property or the Cultural Property Transfer Act (“CPTA”),⁵⁸ together with the Ordinance on the International Transfer of Cultural Property (“CPTO”),⁵⁹ for the first time under Swiss law regulates the “import of cultural property into Switzerland, its transit and export as well as its repatriation from Switzerland.”⁶⁰ Additionally, “[m]any of the [Swiss law’s] provisions discourage trade in unprovenanced cultural property more strongly than do other nations’ implementing legislation.”⁶¹

⁵⁴ Lehman, *supra* note 48, at 542.

⁵⁵ Typically, countries with cultural internationalist perspectives are wealthy nations with high art importing demands. Torsen, *supra* note 7.

⁵⁶ Of these states, Switzerland was the last to implement the UNESCO Convention in 2004, following the U.S. in 1983. *Id.*

⁵⁷ *Id.* Negative media coverage had been swirling around Switzerland because of its notorious involvement in illegal cultural property activity due to the country’s lax laws surrounding art theft. Torsen, *supra* note 7.

⁵⁸ The Swiss legislation implementing the UNESCO Convention has been translated as the Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act). See Bundesblatt [BBl] 4475 (June 20, 2003), Code civil Suisse [Cc] June 20, 2003 (Switz.), translated in http://www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf (last visited Oct. 22, 2006) [hereinafter CPTA].

⁵⁹ See Kulturgütertransfergesetz [KGTG], Code civil Suisse [Cc] Apr. 13, 2005 (Switz.), translated in http://www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf (last visited Oct. 22, 2006) [Hereinafter CPTO].

⁶⁰ Philippe Pulfer, *Getty Cultural*, LEGAL WEEK, Jan. 26, 2006. One of the main adjustments made in the Swiss law, which will not be discuss in-depth, is the extension of the statute of limitations for “claims for repatriation by a state . . . to thirty years after the cultural property is illicitly exported.” CPTA, *supra* note 58.

⁶¹ Torsen, *supra* note 7.

This forthright stance resulted, in large part, from the principle of personal accountability upon which the legislation is based.

“The CPTA and CPTO consider the principle of individual responsibility within the art trade to the greatest extent possible.”⁶² Keeping the art industry at the forefront, the Swiss lawmakers target museum compliance in three main ways: defining the scope of cultural property, imposing stringent due diligence requirements and taking steps toward the recovery and return of property. Additionally, another significant provision under Section 9 of the CPTO, gives Swiss authorities the ability to impose criminal sanctions on those individuals who evade the law.⁶³ Article 33 of the CPTA precludes retroactive application of the law, since it took effect on June 1, 2005.⁶⁴

Two provisions of the CPTA outline the expansive definition given to cultural property. Article I of the CPTA broadly defines cultural property by referencing the categories of cultural property listed in Articles I and IV of the UNESCO Convention.⁶⁵ Further, Article II of the CPTA defines cultural property separately from cultural heritage,⁶⁶ prompting an argument that these separate definitions will likely “narrow [the law’s] impact to a specialized area of the art market.”⁶⁷ This argument, however, fails in two ways. First, the Swiss law is the first of its kind to enter into the Swiss legal system. Thus, the law can only facilitate increased regulation of the illegal art market where no previous law existed to prevent this type of illegal activity. Second, a comprehensive textual reading of the definition of cultural property under Article I of the UNESCO Convention, together

⁶² *New Rules for the Art Trade: A Guide on the Cultural Property Transfer Act for the Art Trade and Auctioning Business*, SWISS FEDERAL OFFICE OF CULTURE, June 1, 2005, <http://www.bak.admin.ch/bak/themen/kulturguetertransfer/01106/index.html?lang=en>.

⁶³ See CPTO, *supra* note 59. As will be discussed later in this note, the ability to impose criminal sanctions is one of the major differences between the Swiss law and the U.S. law in implementing the UNESCO Convention.

⁶⁴ SWISS FEDERAL OFFICE OF CULTURE, *NEW RULES FOR THE ART TRADE: A GUIDE ON THE CULTURAL PROPERTY TRANSFER ACT FOR THE ART TRADE AND AUCTIONING BUSINESS* (June 1, 2005), *available at* <http://www.bak.admin.ch/bak/themen/kulturguetertransfer/01106/index.html?lang=en> [Hereinafter *NEW RULES FOR THE ART TRADE*].

⁶⁵ See CPTA, *supra* note 58. Cultural property is defined as significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, arts or sciences belonging to the categories under Article 1 of the UNESCO Convention of 1970. Cultural heritage is considered the entirety of cultural property belonging to one of the categories under Article 4 of the UNESCO Convention of 1970.

CPTA, *supra* note 58. See UNESCO Convention, *supra* note 19. As will be noted later, the U.S. implementing legislation does not clearly differentiate between cultural property and cultural heritage.

⁶⁶ CPTA, *supra* note 58.

⁶⁷ *Id.*

with the Swiss law, indicates that cultural property encompasses not only historic or archaeological pieces of art, but also “property of artistic interest.”⁶⁸

From a plain reading of the law, the Swiss adopted an expansive definition of what constitutes protected cultural property. While the arguments outlined above target the effectiveness of this recently enacted law, the impact of these definitions on the illegal art trade are yet to be seen. Even where the impact and effectiveness of the legislation remain uncertain, it is clear that the definition of cultural property captures the range of objects housed within museum collections.

Where the Swiss definition of cultural property outlined what museum works are regulated by law, the strict due diligence requirements target the conduct of museum professionals. The Swiss definition and special duties of due diligence were conceptually “derived from the general principle that no illegally acquired cultural property may be transferred.”⁶⁹ “A clear definition of due diligence under Swiss law is significant because of the Swiss good-faith-purchaser doctrine that permits the transfer of good title to stolen goods to a good-faith-purchaser.”⁷⁰ This precedential legislation altered the assumption under Swiss doctrine by establishing that, “cultural property may only be transferred when it can be assumed that the property is not stolen or otherwise lost against the will of the owner, illicitly excavated or illegally imported into Switzerland.”⁷¹ The stringent due diligence guidelines rest upon this principle, specifically affecting museum acquisition policies.

The due diligence requirements cast a wide net over who must comply with the law, and rigorously regulate how professionals in the art world conduct business. The due diligence and good faith provisions obligate those persons and companies active in the art trade on a “professional basis” within Switzerland to comply with the CPTA and CPTO, including persons domiciled abroad and legal entities headquartered abroad.⁷² Additionally, the due diligence regulations expect compliance by all federal institutions, which include museums established under the Federal Department of Culture.⁷³

⁶⁸ UNESCO Convention, *supra* note 19.

⁶⁹ NEW RULES FOR THE ART TRADE, *supra* note 64.

⁷⁰ Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 40 INT’L LAW. 441 (Summer 2006).

⁷¹ NEW RULES FOR THE ART TRADE, *supra* note 64. “Lost against the will of the owner refers in particular to illegally excavated archaeological or palaeontological objects to the extent claimed as state property by the state in question. *Id.*”

⁷² NEW RULES FOR THE ART TRADE, *supra* note 64.

⁷³ *Art and Culture*, Swiss World Organization,

While the due diligence requirements only apply to cultural property over a certain value, they apply to, “all archaeological or palaeontological excavations or discoveries; portions of dismembered artistic or historical monuments or portions of excavation sites; ethnological objects.”⁷⁴ “Many U.S. and international museums and art institutions have contractual understandings or memberships to societies that self-regulate in a similar fashion,” but they do not include this type of due diligence stipulation as law.⁷⁵ “The [CPTA and CPTO] demand[] seamless provenance documentation and focus[] on the accountability of all the parties involved in a cultural goods transaction.”⁷⁶ Thus, museum officials and trustees must ensure they meet the special duties of due diligence that affect the wide scope of cultural property captured under the Swiss law when acquiring objects or accepting loans.⁷⁷

In the vein of due diligence, the Swiss law set up two main avenues to retrieve and protect “cultural and foreign affairs interests and to secure cultural heritage”: bilateral agreements and use of a specialized body for the execution of the CPTA.⁷⁸ Article VII creates a mechanism, similar to the U.S. mode of implementation, by which the Swiss government may “conclude international treaties with contracting states [to the 1970 UNESCO Convention] on the import and repatriation of cultural property.”⁷⁹ Additionally, the law permits bilateral agreements to protect jeopardized cultural property in emergency situations, such as armed conflicts and natural disasters.⁸⁰ While Articles VII and VIII of the CPTA set the groundwork for increased international discussion of the illicit trade of cultural property, these provisions do not clearly define the parameters for these

<http://www.swissworld.org/eng/swissworld.html?siteSect=605&sid=4046816&rubricId=14050> (last visited Nov. 1, 2006). See CPTO *supra* note 59, for a definition of “federal institutions” under Article I of the CPTO.

⁷⁴ *Id.* The value of the cultural property used to determine whether to apply the due diligence requirements can be either the sales price or the appraised value. *Id.*

⁷⁵ Torsen, *supra* note 7. Article XV of the CPTA explicitly establishes the Swiss government’s expectation of federal institutions, which includes federally funded museums. CPTA, *supra* note 58.

⁷⁶ Torsen, *supra* note 7.

⁷⁷ Under Article 16 of the CPTA, the obligations of professionals in the art trade include, establishing the identity of the supplier or seller and require a written declaration from that person claiming his or her right to dispose of that property and retaining written records on the acquisition of the property by noting the origin of the property to the extent known, the information of the supplier or seller and a description of the property. CPTA, *supra* note 58.

⁷⁸ *Id.*

⁷⁹ *Id.* Under the UNESCO Convention, a “contracting party” denotes a state that has assumed the responsibilities outlined under the treaty and has created a state instrument to implement the treaty. UNESCO Convention, *supra* note 19.

⁸⁰ *Id.* See CPTO, *supra* note 59.

types of negotiations. For example, in contrast to the U.S. implementing legislation, the CPTA places no expiration on Article VII international treaties. The most stringent requirement asserted against contracting countries is the condition that, "the scope of the agreement must be cultural property of significant importance to the cultural heritage of the [] state."⁸¹ Thus, while the cultural property at issue must fall under Article four of the UNESCO Convention, the broad categories created under the Convention reduce the difficulty of satisfying the Swiss condition. No bilateral agreements have been negotiated to completion under the CPTA, and thus, the parameters for devising international treaties under the Swiss law may be revised in future practice.

Under the CPTA, two conditions premise a state's claim against Switzerland for the repatriation of cultural property allegedly imported into Switzerland in breach of its state laws: the state is a contracting party and the state is bound by an agreement with Switzerland.⁸² Further, the claim must be premised on the fact that the cultural property at issue is of "significant importance for its cultural heritage."⁸³ These provisions follow the model of previous implementing state legislation, such as that of the U.S. and Germany,⁸⁴ and are consistent with the purpose and intention of the UNESCO Convention. Generally, the UNESCO Convention places, "great stress on co-operation and the text of the Convention is designed to establish this among Member States."⁸⁵ Further, the Preamble of the UNESCO Convention indicates that this Convention was written with the consideration that "the protection of cultural heritage can be effective only if organized both nationally and internationally among states working in close cooperation."⁸⁶ The conditions claims against Switzerland must satisfy are thus not only within the scope of the UNESCO Convention, but also follow other state practice. While

⁸¹ CPTA, *supra* note 58.

⁸² In this context, repatriation means, "the return of something to its country of origin when 'origin' is the determining factor in establishing clear title." James Cuno, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT'L L. 189 (Spring 2001).

⁸³ *Id.*

⁸⁴ O'KEEFE, *supra* note 40, at 74. Under German law, import controls, "can only be implemented after the conclusion of bilateral agreements." Auswärtiges AMT (Foreign Office – Federal Republic of Germany) "Comments on the UNESCO Convention 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property" Doc.615-611.1/4 (1985) at p.3.

⁸⁵ O'KEEFE, *supra* note 40, at 33.

⁸⁶ UNESCO Convention, *supra* note 19. While the Preamble does not set forth obligations or responsibilities for states who undertake this treaty, it is used as a guidepost for interpreting treaties as it establishes the general principles underlying the scope of the treaty. O'KEEFE, *supra* note 40, at 33.

the Swiss law provides a fair mechanism to entertain claims, limitations and conditions protect Swiss museum collections from unfounded assertions of repatriation claims.

Lastly, one of the most significant differences between the Swiss law and other seemingly similar implementing state laws lies in Articles XXIV and XXV of the CPTA, providing for criminal penalties against those who illicitly import cultural property.⁸⁷ Breach of the CPTA may be punishable by imprisonment for one year or with a fine.⁸⁸ Article XVIII of the CPTA permits the Swiss government to appoint a specialized body to ensure compliance with due diligence requirements, giving them access to business rooms and storage facilities of persons active in the art trade as professionals. When a reasonable suspicion of criminal activity arises, the specialized body files a complaint with the appropriate criminal authorities who may then take more drastic measures, such as seizure and prosecution.⁸⁹ Even though the UNESCO Convention does not explicitly discuss criminalizing the intentional dealing in illicitly taken cultural properties, as one of the world's largest art markets, the Swiss believe this is the best route to achieve the goals of the Convention. "The CPTA and CPTO consider the principle of individual responsibility within the art trade to the greatest extent possible."⁹⁰ From its broad scope of protection, to the due diligence requirements and the set parameters for international relations, the Swiss hard-line stance on curbing the illicit art trade permeates all aspects of the law and keeps museums constantly aware of its conduct and policies.

Switzerland's comprehensive approach in enforcing the UNESCO Convention, in many ways, followed the U.S. route to ratification. In 1983, the UNESCO Convention was implemented into U.S. law when President Ronald Reagan signed the Convention on Cultural Property Implementation Act.⁹¹ The State Department described the U.S. position at the time by stating that,

[t]he legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and ethnological interest has led to wholesale depredations in some countries, resulting in the mutilation of ceremonial centers and archaeological complexes of ancient civilizations and the removal of stone sculptures and reliefs. In addition, art objects have been stolen

⁸⁷ CPTA, *supra* note 58.

⁸⁸ *Id.*

⁸⁹ NEW RULES FOR THE ART TRADE, *supra* note 64.

⁹⁰ *Id.*

⁹¹ Hereinafter, CPIA.

in increasing quantities from museums, churches, and collections The United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.⁹²

Although the U.S. enabling legislation came thirteen years after the signing of the UNESCO Convention, “in the context of other art-importing nations [at that time], the United States . . . [had] the most heavily regulated antiquities market in the world.”⁹³ Today, however, the Swiss legislation is arguably more stringent than the CPIA, specifically in regard to regulating museum conduct.

The CPIA concentrates heavily on the import aspect of the UNESCO Convention, in large part failing to address how to deal with artifacts currently within U.S. borders.⁹⁴ “The CPIA is an import law, not a criminal law; it is not codified in Title 18 (“Crimes and Criminal Procedure”) . . . but in Title 19 (“Customs Duties”).”⁹⁵ While “[t]he United States initiatives [] generated [] public awareness as well as long-term educational efforts in the nations involved . . . in some cases United States import bans may have tended to divert the illicit traffic to other art importing countries, where such controlled and thus potentially rare objects are more attractive.”⁹⁶ Even though the U.S. restricted its obligations under the UNESCO Convention to a greater extent than the Swiss,⁹⁷ the Swiss law parallels the U.S. mechanism of implementation in a number of different ways.

First, the stated purpose of the CPIA is “to provide that

⁹² S. Rep. No. 97-564, at 23 (1982).

⁹³ Torsen, *supra* note 7.

⁹⁴ O’KEEFE, *supra* note 40, at 106. Under a narrow scheme, the CPIA focuses on importation versus exportation restrictions as exemplified in Articles 7(b) and 9 of the UNESCO Convention. *Id.* These articles “call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations.” *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*, 917 F.2d 278, 297 (1990).

⁹⁵ *U.S. v. Schultz*, 333 F.3d 393, 409 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004). *Schultz* upheld the conviction of a defendant for conspiracy to receive stolen antiquities that had been transported in interstate and foreign commerce in violation of the National Stolen Property Act (NSPA), which permits conviction where property was stolen in another country. *Id.* This case illustrates that the CPIA was not intended to be the only mechanism by which the U.S. government would deal with antiquities and other “cultural property” imported into the U.S. *Id.* at 408.

⁹⁶ Clemency Chase Coggins, *A Licit International Traffic in Ancient Art*, in 5 INTERNATIONAL SALES OF WORKS OF ART, LEGAL ASPECTS IF INTERNATIONAL TRADE IN ART 47, 53 (Martine Briat & Judith Freedberg eds., 1996).

⁹⁷ O’KEEFE, *supra* note 40, at 111. See also U.S. CUSTOMS AND BORDER PROTECTION, WORKS OF ART, COLLECTOR’S PIECES, ANTIQUITIES, AND OTHER CULTURAL PROPERTY (2006), *available at* http://www.cbp.gov/linkhandler/cgov/toolbox/legal/informed_compliance_pubs/icp061.ctt/icp061.pdf (last visited Sept. 11, 2007)

authority, thereby promoting U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to the nations whence they originate, but also to a greater international understanding of our common heritage.”⁹⁸ This cultural internationalist perspective reflects the American and Swiss definitions of cultural property, covering both property of archaeological and ethnological interest.⁹⁹ Under the CPIA, cultural property includes all of the categories listed in Article one of the UNESCO Convention.¹⁰⁰ More specifically, an archaeological object is defined as any “culturally significant material object, at least 250 years old, which is normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.”¹⁰¹ An ethnological object is characterized as a “product of a tribal or nonindustrial society that is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.”¹⁰² Arguments that the archaeological and ethnological definitions narrow the Article 1, UNESCO Convention definition of cultural property¹⁰³ are refuted by the fact that the definition has not been used in a restrictive manner.¹⁰⁴ By contrast, these definitions broaden the scope of protection and preserve what the U.S. and Swiss view as part of a worldwide common heritage.¹⁰⁵

Second, repatriation and protection of cultural property under U.S. law, similar to the Swiss law, hinges on the bilateral or

⁹⁸ S. Rep. No. 97-564, at 21 (1982).

⁹⁹ See *supra* page 13 for a discussion of the definition of cultural property in the CPTA.

¹⁰⁰ 19 U.S.C. § 2601 (2006).

¹⁰¹ U.S. State Dept. Bureau of Educational and Cultural Affairs: International Cultural Property Protection, Glossary and Definitions, <http://exchanges.state.gov/culprop/glossary.html> (last visited Dec. 27, 2006).

¹⁰² *Id.*

¹⁰³ O’KEEFE, *supra* note 40, at 111.

¹⁰⁴ See *Autocephalous*, 917 F.2d at 297 (defining cultural property under the CPIA as property that is “important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.”). Whether the definition of cultural property restricts or broadens the scope of protection was also raised in conjunction with the Swiss law analysis. However, because the Swiss law was just recently enacted there is not yet evidence that the definition is expansive as with the American law.

¹⁰⁵ The CPIA and the UNESCO Convention draw a distinction between pillaged cultural property and stolen cultural property. Under the CPIA, §§ 2602-06 are concerned with the problem of pillage and illicit export of archaeological and ethnological material that is uninventoried and likely to reside in its place of origin. § 2607 provides on-going protection for material that is stolen after it has been documented or inventoried within a collection. U.S. State Dept. Bureau of Educational and Cultural Affairs: International Cultural Property Protection, Provisions of the Cultural Property Implementation Act, *available at* <http://exchanges.state.gov/culprop/backgrnd2.html> (last visited Dec. 27, 2006).

multilateral agreements the U.S. enters with other states party to the UNESCO Convention.¹⁰⁶ Under these agreements, the U.S. acts by imposing import restrictions on designated categories of archaeological and ethnological materials that are subject to pillage.¹⁰⁷ While the UNESCO Convention does not use the term “emergency condition,” the CPIA provides that the President may also take unilateral emergency action and impose import restrictions on a temporary basis if such restrictions “would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.”¹⁰⁸ These provisions, however, limit the impact the U.S. legislation has on resolving the issues surrounding cultural property.

Even though the U.S. framework for international agreements is comparable to the Swiss law, the CPIA limits protection to the enactment of import restrictions, which are only in effect for a five-year period.¹⁰⁹ Additionally, the protections given under import restrictions do not extend to museums that may have acquired property prior to the enactment of import restrictions. These failures not only restrict the UNESCO Convention provisions implemented under the CPIA, but limit the scope of protection and path to repatriation.

Lastly, the CPIA established the Cultural Property Advisory Committee¹¹⁰ comprised of knowledgeable representatives from the private sector to assist the President in pre-negotiation of agreements with requesting states.¹¹¹ While the Swiss Committee for Protection of Cultural Property mirrors the CPAC, “the CPIA is very explicit about the number of members on the CPAC as well as their qualification prerequisites and specific duties. The Swiss law is currently briefer and less specific in this regard It is possible

¹⁰⁶ 19 U.S.C. § 2602. These agreements are entered into pursuant to Article 9 of the UNESCO Convention. UNESCO Convention, *supra* note 19.

¹⁰⁷ Gerstenblith, *supra* note 70. Once certain determinations have been made on the basis of criteria set forth in § 2602, the president or his designee responds to the request from another State Party by imposing U.S. import restrictions. U.S. State Dept. Bureau of Educational and Cultural Affairs, *supra* note 105.

¹⁰⁸ 19 U.S.C. § 2603.

¹⁰⁹ 19 U.S.C. § 2602(b). The restrictions may be renewed in five year increments if certain conditions apply. *Id.* This limitation provides the opportunity to review the effectiveness of an agreement and assess the current conditions of the situation upon which the agreement was originally established. In contrast to the U.S. law, the

¹¹⁰ Hereinafter, CPAC.

¹¹¹ 19 U.S.C. § 2605. CPAC is responsible for reviewing requests from states asking for U.S. assistance under Article 9 of the UNESCO Convention and recommending a course of action to the U.S. State Department, where the president’s decision-making responsibilities under the CPIA are found. U.S. State Dept. Bureau of Educational and Cultural Affairs: International Cultural Property Protection, Provisions of the Cultural Property Implementation Act, *available at* <http://exchanges.state.gov/culprop/committee.html> (last visited Dec. 27, 2006).

that the Swiss legislation is leaving room to adapt.”¹¹² Members of the American public are permitted to submit comments to the CPAC for review in consideration of a requesting state’s agreement or an extension of such agreement.¹¹³ While the explicit framework laid out in the CPIA for the CPAC appears to be an efficient implementation mechanism, the potential exists for this committee to hinder U.S. progress in its efforts to curb the illegal importation of antiquities. After a request is sent to the U.S. through diplomatic means, the CPAC reviews the request to determine whether any cultural property is in jeopardy. This review takes place before considering whether to restrict its importation.

In other words, under the legislation the Committee could determine that while there are precious few examples of significant, large-scale ancient bronze statuary still extant in Greece, there are enough, and thus, even though a particular object is of a kind with another which has been accepted as part of Greece’s cultural patrimony, Greece’s cultural patrimony is not itself in jeopardy and so the request for import restrictions may be denied.¹¹⁴

Thus, the CPIA guidelines may restrict U.S. efforts in monitoring importation and in protecting the broad range of cultural property.¹¹⁵

While the Swiss law’s recent enactment prevents a comparison of U.S. and Swiss international agreements, the activities regulated under the American and Swiss laws clearly differ. The CPIA uses importation restrictions as the sole means to address the illicit art trade. While this does include the importation of stolen artifacts from museums outside U.S. borders, the CPIA does not monitor museums within the U.S.¹¹⁶ The Swiss law, however, places a duty of due diligence on professionals involved in the art trade,¹¹⁷ demanding provenance

¹¹² Torsen, *supra* note 7.

¹¹³ U.S. Dept. Bureau of Educational and Cultural Affairs: International Cultural Property Protection, Provisions of the Cultural Property Implementation Act, *available at* <http://exchanges.state.gov/culprop/cpacproc.html> (last visited Dec. 27, 2006).

¹¹⁴ James Cuno, *Cultural Property: The Hard Question of Repatriation Museums and the Acquisition of Antiquities*, 9 CARDOZO ARTS & ENT. L.J. 83, 86 (2003).

¹¹⁵ Additionally, complaints have suggested that CPAC is under a statutory veil of secrecy, limiting their impact and angering those in both the legal and commercial art importing community as a result of CPAC’s lack of transparency. Interview with Lucille Roussin, Art Law Expert, in New York, N.Y. (June 10, 2007).

¹¹⁶ *Schultz*, 333 F.3d at 408. The CPIA has also been interpreted to provide other remedies where if “an artifact covered by the CPIA were stolen from a private home in a signatory nation and imported into the U.S., the CPIA would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the National Stolen Property Act. *Id.*

¹¹⁷ CPTA, *supra* note 58.

research before all transfers in cultural property. The due diligence requirement captures the activities of a museum's professionals, a source of foul play within the art world.¹¹⁸

While museums and other institutions within the U.S. self-regulate and create, for example, a code of ethics within its membership organizations, due diligence is not mandatory.¹¹⁹ Even though it remains to be seen how the stringency of due diligence will affect Swiss museums, this targeting legislation clearly focuses on curbing the amount of unprovenanced artifacts remaining within museum collections.

Analyzing the enabling legislation of two different states illustrates how, as a non-self executing convention, the UNESCO Convention gives great leeway to states in their enforcement efforts. While Switzerland and the U.S. chose similar mechanisms of enforcement, distinct differences, such as criminalization of certain activity and due diligence demands, affect the state's enforcement power of individual and institutional art collections under the law. Additionally, it is important to note that other states have chosen entirely different mechanisms by which to enforce the UNESCO Convention. Australia, for example, in passing the Protection in Movable Culture Act in 1986, focused heavily on the "control of export of cultural heritage from Australia in regulations made under Customs legislation."¹²⁰ These examples illustrate how the leniency of the UNESCO Convention fails to provide a uniform approach by which to solve the problem of plundered art housed and acquired by museums. The lack of uniformity currently hinders regulation efforts, but, hopefully, "over time, this permits experience to accumulate . . . [and w]hat is feasible and what is not becomes more obvious."¹²¹

Under the UNESCO Convention, museums play two different roles. On one hand, Article 5(c) characterizes the museum as an institution to promote the "preservation and presentation of cultural property."¹²² In essence, a safe place for treasured antiquities. On the other hand, Article 7(a) recognizes museums as an art network that might support the illegal trade of cultural

¹¹⁸ One example of the continued foul play is the current trial of Marion True, a former curator at the Getty Museum in Los Angeles, CA, who is awaiting trial in Rome, Italy charged with conspiracy to receive plundered artifacts. Christopher Reynolds, *Getty toughens up its rules for acquisition; An item's history must be clean since 1970. The move is not retroactive*, L.A. TIMES, Oct. 27, 2006, at A1.

¹¹⁹ American Association of Museums, Code of Ethics for Museums, *available at* <http://www.aam-us.org/museumresources/ethics/coe.cfm> (last visited Sept. 11, 2007).

¹²⁰ O'KEEFE, *supra* note 40, at 102.

¹²¹ *Id.* at 117.

¹²² UNESCO Convention, *supra* note 19.

property.¹²³ Thus, while museums stand to promote their exhibitions as a “safeguard” for illegally transported artwork, the museum community also takes a defensive stance to protect their collections and policies. These different characterizations fail to provide a clear understanding for all museums of their role in addressing the problems associated with the illegal trafficking of artwork. Thus, museum regulations vary greatly and do not present a united front against the illicit trade, further exemplifying the shortcomings of the UNESCO Convention.

III. MUSEUM CODES OF ETHICS

The problem of the illicit art trade has been recognized by the international museum community since the 1930s, during which time the official journal of the Office International des Musées published articles advising and discussing the protection of cultural sites.¹²⁴ Today, as both private and public museums acquire their collections through the art market, museum acquisition practices have come into question.

Museums have always known that most, if not all museums possess some stolen art, despite their best intentions at times to screen out such objects. At times they have knowingly accepted art of dubious or incomplete provenance in order to acquire great works, fearing that if they do not, they will lose out to another museum that will readily accept such a work.¹²⁵

To address this issue, the international museum community adopted codes of ethics, either as members of larger organizations, such as the International Council of Museums,¹²⁶ or as individual institutions.

Even where acquisition requirements are routinely included and clearly stated in official museum policies, these ethical codes of conduct do not have any legal effect. “[W]hile most museum professionals condemn the illicit trade in art and antiquities, some museum officials continue to retain within their collections objects that were illegally exported or actually stolen from the country of origin or from individual owners.”¹²⁷ The problem, therefore, not

¹²³ Article 7(a) ensures that states take the “necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned.” UNESCO Convention, *supra* note 19.

¹²⁴ *Id.* at 121.

¹²⁵ Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 572 (1999).

¹²⁶ Hereinafter, ICOM.

¹²⁷ Marilyn Phelan, *Legal and Ethical Considerations in the Repatriation of Illegally Exported*

only lies with the acquisition, but also with the retention of property containing gaps in its provenance research.

In analyzing how the discrepancies between museum policies perpetuate the illicit art trade, two questions arise: Whether museums in fact comply with their stated policies and whether museums are truly committed to upholding the highest ethical standards.¹²⁸ Where museums function as public charitable organizations created to further community educational and scientific values, the museum and its Board of Trustees arguably owe a fiduciary duty to the public. However, if problems of compliance with ethical standards arise and a museum ignores the educational and scientific value of cultural objects, there is a breach of these public obligations.¹²⁹ Thus, a museum's failure to comply with ethical guidelines not only affects the art community, but also the public at large.

A. U.S. Museums

The American Association of Museums,¹³⁰ through its membership in ICOM, committed itself to abide by the ICOM code of ethics.¹³¹ The code includes due diligence and provenance provisions to ensure that any object accepted by a museum has not been illegally acquired from its country of origin.¹³² Individual American museums, however, often take contrary positions to the ICOM code of ethics. Some museums have codes, but do not make them public, meaning that they cannot be scrutinized either by the public or by government authorities. In addition, some museums that have what appear to be admirable codes of ethics interpret these codes to grant wide latitude in their enforcement.

"[T]he AAM itself entered into litigation as an amicus to argue that there should be no impediment to the acquisition of antiquities."¹³³ Further, the AAM amended the ICOM code of ethics to limit its acquisition and loan guidelines. The AAM code

and Stolen Cultural Property: Is there a Means to Settle the Dispute?, available at <http://www.intercom.museum/conferences/2004/phelan.html> (last visited Sept. 11, 2007).

¹²⁸ O'KEEFE, *supra* note 40, at 121.

¹²⁹ Patty Gerstenblith, *Museums, the Market and Antiquities* (Mar. 2, 2000), <http://culturalpolicy.uchicago.edu/workshop/gerstenblith.html>.

¹³⁰ Hereinafter, AAM.

¹³¹ See ICOM Code of Ethics for Museums 2006, <http://icom.museum/ethics.html#section2> (last visited Dec. 28, 2006).

¹³² *Id.*

¹³³ Gerstenblith, *supra* note 129. The AAM submitted an amicus curiae brief in *U.S. v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999), *cert. denied*, 68 U.S.L.W. 3479 (U.S. Jan. 24, 2000) (99-641), supporting an art collector in importing into the United States a looted third century B.C. Philae in violation of Italian law. Phelan, *supra* note 127.

broadly states that museums must ensure that “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials.”¹³⁴ Museum officials making the case for encyclopedic museums that foster the cultural internationalist perspective are threatened by policies limiting antiquities collection. These officials argue that antiquities with complete provenance are exceedingly rare and thus ethical policies limiting acquisition would hinder the museums’ cultural internationalist mission.¹³⁵ The AAM’s expansive interpretation of the ICOM code of ethics, without more specific instruction to museum professionals, often leads to an assumption of valid provenance unless proven otherwise.¹³⁶

Unfortunately, the AAM’s narrow interpretation of the ICOM guidelines has not discouraged museum professionals from acquiring illegally traded artwork.¹³⁷ Mary Sue Sweeney Price, President of the Association of Art Museum Directors,¹³⁸ noted that “[t]he question of unprovenanced antiquities has rightly been the subject of heated debate in recent months.”¹³⁹ Yet, she observed that,

[w]hile the gaps in provenance research do not necessarily mean an object has been looted or stolen, museums must continue to do everything in our power to prevent illicitly obtained objects from entering our collections. It is important to stress that the acquisition of unprovenanced material is the exception, not the rule, in museum acquisitions of antiquities and archaeological material.

While this may be the position and intention of the AAMD, the continuing disputes between U.S. museums and foreign countries about artifacts housed in museum collections illustrate a different perspective.

The response by some members in the museum community to *United States v. Schultz* illustrates the position the AAM took in narrowing its code of ethics. In this case, “respectable and prestigious members of the museum community filed an *amicus*

¹³⁴ AAM Code of Ethics for Museums, available at <http://www.aam-us.org/museumresources/ethics/coe.cfm> (last visited Dec. 28, 2006).

¹³⁵ Russell Berman, *Symposium Will Examine Collecting of Antiquities*, N.Y. SUN, May 4, 2006, at 3.

¹³⁶ Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 454 (2003).

¹³⁷ Gerstenblith, *supra* note 129.

¹³⁸ Hereinafter, AAMD.

¹³⁹ Press Release, AAMD, Survey Shows Museum Antiquities Purchases are Less than 10% of Global Trade (Feb. 7, 2006), available at http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease_FINAL.pdf.

curiae brief supporting the activities of a well known art dealer who was convicted for knowingly transporting stolen Egyptian antiquities.”¹⁴⁰ In upholding Schultz’s conviction, the Second Circuit responded to the brief:

Although we recognize the concerns raised by Schultz and the amici about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it creates an insurmountable barrier to the lawful importation of cultural property into the United States. Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government.¹⁴¹

This response demonstrates the court’s willingness to uphold importation restrictions as a constitutional means of curbing the illicit trade of cultural property, sending a message to the museum community that the position of some to narrow ethical standards fail under the court’s scrutiny.

The failure of the American museum community to adopt ICOM’s more comprehensive compliance guidelines has negatively affected American museums, as indicated by the increased number of foreign states requesting repatriation from museums. Most recently, the Italian Culture Minister threatened to sanction the J. Paul Getty Museum in Los Angeles, CA, for refusing to repatriate a 2,500 year old statue of Victorious Youth.¹⁴² While the Getty argues the statue was found in international waters and is not part of Italy’s cultural heritage, the Italian Minister stated that even if it were recovered from international waters, “it was brought into the country and then exported illegally.”¹⁴³ In addition to the statue, the Getty refuses to return nineteen other artifacts requested by Italy.¹⁴⁴ The Getty’s lack of cooperation exemplifies how the complacency of the museum community allows the illicit art trade to persist. While the artifacts in question are often acquired many years prior to a foreign state’s inquiry, the lack of continued research and dedication to the cause exacerbates the problem.

The Getty Museum is not the only museum targeted in recent years. “San Francisco’s de Young Museum is [another] big-name art center to find itself answering embarrassing questions about showcasing looted treasures.”¹⁴⁵ Almost immediately after the de

¹⁴⁰ Gerstenblith, *supra* note 129.

¹⁴¹ *Schultz*, 333 F.3d at 410.

¹⁴² *Italy Threatens Getty in Battle for Bronze*, CBC NEWS, Dec. 21, 2006, <http://www.cbc.ca/arts/artdesign/story/2006/12/21/italy-getty.html>.

¹⁴³ *Id.*

¹⁴⁴ Elisabetta Povoledo, *Italy Digs In Its Heels in Artifacts Dispute With the Getty*, N.Y. TIMES, Dec. 21, 2006, at E8.

¹⁴⁵ Phillip Matier & Andrew Ross, *War drums pound over de Young display: Artifacts from Papua New Guinea May have been Illegally Exported*, S. F. CHRON., Apr. 24, 2006, at B1. The

Young museum opened its exhibit containing tribal artifacts from Papua New Guinea, experts questioned the legality of their export from their country of origin based on suspicions that the artifacts were categorized as cultural property.¹⁴⁶ The debate largely centers on the questionable conditions of the National Museum in Papua New Guinea, such as problems with electricity and a responsive fire department, where the artifacts would be displayed if repatriated.¹⁴⁷ A former curator at the National Museum refuted arguments supporting the retention of the artifacts in America, stating, “[t]he real issue is a moral one” He emphasized that the de Young museum appears to be “in receipt of stuff that’s been illegally exported. That can’t be OK by anybody’s standards.”¹⁴⁸ While the conditions in the National Museum may be a consideration, the lack of a clear code of ethics to follow hinders the American museum’s response to this problem. The ambiguity left open by museum acquisition guidelines does not facilitate a quick resolution to the provenance-based problems arising in the art world.

A private art collector, who neither retained nor sought record of the chain of title, donated the Papua New Guinea artifacts to the de Young museum.¹⁴⁹ Arguably, this type of museum-collector relationship has been the “lifeblood of American museums,”¹⁵⁰ and as illustrated with the de Young museum, does not come without controversy.¹⁵¹ As a result of the increased controversy surrounding the provenance of pieces donated to museums by collectors, the AAMD created new ethical guidelines for loans of antiquities to defend this relationship.¹⁵² The guidelines espouse the same leniency as the AAM’s code of ethics, where “a hazy provenance need not stand in the way of a loan if the work has significant value.”¹⁵³ The AAMD’s “authorization” for public display of potentially illegally obtained artwork may in turn increase “the demand for and the value of

de Young museum is part of the Fine Arts Museum of San Francisco. See Fine Arts Museums of San Francisco, <http://www.thinker.org/index.asp> (last visited Dec. 28, 2006).

¹⁴⁶ *Id.*

¹⁴⁷ Lee Romney, *The De Young Dilemma*, L.A. TIMES, June 3, 2006, at E1. These conditions contrast greatly with countries such as Italy or Greece, which have been most active in requesting repatriation of their cultural property.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Hugh Eakin, *U.S. Museum Guidelines Defend Ties to Collectors*, N.Y. TIMES, Mar. 1, 2006, at 26.

¹⁵¹ The legality of antiquities acquired by collectors has been questioned in the past either after they were donated to a museum or as part of that individual’s collection. See *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

¹⁵² Eakin, *supra* note 150.

¹⁵³ *Id.*

looted objects.”¹⁵⁴

If, however, American museums cooperate with foreign inquiries into their collections, in addition to taking a forthright stance in dealing with looted objects, an agreement for a cultural exchange may satisfy both museum and foreign interests.¹⁵⁵ In September 2006, the Museum of Fine Arts, Boston¹⁵⁶ procured an agreement with Italy to return looted artifacts in exchange for Italy’s promise to loan a collection of antiquities to the MFA.¹⁵⁷ While the MFA director “stopped short of confirming that the objects had been obtained illegally,” he said, “the preponderance of evidence suggested that they were more appropriately owned by Italy than the MFA.”¹⁵⁸ Thus, while most American museums have not outwardly recognized the mistakes of the past, greater repatriation may take place in agreements that repatriate artifacts to their country of origin while benefiting U.S. museum collections and fulfilling their moral obligation.¹⁵⁹

The absence of a U.S. legal mandate demanding museums follow a set code of ethics leaves a gap in U.S. law. As discussed, U.S. law contrasts with other foreign enabling laws by concentrating on importation rather than exportation restrictions on cultural property. Use of exportation restrictions places a stronger emphasis on reducing the “incentives to pillage and destroy archaeological sites” than do importation regulations.¹⁶⁰ Because these foreign laws are not always enforceable within the U.S., codes of ethics can fill this gap by regulating exports. For example, the ICOM code of ethics prohibits the illegal removal of an object from its country of origin.¹⁶¹ Even though the AMA has an ICOM Committee, specifically designed to ensure that the

¹⁵⁴ *Id.* Demand may also increase if more private collectors begin to share the same disconcerting view as Shelby White, a prominent art collector, whose antiquities collection exhibited at the Metropolitan Museum of Art recently came under fire by the Italian government. Kate Taylor, *Shelby White in Center Court at the MET*, N.Y. SUN, May 1, 2007, at 3. Ms. White stated that the scrutiny of antiquities collectors has had unintended effects:

We thought it was very important to lend our objects, to publish and exhibit our collection The unfortunate thing we’re seeing now is that other collectors are not going to show their collections because they don’t want problems. So, you’re seeing a lot more secrecy than 15 years ago.

Id.

¹⁵⁵ Geoff Edgers, *A Peace Offering from Italy Begins New Era at the MFA*, BOSTON GLOBE, Nov. 29, 2006, at C1.

¹⁵⁶ Hereinafter, MFA.

¹⁵⁷ Geoff Edgers, *MFA Returns Art to Italy, Paves Way for Collaboration*, BOSTON GLOBE, Sept. 29, 2006, at D1.

¹⁵⁸ *Id.*

¹⁵⁹ The partnership created between Italy and the MFA mirrors an agreement made in 2006 between the Metropolitan Museum of Art in New York and Italy for the return of a 2500 year old Greek krater. *Id.*

¹⁶⁰ Gerstenblith, *supra* note 129.

¹⁶¹ See ICOM Code of Ethics for Museums 2006, <http://icom.museum/ethics.html#section2> (last visited Dec. 28, 2006).

AMA and its members meet their international responsibilities, unfortunately, the AMA's code of ethics does not parallel the ICOM code covering this legal discrepancy.¹⁶² Thus, this gap remains unfilled.

B. *The British Museum*

The codes of ethics adopted by American museums illustrate the differences between the American and European museum position on resolving the illegalities within their collections. European museums "have taken a position against undocumented antiquities in recent years."¹⁶³ British parliamentary guidelines establish a clear mission for museum due diligence policies, ensuring that they "acquire, or borrow, only ethically acceptable items and reject items that might have been looted or illegally exported."¹⁶⁴

In contrast to the ambivalent stance of American museums, the due diligence guidelines created by United Kingdom's Department of Culture, Media and Sport, are founded on the principles set forth in the UNESCO Convention and reference the ICOM code of ethics.¹⁶⁵ Britain's national museum, established by an act of parliament in 1753, "requires that any proposed acquisition or loan be accompanied by proof that it left its country of origin before 1970."¹⁶⁶ In consideration of the current and past inquiries into American museum collections, the forthright steps taken by the British Museum in combating the illicit art trade appear more effective than the American response. The discrepancies between museum codes of ethics and the varying domestic government support for those guidelines leave gaps in enforcement power that permit the illicit trade to continue over thirty years after the United Nations formally recognized this issue.

The mission statements of both American museums, such as the MFA, and the British Museum espouse the same ideas: to educate and enlighten the public while preserving and showcasing

¹⁶² See Chapter VI - ICOM Committee, AMA Constitution and Bylaws, <http://www.aam-us.org/aboutaam/governance/constitution.cfm>.

¹⁶³ Eakin, *supra* note 150.

¹⁶⁴ United Kingdom Department for Culture, Media and Sport, Cultural Property Unit, Combating Illicit Trade, http://www.culture.gov.uk/NR/rdonlyres/721E9365-38BE-4AF8-BF8D-BE5B4BF8B21C/0/CombatingIllicitTrade_v5.pdf (last visited Sept. 16, 2007).

¹⁶⁵ *Id.* The British guidelines specifically include the ICOM code of ethics provenance and due diligence provision American museums have refused to adopt: "Every effort must be made before acquisition to ensure that any object . . . offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin Due diligence in this regard should establish the full history of the item from discovery or production." *Id.*

¹⁶⁶ The British Museum, About Us, <http://www.thebritishmuseum.ac.uk/aboutus/about.html>; Eakin, *supra* note 150.

the art and antiquities in the most appropriate manner.¹⁶⁷ Additionally, both British and American museums take a stance against the illicit art trade, intending to showcase only works lawfully acquired. However, the affirmative actions taken by the British Museum in line with the stated policies to curb the illegal art trade do not mirror those taken by American museums. Experts concur that adopting a code of ethics similar to ICOM's "could assist in creating a legal defect in the object by reducing its value as well as a defect in the buyer's title."¹⁶⁸ Using the full strength of the current international Conventions and acquisition policies established in the museum community carry a high likelihood of broadly affecting the unlawful trade.¹⁶⁹ The disparate responses to illicit trade by Britain and America are another reason the illicit trade in artifacts continues.

IV. THE PROGRESSION OF ANTIQUITIES PROVENANCE AND REPATRIATION CLAIMS AS COMPARED TO CLAIMS INVOLVING HOLOCAUST-ERA LOOTED ARTWORK

Another example of the failure by many museum officials to adhere to ethical principles in their accessioning policies is with the acquisition and retention of Holocaust-era looted artwork. In the past decade, while many museums have recognized a moral obligation to return looted art to the rightful Jewish owners or their heirs, museum action toward examining their collections of such works has been slow.¹⁷⁰ The issues confronting museums in responding to claimants requesting restitution of Holocaust looted art parallel those of repatriation claims for looted antiquities. Despite these similarities, Holocaust looted artwork has elicited a seemingly more forthright response by the museum community.

A. Background

"The response of American museums to the problem of Holocaust-looted art works has been precisely that — a reaction to pressure brought by the media, government officials, individuals, and organizations."¹⁷¹ More than fifty years after World War II, a rising number of claims by Jews for return of their artwork either

¹⁶⁷ See The Boston Museum of Fine Arts, Boston, <http://www.mfa.org/about/index.asp?key=53>. See also The British Museum, <http://www.thebritishmuseum.ac.uk/aboutus/about.html>.

¹⁶⁸ O'KEEFE, *supra* note 40, at 122. The reduction in value depends on a concept called "merchantability," which broadly means that "the object must be fit for the purposes for which it is sold." *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Phelan, *supra* note 127.

¹⁷¹ Gerstenblith, *supra* note 136, at 445-46.

sold under duress or stolen during the Holocaust-era have surfaced and garnered great public attention. While this attention explains one cause for the increase in claims, other reasons include recent events, such as the end of the Cold War that prevented claimants from coming forward.

A number of factors arose immediately following World War II to limit the restitution of artwork. In a letter to the President on behalf of the Presidential Advisory Commission on Holocaust Assets in the United States, Edgar Bronfman wrote:

[A] number of factors intervened to limit restitution, including: 1) the overwhelmingly chaotic situation in post-war Europe as the United States tried to bring our soldiers home and Europe grappled with the dislocation and destruction caused by years of war; 2) the international legal precedent of restituting recovered loot to governments and not individuals; 3) U.S. concerns about the cost of post-war involvement in Europe, coupled with the strategic desire to rebuild the economies and re-constitute the governments of Germany and Austria along democratic lines; and 4) developing Cold War concerns.¹⁷²

Furthermore, in the immediate post-war era, the psychology of Holocaust survivors made the suggestion of the restitution of material possessions a “taboo” topic, as most were grateful for having survived the war. “In many families it was impossible even to mention the word Holocaust, distasteful to hint at the subject of restitution.”¹⁷³ However, as the psychological mind-set of the Jewish community evolved with time, other obstacles that previously prevented larger restitution efforts have disappeared. These changes have precipitated an influx of claims against museums by heirs of survivors who view restitution as a belated justice.¹⁷⁴

In general, as a result of the passage of time, establishing ownership rights for looted objects is a difficult task because of the number of previous owners and often, the lack of necessary documentation. A main reason “for the increase in Nazi-looted [art] claims of late is that records and documents that have been

¹⁷² PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS’ ASSETS, FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT 15 (2000), available at http://www.pcha.gov/PlunderRestitution.html/html/Home_Content.html (last visited Sept. 11, 2007). The Presidential Advisory Commission on Holocaust Assets in the United States was established in 1998 by unanimous bipartisan support under the Clinton Administration. *Id.* The Commission conducted research on the “collection and disposition” of Holocaust assets and submitted a final report to the President documenting a historic record of Holocaust assets and presenting recommendations on how to proceed with resolving the issues existing with Holocaust restitution. *Id.*

¹⁷³ Godfrey Barker, *The Art of War*, EVENING STANDARD, Dec. 8, 2006, at 24.

¹⁷⁴ *Id.*

locked away in government archives for more than half a century,” became available to the public in the early 1990’s.¹⁷⁵ The post Cold War declassification by countries, such as Germany and the former Soviet Union, provided a greater opportunity for Holocaust survivors and their heirs to fill the holes remaining in their provenance research.¹⁷⁶ While “searching through this multitude of documents is difficult even for the skilled researcher,” the opening of these locked archival documents received considerable attention and gave “a general renewal of awareness of Nazi-looted art.”¹⁷⁷

Most recently, in 2000, when the Jewish community in Vienna decided to sell a vacant building, about half a million pages of detailed records of that community were uncovered within the building’s walls.¹⁷⁸ Finally, after seven years of sifting and categorizing, the records will be on exhibition at the U.S. Holocaust Museum in Washington, D.C. with a correlating exhibit at the Jewish Museum Vienna.¹⁷⁹ The opening of records not only garnered great international recognition, but also presented another avenue to help families file restitution claims, filling holes and answering lingering questions for many Holocaust survivors and their families.

Other factors contributing to the increase in claims for Holocaust looted art include the publicity surrounding books on the subject, such as *The Rape of Europa* and *The Lost Museum*, as well as public discussion of prominent cases, such as the *Republic of Austria v. Altmann*.¹⁸⁰ In addition to forcing the public to recognize the prevalence of looted artwork as an unresolved issue from World War II, the books illustrate how the extent of the Nazi pillage affected restitution efforts. Further, recent cases exemplify the legal difficulties involved in resolving disputes over looted

¹⁷⁵ Paulina McCarter Collins, *Has “The Lost Museum” Been Found?*, 54 ME. L. REV. 115, 119 (2002).

¹⁷⁶ “During the Cold War, the Nazi confiscation lists and records compiled by the Allied art-recovery troops were classified, and access to Soviet archives was . . . impossible.” Howard N. Spiegler, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT’L L. 297, 301 (2001).

¹⁷⁷ *Id.*

¹⁷⁸ Marjorie Backman, *A Nation’s Lost Holocaust History, Now on Display*, N.Y. TIMES, June 2, 2007, at B7.

¹⁷⁹ Veronika Oleksyn, *Austria: Found by accident, files to go on display this week in U.S.*, CHI. SUN TIMES, June 6, 2007, at 36.

¹⁸⁰ See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Vintage Books 1994); HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* (Tim Bent & Hector Feliciano, trans., Basic Books 1997). These books recount the Nazi looting and stashing of artwork throughout Europe during the Nazi reign and describe how the regime targeted certain Jewish families known for their art collections. Spiegler, *supra* note 176, at 300. See also *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

works, specifically, where heirs of deceased Holocaust survivors sue for restitution.¹⁸¹ These books and cases have not only increased interest within the Jewish community, but they have also “generated much discussion among legislators, courts and the art community.”¹⁸²

Lastly, “[t]he popular interest in the fate of the art looted during the War is due, at least in part, to the current market value of high quality art.”¹⁸³ While the cost and difficulties of litigation may have deterred claimants in the past, new hope that restitution sales can recoup soaring litigation costs is encouraging others to come forward. “This year alone, \$135 million, \$88 million, \$40 million, \$33 million and \$31 million have been paid for Gustav Klimt paintings to the Bloch-Bauer family descendants, \$38 million to Anita Halpin and £11.77 million for Egon Schiele’s *Herbstsonne* (Winter Sunshine) to the Grunwalds of Vienna. All were restituted art.”¹⁸⁴ Because museums worldwide waited to address the issue of restitution, they have been “priced out of the market” for the artwork that they are now forced to return. The value of looted artwork alone, as confirmed by their sales tag, has created its own buzz, increasing the number of disputes over works still hanging on museum walls.¹⁸⁵

Despite the increasing claims against museums, the number of restituted artworks remains low in comparison to estimates that state anywhere from 10,000 to 100,000 pieces of artwork are still missing.¹⁸⁶ “The reasons for this lack of progress include the ease of transporting art across international borders, the lack of public records documenting original ownership, the difficulty of tracing art transactions through the decades, and the lack of a central authority to arbitrate claims for artwork.”¹⁸⁷ In 2000, after

¹⁸¹ Maria Altmann filed suit against the Austrian government claiming the restitution of artwork that once hung in the home of her uncle in Czechoslovakia. *Id.* See Collins, *supra* note 175 at 129 (criticizing various legal doctrines the courts have applied in past Nazi-looted art cases, including the statute of limitations, adverse possession and the due diligence rule).

¹⁸² *Id.* at 120.

¹⁸³ Lucille A. Roussin, *Holocaust-Era Looted Art: The Route Into the U.S.*, 5 IFAR J. 36 (2002).

¹⁸⁴ Barker, *supra* note 173.

¹⁸⁵ “Because the German and Austrian museums have dawdled so long over restitution, the price of masterpieces they are having to hand back has soared far beyond their capacity. The Brucke Museum can come nowhere near \$38 million for the Kirchner . . . the Belvedere in Vienna nowhere near . . . the \$89 million paid for Klimts.” *Id.*

¹⁸⁶ Roussin, *supra* note 183. The Claims Conference estimates the number of stolen artwork during the Holocaust to be around 650,000 pieces. Nathaniel Popper, *Study: U.S. Museums Lag on Art Info*, FORWARD, July 28, 2006, at 6. After the War, 1,400 repositories of looted art were found in the American Zone of Occupation alone. Lawrence M. Kaye, *Looted Art: What Can and Should Be Done?*, 20 CARDOZO L. REV. 657, 657-658 (1998).

¹⁸⁷ Claims Conference, Claims Conference/WJRO Looted Jewish Art and Cultural Property Initiative (Oct. 31, 2006), http://www.claimscon.org/index.asp?url=looted_art

presented with evidence that a German Renaissance painting was stolen by the Nazis from an Austrian Jewish collector, the North Carolina Art Museum returned the artwork to the collector's heirs. Without using the weight of any legal authority, the museum returned the painting to the heirs (two sisters in Austria), who then sold the painting to the museum at well under market price, provided that the museum initiate an educational program about the painting.¹⁸⁸ "Perhaps doing the right thing, as the museum did in this case, should not be thought of as remarkable. Unfortunately, however, claims to Nazi-looted art have not always been resolved in this manner It is fair to say that claimants should be prepared for litigation,"¹⁸⁹ and for a slow restitution process.

Characterizing the disputed objects in antiquities cases as national property and in Holocaust art cases as personal property, changes the landscape of the arguments made by claimants in court. Generally, an antiquity claimant attempts to prove the authenticity of the object as a national artifact belonging to and protected by the state from which it was illegally exported. Even though the provenance of an artifact may be difficult to prove, most foreign countries rich with archaeological treasures, such as Egypt and Italy, have domestic patrimony laws declaring all antiquities found within their borders as government property.¹⁹⁰ These laws ease the claimants' task of establishing ownership. In Holocaust restitution cases, however, individuals, not the state, present the arguments for restitution, which slows the Holocaust restitution process. In addition, disputed paintings often do not have their origins in the country in which they were housed and families may only have pictures of the paintings hanging on the wall of their homes prior to German occupation to prove ownership.¹⁹¹ Furthermore, claimants may have to prove that the property was involuntary relinquished or sold at lower than market value.¹⁹²

As a result of the difficulty in provenance research for Holocaust-era art, Holocaust survivors and their heirs must engage in extensive and costly historical and factual research in order to

(last visited Jan. 2, 2007) [Hereinafter Claims Conference].

¹⁸⁸ Emily Yellin, *North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft*, N.Y. TIMES, Feb. 6, 2000, at 22.

¹⁸⁹ Spiegler, *supra* note 176, at 298.

¹⁹⁰ Phelan, *supra* note 127. The Italian patrimony laws were at issue in *United States v. An Antique Platter of Gold*, 184 F.3d 131, and Egyptian patrimony laws were deemed violated in *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

¹⁹¹ Walton, *supra* note 125, at 569.

¹⁹² Collins, *supra* note 175, at 118.

file a successful claim.¹⁹³ “Museum officials often force victims of the Holocaust to seek restitution of their property through expensive litigation,” rather than seeking other means of dispute resolution.¹⁹⁴ In contrast to other types of Holocaust restitution, such as insurance claims, where plaintiffs can share the costs through class action lawsuits, the unique nature of each looted art claim forces one individual to absorb the entire expense. “[Q]uestions of ownership of cultural property are most often resolved in private lawsuits, which can pose severe economic problems for dispossessed owners.”¹⁹⁵ Unfortunately, in large part, as a result of the high economic toll on individual families, Holocaust artwork restitution efforts have yielded far fewer results than efforts to restitute other assets, such as property and financial holdings.¹⁹⁶

B. *The Museum Response to Holocaust-Era Looted Art*

The looting of artwork during the Nazi regime is considered the “greatest mass theft in history.”¹⁹⁷ After the War, many of the pieces stolen by the Nazis ended up in Museum collections worldwide.¹⁹⁸ The recent increase in claims for paintings housed in museum collections has forced the museum community to take a public position on museum acquisition policies and restitution efforts. While “[m]useums have tended . . . to ignore, to a considerable extent other aspects of the problems of stolen cultural property, particularly antiquities,” as a result of the public attention and the horrific circumstances of the Holocaust, museums have had no choice but to respond.¹⁹⁹ In addition, concern that their collections will be the subject of claims has also prompted many museums to respond more readily to the problem of Holocaust-era looted artwork.

Both in terms of legal issues and publicity, museum officials,

¹⁹³ *Id.*

¹⁹⁴ Phelan, *supra* note 127.

¹⁹⁵ Kaye, *supra* note 186, at 659.

¹⁹⁶ Claims Conference, *supra* note 187.

¹⁹⁷ Collins, *supra* note 175, at 123.

¹⁹⁸ The import controls enacted in the U.S. in the immediate post-War era failed to stop the trade of looted artwork into the United States. See Roussin, *supra* note 183.

[I]n the Thirties, museums [in Nazi occupied territory] were given first pick . . . of confiscated works of art, before the sales took place. Other paintings were lodged with museums for safekeeping and never returned. Then, from 1937 to 1938, some 16,000 pictures were removed from the walls of German museums in Hitler’s attack on ‘entartete kunst’ (‘degenerate art’ ie, modern art), so that in the Fifties some museums found themselves without any 20th-century art on their walls. When they went into the market to repair their losses, a lot of the art that was then on sale had been looted.

Barker, *supra* note 173.

¹⁹⁹ Gerstenblith, *supra* note 136, at 446.

government representatives, and the public make a distinction between these two types of art claims: looted antiquities and Holocaust-era artwork. Legally, however, the problems that arise regarding due diligence, the statute of limitations, and evidentiary trails parallel one another.²⁰⁰ The main distinction lies with unexcavated antiquities and subsequently identifying these pieces as coming from a specific country. Yet, the issues of undocumented and documented antiquities should not cloud the public's eye as to similarities between these art claims, and to the pervasiveness of the problem of both looted antiquities and Holocaust-era artwork.

Past and current efforts by museums and affiliated organizations, such as the AAM, are often insufficient when applied by individual museums. As indicated by the resistance of museums to returning looted antiquities, U.S. law limits the impact of any guidelines or policies issued by museums. First, administration and compliance with guidelines is voluntary and not mandated by law. Second, “[l]aws in the United States have not in the past prevented purchasers from acquiring good title to illegally exported artifacts” where a state does not have its own patrimony laws to protect objects from leaving the country.²⁰¹ Unfortunately, museums have not taken the initiative to consistently apply ethical principles to fill the gaps in U.S. law.

In 1998, forty-four nations participating in the Washington Conference on Holocaust-Era Assets, sponsored by the U.S. State Department and the U.S. Holocaust Museum, reached a consensus of eleven principles to assist in resolving the issues related to Nazi confiscated art.²⁰² While the guidelines are not legally binding, positive developments have taken place subsequent to their establishment. In 2006, Austria launched an online database that depicts objects that may have been expropriated between 1939 and 1945.²⁰³ Currently, these items are held within museum collections owned by the Austrian government and the city of Vienna. “Austria’s decision to give up those artworks, which had been displayed for decades, represents

²⁰⁰ See Lucille Roussin, *Recent Judicial Decisions in Nazi-Era Looted Art Cases*, JOURNAL FOR KUNSTRECHT, URHEBERRECHT UND KULTURPOLITIK, April-May 2007, at 52.

²⁰¹ Phelan, *supra* note 127.

²⁰² See U.S. State Dept., Proceedings of the Washington Conference on Holocaust-Era Assets, Appendix G, *available at* <http://www.state.gov/www/regions/eur/holocaust/heac.html> (last visited Jan. 2, 2007).

²⁰³ Katie Fretland, Geir Moulson, Karel Janicek & Nadia Rybarova, *Austrian Online Database Lets Holocaust Survivors, Heirs Look For Looted Treasures*, INT’L HERALD TRIB., Oct. 24, 2006, *available at* http://www.ihf.com/articles/ap/2006/10/24/europe/EU_GEN_Austria_Looted_Art_Database.php. Germany, Britain, Czech Republic and the AAM have also taken the initiative to establish similar online registries for looted artwork.

the costliest concession since it began returning art looted by the Nazis.”²⁰⁴ These improvements, however, were off-set in the same year by a Claims Conference study indicating that “American museums have lagged behind on commitments they made in the late 1990s to research and publicize potentially looted artworks.”²⁰⁵

In 1999, the AAM issued guidelines concerning the unlawful appropriation of objects during the Nazi era, outlining the American museum community’s commitment to the, “highest standard of legal and ethical collection stewardship practices.” Under the ethical guidelines for existing museum collections, the AAM makes clear that research shall be conducted on all works with incomplete or uncertain provenance.²⁰⁶ However, in the years since the Washington Conference, “only 12% of potentially problematic art works [in American museums] have been fully researched and publicized . . . Such research is considered the first step toward facilitating the return of looted works.”²⁰⁷ Where families of Holocaust survivors need access to information and other resources in order to assert a claim for restitution, this astoundingly low percentage directly affects the number of claims asserted against museums.²⁰⁸ Thus, the affirmative steps taken by individual museums do not parallel those espoused in the ethical guidelines issued by the AAM.

The ICOM released recommendations in 1999 concerning the return of artwork belonging to Jewish owners, encouraging the international museum community to “act with integrity and in accordance with the most stringent ethical principles as well as the highest standards of objectivity.”²⁰⁹ Prior to this development, the widespread problem of looted Nazi art in museums caught the public’s attention when a small exhibition opened in France’s Musée d’Orsay, displaying impressionist paintings and drawings stolen by the Nazis.²¹⁰ France’s forthright efforts in the restitution

²⁰⁴ *Id.*

²⁰⁵ Popper, *supra* note 186. The study was conducted by using surveys the Claims Conference sent to 332 American museums, 118 of which did not respond, including such museum as the Guggenheim Museum in New York and the Getty Museum in Los Angeles.

²⁰⁶ AAM, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, *available at* http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm (last visited Jan. 2 2007).

²⁰⁷ Popper, *supra* note 186.

²⁰⁸ While the attention given to Nazi looted has increased together with the number of claims for art, the Claims Conference study noted only twenty museums say they have received claims for Nazi looted art. *Id.* This seemingly small number illustrates the complex nature of each claim.

²⁰⁹ ICOM, Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners, Jan. 14, 1999, *available at* <http://icom.museum/worldwar2.html> (last visited Sept. 11, 2007).

²¹⁰ Alan Riding, *Art Looted by Nazis Goes on Show in Paris, Seeking Its Owners*, N.Y. TIMES, Oct. 25, 1994, at C15. The twenty-eight works were returned to France after intense

process, unfortunately, have long been overshadowed by the lagging efforts of other European nations. In response to the 2006 Claims Conference study, Stuart Eizenstat, the American government's lead negotiator for Holocaust restitution related matters in the 1990's, stated that the progress in Europe has not only been slower than in the United States, but that it has also been unbalanced, "with a handful of countries, including Austria and the Netherlands, leading the way in research and restitution. By contrast . . . the first steps have not yet been taken in Hungary and Poland."²¹¹

The negative response of some in the European museum community reflects the resistance faced by many Holocaust survivors and their heirs in the restitution process. After two years of negotiation, the Brucke Museum in Berlin recently restituted Ernest Ludwig Kirchner's 1913 expressionist painting, the Berlin Street Scene.²¹² The passionate response and public criticism across Europe over the return and eventual auction of this painting exemplifies the obstacles still facing original owners; "fighting the Austrian, Russian and German museums is nasty business."²¹³ While the response can be explained, in part, by the connection Germans felt to the painting, the critique of the restitution went beyond a surface level feeling of loss. The Chairman of the Brucke Museum Board and the Director of the Dresden State Art Collections argued publicly that, "[t]he recent wave of restitution claims . . . are clearly fueled by the booming art market and its hunger for fresh masterpieces."²¹⁴ The response by European museum professionals, those not legally bound to follow a code of ethics, illustrates how museums will continue to exhibit looted artwork in their collections without greater regulation.

American museums have also dragged their feet in making further strides in the Holocaust restitution process. Even after a painting in the Seattle Art Museum²¹⁵ collection was documented by the book, *The Lost Museum*, as having been stolen from a Jewish art collector in Paris, the SAM waited for the family to sue the

negotiations with Germany, with seven of the works identified as belonging to two Jewish families within seven months of their return. *Id.*

²¹¹ Popper, *supra* note 186.

²¹² Anna Blume Huttenlauch, *Berlin Street Fight*, ARTNET, Nov. 7, 2006, available at <http://www.artnet.com/magazineus/features/huttenlauch/huttenlauch11-7-06.asp> (last visited Jan. 2, 2007)

²¹³ Barker, *supra* note 173.

²¹⁴ Huttenlauch, *supra* note 212. In November 2006, after the Brucke Museum returned the Berlin Street Scene and fearing for the loss of many other paintings in their collections, German museums called for a crisis meeting of museum directors. Barker, *supra* note 173.

²¹⁵ Hereinafter, SAM.

museum before taking any action.²¹⁶ In the same year as the SAM dispute, the National Gallery in Washington, D.C., after finding evidence a seventeenth century Flemish painting was looted by the Nazis, returned the painting to its original Jewish owners.²¹⁷ “Nevertheless, most ownership controversies are ending up in court.”²¹⁸

The resistance by American museums to resolve disputes without litigation was supported by members of Congress. In a failed attempt to restrict the CPIA by preventing the imposition of import restrictions, Senator Moynihan, rather than focusing on the destruction caused by the illicit art trade, touted the benefits of free trade as seen through the greatness of the American art museum collections.²¹⁹ Unfortunately, the seemingly greater efforts made toward restituting Holocaust looted art rather than antiquities are mostly surface level, unfulfilled promises to act in accordance with higher ethical principles.

CONCLUSION

In conclusion, the most appropriate institution to facilitate and foster restitution of looted antiquities and Holocaust-era looted artwork is the museum community. Museums have the resources, manpower and ability to research and document the provenance of paintings and artifacts with questionable origins. By filling provenance gaps and offering to return objects that do not belong to a museum or its lender, museums will fulfill their obligations to the public as an honest institution for the preservation and education of the public. “In order to destroy the market for unprovenanced antiquities it is necessary to destroy the business of those who trade in them.”²²⁰ If museums continue to display unprovenanced pieces, they are contributing to the continuation of the illicit art trade. By taking a forthright position on paper, and by acting in accordance with ethical principles, museums can also benefit from their actions. As seen under previous circumstances, where museums cooperate and are forthright about their collections, original owners may leave the restituted painting in the museum or may establish an art

²¹⁶ Gerstenblith, *supra* note 136, at 440. See *Rosenberg v. Seattle Art Museum*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

²¹⁷ Marilyn Phelan & Lucille Roussin, *Public International Law: Cultural Property*, 35 INT’L LAW. 649 (2000).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Robert S. Schwartz, *In Schultz We Trust: The Future Of Criminal Prosecution For Importers of Illicit Cultural Property Under the National Stolen Property Act*, 11 CARDOZO J. INT’L & COMP. L. 211, 233 (2003).

exchange.

It is difficult to subject national and non-national museums to the same domestic laws regarding museum ethics in acquisition and collection maintenance. Thus, changes in museum constitutions, by-laws, and codes of ethics are the most effective place to begin chiseling away at the illicit art trade. However, the affects of greater museum action cannot be seen until museum directors, trustees and board members take the initiative to communicate about the best policies and procedures for dealing with the persistence of this issue into the twenty first century.

*Leah J. Weiss**

* Notes Editor, Cardozo Arts & Entertainment Law Journal; J.D. Candidate, 2008, Benjamin N. Cardozo School of Law; B.A. 2003, University of Michigan. Many thanks to Professor Lucille Roussin for her guidance and expertise, and to my family and friends for their excitement and encouragement. ©2007 Leah J. Weiss.

